THE ROLE OF THE 'LEGAL RULE' IN INDONESIAN LAW:

environmental law and *reformasi* of water quality management

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Doctorate of Philosophy

UNIVERSITY OF SYDNEY

Year 2004

ABSTRACT

In examining the role of the 'legal rule' in Indonesian law, and in particular environmental law related to water quality management, this thesis questions the often expressed view that laws in Indonesia are sound, they merely fail to be implemented. It proposes that this appraisal of the situation does not take a sufficiently deep assessment and that a cause for non-implementation lies within the drafting of the laws themselves. It is argued that the ineffective system for environmental protection in Indonesia can be related to a failure to recognise the role of the 'legal rule' in environmental law.

A proposition presented in this thesis is that the arrangements for environmental law making in Indonesia lacks a strong rule foundation and, for this reason, it is not capable of producing shared understandings by lawmakers about producing and reproducing environmental law as legal sub-system. Another central proposition is that Indonesian environmental law has a form and style, which negates the role of the legal rule in environmental management and control.

Despite the changes brought by *reformasi*, the central position of the legal rule in environmental law and, indeed, the necessary rule foundation to the development of the legal system, has yet to achieve full recognition. If this situation is related to the system of water quality management and pollution control in Indonesia, it can be seen that environmental improvement will not be achieved until underlying issues concerning the structure, form and style of environmental law making are addressed.

ACKNOWLEDGEMENTS

This thesis would never have begun without the prompting of Professor Ben Boer, in 1997, that there were some interesting developments in environmental law in Indonesia waiting to be written about. He introduced me to Indonesian environmental lawyers who became my initial frame of reference. Early on, Professor Koesnadi Hardjasoemantri discussed with me his ideas on the drafting of the *Environmental Management Act 1997* and provided me with access to his collection of environmental law materials. Professor Dr Siti Sundari Rangkuti, from the University of Airlangga, was also very encouraging and generous with her time in sharing her critical approach to the development of environmental law in Indonesia.

In the process of my research, the focus of the thesis altered to take into account the dramatic events that have unfolded in Indonesia since 1998. Throughout the time of writing, the Indonesian Centre for Environmental Law (ICEL) has been an invaluable resource. Discussions with Mas Achmad Santosa (the past Director) and various members of the team of idealistic and hard working lawyers were a source of inspiration in the early stages. I also met a number of officers within the Ministry of the Environment who were keen to discuss with me over the years the difficulties and dilemmas in working for change in environmental law in Indonesia, especially Rasio Sani, Jenni Muslim, R. Vivien Ratnawati, Nugraheni Hastuti and Inar Khsan Ishak.

I would also like to thank Bambang Adinugroho, the dedicated Secretary of the WATSAL program who, over a period in 2000-2002, spared time from his hectic schedule to discuss the latest developments in the water resources management reform programme.

During 2001-2002, through working with the environment program of the German Technical Aid Agency (*Deutsche Gesellschaft für Technische Zusammenarbeit*) (GTZ), I gained insights into changes in environmental management brought by the introduction of regional autonomy. I was fortunate to be offered a contract in 2001 by the Team Leader, Helmut Krist to undertake a gap analysis of environmental law in Indonesia. This work provided a broader perspective on the system of environmental law in Indonesia beyond the relatively narrow topic of the thesis.

I have received helpful criticism from Rosemary Lyster, my Associate Supervisor, who made useful suggestions on the structure of the thesis and the line of argument. She also challenged the presentation of a number of the rule concepts, particularly regarding the rule classifications and their application to the analysis of Indonesian legislation, which helped to clarify and refine my ideas. Professor Tim Lindsey, Director of the Asian Law Centre, who acted for a short period as an Associate Supervisor, provided encouragement for my approach. Professor Boer, my Chief Supervisor, has been a continuing source of support and guidance, particularly on the environmental law aspects of the thesis and in the final stages of completion.

I would like to thank my parents for their unwavering support for this venture, which has led me away from life in Sydney and finally, my husband Arief, without whom the thesis may never have been completed.

LIST OF ACRONYMS

BAPEDAL	*Badan Pengendalian Dampak Lingkungan*	Environmental Impact Management Agency – disbanded in January 2002.
BAPEDALDA	*Badan Pengendalian Dampak Lingkungan Daerah*	Regional Environmental Impact Management Agency, established at the provincial and district level.
BAPPENAS	*Badan Perencanaan Pembangunan Nasional*	National Planning Agency
BOD	*Kebutuhan Oksigen Biologi*	Biological Oxygen Demand
COD	*Kebutuhan Oksigen Kimiawi*	Chemical Oxygen Demand
DAS	*Daerah Aliran Sungai*	Watershed
DPR	*Dewan Perwakilan Rakyat*	National Parliament/ House of Representatives
DPRD	*Dewan Perwakilan Rakyat Daerah*	Regional Parliament/ House of Representatives
DPS	*Daerah Pengaliran Sungai*	River basin
EIA		Environmental Impact Assessment
EMDI		Environmental Management Development in Indonesia (EMDI) Project
EPA		Environment Protection Authority (Australia) Environment Protection Agency (USA)
GBHN	*Garis-Garis Besar Haluan Negara*	Broad Outline of State Policy
GTZ	*Deutsche Gesellschaft für Technische Zusammenarbeit*	The German Technical Agency
HO	*Hinder Ordonnantie*	Hinderance Ordinance
IWRM		Integrated Water Resources Management
KepMen	*Keputusan Menteri*	Ministerial Decree
Keppres	*Keputusan Presiden*	Presidential Decree
MPR	*Majelis Permusyawaratan Rakyat*	People's Consultative Assembly
PDAM	*Perusahaan Daerah Air Minum*	Provincial/District Public Company for Water Supply
Pedoman		Guideline

PERDA	*Peraturan Daerah*	Regional Regulation
PP	*Peraturan Pemerintah*	Government Regulation
PROKASIH	*Program Kali Bersih*	The Clean Rivers Program
REPELITA	*Rencana Pembangunan Lima Tahun*	Five Year Development Plan
UKL	*Upaya Pengelolaan Lingkungan*	Environmental Management Measure/Plan
UPL	*Upaya Pemantauan Lingkungan*	Environmental Monitoring Measure/Plan
UU	*Undang-undang*	Statute
UUD	*Undang-undang Dasar1945*	The 1945 Constitution of Indonesia

LIST OF TABLES

LIST OF FIGURES

INTRODUCTION

The view is often expressed that the laws in Indonesia are sound but they fail to be implemented. The former President Abdurrahman Wahid was quoted as having stated on 1 May 2003:

> You may well ask why I do not talk about the national legal system. My answer is simple. The existing system is already good, and so are the laws and regulations. But their application is not'.[1]

More specifically concerning water quality in Indonesia, it has been stated that the regulations

> … provide a sufficient legal framework for water pollution control. However, for various reasons such as lack of resources, lack of capability, lack of political will and conflict between government agencies, this framework has in general not been implemented.[2]

Is it satisfactory to say that environmental legislation in Indonesia is sound but fails to be implemented or should we ask further questions about why it is not implemented? In relation to water quality management, this issue has assumed a certain urgency. It has been estimated that only 42 percent of Indonesians have access to clean drinking water.[3] The water quality of the rivers in most major cities in Indonesia is highly polluted, as can be seen by any casual observer. The black inky colour of water in the rivers and canals around Jakarta shows its anaerobic state. This situation continues despite laws covering water resources and environmental management.

This thesis aims to look more closely at the nature of environmental law in Indonesia, and water pollution law in particular, as it appears on the statute books and in the few occasions in which it has been interpreted and applied by the courts. The main objective of the analysis is to focus on three research questions, namely:

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1 "Gus Dur proposes new political system" *Jakarta Post* (2 May 2003) 4.

2 Patzer RA, *Environmental Law Compliance and Enforcement*: *Environmental Management Development in Indonesia Project (EMDI)* (Canada: Dalhousie Printing Centre, 1995) 4.

3 State Ministry of the Environment *From Crisis to Sustainability: Paving the Way for Sustainable Development in Indonesia – Overview of the Implementation of Agenda 21*. Jakarta: State Ministry of the Environment, 2002, 41. Depending on the definition of 'clean', this figure is likely to be much lower.

- How can environmental law in Indonesian best be characterised in light of general jurisprudential analysis?

- Is environmental legislation on water quality management and pollution control adequate to achieve its purposes? If not, why not?

- Under what conditions can more adequate environmental law be generated in the *reformasi* era?

In posing these questions, it is not denied that failures in environmental management can be attributed to poor implementation of legislation arising from a lack of human or financial resources and/or weaknesses in legal institutions.[4] It is also not being suggested that it is sufficient to simply establish a system: such an approach would unrealistically reify the law. An effective system of environmental law will rely on the initiative of individuals within the system as well as a change in community attitudes. In addition, any environmental law system relies on the will of those wielding power to support decisions to protect the environment, often against powerful vested interests. However, a system needs to be orderly and methodical and cannot be overly reliant on the contingency that extraordinary people will be available to implement it.

These questions have been posed to discuss whether current legal arrangements provide adequate support for those, within both government and the community, who seek a change in environmentally damaging practices, in light of the low level of human and financial resources as well as political and economic conditions that do not prioritise environmental protection. Finally, in addressing these questions it may be possible to identify strategies that will contribute to a more effective system of environmental law in Indonesia in the future.

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[4] Weaknesses in legal institutions have been comprehensively documented in the study by Budiardjo, Nugroho, Reksodiputro (in cooperation with Mochtar, Karuwin and Komar) and CYBERconsult, *Law Reform in Indonesia – Diagnostic Assessment of Legal Development in Indonesia* (Jakarta: CYBERconsult, 1998).

Academic Background

The thesis topic is located at the intersection of several academic areas namely environmental law and, in particular, concepts of water pollution control and management as they have developed internationally, Indonesian environmental law, Indonesian law more generally, the sociology of law and jurisprudence.

From the perspective of environmental law, the thesis looks at water pollution control and management in Indonesia in the context of developments in environmental law internationally. Indonesian environmental law texts have been written by Koesnadi,[5] Rangkuti,[6] Koeswadji,[7] Santosa,[8] Sembiring[9], Silalahi[10], Usman[11] and others. Where relevant these texts have been referred to; however, in writing the thesis, it was observed that whilst these texts often explain or interpret the content of environmental legislation in Indonesia, they do not seek to critique the system of environmental law in a fundamental way as is necessitated by the research questions of this thesis.

The features of the Indonesian legal system and its development within a historical context has been the subject of considerable legal scholarship in Indonesia as available in the writings of Indonesian academics and practising lawyers such as Sri Soemantri,[12]

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5 Koesnadi H, *Hukum Tata Lingkungan* (Environmental Law*)* (Yogyakarta: Gadjah Mada University Press, 7th ed., 1999).

6 Rangkuti SS, *Hukum Lingkungan dan Kebijaksanaan Lingkungan Nasional* (Environmental Law and National Environmental Policy) (Surabaya: Airlangga University Press, 2nd ed., 2000).

7 Koeswadji HH, *Hukum Pidana Lingkungan* (Criminal Environmental Law) (Environmental Criminal Law) (Bandung: Penerbit PT Citra Aditya Bakti, 1993).

8 Santosa MA, *Good Governance and Hukum Lingkungan* (Good Governance and Environmental Law) (Jakarta: Indonesian Centre for Environmental Law, 2001).

9 Sembiring SN (ed.), *Hukum dan Advokasi Lingkungan* (Law and Environmental Advocacy) (Jakarta: Indonesian Centre for Environmental Law 1998); Sembiring SN, "Recognition of Standing in Environmental Litigation" (1996) Vol 1 No 1 *Indonesian Journal of Environmental Law* 79-89.

10 Silalahi MD, *Hukum Lingkungan – Dalam Sistem Penegakan Hukum Lingkungan Indonesia* (Environmental Law and Law Enforcement in Indonesia) (Indonesia: Penerbit Alumni, 2001)

11 Usman R, *Pembaharuan Hukum Lingkungan Nasional* (The Renewal of National Environmental Law) (Indonesia: PT Citra Aditya Bakti, 2003)

12 Sri Soemantri HR, *Bunga Rampai Hukum Tata Negara Indonesia* (Aspects of Administrative Law in Indonesia) (Indonesia: Penerbit Alumni, 1992); *Hak Uji Material di Indonesia* (Judicial Review in Indonesia) (Indonesia: Pernerbit PT Alumni 2nd ed, 1997).

Manan,[13] Hadjon,[14] Asshiddiquie,[15] Ridwan,[16] Lubis,[17] Nasution[18], Mahfud[19] and others. The approach taken in the thesis differs from these writers in that it tackles a narrow legal area but does so taking a detailed and critical approach that refers to jurisprudential analysis. A number of Indonesianist legal scholars such as Lev[20] and, more recently, Goodpaster,[21] Bourchier,[22] Burns,[23] Bedner[24] and Lindsey[25] have discussed developments in the post-Suharto era, *reformasi* aspirations and the rule of law in Indonesia which provides useful background.

In researching the thesis, it was observed that discussion of both the rule of law and good governance by Indonesian scholars rarely enters into a critique of the legal mechanisms

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13 Manan B, *Dasar-Dasar Perundang-Undangan Indonesia* (The Basis of Indonesian Legislation) (Indonesia: Pernerbit IND-HILL Co, 1992); Manan B and Magnar K, *Beberapa Masalah Hukum Tata Negara Indonesia* (Various Issues in Indonesian Administrative Law) (Indonesia: Alumni, 1993)

14 Hadjon PM, *Perlindungan Hukum Bagi Rakyat di Indonesia* (Legal Protection for the People of Indonesia) (Indonesia: PT Bina Ilmu, 1987)

15 Asshiddiquie J, *Gagasan Kedaulatan Rakyat Dalam Konstitusi dan Pelaksanaanya di Indonesia* (Ideas on the Sovereignty of the People under the Constitution) (Indonesia: PT Ichtiar Baru van Hoeve, 1994).

16 Ridwan HR, *Hukum Administrasi Negara* (State Administrative Law) (Indonesia: UII Press, 2002)

17 Lubis TM, *In Search of Human Rights: Legal-Political Dilemmas of Indonesia's New Order, 1966-1990* (Jakarta: PT Gramedia Pustaka Utama, 1993).

18 Nasution BA, *The Aspiration for Constitutional Government in Indonesia: A Socio-Legal Study of the Indonesian Konstituante 1956-1959 (*Jakarta: Pustaka Sinar Harapan, 1992).

19 Mahfud M, *Hukum dan Pillar-Pillar Demokrasi* (Law and the Pillars of Democracy) (Yogyakarta: Gama Media Offset, 1999).

20 Lev DS, "Between State and Society: Professional Lawyers and Reform in Indonesia" in Lev DS and McVey R (eds.), *Making Indonesia: Essays on Modern Indonesia in Honor of G. McT. Kahin* (USA: Cornell University South East Asian Program, 1996) 144-163; Lev DS, "Judicial Authority and the Struggle for an Indonesian Rechtsstaat" (1978) Vol 13 No 1 *Law and Society Review* 37-71; Lev DS, "Social Movements, Constitutionalism and Human Rights: Comments from the Malaysian and Indonesian Experiences" in Greenberg D, Katz SN, Oliviero MB and Wheatley SC (eds.), *Constitutionalism and Democracy Transitions in the Contemporary World* (USA: Oxford University, 1993).

21 Goodpaster G, "Rule of Law, Economic Development and Indonesia" in Lindsey T (ed.), *Indonesia: Law and Society* (Sydney: The Federation Press, 1999).

22 Bourchier D, "Magic Memos, Collusion and Judges With Attitude – Notes on the politics of law in contemporary Indonesia" Jayasuriya K (ed.), *Law, Capitalism and Power in Asia – The rule of law and legal institutions* (London: Routledge, 1999) 233-52; Bourchier D, "Positivism and Romanticism in Indonesian Legal Thought" in *Indonesia: Law and Society* Lindsey T (ed.), (Sydney: The Federation Press, 1999) 186-196; Bourchier D, *Lineages of Organicist Political Thought in Indonesia* (Melbourne: Ph.D Thesis, Department, Monash University, unpublished).

23 Burns PJ, *The Leiden Legacy – Concepts of Law in Indonesia* (Jakarta: PT Pradnya Paramita, 1999).

24 Bedner A, "Administrative Courts in an Executive-Dominated State: The Case of Indonesia" in Yong Zhang (ed.), *Comparative Studies on Judicial Review Systems in East and South-East Asia* (The Netherlands: Kluwer Law International, 1997) 183-210; Bedner A, *Administrative Courts in Indonesia – A Socio-Legal Study* (The Netherlands: Ph.D Thesis University of Leiden, 2000).

25 Lindsey T, "From Rule of Law to Law of the Rulers – to Reformation?" in Lindsey T (ed.), *Indonesia: Law and Society* (Sydney: The Federation Press, 1999) 11-20; Lindsey T, "Indonesia's *Negara Hukum*: Walking the Tightrope to the Rule of Law" in Budiman A, Hatley B and Kingsbury D (eds.), *Reformasi: Crisis and Change in Indonesia* (Melbourne: Monash Asia Institute, 1999) 363-383.

available in Indonesia to secure desired goals.[26] In this regard, the interaction of language and law, and the use of *Bahasa Indonesia* for the creation of legal rules in legislation, appears to be a problematic area in some areas of Indonesian law making.[27] Legal language is becoming a focus for legal discourse in Indonesia as reflected in the choice of this topic to launch the first edition of a legal journal *Jentera* (Wheel), in August 2002.[28] In 2003, legal language and languaging in Indonesia was addressed in a doctoral thesis by Massier, which became available too late to be taken into account but which has some parallels with the approach taken in this thesis.[29]

Theoretical perspectives and methodologies

Historical perspective and methodology

The nature of the changes that have taken place over the time of writing has required that the thesis be placed within a historical context. In this sense, the historical context is limited to the post-colonial period as the thesis is concerned with efforts since

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[26] This thesis does not take up issues related to legal drafting technique such as the structuring of a statute, writing legislative sentences, exceptions and provisos. In this regard, reference may be made to Seidman A, Seidman RB and Abeyesekere N, *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (The Netherlands: Kluwer Law International, 2001).

[27] Arguments made here regarding environmental law do not necessarily apply across the board in Indonesian law, for example, procedural law contained in Act No. 8 of 1981 on Criminal Procedure (*Kitab Undang-undang No. 8 Tahun 1981 tentang Hukum Acara Pidana* (KUHAP)) contains concise and clearly drafted legal rules.

[28] *Jentera: Jurnal Hukum* (Wheel – Legal Journal) Vol 1 2002 published in Jakarta by *Pusat Studi Hukum dan Kebijakan Indonesia* (PSHKI) (Centre for Indonesian Legal and Policy Studies). See *Forum*: *Bahasa Hukum Indonesia: Krisis Bahasa di antara Pakem dan Frase* and the interview with Arief Sidharta (at 81-88). He stresses the importance of understanding the role of language in the Indonesian legal system (at 84). He notes the poor quality of legal drafting in Indonesia in terms of choice of words and grammatical structure (at 86) and recommends greater public participation in legal drafting (at 88). Marsillam Simanjuntak also interviewed in *Forum* (at 89-94), stresses the lack of well-constructed and grammatical *Bahasa Indonesia* in legislation (89-90). In his opinion, this weakness is widely acknowledged (at 90). He poses the question whether or not there is a living legal culture of written law in Indonesia (at 91). He says that whilst part of the problem arises from finding the appropriate vocabulary in *Bahasa Indonesia* (at 91), a more important problem lies in the failure to set out definite meanings and avoid vagueness. He identifies the primary problem as the lack of a legal culture that values written law, which he says will only come from increased law enforcement (at 93).

[29] From the available summary of the thesis, it is understood that Massier traces how, in the period of Guided Democracy (1959-1965), there was a breach with Dutch legal language and prevailing legal meanings. The foundations of law were affected by representatives of the leading legal community who were more susceptible to the language and texts of the political elite. When the New Order came into being, the legal community was replaced by divergent groups of lawyers in a world in which the position of law itself had become uncertain. There was heterogeneity in training, experience, views, and values, which expressed itself in a variety in language and terminology. According the Massier, the resultant heterogeneity and lack of clarity of legal language usage should ultimately be seen as the expression of a longing for a new unity of consciousness, a new legal community, and a new shared language: http://www.wetenschapsagenda.leidenuniv.nl/index.php3?m=2&c=23

independence to develop Indonesian legal meaning. During the writing of the thesis, major social and political developments occurred in Indonesia. Preliminary research for the thesis began at the end of 1997, before the passing of *Act No. 23 of 1997 on Environmental Management*. At that time, there were great expectations of new provisions for public participation, legal standing for environmental organizations and class actions. Shortly afterwards, the fiscal crisis affected Indonesia and subsequent social upheaval led to the toppling of President Suharto in May 1998 and the beginning of *reformasi*. The introduction of the water resources management reform program funded by the World Bank followed these developments in mid-1999. Over this same period, there were four amendments to the Indonesian Constitution. Widespread regional disaffection and threatened secession by several regions in Indonesia led to the introduction of regional autonomy in January 2001. This radically altered the structure of government and arrangements for law making. In December 2001, as part of the reform program, a new environmental law on water pollution control and management was passed.[30]

To assess the significance of these developments, the thesis looks back to underlying concepts that were part of the development of the legal system in Indonesia at the time of Independence, during the early years of independence and during the period of the New Order. The work of others who have written about competing socio-legal conceptions in the debates during the drafting of the 1945 Constitution is referred to. Reference is also made to competing romanticist and positivist conceptions of Indonesian law as well as concepts such as the *integralistic state* that dominated during the New Order regime from 1966 to 1998.

Jurisprudential perspective and methodology

The primary perspective of this thesis is jurisprudential. In this regard, the methodology rests on an acceptance of the ideas put forward within the legal positivist tradition. Hartian legal positivism has been turned to for its explanation of the nature of law, the

[30] The bulk of the research for this thesis was finalised in early 2003 and the thesis was submitted in August 2003. For this reason, there have only been a few references to developments after mid 2003.

legal rule and the concept of obligation.[31] It is suggested here that an appreciation of Hartian legal positivism is central to understanding the components of good governance and how to achieve the aspirations of *reformasi*.[32]

In particular, the Hartian depiction of a legal system as being constituted by the union of primary rules regulating conduct with secondary rules governing the recognition, change and adjudication of primary rules provides particular insights for law in Indonesia.[33] According to Hart, primary rules are rules that require human beings to do or to desist from doing certain things. They impose obligations and involve actions concerning physical movement or change.[34] Although primary rules can theoretically exist without secondary rules, to overcome the static nature of a system built entirely on primary rules, a legal system requires secondary rules.

The Hartian concepts are adjusted to focus on rule types commonly found in environmental law. In this way, the concept of the legal rule is used as a standard, measure or indicator for the discussion of the development of environmental law in Indonesia.[35] In relation to the concept of the 'legal rule', much work has been carried out by Twining and Miers,[36] Diver,[37] Baldwin,[38] Schauer[39] and Black.[40] The thesis refers to their work and applies it to rule formation in Indonesian environmental law.

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31 Hart HLA, *The Concept of Law: With a Postscript Edited by Raz J and Bullock PA* (England: Clarendon Press Oxford, 2nd ed., 1994).

32 A new version of legal positivism has developed in recent times as part of a wider political philosophy of democratic positivism. Known as ethical-legal positivism, it argues for clear and unambiguous legal rules that impose limits on government and retain power within the legislative forum rather than transfer power to the courts to shape law according to their own values and preferences: Campbell T, "The Point of Legal Positivism" (1998) Vol 9 *Kings College Law Journal* 63-87 at 79-81. A relationship between what is known as progressive constitutionalism and legal positivism has also been identified in the USA: Sebok AJ, "Misunderstanding Positivism" (1995) *Michigan Law Review* 93 2054-132.

33 Hart, Note 31 at 98.

34 ibid., at 81.

35 Twining has argued the need for "comparators', to provide a basis of comparison between legal systems under the rubric of comparative law, see Twining W, *Globalisation and Legal Theory* (London: Butterworths, 2000) 192.

36 Twining W and Miers D, *How To Do Things With Rules* (London: Weidenfeld and Nicolson, 2nd ed., 1982.

37 Diver CS, "The Optimal Precision of Regulatory Rules" (1983) 65 *Yale Law Journal* 65-109.

38 Baldwin R, "Why Rules Don't Work" (1990) 53 *Modern Law Review* 321-337.

39 Schauer F, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (USA: Oxford University Press, 1991).

40 Black J, *Rules and Regulators* (England: Clarendon Press Oxford, 1997).

The significance of legislation is commonly seen to be a product of legal culture in Indonesia, as in many Southeast Asian countries. The thesis does not reject the importance of legal culture, a thorough investigation of which would require a sociological or anthropological analysis of the practices that make up the 'living law" in Indonesia;[41] however, such an approach is beyond the scope of this thesis. It has also not been possible to take a socio-economic approach, and trace the dynamics of how economic and social forces have influenced legal form, style and content in environmental law and, for this reason, there is no reference to custom or legislative history in environmental law. Rather, it was decided to undertake a formal analysis of law as it exists 'on the statute books' in Indonesia. In short, this thesis seeks to 'take Indonesian statutory law seriously'.[42]

In particular, the following laws are analysed for rule content:

1. The Constitution of Indonesia 1945 (as amended)
2. Act No. 23 of 1997 on Environmental Management
3. Act No. 22 of 1999 on Regional Government
4. Government Regulation No. 25 of 2000 on the Authority of the Government and the Authority of the Provinces as Autonomous Regions
5. Government Regulation No. 82 of 2001 on Water Quality Management and Pollution Control

The analysis of Indonesian statutory law was carried out using the original *Bahasa Indonesia* version of all laws. Where statutory provisions have been referred to in the thesis, direct quotes are often used from a translated text. However, in discussing rule formation, no attempt has been made to interpolate Anglo-Saxon legal phraseology into the translation. As far as possible, the grammatical structure contained in the original is used in this discussion, even though it may not read as conventional legalese. This has

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[41] The study of 'living law' was recommended in relation to determining the extent of convergence of environmental law across Southeast Asia by Johnston DM "Environmental Law as 'Sacred Text': Western Values and Southeast Asian Prospects" in Johnston DM and Ferguson G (eds), *Asia-Pacific Legal Development* (Vancouver: UBC Press, 1998) 405-465 at 463. The conceptual conditions that make possible the practice of environmental law could be a fruitful area of analysis. The study of the rule of law as a cultural practice is discussed by Kahn PW, *The Cultural Study of Law – Reconstructing Legal Scholarship* (USA: University of Chicago Press, 1999) 34-40.

[42] This turn of phrase came to mind from Dworkin RM, *Taking Rights Seriously* (London: Duckworth, 1978).

been done to provide evidence for points being made about linguistic practices in *Bahasa Indonesia*. This approach presents difficulties where resort is only available to English translations, as the translated version often adjusts the expression to insert words and phrases that more closely accord with legislative drafting in the Anglo-American tradition.[43] It is part of the argument of this thesis that to appraise Indonesian legislation, the original version in *Bahasa Indonesia* needs to be considered.

The perspective of constitutional theory and legal sociology

Another perspective that has influenced the direction of the thesis has been political or constitutional theory that sees the rule of law as the morally desirable means of regulating society. As the conception of law that represents the dominant mode of authority in most western systems, the rule of law has symmetry with legal positivism and Hart's descriptive concept of law.[44] In writing the thesis, a formal interpretation of the rule of law has been favoured: one that focuses on legal forms that can effectively guide government officials tasked with implementing the law as well as members of the public.

In considering the features of a modern legal system, the sociological tradition of Weber[45] and his depiction of different modes of authority provide relevant insights. There is a strong overlap between Weber's concept of rational legal authority, legal positivism and the concept of the rule of law.[46] There is also a relationship between the development of the rule of law and the formulation of legal rules. This insight is taken from a sociological analysis of law. Luhmann has described the evolution of law from formulations that are justifiable as a behavioural expectation or an ethical statement of a good policy goal, towards law that contains formulations that bring the constituent facts and legal consequences into an '*if* X, *then* Y' relationship.[47] Weber before him traced the same

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43 For example, in the translation of the Government Regulation No. 82 of 2001 on Water Quality Management and Water Pollution Control.

44 As noted by Galligan DJ, *Discretionary Powers* (England: Clarendon Press Oxford, 1986) 60.

45 Weber M, *Law in Economy and Society* (USA: Harvard University Press, 1966).

46 Commonalities between the construct of the legal-rational state, the notion of modernity as it emerged in seventeenth century, legal positivism and the rule of law were drawn in a comparative study of Hobbes, Bentham and Kelsen undertaken by Lee K, *The Legal-Rational State* (England: Gower Publishing Company Ltd, 1990).

47 Luhmann NA, *A Sociological Theory of Law* King E & Mackie M (trans.), Martin Albrow (ed.), (London: Routledge & Kegan Paul, 1985) at 174.

development away from substantive rationality towards formal rationality, which separates law and ethics and where significance in both substantive law and procedure is ascribed exclusively to operative facts, determined not from case to case but generically.[48]

Comparative law perspective and methodology

A restricted comparative approach is taken in comparing the drafting of some legislative provisions. Occasionally, reference is made to statutory provisions in environmental law from Australia and the USA to indicate approaches that have been taken elsewhere in rule making. Reference is also made to German environmental legislation as a civil law system that uses a comparable framework law approach to legal drafting.[49]

As the writer is an Australian lawyer, it is likely that a comparative law perspective has unconsciously crept into the overall approach taken in writing the thesis. In an effort to gain more of an insider's understanding into the operation of environmental law in Indonesia, a range of material was referred to including government reports and journal articles. In addition, many informal interviews were conducted with Indonesian government officials working in the water and environment sectors, academics, lawyers from the private sector and non-government organizations, as well as consultants working in the field of environmental management and capacity building.

Summary of the thesis argument

The role of the 'legal rule'

It is proposed that role of the 'legal rule' is central to answering the research questions. The concept of the legal rule is put forward as being a measure or indicator with which to characterise a legal system and to assess the adequacy of its component parts. The presence of legal rules explains how laws can guide the actions of government and behaviour of citizens and provide the level of predictability that is central to the rule of

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[48] Weber M, *Law in Economy and Society* (USA: Harvard University Press, 1966), chapter 8 especially 224-226 and chapter 11. Also, Roach Anleu SL, *Law and Social Change* (England: SAGE Publications: 2000) 24.

[49] The German government has an active program in water quality management in Indonesia implemented through *Deutsche Gesellschaft für Technische Zusammenarbeit* (GTZ). It includes the establishment of the first water quality information system based on a river basin.

law. The formulation of legal rules stands behind the concept of the separation of powers: once a legal rule is formulated by law-making agencies, using the deductive logic contained within the rule, it can be applied impartially and independently by the judiciary through the application of legal reasoning. It is also fundamental to creating what Luhmann has described as 'structures of expectation' that are necessary in managing an increasingly complex society.[50]

It is widely recognised that legal rules contain a certain logic. The basis for the concept of the 'legal rule' presented in this book is that it is a statement that can be reformulated into an '*if* X *then* Y' proposition, irrespective of its original expression and, as such, operates in the same way as a conditional program. Normative vocabulary is also required as laws are universally agreed to be normative institutions. Legislative provisions that contain legal rules can be broken down into sets of interrelated unitary rules and analysed through deductive logic. The idea behind drafting legislation should be to create manageable units of legal rules that are capable of providing a basis for legal reasoning.

It is proposed in this thesis that an assessment of environmental law is helped by resorting to jurisprudential theory and, particular, the analysis of HLA Hart. He said that a legal system comes into existence through the union between primary rules of obligation regulating conduct and secondary rules governing the recognition, change and adjudication of primary rules.[51] In the thesis, this framework is adjusted slightly to focus on legislative rules on law making (the Hartian secondary rule of change); administrative rules that govern discretionary authority (a hybrid of the Hartian secondary rules of change and adjudication); and public regulatory rules relevant to regulation (the Hartian primary rule). Whilst Hart did not propound his concept of law in terms of Luhmann's conditional program, his jurisprudential theory, which identifies primary and secondary rules as being fundamental to the existence of legal system, is complemented by this understanding of the legal rule.

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[50] Luhmann NA, *A Sociological Theory of Law*, King E & Mackie M (trans.), Martin Albrow (ed.), (London, Routledge & Kegan Paul, 1985) at 73.

[51] Hart, Note 31 at 98.

A proposition presented in this thesis is that the structure for environmental law making in Indonesia contains a weak rule foundation and, for this reason, obstructs shared understandings by lawmakers about producing and reproducing environmental law as legal sub-system. Another central proposition is that the content of Indonesian environmental law has a form and style that negates the role of the legal rule in environmental management and control.

If the provisions on administrative authority in environmental law are examined, it can be seen that they lack rule content. They are dominated by provisions that could be interpreted as permission-granting conferrals of legislative or administrative authority. Frequently, the expression is in the passive voice, which avoids allocating a specific actor. There is a lack of administrative rules to address respective roles and responsibilities for environmental management. Where obligations are imposed on government, imprecise words and vague expressions are used. There is also an absence of procedural rules to govern the manner of the exercise of administrative authority. Whilst there are frequent aspirational statements on integration and coordination, there are no procedural rules to indicate how these goals are to be achieved.

The strongest rules are found in the regulatory aspects of environmental law in Indonesia; however, here the rules suffer from an unlikely combination of a minimalist approach and unnecessary complexity. There are very few strong prohibitions, which are a stronger form of command than obligations. The obligations are of uncertain effect due to a lack of defined terms and vagueness in legal style. The most specific obligations, those on licensing and environmental impact assessment, are a blend of administrative and regulatory rules, which obscures their function and purpose.

Environmental law making follows a framework approach, which means that many provisions central to establishing an operative system for environmental protection are earmarked as subject matter for delegated legislation. When this occurs in government regulations, it means that operative provisions are often relegated to guidelines of an uncertain binding force. There is also a pervasive difficulty with linguistic structure. Legislation is suffused with vagueness, opacity and unnecessary complexity. Vagueness of expression arises from a lack of detail as well as resort to generic and evaluative terms devoid of specificity. Opacity is caused by a failure to define terms and the use of words

in *Bahasa Indonesia* that do not correlate to widely-recognised legal policy tools. Where terms are defined, the definitions suffer from a lack of specificity or concreteness. Sanctions provisions are marred by unnecessary complexity.

The case law considered in the thesis shows that the courts in Indonesia do not seek to demonstrate statutory construction. This situation may be partly attributable to poor legal drafting: stronger rule formation demonstrating a clear statutory intent is likely to require judges to display a stronger analysis in the interpretation and application of legal rules. At present, existing legislative provisions are wide open to interpretation with no boundaries or signposts to guide the application of legal logic. This undermines the development of common understanding about how to use *Bahasa Indonesia* in crafting rules for institutional purposes. The lack of predictability from the courts closes off an important avenue to establish core meanings to legal rules. It also obstructs the process of internalisation of legal rules whereby rules are absorbed by the community and transformed into social norms as the 'right thing to do'.

The research questions

A brief summary of the findings on the research questions are as follows:

- How can environmental law in Indonesian best be characterised in light of general jurisprudential analysis?

If reference is made to the Hartian concept of law, dilemmas arise in seeking to characterise environmental law in Indonesia. It is arguable that the system of environmental law in Indonesia is not merely 'ineffective' or even 'dysfunctional' but is more accurately described as not being fully present: whilst some of the component parts have been created, it does not effectively amount to a legal system. The reason for characterising environmental law in Indonesia as being a 'nascent' legal sub-system can be found in the widespread lack of compliance with primary rules and the high level of uncertainty within the secondary rules that govern the creation of environmental law in Indonesia.

- Is environmental legislation on water quality management and pollution control adequate to achieve its purpose? If not, why not?

For environmental legislation to be adequate to achieve its purpose, it needs to be drafted in such a way as to support expressed policy goals. The argument put forward in this thesis is that environmental legislation on water quality management and pollution control in Indonesia may be sufficient to *permit* environmental protection but does not actively support environmental protection. This is due to the failure to recognise the central importance of the legal rule in the Indonesian legal system and the qualities that make up effective legal rules. It is suggested that environmental laws are inaccessible, not reasonably capable of conveying clear meaning to those who are expected to apply or comply with them, do not entail a specific level of compulsion and do not fully address the environmental problems to which the laws are directed.

- Under what conditions can more adequate environmental law be generated in the *reformasi* era?

It is argued that, despite the reform aspirations of the post-Suharto era, the central position of the legal rule and, indeed, the necessary rule foundation to the creation of a legal system, has yet to achieve recognition. This is apparent in the law establishing regional autonomy, which sets out the arrangements for environmental law making at each level of government in Indonesia. The new water pollution regulation produced in the *reformasi* of water resources management, *Government Regulation No. 82 of 2001 on Water Quality Management and Pollution Control*, perpetuates the legislative form and style that characterised the previously ineffective system of water quality management and control.

At a deeper level, it is suggested that a peculiar vision of the socio-legal order has been officially promoted in Indonesia, which is particularly problematic for the development of environmental law. This vision, which has been labelled variously as romanticist and organicist, prevailed at the time of independence and was adopted and reinforced by the government over the period of the New Order regime. It provided a vehicle for

sidestepping issues within society concerning power relations both between government and civilians and between the more powerful and less powerful sectors of society.

Environmental law must deliberately set out to address power relations in Indonesian society that hinder efforts to protect the environment. In its administrative law aspect, environmental law needs to guide decision-makers and guarantee legal accountability in government activities. At times, this will amount to a reapportioning of power in society towards those affected by environmental decisions. In its regulatory law aspect, environmental law must seek to change community attitudes and, where necessary, to provide the means to enforce legal prohibitions and obligations, sometimes against powerful interests in society. The failure to develop a clear concept of the role of legal rules in the administrative and regularity aspects of environmental law has enabled the system to ignore the issue of unbalanced power relations and, hence, has allowed the environment to be exploited by powerful sectors of society.

An awareness of how to craft strong legal rules within legislation will support the effort to address and alter power relations in society. The means to endow the legal system with greater authority and certainty need to be found. One such means is a re-examination of the use of *Bahasa Indonesia* in the structure, form and style of environmental law making. In turn, this would provide a more reliable basis for law enforcement, through which legal meaning is crystallised.

Structure of the thesis

The first two chapters of the thesis are essentially introductory and set the stage for later discussion. Chapter 3 explores the possibility of a shift in the conception of law in Indonesia. Chapters 4, 5 and 6 concern jurisprudential analysis and the concept of the 'legal rule'. Chapters 7, 8, 9, 10 and 11 discuss Indonesian legislation and court decisions in environmental law. Chapter 12 presents some recommendations to support stronger rule-based law making.

Chapter One - The Environmental and International Law Context for Water Quality Management and Pollution Control

In the first chapter, the nature and extent of the environmental problems in water resources management are indicated along with a discussion of the concept of sustainable development and a presentation of the policy framework emerging internationally to implement integrated water resources management (IWRM).

Chapter Two - The Political Context for Environmental Law Reform

In chapter two, political change in Indonesia since the downfall of Suharto is briefly described as well as the decentralisation of government under regional autonomy. The aspirations of *reformasi*, such as good government are discussed in the context of *reformasi* of water resources management. It is pointed out that the task of reforming water resources management to implement IWRM is enormous, and it is made even more difficult in view of the rapid pace of political change in Indonesia in recent years. In the second half of the chapter, scholarship on the development of legal systems in countries such as Indonesia is discussed. In the face of difficulties in ascertaining environmental law's capacity to act as an instrument to change social behaviour and attitudes, it is suggested that a close look at the features of environmental law is required.

Chapter Three - Shifting Visions of the Social and Legal Order

Chapter 3 considers constitutional theory in Indonesia from a historical perspective beginning with a description of prevailing legal concepts at independence: the *Rechtsstaat*, the *integralistic state* and *Pancasila*. It goes on to explore the possibility that a fundamental shift is occurring in Indonesia, away from past mystifications towards a more rational concept of Indonesian law and law making.

Chapter Four - The Minimum Requirements for a Legal System

Chapter 4 goes forward from the discussion of constitutional theory in chapter 3, to look at the minimum requirements for the existence of a legal system in accordance with general jurisprudence. The Hartian idea that a legal system consists of the union of

primary rules regulating conduct and secondary rules governing the recognition, change and adjudication of primary rules is introduced. The recent critique of Hartian positivism by Tamanaha is also discussed. The underlying question is how to characterise the system of environmental law in Indonesia: is it an ineffective system, perhaps an almost wholly ineffective system, or is it more accurate to describe it as a system whose effective existence has not been demonstrated, i.e. a nascent system, a legal sub-system still in the making?

Chapter Five - The Concept of a 'Legal Rule'

Chapter 5 sets out the basis for a rule-based analysis of legislation. It begins by identifying the creation of laws that are capable of guiding both government and the public as being a common requirement of *Rechtsstaat* and the rule of law. It is suggested that such laws take the form of a conditional program and have an internal structure of logic that can be translated into an '*if* X *then* Y' formulation. At this point, the concept of the 'legal rule' is introduced as possessing the same structure. The legal rule is categorised as falling into three rule types: the legislative rule (the Hartian secondary rule of change), the administrative rule (a hybrid of the Hartian secondary rules of change and adjudication) and the public regulatory rule (the Hartian primary rule).

Chapter Six - Designing Rules for Institutional Purposes

Chapter 6 goes on to explore difficulties in drafting legal rules in any country that arise from the open texture of language and the need for interpretation. It discusses the role of the courts as the leader of the 'interpretive community' involved in constructing the meaning of legal rules and presents the figure of a cycle of knowledge on the use of language for institutional purposes. It describes the dimensions of a legal rule: the position of a legal rule within the legal hierarchy; its linguistic structure; and the sanction that applies on the breach of a rule. The choices available in linguistic structure between precision/vagueness, simplicity/complexity and clarity/opacity are discussed. The means available to maximise the status of a legal rule are set out and the observation is made that status is particularly important where law is to act as an instrument of social change. Accountability in discretionary authority is explored and the suggestion is made that in delimiting areas for the exercise of discretion, rule dimensions need to be deliberately utilised to achieve policy goals.

Chapter Seven – Rules For Making Environmental Law

In chapter 7, it is shown that there is an absence of effectively drafted criteria of validity to guide the production of environmental legislation in Indonesia. The provisions conferring normative authority to each level of government to pass certain types of instruments are incomplete, non-specific and lack definition. The provisions that indicate the scope of normative power in terms of subject matter granted to each level of government are also inadequate. District government has been left in a legal vacuum, having been obliged to carry out environmental management without clear guidance on how to pass valid law. It is suggested that these are serious difficulties as common understandings are unable to develop about law making. This places the existence of environmental law as a legal sub-system in doubt.

Chapter Eight - The National Environmental Law Framework

Chapter 8 begins with a discussion of constitutional protection for the environment, including recent amendments to the Indonesian Constitution. It is argued that the Constitution does not provide a sufficient legal basis for management and protection of the environment. Next, the primary environmental statute in Indonesia, *Act No. 23 of 1997 on Environmental Management*, is reviewed to identify the rule types mentioned in chapter 5. It is shown that in relation to legal style there is heavy dependence on postponing law making to delegated regulations. The linguistic structure is dominated by vague expression, opacity and unnecessary complexity. In relation to legal form, it is noticeable that there is a lack of administrative rules capable of fostering good governance principles or clearly allocating responsibility for environmental outcomes. There is also a lack of prohibitions in public regulatory rules. At the end of the chapter, the rules within the Decree of the Minister for Home Affairs on the jurisdiction of regional environmental agencies are considered and found to have failed in clearly allocating roles and responsibilities for environmental management within the regions.

Chapter Nine - Water Quality Management and Pollution Control

In this chapter, *Government Regulation No. 82 of 2001 on Water Quality Management and Pollution Control* is reviewed. Ongoing issues concerning legal style and the rule dimensions of position and linguistic structure are noted. In many respects, it appears to be a 'framework regulation'. The appropriateness of the extent of postponement of law making on aspects of water quality management and control to guidelines is questioned. The Regulation also suffers from continuing tendency to favour vagueness, complexity and opacity in the style of legal drafting. Observations are made about the lack of specificity in jurisdictional provisions and the lack of, or weaknesses in, substantive and procedural administrative rules. The public regulatory rules are analysed for clarity and effectiveness. Comparisons are made between administrative and public regulatory rules in the use of language to convey normativity. Finally, an assessment is made on how well the Regulation supports the goals of IWRM.

Chapter Ten - Official Sanctions

Chapters 10 is concerned with environmental obligations and what it takes to create a sense of having an obligation to protect the environment. This is a serious issue in the face of widespread non-compliance with environmental law in Indonesia. The role played by administrative and criminal sanctions and the capacity of existing rules to facilitate responsive regulation is considered. It is shown that jurisdictional, substantive and procedural provisions governing administrative sanctions lack detail at the national level, which is likely to undermine both responsive regulation and legal accountability. It is also shown that the provisions constituting criminal sanctions are both overly complex and lacking in detail. It is suggested that this is likely to deter enforcement agencies in carrying out enforcement and undermine reasoned-based judicial decision-making.

Chapter Eleven - Community Sanctions

Chapter 11 explores the idea that the community has a role in creating the social pressure necessary to generate the component of obligation currently absent in Indonesian environmental law. It will be shown that significant strengthening of community sanctions has occurred through the creation of the class action and the availability of legal standing for environmental organizations. However, in comparison to other

countries, the scope of community sanctions is still limited. Furthermore, obstacles arise from the linguistic structure of rules enforceable through community sanctions. The provision on strict liability suffers from opacity and a failure to explain how it is to be applied in Indonesia and the legal remedies remains confusing and incomplete. It is suggested that community sanctions give teeth to *reformasi* rhetoric on community empowerment and can assist in developing the internal aspect of the obligations so that protection of the environment is seen as 'the right thing' to do.

Chapter Twelve - Conclusion

The final chapter draws together the main ideas in the thesis, with some recommendations on factors that will lead to more effective law making focusing on issues related to legal structure, form and style. It also reflects upon the relationship between rationality in law making, reason-based judicial decisions and the creation of genuine legal rules in Indonesian law.

CONTENTS

CHAPTER FOUR - THE MINIMUM REQUIREMENTS FOR A LEGAL SYSTEM

CHAPTER FIVE - THE CONCEPT OF A 'LEGAL RULE'

CHAPTER EIGHT - THE NATIONAL ENVIRONMENTAL LAW FRAMEWORK

CHAPTER NINE - WATER QUALITY MANAGEMENT AND POLLUTION CONTROL

CHAPTER TEN - OFFICIAL SANCTIONS

CHAPTER ELEVEN - COMMUNITY SANCTIONS

CHAPTER ONE

THE ENVIRONMENTAL AND INTERNATIONAL LAW CONTEXT FOR WATER QUALITY MANAGEMENT AND POLLUTION CONTROL

Introduction

This is the first of two chapters giving a brief presentation of the background to the reform of water resources management, including water quality management and pollution control in Indonesia. This chapter highlights the extent of the water management crisis in Indonesia and links increasing industrial water pollution with growth in the manufacturing sector.

The overarching concept of sustainable development and the extent to which it represents international consensus about policy goals in environmental management is discussed. This is followed by an exposition on the components of the concept of integrated water resources management (IWRM), which has become an internationally accepted approach to water resources management.

IWRM provides the conceptual basis for water resources management of which water quality is an integral part. The elements of integration are presented, namely the integration of the natural system within the watershed, the administrative system based on the watershed and the socio-economic system for water use. The ambitious nature of any program to introduce IWRM is highlighted with a view to discussion later in the thesis as to how this concept is being supported legally in Indonesia in relation to water quality management and pollution control.

1. THE ENVIRONMENTAL CONTEXT: STRESS CONDITIONS IN THE WATERWAYS

The water crisis

It is estimated that by the year 2025 as much as two-thirds of the world's population will

live under stress conditions from problems related to water quality and quantity.[1] Such conditions are already visible in the waterways of Indonesia. Population growth, urbanisation and rapid industrialisation have led to an increasing demand for water and increasing sources of water pollution, particularly in Java. In a little over 30 years, the total population of Indonesia grew from approximately 119 million in 1971 to 206 million in 2000.[2] The provinces of Java have a combined population of approximately 113 million people, which accounts for about 60% of Indonesia's population.[3] With only 7% of the land area of Indonesia, population density in Java is very high. Urban transition has also occurred rapidly: in the 1990s, Java was said to be 36% urban and it has been predicted this could exceed 60% by the year 2020.[4]

The water crisis has been brought on by water shortages compounded by high levels of pollution.[5] Whilst these problems are not limited to Java,[6] the situation in Java gives particular cause for concern because of its population density and the intensity of industrial activity. Treatment plants for domestic waste and industrial waste rarely exist, with the result that effluent is discharged directly to rivers. It is a common practice to regularly flush rivers in the dry season as a short-term solution to poor river water quality.[7] The main sources of water pollution are domestic and industrial effluents, agriculture and erosion. In some urban areas, industrial pollution is almost as pervasive

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1 United Nations Commission on Sustainable Development, *A Comprehensive Assessment of Freshwater Resources of the World*. New York: United Nations, 1997, Paragraph 1 and Executive Summary, see http://www.un.org/esa/sustdev/freshwat.htm [accessed 30 May 1998]. Also cited in Global Environmental Outlook 3, UNEP 2002 http://www.unep.org/Geo/geo3/english/267.htm [accessed 26 July 2003]. The year 2003 was declared the International Year of Freshwater: GA Resolution A/RES/55/196.

2 Central Bureau of Statistics, "Population of Indonesia by Province 1971, 1980, 1990, 1995 and 2000" in Central Bureau of Statistics *Selected Tables*. Jakarta: Central Bureau of Statistics, 2000.

3 ibid.

4 World Bank, *Indonesia: Environment and Development: Challenges for the Future, Report No. 12083 – IND.* Washington DC: World Bank Environment Unit Country Dept. III East Asia and Pacific Region, 1994, 9-10.

5 A number of regions regularly experience water shortages in the dry season including Jakarta, West Java, Central Java, Yogyakarta, East Java, Bali and West Nusa Tenggara – *Dewan Riset Nasional* (National Research Council) 1994 cited in Atmanto ISD, *Air untuk Kesejahteraan Rakyat: Reformasi Kebijaksanaan Pengelolaan Sumber Daya Air yang Berkelanjutan dan Berdimensi Kerakyatan* (Water For The Welfare Of The People – Sustainable And Community-Oriented Reform Of Water Resources Management Policy) in Indonesian Centre for Environmental Law, *Sumber Daya Alam Indonesia* (Indonesian Natural Resources) (Jakarta: Indonesian Centre for Environmental Law, 1999) 209-220 at 210.

6 In relation to the need for pollution control, REPELITA VI - Indonesia's Sixth Five Year Development Plan for the 1994/95 to 1998/99 planning period (as established under the Second Long Term Development Plan for Indonesia) said that the most important targets for pollution control are the industrial sectors in the most densely populated areas such as Jakarta, West Java, East Java, North Java, Bandung, Aceh in North Sumatra, Medan, Sulawesi and Bali as well as 101 heavily polluted main rivers across Indonesia: Part IV at 23.

as domestic pollution and its consequences may be more serious where it includes toxic waste. Waste from major industries is said to contribute at least 75% of the pollution load in some river segments.[8] It has been estimated that generally, industrial pollution constitutes from 25% to 50% of the total pollution load in various rivers in Java.[9] The reliance on manufacturing for economic growth without controls over levels of industrial pollution has led to industrial waste being freely discharged into the rivers. The cost to the Indonesian economy is likely to be high, if one considers, for example, the impact upon human health and the economic sectors that rely on clean water, the cost of finding alternative sources of water and the cost of remedial action.[10]

The problems concern both surface water and groundwater. In relation to groundwater, it is acknowledged internationally that:[11]

> Throughout the world, fresh groundwater resources are shrinking by the day. In addition to depletion, three other factors that threaten groundwater are salinity, water logging and pollution of aquifers.

All these problems are present in Indonesia.[12] Over-utilization of groundwater is a serious cause for concern. It is possible that groundwater in the Bandung basin will be exhausted in the near future due to over-intensive pumping. In the Jakarta region there has been a rapid increase in use of groundwater. In 1970, less than 10 million cubic meters of groundwater was used each year and by 1990, this had increased four fold.[13]

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7 Asian Development Bank/REDECON *Report Indonesia – Economic Policies for Sustainable Development*. Jakarta: Asian Development Bank/REDECON undated (approximate date 1997), 38.

8 Potter C and Makarim N, *Development and Implementation of Water Quality Standards in Indonesia*. Jakarta: Environmental Management Development in Indonesia (EMDI) Project and the Ministry of State for the Environment, 1995, 7-8. The Asian Development Bank/REDECON Report, Note 8 states that industrial pollution is responsible for 80 percent of the total organic load entering the Surabaya River at 39.

9 World Bank, Note 4 at 76. However, Central Bureau of Statistics, *Environmental Statistics of Indonesia*, (Jakarta: Central Bureau of Statistics, 1999), Part II.B.17 under Sources of Pollutants and Kind of Pollution in 1996 at 335 gave the ratio between water pollution from domestic sources and industrial sources as 74:286 in West Java, 114: 245 in Central Java and 95: 222 in East Java.

10 Jakarta, Indonesia: The Economics of Water and Waste www.wisc.edu/epat/.energy/.Jakarta--Indonesia--The Economics-of-Watr1/. [accessed 31 May 2003].

11 International Water Management Institute, *Compact Disk: Water Issues for 2025 – A Research Perspective* (Colombo: International Water Management Institute, 2000) 1-29 at 22.

12 World Bank, Note 4 at 74-83. Also, Soetrisno S, *Groundwater Protection – an effort to maintain sustainable development and environmentally sound management of groundwater resources in Indonesia*. Paper presented at "Expert Group Meeting Preparatory to the First Session of the Committee on Environment and Sustainable Development", Bangkok, 30th September - 2nd October 1993 http://www.cedha.org.ar/docs/doc104-eng.htm [accessed 31 May 2003].

13 Tjahjadi B, "The Impact of Abstraction on Groundwater Quality and Monitoring in the Jakarta Region" in ESCAP Water Resources Series No. 70, *Groundwater Quality and Monitoring in Asia and the Pacific* (New

Only five percent of the city's population of over 10 million have access to piped water. Of the rest, about 70 per cent rely on groundwater and the remainder depend on the heavily polluted river water.[14]

The serious nature of Indonesia's water quality problems have been officially recognised for some time. In 1990, the Clean Rivers Program was established to deal with the pressing problems caused by the pollution of rivers from industrial discharges (*Program Kali Bersih* or *PROKASIH*). This was a focused management program, which targeted the heaviest polluters in the most heavily polluted river segments. It was implemented in the provinces under the responsibility of the governors. Notably, it was a program installed outside the existing legal system in an *ad hoc* arrangement. Whilst the program did record some success in reducing pollution discharges in certain areas, difficulties in properly assessing the achievements of the program were caused by incomplete data.[15] Some critics emphasised the bureaucratic approach of *PROKASIH*, which they say lacked community involvement and was too narrow in its reach.[16] In 1995, there were indications that the government intended to develop the program into a fully-fledged regulatory system.[17] This seemed to be supported by the authors of the *1997 Indonesia Country Report*, which reported on the implementation of Agenda 21. The opening to the chapter on Water Resources Management stated that:[18]

> Once believed to be an unlimited resource, the supply and quality of water in Indonesia's major

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York: United Nations, 1991) 177-186. See more generally The Conservation Foundation, *Groundwater: Saving the Unseen Resource*. Washington DC: The Conservation Foundation, 1987.

14 "Clean Water - Clean Government?" *Jakarta Post* (14 September 2002).

15 Afsah S, Laplante B and Makarim N, *Program-Based Pollution Control Management – the Indonesian PROKASIH Program* Washington DC: World Bank, 1996.

16 Witoelar E, "On the Clean River Program in Jakarta" in SPES (ed.,) *Economy and Ecology in Sustainable Development* (Jakarta: Gramedia Pustaka Utama in cooperation with the SPES Foundation, 1994) 199-217.

17 Potter C and Makarim N, *Development and Implementation of Water Quality Standards in Indonesia*. Jakarta: Jakarta: Environmental Management Development in Indonesia (EMDI) Project and the Ministry of State for the Environment, 1995.

18 State Ministry of the Environment, *Indonesia Country Report: Agenda 21 Indonesia's National Strategy for Sustainable Development* Jakarta: State Ministry of the Environment, 1997, 449. Also see State Ministry of the Environment *From Crisis to Sustainability: Paving the Way from Sustainable Development in Indonesia*. Jakarta: State Ministry of the Environment, 2002, which acknowledges that the implementation of Agenda 21 has not been satisfactory (at 1) and which, in relation to water resources, reports on the limited access to clean water (42 per cent of the population) and the need for integrated water resources management (at 41-42).

> cities is now questionable. Growing levels of consumption, environmental damage and pollution have made it necessary to begin sustainable management efforts so that water will not become a scarce resource in years to come.

It went on to say:

> In preparing a sustainable water strategy, the government should pay attention not only to physical and technical matters, but also to the improvement of regulations, laws and administration of water resources management.

Thus, it can be seen that by the late 1990s, the government was emphasising the need for the development of the legal system in this area.

Growth in manufacturing and increasing pollution loads

The development of the Indonesian economy shows a similar pattern to other countries in East Asia. Indonesia has relied heavily on industrialisation for rapid growth of output, exports and employment. Manufacturing contributed only about 10% of total GDP growth in the 1967-73 period but by 1992, it contributed 29.2%.[19] Indonesia's development strategy for the Second Long-term Plan (1993-2013) is to continue reliance on industrial growth for the creation of higher productivity jobs and non-oil exports. It was anticipated that the GDP composition of manufacturing would reach 32.4% at the end of 2013.[20]

As at November 2002, the government's annual economic growth target was 4 percent.[21] The contraction of GDP that occurred from +5.3 percent in 1997 to –14.22 percent in 1998 had been overcome: Indonesia's GDP grew at 1.09 percent in 1999 and 5.24 percent in 2000.[22] Over the 1996-2000 period, percentage distribution of GDP shows the level of manufacturing to have been relatively stable: in 1996, it was 25.62 percent and in 2000, it was 26.04 percent.[23] Very preliminary figures for 2000 showed high growth

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19 Hill H, *The Indonesian Economy Since 1966* (Hong Kong: Cambridge University Press, 1996), 21 (Table 2.1) based on estimates by Hill from accounts prepared by the National Bureau of Statistics.

20 REPELITA VI - Indonesia's Sixth Five Year Development Plan for 1994/95 to 1998/99 (as established under the Second Long Term Development Plan for Indonesia), Table 1.

21 "Indonesian economy grew 3.92 percent in 3rd quarter: BPS" *The Jakarta Post* (16 November 2002) 2.

22 *Badan Pusat Statistik* (National Bureau of Statistics): Growth Rate of GDP at Constant Market Prices by Industrial Origin, 1996-2000.

23 *Badan Pusat Statistik* (National Bureau of Statistics): Percentage Distribution of GDP at Current Market Prices by Industrial Origin, 1996-2000.

rates in a number of sectors that are considered highly polluting, namely iron and basic steel (16.21%), fertilizers, chemicals and rubber products (12.84%), textile, leather and footwear (10.51%), paper and printing (10.21%), other manufacturing products (7.96%) and cements and non-metallic products (7.32%).[24] As these industrial sub-sectors grow, there will be a parallel increase in pollution loads, unless there is effective pollution control.

2. THE INTERNATIONAL CONTEXT: SUSTAINABLE DEVELOPMENT

International law and sustainable development

International law provides an impetus for the development of environmental law in most countries. It also provides a guide to interpretation of new concepts in law making. The international response to environmental problems faced by developing countries has been encapsulated in the concept of sustainable development. As a concept, it is firmly established in international environmental law texts. The most often quoted definition of sustainable development is 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'[25] For any society to attain the goal of sustainable development, both intra-generational and inter-generational equity concerns need to be met.

Agenda 21, the action plan of the *United Nations Conference on Environment and Development* 1992,[26] was drafted to provide a comprehensive range of detailed plans, programs and activities to integrate development and environmental protection through sustainable development. As such, it constitutes 'soft law' status.[27] The program of

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[24] *Badan Pusat Statistik* (National Bureau of Statistics): Selected Tables Growth Rate of Gross Domestic Product at Constant 1993 Market Prices by Industrial Origin, 1996-2000 (Percent). The World Bank has developed an Industrial Pollution Projection System (IPPS) which can be used to rank industrial sectors using pollution intensity factors. The fertiliser and pesticide industry is said to be almost twice as toxic as the next toxic industry, industrial chemicals, which is followed by tanneries and leather, synthetic resins and plastics, paper containers, plastic products, textiles, printing, non-ferrous metals and iron and steel: Bradon C and Ramankutty R, *Toward an Environmental Strategy for Asia World Bank* Discussion Paper #224, page last update 30 August 1999 www.worldbank.org/nipr/work_paper/224-4/index.htm. Also www.worldbank.org/nipr/ipps/ippsweb.htm, updated as at 21 September 1999, table entitled Linear Acute Human Toxicity Intensity.

[25] World Commission on Environment & Development (WCED), *Our Common Future* (England: Oxford University Press, 1987) 43.

[26] Agenda 21, United Nations 1992 UN Doc.A/CONF.151/26/Rev.1.

[27] For discussion of 'soft' and 'hard' international environmental law, see Birnie PW and Boyle AW, *International Law and the Environment* (Oxford: Oxford University Press, 2nd ed., 2002) at chapter 1.

Agenda 21 has been formally adopted by many countries. Chapter 18 of Agenda 21 deals specifically with the protection of the quality and supply of freshwater resources and the application of an integrated approach to the development, management and use of water resources. It is a practical, operational document, which takes the form of a code of practice for each of these program areas and details how its objectives and principles are to be met.

Indonesia has fully endorsed the commitments made at the 1992 United Nations Conference on Environment and Development in Rio (UNCED).[28] The Broad Outline of State Policy (*Ketetapan Majelis Permusyawaratan Rakyat No. 04 Tahun 1999 tentang Garis-Garis Besar Haluan Negara* (GBHN)) that establishes the direction for law making over the 1999-2004 period, noted that although sustainable development has officially been part of government policy, in practice, there has been little control over the use of the environment, with consequent continuing environmental destruction.[29]

The diversity and inconsistency amongst the various definitions of sustainable development has been widely acknowledged.[30] The concept of sustainable development can be most easily used to describe a policy goal. Lowe argues that the concept of sustainable development does not have 'sufficient identifiable normative meaning to be capable of generating a self-contained norm of customary international law' but that it can claim normative status as an element in the process of judicial reasoning.[31]

Difficulties in interpretation are exacerbated by fundamental differences between those who interpret sustainable development as *weak* sustainability and others who interpret it as *strong* sustainability. Under the weak sustainability interpretation, sustainable

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28 State Ministry of the Environment, Note 18 at 2.

29 GBHN Chapter 2.

30 As Turner said in 1988, '[t]he precise meaning of terms such as 'sustainable resource usage', 'sustainable growth' and 'sustainable development' has so far proved elusive, see Turner RK, "Sustainability, Resource Conservation and Pollution Control: An Overview" in Turner RK (ed.), *Sustainable Environmental Management – Principles and Practice* (England: Belhaven Press, 1988) 1-25 at 5.

31 Lowe V, "Sustainable Development and Unsustainable Arguments" in Boyle A and Freestone D (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges* (England: Oxford University Press, 1999) 19-37 at 30-35.

development can be achieved by viewing natural capital (such as clean water, wetlands and forests) as simply one form of capital in the transfer of an aggregate capital stock to future generations.[32] What is important is that the aggregate transferred is no less than the one that exists now. A degraded environment is acceptable as long as the loss is compensated for by increasing the stock of other forms of capital such as man-made physical capital in the form of roads and factories. It is based on a very strong assumption: that of perfect substitutability between different forms of capital.[33] Under the strong sustainability interpretation, it is argued that perfect substitution between different forms of capital is not a valid assumption, as some elements of the stock of natural capital cannot be substituted for by man-made capital except on a very limited basis, including ecosystems that act as life support services.[34] This argument is persuasive where there are water shortages as in such conditions there will be no substitute for clean water.

Sustainable development and water quality

Sustainable utilization

The nature of the resource under consideration will influence interpretation of sustainable development and for this reason more should be said about its application to managing

[32] Capital can include man-made capital, natural capital, human capital and social capital: OECD, *Sustainable Development – Critical Issues*. France: OECD Publications, 2001, 38.

[33] Turner RK, Peace D and Bateman I, *Environmental Economics – An Elementary Introduction* (England: Harvester Wheatsheaf, 1994) 55-56.

[34] ibid., at 56.

water quality. Whilst water may resemble a renewable resource, it is actually part of a closed hydrological cycle. When water is withdrawn from rivers, streams, lakes, reservoirs or groundwater, some water is returned to the hydrological cycle as water or steam but other water is consumed and not later returned to the hydrological cycle as available water. This pattern of consumption includes water used in industrial production or consumed by humans or animals that is not returned. Whilst most water withdrawn by industry and municipalities is returned to watercourses, its quality is often degraded.[35]

Therefore, water can be described as having the potential to be a constant resource, depending upon how well it is managed. The volume of water that falls to earth as rain has the potential to be relatively constant over time within the hydrological cycle whereby water is recycled through precipitation and evaporation from land and water surfaces and transpiration from vegetation. However, to be relatively constant, the maximum sustainable yield over extended periods should not be exceeded. This means that surface water should not be polluted to the extent that exceeds its capacity to self-clean. Groundwater is distinguishable from surface water, as it has characteristics of non-renewability. In some regions, the stock of groundwater may take a long time to be replenished and, if polluted, groundwater may be difficult, if not impossible to restore to its original quality.[36]

Pearce, Markyanda and Barbier who developed the definition of 'non-declining utility' state:[37]

> We summarise the necessary conditions [for sustainable development] as 'constancy of the natural capital stock'. More strictly, the requirement is for non-negative changes in the stock of natural resources such as soil and soil quality, ground and surface water and their quality, land biomass, water biomass, and the waste assimilation capacity of receiving environments.

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35 WCED, Note 25 at points 39-41.

36 Sampat P, "Groundwater Shock: The Polluting of the World's Major Freshwater Stores" (2000) Vol 13 No 1 *World Watch* 10-22 at 10.

37 Pearce D, Markyanda A and Barbier B, *Blue Print for a Green Economy* (London: Earthscan Publications Ltd, 1989) 32.

Pearce has also said:[38]

> In simple terms [sustainable development] argues for (a) development subject to a set of constraints which set resource harvest rates at levels no higher than managed or natural regeneration rates; and (b) use of the environment as a 'waste sink' on the basis that waste disposal rates should not exceed rates of (natural or managed) assimilation by the counterpart ecosystems.

In relation to water resources management, sustainable development means being able to use the environmental services of a water resource over very long periods of time and, in theory, indefinitely. In relation to environmental law, this approach would mean that a water resource must be able to assimilate all forms of waste when used as a waste sink. However, there are some difficulties with this approach to water resources as some waste forms such as toxic waste take the form of 'stock' pollution that does not degrade over time but rather accumulates.[39]

The balance between human needs and preservation of ecosystems

Agenda 21 contains the dual objectives of (1) meeting human needs and (2) preserving the functions of ecosystems. The general objective of Agenda 21 in relation to the quality and supply of fresh water resources is: [40]

> to make certain that adequate supplies of water of good quality are maintained for the entire population of this planet, while preserving the hydro-geological, biological and chemical functions of ecosystems, adapting human activities within the capacity limits of nature and combating vectors of water-related diseases.

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[38] Pearce DW, "Optimal Prices for Sustainable Development" in Collard D, Pearce D and Ulph D (eds), *Economics, Growth and Sustainable Environments* (New York: St. Martins Press 1988a) 58.

[39] Pollution may be divided into 'flow' and 'stock' pollution. Flow pollution occurs when damage results from the level of flow of residuals, that is, the rate over time at which they are being discharged. Common residuals for water pollution are biological oxygen demand (BOD) and chemical oxygen demand (COD). Stock pollution occurs when damage is a function of the stock of the residual in a relevant environmental system at any point in time. Damage results from the concentration rate of the pollutant. Stock pollution may result from BOD if emissions are being produced at a rate that exceeds the capacity of the environment to assimilate them (absorptive capacity). The absorptive capacity of heavy metals, some synthetic chemicals (PCBs, DDT, dioxin) and non-biodegradable rubbish is zero. Most industrial waste is a mixture of flow and stock effects, see Perman R, Ma Y and McGilvray J, *Natural Resources and Environmental Economics* (New York: Longman 1996) 199-205.

[40] Agenda 21, Note 26, Chapter 18 entitled "Protection of the Quality and Supply of Freshwater Resources: Application of Integrated Approaches to the Development, Management and Use of Water Resources" at paragraph 18.2.

This formulation does not deal with the ethical question of how to resolve conflicts between the human demand for water resources and the needs of ecosystems for water.[41] It also does not include a duty to protect ecosystems for their intrinsic value and, as such, can be said to be essentially anthropocentric.

The extent to which anthropocentric and ecocentric concerns are provided for is another point of distinction between differing interpretations of sustainable development. In the anthropocentric approach, the idea of human development takes priority and the environment is represented as having merely an instrumental value. The ecocentric approach favours environmental sustainability as the concept for a wider range of recipients, including the non-human environment. It tends to be a science-based approach, which seeks the protection of the scientific value of species and ecosystems. It also holds that the non-human environment has a value irrespective of human needs.[42] The point of view adopted by the World Conference on Environment and Development (WCED) is essentially anthropocentric where it is stated that: [43]

> The loss [i.e. extinction] of plant and animal species can greatly limit the options of future generations; so sustainable development requires the conservation of plant and animal species.

It can be seen that the orientation is one that focuses on the benefits to be received by humans. The Rio Declaration is explicitly anthropocentric where it states in Article 1:[44]

> Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

The 4 September 2002, Johannesburg *Declaration on Sustainable Development* does not attempt to reconcile the differences in interpreting the concept of sustainable development. It merely refers to the '… mutually reinforcing pillars' of sustainable

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41 Canter L, Otto K and Brown DA, "Protection of Marine and Freshwater Resources" in Lemons J and Brown DA (eds). *Sustainable Development: Science, Ethics and Public Policy* (The Netherlands: Kluwer Academic Publishers, 1995) 158-214 at 202.

42 Bosselmann K, "The Concept of Sustainable Development" in Bosselmann K and Grinlinton D (eds), *Environmental Law for a Sustainable Society* (New Zealand: New Zealand Centre for Environmental Law Monograph Series, 2002) 81-96 at 89-90 and Bosselmann K, "A Legal Framework for Sustainable Development" 145-161 at 148.

43 WCED, Note 25 at point 46.

44 UNCED Declaration of Principles, 31 I.L.M. 874 (1992). Also, Boyle A and Freestone D, "Introduction" in Boyle A and Freestone D (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (England: Oxford University Press, 1999) 1-37 at 4.

development, which are listed as economic development, social development and environmental protection …'.[45] Thus, no indication is given as to the approach to be taken when, for example, economic development conflicts with environmental protection.

By way of contrast, an ecocentric approach is reflected in the definition of sustainability formulated by Allen who states that:[46]

> Sustainable utilization is a simple idea: we should utilize species and ecosystems at levels and in ways that allow them to go on renewing themselves for all practical purposes indefinitely.

The anthropocentric approach is in the process of being refined, as the protection of ecosystems within waterways has been identified as a significant aspect of management. For example, the Commission on Sustainable Development has said that, in recent years, an understanding has emerged of the need to maintain ecosystem health because of the very practical benefits, sometimes called 'ecosystem services', that are provided to humans. These benefits include the production of food, reduction of flood risk and filtering of harmful pollutants. According to the Commission on Sustainable Development, the freshwater needs of aquatic ecosystems are now accepted as 'legitimate calls' on water.

Goals for sustainable development in water resources management

Taking the above into account, a minimum goal of sustainable development requires non-negative change in the quantity and quality of the stock of surface and groundwater as well as the protection of the hydro-geological, biological and chemical functions of ecosystems related to waterways. Sustainable water resource systems have been defined as:[47]

> Water resource systems designed and managed to fully contribute to the objectives of society, now and in the future, while maintaining their ecological, environmental, and hydrological integrity.

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[45] Article 5, A/CONF.199/L.6/Rev.2.

[46] Allen R, *How to Save the World: Strategy for World Conservation* (London: Kogan Page, 1980) 18. This book presents the World Conservation Strategy prepared by the International Union for the Conservation of Nature (IUCN) in conjunction with UNEP and WWF.

Gleick proposes a stronger definition when he stated that a working definition of sustainable water use is: [48]

> Use of water that supports the ability of human society to endure and flourish into the indefinite future without undermining the integrity of the hydrological cycle or the ecological systems that depend on it.

This definition indicates that if there is a conflict between the human demand for water and maintenance of the integrity of the hydrological cycle or dependent ecosystems, the latter are to be given priority. Furthermore, the protection of ecosystems does not depend on the existence of an 'ecosystem service'. It would seem that international law does not yet provide full support for Gleick's approach. However, given the development of the concept by the Commission of Sustainable Development, it is arguable that when applied to the management of fresh water, sustainable development at least requires the protection of ecosystems that provide an ecosystem service to humans.[49]

3. INTEGRATED WATER RESOURCES MANAGEMENT (IWRM)

The goals of IWRM

The concept of Integrated Water Resources Management (IWRM) is accepted internationally as the means for securing sustainable use of water resources. It has evolved since the United Nations Water Conference held at Mar del Plata, Argentina in 1977, through a number of international conferences including the 1990 New Delhi Global Consultation on Safe Water and Sanitation, the 1992 Dublin International Conference on Water and the Environment, the World Water Forum at The Hague in 2000 and the Third World Water Forum in Kyoto in March 2003.

IWRM is elaborated in Chapter 18 of Agenda 21 and is now the key principle in working towards the goal of equity and sustainability in water use. The opening of the Report of

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[47] Loucks DP, Stakniv EZ and Martin LR "Editorial – Sustainable Water Resources Management (2000) Vol 126 No 2 *Journal of Water Resources Planning and Management* 43-47 at 46.

[48] Gleick PH, "The Changing Water Paradigm: A Look at Twenty-first Century Water Resources Development" (2000) Vol 25, No 1, *Water International* 127-138 at 131.

[49] Notably, these definitions do not incorporate the restoration or rehabilitation of degraded water resources. An alternative working definition that arguably is supported by international law is:

> Use of water that supports the ability of human society to endure and flourish into the indefinite future, that maintains, and where appropriate extends current levels of ecological, environmental and hydrological integrity and that protects ecosystem services provided by aquatic ecosystems.

the Commission on Sustainable Development in its *Comprehensive Assessment of the Freshwater Resources of the World*[50] quotes from Agenda 21:[51]

> The holistic management of fresh water as a finite and vulnerable resource, and the integration of sectoral water plans and programs within the framework of national economic and social policy, are of paramount importance for actions in the 1990s and beyond.
>
> Integrated water resources management is based on the perception of water as an integral part of the ecosystem, a natural resource and social and economic good, whose quantity and quality determine the nature of its utilization. To this end, water resources have to be protected, taking into account the functioning of aquatic ecosystems and the perenniality of the resource, in order to satisfy and reconcile needs for water in human activities.

The first programme area proposed in Agenda 21 for the freshwater sector is integrated water resources development and management.[52] It goes on to list the activities that all States could carry out to implement IWRM, including the integration of surface and underground water resources as well as quantity and quality management.[53] The targets listed in Agenda 21 concerning water quality include the following:[54]

- initiate effective water pollution prevention and control programmes, based on an appropriate mixture of pollution reduction-at-source strategies, environmental impact assessments and enforceable standards for major point source discharges and high-risk non-point sources, commensurate with their socio-economic development;

- establish according to capacities and needs, biological, health, physical and chemical quality criteria for all water bodies (surface and groundwater), with a view to an ongoing improvement of water quality;

- adopt an integrated approach to environmentally sustainable management of water resources, including protection of aquatic ecosystems and freshwater living resources;

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50 Commission on Sustainable Development, Note 1.
51 Agenda 21, Note 26, paragraphs 18.6 and 18.8.
52 ibid., paragraph 18.5.
53 ibid., paragraph 18.12
54 ibid., paragraph 18.39.

The Commission on Sustainable Development has also called for an integrated approach to the management of freshwater resources in its Action Plan recommendations. It states that countries should:[55]

1. manage water quantity and quality together in an integrated and comprehensive manner, taking into account the upstream and downstream consequences of management actions, regional and sectoral relations and social equity; and

2. base strategies for the sustainable development of water resources on a participatory process that integrates all aspects of freshwater management.

The elements of integration

The key word within the concept of integrated water resources management is the word 'integrated'. In looking at this concept more closely, it has three aspects. The first derives from the movement of water within a watershed, the second concerns the human response in the establishment of an administrative system to manage water and the third concerns the human response in the provision of a socio-economic system for the use of water.

Each of these systems is interrelated as shown in Figure 1 below:

[55] Commission for Sustainable Development, Note 1, points 156-157. Also see European Commission, *Agenda 21: The First Five Years, European Community progress of the implementation of Agenda 21, 1992-97*. Luxembourg: Office for Official Publications of European Communities, 1997 at 90. The overall environmental objective is to achieve 'good status' in all waters by the end of 2010.

Figure 1. The components of integrated water resources management[56]

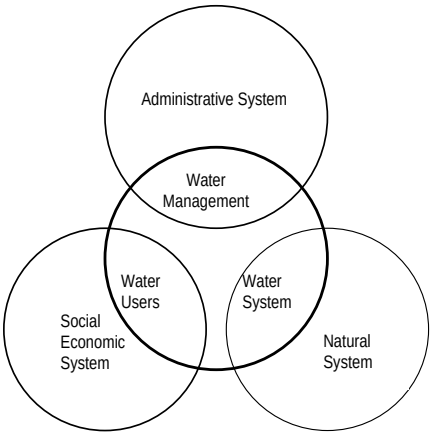

Figure 1 shows that an integrated approach to water resources management in river basins should address the relations within three systems and the relationships between these systems.[57]

The natural system: the movement of water within a watershed

The most obvious feature of water is that it is mobile: it moves along pathways above and below the surface of the earth within an identifiable region determined by the boundaries of a watershed. For this reason, the watershed has been described as the 'fundamental natural unit within the freshwater world'.[58] In fact, the management of water resources based on the river basin or watershed is not a new concept and has been discussed in Europe since at least the 1920s.[59] More recently, it has received recognition in international instruments such as Agenda 21.[60]

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[56] Taken from Meijerink SV, "Cooperation in River Basins; The Scheldt Case" (1995) Vol 20 No 3-4 *Sustainable Development of Water Resources*: *Physics and Chemistry of the Earth* Special Issue 215-220 at 216.

[57] ibid., at 216.

[58] Young GJ, Dooge JCI and Rodda JC, *Global Water Resource Issues* (UK: Cambridge University Press, 1994) 17-18: reporting on the International Conference for Water and the Environment Dublin 1992.

[59] Teclaff LA, *Water Law in Historical Perspective* (New York: William S. Hein Company, 1985) 84-108.

[60] Agenda 21 states that integrated water resources management, including the integration of land- and water-related aspects, should be carried out at the level of the catchment basin or sub-basin, Note 26, paragraph 18.9.

A watershed has been defined as:[61]

> 1. A water parting; a summit or boundary line separating the drainage districts of two streams or coasts; a divide.
>
> 2. The whole region or area contributing to the supply of a river or lake; drainage area; catchment area or basin.

A river basin has been defined as: [62]

> The area of land from which all surface run-off flows through a sequence of streams, rivers and, possibly, lakes into the sea at a single river mouth, estuary or delta.

As explained by Pielou, confusion has been caused by differences between North American and British usage of the terms watershed and river basin. In North American usage, watershed is a non-technical word and the terms watershed and drainage basin are used as synonyms. However, in Europe including Britain, the word watershed has been synonymous with the divide at the height of land between two adjacent watersheds.[63] In the discussion below, the word watershed will be used in the North American sense, as a non-technical word, and the terms watershed and river basin will be used interchangeably.[64]

The location of water within a watershed means there are interactions between land and water, upstream and downstream, groundwater and surface water, and water quantity and quality. Thus, 'integration' requires water resources management that considers all these interrelationships. In particular, a watershed will often contain both surface and groundwater.[65] Where surface water has a physical connection to an aquifer, it can

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61 From Webster as contained in Stamp D and Clark A, *A Glossary of Geographical Terms* (London and New York: Longman, 1979).

62 Joint Text approved by the Conciliation Committee Provided for in article 251(4) of the EC Treaty Directive 2000/ EC of the European Parliament and of the Council establishing a Framework for Community Action in the Field of Water Policy– The European Parliament, Brussels, 30 June 2000 1997/0067 (COD) C5-0347/00 PE-CONS 3639/00 ENV 221 CODEC 513 (art 2(13)).

63 Pielou EC, *Fresh Water* (Chicago: University of Chicago Press, 1998) 84.

64 The Macquarie Dictionary, (Australia: The Macquarie Library Pty Ltd, 3rd ed., 1997) at 2395 also includes both UK and US definitions.

65 Groundwater may be tributary or non-tributary, that is, interlinked with surface water, or not interlinked. Groundwater that is not hydrologically interconnected with surface water sources will not fall within the standard definition of a watershed and may need to be provided for separately.

recharge the aquifer. Alternatively, groundwater can contribute to the flow of the surface water.

Water quality and quantity are strongly interrelated. A lowering of the surface water level through evaporation can lead to a reduction in water quality. Conversely, the addition of clean water to a water body generally improves the quality of polluted water. This aspect of 'integration' requires water resources management that views water in terms of both its quantity and quality. Awareness of quality and quantity interactions assists an understanding of the need to coordinate programs in water management such as supply protection, water resources development, water quality control and water re-use.[66]

The relationship between human and ecosystem need for water is another aspect of the multiple interrelationships within a watershed. This aspect of the meaning of 'integration' is less settled than the aspects discussed above. It is now recognised that biological components of water resources are in steep decline and that aquatic systems have been and continue to be degraded on scales that are unprecedented for most terrestrial environments.[67] There is also growing awareness that water resources have been managed as if the biological systems associated with them were incidental to society. In response to past destructive practices, an objective of IWRM is the acknowledgment that water is 'an integral part of the ecosystem' and that 'water resources have to be protected, taking into account the functioning of aquatic ecosystems and the perenniality of the resource, in order to satisfy and reconcile needs for water in human activities'.[68]

The administrative system: management based on the watershed

Watershed-based management is the key principle through which to allow for consideration of the interests of all those who have a relationship to a particular body of

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[66] As identified by Spulber N and Sabbaghi A, *Economics of Water Resources: From Regulation to Privatisation* (The Netherlands: Kluwer Academic Publishers, 1994) xxiv and 6.

[67] Karr JR "Clean Water Is Not Enough" (1995) Vol 11 No 1 *Illahee* 51-59. For example, the Brantas River in East Java is estimated to have lost at least 77 native species of fish in recent years leaving only 10 native fish species remaining: *"Das Brantas Penyangga Limbah: Sedikitnya 77 Spesies Ikan Asli Lenyap"* (The Brantas River Waste Sink – at least 77 extinct species) (1997) Vol 7 *Buletin Medali* 16-17.

[68] Agenda 21, Note 26, paragraph 18.8. See also United Nations *Convention on Biological Diversity* 31 ILM (1992) which aims to protect and restore damaged ecosystems and *Convention on Wetlands of International Importance* (Ramsar), 996 UNTS 245; UKTS 34 (1976), Comnd. 6465; 11 ILM (1972), 963.

water, both humans and non-humans. The physical location of water within a watershed provides the rationale for the building of broad-based alliances between people living within the watershed to solve problems cooperatively. Within a single watershed, water management problems may include: water shortages, floods, drinking water supply, water supply for agriculture and industry, sewage disposal, domestic waste disposal and waste disposal from small and large-scale industry. Through watershed management, it is possible to establish a systematic approach to the gathering of information, which can then be used to assess these problems, set priorities and goals, design strategies and implement and monitor the success of management programs.[69]

(i) The need for coordination

The task of coordination is immense. Management of the interactions within a watershed can only be realized by extensive cooperation between all the actors that either can influence one or more of the relationships set out in Figure 1 or can be affected by one or more of the relationships.[70] As stressed by Naiman, '[w]atershed issues require coordination at a scale seldom achieved in human societies.'[71] Cooperation is required from industry, governmental agencies, private institutions, academic organisations and local communities. Conflicting demands for water from sectors concerned with agriculture, power generation, domestic water supply, sanitation, industry and the environment need to be accommodated. Thus, it requires mechanisms for coordination between different government sectors and sub-sectors. It also requires mechanisms for coordination between different levels of government, so there is a two-way flow of information between national, provincial and local levels of government.

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[69] It has been said that watershed management does not envisage a single approach but involves a 'loosely linked set of evolving perspectives and methodologies' around the central principle that 'water quality improvement and protection can best be achieved if all actors use the hydro-geological unit of watersheds as their basic orienting framework', see Selznick HL and Palmer S, "Developing a Watershed Management Plan with a Sanitary Survey" in Reimold RJ (ed.), *Watersheds – An Introduction in Watershed Management – Practice, Policies and Coordination* (USA: McGraw Hill, 1998) 55-68 at 71.

[70] Meijerink, Note 56 at 215.

[71] Naiman RJ, "New Perspectives for Watershed Management: Balancing Long-Term Sustainability with Cumulative Environmental Change" Naiman RJ (ed.), *Watershed Management – Balancing Sustainability and Environmental Change* (New York: Springer-Verlag, 1992) 3-11 at 6.

(ii) Data-driven decision-making

Coordination in management requires planning and management systems for the collection of data from a range of sources.[72] There is a need to move away from conceptual solutions to data-driven decisions.[73] The management of information also needs to integrate technical, economic, social and environmental considerations into a coherent framework with a multidisciplinary approach that explicitly links water issues to human development and economic productivity. As pointed out by the report of the Expert Group to the Commission on Sustainable Development,[74] extremely low importance is generally attached to the integration of physical and socio-economic information so that the social and environmental costs and benefits as well as the financial and economic costs and benefits can be taken into account. [75]

(iii) The participatory approach

Internationally, the participatory approach has emerged as a key principle. Chapter 18 of Agenda 21 calls for:[76]

> Development of public participatory techniques and their implementation in decision-making, particularly the enhancement of the role of women in water resources planning and management.

As stated by the report of the Expert Group to the Commission on Sustainable Development: [77]

> An open, transparent and continuous process of consultation and participation is essential if national water resources are to be managed in an equitable and sustainable fashion and resources found to extend water services to those currently deprived of access to water and sanitation. The role of regional and central government as policy maker and provider of technical support must be complemented by local (district level) government action as a mobilizer or promoter of

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72 ibid., at 7. As noted by Naiman, in relation to the Pacific Northwest of the USA, '[e]ffective watershed management requires that information be collected and analyzed on scales that most groups and institutions are reluctant (or unable) to address'.

73 ibid.

74 Commission for Sustainable Development, Note 1 at point 17.

75 ibid., at point 21.

76 Agenda 21, Note 26, paragraph 18.12 (n).

community-based management to yield positive results in terms of health, income generation and environmental protection.

According to the USA Environment Protection Agency, the involvement of people constitutes an essential element of the watershed approach.[78] Public participation is thought to function as a means of integrating influential sectors of the community, building loyalty, legitimising the decision reached, increasing community readiness to accept the decision, controlling decisions of public representatives and protecting legal rights and interests.[79] In Indonesia, public participation may lead to the inclusion of additional sources of information derived from the perspectives and knowledge of the local population.

Ideally, public involvement is tailored to the particular circumstances such as the extent of perceived problems and the characteristics of the community - its level of education, environmental awareness and ability to access information. However, it will also depend on the willingness of decision-makers to delegate authority.[80] A range of public involvement styles has been discerned by Arnstein as follows:[81]

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77 Sixth Session, 20 April 1998 – 1 May 1998 "Structural Approaches to Freshwater Management" E/CN.17/1998/2 dated 27.1.98 at point 22.

78 Selznick and Palmer, Note 69, at 72.

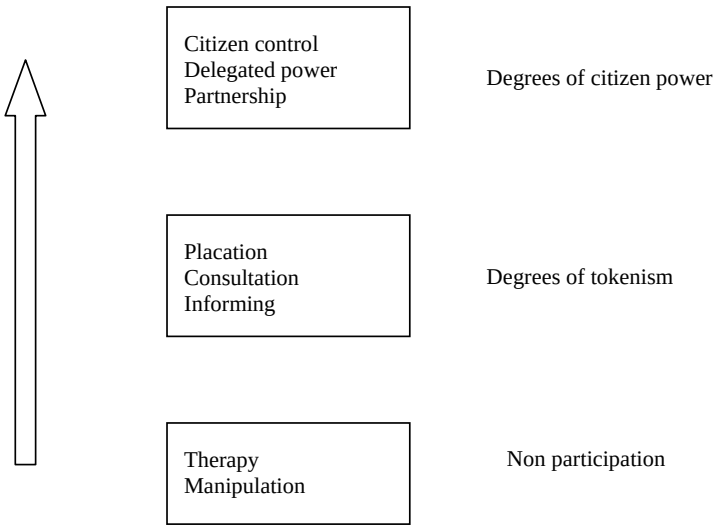
79 Kimber C, "Understanding Access to Environmental Information: the European Experience" in Jewell T and Steele J (eds), *Law in Environmental Decision-making: National, European and International Perspectives* (USA: Clarendon Press Oxford, 1998) 139-160 at 142-143.

80 Heathcote IW, *Integrated Watershed Management Principles and Practice* (Canada: John Wiley and Sons Inc., 1998) 102. For her description of the range of public involvement techniques and processes: 103-134.

81 Arnstein SR, "A Ladder of Citizen Participation" (1969) Vol 35 No 4 *Journal of American Planning Associations* 216-224. Also see Wilcox D, *Arnstein's Ladder of Public Participation* http://www.partnerships.org.uk/part/arn.htm [accessed 26 July 2003].

Figure 2: Forms of public participation showing increasing citizen power

(after Arnstein 1969)



This figure shows that in discussing public participation, it needs to be borne in mind that governments may seek to use or manipulate participation for their own purposes. This is less possible where there is a partnership, delegated power or citizen control.

(iv) Integrated pollution prevention and control

Effective water pollution prevention and control programmes are required. Agenda 21 states that such programs should be based on an appropriate mixture of pollution reduction-at-source strategies, environmental impact assessments and enforceable standards for major point source discharges and high-risk non-point sources.[82] Management based on the watershed means that all forms of waste produced by a particular activity must be dealt with. Pollutants move within a watershed environment

[82] Agenda 21, Note 26, paragraph 18.39.

and cannot be dealt with in a piecemeal manner.[83] A cross-media approach is required to identify all sources of pollution and for this reason, the best method of control is prevention.[84] However, where this is not possible, control measures are necessary, which requires an effective system of regulation.

The socio-economic system for water use

Internationally, there has been a move towards a market-determined framework for water use, away from administration of allocation and regulation. Work has also been carried out on developing a general economic model to integrate the water quality and quantity issues in water resources management. It urges the use of market mechanisms in the allocation of water and the control of water pollution and a connection between demand for, and supply of, water of different qualities.[85] The economic dimension of IWRM is beyond the scope of this thesis. However, the design of legal policy tools such as the licensing of pollution discharges is considered in chapter 9 including the extent to which provisions for licensing connect water quality and quantity and allow for market-based mechanisms.

Conclusion

In this chapter, it is shown that a crisis point has been reached in the management of Indonesia's water resources. Furthermore, in relation to water quality, lack of regulation of industrial pollution will lead to continuing deterioration, particularly in view of the heavily polluting nature of many of the high-growth manufacturing sectors. The discussion here on the international context of environmental law and the concept of sustainable development has shown up areas of disagreement in interpreting sustainable development which, in turn, affect how it can be interpreted and applied legally.

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[83] The Brundtland Report criticises the traditional compartmentalised approach and proposes a holistic approach to pollution control and the structuring of institutions: WCED, Note 25 at p. 37.

[84] Reasons for the integrated approach to pollution prevention and control have been identified by Irwin FH, "An Integrated Framework for Preventing Pollution and Protecting the Environment" (1991) Vol 22 No 1 *Environmental Law* 1-76 at 12-18.

[85] See generally Spulber and Sabbaghi, Note 66.

Nevertheless, at a more specific level, the concept of integrated water resources management (IWRM) has continued to evolve and current thinking about IWRM has been presented in this chapter.

It has been shown that IWRM requires widespread and fundamental change in the way water resources are managed. It requires a re-arrangement of government functions so that the watershed becomes the basic management unit to balance the competing needs for water (both human and environmental) and to account for relationships within the watershed between land and water, upstream and downstream areas, surface and groundwater, and water quantity and quality. It also requires systems of coordination, data driven decision-making, a strongly participatory approach and an emphasis on pollution prevention. The implications for environmental law making in Indonesia will be explored in the following chapters.

CHAPTER TWO

THE POLITICAL CONTEXT FOR ENVIRONMENTAL LAW REFORM

Introduction

Since the downfall of President Suharto in May 1998 and the collapse of the New Order regime,[1] there have been ongoing calls for the transformation of the political and legal system to ensure the implementation of good governance including access to information, transparency, openness, accountability, public participation and community empowerment. This chapter notes the rapid, fundamental and ongoing change that is occurring in Indonesia's system of government. The meaning of good governance in the context of sustainable development is briefly examined and background on the *reformasi* of water resources management in Indonesia is provided. Changes brought by the move to decentralise government functions through the grant of regional autonomy are also outlined.

In the second half of this chapter, issues are raised about the capacity of environmental law to act as an instrument of social change in Indonesia. Controversies concerning the relationship between the development of legal systems and economic and political development abound. At the theoretical level, the extent to which political and social conditions in Indonesia will permit the drafting of effective new laws to re-shape and re-constitute governance remains an imponderable. Furthermore, it is suggested that environmental law differs from law to facilitate the efficient working of the market economy as factors that help to secure effective market-oriented law are not found in relation to building a system of environmental law. There are also number of influences that may undermine environmental law reform in Indonesia. It is suggested that in view of the obstacles ahead, a hard look ought to be given to the quality of laws that have been produced to date, one that is based within a historical-legal context and supported by a theoretical framework.

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[1] The 'New Order regime' was the system of government in place between 1968 and 1998. In 1965, after an alleged coup attempt by the Indonesian Communist Party (PKI) in which six senior generals were killed, the PKI was crushed and President Sukarno was gradually eased from office. The 'Old Order' was a term used by President Suharto to refer to the period of rule under President Sukarno, which was replaced by the 'New Order' government.

1. THE NATIONAL POLITICAL CONTEXT: *REFORMASI*

Calls for good governance

The fall of President Suharto saw an outpouring of popular demand for *reformasi* to address the political, economic, legal, and social problems confronting the country and, in this context, mention of the need for 'good governance' has become commonplace. In 2000, Act No. 25 of 2000 on the National Development Program 2000-2004 (*Undang-Undang No. 25 Tahun 2000 tentang Program Pembangunan Nasional (Propenas) Tahun 2000 – 2004*) was passed, outlining an ambitious and wide-ranging program of national law reform. Whilst the importance of good governance is now firmly on the agenda of post-fiscal crisis recovery, it tends to be given many and various meanings, depending upon the user and the context.

Good governance is capable of embracing popular participation in governmental decision-making, the protection of human rights and the rule of law;[2] however, emphasis on its particular components varies. The IMF sees good governance primarily in terms of its mandate of promoting economic stability and 'high quality growth' in terms of what constitutes sound economic policy. Good governance is promoted as being vitally important for sustained economic growth with an emphasis on effective and accountable economic and financial institutions.[3] This means that concepts associated with good governance have tended to be promoted in the context of making the market work more effectively, by 'freeing up' the market, privatizing government utilities and strengthening financial and commercial institutions. On the other hand, the World Bank's emphasis has been on areas with a direct and obvious link to economic development in the broader sense in advocating the need for new, democratic and more accountable governments, more probity and better performance of government officials. This involves a re-defined public sector with a more modest role for the state and a 'modern approach' to government administration.[4]

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2 Ram C, "Book Review: Sustainable Development and Good Governance" Ginther K, Denter E and De Waart PJIM (eds), Dortrecht Martinus Nijhoff 1995" (1996) Vol 45 *International and Comparative Law Quarterly* 490-491 at 491.

3 Camdessus M, "The IMF and Good Governance" Managing Director of the International Monetary Fund at Transparency International (France) Paris, France, January 21, 1998.

4 World Bank, *East Asia – Recovery and Beyond*. Washington DC, The World Bank 2000, chapter 5.

More specifically in Indonesia, a focal point for anger across society is the culture of corruption, collusion and nepotism (*korupsi, kolusi dan nepotisme* (KKN)) that exists at all levels of government and which has been the basis of the economy.[5] The Broad Outline of State Policy (*Ketetapan Majelis Permusyawaratan Rakyat No. 04 Tahun 1999 tentang Garis-Garis Besar Haluan Negara* (GBHN)) recognises that KKN has led to a crisis affecting all aspects of life. It states that *reformasi* is pushing for improvements in the political system, greater sovereignty of the people, an increased role for the community and a reduction of the dominating role of government.[6] The GBHN includes strong statements in support of good governance principles. For example, in relation to state organisation there is a reference to clean government, heavy sanctions for corruption, collusion and nepotism, increasing accountability, transparency and a government free from abuse of power. A number of statutes and government regulations on corruption have been passed to implement Decision of the MPR No. 11 of 1998 on State Operations that are free from Corruption, Collusion and Nepotism (*TAPMPR No. XI/MPR/1998 tentang Penyelenggara Negara yang Bersih dan Bebas Korupsi, Kolusi dan Nepotisme*).[7]

Outside the emphasis on eradicating corruption, there is a tendency in Indonesia to take a 'compilation' approach to good governance. The concept of good governance remains undefined in relation to its core elements, rather, it is exemplified or instantiated by a list of features of good governance, which vary according to the author or speaker.[8] This indicates a lack of a theoretical framework within which to attain good governance.

The relationship between sustainable development and good governance

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5 Sometimes described as a 'KKN economy', see O'Rourke K, *Reformasi – The Struggle for Power in Post-Soeharto Indonesia* (Sydney: Allen and Unwin, 2002) 29.

6 GBHN Chapter Two.

7 For example:
Act No. 31 of 1999 on the Elimination of Corruption (*Undang-undang No. 31 Tahun 1999 tentang Pemberantasan Tindak Pidana Korupsi*)
Act No. 28 of 1999 on State Operators that are Clean and Free of Corruption, Collusion and Nepotism (*Undang-undang No. 28 Tahun 1999 tentang Penyelenggara Negara yang Bersih dan Bebas dari Korupsi, Kolusi dan Nepotisme*)
Government Regulation No. 68 of 1999 on the Method of Implementing Public Participation in State Operations (*Peraturan Pemerintah No. 69 Tahun 1999 tentang Tata Cara Pelaksanaan Peran Serta Masyarakat dalam Penyelenggaraan Negara*)
Presidential Instruction No. 7 of 1999 on Accountability of Government Agencies (*Instruksi Presiden Republik Indonesia Nomor 7 Tahun 1999 tentang Akuntabilitas Kinerja Instansi Pemerintah*).

8 Lubis TML and Santosa MA "Economic Regulation, Good Governance and the Environment: An Agenda for Law Reform in Indonesia" in Budiman A, Hatley B and Kingsbury D (eds.), *Reformasi: Crisis and Change in Indonesia* (Australia: Monash Asia Institute, 1999) 343-382.

There are clearly identifiable links between the goals of sustainable development and good governance in that principles and procedures of good governance are seen as providing mechanisms to achieve sustainable development. Sustainable development in the context of governance refers to the form in which authority and control is exercised and the consequent relations between government and citizenry. Inherent in the concept of sustainable development is a political system that provides for effective citizen participation in environmental decision-making.[9] The multiplicity and complexity of the goals of sustainable development makes well-designed consultation and participation processes essential components of governance.[10] The Rio Declaration contains the two key procedural provisions, one of which is Principle 10 on public participation that states:[11]

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

The adoption of the *Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* in June 1998,[12] which was a direct result of Principle 10, reflects a growing acceptance of public involvement in decision-making across policy sectors and institutional levels.[13] More recently, the Johannesburg *Declaration on Sustainable Development* also recognises that sustainable development 'requires broad-based participation in policy formulation, decision-making

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9 Ginther K and de Waart P, "Sustainable Development As a Matter of Good Governance: an introductory view" in Ginther K, Denters E and de Waart P (eds), *Sustainable Development and Good Governance* (The Netherlands: Kluwer Academic Publishers, 1995) 1-14 at 10. Also, Hossain K, "Evolving Principles of Sustainable Development and Good Governance" in Ginther K, Denters E and de Waart P (eds), *Sustainable Development and Good Governance* (The Netherlands: Kluwer Academic Publishers, 1995) 15-22 at 20.

10 OECD, *Sustainable Development – Critical Issues*. France: OECD Publications, 2001 at 103.

11 Together with Principle 17 on environmental impact assessment: Boyle A and Freestone D, "Introduction" in Boyle A and Freestone D (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (England: Oxford University Press, 1999) 1-37 at 9.

12 38 ILM (1995) 515.

13 Although primarily directed at this stage towards the members of the UN Economic Commission for Europe, see OECD, Note 10 at 103.

and implementation at all levels.'[14] This uncompromising formulation makes particularly relevant the Arnstein ladder of increasing power within public participation (presented in chapter 1) as a guide to assessing the quality of public participation provided in a legal system. It needs to be borne in mind that public participation as an exercise in public relations – through the provision of information or education – is quite different from providing real choice, power-sharing and community decision-taking.

In Indonesia, the relationship between sustainable development and good governance is discussed in terms of 'good environmental governance'.[15] It has been the topic of a *BAPPENAS*–UNDP study in which the requirements identified as being specifically related to the environment are listed as including:[16]

- community involvement in environmental decision-making
- public access to information
- the balanced exploitation of environmental resources
- the prevention and minimisation of environmental impact through instruments to manage the environment
- the use of economic instruments
- recognition of the rights of traditional communities to control the resources on which they depend
- legal consistency
- legal clarity on rights, obligations and procedure
- enforceability, that is, effective administrative sanctions and legal remedies that can be taken by the community in relation to a violation

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[14] Article 26, A/CONF.199/L.6/Rev.2.

[15] Santosa MA, *Good Governance dan Hukum Lingkungan* (*Good Governance and Environmental Law*) (Jakarta: Indonesian Centre for Environmental Law, 2001).

[16] *Badan Perencanaan Pembangunan Nasional* (National Planning Agency) - United Nations Development Program (BAPPENAS–UNDP) *Vol. 1 Pengaturan Masalah Lingkungan Secara Bijaksana (Good Environmental Governance) Menuju Terwujudnya Konsep Keberlanjutan Bangsa Indonesia*. BAPPENAS–UNDP, 2000 at 39.

- mechanisms for monitoring compliance and environmental conditions.

It can be seen that substantive and procedural aspects of good governance have been mixed in this list. It also brings into play aspects that are associated with the rule of law such as legal consistency and legal clarity.

In this thesis, safeguards of procedural adequacy in 'good governance' are considered to be a means by which sustainable development can be achieved: through public access to information, transparency, openness, the opportunity to participate in decision-making affecting the environment and accountability. Through the free flow of information and community participation, information about environmental risks is more likely to be available and fully discussed, which is likely to lead to decisions based on a consideration of all the relevant factors.

Each of these procedural components has significant and distinct ramifications. Both transparency and openness depend upon mechanisms to secure public access to information.[17] Transparency refers to the visibility of the workings of government and openness refers to opportunities being available to the public to criticise government decisions.[18] All three are needed to enable public participation. However, accountability takes the other aspects of environmental good governance one-step further: it establishes the means to hold government responsible for its action or inaction. Accountability requires governance that goes beyond the consultation, informing and placation stage. It implies a delegation of power, or at least a level of control, to communities who may be affected by environmental damage resulting from a decision. For this reason, systems to foster accountability by the government to the community can be an important factor in promoting environmental good governance.[19]

The *reformasi* of water resources management

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[17] In almost all of the chapters of Agenda 21, there are provisions on the gathering and dissemination of information. Access to information is directly related public participation in environmental decision-making. If the public is to have the opportunity to express their opinion, contribute their knowledge and convey, their priorities they need information.

[18] Bhatta G, "Decentralised Governance: Empowerment Without Capacity Enhancement is Meaningless" in Bhatta G and Gonzalez III (eds), *Governance Innovations in the Asia-Pacific Region Trends, Cases and Issues* (England: Ashgate, 1998) 231-244 at 232.

[19] However, it also needs to be kept in mind that communities will not always opt for sustainable practices in environmental decisions but may prefer actions that will lead to short-term gains. Such outcomes relate to the substance of decision-making rather than the procedure.

In April 1999, the Government of Indonesia made a request to the World Bank for a loan to cover the costs of reforming water resources management in Indonesia. Known as the Water Resources Sector Adjustment Loan (WATSAL),[20] it is 'an integral part of the macroeconomic and sector reform and balance of payments support program of the Bank'[21] that was introduced after the monetary crisis in 1998. In the Letter of Sector Policy to the Bank, the Government of Indonesia made a commitment to wide-ranging reform of the water sector. It explicitly recognised the serious problems in the water resources and irrigation sector, which it stated have led to 'a deterioration of food security, public health and irreversible damage to the environment exacerbated by inappropriate and ineffective legal structures, regulations, policies and institutions.'[22]

In the draft policy statement that followed the successful securing of the loan from the World Bank, it was stated that the spirit of *reformasi* flowing through the population also affected the water sector.[23] The government announced a new approach to water resources management said to be a 'change in paradigm'. The draft National Water Policy called for water resources management to support sustainable development, regional autonomy, human rights, democracy and globalisation.[24] Just what does this paradigm shift in water sector governance and management mean? In October 2000, according to the then Minister for Settlement and Regional Infrastructure it involves:

- fiscal and government decentralisation to implement the principle that the central government is principally an 'enabler and regulator' and not the 'provider'[25]

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20 WATSAL loan contract: http://www.worldbank.org/html/extdr/offrep/eap/projects/watsal/watsalexecsum.htm [accessed 31 May 2003].

21 Letter of Sector Policy from Minister of State for National Development Planning/Chairman of National Development Planning Agency to Mr James D Wolfensohn, President, The World Bank, April 21, 1999 at 1.

22 ibid., at 2.

23 BAPPENAS Draft National Water Resources Policy September 2000 at 12.

24 ibid., at 13.

25 The 'enabling and regulatory' role of central government is also mentioned in the Letter of Sector Policy. An issue to be addressed in this thesis is the capacity of central government to fulfil these roles, in particular, the regulatory role (see chapter 8). The Commission for Sustainable Development has also said that there is a need in many countries to begin or to continue a shift from the government being the 'provider' of water services to being the 'creator and regulator' of an environment that allows for the involvement of communities, the private sector and non-governmental organizations, see United Nations Commission on Sustainable Development, *A Comprehensive Assessment of Freshwater Resources of the World*. New York: United Nations, 1997 http://www.un.org/esa/sustdev/freshwat.htm [accessed 30 May 1998] Executive Summary, point 121. In Chapter 8, it is noted that there is a high level of uncertainty in the administrative rules governing extent of the authority for the Minister for the Environment to actually regulate.

- the establishment of sustainable water sector management institutions and, most importantly

- practical implementation of national reformation aspirations and rhetoric in public governance of the new sector institutions.

She stated further that, 'underlying our sector reform agenda are the governance reformation principles based on transparency, stakeholder involvement, community participation and public-private partnership'.[26]

Since then, the National Water Resource Policy has been passed. As set out in Decree of the Minister for Finance No. 14 of 2001 on National Water Resources Policy Direction (*Keputusan Menteri Koordinator Bidang Perekonomian Nomor: Kep-14/M.Ekon/12/2001 tentang Arahan Kebijakan Nasional Sumberdaya Air*), it reflects many aspects of the paradigm shift. It contains a long list of the goals to be achieved through the national water policy. The mission statement refers to: conservation of water resources to protect sustainable use; equitable use of water resources that takes into account the needs of the community for water quality and quantity; control of the destructive power of water; empowerment and increasing the role of the community; increasing the role of the private sector and government in the management of water resources; and increasing openness and access to data and information (art 3).

[26] Speech by the Minister of Settlement and Regional Infrastructure at the Workshop on Water Resources and Irrigation Sector Reform: Principles and Framework of Program Implementation, October 3-4, 2000.

Integrated water resources management between sectors related within the river territory (*wilayah sungai*) is encouraged in the statement of general policy direction (art 4 (b)). The policy lists a number of general policies, which include: the stipulation of criteria for the determination of watersheds (*daerah aliran sungai*); plans of management based on the river territory; improvement of planning so as to balance use and conservation; the determination of principles of management for water and groundwater use (art 5). A number of policies are set out in terms of goals to be achieved, including: policy on water conservation (arts 6-7); water use (arts 8-9); control of the destructive power of water (arts 10-11); community empowerment and increasing the role of the public, the private sector and the government (arts 12-13); and openness and the supply of information (arts 14-15).

The relationship between environmental law and water resources management in Indonesia needs to be explained, as the analysis presented in this thesis only looks at environmental law aspects of the reform program. Policy makers on water resources management face a dilemma whether to link quality and quantity regulation in a single water law or deal with quality aspects in a separate environmental law. In Indonesia, the reform of environmental law on water quality is seen as an important part of the reform program as a whole. However, it has been dealt with through a regulation on water quality management and pollution control that is authorized by the national environmental law statute rather than through a regulation authorized under the system of water resources management law.

The program supported by WATSAL contains four objectives, two of which relate to environmental law and water quality.[27] Those objectives are "Objective 2: Improve the Organizational and Financial Framework for River Basin Management" and "Objective 3: Improve Regional Water Quality Management Regulatory Institutions and Implementation". The former objective includes the implementation of regulatory arrangements for water allocation and wastewater discharges, water quality monitoring and integrated watershed management. The latter objective includes two sub-objectives, namely the establishment of an 'effective and enforceable national regulatory framework

for water pollution control' and 'integrated water quality management in six highly developed river basins'. A 'monitorable indicator' of the first sub-objective was stated to be a new water pollution control and management regulation. This regulation, which has been passed as *Government Regulation No. 82 of 2001 on Water Resources Management and Pollution Control,* is discussed in chapter 9.

Regional autonomy

The reform program in water resources management is taking place after a sudden move to radically re-organise the structures of government in Indonesia. The regional autonomy process began in 1999, with the passing of Act No. 22 of 1999 on Regional Government (*Undang- undang No. 22 Tahun 1999 tentang Pemerintah Daerah*) in which Indonesia unequivocally decentralised central government power. Amendments to the 1945 Constitution (*Undang-Undang Dasar 1945*) passed on 18 August 2000 (*UUD* 1945 (second amndm)) describe the unified state of Indonesia as consisting of provinces and districts, each with their own regional governments, parliaments and democratically elected heads of government (art 18(1)-(4)). Central government power is now defined in terms of powers *not* held by regional government (art 18(5)).[28] Over this time, the number of regional governments has been steadily increasing: as at March 2002, there were 30 provinces and 354 districts, divided into 85 towns (*kota*) and 269 rural districts (*kabupaten*).[29]

In discussion about devolution of power in environmental management, those in favour of devolution often raise the Subsidiarity Principle; however, the situation in Indonesia can be distinguished from decentralisation in more mature systems of government. The Subsidiarity Principle (SP) concerns the government level at which political (environmental) decisions should be taken. The essence of the principle is that

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[27] Water Resources and Irrigation Reform Program Policy Matrix, attached to Letter of Sector Policy from Minister of State for National Development Planning/Chairman of National Development Planning Agency to Mr James D Wolfensohn, President, The World Bank, April 21, 1999.

[28] Also, article 7 of Act Number 22 of 1999 concerning Regional Government (*Undang-Undang No. 22 Tahun 1999 tentang Pemerintahan Daerah*).

[29] Decision of the Minister for Home Affairs No. 5 of 2002 on Regional Administration Data (*Keputusan Menteri dalam Negeri No 5 Tahun 2002 tentang Data Wilayah Administrasi Permerintahan*).

environmental decisions are most appropriate to be taken at the lowest level possible. The Subsidiarity Principle is expressed in Principle 10 of the Rio Declaration 1992 mentioned above. The UN Commission on Sustainable Development has also urged the delegation of as much responsibility as possible to 'the lowest appropriate level' in making decisions about water resources management.[30] However, in Indonesia, decentralisation has come about, not from a maturing of the system of government,[31] but from the failure of central government to foster regional development compounded by demands from the regions for greater independence from the Jakarta-based government.

The pace and extent of the devolution of power to local government has caused disquiet in some quarters.[32] There are fears that financial and human resources are not adequate to carry out all the government tasks handed over to the regions. The key to decentralisation is the revenue sharing arrangements established in Act No. 25 of 1999 on Revenue Sharing between Central and Regional Government (*Undang-Undang Nomor 25 Tahun 1999 tentang Perimbangan Keuangan Antara Pemerintah Pusat dan Daerah)* (UU 25/1999). It is thought that regional unrest will be quelled once there is greater access by the regions to wealth generated in their own region. It is hoped these arrangements will encourage regional growth and reduce the cost of delivery of government services. However, there is also a strong possibility that economic disparities between the regions will result from new arrangements.[33] Within the arrangements for regional autonomy, district government has received a vast amount of responsibility, which is only to be handed up to provincial government on agreement between the two levels of government. It may have been more pragmatic to decentralise

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30 United Nations Commission on Sustainable Development, *A Comprehensive Assessment of Freshwater Resources of the World*. New York: United Nations, 1997, http://www.un.org/esa/sustdev/freshwat.htm [accessed 30 May 1998] at Point 21.

31 By way of contrast, the renaissance of decentralisation in more economically developed countries may be regarded as a sign of the maturing of a system of government, see Bothe M, "The Subsidiarity Principle" in Dommen E (ed.), *Fair Principles for Sustainable Development: Essays on Environmental Policy and Developing Countries* (England: Edward Elgar, 1993) 123-138 at 128.

32 For example, Ahmad E and Hofman B, *Indonesia: Decentralization – Opportunities and Risks.* Jakarta: IMF and World Bank Resident Mission, 2000.

33 Tambunan M, "Indonesia's New Challenges And Opportunities: Blueprint for Reform after the Economic Crisis" 2000 Vo1 8 No 2 *East Asia: An International Quarterly* 50-74 at 62.

to the provincial level and gradually hand over powers to the district government once they are able to meet set criteria for measuring institutional capacity.[34]

At the regional level, environmental protection is often seen as a luxury, with greater weight being accorded to the benefits to be gained from economic development. Dependence upon economic growth in the private sector for tax revenue is likely to provide a constraint.[35] Vested interests may be able to wield greater influence on local decision-makers than those further away in Jakarta. Implementation failure due to interest group pressures where administrators are 'captured' by the groups they are meant to be regulating is a well-recognised phenomenon, particularly where the regulated classes are well organised and the beneficiaries of a protective statute are diffuse and numerous, as is the case in most environmental protection programs.[36] Where environmental institutions in the regions are weak, the risk of such patterns of behaviour emerging is high.[37]

2. LAW AS AN INSTRUMENT OF SOCIAL CHANGE

Doubts about law's capacity to facilitate change in environmental practices

The enormity of the task in introducing IWRM highlighted was highlighted in the last chapter. Where IWRM intersects with environmental law, questions about environmental law's capacity to act as an instrument of social change arise. It is widely acknowledged that, from within itself, law is essentially derivative and incapable of

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[34] Matsui K, "Decentralisation: Seeking a New Central–Regional Relationship" in Yuri Sato (ed.), *IDE Spot Survey Indonesia Entering a New Era – Abdurrahman Wahid Government and Its Challenges* (Japan: Institute of Development Economics, 2000) 37-47 at 44.

[35] Institutional limits have been identified by Yeager PC, *The Limits of Law – The Public Regulation of Private Pollution* (England: Cambridge University Press, 1991) 32-38. Also, Gunningham N, *Pollution, Social Interest and the Law* (London: Robertson, 1974) 85 says that compromise solutions to conflict are likely to be resolved not from the full range of alternatives but from a narrower span that favours the interests of capital.

[36] The classic work is by Burnstein MH, *Regulating Business by Independent Commission* (USA: Princeton University Press, 1955). Also, Sunstein CR, *After the Rights Revolution: Reconceiving the Regulatory State* (USA: Harvard University Press, 1990) 98-102 and Stewart RB, "The Reformation of American Administrative Law" 1975 88 *Harvard Law Review* 1667-1813 at 1713-5.

[37] As stated by Bhatta: "The jury is still out on the efficacy of the decentralisation programme in promoting good governance. In general, it can be safely said that with a few notable exceptions, decentralisation programmes have not yet contributed in any measurable way to truly enhancing good governance." The exception he refers to is New Zealand., see Bhatta, Note 18 at 235.

generating solutions to social problems.[38] The Marxist concept of law retains the view that 'the law is only a symptom, an expression of other relationships, on which the power of the state is based.' It argues that the real basis of law is the relations of production[39] and that 'society is not based on law; this is a juridical fiction. On the contrary, the law must rest on society.'[40] The central tenet of the Critical Legal Studies movement that 'law is politics' has been said to represent 'the greatest perpetual threat to traditional legal teaching and scholarship.'[41] On the other hand, Critical Legal Studies does not advocate a purely determinist approach. As stated by Kairys: 'the law is not simply an armed receptacle for values and priorities determined elsewhere; it is part of a complex social totality in which it constitutes as well as is constituted, shapes as well as is shaped.'[42]

The assumption is often made that law has the capacity to assist economic and political development. More than two decades ago in America, the 'law-and-development' movement extended the analysis of Weber to argue that a 'modern'[43] legal system is integral to a state's economic growth.[44] According to a Weberian analysis of relations between law and economic activity, the law provides elements necessary to the functioning of a market system: a legal system in which a level of predictability is provided by a system of rules and an economic life that rests on opportunities acquired through contracts and the protection of property.[45] As Weber stated:

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38 According to Tamanaha's review of the theoretical development on this topic, this is a virtually unanimous refrain from all sides of the debate, see Tamanaha B, "Review Article: The Lessons of Law-and-Development Studies" (1995) Vol 2 No 89 *American Journal of International Law* 470-488 at 484.

39 Marx K, *Gesamtausgabe*, Bd V, at 307 and at 321 quoted by Kelsen H, "The Marx-Engels Theory of Law" in Evan WM (ed.), *The Sociology of Law – A Social-Structural Perspective* (New York: The Free Press, 1980) 91-104 at 98.

40 Marx K *von den Koelner Geschworenen* Berlin 1895 at 15 quoted by Kelsen H, ibid., at 99-100.

41 Mercuro N and Medema SG, *Economics and the Law From Posner to Post-Modernism* (Princeton: Princeton University Press, 1997) 165.

42 Kairys D, "Introduction" in Kairys D (ed.), *The Politics of Law, A Progressive Critique* (New York: Pantheon Books, 1990) 6.

43 The concept of a 'modern' legal system means an abstract approach to law that is possible because law is formal in character and based on rational, systematic legislation, see Weber M, *Law in Economy and Society* (USA: Harvard University Press, 1966 at 301-321.

44 The law-and-development movement as a subset of modernisation theory, whose theoretical underpinnings were heavily indebted to Parsons' structural functionalism. As described by Tamanaha BZ, Note 38 at 471, this theory held that development is an inevitable, evolutionary process of increasing societal differentiation that ultimately produces economic, political and social institutions similar to those in the West. The outcome is the creation of a free market system, liberal democratic political institutions and the rule of law.

45 Weber, Note 43 at 35-40.

> … the increasing calculability of the functioning of the legal process in particular, constituted one of the most important conditions for the existence of economic enterprise intended to function with stability and, especially, of capitalistic enterprise, which cannot do without legal security. Special forms of transactions and special procedures, like the bill of exchange and the special procedure for its speedy collection, serve this need for the purely formal certainty of the guarantee of legal enforcement.[46]

A similar argument has been raised concerning the relationship between 'modern law' and political development. The 'law-and-development' movement promoted the notion that legal ideals and institutions similar to those in the West would ultimately develop through a form of evolutionary progress and that the development of law could actually assist this political development.[47]

However, Trubek argues that modern law does not *bring about* political development; it merely supports a centralised bureaucratic state, which depends for its legitimacy on a belief that its decisions are rational.[48] Furthermore, there is an argument that where economic growth has not been based on the free market system, modern law is not needed.[49] Indeed, Weber states in relation to the development of modern law, that it was influenced by events that were 'to a very large extent … caused by concrete political factors, which have only the remotest analogies elsewhere in the world.'[50] Weber observes that only the West witnessed the rise of a 'rational economic system, whose agents first allied themselves with the princely powers to overcome the estates and then turned against them in revolution' and only the West has known 'Natural Law' and with it the complete elimination of the system of personal laws and the ancient maxim that

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46 Weber, Note 43 at 305.

47 Trubek D and Galanter M, "Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States" (1974) No. 4 *Wisconsin Law Review* 1062 – 1102 at 1063-9, where they describe the movement as being action-oriented and a by-product of development assistance activities of the US government and international aid agencies. Tamanaha, Note 38 at 473 describes American scholars going to developing countries, taking with them a view of law as a means of social engineering, to reform legal education and the legal profession as a tool of achieving development perspectives.

48 Trubek DM, "Towards a Social Theory of Law: An Essay in the Study of Law and Development" 1972 82 *The Yale Law Journal* 1-50 at 15-16. Also Trubek and Galanter, Note 47 at 1062 – 1102.

49 ibid. Jayasuriya rejects the notion that there is necessarily a nexus between the development of market forms of economic life, as it has occurred in East Asia, and the emergence of stable and effective legal regimes or the rule of law, see Jayasuriya K, "Introduction: A framework for the analysis of legal institutions in East Asia" in Jayasuriya K (ed.), *Law, Capitalism and Power in Asia – The Rule of Law and Legal Institutions* (London: Routledge, 1999) 5-6.

50 Weber, Note 43 at 304.

special law prevails over general law. Weber also observes that nowhere else has there occurred any phenomenon resembling Roman law.[51]

More recently, the premise that there is a nexus between law and development is evident in a range of World Bank and Asian Development Bank programs.[52] It has led to the view that establishing the rule of law is one of the 'five fundamental tasks' that governments must perform in pursuit of development.[53] International financial organisations such as the International Monetary Fund also commonly require evidence of transformation of the legal infrastructure as a condition of the provision of financial support. The main direction of these governance programs is to provide an institutional framework for ongoing economic development within the global market economy for the protection of private property rights, integration of business-oriented laws, minimization of regulatory intervention and for legal institutions capable of implementing those laws in an efficient and transparent manner.[54]

Although it is assumed that reform of the legal system can act as an instrument for social change in restoring confidence and building a free market economy, empirical studies have not been undertaken to support this conclusion. Goodpaster has acknowledged Indonesia's economic success within its previous system of governance, but he argues that Indonesia will not continue to succeed without establishing the rule of law. He bases his argument on 'societal management and the roles played by institutional incentive creation, the management of risk and uncertainty, and transaction costs.'[55] He says:[56]

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51 ibid.

52 As noted by Jayasuriya, Note 49 at 5-6.

53 The World Bank's World Development Report 1997 cited by Perry AJ, "International Economic Organisations and the Modern Law and Development Movement" in Seidman S, Seidman RB and Wälde TW (eds), *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance* (The Netherlands: Kluwer Law International, 1999) 19-32 at 19.

54 For example, Webb bases his argument for adopting business laws of developed countries on the assumption that market-oriented legal systems ensure that governments function efficiently and transparently to support domestic and foreign capital flows into their countries' private sectors, see Webb D, "Legal System Reform and Private Sector Development in Developing Countries" in Seidman S, Seidman RB and Wälde TW (eds), *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance* (The Netherlands: Kluwer Law International, 1999) 33-52.

55 Goodpaster G, "Rule of Law, Economic Development and Indonesia" in Lindsey T (ed.), *Indonesia: Law and Society* (Sydney: The Federation Press, 1999) 21-32 at 24.

56 ibid., at 24-25.

> Simply put, Indonesia will find that it cannot manage and function effectively in the global economy nor continue strong economic growth without rule of law and widespread rule-based behaviour. This, in fact, may be one of the lessons of the recent series of financial crises that Asian countries have experienced.

In regard to the rule of law, Goodpaster says that he believes it is important 'to demonstrate, empirically and concretely in the Indonesian context that social ordering through the rule of law is in fact economically more efficient than other forms of ordering; and to show just how current incentive structures affect economic performance and social development.'[57] In a similar vein, McAuslan has suggested that there is a need for more research on the impact of law on development. He has observed that compared with economic and policy impact studies, there is a paucity of legal impact studies.[58]

Nonetheless, it seems that the idea that law can *stimulate* economic and social development is making a comeback under the rubric of 'good governance'. Moreover, it is assumed by many that law can, under the 'right conditions', act as a 'facilitator' of social and economic change.[59] A point of distinction has been made by Faundez, who says that the World Bank's approach has a very different conception of the state: it is not a state-centred welfare state but is a market-friendly state.[60] Whether or not this distinction makes any difference in practice remains to be seen. Another difference may be that there is more awareness of the difficulties of using law principally based on western ideas and concepts to bring about economic and social change in a country such as Indonesia.[61] But, according to MacAuslan, 'this idea does not appear to have penetrated through to the official aid community or, if it has, it is being resolutely put on one side in the higher interests of advancing the global market economy.'[62]

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57 ibid., at 30.

58 McAuslan P, "Law, Governance and the Development of the Market: Practical Problems and Possible Solutions" in Faundez J (ed.), *Good Government and Law: Legal and Institutional Reform in Developing Countries* (Great Britain: McMillan Press Ltd, 1997) 25-44 at 43.

59 Seidman A, Seidman RB and Wälde TW, "Building Sound National Legal Frameworks for Development and Social Change" in Seidman A, Seidman RB and Wälde TW (eds), *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance* (The Netherlands: Kluwer Law International, 1999) 1-18 at 3. All the contributors to this volume of work premise their ideas on the understanding that 'under the right conditions' legal change facilitates societal and economic change.

60 Faundez J "Introduction – Legal Technical Assistance" in Faundez J (ed.), *Good Government and Law: Legal and Institutional Reform in Developing Countries* (Great Britain: McMillan Press Ltd, 1997) 1-14 at 12-13.

61 A comment made by McAuslan, Note 58 at 41.

62 ibid.

Distinguishing environmental law from market-oriented law

Whilst effective law making in market-oriented law such as property law, commercial law, banking law and bankruptcy law may be encouraged by the capacity of law to contribute to economic growth, this factor does not apply to environmental law. When environmental degradation is viewed within the market paradigm, the discharge of industrial water pollution is seen as an *externality* that affects the welfare of others without being incorporated into the market; it is an unpriced and uncompensated effect. When externalities arise, consumers and producers do not face prices that are equal to the additional costs to society of producing the good and, as a result, pollution has an unaccounted-for social cost.[63]

Environmental law sets out to achieve defined collectivist goals, which may conflict with the goals of business. It requires powers of coercion even though it may be a mix of so-called 'command-and-control' measures and market-based tools. It needs to address market failures resulting from the phenomenon that individually rational behaviour can lead to collective irrationality: if everyone acts in their own interest to support their individual activities, including using water as a waste sink, water resources will be degraded. Each person is tempted to 'free-ride' while others pay; government regulation attempts to eliminate the free-rider problem.[64]

Environmental law also seeks to set up administrative structures, limits and procedures that apply to decision-making by government agencies. Such decisions may take place within a wide range of government activities such as assessment of a proposed new development, approval of land use change, the license approval process or the decision to

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[63] Coase R, "The Problem of Social Cost" (1960) *Journal of Law & Economics* 1-44. Gupta A and Asher MG, *Environment and the Developing World: Principle, Policies and Management* (New York: John Wiley and Sons, 1998) 42-45.

[64] Sunstein, Note 36 at 49. An economic analysis says that the social costs of pollution may exceed the social benefits but because the costs are small in the individual case, and are spread across society, the market does not force individual polluters to take the costs into account. See also Hardin G, "The Tragedy of the Commons" (1968) 162 *Science* 1243-48.

impose sanctions. Legal mechanisms to protect the environment commonly involve various forms of public participation in government decision-making. Where they amount to an intention to reapportion social power away from elite interests to the wider community, they will have political implications. Community rights to information about a pending decision, rights to be consulted and to participate in decision-making processes, rights to obtain reasons for a decision and to challenge the validity of decisions through appeal and review processes, can be viewed as a threat to powerful interests within society.

Challenges for effective environmental law making

It is likely that there will be resistance to the creation of environmental law that challenges basic attitudes about the role of law in society. It has been found that procedural aspects of law in many Asian countries are harmonising with western systems more slowly than law related to market-allocative mechanisms.[65] Analysis undertaken since the Indonesian fiscal crisis of 1997 on possible convergence between Western and East Asian institutions has identified two competing themes: convergence and path dependency. A process of convergence is thought to be underway in commercial sectors whereby there is a movement from 'crony capitalism,' non-transparent business practices and close government-business relations, to something like the Anglo-American market-centred model. However, there is evidence of inertia in other areas of institutional development.[66]

The external impetus for environmental law making

International environmental law has exerted an influence on the formulation of domestic law in most countries since United Nations delegates agreed to adopt the Stockholm

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[65] Pistor K and Wellons PA et al, *The Role of Law and Legal Institutions in Asian Economic Development 1960-1995* (UK: Oxford University Press, 1999) Figure 8.1 at 278 and Chapter 8. This study, which looked at the development of legal systems in Malaysia, Japan, India, Republic of Korea, Taiwan and the People's Republic of China from 1965 to 1990, sought to discern the extent of convergence between Asian and western legal systems. It emerged that different parts of legal systems behave differently, with some parts showing signs of greater conformity to western counterparts and others developing along more idiosyncratic paths.

[66] Beeson M, "Introduction" in Beeson M (ed.), *Reconfiguring East Asia – Regional Institutions and Organisations after the Crisis* (London: Routledge Curzon, 2002) 1-6 at 3-6. Also, Beeson M, "Conclusion The More Things Change? Path Dependency and Convergence in East Asia" 247-257.

Declaration on the Human Environment in 1972.[67] The internationalisation of environmental law is apparent in the generation of domestic environmental law around the world created in response to developments in international law.[68] Many countries now look to environmental conventions and agreements to guide their own policies and laws. As a result, principles and approaches found in international instruments are being absorbed into national and sub-national legislation. The impact of international law in Indonesia can be seen from the fact that since the Stockholm Declaration in 1972, every five-year GBHN has contained a declaration in support of environmental protection.[69] All the major environmental law instruments were passed in the 1980s and later.

One effect of the external origin of the impetus for legal change is that only a very small portion of the population understands the principles behind the formulation of environmental legislation. This is so even within the government bureaucracy. Depending on the level of training, it can also mean that those tasked with implementing environmental law only have a superficial understanding of the reasoning behind specific legal mechanisms. Often this knowledge is only obtained with the help of international assistance programs.

Another aspect of internationalisation is legislative cross-fertilization: drafters of environmental legislation are directly borrowing concepts, approaches and terminology from countries where environmental management systems and legislation are already well developed.[70] It can be observed that pollution control in Indonesia is at a similar stage as the developed countries in the early 1970s, when they were first attempting to introduce pollution controls. This means that ideas incorporated by Indonesia in environmental law often come from outside Indonesia. There may be no equivalent concept in existing law, such as the concept of strict liability or the right of affected communities to commence class actions. When such ideas are adopted in Indonesia, the

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67 Declaration of the United Nations Conference on the Human Environment (Stockholm), UN Doc.A/CONF/48/14/Rev.1.

68 Boer B, "The Globalisation of Environmental Law: The Role of the United Nations" (1995) Vol 20 *Melbourne University Law Review* 101-125.

69 Koesnadi H, *Hukum Tata Lingkungan* (Yogyakarta: Gadjah Mada University Press, 7th ed., 1999) 66 citing TAP MPR No. IV/MPR/1973 tentang GBHN, at Chapter III, section 10.

70 Boer B, "The Rise of Environmental Law in the Asian Region" (1999) 32 *University of Richmond Law Review* 1503-1553 at 1509.

challenge for legal drafters in their adaptation is to imbue them with meaning without losing sight of their essential purpose.

Another driver for environmental law making, which has the potential to undermine the creation of effective law, has been the source of financial assistance for law-making programmes. When foreign funds are available for a specific law development program, it will be given a higher priority. This may mean that bureaucrats are not fully engaged or that there is little public support or understanding of the program. The impact of external funding for law development programs is likely to vary depending on the context: where projects are fully conceived inside Indonesia, more successful implementation can be anticipated. In contrast, if a project is conceived outside Indonesia, and only becomes of interest to Indonesians when funds are provided, there is likely to be superficial compliance with donor requirements and, ultimately, a failure to implement and sustain its objectives.

A chronology of international donor assistance for environmental programs and activities shows the extent of foreign financial support for the development of environmental law in Indonesia.[71] An example of a major law development program was the program financed by the World Bank in the mid-1990s known as the National Environmental Impact Management Agency Legal Mandate, Enforcement and Compliance Systems program. Part A was designed to assist with the development of laws, decrees, regulations and guidelines to implement pollution control programs and activities on a national and regional basis. Part B was designed to assist with the development of administrative, permit, license, investigation and inspections systems required for effective pollution control. The total budget was $US 4,200,000 over a three year duration. One of the results of the program was *Act No. 23 of 1997 on Environmental Management*,[72] which is reviewed in chapter 8. In the WATSAL program, the impetus for environmental reform has come from the structural adjustment program required by the IMF in the aftermath of

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[71] State Minister for the Environment and BAPEDAL and Kalpa Wilis Foundation, *The Indonesian Environmental Almanac* (Jakarta: Pt Multi Kiranan Pratama, 1997) 261-295.

[72] The information on this program is taken from BAPEDAL Donor Projects Database submitted to BAPEDAL by BAPEDAL Project Management Office, Jakarta in May 1995.

the fiscal crisis.[73]

It can be seen that there are a number of external drivers to support legal change in Indonesia; however, there is also internal support for change from sectors of Indonesian society who are particularly interested in environmental protection such as NGOs, community activists, academics and bureaucrats within the Ministry for the Environment. The question that arises is the extent to which external forces are driving legal change. Jayasuriya has argued that an external impetus will lead to less stable and effective legal regimes.[74] His views are echoed by Lindsey, who has said that:

> … multilateral institutions involved in the reform process are motivated by quite different concerns to the elite, but their approach also tends to encourage superficiality in, and the ultimate failure of, legal reform.[75]

It is in the assessment and management of the detail of implementation of policies that multilateral agencies have greatest difficulty, largely because they are not familiar with local conditions or the local legal system.

The prospect of subversion by vested interests

Whilst the source of the impetus for change may present hazards for developing effective environmental law, a more obvious challenge to effective law making in support of sustainable development is the political and economic power wielded by sectors engaged in environmentally unsustainable activities. A question that emerges is: will the

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[73] In the Letter of Intent to the IMF dated 20 January 2000, which describes the policies that Indonesia intends to implement in the context of its request for financial support from the IMF, the Government of Indonesia stated (point 94):

> We are also accelerating the implementation of the Environmental Management Law (Number 23 of 1997). Until now, only four of the nineteen implementing regulations had been issued, but by December 31, 2000 we will promulgate five new regulations, including the one for water pollution control. At least five additional regulations will be issued by December 31, 2001, and the remainder will be issued in 2002.

Over year 2000 – 2001, seven government regulations were passed:
(1) No. 54 of 2000 on the Resolution of Disputes Outside the Court System
(2) No. 63 of 2000 on Health and Safety of Users of Radiation
(3) No. 64 of 2000 on the Licensing of Nuclear Energy Use
(4) No. 150 of 2000 on the Control of Land Destruction for the Production of Biomass
(5) No. 4 of 2001 on the Control of Environmental Damage or Pollution related to Forest and Land Fires
(6) No. 8 of 2001 on Fertilizer
(7) No. 82 of 2001 on the Management and Control of Water Pollution.

[74] Jayasuriya, Note 49 at 6.

[75] Lindsey T, "Indonesia's Negara Hukum: Walking the Tightrope to the Rule of Law" in Budiman A, Hatley B and Kingsbury D (eds), *Reformasi: Crisis and Change in Indonesia* (Melbourne: Monash Asia Institute, 1999) 363-383 at 375.

government be so beholden to such interests that it will not introduce effective legislation?[76] Sustainable development will not be realized unless a means is found to overcome the power of interests who seek to benefit from weak law. The means for redressing the power imbalance between economic and environmental interests requires environmental capacity-building, community access to environmental information and the fostering of community participation at all levels of environmental management, including law making. However, the introduction of effective laws to support these strategies is likely to be opposed by vested interests such as decision-makers (ministers, governors and mayors), administrators (the elite in government bureaucracies) and commercial and property interests. It has been said that sustainable development requires a 'transition strategy' for overcoming the power of vested government and non-government interests.[77] An important issue in Indonesia is whether an effective transition strategy can be discerned in new laws.

Conclusion

The Indonesian government has recognised the need for urgent attention to managing water resources and has embarked upon an ambitious program of water resources management reform, which includes reform of water quality management. This program is being implemented in the context of persistent calls from many quarters for the introduction of good governance. Official policy statements in support of the program resonate with social aspirations for political change. They accord with the aspirations for good governance and support many of the concepts presented in the first chapter on integrated water resources management (IWRM).

The reform program is being introduced at a time when the relations between each level of government have been rearranged to devolve central government power through the

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[76] Such questions in relation to the US legal system led to the development of public choice theory, which uses an economic analysis to explain how individuals and economic sectors use government and law making to protect their interests, see Mercuro and Medeman, Note 41 at chapter 3. Also, see Bottomley S, Gunningham N and Parker S, *Law in Context* (Australia: The Federation Press, 1994), at chapter 8. These authors criticise public choice theory on the basis that it tends to overstate its case: sometimes governments and agencies do work for the public good and for this reason an analysis should address the circumstances in which they work well. Whilst this thesis is not able to explore the interests, processes and dynamics that come into play in the formulation of laws in Indonesia, it could be a useful area for further research.

[77] Dernbach JC, "Sustainable Development as a Framework for National Governance" (1998) Vol 49 No 1 *Case Western Reserve Law Review* 1-103 at 100.

grant of regional autonomy. This makes the task at hand more complex, as the situation is undergoing fundamental and rapid change both in relation to the roles and responsibilities of each level of government and also, as will be discussed later in the thesis, in relation to the process law making itself.

Law reform in environmental law presents particular problems in Indonesia: factors that may help to secure success in the reform of market-oriented law are not present in environmental law. There is also the possibility that vested interests will seek to circumvent the creation of strong effective environmental law. Ironically, foreign interest may undermine the quality of environmental law making. This can arise from a lack of detailed understanding of socio-legal concepts in Indonesia and the acceptance of superficial adaptation of new and foreign concepts. In addition, where timeframes are set by an external agenda and priorities are determined by the availability of foreign funds, legislation might be drafted too quickly to allow for a full appreciation of its implications.

To succeed in achieving its policy goals, environmental law has the complex and difficult task of supporting social change in Indonesia. For this reason, it is suggested that examination of concepts behind the legal system in Indonesia may prove fruitful in identifying factors relevant to the capacity of law to act as an instrument to re-shape and re-constitute attitudes and behaviour towards the environment. It is also suggested that there is value in taking a hard look at the quality of laws that have been produced and their capacity to help in the modification of patterns of social behaviour in Indonesia.

CHAPTER THREE

SHIFTING VISIONS OF THE SOCIAL AND LEGAL ORDER

Introduction

This chapter takes up the suggestion from the last chapter that an examination of concepts behind the legal system in Indonesia may prove fruitful in identifying factors relevant to the capacity of law to act as an instrument to re-shape and re-constitute attitudes and behaviour towards the environment. In doing so, it also speculates on prospects for change in Indonesian attitudes to law and the law-making process.

In the first part of the chapter, the nature of the state in Indonesia is explored with reference to the concept of the *Rechtsstaat*, which is declared in the Indonesian Constitution to be the basis of the legal system. It is observed that during the New Order government, this concept was eclipsed by romanticist notions on the social and legal order contained in the concept of the *integralistic state* and the official interpretation of the state philosophy *Pancasila.* It is suggested that this is likely to have inhibited the formulation of legal mechanisms capable of achieving policy goals that require change in social behaviour and social relations within society.

In the second part of this chapter, the possibility is explored that since the fall of Suharto, a fundamental shift in the vision of the social and legal order has started to occur. This is indicated by an equalising of the strength of each arm of government (the executive, legislature and judiciary) and a greater appreciation of the importance of independence of the judiciary. Furthermore, the last few years have witnessed a revival of constitutional human rights and a concurrent retreat from the promotion of the past official interpretation of *Pancasila*. It is suggested that if the conjecture in the first part of the chapter is correct, and there has been a shift in the vision of the social and legal order in recent times, the present situation in Indonesia may be conducive for changes in the previous approach to law making.

1. CHARACTERISING THE INDONESIAN STATE

The *Rechtsstaat* and the Indonesian Constitution

It can be expected that indications on how to characterise the Indonesian state may be gleaned from the Indonesian Constitution. The Constitution declares that Indonesia is a state based on law (*Rechtsstaat*) and not on unlimited power (*Machtsstaat*).[1] *Rechtsstaat* comes from *recht* (law) and *staat* (state). The choice of the German word *Rechtsstaat* rather than the common law equivalent *rule of law* indicates a European frame of reference. Indeed, the Indonesian version, *negara hukum*, also means literally 'law state' or 'state based on law'. Given its prominent position in the Indonesian Constitution, the meaning of *Rechtsstaat* requires further examination. The term is not always noted for its clarity, despite being one of the most commonly used terms of German constitutional theory.[2] Kelsen describes a *Rechtsstaat* as existing where 'the state, existing as a social reality independent of law, creates the law and then subjects itself to it, voluntarily as it were.'[3] He goes on to clarify how this occurs, by stating:[4]

> It does not happen, and can never happen, that a state, which in its existence precedes the law, creates the law and then submits itself to it. It is not the state which submits itself to the law, but it is the law which regulates the behaviour of man and, particularly, their behaviour directed at the creation of law, and which thereby subjects these men to law.

Kelsen also said that if *Rechtsstaat* only means a legal order, then it is a pleonasm as a state is a legal order. He says that it is a 'special type of state or government, namely one that conforms with postulates of democracy and legal security.' In this sense it is:[5]

> …a relatively centralised legal order according to which jurisdiction and administration are bound by general legal norms – norms created by a parliament elected by the people; a chief of state may or may not participate in this creation; the members of the government are responsible for

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1 On the system of state government, the Elucidation says "*Negara Indonesia berdasar atas Hukum (Rechtsstaat), tidak berdasar atas kekuasaan belaka (Machtsstaat).*'

2 As noted by Blaau LC, "The Rechtsstaat Idea Compared with the Rule of Law as a Paradigm for Protecting Rights" (1990) Vol 107 *The South African Law Journal* 76-96 at 79.

3 Kelsen H, *Pure Theory of Law* Knight M (trans.), (USA: University of California Press, 1967) 312.

4 ibid., at 313.

5 ibid.

their acts; the courts are independent; and certain civil liberties of the citizens, especially freedom of religion and freedom of speech, are guaranteed.

A number of essential components normally associated with the concept of *Rechtsstaat* have been identified as:[6]

(a) The representatives of the people adopt legislation under a constitutional order pursuant to the principle of legality.

(b) Government power is separated and differentiated between the legislature, executive and judiciary. This establishes checks and balances on the exercise of power by each arm of government.

(c) The Constitution binds all three arms of the state to law. As a result, statutes are the basis of all state action, including that of the judiciary. State authority should be exercised according to the provisions of statute. The legislature itself is bound by such legislation until it has been repealed or amended.

(d) State action must be predictable in order to facilitate legal certainty; retroactive legislation is only permitted within limited boundaries. Culpability and the measure of punishment for an act must be laid down in law before the act in question was committed.[7]

(e) State action is in proportion to the object pursued; excess of state authority is prohibited. Intrusion into basic rights (or public benefits) has to be in proportion to the reason for the intrusion.[8]

(f) To protect fundamental rights, the judiciary is independent of influence by either the legislature or the executive. It is also independent of influence by the parties in a dispute.

One of the features of law in Indonesia that accords with *Rechtsstaat* is the existence of a formal legal hierarchy for the creation of state law. The existence of a legal hierarchy

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6 Hailbronner K and Hummel HP, "Constitutional Law" in Ebke WF and Finkin MW (eds) *Introduction to German Law* (The Netherlands Kluwer Law International 1996) 43-80. Blaau, Note 2 at 81-82.

7 According to Hailbronner and Hummel, Note 6 at 47, this is one of the most important requirements of *Rechtsstaat*.

tells us that there is a formal structure to the making of state law in Indonesia. In this way, Indonesian state law conforms to the *Rechtsstaat* principle that pursuant to the principle of legality, the representatives of the people adopt legislation under a constitutional order.

The legal hierarchy is not mentioned in the Constitution but in a decision of People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*)(MPR). The MPR, which is the highest legislative body in Indonesia, meets at least once every five years (UUD art 2(2)). It has authority to amend the Constitution and determine the Broad Outline of State Policy (*Garis-Garis Besar Haluan Negara*)(GBHN) (UUD art 3). The legal hierarchy was first established by the MPR in 1966 through the passing of the Decision of the MPR No. 20 of 1966 on Sources of Law and the Order of Legislation (*Ketetapan Majelis Permusyawaratan Rakyat Nomor XX/MPR/1966 tentang Sumber Hukum dan Urutan Peraturan Perundangan*), which set out the hierarchy as follows (Part II (A) para 1):

1. The Constitution (*Undang-Undang Dasar 1945*) (*UUD* 1945)
2. Resolutions of the MPR (*Ketetapan MPR*)(*TapMPR*)
3. Statutes (*Undang-undang*)(*UU*)
4. Government regulations amending Statutes (*Peraturan Pemerintah PenggantiUndang-undang*) (Perpu)
5. Government regulation (*Peraturan Pemerintah*)(*PP*)
6. Presidential Decrees (*Keputusan President*)(*Keppres*)
7. Other implementing regulations such as Ministerial Regulations (*Peraturan Menteri*), Ministerial Instructions (*Instruksi Menteri*) and others.

This hierarchy has recently been replaced by Decision of the MPR No. 3 of 2000 on Sources of Law and the Order of Legislation (*Ketetapan Majelis Permusyawaratan Rakyat Nomor III/MPR/2000 tentang Sumber Hukum dan Tata Urutan Peraturan Perundang-undangan*)(*TapMPR/III/2000*). The new hierarchy is as follows (art 2):

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[8] ibid., at 48.

1. The Constitution (*Undang-Undang Dasar 1945*) (*UUD* 1945)
2. Resolutions of the MPR (*Ketetapan MPR*)(*TapMPR*)
3. Statutes (*Undang-undang*)(*UU*)
4. Government regulations amending Statutes (*Peraturan Pemerintah PenggantiUndang-undang*) (*Perpu*)
5. Government regulation (*Peraturan Pemerintah*)(*PP*)
6. Presidential Decrees (*Keputusan President*)(*Keppres*)
7. Regional Regulations (*Peraturan Daerah*)(*Perda*)

It can be seen that the new hierarchy has added in the Regional Regulation as a source of law and removed 'Ministerial Regulations, Ministerial Instructions and others'.

The balance of power in the Constitutional order: the '*integralistic state*'

In apparent support of the *Rechtsstaat* ideal, the 1945 Constitution established an executive, legislature and judiciary; however, the extent to which it has provided for the separation of powers, fundamental to *Rechtsstaat*, is questionable.[9] As described by Lindsey, rather than power being 'separated', in Indonesia it has been 'distributed' between the executive, the legislature and the judiciary.[10] Sri Soemantri has also referred to the constitutional arrangements for 'power sharing' (*kekuasaan bersama*) rather than the separation of power (*pemisahan kekuasaan*).[11]

In particular, the concept of the unified '*integralistic state*' (known in Dutch as the *integralistische staatsidee*) has cast doubt over the degree of separation of powers under the Constitution. The concept of the '*integralistic state*' does not appear in a legal instrument but it was introduced into the Constitutional debates of 1945 by Dr Raden Supomo, the primary author of the 1945 Constitution, when he presented his vision of the

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9 As first propounded by Montesquieu, *The Spirit of Laws* Cohler AM (trans. & ed.), (England: Cambridge University Press, 1989) 156-157.

10 Lindsey T, "Paradigms, Paradoxes and Possibilities: Towards Understandings of Indonesia's Legal System" in Taylor V (ed.), *Asian Laws Through Australian Eyes* (Sydney: LBC Information Services, 1997) 90-110 at 97.

11 Sri Soemantri HR, *Hak Uji Material di Indonesia* (Judicial Review in Indonesia) (Indonesia: Pernerbit PT Alumni 2nd ed, 1997) at 10.

kind of legal system that would be appropriate for Indonesia.[12] Supomo referred to the special character of the Indonesian people saying that the state must be *integralistic* (*integralistik*), that is, unified with the populace. In a mystification of social relations, society was depicted as an organic whole; he referred in one breath to the 'unity of life, unity of slave and lord, that is to say unity of the material world with the unseen internal world, unity between the micro and the macrocosm, between the populace and its leaders.'[13]

The *integralistic state* is seen as embracing the whole nation and uniting all the people. It presents the people and the state as an organic unity. As observed by Lubis, the *integralistic state* promotes the idea of a strong state with an emphasis on unity, a denial of dualism between the state and the individual. It has also allowed for the promotion of the family principle central to *Pancasila* (discussed below), which sees relations between the individual and the state in terms of the relations of subordination and obligation.[14]

The mystification within the concept of the *integralistic state* has been influential in the conception of the social order in Indonesia. Nasution has observed that it was used in 1957 to support the introduction of Guided Democracy by President Sukarno along with a rejection of the parliamentary system. It came to replace the concept of the constitutional state after the return, in 1959, to the 1945 Constitution and a rejection of the 1949 Constitution.[15] Whilst not derived from *Pancasila*, after the introduction of Guided Democracy, it was justified by *Pancasila* as an ideology.[16] It has also influenced the concept of law within the Indonesian state and institutional development. In particular, it has worked to deny the need for checks and balances in the daily operation of government. This can be seen in the respective power of the executive, legislature and judiciary before *reformasi* discussed below.

The executive

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[12] See generally the account of Mahfud M, *Hukum dan Pilar-Pilar Demokrasi* (Law and the Pillars of Democracy) (Yogyakarta: Gama Media Offset, 1999) at 40-46.

[13] Yamin M, *Naskah-Persiapan Undang-Undang Dasar 1945* (Preparatory Documents of the 1945 Constitution) (Jakarta: Prapantja, 1959) at 113.

[14] Lubis TM, *In Search of Human Rights: Legal-Political Dilemmas of Indonesia's New Order, 1966-1990* (Jakarta: PT Gramedia Pustaka Utama, 1993) at 91.

[15] Nasution BA, *The Aspiration for Constitutional Government in Indonesia: A Socio-Legal Study of the Indonesian Konstituante 1956-1959* (Jakarta: Pustaka Sinar Harapan, 1992) at 421-423.

[16] ibid., at 421.

Under the Constitution, the President has held wide-ranging power, with very little by way of checks and balances from the legislature or judiciary. The President has had power to pass statutes 'in agreement with the DPR' (art 5(1)) and to determine regulations necessary to implement statutes (art 5(2)). According to Sri Soemantri, in combination with article 20(1) (mentioned below), this meant that the bulk of law-making power was given to the President, not the legislature.[17] The Elucidation states that the President is the highest executive below the MPR and has authority and responsibility for administration of the State. The Cabinet is appointed by the President and is extra-Parliamentary (art 17). It is answerable directly to the President and not Parliament. Ministers are 'the assistants' of the President. (Elucidation 5, VI). One limitation on Presidential power has been the requirement to uphold the authority of government in accordance with the Constitution (art 4(1)). Another is contained in the Elucidation, where it is stated that the President must execute the policy of the state according to the GBHN and in this regard, the President is subordinate to and responsible to the MPR (Elucidation 5, III). Apart from being responsible to the MPR, the President must 'carefully and thoroughly pay attention to the voice of the DPR.' (Elucidation 5, VII)

Ministers have also had a strong role in government and law making. Pursuant to the legal hierarchy, most operational aspects were governed by ministerial decrees. This situation led Lindsey to comment that during the New Order regime, Indonesian society was governed by the 'law of the rulers' rather than the rule of law.[18] As stated by

O'Rourke:

> Over four decades of authoritarian rule, every component of the legal system had been crafted to defend the supremacy of the ruler, rather than the supremacy of law. Indonesian's legal system was not dysfunctional; in fact, it functioned efficiently and effectively – but towards the wrong ends. The system worked to uphold the interests and authority of the ruler, rather than upholding justice.'[19]

The legislature

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17 Sri Soemantri, Note 11 at 9.

18 Lindsey T "From Rule of Law to Law of the Rulers – to Reformation?" in Lindsey T (ed.), *Indonesia: Law and Society* (Sydney: The Federation Press, 1999) at 11-20.

19 O'Rourke K, *Reformasi – The Struggle for Power in Post-Soeharto Indonesia* (Sydney: Allen and Unwin, 2002) at 150.

The position of the legislature in relation to law making has been very much subordinate to the President. Prior to a recent amendment discussed below, statutes required the 'agreement' of the DPR (art 20(1)&(2)) and members of the DPR 'had the right' to submit a bill (art 21(1). If they were not ratified by the President, even though agreed to by the DPR, they could not be submitted again in the same session of the DPR (art 21(2)). Typically, when a government agency wished to propose a bill, it reported to the President and it was only upon the President's agreement that a committee was set up to draft the bill. When complete, it was forwarded to the President for the preparation of a letter by the Cabinet Secretary to accompany the bill to the DPR. The President submitted the bill to the DPR for discussion. If the DPR accepted the bill, the Cabinet Secretary prepared the final form to be submitted to the President. The President could then either accept or reject the bill.[20]

The judiciary

The role of the judiciary within the arrangement of state power has also been limited. The 1945 Constitution simply says that judicial power is to be exercised by the Supreme Court (*Mahkamah Agung*) and other courts in accordance with statute and that the structure and powers of the courts is to be regulated by statute (art 24(1)&(2)). It then states that the conditions for becoming a judge and for being dismissed shall be prescribed by statute (art 25). The Elucidation states (Elucidation Chapter IX):

> The judicial powers are powers which are independent, which means that they are free from the influence of Government authority. Therefore, guarantees must be established by statute concerning the position of judges.

The meaning of 'independent' power has not been elaborated.[21] In 1964, Act No. 19 of 1964 on Judicial Power (*Undang-Undang No. 19 Tahun 1964 tentang Ketentuan-Ketentuan Pokok Kekuasaan Kehakiman*) was enacted. In 1965, it was followed by Act No. 13 of 1965 on General Courts and the Supreme Court (*Undang-undang No. 13 Tahun 1965 tentang Pengadilan Dalam Lingkungan Peradilan Umum Dan Mahkamah Agung*.)

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[20] This summary is taken from Himawan C, "Indonesia" in Tan PL (ed.), *Asian Legal Systems – Law, Society and Pluralism in East Asia* (Australia: Butterworths, 1997) 196-262 at 245-246.

[21] Lubis TM, "The Rechtsstaat and Human Rights" in Lindsey T (ed.), *Indonesia: Law and Society* (Sydney: The Federation Press, 1999) 171-185 at 176.

As a result, judicial powers were placed under the executive and the Supreme Court was given the same status as a Ministry.

Act No. 14 of 1970 on the Judiciary (*Undang-undang Nomor 14 Tahun 1970 tentang Pokok-pokok Kekuasaan Kehakiman*) ('the Judiciary Act') defines judicial authority in article 1 as an independent state power 'for the operation of a judicature to uphold the law and justice based on *Pancasila*'. The Elucidation of article 1 states that this provision means the judiciary is to be free from interference in decision-making. However, at the same time, it took away some of that independence by a qualification on 'independence of the judiciary' where it stated:

> The independence of the judiciary should imply that there is a judiciary independent from interference of other state institutions, free from pressures, directions or recommendations which originate from extra-judicial authorities except in the things permitted by law. Freedom in implementing judicial authority is in itself not absolute because the function of judges is to uphold the law and to find justice based on *Pancasila* through implementation of law, and finding of its basis through cases leading to decisions that reflect the sense of justice of the Indonesian people.

The words 'except in the things permitted by law' have provided a pretext for government to interfere with the judiciary, according to Lubis.[22]

Importantly, the state structure set out in the 1945 Constitution did not fully support the separation between judicial and legislative power, as there was no court to review the constitutional validity of statutes. Thus, there was no judicial body responsible for interpretation or upholding the Constitution.[23] In 1970, limited separation was introduced in Act No. 14 of 1970 on Judicial Authority (*Undang-undang No. 14 Tahun 1970 tentang Ketentuan-ketentuan Pokok Kekuasaan Kehakiman*), which granted the

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[22] ibid., at 177. An example of such an intervention, which was clearly contrary to law was the *Kedung Ombo* case Dec No 2263 K/Pdt/1991 (Supreme Court); and Dec No 650 PK/Pdt/1994 (Review Court of the Supreme Court) discussed by Fitzpatrick D, "Beyond Dualism: Land Acquisition and Law in Indonesia" in *Indonesia: Law and Society* Lindsey T (ed.), (Sydney: The Federation Press, 1999) 74-93 at 83-86. According to Fritzpatrick, after a meeting between the Chief Justice and the President, the then Chief Justice of the *Mahkamah Agung* exercised his discretionary power to review the Supreme Court's decision. A Review Court reconsidered an earlier decision, which increased an award of compensation to villagers who lost their land from the construction of the *Kedung Ombo* dam. It reversed its own decision and reduced the amount of compensation. The comment has been made by Fitzpatrick that this decision shows that written law may be overridden by other considerations clustering around *Pancasila*, policy, development and social function, at 86.

Supreme Court power to review legislation below the level of statute (*hak uji material*) to ascertain whether there it conflicts with provisions contained in a higher law (art 26(1)) as part of an appeal (art 26(2)). This power was also mentioned in Act No. 14 of 1985 on the Supreme Court (*Undang-undang No. 14 Tahun 1985 tentang Mahkamah Agung*). Procedures for the authority of the Supreme Court was later provided in Supreme Court Regulation No. 1 of 1993, which stated that the Supreme Court could preside in an application for judicial review at first instance. Notably there were few such applications, apart from the Tempo Case decided on 13 June 1996.[24]

Other signs of a stronger role for the judiciary began to appear with the establishment of the Administrative Court in 1986, through which the courts have had the right to review administrative decisions. This development represented a break with the concept of the *integralistic state* as it introduced the notion that government should be accountable to the populace for decisions made in the exercise of its administrative authority. This was the first time that the New Order government took action to recognise that individual interests might conflict with the interests of the state.[25]

Pancasila

The five principles of *Pancasila* were the unifying ideology of the new state at the time of independence. They are stated in the Preamble to the 1945 Constitution namely:

- Belief in one supreme God

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[23] In this respect, the separation of powers is similar to the Constitution in The Netherlands (s.120): Kortmann C and Bovend'Eert P, *The Kingdom of the Netherlands – An Introduction to Dutch Constitutional Law* (The Netherlands: Kluwer Law and Taxation Publishers, 1993) at 6-8.

[24] Discussed by Sri Soemantri, Note 11 at 97-119.

[25] Quinn B, "Indonesia: Patrimonial or Legal State? The Law on Administrative Justice of 1986 in Socio-Political Context in Indonesia" in Lindsey T (ed.), *Indonesia: Law and Society* (Sydney: The Federation Press, 1999) 258-268 at 261. However, before the formation of the Administrative Court it was, and still is, possible to bring an action through the ordinary courts for compensation for illegal actions of the administration based on article 1365 of the Civil Code and this includes judicial review of unlawful executive regulations, which cause injury to citizens, see Lotulung PE, "Judicial Review in Indonesia" Yong Zang (ed.), *Comparative Studies in the Judicial Review System in East and South East Asia* (The Hague: Kluwer Law International, 1997) 176-182 at 169. See also Bedner A, *Administrative Courts in Indonesia – A Socio-Legal Study* (The Netherlands: Ph.D Thesis University of Leiden, 2000). Also Bedner A, "Administrative Courts In An Executive-Dominated State: The Case of Indonesia" in Yong Zhang (ed.), *Comparative Studies on Judicial Review Systems in East and South-East Asia* (The Netherlands: Kluwer Law International, 1997) 183-210 and Bourchier D, "Magic Memos, Collusion and Judges With Attitude – Notes on the politics of law in contemporary Indonesia" Jayasuriya K (ed.), *Law, Capitalism and Power in Asia – The rule of law and legal institutions*, (London: Routledge, 1999) 233-52 at 239-249.

- Just and civilised humanity
- National unity
- Democracy guided by inner wisdom in the unanimity arising out of deliberation amongst representatives
- Social justice for the whole of the people of Indonesia.

Each of these principles is supported by particular provisions within the Constitution.[26] When Suharto came to power in 1965, *Pancasila* was given an official interpretation that became part of the New Order ideology. *Pancasila* was promoted in strongly organicist terms in which the elements of the state were seen to be harmoniously related rather than having separate, independent and balancing functions.[27] In 1966, *TapMPR/XX/1966* pronounced *Pancasila* to be 'the source of all sources of law'. In 1970, the Judiciary Act stated that upholding the law was to be based on *Pancasila* (art 3(2)), as was the guarantee of human rights by the court (Elucidation arts 5-8). There were frequent references to *Pancasila* in Act No. 3 of 1975 on Political Parties (*Undang-undang No. 3 Tahun 1975 tentang Partai Politik Dan Golongan Karya*). The purpose of political parties and groups was to give rise to a just and prosperous society, 'balanced between the spiritual and material based on *Pancasila*' (art 3(1)(b)). In the Elucidation, there is mention of the 'spirit' (*jiwa*) of *Pancasila* and having high moral standards (*bermoral*) of *Pancasila*. In 1978, *Pancasila* became the subject of a decision of the MPR concerning the Guide to the Living and the Practice of *Pancasila* (*TapMPR/II/1978*) in which the aspirations behind each of the five principles were set out.

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[26] Soemantri sets this arrangement out as follows:
- Principle 1: articles 29(1) and (2)
- Principle 2: article 34
- Principle 3: articles 1(1), 35 and 36
- Principle 4: article 1(2)
- Principle 5: article 33.

He says the five principles form one chain in which one link cannot be separated from another: Sri Soemantri HR, *Bunga Rampai Hukum Tata Negara Indonesia* (Aspects of Administrative Law in Indonesia) (Indonesia: Penerbit Alumni, 1992) at 5-7.

[27] Bourchier has analysed how the New Order regime in particular adapted *Pancasila* into an organicist interpretation, see Bourchier D, *Lineages of Organicist Political Thought in Indonesia* (Melbourne: Ph.D thesis Politics Department, Monash University, unpublished) at chapter 6.

Through the Board to Promote Education, Implementation, Guidance to the Understanding and Application of *Pancasila* (*Badan Pembinaan, Pendidikan, Pelaksanaan, Pedoman, Penghayatan dan Pengamalan Pancasila Pusat*), the New Order regime began to standardise the interpretation of *Pancasila*.[28] In 1985, Act No. 8 of 1985 on Social Organisations (*Undang-undang No. 8 of 1985 tentang Organisasi Kemasyarakatan*) made *Pancasila* the binding ideology not only for the state but also for existing political parties and all mass organizations in Indonesia. It was said to be the only principle upon which community groups are based (art 2(1)) and that organizations had an obligation to inspire, carry out with devotion and safeguard *Pancasila* and the Constitution (art 7 (b)). The provisions of Act No. 14 of 1985 on the Supreme Court (*Undang-Undang Nomor 14 Tahun 1985 tentang Mahkamah Agung*) repeat the provisions of the Judiciary Act in relation to *Pancasila*.

To appreciate the socio-legal implications of *Pancasila*, it needs to be understood that *Pancasila* reflects a Javanese social philosophy that contains a mystical ideal of unity and harmony between man and 'God' and it also stands as a model for the relationship between man and society. The quest for unity-harmony, and the maintenance of order, are the predominant Javanese elements, which have been utilized in the official conceptualisation of social relations in Indonesia.[29] Mulder has shown how the official version of *Pancasila* was used to project the Javanese image of social organisation as being rooted in the family onto Indonesian society as a whole.[30] Fundamental to *Pancasila* has been the subordination of the individual to the community and the state, in the same way that an individual is subordinate to the family. Both are seen to embody the concept of the 'common good' that is to prevail over private or individual interests. All rights come with a parallel emphasis on the obligation that individuals have to others, to society and the state. Thus, there are two themes of relations between the individual and larger social units: subordination and obligation.[31] This is exemplified in the traditional Javanese concept of leadership, where the military or feudal leader was regarded as the father (*Bapak*) who is to be honoured and followed but who in turn is expected to care for his subjects (*anak buah*).

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[28] Rohdewohld R, *Public Administration in Indonesia* (Melbourne: Montech Pty Ltd, 1995) at 14.
[29] Mulder N, *Mysticism in Java – Ideology in Indonesia* (Amsterdam and Singapore: The Pepin Press, 1998) at 61.
[30] Mulder N, *Inside Indonesian Society: Cultural Change in Java* (Amsterdam: The Pepin Press, 1996).
[31] Mulder, Note 30 at 67.

Mulder's study of '*Pancasila* Moral Education' (*Pendidikan Moral Pancasila* (PMP)), which all school students are required to study until the end of secondary school, provides insights.[32] In PMP, it is stated that the Republic is an umbrella that shelters the whole territory and all the population. The protection entails obligations upon the people to work and support the state. Indonesians are required to submit to (*tunduk*) and to obey (*patuh*) all the regulations that emanate from the legitimate government. As quoted by Mulder, the PMP states that:[33]

> Apart from being submissive and obedient to the given regulations, we are also obliged to respect (*hormat*) the officials who carry out the administration.
>
> We believe that if all Indonesian nationals fulfil their obligation to the state, the state shall also satisfy hers, namely to guarantee the rights of each national.
>
> The good Indonesian national will always give precedence to his obligations over his rights.

The key concept leading to an understanding of *Pancasila* lies not in the notion of equality but in the idea of the functioning of a family (*kekeluargaan*).[34] *Kekeluargaan* paired with the principle of mutual assistance and sharing burdens through cooperation (*gotong-royong*) has been the basic principle of the Indonesian nation and state. Decisions are to be reached by mutual consultation (*musyawarah).* It means that in social life, harmony should come about as in the family, in the consciousness that the common interest transcends that of the individuals.[35] The family principle contained within *Pancasila* has one basic flaw, as pointed out by Mulder:

> Indonesian is not a big family. In a family, you know each other personally. You do not know two hundred million people that way. Indonesia is not a community. It is, perhaps, a national economy, a so-called nation state, and it is conceptually difficult to call it a society. There are so many culturally specific groups, communities, and societies within Indonesia.[36]

It can be seen that *Pancasila* presents an idealised model of society that avoids acknowledgment of the existence of power relations within society. This is clear in the Guide to the Living and the Practice of *Pancasila* (*TapMPR/II/1978*) where it sets out the

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32 Also discussed by Mulder, Note 29 at 99-114.
33 Mulder, Note 30 at 71 citing PMP: II at 96.
34 ibid., at 68.
35 Mulder, Note 29 at 86, 1000, 105, 129 and 123-124.
36 ibid., at 125.

Principle of Democracy Guided by Wisdom through Deliberation/Representation (principle 4). This principle states that all Indonesians are to have the 'same position, rights and responsibilities' and, in the exercise of their rights, they are 'conscious of the need to always heed and stress the interests of the State and society.' It is stated that 'because of the possession of the same position, rights and responsibilities, it is forbidden that the wishes of one be forced upon others'. There is no acknowledgement that people do not hold equal positions within society, that the state holds more power than individuals do or that the state may have an obligation to protect the weaker sections of society.

Social conflict is to be resolved through deliberations 'conducted and arrived at by a decision based upon mutual consensus' and in the 'spirit of the family'. This is a reference to *musyawarah* style decision-making, namely consultation, negotiation and mediation, rather than voting or adjudication. This kind of decision-making can fail to properly allow for the protection of the interests of the less powerful where they do not have access to information or the means to represent their interests. Unlike voting or adjudication, it undermines the debating process whereby the force of an argument will depend on the clarity with which it is expressed and the power of its reasoning.[37]

In particular, *Pancasila* has worked against the idea of rights held by citizenry, which are reciprocated by duties owed by the state. Concerning human rights in Indonesia, Lubis has said that there have been three important cultural factors:[38]

(a) a strong belief in social hierarchy which, in the Javanese context in particular, includes an 'unshakable' belief in the pre-determination of one's place in society either as a subject (*kawula*) or lord (*gusti*);

(b) a cultural obsession with harmony; and

(c) the reality that in most parts of the country Indonesian society is still duty-based rather than rights-based.

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[37] In 1994, Buchori discussed why Indonesians have been apprehensive about debate and concluded that they were ready for 'polite debate', see Buchori M, "The stigmatisation of debate and criticism in Indonesian society", *Sketches of Indonesian Society – A Look from Within* (Jakarta: Jakarta Post and IKIP – Muhammadiyah Jakarta Press, 1994) 69-73. Since the fall of President Suharto, vigorous discussion on matters of topical interest can be viewed nightly on national television, which is another sign of social change.

Suharto is known for having stated on various occasions that Indonesia is not a rights-based society and that what is important is duty.[39] The dualistic concept of duty conformed with the *integralistic* idea that just as the state has responsibilities to the people, so the people have responsibilities to the state. This conception denies a reciprocal relationship between rights held by citizens and duties or obligations owed by the state.[40] The traditional Indonesian approach has not rested on such an appreciation but rather emphasises the state's obligation to 'the community' and the duty of individuals and 'the community' to the state. Indeed, the primary duty to the state has been the duty to sustain a harmonious society.[41]

It can be seen that the vision of society portrayed in *Pancasila* is essentially static. It does not allow for consideration of mechanisms available to achieve collectivist goals or goals that take a long-term view of the interests of society. This may include mechanisms to deal with the socially undesirable effects of social domination of weaker sections of society by more powerful interests. In mystifying the power relationships within society, it resorts to vagueness and opacity of expression. Mulder has referred to the 'tendency to cloak things in mystery - or at least, in expressions that are difficult to understand.'[42]

Positivism versus romanticism and the implications for law making

Bourchier has observed that around the time of independence there were two competing visions of the social and political order and the place that the law should take within it related to two divergent legal traditions inherited from the Dutch: 'positivism' and 'romanticism'.[43] Positivism says that 'law' is posited or created by law making institutions; the legislative act 'creates' or 'posits' norms. Positivism is concerned with

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38 Lubis, Note 14 at 297-298.

39 Lubis, Note 14 at 10 states that implicit in the speech by Suharto before the DPR in 1989, is the notion that human rights can only be recognised in conjunction with human duties.

40 It is commonly assumed in western legal systems that the opposite of a duty or obligation is a right and indeed, the grant of a right may be a shorthand way of saying that others have an actual or hypothetical legal obligation to act or not to act in certain ways touching the right-holder. Dworkin RM, described rights in this way in *The Philosophy of Law* (USA: Oxford University Press, 1977) at 38.

41 Lubis, Note 14 at 11. He notes that relatively few studies have been undertaken on the concept of duty and that it is often simply explained by reference to *dharma*, meaning duty or devotion, at 26.

42 Mulder, Note 29 at 96.

43 Bourchier D, "Positivism and Romanticism in Indonesian Legal Thought" in *Indonesia: Law and Society* Lindsey T (ed.), (Sydney: The Federation Press, 1999) 186-196.

the systematisation of laws, formal definitions and classificatory schemes, upon which the validity of law is based. Positivism also presents a mode of legal thought based on rationality in law finding, through which legal norms are applied with the exercise of legal reasoning to the facts of a particular case.[44]

Within the romanticist tradition, in contrast to positivism, the law is legitimate only if it arises organically from the history and culture of a civilization. Romanticism looks to the particular spirit of the nation and to its tradition and national past for inspiration.[45] This tendency in Indonesia has been traced back to the juridical movement associated with German romanticism, namely the German Historical School of Law founded in 1815, which split from the Romanists in 1840 and, more particularly, the School of Law at Leiden University in Holland.[46] As Bourchier describes it, Indonesian lawyers were won over by arguments that the 'Western' model of law and government, with its emphasis on individual rights and impersonal rules, was inappropriate for Indonesia.[47] Evidence of the way in which European romanticist ideas were incorporated into Indonesian legal thought appears in the early opinions expressed by Dr Raden Supomo, who received his legal training at the Leiden law school, as well as the accounts of other influential legal figures of the time, who studied at Leiden University.[48]

Conflict between the competing visions of society was apparent in the debates between Raden Supomo and Mohammad Yamin during the drafting of the 1945 Constitution.[49] Yamin made a case for a clear separation of powers between the executive, legislature and judiciary and a Supreme Court with powers of constitutional review. He argued for a directly elected parliament and for a ministry that is responsible to parliament.[50] Yamin, along with Mohammad Hatta, also argued that individual human rights were necessary to protect the rights of the people and to prevent the state from becoming all-powerful.

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44 Roach Anleu SL, *Law and Social Change* (England: SAGE Publications, 2000), 21-23. Also Luhmann NA, *A Sociological Theory of Law* King E & Mackie M (trans.), Martin Albrow (ed.), (London: Routledge & Kegan Paul, 1985) 156.

45 Bourchier, Note 43 at 187.

46 Burns PJ, *The Leiden Legacy – Concepts of Law in Indonesia* (Jakarta: PT Pradnya Paramita, 1999) 292-305.

47 Bourchier, Note 43 at 189.

48 Bourchier, Note 43 at 189. Burns, Note 46 at 293-294.

49 These debates are discussed by Mahfud, Note 12 at 110-113.

50 Yamin, Note 13 at 330-337.

Yamin's ideas were rejected by Supomo, who argued for a legal system based on what he regarded as intrinsic Indonesian values of unity of the individual and leadership within the *integralistic* state, mutual deliberation (*musyawarah*), mutual assistance (*gotong-royong*) and the family principle (*semangat kekeluargaan*).[51] Both Sukarno and Supomo expressed the view that individual human rights were unnecessary for the Indonesian state, which was based on sovereignty of the people and the family principle.[52]

In the tension between these traditions, the romanticist tradition succeeded in having most influence over the conception of the Indonesian state and society as presented in the Indonesian Constitution. The Constitution states that it gives form to the fundamental ideas in the Preamble that pervade the 'spiritual background of the Constitution' (Elucidation 4, III). The Constitution itself is a very short document of only 37 articles and even acknowledges its own brevity. It is stated to be enough that the Constitution only contains fundamental rules (Elucidation 4, IV). By way of further explanation it is stated that '[c]ertainly, it is the nature of those written laws to be binding. For that reason, the more flexible those rules are the better'.[53] This statement contains a contradiction in terms: as long as it is considered desirable that rules are flexible, there is no guarantee that law will be binding in a particular instance. It is supplemented by references to the 'family principle' and the 'spirit of the authorities' expressed as follows (Elucidation 4, IV):

> What is extremely important in the administration and in the life of the state, is the spirit of the authorities of the state, the spirit of the leaders of the administration. Although a constitution is drawn up which, according to the letter, is characterised by the family principle, if the spirit of the authorities of the state, the leaders of the administration be individualistic, that constitution is certain to have no meaning in practice. … Thus, what is most important is the spirit. That spirit is a living thing, or in other words, it is dynamic. In connection with this, only the fundamental rules alone must be laid down in the constitution, whilst what is necessary for executing those fundamental rules must be left to statutes.

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[51] Yamin, Note 13 at 113.

[52] However, note the observation by Nasution BA, *The Aspiration for Constitutional Government in Indonesia: A Socio-Legal Study of the Indonesian Konstituante 1956-1959* (Jakarta: Pustaka Sinar Harapan, 1992) at 422, that by 1949, Supomo had largely abandoned these ideas as indicated in his participation in the drafting of the 1949 Constitution.

[53] *Memang sifat aturan yang tertulis itu mengikat. Oleh karena itu, makin "supel" (elastic) sifatnya aturan itu, makin baik.*

This is strongly romanticist in its vision as it claims that there is a particular, unique Indonesian character, which is reflected in the Constitution.

The same 'spirit' appears in the presentation of the concepts of the *integralistic state* and *Pancasila*. The struggle between these ideas continued between 1945 and 1959.[54] The outcome was most clearly seen in 1959, when the 1949 Constitution was replaced by the 1945 Constitution.[55] The 1949 Constitution was a lengthy document that established a federal structure of government and made extensive provision for protection of human rights.[56] Asshiddiquie has described three periods of state policy "from individualism to collectivism" since Indonesia's independence over the period of 1945 to 1990 as parliamentary democracy (1945-1959), Guided Democracy (1959-1966) and Pancasila Democracy (1967-1990).[57]

After the installation of the New Order regime in 1965, the official vision of Indonesian society combined foreign romanticist notions with a particular interpretation of traditional (essentially Javanese) culture. This is evident by promotion of concepts supportive of the *integralistic state* in support of the New Order government's interpretation of *Pancasila*. The concept of social organization abandoned any safeguards against possible abuse of power. Critics of the official interpretation of *Pancasila* stressed that it did not arise from community debate but was handed down by political figures; neither was it followed up by substantive discussion on what *Pancasila* meant in terms of implementation or the achievement of its aspirations.[58]

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54 Nasution demonstrates the struggle in the years between 1945 to 1959 for ideas supportive of constitutional government protective of basic human rights and parliamentary democracy see, Nasution AB, "Democracy's Struggle in Indonesia" in Palmer L (ed.), *State and Law in Eastern Asia* (England: Dartmouth Publishing House, 1996) 23-68. See also Feith H, *The Decline of Constitutional Democracy in Indonesia* (USA: Cornell University Press, 1962).

55 The 1949 Constitution was a lengthy document establishing a federal structure of government. There were 35 provisions on human rights. The Provisional Constitution that was adopted after the return to a unitary state on 15 August 1950 strengthened the parliamentary system and enlarged upon all the human rights provisions of the 1949 Constitution. The rights contained in the Provisional Constitution were, however, lost in 1959 when it was replaced by the 1945 Constitution.

56 There were 35 provisions on human rights. The Provisional Constitution that was adopted after the return to a unitary state on 15 August 1950 strengthened the parliamentary system and enlarged upon all the human rights provisions of the 1949 Constitution. The rights contained in the Provisional Constitution were, however, lost in 1959 when it was replaced by the 1945 Constitution.

57 Asshiddiquie J, *Gagasan Kedaulatan Rakyat Dalam Konstitusi dan Pelaksanaanya di Indonesia* (Ideas on the Sovereignty of the People under the Constitution) (Indonesia: PT Ichtiar Baru van Hoeve, 1994).

58 Lubis, Note 14 at 8.

This way of thinking reinforced social relations that correlate with Weber's concept of patrimonialism. Bourchier has said that the impact of *Pancasila* has favoured a 'fluid and totalistic concept of authority, in which the people are governed not by fixed rules consistently applied but by a diffuse paternalism resting on the concept of the 'public good''.[59] In Indonesia, a form of patrimonialism has been discerned in the personal centrality of the political leader and his officials to manage the affairs of society.[60] Anderson has said that patrimonialism in Indonesia arose from the arrangements between the leader and his assistants whereby they obtained their position as part of the personal favour of the ruler and could be dismissed and downgraded at his whim.[61] Patrimonial social organization does not require a legal system structured on impersonal rules nor does it adopt the mode of thought that has been described as rational legal. According to Weber, it may be contrasted with the *formal rationality* of bureaucratic social organization.[62] As analysed by Weber, formal rationality occurs where significance in both substantive and procedural law takes a particular form: it is determined exclusively through the application of operative facts - that is, the particular facts that exert an influence in the case at hand. Moreover, the operative facts do not vary from case to case but are pre-determined generically by the laws themselves and are to be applied strictly according to their terms.[63]

It can be seen that the vision of social and legal relationships in the concept of the *integralistic state* does not allow for the appraisal of social behaviour of the powerful or the relations within society; nor does it consider how to address the damaging effects of such behaviour or relationships. It follows that under the influence of this concept, little consideration was given to legal mechanisms available to protect the weak against abuses of power or to protect public goods such as the environment. It also follows that where

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59 Bourchier, Note 43 at 194.

60 Lev DS, "Judicial Authority and the Struggle for an Indonesian Rechtsstaat" (1978) Vol 13 No 1 *Law and Society Review* 37-71 at 39. Patrimonial domination is usually regarded as occurring as a form of social organization when the household is the basis of social, economic and political organization Collins R, *Weberian Social Theory* (USA: Cambridge University Press, 1986) at 128.

61 Anderson B, *Language and Power – Exploring Political Cultures in Indonesia* (USA: Cornell University Press, 1990). He is of the opinion that the traditional concept of power in Java existing in the role of extended families and the tensions that existed between the families and Ministeriales (high ranking officials of commoner origin) 'may be useful' for understanding 'some aspects' of political behaviour in contemporary Indonesia, at 46-48.

62 Weber M, *Law in Economy and Society* (USA: Harvard University Press, 1966) at 63.

63 ibid., Roach Anleu, Note 44 at 24.

social organization does not value impersonal rules, it will not be envisaged that such social objectives are to be achieved through the formulation of strong, clear legal rules. .

2. CHANGING CONCEPTIONS OF THE LEGAL AND SOCIAL ORDER

The fading of the '*integralistic state*'

The *reformasi* era is witnessing a fading of the '*integralistic state*'. There has been a reduction in Presidential and Ministerial power combined with a strengthening of the legislature and the judiciary. These changes are supportive of greater separation of power as well as checks-and-balances in contradiction to the ideas of the '*integralistic state*'.

The executive

Since the demise of the New Order government, both Ministerial and Presidential law-making powers have been reduced. The past extensive law-making power of Ministers has been curtailed. *TapMPR/III/2000* has removed ministerial decrees and ministerial regulations from the legal hierarchy, which means that they no longer have the same legal status as other legal instruments such as statutes, government regulations, presidential decrees and regional regulations.

The President's role in passing legislation through Parliament has also been reduced. In the first amendment to the Constitution passed on 19 October 1999, it is stated that the President has a right to propose draft legislation to the DPR (art 5)) and the DPR now has authority to pass legislation (art 20(1)). However, draft laws are to be discussed by the DPR and the President, so as to reach agreement (art 20(2));[64] if agreement is not reached, the draft legislation cannot be resubmitted during the same sitting of the DPR (art 20(3)). As a result of the second amendment, passed on 18 August 2000, if the DPR and President have agreed to a draft statute but it is not later ratified by the President, it will become valid 30 days after agreement was reached (art 20(5)).

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[64] Notably, no time limit was placed on this process, which has been said to be a cause of the delay in passing legislation: "DPR Menunggak 53 RUU" ('DPR In Arrears for 53 Bills'), *Kompas* (20 January 2003) 6. It is an example of a poorly drafted procedural rule.

The extent of presidential power in relation to the judiciary has also been reduced in some respects. The President's power to grant 'clemency, amnesty, abolition and rehabilitation' was reduced by the First Amendment (art 5), which states the President can give clemency and rehabilitation 'with attention to the opinion of the Supreme Court'. Amnesty and abolition can also be granted 'with attention to the opinion of the DPR.' However, the actual intention of this change is not clear as the effect seems to be minimal in practice: it does not actually say that the agreement of the Supreme Court or the DPR is required and, so it seems that it is still within the President's sole power to make the final decision.

The legislature

The authority of the legislature has been strengthened by the second amendment to the Constitution, which provides more detail on the DPR. It is now specified that members of the DPR are to be chosen through a general election (art 19(1)); the DPR has legislative, budgetary and oversight powers (art 19(2)); and each member of the DPR has the right to question and put forward proposals and opinions with immunity (art 20A(2)).

The judiciary

Since *reformasi*, a number of changes in judicial administration have strengthened its independence. Act No. 35 of 1999 on amendment of the Judiciary Act (*Undang-undang Nomor 35 Tahun 1999 tentang Perubahan atas Undang-undang Nomor 14 Tahun 1970 tentang Pokok-pokok Kekuasaan Kehakiman*) moved the organisation, administration and financial management away from the Ministry of Justice and Human Rights to the Supreme Court (*Mahkamah Agung*) (art 1(1)). This is to be the subject of an additional statute (art 1(2)). As a result, the judiciary will be freed from direct government interference in its affairs as administrative matters such as the appointment, promotion and remuneration of judges will not longer be under the jurisdiction of the Ministry of Justice and Human Rights. In an effort to raise the status of judges, the salaries of Supreme Court judges were increased effective from 1 January 2000.

In 2002, the United Nations Commission of Human Rights prepared a comprehensive report and recommendations for fostering greater independence of the judiciary, which notes the low salaries paid to judges and the low budget allocated to the running of the

court system as a whole.[65] This report noted that in 2001, approximately 750 judges were transferred, of whom 20 judges were transferred for misconduct.[66] Further substantial changes are being formulated at the time of writing. A Judicial Commission will be established to oversee the performance of the Supreme Court. The third amendment to the Constitution, introduced in 9 November 2000, reinforced the concept of independence of the judiciary where it provided that a Judicial Commission be formed for the proposal of judicial appointments with other authority to protect and enforce the honour and dignity of judges as well as their behaviour.[67] It remains to be seen how career development decisions will be made and whether they will be performance-based and consider specialist training or the quality of judgments delivered by a particular judge.

In a significant change to court authority, a major development has been the establishment of a Constitutional Court (*Mahkamah Konstitusi*) in the third amendment of the Constitution. The Constitution has been amended to include article 24C(1), which states:

> A Constitutional Court is authorised to adjudicate at the first instance, and in the form of a final decision, disputes regarding the constitutional validity of legislation.[68]

This is a significant expansion of judicial power.[69] Under previous law, the Supreme Court (*Mahkamah Agung*) only had limited powers of review. As mentioned above, it had the power to review regulations ranking lower than statutes, which meant that the Supreme Court could examine the validity of government regulations, presidential

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65 United Nations Commission on Human Rights, Report of the Mission to Indonesia, Civil and Political Rights Including Questions of: Independence of the Judiciary, Administration of Justice – Report of the Special Rapporteur on the Independence of Judges and Laywers, Dato' Param Cumaraswamy, Submitted in Accordance with Commission of Human Rights Resolution 2002/43 Report on the Mission to Indonesia 15-24 July 2002 E/CN.42003/65/Add.2 13 January 2003. paras 34-35.

66 ibid para 21.

67 Article 24B, third amendment to Indonesian Constitution.

68 *Mahkamah Konstitusi berwenang mengadili pada tingkat pertama dan terakhir yang putusannya bersifat final untuk menguji undang-undang terhadap Undang-Undang Dasar, memutus sengketa kewenangan lembaga negara yang kewenangannya diberikan oleh Undang-Undang Dasar, memutus pembubaran partai politik, dan memutus perselisihan tentang hasil pemilihan umum.*

69 At the time of finalising the thesis, the statute to bring the Constitutional Court into existence was being drafted for submission to the DPR by 18 August 2003. Notably, the Constitutional Court will also have the power to determine the validity of a request by DPR to the MPR to dismiss the President and/or Vice President on the basis that they have breached the law through an act of treason, corruption, bribery, or other act of a grave

decrees, ministerial decrees and regional regulations. In 2000, the MPR gave official recognition to the Supreme Court's authority to examine the validity of delegated regulations including regional regulations as a court of first instance in *TAPMPR No.III/MPR/2000* (art 5(2)&(3)). This Constitutional amendment is very significant for the conception of law in Indonesia: it grants power to the Courts to assess the validity of laws made by the legislature. In so doing, it gives an independent supervisory role to the judiciary, which is fundamental to the separation of powers doctrine.

Retreat from the official version of *Pancasila*

Since the end of the New Order in May 1998, attitudes to the past official version of *Pancasila* appear to have undergone a significant shift. In the 1999 - 2004 Broad Outline of State Policy (*Garis-Garis Besar Haluan Negara*)(GBHN)), the mission statement refers to developing an understanding of *Pancasila* that is consistent with the life of the community, the nation and the state. In the decision of the MPR No. 5 of 2000 on Stabilisation of National Unity and Integrity (*Ketetapan Majelis Permusyawaratan Rakyat RI No. V/MPR/2000 tentang Pemantapan Persatuan Dan Kesatuan Nasional*)(*TapMPR/V/2000*)) it is acknowledged that the philosophy of *Pancasila* has been misused to sustain the status quo and that it should become a national ideology that is open to discussion for the future vision of Indonesia.

A reconciliation between *Pancasila* and human rights appears in the Elucidation of Act No. 39 of 1999 on Human Rights (*Undang-undang No. 39 Tahun 1999 tentang Hak Asasi Manusia*) where it provides that the state has an obligation to acknowledge and protect human rights without exception. *Pancasila*, as the basis of the state, is said to conceive of the individual as possessing personal and social aspects and because of this, the personal freedom of one person is limited by the human rights of another. This obligation is said to extend to the state, which has the responsibility to respect, protect and guarantee human rights without exception. It also acknowledged that for over 50 years, the protection of human rights in Indonesia has been far from satisfactory.

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criminal nature, or through moral turpitude, or that the President or Vice President no longer meets the qualifications to serve as President and/or Vice President: article 7B.

In statutes passed since the end of the New Order, references to *Pancasila* are no longer coloured by spiritualism. *Pancasila* is mentioned plainly in *TapMPR/III/2000*, which

refers to the fundamental basis of national law as being '*Pancasila* as written in the Preamble to the Constitution' (art 1(3)).[70] There are a number of references to *Pancasila* in the regional autonomy statute, Act No. 22 of 1999 on Regional Government (*Undang undang No. 22 Tahun 1999 tentang Pemerintah Daerah*). These references concern the establishment of regional parliaments as a forum for the implementation of 'democracy based on *Pancasila*' (art 16) along with an obligation to 'defend and protect the unity of the Republic and put into practice *Pancasila* and the Constitution' (art 22).

That is not to say that *Pancasila* no longer has a prominent position in the conception of the Indonesian state. A reference to *Pancasila* as 'the basis of the state' is found in Act No. 4 of 1999 on the Arrangement and Positions within the MPR, DPR and DPRD[71] (art 1) as well as a reference to 'democracy based on *Pancasila*' (arts 33(1) & 34(1)). A reference to *Pancasila* state ideology is also found in Act No. 43 of 1999 amending Act No. 8 of 1974 on Government Employees,[72] where it is stated that a public servant will lose their position if they deviate from the state ideology, *Pancasila* or the Constitution (art 23(5)). Another reference is in Act No. 3 of 1999 on General Elections[73] in the formulation of a prohibition against violating the state ideology of *Pancasila* and the Constitution (art 47(1)(a)). In addition, oaths of office still refer to *Pancasila*. At issue is whether ongoing references to *Pancasila* have become detached from the romanticist conception of the law contained in the *integralistic state.*

The resurrection of human rights principles and beyond

Another significant development since the end of the New Order has been the shift in

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[70] In conducting a search of recent statutes for references to *Pancasila*, the following statutes were reviewed:
Act No. 2 of 1999 on Parliamentary Political Parties (*Undang-undang No. 2 Tahun 1999 tentang Partai Politik Dewan Perwakilan Rakyat*).
Act No. 3 of 1999 on General Elections (*Undang-undang No. 3 Tahun 1999 tentang Pemilihan Umum*)
Act No. 4 of 1999 on the Arrangement and Positions within the MPR, DPR and DPRD (*Undang-undang No. 4 Tahun 1999 tentang Susunan dan Kedudukan MPR, DPR dan DPRD*).
Act No. 28 of 1999 on State Administration Free from Corruption, Collusion and Nepotism (*Undang-undang No. 28 Tahun 1999 tentang Penyelenggaraan Negara Yang Bersih dan Bebas dari Korupsi, Kolusi dan Nepotism*)
Act No. 40 of 1999 on the Press (*Undang-undang No. 40 Tahun 1999 tentang Pers*)
Act No. 43 of 1999 amending Act No. 8 of 1974 on Government Employees (*Undang-undang No. 43 tahun 1999 tentang Perubahan atas Undang-undang No. 8 Tahun 1974 tentang Pokok-pokok Kepegawaian*)
Act No. 26 of 2000 on the Human Rights Court (*Undang-undang No. 26 Tahun 2000 tentang Pengadilan Hak Asasi Manusia*)

[71] *Undang-undang No. 4 Tahun 1999 tentang Susunan dan Kedudukan MPR, DPR dan DPRD*.

[72] *Undang-undang No. 43 tahun 1999 tentang Perubahan atas Undang-undang No. 8 Tahun 1974 tentang Pokok-pokok Kepegawaian*.

[73] *Undang-undang No. 3 Tahun 1999 tentang Pemilihan Umum*.

attitude to the recognition of human rights within the Indonesian legal system. In 2000, respect for human rights, along with legal consistency and supremacy of the law, was identified in *TapMPR/V/2000* as being necessary for national unity. In the vision statement of the GBHN, a system of government that guarantees supremacy of the law and human rights based on truth and justice is projected. The second amendment to the Constitution (art 28A-J) restored the comprehensive human rights provisions that had been set out in the 1949 Constitution. Responsibility for the protection, advancement, enforcement and fulfilment of human rights has been allocated to the government as its 'primary responsibility' (art 28I(4)). It is also stated that the enforcement and protection of human rights in accordance with the democratic rule of law is to be guaranteed through legislation (art 28I(5)). At the same time, the duty of individuals to ensure respect for human rights has been retained (art 28J (1)). There has also been established a Human Rights Court (Act No. 26 of 2000 on the Human Rights Court (*Undang-undang No. 26 Tahun 2000 tentang Pengadilan Hak Asasi Manusia*).

In addition, there are moves afoot to introduce the kind of rights that go beyond traditional human rights, such as the right to information. As mentioned in chapter 2, the access to information is essential for transparency and openness in governance, which in turn is the basis for accountability. A draft bill on Freedom of Information (*Rancangan Undand-undang No. … tahun 2002 tentang Kebebasan Memperoleh Informasi Publik*) is due to be discussed by parliament towards the end of 2003. The draft bill contains detailed provisions on the right to obtain government information and the respective obligations of government to provide information both on request and in the ordinary course of government activities.

Implications for law making

The fading of the *integralistic state* and a retreat from the previous official version of *Pancasila* may allow for an approach to law making that is concerned with a further strengthening of checks and balances between the respective arms of government. It may lead to a concept of government agencies constructed on the rights of citizens and the duties of government officials. It could lead to a greater focus on mechanisms to establish controls over the exercise of discretion by government and legal accountability in administrative decision-making. This possibility is strengthened by the increasing

recognition that is being given to human rights and the extension of this approach to rights to information and other forms of public participation that make up good governance.

A shift away from official *Pancasila* ideology could allow for the acknowledgement that legal mechanisms are needed to deal with situations where those in authority do not fulfil their obligations. It could provide an opening to break social patterns of subordination so that individuals and communities feel more entitled to assert their rights in relation to government and to others in the community that infringe their rights such as a right to a clean and healthy environment. Furthermore, it could lead to a greater acceptance of resolving such disputes through the courts rather than through the more traditional private forms of dispute resolution. This would require a focus upon remedies available through the courts and a more sanction-oriented approach to law making.

At a more fundamental level, if it is correct to assert that the conception of the *integralistic state* inhibited law's capacity to address social behaviour and social relations, the shifts in the vision of the social and legal order described above may open up the way to a different approach to law making. It may allow for a focusing on the formulation of impersonal rules applicable to both the government and the public to facilitate social change. It may also allow for an emphasis on a style of law making that values the importance of clarity, precision and simplicity. This would lay the groundwork for legal reasoning based on such rules; in other words, the development of a more rational legal system in which law making provides for, and law-finding is carried out by, the application of legal norms through the exercise of legal reasoning to the facts of a particular case.[74]

Conclusion

This chapter has explored ideas on political and constitutional theory. It has been observed that the pronouncement in the Constitution that the Indonesian state

[74] This is the fundamental requirement for a rational legal system: Roach Anleu, Note 44 at 21-23.

was a *Rechtsstaat* was later eclipsed by the concept of the *integralistic state*, a particular interpretation of *Pancasila* and a limited conception of the role of human rights in Indonesian society. It has been suggested that the mystifications contained in these notions are likely to have influenced attitudes to law making and the form and style of legislation in Indonesia.

It has also been suggested that the influence of the concepts of the *integralistic state* and the New Order version of *Pancasila* is waning. This could allow for a more rational approach to law making. It potentially opens up the way towards a legislative form that focuses on the creation of legal rules designed to facilitate change in social practices and behaviour. It may also allow for the development of a legal style that emphasises laws that are precise, clear and accessible.

As a further preliminary matter, the next chapter will take a closer look at legal positivism and the idea that there are minimum requirements for the existence of a legal system. It will introduce the Hartian idea that a legal system contains a certain arrangement of legal rules, which he called primary and secondary rules, and consider the implications for the existence of a system of environmental law in Indonesia.

CHAPTER FOUR

THE MINIMUM REQUIREMENTS FOR A LEGAL SYSTEM

Introduction

This chapter is concerned with the identifying the essential features of a legal system, with a view to determining how to characterise the system of environmental law in Indonesia. It looks more closely at the positivist conception of law and explores the idea that there are minimum requirements for the existence of a legal system. The general concept of law as conceived by HLA Hart is presented, namely, his idea that a legal system consists of the union of primary rules regulating conduct with secondary rules governing the recognition, change and adjudication of primary rules.[1] This is done with the intention of shedding light on the system of environmental law in Indonesia as a sub-system of the legal system as a whole.

Hart's ideas have been selected for attention as he sought to provide a general descriptive theory of what law is, in a sense that is not tied to any particular legal system or legal culture. He describes the common structures, forms and content of legal systems. This theory offers techniques of conceptual elucidation as well as analytical and descriptive tools for comparison between legal systems.[2] In addition, it accords with normative ideas from political and constitutional theory that support the concept of *Rechtsstaat* discussed in the last chapter and the rule of law model of government, which is discussed in the next chapter.

The first part of this chapter briefly outlines the Hartian general concept of law. Hartian concepts are applied to the Indonesian legal system and tentative conclusions are drawn as to insights that it provides. This is followed by a presentation of Tamanaha's critique of Hart's theory and his alternative approach of socio-legal positivism, which he claims

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1 HLA Hart, *The Concept of Law*: *with Postscript edited by Bullock PA and Raz* J (England: Clarendon Press, Oxford, 2nd Ed., 1994) 98.

2 Twining has argued for the revival of general analytical jurisprudence drawing on the techniques of elucidation of Hart and others and in this context the need for 'comparators' - that is standards, measures or indicators that provide a basis of comparison between legal systems under the rubric of comparative law: Twining W, *Globalisation and Legal Theory* (London: Butterworths, 2000) 187-192.

to be more appropriate in relation to non-western legal systems. Observations are then made about outstanding issues to be resolved in Tamanaha's position.

The discussion looks at the implications of the theory of primary and secondary rules for Indonesian environmental law, as a legal sub-system. An issue that arises is whether the present system can be described as a functionally weak and deficient system, even an almost wholly ineffective system, or whether we should we go further and question its very existence. It is suggested that these are serious questions but that neither the analysis of Hart or Tamahana is fully satisfactory. The issues raised are confronting and demonstrate the need for a critical attitude to law reform that does not merely focus on the topics of particular statutes, regulations and guidelines but which also addresses the underlying conditions necessary to bring environmental law as a legal sub-system to life in Indonesia.

1. THE HARTIAN GENERAL CONCEPT OF LAW

Legal positivism

Positivism has two central tenets: the so-called "social thesis" (what counts as law in a given society is a matter of social fact – that which is posited); and the "separability thesis" (there is no necessary connection between law and morality).[3] Positivists differ on the interpretation of these theses; for example, there is a widely accepted gulf between inclusive legal positivism, which allows moral principles to count as law, and exclusive legal positivism, which distinguishes between legal status and moral argument.[4] In this thesis, it is not intended to delve into debates between legal positivists but rather to explore the concept of one of its most influential proponents.

Hartian positivism: a legal system as the merger of primary and secondary rules

The legal positivist analysis undertaken by HLA Hart is still recognised as the most

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3 As summarised by Freeman MDA, *Lloyds Introduction to Jurisprudence* (London: Sweet and Maxmell, 7th ed., 2001) 334.

4 ibid., at 334.

successful attempt at achieving the objective of general jurisprudence.[5] He undertook a predominantly conceptual analysis in which he claimed to discern the essence of law. Hart responded to earlier legal theories of law that emphasised orders, obedience, habit and threats by saying they were inadequate, as they could not accommodate familiar features of a modern state.[6] He said that first, they do not explain that the same laws apply to those who give orders as those who receive them. Second, some forms of law confer power to adjudicate or legislate, which cannot be conceived of as being orders backed by threats. Third, a conception of law needs to account for the continuity of legislative authority.[7] He went on to say that the root cause of the failure of past theories of law was that they did not yield 'the idea of a rule, without which we cannot hope to elucidate even the most elementary forms of law'.[8] Central to his theory is the idea that a legal system consists of the union of primary rules regulating conduct with secondary rules governing the recognition, change and adjudication of primary rules.[9]

Primary rules are rules that require human beings to do or to abstain from doing, certain things. They impose obligations and involve actions concerning physical movement or change.[10] Although primary rules can exist without secondary rules, if they do so, they will not form a legal system. Secondary rules are called secondary rules because they presuppose the existence of primary rules; they have no reason to come into being without the existence of primary rules. Secondary rules are on a different level to primary rules, as they are *about* such rules.[11] The difference between the two forms of rules, according to Hart, is that whilst primary rules can be construed as orders backed by

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5 Tamanaha BZ, "Socio-Legal Positivism and a General Jurisprudence" (2001) Vol 21 No 1 *Oxford Journal of Legal Studies* 1-32 at 1. Freeman considers that contemporary analytical jurisprudence – and not just in the English-speaking world – owes much to Hart, see Freeman, Note 3 at 333-334. A new version of legal positivism has developed in recent times as part of a wider political philosophy of democratic positivism. Known as ethical-legal positivism, it argues for clear and unambiguous legal rules that impose limits on government and retain power within the legislative forum rather than transfer power to the courts to shape law according to their own values and preferences: Campbell T, "The Point of Legal Positivism" (1998) Vol 9 *Kings College Law Journal* 63-87 at 79-81. A relationship between what is known as progressive constitutionalism and legal positivism has also been identified in the USA: Sebok AJ, "Misunderstanding Positivism" (1995) *Michigan Law Review* 93 2054-132.

6 Hart, Note 1 at 79. For a discussion of Bentham's imperative theory of law in which the key concepts are sovereignty and command as well as Austin's approach to law as command, see Freeman, Note 3 at 200-220.

7 Hart, Note 1 at 79.

8 ibid., at 80.

9 ibid., at 98.

10 ibid., at 81.

11 ibid., at 94.

threats, the same cannot be said of secondary rules.[12] Primary rules impose duties, secondary rules confer powers:[13] public powers to adjudicate or legislate or private powers to create or vary legal relations.[14] However, not all secondary rules are enabling or power conferring: secondary rules also include the rule of recognition which does not confer power but rather *shows* the conditions for validity of other rules.[15]

The rule of recognition

A regime of primary rules will be uncertain unless there is a way of identifying which rules should be properly accepted as rules and which rules should not. The remedy for the *uncertainty* of a regime of primary rules is, according to Hart, the existence of a rule that recognises other rules.[16] A central proposition put forward by Hart is that a distinct legal system is created when a community follows a fundamental rule that stipulates how legal rules are to be identified, which he called the 'rule of recognition'. He said that the foundations of a legal system are established 'when a secondary rule of recognition is accepted and used for the identification of primary rules of obligation'.[17]

The rule of recognition is very seldom expressly formulated as a rule,[18] rather it is *shown* by the way in which particular rules are identified, either by the courts or other officials or private persons or their advisors.[19] The rule of recognition may be relatively simple: it may simply state that law is whatever the king decrees. In a modern legal system, it is likely to be more complex, relying on multiple criteria for identifying a law, which will commonly include a written constitution, legislation and judicial precedents. The criteria are likely to be ranked in order of subordination and primacy.[20] According to Hart, in developed legal systems, there is likely to be a complex rule of recognition, with a hierarchical ordering of distinct criteria maintained in the general practice of identifying the rules by such criteria.[21] In some systems of law, legal validity may specifically

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12 ibid., at 79.
13 ibid., at 81.
14 ibid., at 79.
15 As observed by Raz J, *The Authority of Law – Essays on Law and Morality* (England: Clarendon Press Oxford, 1979) 93.
16 Hart, Note 1 at 94.
17 ibid., at 100.
18 ibid., at 101.
19 ibid., at 101.
20 ibid., at 101.
21 ibid., at 101.

incorporate principles of justice or substantial moral values that form the content of the legal constitutional constraints.[22]

The distinguishing feature of the rule of recognition is that it provides the criteria for the assessment of the validity of other rules in the system. According to Hart, the rule of recognition is the *ultimate rule* in that 'where there are several criteria ranked in order of relative subordination and primacy, one of them is *supreme*'.[23] It is also the only rule in a legal system whose binding force derives from its acceptance by society, rather than from fulfilling criteria of validity as set out in the legal system.[24] It also provides the means to resolve conflicts between laws.[25] The existence of the rule of recognition is shown by the behaviour of the 'officials' of the system, by which Hart probably means the law-applying officials.[26] The logical form of a rule of recognition (although this would not need to be written) would be:[27]

> All law-applying officials have a duty to apply all and only laws that satisfy the following criteria.

Expressed slightly differently, the rule of recognition could be stated as:

> *If* a law satisfies the following criteria *then* all law-applying officials must apply that law.

Other secondary rules

Rules of change

The idea of rules of change was developed by Hart when he considered the static quality of a system that consists solely of primary rules. The role of the secondary rule of change is to enable a legal system to renew itself: to expand, reduce or alter the content of primary rules so that a legal system can adjust to the changing circumstances and needs of society. As a class of rule, secondary rules of change include provisions that confer power on a national or regional parliament to pass legislation concerning certain

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22 ibid., at 247.
23 ibid., at 105-106.
24 Hart does not agree that all laws are essentially or 'really' the product of legislation. For example, in the Anglo-American system, common law owes its legal status, not to legislative power but to the acceptance of a rule of recognition that accords it an independent though subordinate place in the legal system: Hart, Note 1 at 101.
25 Raz, Note 15 at 91.
26 At least, according to Raz, Note 15 at 92.
27 ibid., at 93.

subject matter.[28] Such provisions will provide criteria of validity that can lead to a rule of change being formulated by way of judicial precedent, if there is a system of binding precedent in place.

Rules of adjudication

According to Hart, rules of adjudication are secondary rules that empower individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken.[29] Such rules confer judicial power and set out the procedure to be followed in the exercise of that power.[30] They are also closely related to other secondary rules, particularly the rule of recognition.[31] An example of a rule of adjudication would be a rule setting up the jurisdiction of a court to determine certain types of disputes or a rule governing the procedure to be followed by the parties to a dispute in bringing it to hearing.

Another example of a rule of adjudication would be system of binding precedent in common law. Notably, this system has not been adopted in Indonesia. Although it is generally accepted that judges will follow a judgment of the Supreme Court or High Court, this is said to be for practical reasons or because they are of the same opinion.[32] Such judgments are referred to as *yurisprudensi* and are regarded as being persuasive;[33] however, the hierarchical concept of binding precedent and a system of reasoning developed around whether or not a decision in a higher court should be followed by a lower court based on the facts of a case does not apply in Indonesia. Indeed, a practical reason why this does not happen is that judgments are not readily available, even for members of the judiciary.

The pure form of these rules, as they relate to the judiciary, will not be discussed in the thesis. However, rules of adjudication also arise in the exercise of administrative power. The exercise of quasi-judicial discretionary authority by administrative agencies is an

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28 Hart, Note 1 at 95-96.
29 ibid., at 96.
30 ibid., at 97.
31 ibid., 1 at 97.
32 Soetami AS, *Pengantar Tata Hukum Indonesia* (Introduction to Indonesian Administrative Law) (Indonesia: Refika Aditama 3rd ed., 2002) at 26
33 Kusumaatmadja M dan Sidharta BA, *Pengantar Ilmu Hukum – Buku 1* (Introduction to Legal Science – Book 1) (Indonesia: Alumni, 2000) at 69.

important aspect of environmental management. An example of a rule that governs the exercise of quasi-judicial discretionary authority is one that sets out matters to be taken into account in deciding upon licensing application (a substantive rule) or a rule on a procedure in processing an application (a procedural rule).

Private power-conferring rules

Hart does not go into detail concerning private power-conferring rules apart from saying that they are secondary rules that confer power on individuals to vary their initial positions under primary rules. He says that operations made possible by such rules are the making of wills, contracts, transfer of property and many other voluntarily created structures of rights and duties.[34] These rules will not be discussed in the thesis, as they relate to private law.

PPLYING HARTIAN LEGAL POSITIVISM TO INDONESIAN ENVIRONMENTAL LAW

The next chapter will seek to extend the basic concepts in the Hartian approach so that it can be more readily applied to environmental law. At this stage, some preliminary observations will be made on aspects of environmental law that come into focus when applying these conceptual tools and the implications for environmental law in Indonesia.

Identifying primary and secondary rules

Primary rules require human beings to do or to abstain from doing certain things. In environmental law, they are the rules that make up the regulatory aspect of environmental law. It will therefore be necessary to locate such rules within the text of environmental legislation and to identify the features of legal drafting which indicate that human beings are required to do, or to abstain from doing, certain things.

Hartian secondary rules in environmental law in Indonesia would consist of the following:

- criteria of validity contained in conferral of public power to pass legislation and policy on environmental protection

- rules of adjudication
- the rule of recognition.

Rules of adjudication will not be considered here. They are relevant as they relate to the functioning of the court system generally; however, they do not specifically concern environmental law.

Of particular importance for passing environmental law are the Hartian secondary rules of change. In Indonesia, the Constitution of Indonesia contains some secondary rules of change. Other rules are contained in the legal hierarchy set out in Decision of the MPR No. 3 of 2000 on Sources of Law and the Order of Legislation (*Ketetapan Majelis Permusyawaratan Rakyat Nomor III/MPR/2000 tentang Sumber Hukum dan Tata Urutan Peraturan Perundang-undangan*)(*TapMPR/III/2000*), mentioned in the last chapter. These are the rules through which government officials engage in producing and reproducing the legal system in Indonesia. *TapMPR/III/2000* also provides limited information on each source of law. It states that authority for creating statutes derives from the Constitution and decisions of the MPR (art 3(3)). Government regulations are stated to be instruments created by the government for the realisation of statutes (art 3(5)). Presidential decrees are regulations passed by the President to put into effect the functions and tasks of state and government administration (art 3(6)). Regional regulations are stated to realise higher law and make provision for regional conditions (art 3(7)). *TapMPR/III/2000* also states that in accordance with the legal hierarchy, a lower legal rule is not permitted to conflict with a higher legal rule (art 4(1)).

TAPMPR/III/2000 provides criteria for the validity of legal instruments in Indonesia; however, it is quite rudimentary. It does not contain sufficient information to guide legal drafters in deciding whether a measure should be contained in a statute, regulation, presidential decree or non-binding guideline; neither does it clearly indicate when a legal measure is suitable to be passed by central government, provincial or district government. Rules concerning specific aspects of governance are contained in the regional autonomy law and will be discussed in chapter 7. It will be suggested that there is a high level of uncertainty about secondary rules, particularly in the context of regional autonomy.

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[34] ibid., at 96.

Looking for the rule of recognition in Indonesian law

Where are the authoritative criteria?

In identifying the rule of recognition in Indonesia, a rule needs to be found that specifies the feature or features the possession of which is conclusive affirmation that a primary rule is valid. A question arises - is there an authoritative text, a legislative enactment, customary practice or *yurisprudensi* that contains such rules? As Hart said, in a modern legal system the rule of recognition is likely to be complex, relying on multiple criteria for identifying a law, which will commonly include a written constitution, enactment by a legislature and judicial precedents.

Using on Hart's chain of reasoning in relation to the validation of a county council by-law in England,[35] we can see that in a challenge to the validity of a regional regulation in Indonesia, the issues that are likely to arise include a number of steps that proceed up the legal hierarchy as follows:

1. A rule would need to exist to the effect that the regional regulation will be valid if it is passed in accordance with powers conferred on the region to pass regulations. This rule may not be expressly stated within the legislative scheme but will be created within *yurisprudensi* when a dispute over the validity of a regional regulation is adjudicated. There would need to be a provision within the statutory order providing the criteria of validity. A provision is contained in *TapMPR/III/2000*, which states that a regional regulation implements higher law and makes provision for regional conditions (art 3(7)). Another provision would be found in the list of areas of competency for law making by regional government contained in the regional autonomy law (discussed in chapter 7). There may also be procedural rules that bind regional government on the circumstances and process for making regional law.

2. If the validity of a government regulation as the 'higher law' were questioned, it would be assessed in terms of the conferral of power to make the government regulation. *TapMPR/III/2000* states that government regulations are instruments created by the government to implement statutes (art 3(5)). This could be interpreted as stating that only

[35] ibid., at 107.

a government regulation that implements a statute is a valid government regulation. Criteria of validity may also be found in regional autonomy law setting out the law making powers of the central government.

If the validity of a statute, as the 'higher law' were questioned then it would be assessed in terms of central government power to pass statutes as set out in the Constitution and adjudicated upon by the Constitutional Court.

Change within the rule of recognition in Indonesia

As mentioned in chapter 3, before *reformasi*, judicial power to review legislation was limited. This meant that in effect there was a rule of recognition which stated that whatever was passed by the DPR as a statute was law. This was a clear rule of recognition. It was the *ultimate rule* as there is no rule providing criteria for the assessment of its own validity. It was also exhibited in the practice of the Indonesian parliament.

This situation has now changed with the creation of judicial power to review the constitutionality of statutes. As stated by Hart, the rule of recognition is 'a complex, but normally concordant, practice of the courts, officials and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact'.[36] Changes brought by *reformasi* have laid the path for a stronger role for the judiciary. In addition, it is possible that a more complex rule of recognition will develop: one that relies on multiple criteria for identifying a law, which will include the Indonesian Constitution, enactments by the legislature and *yurisprudensi*.

[36] ibid., at 110.

3. CRITIQUING THE HARTIAN GENERAL CONCEPT OF LAW: THE CHALLENGE OF SOCIO-LEGAL POSITIVISM

Recently, a critique of Hartian positivism has been provided by Tamanaha.[37] He proposes socio-legal positivism as an alternative to Hartian legal positivism, and argues that it more accurately represents a conception of law from a non-western perspective. In establishing his critique, he focuses on divergences within Hart's theory between the theoretical components of essentialism, conventionalism and functionalism. The aspect of Hart's legal positivism that is essentialist is where he seeks to identify characteristics that are essential to the existence of law. In contrast, conventionalism looks at ordinary usage or social practice to identify social phenomena.[38] Functionalism assumes law's efficacy, that is, a legal system's capacity to act as a means of controlling and guiding human conduct.[39]

A single concept of law?

Tamanaha argues that whilst Hart was substantially correct in his identification of primary and secondary rules, his abstraction from state law provided too limited a base upon which to structure a general jurisprudence.[40] He says that Hart felt compelled to identify a single concept of law – *the* concept of law. Tamanaha objects to the assumption that there must be a single standard or central case because it is too narrow to account for the complex presence of legal phenomena, especially in non-Western countries.[41] He also says that modern legal-anthropological thought would reject the proposition that societies lacking developed secondary rules in the form of a rule of recognition are 'pre-legal', as they may still have sophisticated means to identify, interpret and apply their social norms. Tamanaha sees a divergence between the conventionalism and essentialism in Hart's theory. He says that Hart used conventionalism in a limited way by relying on social acceptance to identify the rule of recognition, but once identified, he moves to a

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37 Tamanaha, Note 5 at 1-32.
38 ibid., at 3-4.
39 ibid., at 4.
40 ibid., at 1.
41 ibid., at 17.

predominantly essentialist approach to discern the *essence* of law: he cannot claim to have discerned the essence of law when he is actually relying on convention.[42]

Taking an alternative approach, Tamanaha accepts that societies contain different social phenomena that are recognised as 'law' by those societies. On this basis, there may be different types of laws, each with their own characteristic features.[43] Types of law that are not included within the Hartian approach are customary law and international law. Tamanaha argues these types of law can no longer be seen as pre-legal or imperfect examples of law.[44] The conventionalist conceptualisation of law put forward by Tamanaha recognises these forms as 'law' and not merely pre-legal forms. This approach enables acceptance that there are different kinds of law, each of which has a social existence with its own characteristic features.[45] When applied to Indonesia, it means that law becomes 'law' as long as it is conventionally referred to as 'law' and 'it involves norms that claim authority'.[46] This aspect of Tamanaha's critique is not directly relevant to environmental law, which is state law, but it provides useful background to other aspects of Tamanaha's critique and his emphasis on the need for a consistent approach.

The efficacy problem: when a legal system does not maintain order or guide conduct

Hart's position

Tamanaha also observes that Hart's theory contains a potential internal divergence between essence and function; this aspect of his critique has direct relevance for environmental law in Indonesia. He says that although Hart claims to have discerned the *essence* of a legal system, he actually focuses on its *function*. This affects conclusions to be drawn about the existence of a legal system where it consists of primary and secondary rules, but they do not function to maintain order or guide conduct, as is arguably the situation in Indonesian environmental law. At issue in Indonesia is whether the system of environmental law is merely an ineffective system, or even an almost

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42 ibid., at 3.
43 ibid., at 18.
44 This is relevant to customary (*adat*) law and Islamic law, which exist independently alongside state law in Indonesia. See also, Dworkin RM, "Is Law a System of Rules?" in Dworkin RM (ed.), *The Philosophy of Law* (USA: Oxford University Press, 1977) 38-65 at 63.
45 Tamanaha, Note 5 at 18. Tamanaha is of the view that "Law is whatever people identify and treat through their social practices as 'law'", at 27.
46 ibid., at 28-29.

wholly ineffective system, or whether it would be more accurate to describe it as a system that has not actually come into existence.

Whilst Hart did not explicitly link law's structural essence to a function, he has two minimum conditions necessary and sufficient for the existence of a legal system, which Tamanaha argues means that he has linked essence with function. The first condition identified by Tamanaha, is that primary rules must be generally obeyed. This is apparent where Hart says:

> … rules of behaviour which are valid according to the system's ultimate criterion of validity must be generally obeyed.[47]

In relation to primary rules, Tamahana argues that Hart has been influenced by functionalism in his requirement that the populace generally obey primary rules as a minimum condition for the existence of a legal system.[48]

The second of Hart's conditions identified by Tamanaha, is that secondary rules need to be accepted and used for the identification of primary rules of obligation. Hart says that this situation is the foundation for a legal system.[49] 'Acceptance' of a secondary rule was said by Hart to differ from 'obedience' to a primary rule, which involves a critical attitude to whether an action or behaviour is 'right', 'correct' or 'obligatory'. Secondary rules are obeyed for other reasons unrelated to obligation, so that a personal attitude is not involved.[50] According to Hart, the minimum requirement is that:

> … rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of officials by its officials.[51]

Tamanaha says that it is apparent that Hart's rule of recognition is functionalist in the sense that to exist, it must function as a means of controlling and guiding human conduct

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47 Hart, Note 1 at 116.
48 Tamanaha, Note 5 at 4 and 10.
49 Hart, Note 1 at 100.
50 ibid., at 115-116.
51 ibid., at 116.

and that the same conclusion may be drawn in relation to his theory of secondary rules.[52]

Socio-legal positivism – Tamanaha's position

According to Tamanaha, there are two ways of characterising a divergence between essence and function:[53]

(a) Law's essential structure (primary and secondary rules) is conceptually joined with its function, so that to qualify as law, a system of primary and secondary rules necessarily maintains order and guides conduct. If it does not achieve this purpose then it will not qualify as a legal system.

(b) The connection between law's essential structure (primary and secondary rules) and its function is contingent. Law will exist when its essential characteristics are satisfied (where a system of primary and secondary rules is present), even if this system fails to fully function. This enables a legal system to be characterised as such, but as one that is functionally weak or deficient.

Tamanaha argues for dropping the efficacy requirement contained in the first characterisation. He says it is inconsistent with social reality, particularly in legal systems in formerly colonized countries that have a component of transplanted law.[54] Many early colonial legal systems did not attempt to exert social control over the majority of the population even though they claimed general authority over the territory. He argues that there was no question, at least by those in control, that legal systems existed in these countries.[55] Another argument against the efficacy requirement, according to Tamanaha, is that it fails to provide criteria to specify how much efficacy is enough.[56] It does not allow for an assessment of increases and decreases in efficacy,

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52 Other jurists require a level of obedience to law. For example, Kelsen states "A norm that is not obeyed by anybody anywhere, in other words a norm that is not effective at least to some degree, is not regarded as a valid legal norm. A minimum of effectiveness is a condition of validity."- Kelsen H, *Pure Theory of Law* Knight M (trans.), (USA: University of California Press, 1967) 11. Also, Lasswell and Kaplan state that "Laws are not made by legislatures alone, but by the law-abiding as well: a statute ceases to embody a law (except in a formal sense…) in the degree that it is widely disregarded." See Lasswell H and Kaplan A, *Power and Society – A Framework for Political Inquiry* (New Haven: Yale University Press, 1950) 75.

53 Tamanaha, Note 5 at 9-10.

54 ibid., at 12.

55 ibid., at 13.

56 ibid., at 13.

rather the issue becomes whether or not a legal system passes a threshold in efficacy thereby coming into or going out of existence.[57]

Whilst this review of Tamanaha's critique does not consider all his arguments, in summary Tamanaha:[58]

(a) retains Hart's abstraction of primary and secondary rules at the core of legal systems;

(b) eliminates the requirement that primary rules must be generally obeyed by the populace; and

(c) eliminates the requirement that legal officials effectively accept secondary rules.

As a result, according to Tamanaha, a legal system can be said to exist even where '… no one accepts the legal rules governing conduct and the officials minimally accept the secondary rules.'[59] The minimum requirement is that there are legal actors who engage in producing and reproducing a legal system through shared secondary rules, regardless of their efficacy in generating widespread conformity to the primary rules.[60]

This position is attractive as it simplifies the task in relation to characterising the existence of a legal system or legal sub-system in a country like Indonesia. However, the attraction is superficial as it glosses over a number of difficulties. Tamanaha admits there are remaining areas to be developed such as *who* it is that identifies phenomena as 'law' and *how many* people must view something as 'law' for it to qualify as such.[61] In relation to *who*, Tamanaha says that any member of a given group can identify what law is, as long as it constitutes a conventional practice. In relation to *how many*, he says that it is necessary for sufficient people, with sufficient conviction, to consider something as 'law', and to act pursuant to this belief in ways that have influence in the social arena.[62] He admits that this is a vague test, but says that it is intended to set a threshold for

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57 ibid., at 13-14.
58 ibid., at 21.
59 ibid., at 20.
60 ibid., at 15.
61 ibid., at 28.
62 ibid., at 28.

inclusion so that law in this non-essentialist approach is whatever people recognise and treat as law through their social practices.

It is suggested that in relation to the *who* question, Tamanaha's approach does not deal adequately with the possibility of different perceptions across society. For example, an elite minority may consider that society is governed by a legal system, whilst the vast majority may conclude that, for them, there is no legal system to protect their interests. In relation to a legal sub-system such as environmental law, central government bureaucrats may be busily engaged in creating law that has little relevance for those at the local level, or those seeking to enforce rights or obligations contained in such law. The tests for *who,* and *how many*, each concern social practices. It requires an assessment to be made of the extent of social practice in terms of numbers of people and the degree of influence of their actions. This comes close to an efficacy requirement.

Another area of difficulty is Tamanaha's treatment of secondary rules, which does not appear to be fully developed. On the one hand, he eliminates the requirement that legal officials 'accept' secondary rules and on the other, he says that a legal system can be said to exist whenever legal actors engage in producing and reproducing a legal system through shared secondary rules. According to Tamanaha, under a socio-legal positivist view:[63]

> …a legal system will exist when there is a complex of 'legal' actors (conventionally identified as such) who coordinate their actions to do things with norms. The very fact of coordination requires some agreement in their social practices, which would be satisfied by shared adherence to the secondary rules. If, for example, legislators promulgate laws and judges agree about which laws are validly enacted, and take action to apply them, a legal system will exist.

He says that this can be true, without the need to consider whether or not legal officials *accept* the primary or secondary rules or whether primary or secondary rules are generally obeyed. It would seem that a minimum condition in relation to secondary rules is a recognition of and adherence to secondary rules by legal officials. Whether or not this amounts to 'acceptance', as Hart used the word, may not make any difference in practice.

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[63] ibid., at 20.

An aspect that is only briefly dealt with under socio-legal positivism, which is relevant to legal efficacy, is the importance of recognition by law-applying organs for the existence of a particular law within a legal system. Recognition by law-applying organs was proposed by Raz as a possible solution to 'the efficacy problem'. Raz said that a law is part of a legal system only if it is recognised by legal institutions, with the emphasis on the law-applying rather than the law-creating institutions.[64] Raz gives three justifications for this proposition:[65]

1. Law-applying institutions are a constant feature of law in every type of society and their existence should be a defining characteristic of law.

2. Since most legal systems recognize diverse sources of law, the only way to determine which are the law-making institutions and procedures of a given legal system is to establish which sources of law are recognized by the courts.

3. It is an essential feature of legal systems that they are institutional, normative systems. When the actions of law-creating and law-applying organs conflict, law-applying organs have final authority to declare what is the law.

Thus, Raz argues that efficacy is relevant where it relates to the practice of the courts. It follows that law not applied by the courts will not be part of the legal system, even if it was lawfully enacted and not repealed. If the courts consistently interpret a statute contrary to its original meaning, their reading of it, not its original sense, becomes law. This is a more satisfying resolution than that provided by Tamanaha.

The efficacy problem in Indonesian environmental law

The above discussion leads to the question of the impact of the efficacy requirement in general jurisprudence for the existence of a system of environmental law in Indonesia. Is it necessary for the existence of a system of environmental law that primary rules actually maintain order and guide conduct? Understanding the implications of a conceptual link between function and essence in Hart's theory is particularly relevant where primary rules are ignored or treated simply as options.

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[64] Raz, Note 15 at 87. As noted by Raz, a large number of authors – among them Holland, Gray, Salmond, Holmes, Llewellyn and Hart opt for this approach, at 89.

Difficulties in enforcing the law in Indonesia are well-known. They include political interference in decision-making, the susceptibility of judges to bribery, delay in finalising disputes, a lack of legal reasoning, contradictory judgments and an absence of means to enforce judgments.[66] In these circumstances, the legal system in Indonesia frequently does not function: laws are not applied, violations of the law are not prosecuted and law enforcement actions fail because of irregularities in the judicial process. The poor quality of court decisions is a problem right across the legal system and has persisted into the post-Suharto era.[67] There have been some notable convictions for public wrongdoing; however, continuing irregularities in judicial decision-making are apparent.[68] In September 2002, the extent of the lack of public trust in the court system was revealed in a survey conducted by the national daily newspaper *Kompas* in which 87.6 percent of those surveyed were of the opinion that the administration of legal sanctions against those who had broken the law was not just, fair or equitable.[69]

In relation to environmental law, the uncontrolled use of the environment as a sink for all forms of waste is something that can be observed by anyone in Indonesia; there is very

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[65] ibid., at 88.

[66] Some of these aspects are noted by Pangestu M and Bhattacharya A, *Indonesia: Development Transformation and Public Policy* (Washington DC: World Bank, 1993) 41.

[67] The record of independent decision-making since the change in government has been disappointing. The continuing inability of the courts to deal consistently with corrupt government and business practices has continued since the fall of the Suharto government. It has been proposed that many aspects of the judiciary need to change, including education and training, the system of selection and promotion, the status of different levels of the judiciary and legal information systems, see *Consortium Reformasi Hukum Nasional Lembaga Kajian dan Advokasi untuk Independensi Peradilan, Menuju Independensi Kekuasaan Kehakiman* (Jakarta: ICEL and LeIP, 1999).

[68] "Reforming the Justice Sector" in The World Bank, *Maintaining Stability, Deepening Reforms: The World Bank Brief for the Consultative Group on Indonesia*. Report No. 25330-IND (Washington DC: The World Bank, 2003) 29-42 at 36. A notable conviction was the conviction of the son of the former president, Tommy Suharto, to 15 years jail for the manipulation of Rp 95.4 billion funds of a government agency in a landswop deal, the murder of a Supreme Court judge, illegal possession of firearms and escape from custody. Also the conviction of Bob Hassan, former director of PT Mapindo Parama and crony to former President Suharta, to 6 years jail for manipulation of $244 million from the forestry rehabilitation fund.

[69] "*Fokus - Potret Negeri Penuh Ketimpangan*" ('Focus – Portrait of a Country Full of Instability') *Kompas* (15 September 2002) 32. In the World Bank report "Reforming the Justice Sector" in The World Bank, *Maintaining Stabiltiy, Deepening Reforms: The World Bank Brief for the Consultative Group on Indonesia* Report No. 25330-IND (Washington DC: The World Bank, 2003) 29-42 it was said that the core problem facing the Indonesian judiciary is that they neither enjoy the trust nor the respect of Indonesian society and this lack of respect and trust arises from the widely held public view that there is a frequent abuse of power and the court system is deeply corrupt, at 29.

little control over environmental quality. In view of the fact that there are at least some primary rules in the system of environmental law, the condition of the environment points to widespread lack of compliance with such rules. Enforcement will be discussed in chapters 10 and 11. At this stage, it can be foreshadowed that the case studies show that in so far as judicial reasoning can be discerned, it often fails to address the words of legislation or to reveal reason-based decision-making.

In these circumstances, at a conceptual level, the Hartian theoretical requirements for the existence of a legal system are not met, as primary rules are not 'generally obeyed'; this challenges the existence of the system of environmental law, not just the effectiveness of the law. Such a conclusion may seem difficult to accept, particularly if one considers that there is a body of legislation in place, environmental institutions and a number of environmental cases have been decided upon by the courts in Indonesia. However, if 'general obedience' is a requirement for the existence of a legal system then it cannot be said to be fulfilled in Indonesia. As a result, the system does not effectively exist - even though there is a semblance of a system in place.

If Tamanaha's approach to the efficacy of primary rules is accepted, it is still necessary for 'sufficient people', with 'sufficient conviction' to consider something to be 'law', and to act pursuant to this belief, 'in ways that have influence' in the social arena. It is difficult to say whether these criteria are met in Indonesia: this may be a fruitful area for an empirical enquiry to measure the attitudes of lawmakers and law appliers as well as perceptions of the general public and those who are the subject of environmental law.

In relation to secondary rules, the question that arises under the Hartian approach is, do lawmakers 'accept and use' secondary rules when they make environmental law? If lawmakers reject or ignore secondary rules, this will show lack of acceptance. Where rules in the legal hierarchy and regional autonomy law are adhered to in law making they will be efficacious. However, efficacy will be undermined where the meaning of secondary rules is uncertain. In such circumstances, it will be difficult to assess the extent to which secondary rules are being deliberately used with a shared understanding. It will be recalled that even under Tamanaha's minimalist conditions, lawmakers must be able to engage in producing and reproducing a legal system through shared secondary rules. Therefore, the difficult question in Indonesia is – are the secondary rules contained

in *TapMPR/III/2000* and the regional autonomy law sufficiently clear to assess whether or not they are being followed with a shared understanding across the country? These issues will be discussed further in chapter 7.

Conclusion

This chapter has presented the conceptual basis within general jurisprudence for recognising the existence of a legal system and has raised questions about the existence of a system of environmental law in Indonesia. It has outlined Hart's concept of law, which sees a legal system as consisting of interrelating primary and secondary rules that perform specific functions. This provides the basis for the development of the schema of rules introduced in the next chapter that consists of legislative rules (the Hartian secondary rule of change), administrative rules (a hybrid of the Hartian secondary rule of change and rule of adjudication), and public regulatory rules (the Hartian primary rule).

Attention has been drawn to the possibility that the system of environmental law in Indonesia is not merely 'ineffective' or even 'dysfunctional' but is more accurately described as not being fully present: whilst some of the parts have been created, it does not effectively exist as a legal sub-system. The reason for characterising environmental law in Indonesia in this way can be found in the lack of general obedience to primary rules and the high level of uncertainty within secondary rules governing the creation of environmental law.

Even under Tamanaha's minimalist version of legal positivism, where compliance with primary rules is not a requirement for the existence of a legal system, there still needs to be 'sufficient people' with 'sufficient conviction' that something is a law. Furthermore, a level of certainty in interpreting secondary rules is required before lawmakers can engage in producing and reproducing a legal system through shared understanding of secondary rules. It seems that the issues for Indonesian law in general jurisprudence cannot be completely resolved by Tamanaha's socio-legal positivism. Indeed, to question whether a system of environmental law actually exists in Indonesia is a valid response to the current state of affairs.

CHAPTER FIVE

THE CONCEPT OF A 'LEGAL RULE'

Introduction

In chapter 3, it was observed that at the time of independence, Indonesia found itself with a very brief Constitution that did not fully endorse the concept of the separation of powers or give support to a legal rationalist conception of the legal system. Indeed, the Constitution states that as rules are binding it favours flexible rules.[1] This approach contains an inherent difficulty: a flexible rule may be the subject of conflicting interpretation regarding the circumstances in which it will bind. In light of this background, this chapter explores in greater depth the concept of the 'legal rule'.

In part one, the thesis returns to the discussion in chapter 3 concerning the concepts used to describe the Indonesian state. It looks at some meanings that have been ascribed to the Indonesian concept *negara hukum*. As it is more common in the *reformasi* era to hear calls for the rule of law, the formal meaning of 'the rule of law' is explored. It is shown that if a formal approach is taken to both *Rechtsstaat* and the rule of law, the role of the 'legal rule' is of central importance.

In part two, normativity in law and how it relates to the formulation of legal rules is considered. By way of preliminary clarification, norms within principles are considered and the formulation of policy is distinguished from the drafting of law containing legal rules. Permission-granting conferral of public power is discussed and distinguished from the normativity contained in the 'legal rule'.

In part three, norm creation through drafting legal rules is considered. A distinction is drawn between the legal rule, social rule and descriptive rule. The expression of commands and authorisations is presented and the use of the passive and active voice is

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[1] In Part 4 in the General Section of the Elucidation it is stated that "The Constitution is short and flexible in character" (*Undang-Undang Dasar Bersifat Singkat dan Supel*). It goes on to state: "Certainly, it is the nature of those written rules to be binding. For that reason, the more flexible (elastic) those rules are, the better" (*Memang sifat aturan yang tertulis itu mengikat. Oleh karena itu, makin "supel" (elastic) sifatnya aturan itu, makin baik*). This section of the Constitution has not been amended.

discussed. Finally, in part four, a schema of rule types is introduced that draws on the Hartian categories of primary and secondary rules. The rule types presented in the schema consist of legislative rules (the Hartian secondary rules of change), administrative rules (a hybrid of the Hartian secondary rule of change and rule of adjudication), and public regulatory rules (the Hartian primary rule).

1. THE 'LEGAL RULE' AND THE RULE OF LAW

Selective understanding of the rule of law in Indonesia

Under the New Order regime in Indonesia, the government used the phrase 'the rule of law' or the Indonesian variant *negara hukum* to further its own program. In *TapMPR/XX/1966*, the New Order government elevated the concept of *negara hukum* by stating that the 1945 Constitution is the supreme written law in the hierarchy of legislation and 'in accordance with the principles of *negara hukum*, each legislative product must be explicitly based upon and have as its source the legislation in force at the higher levels' (Part II (A) para 3). *Negara hukum* was also mentioned in the first Five-Year Development Plan (REPELITA) of 1969/70 where the MPR described it as consisting of three basic principles:

a. formal and substantive legality

b. an independent judiciary

c. recognition and protection of fundamental human rights.

Some encouragement of formal and substantial legality could be seen in the legal hierarchy within *TapMPR/XX/1966*, the grant of power to the Supreme Court to review regulations below statutes and the later establishment of the Administrative Court.

However, many aspects of the rule of law were not implemented during the New Order such as independence of the judiciary and human rights. Probably the most disturbing violation of the rule of law was the killings, yet to be fully acknowledged and investigated, that accompanied the installation of the New Order government in 1965-

1966.[2] There was also a failure to protect a wide range of human rights such as freedom of speech, freedom of assembly and no imprisonment without a trial.[3] This history supports the conclusion that the official pronouncements on the rule of law amounted to little more than co-option as a catch phrase to suit the purposes of the New Order government.

Within academic circles, there appears to be a number of versions of *negara hukum* in Indonesia. The synthesis of the ideas of *Pancasila*, *Rechtsstaat* and the rule of law within *negara hukum* has been interpreted differently by academic writers since independence.[4] *Negara hukum* itself has been synthesised with *Pancasila* to create a specifically Indonesian interpretation of the concept. In this view, expressed by Hadjon, the central point is not human rights expressed individualistically but harmony in relations between the government and the people.[5] *Negara hukum Pancasila* is said to have the following elements:

a. balance in relations between the government and the community based on the principle of agreement and harmony

b. a proportional relationship between state power or authority

c. support for resolution of disputes through negotiation and use of the court system as a last resort

d. balance between rights and obligations.[6]

This view is rejected by Mahfud, who argues the need for a more practical and less ambiguous approach, which does not allow such broad scope for interpretation.[7]

In contrast, Soemantri questions the implication of *Pancasila* ideology for *negara*

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2 See Cribb R (ed.), *The Indonesian Killings 1965-1966: Stories from Java and Bali, Second Edition, Monash Papers on South East Asia No 21* (Melbourne: Monash University, 1991).

3 See Thoolen H (ed.), *Indonesia and the Rule of Law – Twenty Years of 'New Order' Government: A Study Prepared by the International Commission of Jurists and the Netherlands Institute of Human Rights* (London: Frances Pinter (Publishers) Limited, 1987).

4 Mahfud shows how *negara hukum* has been interpreted differently by those writing on the topic, see Mahfud M, *Hukum dan Pillar-Pillar Demokrasi* (Law and the Pillars of Democracy) (Yogyakarta: Gama Media Offset, 1999) 138-145.

5 Hadjon PM, *Perlindungan Hukum Bagi Rakyat di Indonesia* (Legal Protection for the People of Indonesia) (Indonesia: PT Bina Ilmu, 1987) at 90.

6 ibid at 85.

7 Mahfud, Note 4 at 145-146.

hukum and finds the answer by going back to the part in the Elucidation of the Constitution that follows the provision on *Rechtsstaat* and which says that the system of government is a constitutional system in which authority is not absolute.[8] He concludes that this provision means that those that wield power within government must base their actions on legal norms and that it is the judiciary who has the task of upholding the constitution.[9] He sets out *negara hukum* based on *Pancasila* as consisting of the following elements:[10]

a. recognition of the guarantee of human rights for citizens

b. the division of state power

c. the implementation of tasks and function of government based on law

d. an independent judicial authority that is free from influence by government or other parties.

During the New Order, there was another conception of *negara hukum* adopted by practising lawyers, who Lev observed to be its most articulate and generally most liberal spokesmen.[11] The concept of *negara hukum* was a powerful symbol for reform, a point of challenge and criticism of the New Order. As described by Lev, 'law movements'[12]

> ... led persistent demands to subject political authority and common social and economic processes to limits defined by a body of conceptually autonomous rules and applied by a similarly autonomous legal system.

Lev has analysed the sources of support for legal reform during the New Order and found that efforts to establish an Indonesian law state amounted to a challenge by the middle class and ethnic and religious minorities to patrimonial assumptions of political order.[13]

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8 Soemantri HR, *Bunga Rampai Hukum Tata Negara Indonesia* (Aspects of Administrative Law in Indonesia) (Indonesia: Penerbit Alumni, 1992) at 44.

9 ibid 47-48.

10 ibid at 49.

11 Lev DS, "Between the State and Society: Professional Lawyers and Reform in Indonesia" in *Indonesia: Law and Society* in Lindsey T (ed.), (Sydney: The Federation Press, 1999) 227-246 at 231.

12 Lev DS, "Judicial Authority and the Struggle for an Indonesian Rechtsstaat" *Law and Society Review* Vol 13 No 1 (1978) 37-71 at 39.

13 Lev, Note 12 at 37-71. Also Lev DS, "Social Movements, Constitutionalism and Human Rights: Comments from the Malaysian and Indonesian Experiences" in Greenberg D, Katz SN, Oliviero MB and Wheatley SC

Ideas that became the mainstay of protest from the late 1960s to the 1990s were the confining of executive authority, the protection of private citizens and interests, restoration of the separation of powers, judicial independence, judicial control over executive-bureaucratic authority and legal process in the political system overall.[14]

Towards a formal understanding of the rule of law

Immediately before the end of the New Order regime in 1998, the call for rule of law and *negara hukum* became part of the demand for *reformasi*.[15] The call for the implementation for the rule of law continues in Indonesia. To this end, some benefit is to be obtained by seeking common ground between ideals of the rule of law and *Rechtsstaat*. Hayek, who has been said to provide one of the clearest and most powerful formulations of the ideal of the rule of law,[16] said that:

> [s]tripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.[17]

This approach is formal as it emphasises the importance of form rather than content. In a similar vein, Selznick stresses process rather than content when he says:

> [t]he essential element in the rule of law is the restraint of official power by rational principles of civic order …. Legality imposes an environment of constraint, of tests to be met, standards to be observed, ideals to be fulfilled …. Legality has to do mainly with how policies and rules are made and applied rather than with their content.[18]

The formal idea that the law and its meaning must be fixed and publicly known in advance of its application and that it binds those applying the law, as much as those in regard to whom it is applied, has become familiar. Unger has said:

(eds), *Constitutionalism and Democracy Transitions in the Contemporary World* (USA: Oxford University, 1993) 139-158 on Legal Aid Bureaus (*Lembaga Bantuan Hukum*)(LBH).

14 Lev, Note 11 at 236-237.

15 Budiman A, "The 1998 Crisis: Change and Continuity in Indonesia in *Reformasi*" in Budiman A, Hatley B and Kingsbury D (eds), *Reformasi: Crisis and Change in Indonesia* (Australia: Monash Asia Institute, 1999) 41-58 at 43.

16 According to Raz J, *The Authority of Law – Essays on Law and Morality* (England: Clarendon Press Oxford, 1979) at 212.

17 Hayek FA, *The Road to Serfdom* (London: Routledge & Keagan Paul, 1944) 54.

18 Selznick P, *Law, Society and Industrial Justice*, (New York: Transaction Books, 1969) 5.

> In the broadest sense, the rule of law is defined by the interrelated notions of neutrality, uniformity, and predictability. Government power must be exercised within the constraints of rules that apply to ample categories of persons and acts, and these rules, whatever they may be, must be uniformly applied.[19]

More recently, in the context of the rule of law in Indonesia, Goodpaster has said:

> Rule of law systems, at least in ideal form, are characterised by widespread, general obedience to reasonably clear, enacted rules or authoritative interpretation of rules; in other words, rule-based behaviour.[20]

As described by Goodpaster, the existence of the rule of law will mean that citizens are aware of what will occur if they do or fail to do something. In this way, the law stands outside the activities of both government and citizens, who each have rights and obligations, and accordingly are equally bound by it. The law operates to create 'structures of expectation'[21] that guide the behaviour of officials and the activities of citizens.

The conception of the rule of law presented above does not enter into the content of particular laws, fundamental rights or concepts of equality or justice. Taken literally, 'the rule of law' means that both government and the citizenry should be ruled by the law. However, to do so, the law must be capable of guiding the behaviour of its subjects: laws must be *capable* of being obeyed. Subjects must be capable of finding out what they are required to do and acting on it.[22] According to Raz, most of the requirements associated with the rule of law can be derived from this one basic idea.[23] Raz has identified the existence of certain principles in a legal system that will assist the rule of law as formally conceived. Those principles are:[24]

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19 Unger R, *Law in Modern Society* (New York: The Free Press, 1976) 177.

20 Goodpaster G, "The Rule of Law, Economic Development and Indonesia" in Lindsey T (ed.), *Indonesia: Law and Society* (Sydney: The Federation Press, 1999) 21-31 at 21.

21 Goodpaster, Note 20 at 21. Goodpaster uses a phrase from Luhmann NA, *A Sociological Theory of Law*, King E & Mackie M (trans.), Martin Albrow (ed.), (London, Routledge & Kegan Paul, 1985) at 73.

22 Raz, Note 16 at 214.

23 ibid.

24 ibid., at 214-219.

1. Laws should be prospective, open and clear.

2. Laws should be relatively stable.

3. The making of particular laws (particular legal orders) should be guided by open, stable, clear and general rules.

4. The independence of the judiciary must be guaranteed.

5. The principles of natural justice must be observed.

6. The courts should have review powers over the implementation of the other principles.

7. The courts should be easily accessible.

8. The discretion of crime-preventing agencies should not be allowed to pervert the law.

At this more formal level, there is an overlap between the *Rechtsstaat* ideal (as discussed in chapter 3) and the rule of law. Common to each ideal is the central importance of the separation of powers and an independent judiciary. This provides the necessary components for creating a stable environment characterized by neutrality, uniformity, accessibility and predictability. The division between judicial and legislative power and between judicial and executive power, allows lawmakers to devise policies that take into account political, social and economic considerations in accordance with democratic processes. Once policies have been settled, they are rendered into legal rules that bind citizens and government alike. The judiciary, as a separate body of authority, interprets and applies the law: they are not part of the primary policy making branches of government and are free from outside influence.

The role of the 'legal rule'

The 'legal rule' and the rule of law

It is at this point that there is an overlap between a formal conception of the rule of law

and the concept of the 'legal rule'.[25] At the risk of oversimplification, it can be said that the concept of the separation of powers and the importance of an independent judiciary is bound up with the idea that laws made by the legislature contain impersonal rules with an internal logic that can be applied by the courts through independent and reason-based decision-making. These rules, made by the legislature, will be generalised in their statement of the operative facts and have a consequence attached to the fulfilment of those facts. There is a deductive logic within the rule, which is identified and applied by the courts in determining whether the operative facts have been fulfilled and applying the consequence set out in the rule. Within the concept of the separation of powers, the courts are *able* to be separate from the legislature and the executive, and to function independently, because laws contain legal rules that can be applied using deductive logic. In its ideal form, a legal rule is drafted in such a way that the courts can first, determine whether the operative facts are made out and second, apply the consequence which has been predetermined by the legislature.

This insight is taken from a sociological analysis of law. Luhmann has described the evolution of law from formulations that are justifiable as a behavioural expectation or an ethical statement of a good policy goal, towards law that contains formulations that bring the constituent facts and legal consequences into an '*if* X, *then* Y' relationship.[26] Weber before him traced the same development away from substantive rationality towards formal rationality, which separates law and ethics and where significance in both substantive law and procedure is ascribed exclusively to operative facts, determined not from case to case but generically.[27]

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[25] Scalin A, "The Rule of Law as a Law of Rules" (1989) Vol 56 *University of Chicago Law Review* 1175-1188 at 1178-80 argues for rules over more loosely defined standards and multifactor balancing tests. However, Fallon RH, ""The Rule of Law" As a Concept in Constitutional Discourse" (1997) Vol 97 No 1 *Columbia Law Review* 1-56, takes a more sophisticated approach through the development of four ideal types of rule of law. He concludes that the rule of law needs to be understood as a concept of multiple and complexly interwoven strands. He discusses the relative priority of various strands in diverse institutional settings. He describes rule-based versions of the rule of law as the formalist ideal type associated with form rather than substance and says that to rely on rules is manifestly unreasonable as it fails to provide for a situation where the best rule cannot be extracted directly from the original meaning to allow an assessment to be made on other grounds such as the legal process ideal type or a substantive conception of the rule of law, see 28-30. Whilst it may be incorrect to *rely* on rules, his reasoning does not deny the importance of legal rules to the rule of law.

[26] Luhmann NA, *A Sociological Theory of Law* King E & Mackie M (trans.), Martin Albrow (ed.), (London: Routledge & Kegan Paul, 1985) at 174.

[27] Weber M, *Law in Economy and Society* (USA: Harvard University Press, 1966), chapter 8 especially 224-226 and chapter 11. Also, Roach Anleu SL, *Law and Social Change* (England: SAGE Publications: 2000) 24.

As elaborated by Luhmann, questions of fact and law become differentiated and law is no longer lodged in events themselves, but 'only in the norm which serves the basis of legal evaluation of events.'[28] Luhmann has argued that 'modern' law imitates a decision-making program for the elaboration of collectively binding decisions. In that decision-making program, the general form of legal norms allows them to operate exclusively as conditional programs. The tendency towards the conditionalisation of legal norms is seen in the expression of legal propositions as well as in the reasoning within judicial decisions. In this way, the uncertainties that are involved in higher complexity can be managed more easily through conversion into 'congruently expectable conditions'.[29] As stated by Luhmann, the basic form runs as follows:[30]

> *If* specific conditions are fulfilled (if previously defined constituent facts are given), *then* a certain decision has to be made.

Luhmann sees specific advantages from conditional programs for a person within a complex social system. He says that although it may remain uncertain whether or not particular factual behaviour will occur and whether a particular sanction will be imposed, the level of uncertainty is made bearable by adopting a form of 'contingent insecurity', that is, by placing the contingency of behaviour and contingency of sanction into a selective if/then relation.[31]

The logical structure of '*if* X, *then* Y' is also the structure of the 'legal rule'. Despite variations that appear in grammar and syntax, a legal rule always contains an '*if* X, *then* Y' underlying structure.[32] It can always be analysed and restated as a compound conditional statement in the form of '*if* X, *then* Y'. As stated by Twining and Miers:

> The first part, 'if X', which is known as the *protasis*, is *descriptive* - it indicates the scope of the rule by designating the conditions in which the rule applies. The second part, 'then Y', known as the *apodosis*, is *prescriptive* – it states whether the type of behaviour governed by the rule is prohibited ('may not', 'ought not'), required ('ought' or 'must'), permitted ('may') and so on.

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28 Luhmann, Note 26 at 141.
29 ibid., at 174-175.
30 ibid., at 174.
31 ibid., at 175.
32 Twining W and Miers D, *How To Do Things With Rules* (London: Weidenfeld and Nicolson, 2nd ed., 1982) 137-8.

A normative expression may not be obviously formulated in this way; however, any expression that is designed to function normatively as a rule must be capable of being reduced, expanded, analysed or translated into this logical structure.[33]

The capabilities of the legal rule more generally

The legal rule is not only of central importance for the rule of law; the existence of legal rules will be central to the successful implementation most legislation.[34] The various capabilities of the legal rule have been identified by those working in this area, in particular, by Schauer in his largely descriptive and conceptual analysis of the legal rule.[35] The legal rule has an ability to *simplify* so that a decision-maker only needs to apply the rule (and to interpret it if necessary) without examining a wide range of information that may otherwise be available.[36] With simplification, an administrator is likely to *avoid error,* as the range of factors that must be considered is reduced.[37] The legal rule *assists efficiency* by channelling the efforts of decision-makers to easily identifiable factors, with the result that proceedings are streamlined and gains in time are made.[38]

The existence of legal rules has particular importance for the implementation of good governance. The legal rule provides a designation that is public and categorical[39] and, in this way, it *creates transparency*. The legal rule also allocates responsibility;[40] it acts as a device for determining who should consider what.[41] The legal rule assists

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33 Gottlieb G, *The Logic of Choice* (London: Allen and Unwin, 1968) 40.

34 In this regard, it is interesting to note the work of Susskind and others in developing expert systems in law, which build knowledge bases that can be handled by computers by breaking down a particular area of the law into a set of interrelated unitary rules. These expert systems are based on an extraction of the deductive reasoning that is inherent in the legal rules that make up a legal sub-system, see Susskind R, *Experts Systems in Law* (Oxford: Clarendon Press, 1987). Also, Stamper RK "The Role of Semantics in Legal Expert Systems and Legal Reasoning', (1991) Vol 4 No 2 *Ratio Juris* 219-244.

35 Schauer F, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (USA: Oxford University Press, 1991).

36 Schauer, Note 35 at 145 and 177. Luhmann, Note 26 at 176. The simplifying nature of legal rules has particular importance in Indonesia, where the cost of information is high as a result of the cost of technology in transporting and communicating information. Information costs in Indonesia have been identified as a major source of difficulty in implementing law, see Gray CW, "Legal Process and Economic Development: A Case Study of Indonesia" (1991) Vol 19, No 7 *World Development* 763-777 at 764-765.

37 Schauer, Note 35 at 149-159.

38 ibid., at 147.

39 ibid., at 139.

40 ibid., at 233.

41 ibid., at 158.

accountability through its capacity to publicly *limit power* by narrowing the range of factors to be considered by a decision-maker.[42] The legal rule also de-personalises decision-making, which *creates fairness,* as decisions are acontextual:[43] a decision is based not on 'who you are', but on 'what you are' and 'what you did'.[44] De-personalised decision-making is what gives meaning to *equality before the law*.[45]

Legal rules are also fundamental to the *integration* within government and society generally. Within and between state agencies legal rules are able to establish structures of reciprocity in a context of belonging, which is fundamental to integration.[46] The legal rule also *assists coordination* by allocating responsibility for respective tasks, decisions or actions. It also assists in the *accumulation of information* that is necessary for the *coordination* of decision-making.[47] By allocating responsibility in a legal rule that has been formulated through democratic processes, power can be allocated away from individual members of the community, to the community as a whole. In this way, the legal rule can have a *homogenising* influence and assist social integration.[48] The capacity of the legal rule to simplify also facilitates understanding and *consensus.*[49] It can also assist the evolution of *cooperative solutions*, as participants can more readily understand how their role relates to the welfare of the group.[50] .

2. ASPECTS OF NORMATIVITY IN ENVIRONMENTAL LAW

Norms within legal rules and principles

The analysis presented in this thesis will focus on normative statements and presents the legal rule as being essentially normative. In this sense, it is more than a conditional program although it is has the same structure as a conditional program. There is a need to focus on normativity as it is widely agreed that one of the defining features of law is

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42 ibid., at 232.
43 ibid., at 135.
44 ibid., at 135.
45 Luhmann, Note 26 at 177.
46 Frankenberg G, "Tocqueville's Question. The Role of a Constitution in the Process of Integration" (2000) Vol 13 No 1 *Ratio Juris* 1-30 at 3-4.
47 Luhmann, Note 26 at 177.
48 Schauer, Note 35 at162.
49 Luhmann, Note 26 at 176.
50 Schauer, Note 35 at 163-4.

that it is an institutionalised normative system.[51] A normative statement will guide behaviour by indicating that something 'ought' or 'ought not' be done.[52] The existence of a norm is the foundation of the normative statement and, in building a legal system, its existence is facilitated by laws that oblige, prohibit or conditionally permit.

The statement of principle is normative but it operates differently from a legal rule in that it leaves open an area of optionality. Principles are an important aspect of both policy formulation and law making, particularly in a new area of law such as environmental law. Principles formulated in international environmental law instruments are often adopted by statutes, for example:[53]

- Inter-generational equity

The present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.

- Conservation of biological diversity and ecological integrity

Conservation of biological diversity and ecological integrity should be a fundamental consideration.

- The polluter pays principle

Those who generate pollution and waste should bear the cost of containment, avoidance or abatement.

The above formulations contain an '*if* X *then* Y' logical structure but the consequence contained in the '*then* Y' is expressed as a 'should'. The level of optionality will distinguish the statement of principle from the formulation of a legal rule.

It has been alleged that legal positivism fails to incorporate the role played by principles or standards in legal reasoning. In Dworkin's analysis of adjudication, he focuses on the problem of what happens when rules run out, when they do not provide a clear answer in a given situation. He asserts that when lawyers are in dispute about legal rights and

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[51] Raz observed 'Many, if not all, legal philosophers have been agreed that one of the defining features of law is that it is an institutionalised normative system.' Note 16 at 105.

[52] Von Wright GH, *Practical Reason: Philosophical Papers 1* (England: Basil Blackwell Publisher Limited, 1983) 67-68.

[53] These principles are taken from *The Protection of the Environment Administration Act* 1991 (as amended in 1997) New South Wales.

obligations they make use of 'standards that do not function as rules, but operate differently as principles, policies and other kinds of standards.'[54] In Hart's reply, he admits that his theory says too little about argument from legal principles but ultimately he is of the view that Dworkin's criticism can be accommodated without serious consequences for his theory as a whole.[55]

An aspect that remains in dispute is whether a sharp distinction can be drawn between rules and principles. According to Dworkin, a principle is 'a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.'[56] In comparison to a principle, according to Dworkin, rules are applicable in an 'all-or-nothing fashion'.[57] He said, 'if the facts which a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.'[58] However, principles do not set out legal consequences that follow automatically.[59] Principles have a dimension of weight or importance, and so if one principle conflicts with another, its importance must be assessed.[60]

Hart rejects the sharp distinction drawn by Dworkin by saying that the difference between rules and principles is a question of degree: relative to rules, principles are broad, general, or unspecific; however, rules can also vary in their conclusiveness. He says that an important distinction is that principles contain an explanation or rationale that contributes to their justification.[61] Hart also differs from Dworkin in that he says a rule may have a dimension of weight and where rules conflict the more important rule will survive to determine the outcome.[62] Hart suggests that a more reasonable contrast is between 'a near conclusive rule' and 'non-conclusive principles'. In the former, the

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54 Dworkin RM, *Taking Rights Seriously* (London: Duckworth, 1978) 22.
55 Hart HLA, *The Concept of Law: With a Postscript Edited by Raz J and Bullock PA* (England: Clarendon Press Oxford, 2nd ed., 1994) 259.
56 Dworkin, Note 54 at 22.
57 ibid., at 24.
58 ibid., at 24.
59 ibid., at 25.
60 ibid., at 26.
61 Hart, Note 55 at 260.
62 ibid., at 260.

satisfaction of the conditions of application suffices to determine the legal result except in a few instances and, in the latter, the decision is merely pointed to.[63]

The approach taken here sees the distinction drawn by Dworkin between rules and principles as providing a useful reference point to show that they operate in different ways. However, Dworkin's presentation of principles may be too narrow in the context of environmental law where statements of principle in environmental law frequently seek to advance or secure goals deemed desirable, albeit for reasons related to wider concerns such as environmental justice, equity or an ethic related to protection of the environment.

The distinction between legislation and policy in Indonesia

Policy making that precedes legislative drafting

Dworkin described policy as 'that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community'.[64] In the context of drafting legislation, the formulation of policy usually precedes legal drafting, and establishes a goal seen to be an improvement in an aspect of managing social relations. A statement of policy may be an aspirational document that explains the basis upon which it is anticipated that gains will be made from the implementation of certain measures. Legal policy explains the approach to be taken to law reform, with the end-point often involving the selection of certain legal policy tools. In doing so, predictions and recommendations are made on the benefits to be gained. However, such policy does not contain legal rules. Drafting legislation is quite distinct from the formulation of policy: the process of legal drafting renders policy statements into law and in doing so creates legal rules where they are considered desirable.

The distinction between policy (*peraturan kebijaksanaan*) and legislation (*peraturan perundang-undangan*) has been drawn by Indonesian legal scholars. For example,

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[63] ibid., at 263. As Hart acknowledged, arguments from such non-conclusive principles are an important feature of adjudication and legal reasoning and his use of the word 'rule' is not meant as a claim that legal systems comprise only 'all-or-nothing' or near conclusive rules, at 263.

[64] Dworkin, Note 54 at 22.

Manan emphasises the discretionary nature of policy making and its reviewability.[65] It has also been said that legislation is the exercise of legislative authority by representatives of the community to establish enforceable obligations and prohibitions whereas policy is made by the executive in the process of planning.[66]

However, an Indonesian practice that obscures the distinctive function of the legal rule is the interchangeable reference to legislation and policy. In Indonesia, policy has been located within legal instruments. For example, the Broad Outline of State Policy (*Garis-Garis Besar Haluan Negara*)(GBHN) is a statement of policy; however, as a decision of the MPR, it is an instrument that is also listed in the legal hierarchy contained in Decision of the MPR No. 3 of 2000 on Sources of Law and the Order of Legislation (*Ketetapan Majelis Permusyawaratan Rakyat Nomor III/MPR/2000 tentang Sumber Hukum dan Tata Urutan Peraturan Perundang-undangan*)(*TapMPR/III/2000*). The Five Year Development Plan (REPELITA), which is a policy document, has taken the form of a presidential decree, which is also a legal instrument.

Indeed, it can be observed that there is very little emphasis on legislative authority in the Indonesian legal framework. The regional autonomy statute, Act No. 22 of 1999 on Regional Government (*Undang-undang No. 22 Tahun 1999 tentang Pemerintah Daerah*) does not emphasis legislative authority. Legislative activity is implicit in areas of authority allocated to each level of government; however, the implementing regulation only mentions legislative authority as one of the areas of authority of central government in an obscure sub-article: article 2(3)24 of Government Regulation No. 25 of 2000 on the Authority of Central and Regional Government in Regional Autonomy (*Peraturan Pemerintah No. 25 Tahun 2000 tentang Kewenangan Pemerintah Dan Kewenangan Propinsi Sebagai Otonomi*). Law making (*pembinaan hukum dan peraturan perundang-undangan*) is treated as an aspect of a 'field' of government, namely the field of law and legislation (*Bidang Hukum dan Perundang-undangan*) rather than the central aspect of governance itself that affects all fields of government. Act No. 23 of 1997 on Environmental Management (*Undang-undang No. 23 Tahun*

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[65] Working paper of Manan B *Peraturan Kebijaksanaan* in 1994 16-17 as quoted by Ridwan HR, *Hukum Administrasi Negara* (State Administrative Law) (Indonesia: UII Press, 2002) at 137.

[66] Attamimi AHS *Hukum tentang Peraturan Perundang-undangan dan Peraturan Kebijaksanaan*, Speech at the University of Indonesia Law Faculty, Jakarta 20 September 1993 at 12-13 as quoted by Ridwan Note 65 at 13.

1997 tentang Pengelolaan Lingkungan Hidup) does not refer to law making at all and, notably, the definition of environmental management only refers to environmental policy.

It is possible that clearer distinction is being made between policy making and law making since *reformasi*. The Regional Autonomy Regulation defines policy as:

> A statement of principle as a basis for an arrangement in the achievement of an objective (Elucidation art 2(3)(a))

However, recently in selecting an instrument to contain policy there has been some confusion. During the finalisation of the National Water Resources Management Policy, there was uncertainty about how it should be promulgated. Initially it was proposed to enter the policy into a presidential decree. It was later realised that a presidential decree was not suitable as a vehicle for passing policy, as it is a legal instrument. Ultimately, it was decided that the policy be contained within a ministerial decree,[67] which was seen as a more appropriate vehicle for the release of the new policy to precede the anticipated wide-ranging legislative program.[68]

Policy as a non-binding legal instrument

Another distinction between legislation and policy arises where measures are contained in instruments not recognised by a legal system as being enforceable. Such discretionary measures provide guidance for decision-makers in administrative decision-making. They do not have legal force or effect unless expressly so provided through a specific legislative provision.[69] In this sense, the effect of a policy is quite different from that of a legal rule, which is binding upon those caught by its scope.

In Indonesia, there are a wide range of instruments beyond those listed in the legal hierarchy that take the form of guidelines, codes, circulars, and other documents. However, there is a difference in opinion on the binding nature of these instruments. According to Manan, policy is not directly binding but has legal relevance. He looks at

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[67] Decree of the Minister for Finance No. 14 of 2001 on the Policy Direction for National Water Resources Management (*Keputusan Menteri Koordinator Bidang Perekonomian Nomor: Kep-14/M.Ekon/12/2001 tentang Arahan Kebijakan Nasional Sumberdaya Air*).

[68] The writer is aware of these discussions as she participated in them.

[69] The effect of a policy instrument will depend on the legal context in which it is created. A provision in a statute may require that a policy be taken into account in decision-making and, if so, the policy is binding.

the issue from the perspective that policy is directed to government officials and not the general community.[70] Others have taken the view that the community is indirectly bound or that if the policy is integrated into the legal hierarchy it may be binding.[71]

Public power, normativity and grants of permission

State law is frequently concerned with the conferral of public or official power. Public power can be legislative, judicial or administrative, which is usually a combination of legislative and judicial power. As this area of law is not backed by sanctions, it raises issues about whether such conferrals of power are normative.

According to both Raz and Hart, these laws are normative as they guide behaviour.[72] In discussing the conferral of legislative power and judicial power, Hart refers to such laws as *power-conferring* laws. Hart argued that even though such conferrals of power are not backed by threats, they are concerned with activity that serves a social purpose (purposive activity) and, in this sense, they are normative.[73]

However, it is suggested that Hart's approach tends to downplay the importance of obligation in the exercise of administrative authority. The comment has been made by Galligan that Hart's analysis makes little reference to discretionary power.[74] Through administrative law, behaviour is guided to avoid the possibility of negative consequences; where administrative authority is exercised outside the grant of power it can be annulled and, similarly, legislation can be invalidated if it is drafted for purposes beyond the grant of power to pass law. Whilst such outcomes do not amount to a sanction, they operate to strengthen the normativity within provisions that confer public power.

There is an important refinement developed by Raz concerning laws dealing with public power that will not be norms. An example that Raz gives of a non-normative law is a

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70 Manan B and Magnar K, *Beberapa Masalah Hukum Tata Negara Indonesia* (Various Issues in Indonesian Administrative Law) (Indonesia: Alumni, 1993) at 169-170.

71 As reviewed by Ridwan, Note 65 at 140.

72 Raz J, *The Concept of a Legal System – An Introduction to the Theory of Legal System* (Oxford: Clarendon Press, 2nd ed, 1980) 168-169 and Hart, Note 55 at 27-33.

73 Hart, Note 55 at 39-42.

74 As noted by Galligan, Hart does not concern himself with discretion as a specific concept, nor with the implications of discretionary authority for his system of primary and secondary rules, see Galligan DJ, *Discretionary Powers* (England: Clarendon Press Oxford, 1986) at 58.

law that is *permission-granting* in that it states that a government official is permitted to (or may) do *A* in *C*.[75] Raz is of the view that such laws are not in themselves normative although they may have internal relations to normative laws. An example he gives is a law that confers authority to impose sanctions without prescribing when sanctions are to be imposed.[76]

It will be suggested that many statutory provisions concerning public power in Indonesia could be interpreted as permission-granting in that they allow government to do certain things, without any attempt to guide decision-making or to secure accountability. The implications are significant at this stage of Indonesia's legal development where the fostering of legal certainty is a high priority. It highlights the importance of consistent linguistic practices in drafting legal rules concerning public power. Consistency in the choice of normative linguistic structures would clearly indicate which level of normativity is intended such as an unconditional permission, conditional permission or an obligation. It is particularly relevant in relation to mechanisms to constrain the exercise of public power and secure accountability in environmental decision-making.

3. NORM CREATION IN INDONESIA THROUGH DRAFTING LEGAL RULES

Forms of rules: the social rule, the descriptive rule and the prescriptive rule

What does it mean to say that a legal rule has been created? How does a legal rule compare to a social rule? According to Hart, the existence of a social rule requires the expression of normative words requiring behaviour through words such as 'shall, must, should, ought, or may'.[77] However, a legal rule goes further than a social rule: it is a distinct concept indicating both more than a generally accepted pattern of conduct or a social rule. As clarified by Selznick, it is a special kind of norm, which is in some way formal and official; it is also explicit and deliberately instituted.[78] A major concern in Indonesian law is how to bring social rules and legal rules together so that the legal rule,

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75 Raz, Note 72 at 172.
76 ibid., at 174.
77 Hart, Note 55 at 9.
78 Selznick P, *Law, Society and Industrial Justice* (New York: Transaction Books, New York 1969) 5.

which is formal and official, becomes accepted as a social rule and that the content of the legal rule becomes an accepted standard of behaviour.

In relation to the 'explicit and deliberately instituted' nature of a legal rule, there is an important distinction to be drawn between prescriptive rules and descriptive rules. Prescriptive rules are designed to alter human behaviour; they lay something down as a course of action to be followed. Descriptive rules, on the other hand, reflect the world as it is: they state an empirical regularity or make a generalisation about something that already occurs. Like the *law* of gravity or the *principles* of physics, they are used to describe and explain the world.[79] Examples of descriptive (non-legal) rules from Indonesia would be 'As a rule the dry season in Indonesia lasts from May until November' or 'East Javanese food is more spicy than food from Central Java'. A descriptive rule will not contain normative vocabulary; often it will simply describe a value commitment or describe that which is ideally, or generally, done in a given situation.

In Indonesian law, as will be shown later in the thesis, the distinction between descriptive and prescriptive rules is frequently not explicit from the wording of a statutory provision. An example is the article on environmental management in *Act No. 23 of 1997 on Environmental Management*, which states (art 9(2)):

> Environmental management is performed in an integrated manner by government institutions in accordance with their respective fields of tasks and responsibilities, the public, and other agents of development while taking into account the integratedness of planning and implementation of environmental management tools.

Another example is the provision on public participation, which states (art 7):

> 1. The community has the same and the broadest possible opportunity to play a role in environmental management.
>
> 2. Implementation is carried out by:
>
> a. increasing independence, community empowerment and partnership
>
> b. growth of community capability and initiative

c. increasing community responsiveness in carrying out social supervision

d. providing suggestions

e. conveying information and/or report.

In the original *Bahasa Indonesia*, the normative words shall or must (*harus* or *bakal*), should or ought (*seharusnya*) do not appear. As a result, the existence of an obligation has to be implied into the provision if it is to have a normative consequence. Furthermore, as the precise level of obligation is not explicit, it cannot be readily discerned whether what has been created is a 'should', a 'must' or a 'may'. Thus, it is not immediately apparent (particularly to those outside the legal field) whether the legislative intent is to describe that which occurs, declare a principle or formulate a legal rule. If it is assumed that a mere description would not serve any legal purpose then it is still unclear whether a 'should' or a 'must' is intended. This distinction is important, as only a 'must' removes the element of optionality.[80]

At a sociological level, where legislation predominantly contains descriptive rules describing value commitments, or describing what ideally or generally should be done in a given situation, it approximates substantive rationality rather than formal rationality.[81] These two forms of rationality constitute different modes of legal thought.[82] In substantive rationality, norms consist of ethical imperatives, utilitarian and other expediential rules, as well as political maxims; they are not obtained from logical generalisation of abstract interpretations of meaning.[83] As mentioned earlier in this chapter, Luhmann has described how law in modern legal systems has evolved from formulations justifiable as a behavioural expectation, or an ethical statement of a good policy goal, towards law that contains formulations that bring the constituent facts and legal consequences into an '*if* X, *then* Y' relationship.[84] Weber before him traced the same development away from substantive rationality towards formal rationality, stating that formal rationality occurs where significance in both substantive law and procedure

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79 Schauer, Note 35 at 1-2.

80 As mentioned in the introduction, in translating provisions of Indonesian law, the English version will use a normative word only where that word actually appears in *Bahasa Indonesia*.

81 Roach Anleu, Note 27 at 23.

82 ibid., at 23-25.

83 Weber M, *Law in Economy and Society* (USA: Harvard University Press, 1966) 63-64.

84 Luhmann, Note 26 at 174.

is ascribed exclusively to operative facts, which are determined not from case to case but within a generically determined manner.[85] Legislation that contains many rules that are written in a descriptive style, even if they can be interpreted as normative, appears to lack formal rationality.

The formulation of legal rules

The 'if X, then Y' logical structure

The idea that any legal rule, however expressed, can be analysed and restated as a compound conditional statement in the form of '*if* X, *then* Y',[86] requires further explanation as does the importance of normative vocabulary. An example of a simple rule would be 'A person who travels on a train without a ticket will receive a $100 fine'.

If X …

The '*if* X' part of the rule is descriptive. In the example above, the *if* X … would be:

> *If* a person travels on a train without a ticket ……..

This indicates the scope of the rule: it applies to any person who travels on a train without a ticket. It is the factual predicate: it means that the consequence of the rule will be predicated on proving that there was a person who travelled on a train without a ticket. It also provides the basis for the determination of the operative facts, that is, the facts that are relevant in the application of the rule.[87] The operative facts will be all the facts that are relevant to applying the *if* X … part of the rule, for example, that an individual was found, he/she was travelling on a train and he/she did not possess a ticket. The fact that the person was not wearing shoes, for example, will not be an operative fact as it is not specified in the *if* X.

… *then* Y

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85 Roach Anleu, Note 27 at 24.

86 Twining and Miers, Note 32 at 137.

87 According to Twining and Miers, it should contain all the ingredients of the rule that could give rise to a question of fact in a particular case governed by the rule: the person or persons whose behaviour is governed by the rule (the agent); the type of behaviour involved (acts, omissions, activities); and the condition under which the rule applies (for example, the absence of permission). In this way, all the ingredients that have a bearing on the scope of the rule should be stated: see Twining and Miers, Note 32 at 138. See also, Schauer, Note 35 at 23-24.

The prescriptive '… *then* Y' part of the rule indicates the consequence of the rule and is the aim of the rule. Following the example above, the consequence or *then* Y would be:

> … that person will receive a $100 fine.

It can be seen that the consequence follows automatically once the factual predicate is made out, unless there are some provisos or exceptions stated in the rule.

Normative vocabulary

In prescribing whether behaviour governed by the rule is prohibited, required or permitted, certain normative words (or their equivilent) are customarily used to indicate normativity as follows:

	Prohibited	**Obliged**	**Permitted**
Words preceding	must not … shall not …	must … shall …	may …
Words following	… is prohibited … is not to occur	… is required … must be done	… is permitted

A formulation containing the word 'ought' or 'should' will show normativity but not function as a legal rule, as it will explicitly provide a level of optionality. In this way, it will be more likely to function as a statement of principle than as a legal rule. It is important to distinguish between the notion of a legal rule and the formulation of the rule.[88] A legal rule may be expressed using a variety of arrangements of syntax and grammar. However, the key point is that for a legal rule to be created, the '*if* X, *then* Y'

[88] Twining and Miers, Note 32 at 137-8.

logical structure can always be discerned.[89]

Commands and authorisations

A key aspect of creating norms through drafting legal rules is the formation of commands and authorisations. In this sense, rules may be divided into positive and negative rules.[90] A *positive rule* is created when a definite act/omission is commanded or authorised, or an individual is commanded or authorised by the normative order to bring something about. By way of comparison, a *negative rule* arises when behaviour is not forbidden but is also not positively permitted; it is permitted in the negative sense.[91] In most law reform programs, the concern is with the creation of positive rules through the creation of commands and authorisations.

- Commands – obligations and prohibitions

A command can be an obligation or a prohibition. Fundamental to the creation of a command is the choice of normative words to convey the '*then* Y' part of the '*if* X … *then* Y' logical structure: those words customarily used in English include the normative words *shall*/*must* (obligation) or *shall not*/*must not* (prohibition). Alternatively, it may be stated that something *is required* or something *is* to happen.

Equivalent commanding words in *Bahasa Indonesia* are *wajib*, which means must and refers to an obligation or duty and *bakal*, which is used when something will happen in the future. Another word, *harus*, connotes that something is imperative, and must be done. Each of these words could be used in *Bahasa Indonesia* to convey a command. Alternatively, a command may be expressed as a statement that an act or omission is required (*diwajibkan*) or prohibited (*dilarang*). There may be a question about whether or not a statement that allocates responsibility is a command. This arises especially in jurisdictional administrative rules that allocate responsibility to an authority for certain

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89 According to Von Wright, Note 52 at 68, in a similar way, the creation of a norm requires use of language in what has been called *norm-formulation* but the norm itself is not to be confused with the norm formulation. Three formulations of norms have been said to exist, namely:
(a) an imperative sentence
(b) a sentence which uses the auxiliary verbs of 'ought', 'shall', 'may' or 'must not'
(c) an indicative sentence of a declarative or descriptive type.

90 Kelsen H, *Pure Theory of Law* Knight M (trans.), (USA: University of California Press, 1967) at 15.

91 ibid., at 16 and 42.

activities. A statement of responsibility could merely serve to identify *who* is the responsible government authority rather than *requiring* them to do something.

Obligations and prohibitions contain different logical structures, which make a prohibition a potentially stronger command than the obligation. In an obligation, the certainty of the effect of the obligation will depend on how accurately or comprehensively the behaviour or activities required are stated. By comparison, a prohibition sets out behaviour or activities that are *not* permitted in the '*if* X'. It is often easier to identify that which is *not* to be done than that which *is* to be done. In addition, a prohibition will always be simple in its '*then* Y', which is the statement of prohibition. This means that prohibitions contain inherent advantages in achieving an outcome that derive from a linguistic structure that supports certainty, targeted results, intelligibility as well as ease and accuracy.

- Authorisations – conditional permissions

An authorisation is a positive permission. It will be expressed with permitting rather than commanding words such as *is able* or *may*. The equivalent words in *Bahasa Indonesia* are *dapat* or *boleh*. The word *dapat* can be understood as meaning 'may' or to connote that something is physically possible.

A conditional permission is a kind of authorisation. It grants permission to do something or refrain from doing something on the fulfilment of a condition(s) and in this sense it is normative: it has the effect that something *ought not* be done unless the condition(s) are met. Where the permission concerns an individual, the individual is authorised by the normative order to bring something about that would otherwise be prohibited, if he or she meets certain conditions. Where the permission concerns an official exercising public power, it enables power to be exercised as long as certain provisos are met. In this way, it constrains the exercise of public power and can provide mechanisms for accountability.

Unconditional permissions

It is suggested here that, following from the point made by Raz mentioned earlier in the chapter concerning public power, a grant of public power may take the form of an unconditional permission and, if so, it will not be normative. This sort of provision does not use an '*if* X … *then* Y' structure, rather it takes the form '*X* is permitted to (or may) do *A* in *C*'. It is non-normative as it does not attempt to guide behaviour by imposing conditions, it merely enables it to happen. As it is unconditional, it can be referred to as the 'unconditional permission' and rather than a legal rule. The difficulty that this possibility presents is, how to determine whether a grant of public power is merely a grant of permission? It is at this point that the use of explicit language is important unless the legal system is to rely on subsequent interpretation developed by the interpretive community.

Issues may arise in relation to choice of normative vocabulary. A word that is often used in relation to public authority in Indonesia is *berwenang*, which means 'is authorised'. It could be argued that the exercise of authority (once it has been exercised) involves responsibility for the outcome; however, does it actually *require* the authorised actions to be carried out? In Indonesia, the choice of legal vocabulary does not always make the exercise of public power explicitly normative. This situation means that the interpretive community has to decide whether a grant of authority entails an obligation.

The use of the passive and active voice in drafting legal rules

A command or authorisation can be given in the active or passive voice. In an active voice, the subject will be an actor, whereas in the passive voice, the subject will be the patient and naming the actor can be avoided. A simple example, which indicates the difference between the two voices is when a boy who breaks a window whilst playing ball in the yard is asked by his mother what happened. He may respond in the passive voice by saying, 'the window broke'. Alternatively, he may say in the active voice 'I broke the window'. When he says 'the window broke' he avoids admitting that he broke the window.

In *Bahasa Indonesia*, the passive voice is far more common than in English.[92] There may be a number of reasons for the use of the passive voice: the actor is not known, is obvious, not important or because the action can be done by anyone.[93] However, those reasons are not justifiable in legislative drafting. The actor should be clear to whoever reads a legislative provision as the actor is always important. Even if the identity of the actor is obvious, it should be stated; if the action can be done by anyone, this is something that should be made clear. The difference between the active and the passive voice is that the use of the active voice necessitates naming the actor. Whilst the actor may be named in the passive voice, it is not necessary to name the actor. Thus, it may lead to the actor being omitted by force of habit.

If the effect of a legal rule is to be made explicit, relevant factors will be:

- normative vocabulary: express obligation/no express obligation
- actor/no actor
- the construction: passive/active voice.

The result can be reproduced in table form as follows:

92 Sneddon JN, *Indonesian Reference Grammar* (Australia: Allen and Unwin, 1996) 254.
93 ibid., at 253.

Table 1: The effect of the active/passive voice on normativity in legal rules

ACTIVE VOICE

	Normative vocabulary	**No express normative vocabulary**
Actor	Certain normativity with certain target	Possible normativity with certain target

PASSIVE VOICE

	Normative vocabulary	**No normative vocabulary**
Actor	Certain normativity with certain target	Possible normativity with certain target
No Actor	Certain normativity with uncertain target	Possible normativity with uncertain target

The above table shows that the use of the passive voice creates more 'shades of meaning' in comparison to the active voice by enabling the target to be omitted.

4. RULE TYPES

Overview of the schema of rule types

This section will introduce the types of legal rules that will be the basis of the legislative analysis in chapters 8 and 9. A schema has been designed to represent a toolbox for analysis. The rule types within the schema are:[94]

[94] The Hartian secondary rule of adjudication, which determines judicial power and procedure, is not included in the schema as this rule concerns the system of adjudication across the legal system as a whole.

(a) Legislative rules addressed to legislators.

These are the Hartian secondary rules of change governing the exercise of normative power, in particular the power to create legal instruments. Such instruments in Indonesia are the statute, government regulation, presidential decree and regional regulation.

(b) Administrative rules addressed to administrators

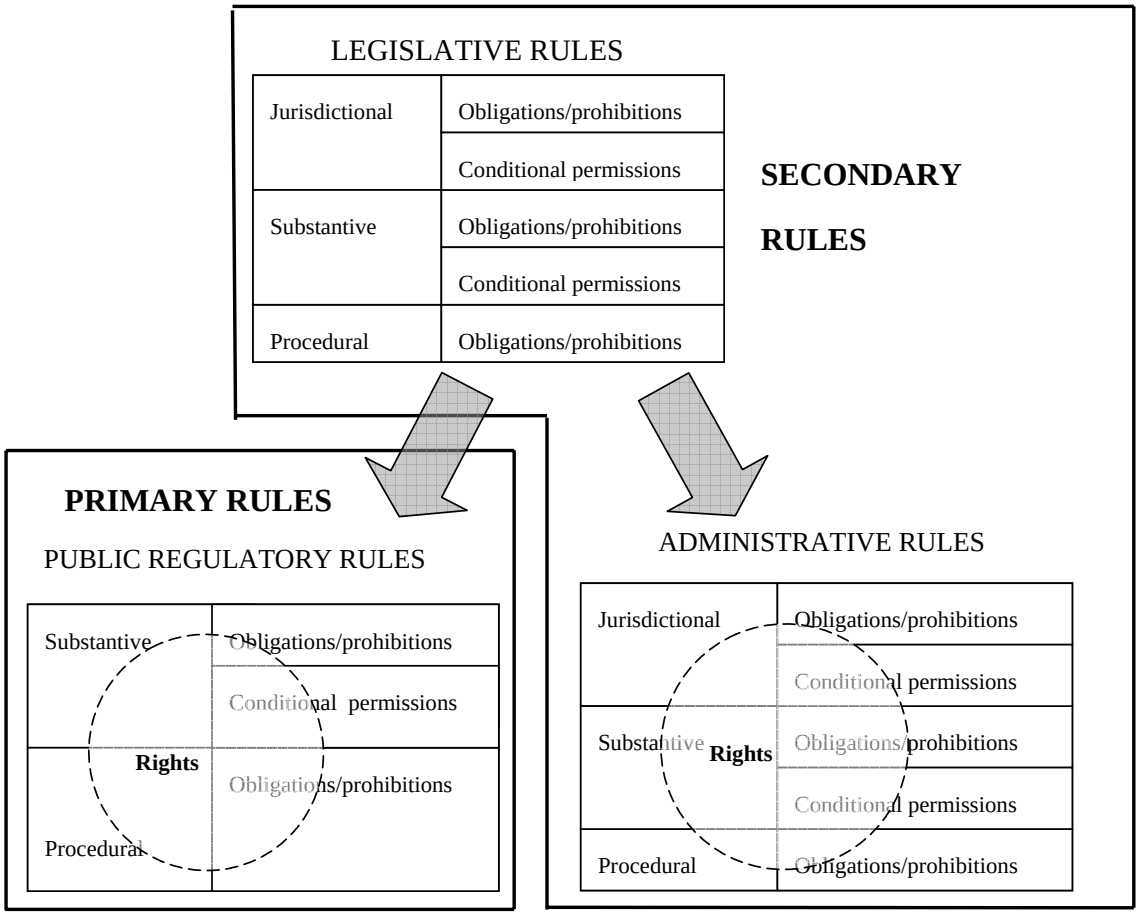
These rules make up the administrative aspects of environmental law. They are a hybrid of the Hartian secondary rules of change (formulation of guidelines and policies) and adjudication (environmental decision-making), which govern the exercise of administrative discretion.

(c) Public regulatory rules addressed to the public

These rules make up the regulatory aspect of environmental law. They are the Hartian primary rule creating commands (obligations and prohibitions) and conditional permissions binding on private citizens. .

The following schema seeks to further explain the arrangement of these rules:

Figure 3 - Schema of types of 'legal rule' found in environmental law



The schema indicates the range of rule types that are available in developing a system of environmental law. It can be seen that *secondary rules* include legislative and administrative rules. *Primary rules* are essentially of one type, namely public regulatory rules. Legislative and administrative rules can be broken down into three main sub-rule types: jurisdictional, substantive and procedural rules. However, public regulatory rules, which are not addressed to government, only contain two sub-rule types: the substantive and procedural rules. It can also be seen that whilst procedural rules are expressed as obligations, jurisdictional and administrative rules can be expressed as obligations/prohibitions or conditional permissions.

The arrangement of rules can be set out in tabular form as follows:

Table 2 - The arrangement of legislative, administrative and public regulatory rules

	SECONDARY RULES		***PRIMARY RULES***
	Legislative rules: addressed to legislators	**Administrative rules: addressed to administrators**	**Public regulatory rules: addressed to the public**
Jurisdictional	Confer official power to legislate	Confer official power to administer	
Substantive	Define and regulate the exercise of official power to legislate	Define and regulate the exercise of official power to administer	Define and regulate peoples rights, obligations and liabilities
Procedural	Govern the manner of proceeding to legislate	Govern the manner of proceeding in administration	Govern the manner of proceeding or method of asserting rights or enforcing obligations.

This table shows that *secondary rules* are legislative rules and administrative rules and they are each made up of jurisdictional, substantive and procedural sub-rules.[95] Jurisdictional rules are rules that confer official power and are relevant to legislative authority and administrative authority. Substantive rules define and regulate the exercise of official power and are relevant to both legislative authority and administrative authority. Procedural rules govern the manner of proceeding in any action or process, rules of conduct, or rules on the method of enforcing rights and duties.

[95] The different functions of these sub-rules in relation to legislative rules are set out by Guastini R "Invalidity" (1994) Vol 7 No 2 *Ratio Juris* 212-226 at 213-215. Guastini uses the term 'meta rule' for legislative rule. He divides meta rules into three groups, namely: power-conferring rules, competence rules and procedural rules. As the legal tradition of the writer is the Anglo-American tradition, the more familiar concepts jurisdictional and substantive rules have been used but they are the same as the power-conferring and competence rules referred to by Guastini. For a definition of jurisdictional, substantive and procedural, reference was made to Nygh PE and Butt P (eds), *Butterworths Australian Legal Dictionary* (Australia: Butterworths, 1997).

Primary rules include substantive rules, where they define and regulate people's rights, obligations and liabilities, in addition to procedural rules.

Legislative rules addressed to legislators

1. Jurisdictional legislative rules

As mentioned in chapter 4, the Hartian secondary rule includes rules of change, which are the source of statutory law. Rules of change set out who can exercise normative power and when it is validly exercised. Raz has pointed out that some rules concerning the exercise of public power may not be normative. Normative power is often granted through an unconditional permission to an organ of government to exercise legislative authority, for example, article 20(1) (first amendment) of Indonesia's Constitution, which states that '[t]he People's Consultative Assembly has authority to pass statutes'. It is suggested here that provisions conferring legislative power are likely to be non-normative. Indeed, they do not need to be stated as a legal rule: as discussed in chapter 4 on the rule of recognition, they provide authoritative criteria of validity, which are used in the development of judicial precedent. In this way, they provide the basis for normative secondary rules formulated through judicial precedent

2. Substantive legislative rules

The extent of normative power can be established within the grant of power and so it may be difficult to discern the difference between the jurisdictional and substantive aspects. Such provisions generally either:

- list the subject matter in relation to which normative power has been granted to a particular level of government or government body; or
- identify a particular subject matter and list the level(s) of government or government body with normative power to make law in relation to that subject matter.

If a provision simply authorises a level of government to pass laws on certain subject matter it will be permission-granting. However, in the same way as a jurisdictional provision, it will go towards providing the criteria of validity, which can be adopted in the form of a rule. Examples of permission-granting provisions are those that list subject

matter of laws able to be passed by a central parliament.

3. Procedural legislative rules

Procedural rules will be expressed as obligations. Procedural rules are usually related to a jurisdictional rule or substantive rule. Where they apply to the passing of statutes they are usually found in national constitutions and/or in rules and orders created by the Parliament. Procedural rules will commonly apply to the formulation of draft legislation, for example, a procedural rule will often require the publication of a draft law to allow public comment or other forms of public participation.

Administrative rules addressed to administrators

Administrative rules are found in the administrative law aspect of environmental law and deal with the exercise of discretionary authority by government agencies.[96] They enable government to formulate policy and guidelines (a quasi-legislative function) and to adjudicate upon the application of law (a quasi-judicial function).

In Hart's analysis, there is little reference to discretionary authority;[97] however, Galligan is of the view that whether a body has discretion and the extent of the discretion will be resolved by examining the governing secondary rules[98] and for this reason, administrative rules can be regarded as being secondary rules. Through administrative rules, decision-makers can be required to carry out balanced decision-making based on adequate understanding of competing environmental, social and economic interests. When deciding upon the rights and obligations of a member of the public or a community, government will be bound by quasi-adjudicative rules.

1. Jurisdictional administrative rules

The jurisdictional administrative rule is the rule that confers certain powers upon administrative agencies. This may be a quasi-legislative power or a decision-making power that is a quasi-judicial such as a power to grant a licence or other form of approval or to determine rights and responsibilities through a tribunal. In environmental

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[96] Galligan, Note 74.

[97] As noted by Galligan, Hart does not concern himself with discretion as a specific concept, nor with the implications of discretionary authority for his system of primary and secondary rules, ibid., at 58.

management they are likely to confer power to carry out management or regulatory functions such as a rule which confers power to coordinate, manage water quality, compile a water use plan, classify, make an inventory of water resources, monitor water quality or license water use or the disposal of waste. Where a provision is an unconditional grant of permission, it will be non-normative and not amount to a legal rule. An example of an authorisation that is an unconditional permission in a quasi-legislative capacity would be a provision that states '[t]he Authority may formulate and promote plans for environmental protection.' [99]

2. Substantive administrative rules

Substantive administrative rules define and regulate the exercise of official powers and duties by controlling the substance of decisions made by government. They provide mechanisms to ensure legal accountability in the exercise of discretion, as will be discussed in the next chapter. Substantive administrative rules can take the form of obligations, prohibitions or conditional permissions.

- Obligations

Certain activities may be required by government agencies through a rule that imposes an obligation such as an obligation to establish national programs for environmental protection or the content of an environmental plan. The matters to be taken into consideration in decision-making such as licensing can also be drafted as obligations. This kind of rule is particularly important as a mechanism to foster legal accountability in the exercise of administrative discretion. It will be shown in later chapters that such rules rarely appear in Indonesian national environmental legislation. Where they do exist, the matters to be taken into account are drafted in vague and imprecise terms.

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98 ibid., at 58.

99 *Protection of the Environment Administration Act* 1991 (New South Wales) s 9(1)(a) s 8(a).

- Prohibitions

A prohibition in a substantive administrative rule can prohibit certain results in an administrative decision. It can also limit the ends to which decision-making authority can be used

- Conditional permissions

A government agency may be granted conditional permission to do certain things so that authority is granted only on fulfilling certain requirements. If those requirements are not fulfilled then a government agency will be regarded as acting beyond its powers. An example of such an authorisation is a rule that grants authority to make decisions only about certain subject matter.

3. Procedural administrative rules

Procedural administrative rules can govern relations between the government and the public, relations between government departments and agencies, and relations between levels of government.

- Obligations

Procedural obligations may be imposed with the conferral of decision-making power, for example, the power to issue an environmental licence may be accompanied by a procedural obligation to provide the applicant with a written decision within a certain time. Public participation rules will take the form of procedural obligations. Other obligations may be imposed as internal procedural steps to be taken by an agency or procedural steps governing relations between agencies in reaching a decision.

- Prohibitions

Procedural prohibitions may be drafted to ensure that government decisions are not made without certain procedures being followed, for example, to ensure fairness in decision-making. Another type of procedural prohibition can ensure that coordination occurs,

such as a rule that a pollution licence cannot be processed unless development consent must be been obtained.

Public regulatory rules addressed to the public

The key role of the public regulatory rule in environmental law cannot be overstated; public regulatory rules are the foundation of the regulatory aspect of environmental law. They are the Hartian primary rule containing obligations that are designed to influence public behaviour. They are designed to create normative pressure on the public and are often supported by sanctions or other forms of coercion. In their substantive aspect, they may seek to influence behaviour directly through the imposition of sanctions for the breach of obligations or indirectly through such mechanisms as market-based instruments or voluntary mechanisms. They may also provide procedures to be followed by the public in their relations with government or each other.

1. Substantive public regulatory rules

Substantive public regulatory rules establish people's rights, obligations and liabilities. They can be divided between commands (obligations and prohibitions) and authorisations.

- Obligations

Environmental law usually contains a variety of obligations, which may be general or specific. A targeted obligation can be created by clearly identifying the recipient of the obligation in the '*if* X….'. Behaviour that is obliged may also be expressed in some detail in the '*then* Y'.

- Prohibitions

A prohibition may be expressed as a blanket command not to do something and if so, it is a powerful regulatory tool. Examples of a general environmental prohibition are:

> A person must not pollute any waters.[100]
>
> Solid waste may not be introduced to a body of water for the purpose of disposal.[101]

In applying the prohibition, a logical process will need to be gone through to determine that which is prohibited. In considering this aspect, the '*if* X, *then* Y' structure emerges. A prohibition imposes an obligation not to do something by forbidding an act or omission which is set out in the '*if* X'. The command is contained in the prescription, the '*then* Y' part of the rule. Therefore, in seeking to comply with the first example of a prohibition, a person will have to ask whether what they are doing amounts to pollution of waters. *If* the answer is yes, *then* it will be prohibited. The prescription may vary in specificity and may depend on the application of defined terms such as a definition of pollution, which will have to be interpreted by those seeking to apply the rule.

- Conditional permissions

Where a prohibition has been imposed, there may also be a provision that positively guarantees freedom to do that thing as long as certain preconditions are met. The combination of these two types of rules provides a useful regulatory mechanism.

2. Procedural rules

Procedural rules imposed on the public in environmental law usually concern the communication of information by members of the public to the government in applying for authorisation to conduct certain activities. Procedural rules set out requirements to be fulfilled before the activity is authorised. Procedural rules may include rules on the form in which an application for authorisation is made to a government authority such as a provision to the effect that an application must be made in a particular format, contain certain information, and be accompanied by the payment of a prescribed fee. A requirement to advertise the fact that an application for authorisation has been made is a procedural rule. In a similar way to administrative procedural rules, they have a temporal dimension and establish what must be done, how and by whom.

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[100] *Protection of the Environment Operations Act* 1997 (New South Wales) s 120(1).
[101] German *Act on Managing Water Resources (Federal Water Act)* 1996 (as amended in 2000) art 26(1).

Rights

A separate category has not been created for rights is suggested that it is sufficient to focus attention on the creation of obligations, prohibitions and conditional permissions contained in legal rules, particularly administrative rules and public regulatory rules.[102] The reason for this approach rests on the nature of the kind of rights that are likely to be granted in environmental law. Rights may be divided into three classes.[103] In one class, a right is a shorthand way of saying that others have an actual or hypothetical legal obligation to act or not to act in certain ways touching the right-holder.[104] In another class of rights, which are liberty rights and power rights, the law recognises the freedom or legal efficacy of the choices of individuals such as freedom of speech and freedom of association. A further class of right has been called the immunity right and corresponds to a lack of power in others, for example, a right not to be dismissed on certain grounds. In relation to environmental law, it is the first kind of right that is most relevant.

A right may be stated in the abstract, for example, a bald statement of the right to a clean and healthy environment, or the right to be informed, or the right to participate in environmental decision-making. Examples of such rights are found in Indonesian legislation, such as:[105]

> Every person has the same right to a clean and healthy environment.
>
> Every person has the right to environmental information
>
> Every person has the right to play a role in the scheme of environmental management

It can be seen that the expression of a right focuses on the result or consequence

> *If* a living entity is a person/human being *then* they have a right to…..

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[102] Raz has stated that "the possibility of analysing rights, and therefore also laws instituting them, in terms of duties and powers … is of utmost importance', see Raz, Note 72 at 181.

[103] These classifications are taken from MacCormick DN, "Rights in Legislation" in Hacker PMS and Raz J (eds), *Law, Morality and Society – Essays in Honour of HLA Hart* (England: Clarendon Press Oxford, 1997) 189-209 at 193-194.

[104] Kelsen, Note 90 at 168.

[105] Taken from article 5 in *Act No. 23 of 1997 on Environmental Management* (*Undang-undang No. 23 Tahun 1997 tentang Pengelolaan Lingkungan Hidup*).

However, this formulation requires another step. A rule is needed to the effect that *if* a person has a right to X (eg: a clean and healthy environment) *then* Y (something specific) will follow. Where the second part of this construction is absent, the expression of the right merely establishes a concept by naming the right. The effect will rely on interpretation by the courts, taking into account the objectives of the legislation and principles that can be discerned from a statute or from public policy more widely.

Conclusion

In this chapter, it has been shown that the cultivation of the 'legal rule' is of central importance to both *Rechtsstaat* and the rule of law. This is so because the existence of laws that are capable of guiding both the government and the public in their relations with each other is fundamental to both concepts. An account has been presented of the virtue of legal rules formulated as a conditional program containing the logical form '*if* X *then* Y'. It is being suggested that the formulation of the 'legal rule' is not only central to the rule of law, but is also likely to be central in achieving *reformasi* goals more generally.

The Hartian rule types of the primary and secondary rule discussed in the last chapter have been refined to allow an analysis of environmental law. The Hartian rules are put forward as the legislative rule (the Hartian secondary rule of change); the administrative rule (a hybrid of the Hartian secondary rules of change and adjudication); and the public regulatory rule (the Hartian primary rule). These rule types, and the sub-rule types that fall within them, will be used as the basis for the textual analysis in the following chapters.

In distinguishing the concept of the legal rule, it has been observed that in Indonesia there is a tendency to blur the distinction between policy and law. It has also been foreshadowed that normativity is often not explicitly expressed in legislative provisions. To assist the analysis, a distinction has been made between provisions that command and provisions that authorise. A further distinction has been made between authorising provisions which amount to conditional (normative) permissions, and others that more closely approximate unconditional (non-normative) grants of permission.

It is being suggested that the key to effective law making is likely to be found in

recognising the particular role of each rule type and formulating rules to match the individual circumstances and needs to be addressed. In assessing Indonesian environmental legislation, questions that will be asked are:

- Is it clear that the provision is a legal rule rather than a statement of principle or policy?
- Can a logical structure of '*if* X … *then* Y' be discerned?
- To what extent is the provision explicitly normative?
- Which rule types appear? Is there an absence of certain rule types?
- Which sub-rules types appear? Is there an absence of certain sub-rule types?

CHAPTER SIX

DESIGNING RULES FOR INSTITUTIONAL PURPOSES

Introduction

Before embarking on an analysis of environmental legislation in Indonesia, this chapter suggests concepts that are useful in considering the adequacy of environmental laws. It commences by considering the inevitable difficulties that arise in drafting legal rules from the open texture of language and, on a more philosophical level, the difficulty in expressing an idea in such a manner that it cannot be misapplied. The social constitution of the meaning of rules through their continued use and the role of an 'interpretive community' in attaining agreement in interpretation is also discussed. In this context, a knowledge cycle is depicted which shows the central role of judges in developing understandings about how language is used for institutional purposes in the formulation of legal rules.

Next, the idea is presented that awareness of the dimensions of legal rules can assist in designing rules for institutional purposes. These dimensions are the position of the rule within the Indonesian legal hierarchy, its linguistic structure and the accompanying sanction. It is suggested that these rule dimensions can be deliberately utilised to achieve a style of legal drafting that is supportive of particular policy goals.

The arena for the exercise of discretionary authority in government decision-making is also explored. The construction of, and constraint over, the exercise of discretion is an important aspect of environmental management and, more broadly, good governance. There is an investigation of the means available, through the drafting of administrative rules, to develop mechanisms that foster legal accountability in the exercise of discretionary authority in Indonesia. Finally, the advantage of proceduralising law, as presented in the concept of reflexive rationality, is briefly discussed in the Indonesian context.

1. INEVITABLE DIFFICULTIES IN EFFECTIVE RULE MAKING

The open texture of language

This is an unavoidable source of difficulty in drafting a legal rule in any language, which comes from the 'open texture' of language. Language is said to have an 'open texture' because even the least vague, most precise term, may turn out to be vague as a result of our imperfect knowledge of the factual context in which it is to be applied and our limited ability to foresee the future.[1]

As already discussed, the legal rule is in two parts: '*if* X, *then* Y'. The first part is the factual predicate. It sets out the scope and the operative basis of the rule and, as it anticipates potential factual situations, it is by necessity a generalisation. As it is a generalisation, it is particularly susceptible to the problem of open texture. When it is applied, there is a likelihood that it will be either over-inclusive, by including targets that are in some cases irrelevant, or under-inclusive by missing relevant targets. As the '*then* Y' part of the rule is the aim and the consequence of the rule, to ensure the goal of a rule is achieved, there must be a fundamental congruence between the scope of the rule and its consequence.

Taking the example of the rule mentioned in the last chapter – 'A person who travels on a train without a ticket will receive a $100 fine'- the goal of this rule is to require people to buy train tickets and thereby provide revenue for public transport. However, the consequence of a rule will only arise after an interpretation of the scope. For example, this rule will require interpretation regarding who is a person – does it include 3 year old child? Furthermore, even if there is a perfect causal match between the generalisation in the '*if* X' and the consequence in the '*then* Y', future events may develop to alter the

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[1] Waismann F, "Verifiability'in Flew AGN (ed.), *Logic and Language* (England: Basil Blackwell, 1952) 117-144 at 119-120. Waismann discusses the open texture of most of our empirical concepts. He distinguishes this from vagueness, which can be modified. In addition, Hart HLA, *The Concept of Law*: *With a Postscript Edited by Raz J and Bullock PA* (England: Clarendon Press Oxford, 2nd ed., 1994) 124-136 and Schauer F, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (USA: Oxford University Press, 1991) 35.

congruence between the two parts of the rule.[2] For example, does a rule that prohibits 'vehicles' entering a certain area also apply to motorised scooters?

The difficulty in predicting the manner in which a rule will be applied in practice leads to indeterminacy.[3] This problem led Fuller to question whether it was possible for a rule to have a clear meaning outside of its application in the circumstances and context of a particular situation.[4] The response by Hart in relation to open texture is that whilst all rules are 'theoretically ambiguous' or 'possibly vague', only a subset is 'actually ambiguous' or 'actually vague'[5] when they are applied. The task of reducing the subset of actually ambiguous or actually vague rules falls to the legal drafter.

Communicability of legal rules and the problem of interpretation

Expectations concerning the communicability of legal rules have been undermined by the philosophical debate over the operation of linguistic rules.[6] In this debate, the relationship between the content of rules and their interpretation has long been a point of contention. This issue arises in the context of drafting a legal rule, where a rule-maker has to anticipate the likely interpretation of a rule by those to whom it is directed. The rule-follower and rule-applier need to determine the meaning of the rule intended by the rule-maker in order to be able to follow or apply it.

Dworkin argues that rules frequently do not provide a clear answer in a given situation. He asserts that when lawyers are in dispute about legal rights and obligations they make use of 'standards that do not function as rules, but operate differently as principles, policies and other kinds of standards.'[7] In Hart's reply, he admits that his theory says too little about argument from legal principles, although ultimately he is of the view that Dworkin's criticism can be accommodated without serious consequences for his theory

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2 Black J, *Rules and Regulators* (England: Clarendon Press Oxford, 1997) 7 and 22.

3 A critique that goes further is put forward by the critical legal theorists who use indeterminacy to challenge the legitimacy of law, particularly in relation to adjudication. See Singer J, "The Player and the Cards: Nihilism and Legal Theory" (1984) 94 *Yale Law Journal* 1-70; Kennedy D, "Form and Substance" (1976) 89 *Harvard Law Review* 1685-1778; and Unger R, *Knowledge and Politics* (New York: The Free Press, 1976) 88-100.

4 Fuller L, "Positivism and Fidelity to Law" (1958) 71 *Harvard Law Review* 630-672 at 662-665.

5 Hart, Note 1 at 128.

6 Campbell T, "Democratic Aspects of Ethical Positivism" in Campbell T and Goldsworth J (eds), *Judicial Power, Democracy and Legal Positivism* (England: Ashgate Dartmouth, 2000) 3-36 at 12.

7 Dworkin RM, *Taking Rights Seriously* (London: Duckworth, 1978) 22.

as a whole.[8] Hart contended that it is possible for a rule to have a core meaning, although there will be cases, which he referred to as 'penumbral', in which interpretation is required. Within the core, cases are plain; there is no need for interpretation because what is required is 'unproblematic' or 'automatic'.[9] In doing so, he argued that '… uncertainty at the borderline is the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact.'[10]

In relation to the possibility of achieving core meanings, the implications of linguistic theory are relevant, particularly Wittgenstein's analysis. Wittgenstein is said to have demonstrated that philosophers make a fundamental error in stating that there can be an idea that is 'complete' and immune from misapplication.[11] This proposition was taken up by Twining and Miers in their analysis of legal rules, who said that even a single word such as the word 'game' cannot be made completely clear. This is because not all games share all of the same characteristics (compare a professional racing car rally to amateur water ballet to children playing 'dress-up'). At best, it can be said that they may be related to one another as they share some characteristics with some other activities, some of which are typically thought of as games.[12] This suggests that finding the 'core meaning' may not be as determinate, with fixed and definite limits, as asserted by Hart.[13]

There are competing schools of thought about Wittgenstein's account of rule-following, which was concerned with unreflective rule-following in the rules of language or mathematics; however, there is consensus that in actuality, language and meaning is a social phenomenon.[14] A collectivist approach is propounded by Peacock, who argues that if we are concerned with how a rule will be interpreted and applied, the role of shared judgments in the meaning and application of the rule is important. He pointed out that what it is for a person to follow a rule, even individually, cannot ultimately be

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8 Hart, Note 1 at 259.
9 ibid., at 126.
10 ibid., at 128.
11 Baker G, "Following Wittgenstein: Some Signposts for Philosophical Investigation" in Holtzman SH and Leich GM (eds), *Wittgenstein: To Follow a Rule* (London: Routledge & Kegan Paul, 1981) 31-71 at 47.
12 Twining W and Miers D, *How To Do Things With Rules* (London: Weidenfeld and Nicolson, 2nd ed., 1982) 206.
13 ibid., at 206.
14 Hacker PMS, *Wittgenstein: Connections and Controversies* (England: Clarendon Press Oxford, 2001) xviii.

explained without reference to some community[15] and in this regard, he quotes Wittgenstein where he said:

> 'If language is to be a means of communication, there must be agreement not only in definitions but also (queer as this may sound) in judgments.'[16]

Taking a different collectivist approach, Bloor focuses on Wittgenstein's slogan 'A game, a language, a rule is an institution'.[17] As pointed out by Bloor, Wittgenstein did not explain or define what he meant by institution.[18] Bloor has sought to supplement this omission by saying that it is a 'collective pattern of self-referring activity' and the task is to locate these self-referential and performative processes within rules and rule following.[19] He also refers to Wittgenstein's slogan that 'meaning is use' and says that the true significance is that use is not to be explained by reference to meaning, as meaning comes from use; meaning does not have a pre-existing reality. Meaning is generated in a step-by-step fashion as we go along. [20]

Hacker's analysis of Wittgenstein has a different emphasis. He says that the point is not to establish that language involves a community but that 'words are deeds' and what is important is the regularity, the multiple occasions, of action.[21] He quotes Wittgenstein where he says: [22]

> '… any interpretation still hangs in the air along with what it interprets, and cannot give it any support. Interpretations by themselves do not determine meaning.'

Hacker goes on to say that:[23]

> Only in a context of which there is an established technique of application of a rule, in which the rule is standardly involved in explanation and justification, in teaching and training, can questions of giving interpretations arise. For only then is the expression *used*, and an internal relation established

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15 Peacocke C, "Reply: Rule-Following - The Nature of Wittgenstein's Arguments' in Holtzman SH and Leich GM (eds), *Wittgenstein: To Follow a Rule* (London: Routledge & Kegan Paul, 1981) 72-95 at 73.

16 Wittgenstein L, *Philosophical Investigations* Rhees R (trans.), Anscombe GEM (ed.), (England: Blackwell, 1958) §242 as quoted by Peacocke, Note 15 at 89.

17 Wittgenstein L, *Remarks on the Foundation of Mathematics* 1978 VI: 32.

18 Bloor, *Wittgenstein, Rules and Institutions* (London: Routledge, 1997) 27.

19 ibid., at 33.

20 ibid., at 136.

21 Hacker, Note 14 at 282 referring to Wittgenstein *Philosophical Investigations* §§198-202.

22 ibid., at 281 quoting Wittgenstein, *Philosophical Investigations* §198.

23 ibid., at 281.

> between act and rule. Only if there *are* genuine rules, only if something does actually count as following (and everything else as going against), is there room for interpreting a rule correctly or incorrectly. But then what counts as *accord* with the rule is fixed independently of interpretations.

The salient point from these accounts is that something more than an interpretation is necessary to give meaning to a rule. A rule needs to be used a number of times before it becomes a genuine rule and through use, an internal relation is established between an act and a rule. Without use, there will be no core meanings or genuine rules.

The role of the interpretive community

Given that meaning in a text is socially constituted, the role played by an 'interpretive community' becomes significant.[24] The process of legal drafting requires a high level of linguistic skill. As can be seen in many jurisdictions, legal drafters sometimes lapse in managing the complex rules of grammar including syntax and morphology. This possibility is exacerbated by problems of multiple or overlapping meanings or the problem of open texture mentioned above. In socially constituting the meaning of legislative provisions, an active interpretive community becomes particularly important.

An interpretive community is a group to which people belong, which shapes the content of their interpretations.[25] As Black stated, 'certainty is not solely a function of the rule, but is a function of the community interpreting the rule'.[26] In Indonesian environmental law, the interpretive community includes a range of sectors of society, including government officials, judges, academics, environmental organizations, business and concerned members of the community. The leader of a legal interpretive community is the judiciary as it provides the final interpretation of a legislative provision.[27] Furthermore, it does so through a public forum that has traditions of interpretation that

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[24] Black, Note 2 at 17-19 and Fish S, "Fish v Fiss" in Fish S, *Doing What Comes Naturally- change, rhetoric and the practice of theory in literary and legal studies* (USA: Duke University Press, 1989) 120-160 at 122.

[25] This idea was developed by Fish as part of his literary theory to explain how readers so often reach the same interpretation of a different work and how different interpretations can be explained by the different circumstances and background of different readers, see Note 24 at 141.

[26] Black, Note 2 at 18.

[27] The important role of the judiciary in Indonesia in the development of environmental law is noted by Silalahi MD, *Hukum Lingkungan – Dalam Sistem Penegakan Hukum Lingkungan Indonesia Indonesia* (*Environmental Law and Law Enforcement in Indonesia*) (Indonesia: Penerbit Alumni, 2001) at 134.

demonstrate the technique of application of a rule and that explain and justify how a decision has been reached based on the application of the rule.[28]

Philosophical insights on interpretation and meaning in unreflective rule-following (such as in linguistic rules) have implications for the creation of legal rules within a legal system and for lawmakers who are tasked with rendering rules that can be understood, followed and applied collectively. First**,** meaning can only be unreflectively assigned to a word or a rule when it has a pre-existing shared meaning within a community that has developed through usage. This is the literal or 'plain meaning', the meaning identified by Hart as the 'core' as it is a meaning automatically attributed by the general community.[29] This occurs when a rule becomes familiar and is learned from recurring experience and so does not need to be interpreted. It includes words that have a technical meaning within a certain technical field or legal terms that have a particular meaning within the legal community.[30]

Second, there is no objectively clear rule. As a result, the clarity of a rule will be dependent on the community that follows and applies the rule. It will require interpretive assumptions that are widely shared in the community so that the rule appears to all to take the same shape, even though that shape is actually the result of interpretation.[31] The rule-maker will, therefore, need to anticipate whether terms adopted will be clear to those who have to interpret the rule and will have to consider how it will be interpreted by those acting in good faith as well as by those who will seek to exploit loopholes or 'gaps' in the rule. In addition, the rule-maker has to gauge the extent to which the tacit assumptions, the values and purposes behind the rule will be 'read in' to the rule.[32]

In view of these tasks, it can be seen that in Indonesia particular difficulties in drafting legal rules in environmental law arise. There is no clearly identifiable interpretive

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[28] In developed legal systems, judges are not free to interpret statutes in any way they desire. They are constrained by conventions of the judicial process and other institutions. In the common law system, this includes the system of precedent. Starting from their legal education in law school, the judiciary has internalised the norms, categorical distinctions, and evidentiary criteria that make up their understanding of what the law is. Schanck PC, "Understanding Post-modern Thought and Its Implications for Statutory Interpretation" (1992) Vol 65 No 6 *Southern California Law Review* 2505-2597 at 2545-2546 discussing the analysis of Fish.

[29] Sebok A, "Finding Wittgenstein at the Core of the Rule of Recognition'(1999) Vol 52 No 1 *Southern Methodist University Law Review* pp 75-109 at 91.

[30] Black, Note 2 at 18.

[31] ibid., at 18; Fish, Note 24 at 122.

[32] Black, Note 2 at 3; Fish, Note 24 at 125.

community in environmental law in Indonesia. Whilst there are a number of Indonesian legal scholars and activists/academics who express opinions on the meaning of particular provisions in environmental legislation, the courts are only just starting to become part of the interpretive community and, at this stage, they do not yet play a significant role in interpreting statutory provisions on environmental protection. In addition, expressions are only just beginning to be *used*. This is apparent from the lack of compliance with legislation, lack of enforcement activity and the lack of involvement of the courts in publicly pronouncing on the interpretation and application of legal rules in environmental law. As a result, the internal relation between acts and rules has not developed. This is exacerbated by the fact that a number of environmental law concepts, such as strict liability and class actions, are derived from foreign legal systems and require adaptation and assimilation into existing legal conceptual frameworks, structures and procedures.

2. DEVELOPING A LEGAL TRADITION IN THE FORMULATION AND INTERPRETATION OF LEGAL RULES IN INDONESIA

Symbiosis in the traditions of legal drafting and judicial interpretation

It has been observed that, as is the case in many developing countries, Indonesia lacks a legal drafting tradition.[33] It is suggested here that a tradition in legal drafting is most likely to develop alongside development of reasoned interpretation of statutory language and the rational identification and application of legal rules by the courts. This, in turn, will lead to agreed techniques for statutory construction and the application of legal reasoning in Indonesia, which could then be absorbed and applied by legal drafters.

The relationship between these traditions can be seen in developed legal systems. For example, there appears to be an interrelationship between the drafting and judging traditions in civil code systems. Statutory law in civil code systems tends to be characterised by a desire for coherence, comprehensiveness, knowledgeability, clarity and the absence of contradiction.[34] There is a great concern to establish a rational overall

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[33] Budiardjo A, Nugroho, Reksodiputro (in cooperation with Mochtar, Karuwin and Komar) and CYBERconsult, *Law Reform in Indonesia – Diagnostic Assessment of Legal Development in Indonesia* (Jakarta: CYBERconsult, 1998) note this absence in Indonesia at 93-101. In relation to developing countries, see Seidman A and Seidman RB "Using Reason and Experience to Draft Country Specific Laws" in Seidman A and Seidman RB and Wälde TW (eds), *Making Development Work – Legislative Reform for Institutional Transformation and Good Government* (London: Kluwer Law International, 1999) 249-283 at 263.

[34] Holland JA and Webb JS, *Learning Legal Rules – A Student's Guide to Legal Method and Reasoning* (UK: Blacksone Press Limited, 4th ed., 1999) 184-186.

structure. Higher laws move from the general to the particular, which contain the exceptions and the more specific principles. Other features of civil code legislation are linguistic simplicity and brevity.[35] This drafting tradition is balanced by the grant to judges of substantial discretionary powers in the absence of clear language, to interpret legislation according to its objectives, or the intention of parliament.[36]

By way of comparison, in common law systems, where the legal drafting tradition tends to be less carefully structured, more verbose and with a less natural linguistic style, there are canons of statutory construction, which are essentially statements of a general judicial approach to the task of interpretation of statutes in particular contexts.[37] Two basic approaches that have developed in common law countries in interpretation are the 'literal' and the 'purposive' approach.[38] The literal or 'plain meaning' approach is the logical starting point, which looks to the ordinary and natural meaning of language. If the ordinary and natural meaning does not determine the issue at hand if, for example, it leads to inconsistency or absurdity, then the courts may have resort to the purposive approach by looking to the purpose of parliament in passing the legislation or the particular provision in question.[39] In this regard, legislative statements of policy or principles are regarded as being useful and a provision may be interpreted in the context of other provisions of a statute.

However, a difficulty in cultivating the relationship between legal drafting and interpretation by the courts is posed by the quality of judicial decisions in Indonesia. Where the courts have been involved in adjudicating environmental disputes, judgments do not provide clear legal reasoning and the response of the judiciary may be inconsistent. This is a problem across the legal system generally. It can be attributed, at least in part, to the lack of a strong understanding of what the law is in Indonesia, so that judges are not bound by internalised norms but appear to interpret law purely on personal or idiosyncratic grounds. Shortcomings have also been attributed to corruption within

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35 ibid., at 188-189. By way of comparison, the drafting tradition in the Anglo-American tradition tends to be less carefully structured, more verbose and with a less natural style of language.

36 ibid., at 195.

37 Cross R, *Statutory Interpretation* (England: Butterworths, 3rd ed., 1995) 4.

38 Cook C, Creyke R, Geddes R and Holloway I, *Laying Down the Law* (Australia: Butterworths, 2001) 208-220.

39 Holland and Webb, Note 34 at 218-219.

the ranks of the judiciary. For example, in May 2001 it was estimated by the Chief Justice of the Supreme Court that 75 to 85 percent of judges are corrupt.[40]

However, institutional factors also work against the development of legal reasoning in judgments. For example, the absence of a system for publishing and distributing judgements, including the publication of dissenting judgments, means that judicial decisions are not readily open to scrutiny either by judges or by the public. It also means that judges find it difficult to locate judgments on similar points of law. If a system for disseminating judgments were to be introduced, the legal community in Indonesia would need to develop a more widespread interest in solid legal analysis of judicial reasoning and structured academic debate on the relative strengths and weaknesses in the reasoning displayed in judicial decisions. There is also a need to change the way in which law is taught at law schools to focus on the analysis of judgments rather simply on memorising legislation. Such changes imply a new way of thinking about law in Indonesia, which can only be hinted at in this thesis.

This thesis will not speculate on which should come first, a stronger tradition in legal drafting or the fostering of reason-based decision making in statutory construction by the courts. Space does not permit a full exploration of the relationship. It is suggested that analytical jurisprudence looking at the nature of adjudication and the role of practical reasoning in Indonesian law, would be a fruitful area for further research.

However, it can be argued that if legislation is poorly structured, expressed with a lack of clarity, without specificity or precision or expressed in a complex manner that inhibits comprehensibility, this will make it more difficult for the judges to understand the intent of the law or to systematically seek to interpret and apply its terms. Conversely, it will make it easier for judges to escape the intent of the legislation and bend a decision to favour the interests of the more influential party in a dispute. It will also make it more difficult for others outside the court system such as academics, lawyers or the public to conduct a solid legal analysis of the reasoning in a judicial decision.

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[40] "Chief Justice Bagir Manan aiming for judicial transparency" *Jakarta Post* (16 May 2001) at 5.

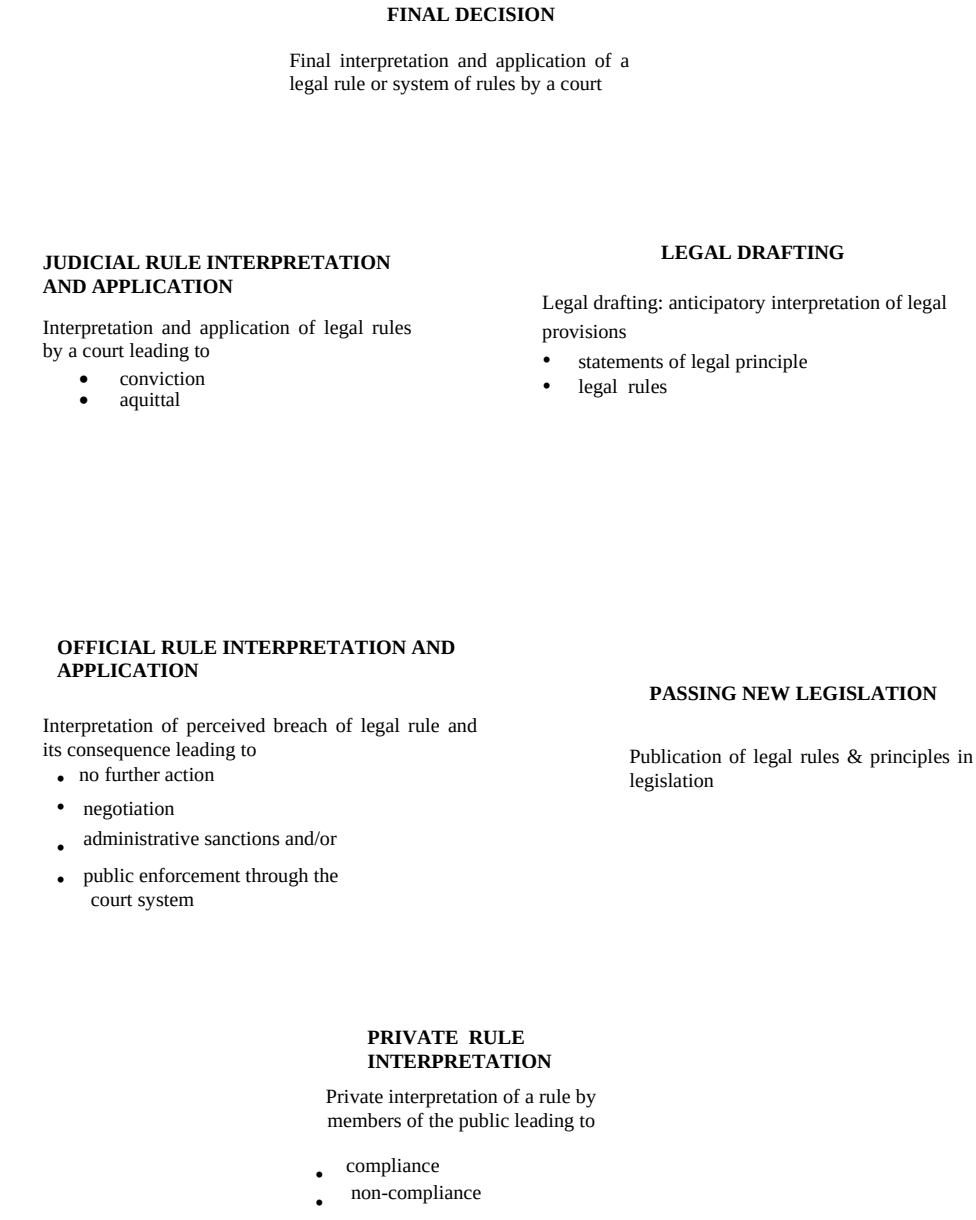
A knowledge cycle

It is suggested here that the two traditions can be depicted as a knowledge cycle, which passes through a number of stages. For example, in relation to public regulatory rules for environmental protection the following stages are involved:

- formulation of overall policy on environmental protection measures
- selection of legal policy tools relevant for legislation that is anticipated to achieve change in public behaviour in protecting the environment
- crystallisation of legal policy tools into legislation containing statements of legal principles and legal rules
- interpretation of legal rules by those addressed by rules, leading to a decision to comply with a rule or breach a rule
- detection of a breach of a rule by a departmental officer or others who have a role in ensuring compliance with the rule
- enforcement outside the court system, and if that fails, application of the legal rule by a court
- if the decision of the court is challenged, appeal to a higher court to review the reasoning of the lower court until a final decision is reached
- publication of the court decision and absorption of judicial reasoning by the public and the legal community including lawmakers
- application of judicial reasoning in drafting of further legal principles and rules.

For the purpose of simplification, this cycle has been reduced to diagrammatic form below:

Figure 4: The knowledge cycle in the formulation and interpretation of legal rules



Through the knowledge cycle, interpretation by the courts in the application of a legal rule or system of rules becomes part of the institutional knowledge shared by all participants in the legal system. In this way, common understandings are developed about how language can be used to serve institutional purposes.[41] This contributes to the development of linguistic competence in legal drafting. Statutes may also be passed which set out the approach to be taken to statutory interpretation.[42]

In Indonesia, the relative insignificance of the judicial process in the functioning of the state, and the absence of an independent and corruption free judiciary, has meant that the knowledge cycle remains unformed. However, this situation may be changing. For the reasons set out in chapter 3, it appears that a shift in the conception of the Indonesian state has occurred since the end of the Suharto era, with the result that the role of courts is receiving greater recognition as a separate arm of state authority. Furthermore, in the future it is envisaged that major efforts will be taken to reduce levels of corruption within the courts through the establishment of a Judicial Commission (as mentioned above in Chapter 3). The Supreme Court has commissioned several 'blueprints' for reform of the judiciary. It is being proposed that the public have greater access to judgments. In addition, ways to overcome inconsistency in judgments and the causes for inconsistency are being addressed.[43]

3. UTILISING THE DIMENSIONS OF LEGAL RULES IN LEGAL DRAFTING

This section looks at how certain aspects of legal rules can be consciously utilised to achieve a particular institutional purpose. Theorists writing about legal rules have called

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41 This depends on judgments being published and circulated, which does not happen in Indonesia. Court decisions are generally held by the individual court without any national documentation system. This difficulty has been discussed in Budiardjo, Nugroho, Reksodiputro (in cooperation with Mochtar, Karuwin and Komar) and CYBERconsult, *Law Reform in Indonesia – Diagnostic Assessment of Legal Development in Indonesia* (Jakarta: CYBERconsult, 1998), see recommendation 8.1.7 at 167.

42 However, in common law countries where this has occurred, such statutes have been preceded by the development to common law approaches to interpretation and the courts may still refer to the common law. Such statutes may clarify when a purposive approach rather than a literal approach is to be taken and the implications of the use of certain words such as 'shall' and 'may', see Australian Acts Interpretation Act 1901 (Cth).

43 Asian Development Bank TAR:INO 37037 Technical Assistance to Republic of Indonesia for the Improvement of the Administration of the Supreme Court, December 2003.

these aspects "rule dimensions", in particular, Diver[44], Baldwin[45], and more recently, Black.[46] The dimensions discussed below are proposed as being particularly useful for the analysis of Indonesian legislation.[47] They concern choices leading to a style of lawmaking.

Position in the legal hierarchy

'Position' will refer to the position of a legal instrument within the legal hierarchy set out in Decision of the MPR No. 3 of 2000 on Sources of Law and the Order of Legislation (*Ketetapan Majelis Permusyawaratan Rakyat Nomor III/MPR/2000 tentang Sumber Hukum dan Tata Urutan Peraturan Perundang-undangan*)(*TapMPR/III/2000*). The legal hierarchy has been mentioned in chapter 3 and is discussed in more detail in the next chapter. As will be pointed out, choices need to be made between including a measure in a legally binding instrument or a guideline. At the national level, additional choices are provided by a range of legal instruments: the statute, government regulation and presidential decree.

Linguistic structure

Linguistic structure refers to the description of a rule as precise/vague, simple/complex or clear/opaque.[48] By way of further clarification:

Precision or *vagueness* refers to the level of certainty or the definiteness of the meaning conveyed by a rule. Precision relates to the degree to which something is specified. Vagueness in legal drafting may arise where:

- there is a lack of specification or detail to sufficiently convey (a) the context or the manner in which an action is to be performed or (b) a complete meaning

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44 Diver CS, "The Optimal Precision of Regulatory Rules" (1983) 65 *Yale Law Journal* 65-109.
45 Baldwin R, "Why Rules Don't Work" (1990) 53 *Modern Law Review* 321-337 at 322-323.
46 Black, Note 2.
47 The rule dimensions identified by Black provide useful tools for analysis of rule formation in Indonesian law. Those rule dimensions are substance/scope, character/consequence, legal status, sanction and linguistic structure. These dimensions have been adjusted as the dimensions of substance/scope and character/consequence have been incorporated into discussion of linguistic structure. Black's dimension of status has been dropped as status is viewed as the result of the interplay of dimensions rather than as a separate dimension. Position in the legal hierarchy, rather than status, is identified here as a relevant rule dimension.
48 These categories are taken from Black, Note 2 at 22-24.

- a word is evaluative, for example, ‘reasonable’, ‘fair’, ‘suitable’ or ‘significant’

- generic terms are used, which refer to a whole class of institutions, persons, objects or events, rather than a specific term that refers to a component of that class

- an expression is ambiguous in that it can have more than one meaning.

Simplicity or *complexity* refers to the number of factual situations or assessments involved in determining a rule’s applicability. An example of a simple rule would be ‘no licenses may be granted to firms with less than 25 employees’. A more complex rule would be one that states ‘licenses may be granted to firms that comply with the following conditions …’

Clarity or *opacity* represents the extent to which a rule is capable of being readily understood by those applying the rule. If it uses everyday language, concrete terms or words with a defined meaning, it is more likely to be clear. Opacity will result where words that are not everyday words are undefined or abstract.

Unintended vagueness, unnecessary complexity or habitual opacity within legal rules needs to be distinguished from the deliberate utilisation of these linguistic structures. Vagueness can result from a lack of linguistic competence, for example, where a word or a phrase has a number of meanings, which are used imprecisely or inconsistently with no discernable benefit. Vagueness also arises from faulty grammar, where phraseology or grammatical structure enables a provision to be interpreted in conflicting ways. Unnecessary complexity can result from a failure to use proper syntax and a lack of linguistic competence in constructing sentences and paragraphs. Habitual opacity can result from a way of thinking that does not emphasise clarity, or a lack of facility in reducing concepts from the abstract to the concrete or a lack of technical knowledge in the subject matter.

However, when choices within these linguistic structures are used deliberately, they can provide tradeoffs, which have been reduced to table form below:

Table 3 - Tradeoffs within linguistic structure

	The scope (if **X***)*		*The consequence (then* **Y***)*	
	Advantage	**Disadvantage**	**Advantage**	**Disadvantage**
Precision or	Certainty in application Targeted application	Inflexibility in application Under-inclusive in targeting	Certainty Appropriateness of outcome is pre-determined Targeted results	Inflexibility in determining outcome
Vagueness	Flexibility in targeting	Uncertainty in targeting	Flexibility in determining outcome	Uncertainty, unpredictability of outcome
Simplicity or	Accessibility and intelligibility Ease and accuracy in application	Under-comprehensiveness of application Under-inclusiveness in targeting	Accessibility and intelligibility of outcome Ease and accuracy in achieving the desired outcome	Lack in comprehensiveness in the result
Complexity	Sophisticated application	Lack of accessibility or intelligibility in method of application	Outcome appropriate to achieving multiple or complex goals	Difficulty in obtaining the desired result
Clarity or	Accessibility and intelligibility Certainty in application Targeted application Ease and accuracy in application	Inflexibility in application/ targeting	Certainty in outcome Ease and efficiency in achieving outcome	Inflexibility in achieving outcome
Opacity	Technical appropriateness	Lack of accessibility or intelligibility in application	Technical appropriateness	Lack of accessibility or intelligibility in obtaining the intended outcome

Sanctions

The sanction is the third rule dimension that can be utilised to achieve institutional purposes. It is the repercussion that follows the failure to comply with a rule and is crucial to the formation of a command (obligation/prohibition) or conditional

permission.[49] The existence of a sanction is essential as it turns what would otherwise be a mere option into a command. If no legal sanction exists, a rule will rely on social norms to achieve its effect. Alternatively, economic mechanisms that rely on the 'invisible hand of the market' may be designed to have a coercive effect.[50]

Sanctions in public regulatory rules

When a command or conditional permission is backed by a sanction, the sanction is contained in a separate rule.[51] For example, an obligation imposed upon the public to obtain a licence for the discharge of industrial waste backed by a sanction can be seen to be two rules as follows:

	***If* X …**	**… *then* Y**
Rule 1	If the occupier of any premises discharges industrial waste to a water course	then the occupier must obtain an industrial waste discharge licence from the relevant authority.
Rule 2	If the occupier of any premises which discharges industrial waste to a water course fails to obtain a licence from the relevant authority which permits the discharge of such waste	then the occupier is liable to a fine of …… and/or imprisonment of ……

In reality, any command, even one backed by a sanction, always has a level of optionality.[52] For example, the effect of the above rule is '*if* a person does not want to be sanctioned, then he/she should not discharge waste to a water course without a licence.' Even a *prohibition* accompanied by a fine and/or imprisonment is an option as it could read: '*if* you do not wish to pay a fine or go to prison … *then* …'. The recipient can exercise the option and is likely to be influenced by their assessment of

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[49] Kelsen H, *Pure Theory of Law* Knight M (trans.), (USA: University of California Press, 1967) 302-303.

[50] Hart distinguishes taxes and fines on the basis that unlike a fine, a tax does not imply a breach of a duty, see Hart, Note 1 at 39.

[51] There is a question whether the sanction is prescribed in the "*then Y*" of the rule that establishes the obligation or whether it is prescribed in another, independent but related rule. The approach taken here follows that of Twining and Miers, who treat the prescription of the sanction as being an independent rule, see Twining and Miers, Note 12 at 30.

[52] Schauer, Note 1 at 3.

the likelihood of enforcement. If enforcement action is seen to be unlikely, or unlikely to succeed, the force of the command will be dissipated. This point is particularly relevant for the drafting of rules in sanctions: it is important that the legal drafting should not give the impression that enforcement is unlikely to succeed because of difficulties caused by linguistic structure from vagueness, unnecessary complexity or opacity. This point is taken up in chapter 10 in relation to the linguistic structure of criminal sanctions.

Sanctions in legislative and administrative rules?

The sanction only arises in public regulatory rules, not in legislative and administrative rules concerning state organs and officials. Although 'obligations' of the state are often talked about, there is nothing in the form of a sanction to correspond to the coercive sanction imposed on an individual.[53] Frequently the obligation is in the form of a moral-political obligation. Furthermore, failure to comply with procedural provisions may not be fatal to the exercise of administrative authority. In the last chapter it was stated that such rules are usually expressed as commands using the 'shall' word or its equivalent. Whether or not this will be interpreted as imposing a mandatory requirement is likely to be a question for interpretation by a court.[54] Nonetheless, the possibility that a court may declare a legal instrument to be invalid, or a decision to be beyond jurisdiction, presents an avenue for asserting the normativity contained in legislative and administrative rules.

In Indonesia, applications for review of administrative decisions may be filed in the Administrative Court. Act No. 5 of 1986 on the Administrative Judicature Law (*Undang-undang No. 5 Tahun 1986 tentang Peradilan Tata Usaha Negara*) ('the Administrative Court Act') states the grounds for review as being (art 53(2)):

> the administrative decision is contrary to prevailing law and regulations;
>
> the administrative body or official at the time of issuance of the decision ... has used its administrative power for other purposes than the intention of the given power;
>
> the administrative body or official at the time of issuance or non-issuance of an administrative decision ... should have not come to the issuance or non-issuance of the said decisions after having taken into consideration all the related interests to that said decision.

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[53] Kelsen, Note 49 at 303; Hart, Note 1 at 29-42.

An additional ground, principles of proper administration, is now recognised as a ground for review.[55] To date, disputes brought before the Administrative Court have primarily centered on concerns relating to civil servant law, land law and some constitutional matters.[56]

Utilising rule dimensions to serve institutional purposes

Appropriate selection of the dimensions of a rule will facilitate intended institutional purposes. If an informative use is intended, then a provision worded in simple and everyday language and placed a guideline will be effective. If it is intended to create an area for the exercise of discretion in administrative authority, this may be achieved by drafting a rule with a vague linguistic structure in a legal instrument or by putting a precise rule into a code or guideline for which there is no automatic legal consequence. If a specific pre-determined outcome is intended, a precise scope with a clear and simple consequence contained in a legal instrument is likely to be most effective.

If the successful implementation of a system of law will require widespread change in social behaviour, then rule dimensions should be chosen that give the new law a high status. By law with a 'high status' is meant law that carries authority and prestige. The new law will be required to play an educative role and, in addition, there may be sectors of society who resist the proposed changes. Of primary importance for an educative role, according to Evan, is that new law be authoritative and prestigious.[57] Thus, it can be seen that high status law is likely to be a key factor for the success of *reformasi* law. Therefore, there needs to be a conscious utilisation of the dimensions of legal rules that will elevate the status of legal measures in support of *reformasi* programs.

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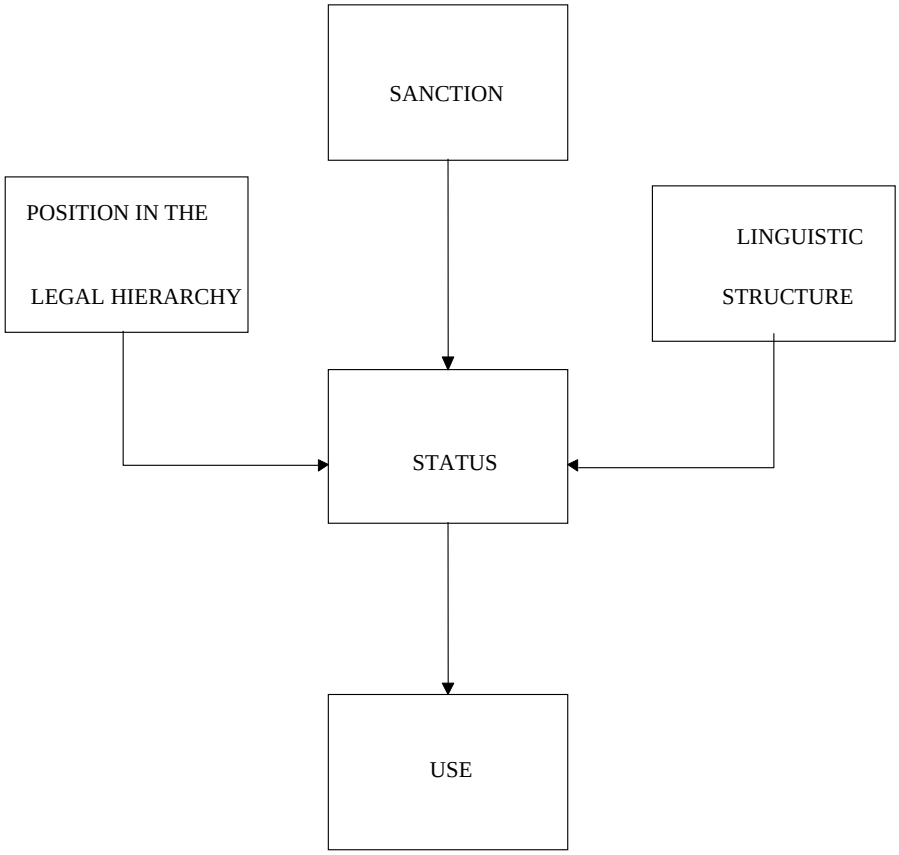
[54] For example, in Australia the issue is seen as whether such a provision imposes a condition precedent to the exercise of a power, see *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

[55] These are a set of criteria for judging administrative acts, which were developed by continental administrative court judges. Some important principles are formal carefulness, fair play, motivation, formal legal security, material legal security, trust, equality, material carefulness and proportionality, see Bedner A, *Administrative Courts in Indonesia – A Socio-Legal Study* (Ph.D Thesis) (The Netherlands: University of Leiden, 2000) 97-8.

[56] Relating to freedom of religion, freedom of movement, freedom of opinion, the performance of civil rights, the right to legal counsel, restrictions on political parties and village head elections, see Bedner, Note 55. Also, Bedner A. "Administrative Courts in an Executive-Dominated State: The Case of Indonesia" in Yong Zhang (ed.), *Comparative Studies on Judicial Review Systems in East and South-East Asia* (The Netherlands: Kluwer Law International, 1997) 183-210.

[57] Evan WM "Law as a Instrument of Social Change" in Evan WM (ed.), *The Sociology of Law – A Social-Structural Perspective* (New York: The Free Press, 1980) 554-562 at 557.

Figure 5: Relationships between rule dimensions



The above diagram indicates the combined effect of position, sanction and linguistic structure in determining the status of a legal rule. It also indicates that status will affect the use of a rule.

The status of a particular legal rule will be determined by choices made in relation to the dimensions of legal rules. In Indonesia, the status of a legal rule will be strongly influenced by its position in the legal hierarchy. Clearly, a public prohibition contained in a statute will have a higher status than one contained in a departmental guideline. Status will also be influenced by the authority conveyed in the linguistic structure of the rule: a

precise, simple and clear rule is likely to carry more authority than one that is vague, unnecessarily complex or opaque, even where the rule is located high up in the legal hierarchy. However, the strength of a sanction will ultimately determine the status of a rule: if a rule has a light sanction, even when it is located high up in the legal hierarchy and has a clear linguistic structure, it will have low status.

Within the legal hierarchy in Indonesia, the statute has the most prestige of all the operational laws as it is passed by parliament.[58] Statutes may take the form of framework laws that operate as 'basic law' or as law that is more specific. It is notable that the first environmental law statute, Act No. 4 of 1982 on Basic Provisions on Environmental Management (*Undang-undang No. 4 Tahun 1982 tentang Ketentuan-ketentuan Pokok Pengelolaan Lingkungan Hidup*) was a basic law. Its successor was not said to be a basic law, however, it does not appear to be very different from the earlier framework law.

Most statutes in Indonesia rely on delegated legislation to realise the details of the statutory provisions, which do not govern by themselves. In the sense that they must be implemented by a subsidiary agency or through further regulation they are still framework laws.[59] At numerous points in a statute, subject matter is identified as a topic that will be dealt with in a government regulation. The same tendency occurs in government regulations: they defer subject matter as topics to be dealt with in national guidelines or regional regulations. As a result, implementing measures have a relatively low position in the legal hierarchy and may not take the form of legally binding instruments. It is likely that this practice, which gives a low status to implementing measures, affects the ability of *reformasi* law to act as an instrument of social change.

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[58] Decisions of the MPR have higher status but are usually are non-operational.

[59] Friedman LM, "Legal Rules and the Process of Social Change" (1967) Vol 19 *Stanford Law Review* 786-840 at 829-830.

4. DRAFTING ADMINISTRATIVE RULES FOR LEGAL ACCOUNTABILITY

Constructing and constraining discretion

In the final section of this chapter, the discussion of the role of the legal rule will be continued in relation to the drafting of administrative rules to construct and constrain the exercise of discretion. In administrative law, discretion may be described as a sphere of autonomy within which a decision-maker can exercise some degree of personal judgment and assessment.[60] In *Bahasa Indonesia*, there is no indigenous word to convey the concept of discretion. The closest indigenous word to 'discretion' is *kebijaksanaan*,[61] which comes from the word *bijaksana*, meaning wise, bright or clever.[62] A word that is sometimes used to convey discretion, is an anglicised word, *diskresi*, or *kewenangan dikresioner* for discretionary authority. A term that is also used is *freies ermessen*, which comes from the word *frei* meaninging free and *ermessen* meaning consideration, assessment, or estimation.[63] It is most commonly identified in Indonesia in relation to the provision of services by the government in the socio-economic life of the nation.[64]

In Galligan's analysis of discretion, he says that a distinction can be made between *strong* and *weak* discretion. The difference for present purposes is that strong discretion involves creating one's own standards, whereas weak discretion requires interpreting a given standard within a legal rule in order to apply it.[65] According to Galligan, discretion in the strong sense will arise when a grant of power does not include constraints in the form of standards to apply.[66] Weak discretion arises when there are constraints over the exercise of administrative discretion imposed in substantive rules such as a requirement that officials realise and advance the objects and purposes for which their powers have been granted. A statute may stipulate all the matters that may be taken into account or

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60 Galligan DJ, *Discretionary Powers* (England: Clarendon Press Oxford, 1986) at 8-9.

61 Echols JM and Shadily H, *Kamus Inggris Indonesia* (An English Indonesian Dictionary) (Jakarta: Cornell University Press/PT Gramedia Pustaka Utama, 1996).

62 Salim P, *Standard Indonesian – English Dictionary* (Jakarta: Modern English Press, 1993). The derivation in English may be similar as, according to Galligan, the etymological origin of discretion is good judgment, see Galligan, Note 60 at at 8-9.

63 Ridwan HR, *Hukum Administrasi Negara* (State Administrative Law) (Indonesia: UII Press, 2002) at 130.

64 ibid., at 132 quoting Laica Marzuki.

65 Galligan, Note 60 at 14.

state those that must be taken into account. It may also weight the factors to be taken into account, thereby further reducing the scope for the exercise of discretion. In Galligan's view, discretion is what is left within such constraints, from gaps in standards, or where standards are vague, abstract or in conflict.[67]

A similar distinction is made in Indonesia. Ridwan has identified three situations where discretion arises. The first, which is similar to Galligan's strong discretion, is said to be where there is a legislative delegation where authority to regulate alone has been given. The second, which is part of Galligan's weak discretion, is where interpretive authority is given such as where an instrumentality has to interpret the meaning of "giving rise to danger". The third example is where legislation has not yet been passed but a problem needs to be addressed.[68]

The exercise of discretion is a particularly important component of environmental management.[69] Specifically in relation to integrated water resources management (IWRM), decisions require the taking into account of multiple and sometimes conflicting objectives. Concessions or trade-offs need to be made in specific situations. If IWRM is to be truly 'bottom up' it will need to adopt a mode of implementation based upon group processes and bargaining, and effective allocation of discretionary authority will be necessary to encourage this kind of decision-making.

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66 ibid., at 15.

67 ibid., at 27-32.

68 Ridwan, Note 63 at 132.

69 Unger has observed that in the transition from a liberal to the welfare state, government has had to assume managerial responsibility in areas where complexity and diversity is too great to rely on general rules, see Unger RM *Law in Modern Society* (New York: The Free Press, 1976) 192-200. In developed legal systems, concern has arisen over the extent of bureaucratic discretion resulting from the broad delegation of power to administrative agencies, see Davis KC, *Discretionary Justice: A Preliminary Inquiry* (USA: Louisiana State University Press, 1969) where he argued that 'unnecessary' bureaucratic discretion needs to be confined and structured, through the use of rules and precedent, to eliminate all unnecessary discretionary power, at 219. Also, see Stewart RB, "The Reformation of American Administrative Law" (1975) 88 *Harvard Law Review* 1067-1813. In support of discretion, Baldwin and Hawkins have introduced the idea of 'polycentric' issues, where many factors interact and decision-making calls for an assessment of values or balanced judgment rather than rational justification. They say that to seek to employ rules or even principles, standards or procedural requirements in these areas would be to make a 'category mistake', see Baldwin R and Hawkins K, "Discretionary Justice: Davis Reconsidered" (1984) Winter *Public Law* 570-599 at 591. Also, Hawkins K, "The Use of Legal Discretion: Perspectives from Law and Social Science" in Hawkins K (ed.), *The Uses of Discretion* (England: Clarendon Press Oxford, 1992) 11-46 at 11.

Rules are not the antithesis of discretionary power; rather, the dimensions of rules can be utilised to constitute, define and limit the exercise of discretion.[70] This is particularly so concerning discretion in the weak sense. This form of discretion can be created by locating a rule in a non-binding instrument. It can also be created by the absence of any legal means to ensure that a rule is followed, such as, where there is no appeal or review process which may otherwise create a level of pressure to follow a rule guiding the content of a decision or procedure to be followed. Discretion can be deliberately promoted by a vague linguistic structure such as where a rule contains evaluative words requiring an element of judgment before they can be applied such as 'reasonable', 'appropriate' and 'significant'. Rules that make use of general, descriptive or 'class' terms also leave room for the person applying the rule to exercise discretion. On the other hand, discretion may be confined by a precise and clear linguistic structure.[71]

Importantly, discretion should not arise by default: from faulty grammar, unintended use of ambiguous words or a failure to clearly express the intended meaning. These features are related to a lack of linguistic competence rather than the deliberate use of rule dimensions. As Galligan has said, if discretion is conferred without a certain level of rule formation, there will be only the lowest level of guidance, and whilst there may be a legally valid power, it will 'defeat the very idea of law'.[72]

The need for legal accountability

Whilst the advantages of discretion are that it provides for flexibility in decision-making, the dangers of uncontrolled discretion are familiar and include inconsistency in outcomes, arbitrariness, the use of improper criteria in reaching a decision (such as personal connections), lack of transparency and the taking into account of information which may have questionable accuracy, reliability or relevance.[73] These dangers can be held in check by systems to ensure accountability. In the last few years, there has been

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[70] Hawkins states '… the use of rules involves discretion, while the use of discretion involves rules.' Hawkins, Note 69 at 12. Also, Galligan, Note 60 at 3.

[71] Black, Note 2 at 26.

[72] Galligan, Note 60 at 60.

[73] Hawkins, Note 69 at 14.

increasing discussion in Indonesia about accountability.[74] Openings for greater political accountability have developed from the freeing up of the media, an increase in the range and intensity of political debate in the country and changes in the electoral laws that will enable direct election of the President and heads of regional government in 2004.

Building systems of accountability into the decentralisation of government functions in environmental management is particularly important in Indonesia because of the prevalence of corruption in government. As noted by Hill, in Indonesia '[i]llegal payments and exactions are an everyday occurrence for all manner of government services'.[75] Opportunities for corruption occur at the interface between public and private sectors whenever a public official has discretionary power over distribution to the private sector of a benefit or a cost, as this provides an incentive for bribery.[76] In the management of water resources, benefits may be conferred through water supply licenses or access to water and costs may be imposed through the imposition of regulatory requirements such as pollution licenses, environmental impact assessment and enforcement action. Each of these junctures contains the opportunity for corrupt practices to develop.

There is hope that decentralisation will enable an erosion of corrupt practices because politicians will be closer to their constituencies.[77] However, in the short term, proximity between politicians and powerful entities is also likely to lead to even greater opportunities for corrupt practices. The establishment of a Corruption Eradication Commission, with powers to investigate and prosecute corruption cases, was an important step, as is the establishment of an ad hoc corruption tribunal established as part of the Commission.[78]

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74 It is seen as one of the components of good governance, see Indonesian Centre for Environmental Law *Lingkungan Hidup Dan Sumber Daya Alam Pasca Orde Baru* (The Environment and Natural Resources After the New Order) (Jakarta: ICEL, 1999) at 2.

75 Hill H, *The Indonesian Economy Since 1966* (Hong Kong: Cambridge University Press, 1996) 118.

76 Rose-Ackerman S, "The Political Economy of Corruption" in Elliot KA (ed.), *Corruption and the Global Economy* (Washington DC: Institute for International Economics, 1997) 31-60 at 31.

77 Thohha M, "*Praktik Birokrasi Publik yang Menjadi Kendala Terwujudnya Good Governance*" (Bureaucratic Practices that Obstacles to Good Governance) in Thoha M and Dharma A (eds), *Menyoal Birokrasi Publik* (Jakarta: Balai Pustaka, 1999) 55-72.

78 "Screening of graft court judges passes almost unnoticed" *Jakarta Post* (21 June 2004) at 2.

As observed by Nasution, accountability is foreign to the concept of the *integralistic state* (discussed in chapter 3) and the family metaphor, which informed the idea of an *integralistic state*:[79]

> Opposition is interpreted as distrust of the good faith of the ruler; just as it would be inconceivable that children demand that their father account for their acts, it is inconceivable that the people demand that the ruler be accountable for his deeds.

The Indonesian word sometimes used to in the grant of administrative authority is *pertanggungjawaban*, which can be translated as responsibility.[80] Responsibility may imply an obligation to answer for actions, it can also simply mean that someone has authority to act independently or is under a legal obligation to do a certain thing. In recent times a new word has come into usage, namely, *akuntabilitas*; in the context of good governance, *akuntabilitas* is said to connote 'genuine' public participation and transparency in decision-making;[81] however, no explanation is given concerning the meaning of 'genuine' participation. This is an English-based word and it is questionable whether there is widespread understanding of its implications. *Akuntabilitas* does not appear as an entry in the 2001 edition of the *Kamus Besar Bahasa Indonesia*. An alternative word for accountability is *bertanggung-gugat*, which is a combination of words: *bertanggungjawab* meaning to hold responsibility and *gugat*, which means to accuse, claim or criticise.[82] It would seem that this word has been recently created to specifically indicate that those with responsibility are answerable for how it is used and this may be the subject of a claim against them.

The achievement of accountability branches in two directions: one towards the political process and the other towards the legal system.[83] Political accountability concerns the accountability of elected office bearers through the political process and is beyond the scope of this thesis. To assist an understanding of how to achieve legal accountability,

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79 Nasution BA, *The Aspiration for Constitutional Government in Indonesia: A Socio-Legal Study of the Indonesian Konstituante 1956-1959* (Jakarta: Pustaka Sinar Harapan, 1992) 423.

80 Salim, Note 62.

81 Indonesian Centre for Environmental Law *Lingkungan Hidup Dan Sumber Daya Alam Pasca Orde Baru* (The Environment and Natural Resources ofter the New Order) (Jakarta: ICEL, 1999) 2.

82 Salim, Note 62.

83 Legal accountability is a form of accountability that ultimately requires an effective and independent court system, see Galligan, Note 60 at 96.

Galligan has identified two different models of legal authority.[84] In the first, the *private law model*, legal authority functions to provide social order and stable facilities for private relations. The institutional structure is built on the separation of powers, citizen-state relationships that give primacy to rights, state intervention controlled by rules, and the resolution of disputes about rights through the courts. Participation is limited to political participation at the macro political level and the right to participate in court processes.

In the second model, the *public law model*, the law provides the framework for the achievement of particular goals, the realization of which is delegated to the executive and administration through the exercise of discretion. The role of law is to set limits and constraints on the exercise of that discretion. In citizen-state relations, the emphasis shifts away from rights, towards interests and the resolution of conflicts that may arise between competing interests. Public participation becomes more extensive and includes participation in discretionary decision-making. The ideals of *reformasi* discussed in chapter 2, with their emphasis on transparency, openness, public participation and community empowerment reflect a concept of society represented in the *public law model* of legal authority. Furthermore, the kind of decision-making required for IWRM also requires a public law model of legal authority. The dilemma for Indonesia is that whilst there may be an aspiration in some sectors of society to move towards a public law model, the legal system has not developed to the extent that it approximates a private law model.

The means to achieve legal accountability: process

Galligan suggests that the basis of legal accountability in the public law model is process. By process, he is referring to the legal rules that set out constraints upon the reasoning behind a decision, the permissible outcomes and the manner in which a decision is made.[85] These constraints will be found in substantive and procedural administrative rules. If the goal is to maximise accountability, then these rules need to be expressed precisely and clearly, with a minimal use of evaluative or generic terms. They should also be given a high status. These concerns will be discussed further in chapters 8 and 9.

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[84] Galligan, Note 60 at 86-87.
[85] ibid., at 97.

At this stage, it can be said that there is a strong tendency at the national level to avoid dealing with this level of detail in statutes and government regulation.[86]

According to Galligan, two approaches to fostering accountability present themselves: incrementalism and comprehensive planning.[87] The incrementalist approach involves solving problems as they arise. Comprehensive planning, on the other hand, seeks to anticipate all the factors and difficulties that may arise. Accountability is achieved in the comprehensive planning approach through the drafting of precise rules within plans, the application of policy standards, and the external oversight of the implementation of those rules.[88] The public availability of information will facilitate transparency and openness.[89]

Comprehensive planning is not likely to be an option for Indonesia, particularly in the regions, as systems of government are not fully established, there are insufficient human and financial resources, and the cost of information is high.[90] In the incrementalist approach, accountability will depend on the scope for interested parties to participate directly in the decision.[91] To secure direct participation there is a need for procedural rules to establish rights to participate and obligations to respect those rights. Attention also needs to be given to the character and nature of the discourse that occurs between participants to enable true communication.[92]

This means that in Indonesia, procedural rules must detail the form in which public participation is to occur at the various junctures in the decision-making processes such as strategy formulation, policy making, environmental impact assessment, development

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[86] The cost of drafting legal rules is an important consideration. As discussed by Ehlich I and Posner R, "An Economic Analysis of Legal Rulemaking" (1974) Vol 3 *Journal of Legal Studies* 257- 286 at 267-269, formulating rules can be costly, particularly where a rule is politically controversial and requires negotiation. Legislative production is expensive and transaction costs increase rapidly with the number of parties whose agreement is necessary.

[87] Galligan, Note 60 at 127.

[88] In the USA, the problem of corporate capture of regulating agencies has been argued to be a reason for precise rules, particularly with the aim of reducing discretion in sanctioning and enforcement. Bardach E and Kagan R, *Going By the Book – The Problem of Regulatory Unreasonableness* (Philadelphia: Temple University Press, 1982) 44-51.

[89] Galligan, Note 60 at 128.

[90] Information costs together with risk costs have been identified as affecting many of the characteristics of the legal process in developing countries, see Gray CW, "Legal Process and Economic Development: A Case Study of Indonesia" (1991) Vol 19, No 7 *World Development* 763-777.

[91] Galligan, Note 60 at 127.

[92] As pointed out by Black in relation to her work on developing models of proceduralization, attention needs to be given to the modes of discourse adopted in procedures, see Black J, "Proceduralizing Regulation: Part II" (2001) Vol 21, No 1 *Oxford Journal of Legal Studies* 33-58 at 33-34.

approval and licensing. Such rules would provide 'causal steps to achieve their aims'.[93] For example, if a local community is to be consulted in a management decision, it may be necessary to set out how the consultation is to occur, to take into account the level of education and cultural attitudes and comfortable means of communication. It may not be appropriate to rely on outside non-government organizations to represent community interests. Rules may be needed to enable interpretation and explanation of views expressed, to recognise and compensate for the distorting effects of power relationships between participants, and to allow for the adoption of strategies for dispute resolution such as mediation. Attention also needs to be given to the role of regulators, for example, whether the regulator can act on behalf of an affected community, and whether they have ultimate power to decide upon a particular issue.

Towards reflexive rationality?

The means to ensure accountability within incrementalism points to the need for comprehensive procedural rules; this overlaps with ideas of *reflexive rationality* that have emerged in developed legal systems, where the expanded role for administrative discretion has been described as leading to a crisis of formal rationality.[94] Whilst administrative discretion assumes a framework of standards, there is a diminution in the formal rationality of the system since the official is concerned to make the decision that best achieves the ends sought. This form of rationality is purpose-oriented; there is not the same concern to separate law from ethical, political or religious ideas, or to develop a system of abstract legal norms that characterises formal authority.[95] In developed legal systems, it is seen to amount to a regressive return to substantive rationality with 'grave consequences for the conceptual construction of doctrinal legal systems.'[96] Furthermore, it is said to have encountered difficulty in effectively organising and regulating socio-economic affairs in developed legal systems.[97]

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93 As stated by Sugianto I, "Public Participation in Environmental Management " (1996) Vol 1 *Indonesian Journal of Environmental Law* 29-41 at 40.

94 Teubner G, "Substantive and Reflexive Elements in Modern Law' (1983) Vol 17 *Law and Society Review* 239-285 at 259.

95 ibid., at 257 and Galligan, Note 60 at 66.

96 Teubner, Note 94 at 254.

97 ibid., at 239 refers to the increasing disenchantment with the goals, structures and performance of the regulatory state that started to emerge in the early 1980s and led to a reappraisal of the system of law and public regulation.

Reflexive rationality is an alternative form of rationality proposed by Teubner and Habermas and, as stated by Teubner, it 'shares with substantive law the notion that focused intervention in social processes is within the domain of the law, but it retreats from taking full responsibility for substantive outcomes.'[98] Reflexive rationality searches for 'regulated autonomy' and seeks to design 'self-regulating social systems through norms of organization and procedure'.[99] It tends to rely on procedural norms, which regulate processes, organization and the distribution of rights and competencies.[100] The distinctive feature of reflexive rationality is that norms are directed towards organization, procedure and competence rather than substance. Instead of trying to take responsibility for concrete results, the law structures mechanisms for self-regulation such as negotiation, conflict resolution, planning and decentralised decision-making. It also introduces new modes of participation such as social advocacy, class actions and representation of group interests.[101]

It is suggested here that the concept of reflexive rationality has particular relevance for Indonesia, especially in the context of regional autonomy, good governance and sustainable development. In its emphasis on legal self-restraint through the development of procedural laws, reflexive rationality provides ideas on how central government could enable the design and implementation of policy without imposing their substantive values on regional government, apart from the values inherent in procedures which may support, for example, public participation or more widely, good governance. Procedural rules at the national level in both legislative rules and administrative rules potentially provide mechanisms which enable a shift towards national laws that provide indirect strategies of achieving the goals whereby the substantive ends, and the means for achieving them, are established within the regions themselves.

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98 ibid., at 239.

99 ibid., at 254-255.

100 ibid., at 255.

101 Teubner refers to these features of reflexive law when he argues that the concept of responsive regulation proposed by Nonet P and Selznick P in *Law and Society in Transition: Toward Responsive Law* (New York: Harper, 1971) closely matches reflexive rationality, see Teubner, Note 94 at 251. Also, see Habermas J, *Between Facts and Norms Contributions to a Discourse Theory of Law and Democracy* Rehg W (trans.), (USA: MIT Press, 1996) 427-446 and Postscript 447-462. The communications theory of Habermas proposes the goal of proceduralisation as being the creation of situations where deliberation is rational, there is equal participation of all relevant parties, all issues are open to question, and all opinions voiced freely. As a result, the outcome is determined by the force of reason contained in the better argument.

Concepts of proceduralisation within reflexive rationality also have relevance for coordination between the different actors or systems in Indonesian society. The key is that reflexive rationality does not carry the burden of implementation; it externalises this burden to systems. It does not need to resolve social conflict but channels conflict between systems through the avenues of mediation and coordination. However, as pointed out by Teubner, reflexive rationality requires an understanding of the strategic structures of systems and, in particular, the relations between systems.[102] As will be shown later in this thesis, there appears to be a lack of such an understanding in Indonesia, or even an appreciation as to why it is important.[103] This understanding will need to be cultivated before discourse on reflexive rationality has real significance for Indonesia.

Conclusion

This chapter has sought to cover some of the issues that arise in designing legal rules for environmental management and pollution control. This has been done with a view of addressing the question whether or not environmental legislation on water quality management and pollution control is adequate to achieve its purpose.

The idea that rules have dimensions has been introduced and it has been suggested that the interplay of rule dimensions (position, linguistic structure and sanction) is significant for designing legal rules for particular institutional purposes. Where that purpose is to act as an instrument of social change, such as in environmental law, building legal status is important. It has been suggested here that high status law requires rules that are high up in the hierarchy, with a clear, simple and precise linguistic structure and strong sanctions.

It has been considered how rule dimensions can be utilised for the construction and constraint of discretionary authority, which is important in the administrative aspects of environmental law. It is suggested that legal accountability in Indonesia will require the

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[102] Teubner G, "After Legal Instrumentalism? Strategic Models of Post-Regulatory Law" in Teubner G (ed.), *Dilemmas of Law in the Welfare State* (Berlin: Walter de Gruyter, 1986) 307-310.

[103] This may be changing: Radjagukguk has said that new laws must be presented in language that is understandable, confirms the aspirations of the people and, if necessary, contain procedural rules, see Radjagukguk, E "Indonesian Development Under Economic Globalisation: The Reform of the Investment

careful drafting of substantive and procedural administrative rules. Finally, it has been proposed that the concept of reflexive rationality has relevance for Indonesia, as it opens up new possibilities for the role of national law within regional autonomy.

Process" in Koesnadi H and Naoyuki S (eds.), *Current Development of Laws in Indonesia* (Japan: Institute of Developing Economics – Japan External Trade Organisation, 1999) 65-90 at 70.

CHAPTER SEVEN

RULES FOR MAKING ENVIRONMENTAL LAW

Introduction

This chapter focuses more particularly on the rules for law making in Indonesia. It builds on the earlier discussion in chapter 4 concerning the role of secondary rules of change in enabling a legal system to renew itself: to expand, reduce or alter the content of a legal system so that it can adjust to changing circumstances and the needs of society. To this end, the Hartian view is that a minimum requirement for the existence of a legal system is that secondary rules of change are accepted as common public standards in the making of primary rules.[1] Even under Tamanaha's conditions of minimal acceptance, lawmakers must be able to engage in producing and reproducing a legal system through shared secondary rules.[2]

It was observed in chapter 4 that the provisions in the legal hierarchy are quite rudimentary. Whilst secondary rules may not be rejected or challenged by lawmakers, the more relevant question in Indonesia is whether current arrangements adequately guide environmental law making.[3] In this chapter, the regional autonomy laws passed in 1999 and 2000 will be reviewed in relation to environmental law.[4] Part of the 'change in paradigm' in water resources management reform is the idea that central government is primarily an 'enabler and regulator'.[5] To fulfil this role, central government must be able to answer the following questions:[6]

- What are the relevant policy objectives?

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1 Hart HLA, *The Concept of Law - With a Postscript Edited by Raz J and Bullock PA* (England: Clarendon Press Oxford, 2nd ed., 1994) 116.

2 Tamanaha BZ, "Socio-Legal Positivism and a General Jurisprudence" (2001) Vol 21 No 1 *Oxford Journal of Legal Studies* 1-32 at 15.

3 At the time of writing, a statute on law making was in the process of being drafted. Some of the issues raised in this chapter will be addressed by this statute.

4 This chapter looks at the rules for environmental law making rather than law making in water resources management. However, environmental law overlaps with water resources management in the area of water quality management and control.

5 As mentioned in chapter 2, the 'enabling and regulatory' role of central government is referred to in the Letter of Sector Policy.

6 Baldwin R, *Rules and Government* (England: Clarendon Press Oxford, 1995) 157.

- Which level of government can best achieve those objectives?

- Which strategies will best influence this level of government to act appropriately?

It is suggested here that the current arrangements for environmental law making do not assist in providing answers to these questions.

1. THE CRITERIA FOR VALIDITY UNDER REGIONAL AUTONOMY

Gaps in the legal hierarchy

As mentioned in chapter 3, after the fall of Suharto, the MPR established a new legal hierarchy for the creation of law in Decision of the MPR No. 3 of 2000 on Sources of Law and the Order of Legislation (*Ketetapan Majelis Permusyawaratan Rakyat Nomor III/MPR/2000 tentang Sumber Hukum dan Tata Urutan Peraturan Perundang-undangan*)(*TapMPR/III/2000*). For the purpose of more detailed analysis, the legal hierarchy is set out here again (art 2)):

1. The Constitution (*Undang-Undang Dasar 1945*) (*UUD* 1945)
2. Resolutions of the MPR (*Ketetapan MPR*)(TapMPR)
3. Statutes (*Undang-undang*)(*UU*)
4. Government regulations amending statutes (*Peraturan Pemerintah Pengganti Undang-undang*) (Perpu)
5. Government regulation (*Peraturan Pemerintah*)(*PP*)
6. Presidential Decrees (*Keputusan President*)(*Keppres*)
7. Regional Regulations (*Peraturan Daerah*)(*Perda*)

Provision is also made for regional regulations, which are stated to include regulations made at the following levels (art 3 (7)):

a. provincial level (*Peraturan Daerah Propinsi*)
b. local level (*Peraturan Daerah Kabupaten/Kota*) and
c. village level (*Peraturan Desa*).

TapMPR/III/2000 goes on to describe the features of each type of legal instrument. It is stated that statutes are made 'by the DPR together with the President for the implementation of the Constitution and decisions of the MPR' (art 3(3)). Government regulations are described as instruments created by 'the government' for the 'implementation of statutes' (art 3(5)). Presidential decrees are regulations passed by the President to 'put into effect the functions and tasks of state and government administration' (art 3(6)). Regional regulations are stated to 'implement higher law and make provision for regional conditions' (art 3(7)). Provincial regulations are prepared by the Provincial DPR together with the Governor (art 3(7)(a)), district regulations are prepared by the District DPR together with the Mayor (art 3(7)(b)) and village regulations are prepared by the Village Representative Body (art 3(7)(c)).

These provisions confer normative power upon the respective organs of government to pass certain types of legal instruments. They provide the criteria that can be referred to if there is a challenge to the validity of a legal instrument (as previously discussed in chapter 4). At the national level, a choice has to be made between passing a statute, government regulation or presidential decree and ideally, this decision should be guided by such provisions.

Statutes

Beyond the provision that statutes are to 'implement' the Constitution and decisions of the MPR, there is only one legislative statement concerning the content of statutes. The Constitution states that certain aspects of government are regulated by statute such as finances (art 23), conditions for becoming a judge (art 25), structure and power of the courts (24(2)), conditions for citizenship (art 26(2)), freedom of association and assembly (art 28), defence (art 30(2)). However, this list is not definitive. There appears to be no provision that addresses the generic content of statutes.[7] The question of when material

[7] Presidential Decree No. 44 of 1999 addresses the technical aspects of drafting statutes, government regulations and presidential decrees: *Keputusan Presiden No. 44 Tahun 1999 tentang Tehnik Penyusunan Peraturan Perundang-undangan Dan Bentuk Rancangan Undang-undang, Rancangan Peraturan Pemerintah, Dan Rancangan Keputusan Presiden.*

should be dealt with by a statute has been canvassed by Manan,[8] who identified such factors as matters relevant to basic rights or the interest of obligations of many people.[9]

Government regulations

It is stated in *TapMPR/III/2000* that government regulations 'implement' statutes (art 3(5)). However, a decision must be made as to the subject matter that is appropriate for a statute as opposed to the 'implementation' of a statute and there is nothing to set out the dividing line between the two instruments. As will be pointed out in chapter 8, the content of statutes is very bare. After touching on a subject matter, the general practice is to state that it is 'to be regulated further in …' (*diatur lebih lanjut dalam* …) a certain legal instrument such as a government regulation, presidential decree, national guideline or regional regulation.

There is no rationale expressed in the legal framework to guide the placement of subject matter in a government regulation rather than a statute. Manan has explained the increasing delegation of subject matter to government regulations in terms of the lack of parliamentary capacity to meet the urgent need for new and increasingly complex laws.[10] He is concerned with limiting the extent of delegation saying that they should not be concerned with matters that are proper for higher laws, of general subject matter or without a specific delegation of law-making authority.[11]

Presidential decrees

The most explicit provision governs the content of presidential decrees: article 3(6) in *TapMPR/III/2000* states that presidential decrees are regulations passed by the President to 'put into effect the functions and tasks of state and government administration';

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8 Manan B, *Dasar-Dasar Perundang-Undangan Indonesia* (The Basis of Indonesian Legislation) (Indonesia: Pernerbit IND-HILL Co, 1992) 37-45.

9 ibid.,at 41.

10 ibid., at 41-45.

11 ibid., 45-46.

however, this provision is interpreted broadly. Before regional autonomy was introduced, presidential decrees relevant to environmental law were passed on such subject matter as business licences, protected areas, land use for industry, energy conservation, the coordination of spatial planning and coastal reclamation. Since regional autonomy was introduced, presidential decrees have been passed on such subject matter as the technical aspects of statutory drafting, national coordination of spatial planning, the tasks and functions of Ministers of State and the implementation of authority by district level government.

Regional regulations

It is apparent from the national hierarchy that regional regulations are to realise 'higher law'. It would seem that the intention is to enable regional government to adjust national law to regional conditions. Given the high level of activity in central government in drafting national guidelines, it would seem that the formulation of regional regulations is to be guided by the content of national guidelines. However, the extent to which regional government is required to flesh out national instruments is not specified and seems to be left open, as a matter to be determined regionally.[12]

To bind or not to bind?

Ministerial Decrees

A vast amount of legislation is passed as ministerial regulations (*peraturan menteri*) or ministerial decrees (*keputusan menteri*). However, there does not appear to be a clearly set out rationale for passing this form of instrument as compared to a government regulation. For example, where is the legal rationale to explain why the content of *Decree of the Minister for the Environment No. 17 of 2001 on the Types of Planned Businesses or Activities that are Obliged to Complete an Environmental Impact Assessment* was passed as a ministerial decree rather than as a government regulation.[13] A similar question could be asked concerning *Decree of the Minister for the Environment*

[12] From the writer's experience, regional governments often have difficulty in obtaining national laws lower than statutes and are uncertain about how to implement them.

[13] *Keputusan Menteri Negara Lingkungan Hidup No. 17 Tahun 2001 tentang Jenis Rencana Usaha Dan/Atau Kegiatan Yang Wajib Dilengkapi Dengan Analisis Mengenai Dampak Lingkungan Hidup.*

No. 30 of 2001 on Guidelines for the Implementation of Compulsory Environmental Audits.[14]

Before *reformasi*, ministerial regulations and decrees were included in the legal hierarchy. According to Manan, such instruments were only permitted to deal with administrative procedural matters relating to organisation, work mechanisms, licensing procedure or the making applications by the public to government.[15] It is apparent that much of the subject matter for administrative law is found in these lower level instruments.

As mentioned above, the replacement of *TapMPR/XX/1966* has the effect that ministerial decrees passed after the promulgation of *TapMPR/III/2000* are not part of the legal hierarchy. The implications of this loss of legal status are not yet clear. Does it mean that provisions within ministerial decrees passed after *TapMPR/III/2000* are not binding? It would appear that there is an intention from those involved in drafting the rules for law making that a ministerial decree or other instrument not mentioned in the legal hierarchy will be binding if it has been ordered by an instrument in the legal hierarchy.[16] However, the binding nature of ministerial decrees in environmental law is still not clear. They are frequently referred to as guidelines (*pedoman*), as can be seen in Government Regulation No. 82 of 2001 on Water Quality Management and Pollution Control (discussed in chapter 9). If such guidelines, issued as ministerial decrees, are not binding, there is a legal vacuum at the level of central government law making.

The role of national guidelines

Other forms of guidelines at the national level are ministerial instructions, decisions of a head or director-general of a ministerial department and circulars. The choice between locating a measure within a central government law or national guideline is related to how much flexibility is considered desirable for regional government in relation to a particular subject matter. If a measure is contained in national law, it will apply automatically at the regional level. It would appear that if a measure is contained within

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[14] *Keputusan Menteri Negara Lingkungan Hidup No. 30 Tahun 2001 tentang Pedoman Pelaksanaan Audit Lingkungan Hidup Yang Diwajibkan.*

[15] Manan, Note 8 at 59.

[16] According to communications with officers in the Ministry of Law and Human Rights in 2003.

a national guideline not directly ordered by a national law, a regional government has the following options:

(a) draft a law to make the measure legally binding;

(b) endorse the measure within a regional guideline; or

(c) ignore the measure.

The choice made at the national level is therefore important from the perspective of regional government: each time non-binding instrument is passed by central government, regional government must decide how to respond. A major consideration for the nation is the need to avoid unnecessary duplication of human effort going into drafting regional law. This need is particularly apparent in relation to the 440 district governments (approximately) that now have primary responsibility for environmental management.

Another consideration in deciding whether subject matter should be the dealt with through a national law or guideline, and one that is not given attention in Indonesia, is the relationship between the position of a law in the legal hierarchy and its legal status. Status will affect the role that a new law can play as an instrument of social change. The status of a legal rule was mentioned in chapter 6 as being the result of a combination of position, linguistic structure and sanction. Position in the legal hierarchy will be significant in determining the status of a law, particularly if it is administrative law, the breach of which is not followed by a sanction.

Laws in support of sustainable development or good governance are likely to confront vested interests that oppose their effective implementation. They also must play an educative role to internalise the values implicit or explicit in new law. Each of these factors point to a need for laws that are authoritative and prestigious, that is, laws that are high up in the hierarchy.[17] At present, the criteria of validity to relate the type of legal instrument to generic subject matter are not well developed. For example, it is arguable that in light of the importance of good governance, measures to implement good governance should be found in national legislation rather than guidelines.

Regional guidelines

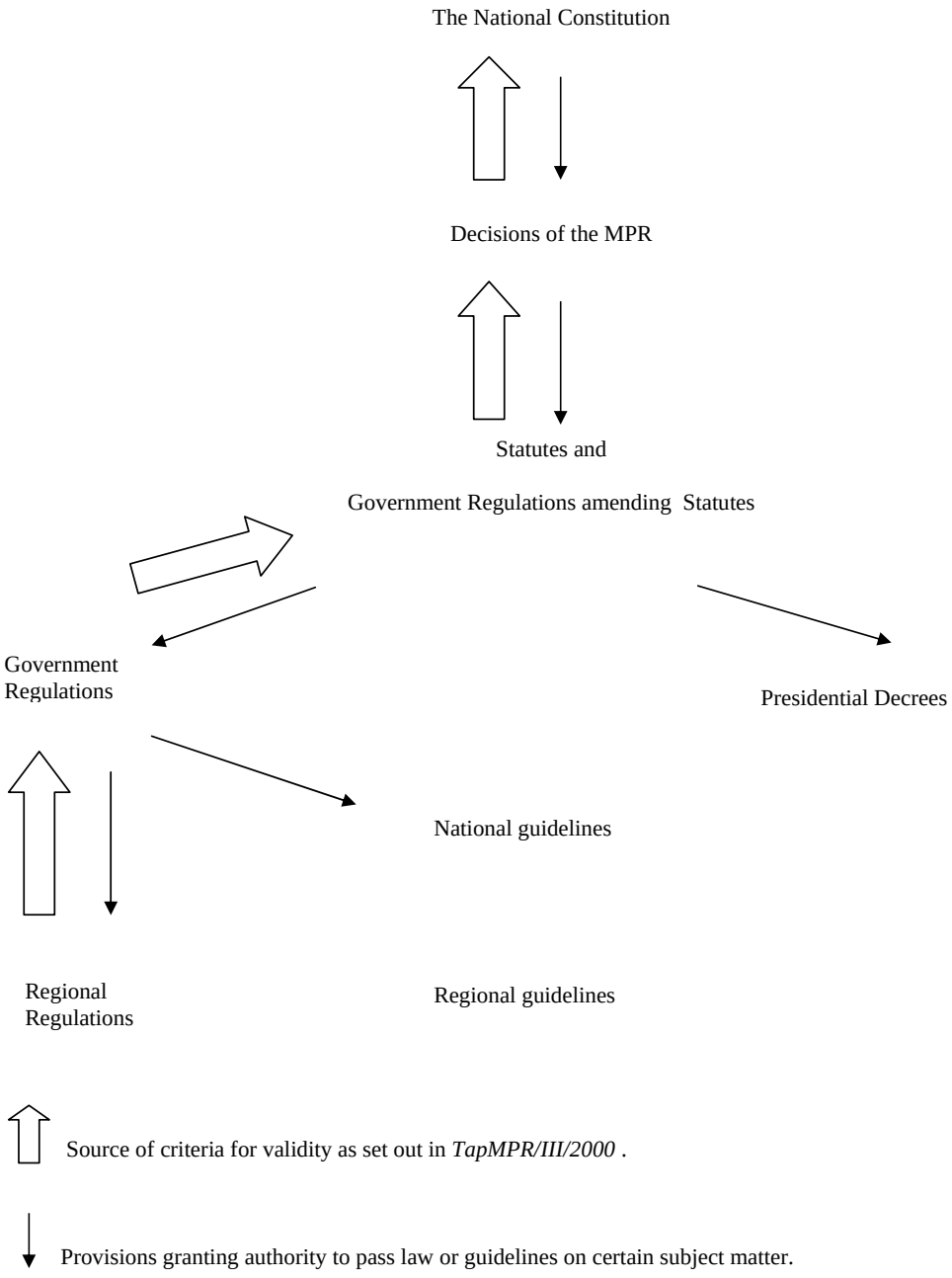
A number of regional legal instruments are not mentioned in the legal hierarchy. At the provincial level, there is the decision of the governor, instruction of the governor, decision of the regional parliament (*Dewan Perwakilan Rakyat Daerah* (DPRD)), circulars of the governor and letter of decision of heads of departments. A similar range of instruments is available at the district level. These guidelines are not arranged in a hierarchy, nor are there any criteria to indicate the generic subject matter that is to be dealt with under each form of guideline.

The overall structure

The overall structure (as at 2003) can be reduced to the following diagrammatic form:

[17] Evan WM, "Law as a Instrument of Social Change" Evan WM (ed.), *The Sociology of Law – A Social-Structural Perspective* (New York: The Free Press, 1980) 554-562 at 556-560. He emphasised the need for prestigious law where it is required to educate.

Figure 6: Validation of legal instruments in the Indonesian legal hierarchy



The above diagram sets out the arrangement in accordance with what appears to occur in practice; there are no provisions that comprehensively set out the arrangements between all the forms of possible legal instruments. The thick arrow indicates the arrangement for obtaining validity under the legal hierarchy. The thin arrow indicates a practice of foreshadowing certain subject matter will be covered in an instrument lower down the legal hierarchy.

The absence of a relationship between national guidelines and regional regulations or regional guidelines can be seen from this diagram. The lack of criteria for the validity of presidential decrees is also apparent, as is the lack of a relationship between the presidential decree and the government regulation. This issue came to a head in early 2002 when a presidential decree was passed for the abolition of the national environment agency, BAPEDAL and the hand over of functions of BAPEDAL to the Minister for the Environment.[18] An application filed by a number of environmental NGOs on 26 February 2002 challenged the issuance of the presidential decree. In this case, which is currently still awaiting a hearing in the Supreme Court, it is alleged that the said presidential decree is in conflict with *Act No. 23 of 1997 on Environmental Management* (discussed in chapter 8) which envisages the existence of an institution such as BAPEDAL charged with carrying out the operational functions of the Ministry (art 23). It is also alleged that the presidential decree conflicts with a number of regulations passed pursuant to the statute that confer powers on BAPEDAL to carry out certain operational tasks.

The trouble with Indonesian framework laws

[18] Presidential Decree No. 2 of 2002 on Amendment of Presidential Decree No. 101 of 2001 on the Position, Tasks, Functions, Authority, Organisation and Working Arrangements of Ministers of State and Presidential Decree No. 4 of 2002 on Amendment of Presidential Decree No. 108 of 2001 on the Organisation and Tasks of Eschelon One within State Ministries (*Keppres No. 2 Tahun 2000 tentang Perubahan Atas Keppres No. 101 Tahun 2001 tentang Kedudukan, Tugas, Fungsi, Kewenangan, Susunan, Organisasi, dan Tata Kerja Menteri Negara* and *Keppres No. 4 Tahun 2002 Perubahan Atas Keppres 108 Tahun 2001 tentang Unit Organisasi dan Tugas Eselon Menteri Negara*).

As a style of law making, a framework law has been said to set out 'purposive programs' by way of generalisations and vaguely worded clauses that do not govern by themselves.[19]

[19] Friedman LM, "Legal Rules and the Process of Social Change" (1967) Vol 19 *Stanford Law Review* 786-840 at 829-830.

The framework law may be useful where there is a need to satisfy 'the urge for public action without completely antagonising forces resisting the action'.[20] Indeed, the preference for framework laws in Indonesia may be attributable to the desire to maintain social cohesion and avoid potentially divisive debate in statutory law making, which has been traditionally achieved through consensus. It is also possible that framework law is seen as more cost-effective than laws that include detailed provisions: it allows the detail of government to be settled through means other than the cumbersome, time-consuming process of drafting a statute. However, the level of compromise involved in statutory law making is often so great that there is very little legal content.

The problems that arise from the way in which the framework law model is used in Indonesian environmental law will become apparent in the next chapter. It can be said at this stage that Indonesian statutes tend to be very general and do not focus on specific issues. There is an avoidance of rules on how to achieve goals; these matters are postponed, to be dealt with by government regulation. Frequently, there is a long time delay before regulations are passed, if at all. The framework statute is customarily accompanied by an Elucidation. The Elucidation lists each article in the statute and provides background on the meaning of a provision or a textual explanation if the drafting in the statute is unclear. A difficulty with the Elucidation is that it often contains additional legal rules. This arrangement hinders accessibility, as the reader has to reconcile two documents. Furthermore, there is no rationale for provisions being located in the Elucidation, rather than in the body of an Act.

As will be shown in chapter 9, Government Regulation No. 82 of 2001 on Water Pollution Control and Management (*Peraturan Pemerintah No. 82 Tahun 2001 tentang Pengendalian dan Pengelolaan Pencemaran Air*) repeats the framework law approach. It appears that this approach is also being repeated at the regional level in the drafting of regional regulations. In the words of a participant at an open forum discussing a draft regional regulation for the City of Semarang in Central Java,[21] '[w]e already have enough

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[20] ibid., at 830.

[21] The writer participated in a forum organised by the Semarang BAPEDALDA on 29 May 2002 to discuss a draft regional regulation on environmental management. The consensus at the meeting was that the regulation had to be re-written, as it resembled a framework law rather than an operative law. The draft regulation was subsequently abandoned and drafting started afresh.

umbrella laws - it's dark under here'.[22] Environmental law at the regional level will need to be a different kind of law: one with specific operative provisions. This presents regional government with a major law-making challenge for which they have little experience or resources.

Uncertainty in the criteria for validity when national law is incomplete

The grant of law-making authority to the regions under regional autonomy law is subject to the proviso that regional law (provincial and district) is a realisation of national law. A difficulty is caused by law making practices in Indonesia as subordinate regulations or guidelines referred to in a framework law frequently do not exist. In a situation where a national regulation or guideline anticipated by a statute has not been passed, a high level of uncertainty will result.[23]

Uncertainty is being felt within the regions by those tasked with implementing national law. If they pre-empt the completion of national legislation, they run the risk of a regional regulation being struck out by the Supreme Court.[24] There are now many examples of environmental laws that have been passed by regional government that are thought to conflict with central government laws.[25] The reason for this level of confusion can be attributed to a number of factors including:

- failure to pass foreshadowed central government regulations and/or guidelines
- inconsistent or conflicting central government law

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22 *"Sudah ada cukup payung sehingga sudah gelap di bawahnya!"*

23 The unwillingness of the courts to fill a legislative gap that remained 7 years after the passing of the Act No. 4 of 1982 on the Basic Provisions for Environmental Management (*Undang-undang No. 4 Tahun 1982 tentang Ketentuan-ketentuan Pokok Pengelolaan Lingkungan Hidup*) was demonstrated in the case of *Samidun Sitorus and Nine People v Pt Inti Indorayon Utama.* In that case, a claim for compensation arising from pollution of the Asahan River by Pt Inti Indorayon Utama was made by members of a local community. The pollution had caused the river water to turn brown and to smell. There had been fish kills and the river could no longer be used for the daily needs of the local community or for income generation. The claim was rejected by the court on the basis that the procedure for processing compensation claims had not been passed: the District Court (*Pengadilan Negeri*) Medan, 27 November 1989 154/Pdt.G/1989/PN.Medan. A similar approach was taken by the Surabaya District Court in the claim for compensation heard in *WALHI v PT Surabaya Meka Box, PT Surabaya Agung Industri Pulp dan Kertas* and *PT Suparma,* Decision No. 116/Pdt.G/1995/PN.Sby.

24 This occurred on 7 February 2002, when an application was successfully made to the Supreme Court by the Association of Swallow Nest Businesses, Managers and Workers to challenge a licence issued by the Berau District Government in East Kalimantan: *Mahkamah Agung Putusan Nomor*: 03 P/HUM/2001.

25 According to Sudharto Hadi, Staff Expert with the Minister for the Environment as at 13 June 2002 the number was in the order of 70. Also "*Pelaksanaan Otonomi Daerah Melenceng*" ('Implementation of Regional Autonomy Misses its Target') *Kompas* (25 March 2002).

- difficulty in physically locating ministerial decrees or lower level guidelines

- difficulty in interpreting central government legal instruments.

2. NATIONAL LAW

Limited grants of authority to central government

Additional criteria of validity are found in regional autonomy law: it sets out the subject matter that falls within the respective authority of central government and regional government. Act No. 22 of 1999 on Regional Government (*Undang-undang No. 22 Tahun 1999 tentang Pemerintah Daerah*) ('the Regional Autonomy Act') is the highest law in this regard. A preliminary query that arises concerns its position within the legal hierarchy: as the Regional Autonomy Act is a statute, it operates at the same level as numerous pre-existing statutes, whose provisions conflict with the regional autonomy arrangements. No doubt, given the heavy political pressure to produce a law on regional autonomy, there was little choice but to provide for regional autonomy in the form of a statute. The resolution of inconsistencies will requires a review of all laws to bring them into line with the Regional Autonomy Act; however, this has to be done on a voluntary basis. It is clear that the problems that arise from deficiencies in national law do not only relate to environmental law. The Indonesian Chamber of Commerce has reportedly called for the scrapping or review of thousands of central government regulations and presidential decrees and delegated legislation which are hindering business in the regions because they conflict with regional autonomy law or exhibit inconsistencies.[26]

Pursuant to the Regional Autonomy Act, all authority for government has been handed over to the regions except in certain specified areas of authority which are listed as foreign affairs, defence, national security, justice, finance, religion and authority in other areas (art 7(1)). The 'other areas' include policy on national planning and development in a macro sense, financial affairs, national administration, the national economy, human

[26] "Govt chided as 'incompetent' in autonomy implementation" *Jakarta Post* (20 September 2002) 4.

resources, the exploitation of natural resources, higher technology, conservation and national standardisation (art 7(2)).

The 'other areas' are set out in more detail in Government Regulation No. 25 of 2000 on the Authority of Central and Regional Government in Regional Autonomy (*Peraturan Pemerintah Republik Indonesia No. 25 Tahun 2000 tentang Kewenangan Pemerintah Dan Kewenangan Propinsi Sebagai Daerah Otonomi*) ('the Regional Autonomy Regulation'). This is the most specific legal instrument in relation to regional autonomy passed to date. It contains overarching criteria for the allocation of government authority across sectors and geographic regions. Again, a question arises concerning its position within the legal hierarchy: this subject matter would have been better placed within a statute. The explanation for the resort to a Government Regulation can probably be found in the context and speed with which regional autonomy was being introduced.

The Regional Autonomy Regulation contains a long list of subject matter that falls within the scope of central government authority as 'other areas'.[27] Within this list, central government authority for the environment is stated to include (art 2(3)(18)):

a. the determination of guidelines for control over natural resources and the preservation of the functions of the environment

b. the regulation of environmental management in the utilisation of marine resources beyond the span of 12 nautical miles from the coastline

c. assessment of the environmental impact of activities that

    - potentially have an adverse impact on the broader community and/or are concerned with defence and security
    - have the locations encompassing more than one province
    - are located in areas in dispute with other states

[27] The list is made up of the fields of agriculture, maritime affairs, mining and energy, forestry and plantations, industry and commerce, cooperatives, capital investment, tourism, manpower, health, education and culture, social affairs, spatial planning, defence, housing, public works, communications, the environment, Home Affairs and public administration, regional development, finance, the population, sport, law and legislation and information. It also identifies those areas that fall within regional and district government authority.

- are located in the sea territory beyond the span of 12 miles
- are located in a border crossing area

d. the determination of standards of environmental quality and guidelines for managing environmental pollution

e. the determination of guidelines for the conservation of natural resources.

Additional areas of central government authority granted by the Regional Autonomy Regulation relevant to environmental management are:

- the determination of guidelines for minimum standards of service in fields that must be implemented by district level government (art 2(4)(b))
- the determination of criteria for the determination of and change in the function of zones and land in the framework of compiling spatial plans (art 2(4)(c))
- the determination of guidelines for the management and protection of natural resources (art 2(4)(g))
- the regulation of the application of international agreements or treaties ratified on behalf of the state (art 2(4)(i))
- the determination of standards for the giving of licences by regional government (art 2(4)(j))
- the determination of policies on national information systems (art 2(4)(n)).

It can be seen that the Regional Autonomy Regulation not only contains criteria of validity for legal instruments; where it mentions the regulatory power of central government and environmental impact assessment, it refers to administrative activity. The approach blurs the distinction between two very different governmental functions: law making and administration.

In relation to the provisions on administration, it is notable that the provisions do not convey a clear meaning. For example, whilst the authority to 'regulate' marine resources is straightforward (regulation is a concept commonly understood in law), the provision that central government has authority for the 'regulation of the application' of

international agreements or treaties ratified on behalf of the state is not clear. First, it must be decided whether a particular environmental law relates to an international agreement or treaty is often a matter of interpretation. Second, 'regulation of application' does not have a clear meaning as distinct from 'regulation'.

Guidelines, criteria, standards and policies

At first glance, the normative power of central government is appears to be limited. The form follows the substance as shown below:

Substance	**Central government instrument**
Control over natural resources and the preservation of the functions of environment	Guidelines
Management of environmental pollution	Guidelines
Minimum standards of service in fields implemented by district government	Guidelines
Management and protection of natural resources	Guidelines
Determination of and change in the function of zones and land in the framework of compiling spatial plans	Criteria
Licensing by regional government	Standards
Environmental quality	Standards
National information systems	Policies

As can be seen, the Regional Autonomy Regulation grants power to central government to pass guidelines, criteria, standards, and policies. Each of these instruments is explained in the Elucidation. A *guideline* is said to be 'a reference which is general in nature and which must be further spelled out and can be adjusted to the characteristics and capacity of a region' (Elucidation art 2(3)(b)). There are a number of forms for a central government guideline in environmental law. One form is the Ministerial Decree

(*Keputusan Menteri (Kepmen*))[28] and others include the Ministerial Instruction (*Instruksi Menteri*) and the Circular (*Surat Edaran Menteri*). The reference to guidelines in autonomy law does not make a distinction between each of these forms of guidelines. A *criterion* is stated to be a 'yardstick that becomes the basis for evaluation and stipulation of something' (Elucidation art 2(3)(f)). A *standard* is stated to be 'a technical specification or something standardised as a reference in conducting an activity'[29] (Elucidation art 2(3)(g)). A *policy* is stated to be a statement of principle as a basis for regulation in the achievement of an objective (Elucidation art 2(3)(a)).

The binding nature of each of these instruments is not specified. Ordinarily a policy or guideline will not be binding. It is conceivable that a national standard is binding but it is stated that it is to be used 'as a reference'. The meaning of 'standards for the giving of licences by regional government' could refer to service standards, which would open up the possibility that national law could prescribe procedures for licensing; however, this conclusion is open to interpretation.

A provision buried within a subsection of the Regional Autonomy Regulation grants a far wider law-making authority to central government. It states:

> Central government authority also includes in the field of law, the building and improvement (*pembinaan hukum*) of national laws and legislation (art 2(3) 24(a)).

In view of this provision, the extent of central government's law-making authority can be seen to be far broader than it may appear from regional autonomy law; in fact, central government is authorised to pass environmental law at each level of the hierarchy that pertains to national government. However, without stumbling upon article 2(3)24(a) in the Regional Autonomy Regulation, it would seem that a not unreasonable question is the extent to which central government actually has power to pass environmental law.[30]

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[28] This would also include instruments sometimes known as Ministerial Regulations (*Peraturan Menteri*) and Joint Ministerial Decrees (*Keputusan Bersama Menteri*). Notably, these instruments are not mentioned in the legal hierarchy.

[29] Government Regulation No. 102 of 2000 on National Standardisation (*Peraturan Pemerintah No. 102 Tahun 2000 tentang Standardisasi Nasional*) contains a similar definition where it states that a standard includes 'technical specifications, or something that sets a standard of methodology' (art 1(1)).

[30] This question was put to the writer by a chief of party from the World Bank team responsible for oversight of the water management reform program.

3. REGIONAL LAW

Residual authority to regional government – a process of elimination

As mentioned above, pursuant to the Regional Autonomy Act, regional government has authority for all government functions outside those specifically allocated to central government (art 7(1)). In relation to environmental law, this means that unless an aspect of environmental management has been reserved for central government, regional government is responsible for developing and implementing regulations and guidelines but, in accordance with the legal hierarchy, they can only do so if they are 'realising' higher (national) law.

As a result, the sequence for determining the extent of law-making authority for regional government is as follows:

'*if not* A *then* B *provided* B is a realisation of higher national law'.

Where

A = central government authority

B = regional government authority

The '*provided* B" has been added at the end of this sequence as, in accordance with the legal hierarchy, any law passed by regional government must be a realisation of national law.

As a means of providing criteria of validity, this arrangement is only effective to the extent that it is accessible and intelligible, which requires a level of certainty about the allocation of central government authority. However, as discussed above, the allocation of central government authority has not been formulated in a precise manner.

Specific mention is made of the regional government's authority to manage national resources that are available in the region (*berwenang mengelola sumber daya nasional yang tersedia*) and responsibility for maintaining preservation/conservation of the environment (*bertanggung jawab memelihara kelestarian lingkungan*) in accordance

with national legislation (Regional Autonomy Act art 10(1)). This provision could be interpreted as relating to both law making and administration. The meaning that seems to be intended is to the effect that *if* natural resources are present in the region *then* regional government will have authority to manage them and *in doing so* it has a responsibility to preserve and conserve the environment in accordance with national legislation. The reference to 'responsibility' implies more than an authorisation; it seems to be intended to connote a level of normativity, so that this is something that 'ought' to be done.

Provisos for provincial government

To determine the full extent of provincial government authority for law making, the above criteria have to be refined. Provincial government authority is stated to include fields of governance that straddle district boundaries as well as authority in certain other fields of governance (Regional Autonomy Act (art 9(1)). Provincial government authority also includes authority that 'is not or is not yet able to be implemented' by district level government (Regional Autonomy Act art 9(2)). Provincial government authority, as an area of administration, is stated to include authority in the field of governance that is referred to the Governor as the representative of central government (Regional Autonomy Act art 9(3)). These criteria would appear to create additional provisos and greater complexity so that the effect is:

'*if not* A *then* B provided B is a realisation of higher national law and C'

where

A = central government authority

B = provincial government authority

C = the authority is for a field of government that straddle district boundaries *or*

the authority is for certain other fields of governance *or*

if the field of government does not straddle district boundaries, it is not able to be implemented by district government *or*

it is specifically referred to the Governor by central government.

It can be seen that the criteria for determining the extent of provincial government

authority involve assessments being made at a number of stages. The exact nature of each assessment is not clear. It will be affected by uncertainties within the scope of central government authority as the baseline for the assessment of the scope of regional government authority. The provisos require further detail to be meaningful.

The Regional Autonomy Regulation goes into more detail on fields of government under provincial authority. Provincial government is said to have authority for planning and control 'in a macro sense' concerning regional development, training in certain fields, allocation of human resources, research, control of the environment and spatial planning (art 3(2)). The use of the phrase 'in a macro sense' is undefined and opaque in its meaning. The Regional Autonomy Regulation repeats the proviso that the province can implement authority that has not or is not able to be implemented by district government (art 3(3)) and adds that this is to be done pursuant to an agreement between the province and the district government (art 3(4)). There is no further detail on the nature of the agreement or how it is to be reached.

In relation to the delineation of authority for the environment, the Regional Autonomy Regulation has granted to the provinces specific authority for certain aspects of environmental management, namely (art 3(5)(16)):

(a) control of the environment that straddles districts

(b) regulation of environmental management of the sea between 4 to 12 nautical miles from the coast

(c) the security and preservation of water resources that straddle districts

(d) environmental impact assessment for activities that have the potential for negative impact upon the wider community and which are located in more than one district

(e) oversight of the implementation of conservation of the environment that straddles districts

(f) the determination of environmental quality standards based on national environmental quality standards.

In the same fashion as has been done in relation to central government, the criteria in article 3(5)(16)) refer to various activities that relate to administrative functions (control, regulation, oversight) and others that appear to be legislative (determination of

standards). There is also no express reference to law making in support of these activities.

Of the above, (a), (c), (d) and (e) are a refinement of the concept of straddling districts. However, the provision is opaque as there is no definition of 'environment that straddles districts' or of 'water resources that straddle districts'. Such definitions are likely to be developed in new legislation. In the meantime, the Elucidation to the Regulation states that 'indicators' to determine provincial authority are:

(a) the guarantee of balanced development in the province

(b) the even spread of services throughout the population of the province and

(c) efficiency in the delivery of government services.

It leaves open the question, how to determine the meaning of 'balanced development', 'even spread' and 'efficiency' which are value-based assessments. There is a provision in the Elucidation to the effect that in border-sharing districts, if the government service is provided to more than 50 percent of the population, it is to be provided by the province but if it is provided to less than 50 percent of the population, it is to be provided by the district. Whilst it appears designed to provide clarification, the meaning is difficult to discern.

Whilst the Regional Autonomy Regulation appears to provide detailed criteria, some of the terminology is opaque. For example, what does it mean to 'plan and control' in a 'macro' sense? Much depends upon the application of the provisions concerning fields of government that straddle district governments. However, to apply these provisions, a clear understanding of 'control', 'the security and preservation' and 'oversight' are required. These terms are not defined, unlike environmental impact assessment, which is a recognisable term in the environmental management 'interpretive community'. The Elucidation is not particularly helpful in this regard. Furthermore, there are no procedural rules to be applied if a situation arises where a district government appears 'not able to implement' its authority so that authority can be delegated upwards to the provincial level pursuant to an agreement. The 'indicators' to determine provincial authority are not objective standards: words such as 'balanced' and 'efficient' are subjective and require an evaluation before they are applied, and for this reason they

suffer from vagueness.

Obligatory functions for district level government and a process of further elimination

The only simple rule in the whole arrangement is the one that lists certain fields of government that *must* be carried out (*wajib dilaksanakan*) at the district level (Regional Autonomy Act art 11(2)). As the environment is included on the list, the effect of this rule is that district government must manage the environment apart from aspects of environmental management allocated to central government and provincial government. It is the only normative provision and contrasts with the provisions for provincial and central government, which could be read as unconditional permissions. The express normativity underscores the importance of discerning exactly what it is that must be carried out by district government.

In addition, district government is to manage the balance of government authority that has not been allocated to the central government or provincial government (Regional Autonomy Act art 11(1)). This provision mirrors the provisions that identify the distinction between central and regional government authority. It suffers from the same weakness mentioned above in relation to the criteria for the validity of provincial laws: to the extent that the conferral of power to the central and provincial government suffers from vagueness, there will be uncertainty about the extent of authority at the district level.

There is a double residual exercise in determining the extent of district government's law-making authority. The logic is as follows:

> *If* not A and *if not* B then C *provided* C is a realisation of a higher national law
>
> *Where*
>
> A = central government authority
>
> B = provincial government authority
>
> C = district government authority

It can be seen that the calculation for district government is likely to be a complex task,

which is made uncertain by the unknown extent of authority at the central and provincial levels of government.

District government must be able to calculate the extent of their responsibility in the areas allocated to them, as they have a responsibility to implement it. The exact implications of the responsibility are not clear as the Elucidation of article 11(2) states that the districts must implement their authority in accordance with the condition of each region. It then goes on to state that this authority cannot be transferred to provincial government especially the authority in urban areas that concerns the needs of the city such as fire extinguishing, cleanliness, gardens and urban systems. None of these terms is defined, which adds to the opacity of the provision.

The delineation in authority between provincial and district government

It can be seen from the arrangement described above, that the provisions on the delineation of authority between provincial and district levels of government leave wide scope for interpretation and significant uncertainty. Depending upon how particular aspects of environmental management are interpreted, the province could hold significant areas of authority. Over time, these questions may be answered by the passing of national law or cooperative inter-government arrangements at the regional level; however, at this stage there is considerable uncertainty about the division of authority between provincial and district government.[31]

Conclusion

This chapter has demonstrated the absence of a coherent concept for environmental law making under regional autonomy. The generic content of each form of national law instrument, that is, the statute, government regulation or presidential decree has not been adequately defined in *TapMPR/III/2000*. There is also no guidance to determine when a

[31] On 3 November 1999, a General Guideline on Planning for Sustainable Development in the Regions (Regional Agenda 21) No. 050/2615/V/Bangda (*Pedoman Umum Penyusunan Perencanaan Pembangunan Berkelanjutan Di Daerah (Agenda 21 Daerah) No. 050/2615/V/Bangda*) was passed. It does not make any distinction between the respective roles of each level of regional government but rather generally describes the aims of each aspect of planning the sustainable development of water resources, namely the development of partnerships, community-based analysis, development of action plans, implementation and monitoring, and evaluation and review. It also lists the issues to be addressed in determining who are the stakeholders relevant to each aspect of water resources management.

measure shall be contained within a binding legal instrument as opposed to a non-binding guideline. This is true both at the national and regional level.

It will be shown later in the thesis that many aspects of environmental law are being made the subject of national guidelines. There appears to be an absence of any rationale for this practice and the low status of measures contained in guidelines seriously undermines the capacity for law to act as an instrument of social change. It imposes a heavy law-making burden on regional government, which is left with the task of deciding how to implement the national guidelines; it also works against the development of national consistency.

Regional autonomy law does not clearly differentiate between legislative and administrative authority. It also produces unnecessary complexity, vagueness and opacity. It is particularly important to clarify the extent of central government authority, as regional authority consists of authority *not* held by central government. The determination of the extent of provincial government authority, as a residual authority, requires a prior assessment of the extent of central government authority, the application of complex provisos along with an interpretation of specific grants of authority. As district government authority is that authority not held by national or provincial government, there is a further accumulation of complexity.

This situation is likely to continue to lead to a high level of uncertainty about what is expected of each level of government in environmental management and the best way to proceed. This is particularly so for district government, which is the level of government with responsibility for environmental management. These problems underscore the question raised in chapter 4, whether there is an adequate basis for the existence of shared understandings on the practice of environmental law making in Indonesia.

CHAPTER EIGHT

THE NATIONAL ENVIRONMENTAL LAW FRAMEWORK

Introduction

This is the first chapter to focus directly on environmental law in Indonesia. The analysis of environmental law presented here begins with a discussion of environmental provisions in the Indonesian Constitution, which is followed by a review of the primary environmental law statute in Indonesia, Act No. 23 of 1997 on Environmental Management (*Undang-undang No. 23 Tahun 1997 tentang Pengelolaan Lingkungan Hidup*) ('the Act'). Finally, there is a discussion of the legislative instrument, which allocates the functions and tasks of each level of government in environmental management.

Following the analytical approach outlined in chapter 6, the review applies the idea that legal rules have dimensions that affect their use (see Figure 5), namely, the position of the rule in the legal hierarchy, its linguistic structure and its sanction. It is observed that there are a large number of provisions that postpone important aspects of environmental management to formulation in lower level instruments. It is also shown that there are linguistic structure is frequently opaque from choice of wording and terminology and lack of definitions.

In the analysis of rule types, the general lack of administrative rules is noted; this reduces the capacity to impose accountability in the exercise of administrative discretion by decision makers. The minimal use of public regulatory rules is noted. The sub-rule types most noticeably absent are substantive administrative rules and all types of procedural rules. Furthermore, it is shown that legal expression is frequently marred by linguistic practices that appear to result from unintended vagueness and unnecessary complexity.[1]

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[1] From discussion with officers within the Ministry for the Environment and NGOs associated with drafting the Act, the writer is aware of disappointment in the final form of the Bill as determined by the State Secretariat, particularly in relation to the provisions on public participation and environmental licensing. The goals of one of the chief drafters, Moestadji, SH were set out in "Development and Review of Environmental Law in Indonesia" 1997 *Indonesian Journal of Environmental Law*, Edition II, 133-141. An account of the law-making process is provided by Santosa MA and Fjellstrom K "The Environmental Management Bill 1997" 1997 *Indonesian Journal of Environmental Law*, Edition II, 153-162. In this account, it is said that the Bill was concluded with 'inordinate haste' within the tight timeframe imposed by the Minister: at 153.

In the review of the rules that allocate functions and tasks at each level of government in environmental management, it is observed that they fail to indicate clear roles and responsibilities for environmental management.

1. PROTECTION OF THE ENVIRONMENT IN THE INDONESIAN CONSTITUTION

The Preamble

The Preamble to the Constitution states that the Government of Indonesia 'protects the whole of the Indonesian people and their entire native country'.[2] This has been interpreted by Koesnadi as providing a principle underwhich the government has a responsibility and obligation for the protection of both human and environmental resources of Indonesia.[3] Further provision is made in the Constitution by way of a human right to a 'good and healthy environment' and state obligations contained in article 33(3) & (4), which will be discussed below.

The human right to a 'good and healthy' environment

The second amendment to the Constitution includes the following statement amongst the new human rights provisions (art 28H(1) Amendment No. 2 (18.8.2000)):

> Every person has the right …… to a good and healthy environment.

This provision suffers from vagueness: the words 'good' and 'healthy' are evaluative and require interpretation before they can be applied. This leaves the public, including business and affected communities, uncertain as to how far the right extends. Anderson has suggested that in this context, detailed textual definitions are helpful. He notes that some argues that the best formulation draws on existing concepts of environmental regulation – resource use, pollution control and land development.[4] This has not been done in the Indonesian Constitution.

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2 "*Kemudian daripada itu untuk membentuk suatu Pemerintah Negara Indonesia yang melindungi segenap bangsa Indonesia dan seluruh tumpah darah Indonesia*.'

3 Koesnadi H, *Hukum Tata Lingkungan* (Yogyakarta: Gadjah Mada University Press, 7th ed., 1999) 66.

4 Anderson MR "Human Rights Approaches to Environmental Protection: An Overview" in Boyle AE and Anderson MR (eds.), *Human Rights Approaches to Environmental Protection* (Oxford: Clarendon Press, 1996) 1-24 at 12.

Concerning the content of the right, it is notable that whilst a human right will always be essentially a *human* right, some other Constitutions in other countries grant include a right to an ecologically balanced environment, which is less anthropocentric than a right based on human well-being.[5] For example in article 66(1) of the Constitution of Portugal, it is stated that '[a]ll have the right to a humane, healthy and ecologically balanced human environment and the duty to protect it. In addition, the new Brazilian Constitution states that '[e]verybody has a right to an ecologically balanced environment, an asset for common use by the people and essential to the wholesome quality of life …' (Article 225 of Chapter VI).

The expression of a right to a 'good and healthy' environment may lead to the expectation, depending on the circumstances, that certain obligations will be imposed to ensure that the right is guaranteed. However, the grant of an environmental right is most likely to bring tangible benefits when it is accompanied by a legal obligation to act or not to act in certain ways touching the right-holder. The only provisions in the Indonesian Constitution that could be interpreted as imposing an obligation are set out in article 33(3) and (4) discussed below.

State obligations: Article 33 (3) & (4)

Article 33(3)

The Constitutional basis for the protection of Indonesia's natural environment is article 33(3), which states:

> Land and water and the natural resources therein are controlled by the state and utilised for the greatest welfare of the people.[6]

Article 33(3) is an example of a power-conferring provision that confers considerable legislative and administrative power to on the state to control land, water and the natural resources of Indonesia. However, it is not clear whether article 33(3) is intended to

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5 ibid., at 14

6 "*Bumi, air, angkasa, dan kekayaan alam yang terkandung di dalamnya dikuasai oleh negara dan dipergunakan untuk sebesar-besarnya kemakmuran rakyat*'.

operate as grant of authority combined with a principle or a legal rule on the management of the environment.

Article 33(3) is not readily convertible into an '*if* X, *then* Y' logical structure. In order for it to conform to such a structure it may be re-formulated in two parts as follows:

> *if* something can be considered to be land, water and natural resources therein *then* it is controlled by the state.
>
> *if* the state exercises control over land, water and natural resources therein *then* the utilization of land, water and natural resources therein is for the greatest welfare of the people.

When re-formulated in this way, it can be seen that there is no explicit normativity in the choice of legal vocabulary although it is open to interpretation as a normative statement.

If the scope (*if X*) of the first part is considered, the operative facts appear to be limited to land, water and natural resources therein. They do not explicitly include the living environment through a reference to ecosystems or the biological diversity found in the flora and fauna of Indonesia. The scope only conceives of the natural environment as containing resources to be utilised or exploited, rather than as also something that exists independently of its use to human beings and which may require protection for its own sake. This points to the content of the scope and whether it reflects an environmental policy that is under-inclusive, especially when compared with developments in the area of environmental law internationally.

In relation to the second part, the consequence provides a limitation on the grant of legislative and administrative authority to the state to the effect that power exercised is 'utilised for the greatest welfare of the people'. Two issues arise in relation to the consequence. The first issue concerns the legal drafting: it is unclear how to interpret 'for the greatest welfare of the people' as the phrase is ambiguous. Does it mean that the benefits received by the total population are to be maximised, in the utilitarian tradition of the principle of 'the greatest happiness for the greatest number', or does it mean that the interest of the majority is to take priority over the minority? If the former, how are such benefits to be assessed? If the latter, where does it place a minority group or indigenous community, whose traditional way of life is supportive of environmental protection and

whose interests are being threatened by the majority? The second issue concerns the vagueness of the consequence, which arises from the lack of specification of the manner in which the action is to be performed. There is no guidance as to *how* it is to be assessed that the environment is being utilised for the greatest welfare of the people: it is completely within the state's discretion.

Finally, there is an issue about the content of the second part, which is related more to the concept of sustainable development than the rule formulation. Article 33(3) focuses on who shall benefit from the utilisation of the environment rather than on the environment. Sometimes there will be a conflict between protection of the environment and use for the 'greatest welfare of the people'; for example, protection of an endangered species or sensitive ecosystem such as a wetland will not always be justifiable in terms of maximising human welfare. The provision provides no guidance in making such choices.

By way of comparison, a substantive legislative rule created in the Constitution of Portugal states that (art 66(2)):

> 2. The state is obliged, through its agencies and by appeal and support of popular initiatives:
>
> (a) to prevent and control pollution and its effects and harmful forms of erosion;
>
> (b) to organize territorial space so as to establish biologically stable zones;
>
> (c) to create and develop natural and recreational parks and reserves.....; and
>
> (d) to promote rational enjoyment of natural resources while safeguarding their capacity for renewal and ecological stability.

In a similar approach, many EU Member states including Germany, the Netherlands, Sweden, Finland and Greece have imposed constitutional duties and obligations to provide environmentally sound conditions. The 1993 amendment to the German Constitution included a new article that defines care for conditions of life and for future generations as a state obligation. Article 20a states:

> In fulfilling its responsibility for future generations, the State shall protect the natural basis of life within the framework of the Constitutional order through legislative means, executive measures and judicial review, in conformity with legislation and legal rules.

Article 33(4)

On 10 August 2002, the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*) (MPR) passed a fourth amendment to the Constitution, which includes the following (art 33(4)):

> The national economy is to be managed based on a democratic economy, through the principles of cooperation, efficiency, justice, sustainability, environmentalism and independence as well as protection of progress and national economic unity.[7]

This provision raises a number of issues. First, it is not clear whether this provision is a principle or a rule; however, the reference to principles would appear to indicate that it is a principle. In a similar way to article 33(3), it lacks explicit normative language. Second, the linguistic structure of the provision is opaque as the meaning is not capable of being readily understood: each reference to a principle lacks a definition. Notably, the internationally recognised term sustainable development (*pembangunan berkelanjutan*) has not been used and, as a result, there is no access to internationally developed interpretations. The word 'sustainability' could refer to sustainability in a narrow economic sense of sustained economic growth *or* sustainability, which has as its premise the idea that sustainable economic growth is only possible in the long-term when the environment is sustainably managed. The only direct reference to the environment is in the word 'environmentalism' (*berwawasan lingkungan*) which may be translated as 'having an environmental perspective'. This phrase is non-specific and undefined: it does not relate to internationally recognised terminology and as a result suffers from opacity.

2. THE ENVIRONMENTAL MANAGEMENT ACT: ISSUES CONCERNING THE POSITION OF RULES

Framework law: implications for the position of legal rules

Like many statutes in Indonesia, Act No. 23 of 1997 on Environmental Management (*Undang-Undang No. 23 Tahun 1997 tentang Pengelolaan Lingkungan Hidup*) ('the

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[7] *Perekonomian nasional diselenggarakan berdasar atas demokrasi ekonomi dengan prinsip kebersamaan, efisiensi, berkeadilan, berkelanjutan, berwawasan lingkungan, kemandirian, serta dengan menjaga keseimbangan kemajuan dan kesatuan ekonomi nasional.*

Act') operates as a framework law, even though it is not officially stated to be a framework law.[8] It is non-media specific and appears at first sight to have a broad coverage; however, the operative provisions are rather more limited. To the extent that the Indonesian legal tradition follows that of the European codified legal system, it could be expected that the purpose of a framework law is to establish a rational overall structure, followed by a movement from the general to the particular. It is a common feature of codified laws to establish general rules in statutes alongside specific principles and to include the exceptions in delegated legislation.[9] As mentioned in the last chapter, a question for law making in Indonesia is, what should be the distinction between the level of detail in a framework law in comparison to delegated legislation and should provisions in a framework law be directly applicable?

The Act primarily contains provisions that relate to environmental quality such as environmental impact assessment, pollution control and waste disposal through licensing, monitoring and enforcement. The Act does not deal with the wider concerns of environmental management; it is not readily applicable to the management of natural resources such as water, land, soil, ecosystems, biodiversity and endangered species. It does not make specific links between environmental management and land use planning concerning, for example, soil management, river basin management and coastal management. There is no provision for the collation of environmental information through inventory making, classification systems or the monitoring of changes occurring in the environment. Neither is there specific mention of activities such as the restoration and rehabilitation of damaged environments.

The Act does not govern by itself. Throughout the statute, key areas of environmental law making are postponed as matters to be dealt with by government regulations or presidential decree. This occurs in relation to the following subject matter:

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8 As compared to its predecessor, Act No. 4 of 1982 on the Basic Provisions for Environmental Management (*Undang-undang No. 4 Tahun 1982 tentang Ketentuan-ketentuan Pokok Pengelolaan Lingkungan Hidup*).

9 Holland JA and Webb JS, *Learning Legal Rules – A Student's Guide to Legal Method and Reasoning* (UK: Blacksone Press Limited, 4th ed., 1999) 187.

Natural resources management (art 8(3))

Tasks, functions, authority, organisational arrangements and institutional working procedures for environmental management (art 11(2))

Environmental quality standards, pollution prevention and control, and restoration of carrying capacity (art 14(2))

Criteria of environmental damage, prevention and control of environmental damage, and restoration of environmental supportive capacity (art 14(3))

Management of waste by business (art 16(3))

Management of hazardous and toxic material (art 17(3))

The licensing of waste disposal (art 20(5))

Regulations regarding class actions (art 37(3))

As with most statutes in Indonesia, such subject matter is identified by a provision that states it is 'to be regulated further in …' (*diatur lebih lanjut dalam* …) a certain legal instrument. Thus, a prominent feature of the Act is the presence of a large number of provisions that identify subject matter to be dealt with by legal instruments lower down the legal hierarchy.

Whilst such instruments are legally binding, it will be shown in the next chapter that, at least in regard to water quality management and pollution control, the government regulation takes on the character of a framework regulation. This system results in a cascading pattern of law making where operative provisions are formulated at different times and places. One is constantly referred to a lower-level instrument to find the details on operative provisions. Those provisions are frequently difficult to physically locate, as they are not as publicly accessible as statutes. In addition, there is usually a long time delay in the formulation of implementing regulations, and often they have not actually been passed.

In other codified legal systems, it can be seen that statutes cover narrower subject matter. This means that the law is more complete: the most important provisions are contained

within a single instrument. For example, in Germany, which also has framework law model, the following environmental statutes exist:

- Water Resources Management Act 1996
- Charges Levied for the Discharge of Wastewater into Waters Act 1994
- Assessment of Environmental Impact Act 1990
- Environment Information Act 1994
- Noise, Vibration and Other Similar Phenomena Act 1990
- Protection Against Hazardous Substances Act 1994
- Conservation of Nature and Landscapes Act 1998.

The Ministry's non-departmental status: implications for the position of legal rules

The Act does not identify any one particular entity within government as being responsible for environmental conditions in Indonesia – the environment is the responsibility of 'the government'. References to 'the government' having authority for environmental management arise in relation to natural resources management including a power to regulate and control (art 8(2)), policy making (art 9(1)) and environmental management (art 10). The Minister for the Environment is said to be responsible for 'coordinating the integratedness of planning and the implementation of national environmental management policy' (art 9(4)) but the authority of the Minister in relation to the other more powerful Ministries is not set out. For example, what role does the Ministry play in decision-making by other Ministries or policy making that is likely to affect the environment? Is it just an authority to speak out on a matter - if so, to what effect? These issues that concern relations within central government are not addressed in detail by the Act.

The Minister for the Environment is a Minister of State who is directly responsible to the President and does not have a department[10] (see note below). As a result, aspects of environmental law are often found in sectoral law such as law on industry or natural resources laws such as forestry law, land management or spatial planning. The position of environmental provisions will be determined by the application of the legal hierarchy within the particular sectoral law. This leads to unpredictability both concerning when the particular area of law will be dealt with by the relevant sector and the approach taken by the sector such as where the provision will be located in the legal hierarchy.

Comment [BB1]: You could briefly mention here, in a footnote to remind the reader, that things have changed in the last couple of years with the disappearance of the central BAPEDAL; this would explain the

Comment [BB2]:

Comment [BB3]:

Another effect of the non-departmental status of environmental law has been that, unlike a sectoral ministerial decree, even before decentralization, national environmental law has tended to rely on the issuing of guidelines.[11] In this way, environmental law in Indonesia was unlike other areas of law where, before regional autonomy, the roles and functions were established in an arrangement of deconcentrated power reaching out from the centre to the regions. Ministerial decrees as legal instruments could set out the roles, functions and procedures to be followed by local departmental offices (*dinas*).[12] In comparison, ministerial decrees issued by the Minister for the Environment frequently have the title of a guideline; for example, *Ministerial Decree No. 12 of 1994 on Guidelines for Environmental Management and Environmental Monitoring*,[13] *Ministerial Decree No. 14 of 1994 on Guidelines for the Composition of Environmental Impact Statements*[14] and *Ministerial Decree No. 42 of 1994 on Guidelines for the Implementation of Environmental Audits*.[15] Even sectoral ministerial decrees on environmental law were

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[10] Presidential Decree No. 2 of 2002 on Amendment of Presidential Decree No. 101 of 2001 on the Position, Tasks, Functions, Authority, Organisation and Working Arrangements of Ministers of State (*Keppres No. 2 Tahun 2000 tentang Perubahan Atas Keppres No. 101 Tahun 2001 tentang Kedudukan, Tugas, Fungsi, Kewenangan, Susunan, Organisasi, dan Tata Kerja Menteri Negara*). A number of Indonesian commentators have called for departmental status, for example: Rangkuti SS "*KLH Harus Menjadi Departemen*" (The Ministry for the Environment Must Become a Department) (2000) *Ozon* 34-36. Also, Usman R, *Pembaharuan Hukum Lingkungan Nasional* (*The Renewal of National Environmental Law*) (Indonesia: PT Citra Aditya Bakti, 2003) 95-101.

[11] This comment does not apply to environmental provisions contained in sectoral law.

[12] For example, Ministerial Decree No. 150 of 1995 on Business Licences (*Keputusan Menteri Perindustrian No. 150 Tahun 1995 tentang Tata Cara Pemberian Izin Usaha Industri Dan Izin Perluasan*).

[13] *Keputusan Menteri Negara Lingkungan Hidup No. 12 Tahun 1994 tentang Pedoman Umum Upaya Pengelolaan Lingkungan (UKL) dan Upaya Pemantauan Lingkungan (UPL).*

[14] *Keputusan Menteri Negara Lingkungan Hidup No. 14 Tahun 1994 tentang Pedoman Umum Penyusunan Analisis Dampak Lingkungan.*

[15] *Keputusan Menteri Negara Lingkungan Hidup No. 42 Tahun 1994 tentang Pedoman Umum Pelaksanaan Audit Lingkungan*.

given the title of a guideline, for example, *Decree of the Minister for Industry No. 250 of 1994 on Technical Guidelines for the Arrangement of the Control of Environmental Impact in the Industrial Sector*.[16] It is being suggested here that this is significant as the frequent use of guidelines has tended to give the impression that most environmental law is optional or, at least, not a high priority for implementation and enforcement.

3. THE ENVIRONMENTAL MANAGEMENT ACT: ISSUES CONCERNING LINGUISTIC STRUCTURE

Linguistic structure and the tendency towards vagueness, complexity and opacity

The rule dimension of linguistic structure, namely, the choices between expression that is precise or vague, simple or complex, and clear or opaque were discussed in chapter 6. In European statutes, statutory provisions are stated briefly and precisely in clear naturalistic language. At issue in Indonesia is the extent to which the style of legal drafting appropriately utilises linguistic structure. The section below will discuss the use of particular words: the drafting of definitions, the lack of definitions and common words in *Bahasa Indonesia* that foster vagueness, unnecessary complexity and opacity in linguistic structure. The effect of these linguistic practices pervades the Act as a whole.

Poor drafting of definitions

Creating an adequate definitional framework for environmental management provides challenges for the legal drafter, as many concepts are abstract in nature, whilst others are technical. However, clear and concise definitions are crucial to ensuring that a legal rule is readily understood by those applying the rule, both enforcers and those following the rule. Reducing concepts to the concrete and measurable helps to avoid opacity. The following observations are made in relation to the definitions found in the Act, both in relation to the content of definitions and the skill with which terms are defined:

- The environment

The environment is defined as (art 1(1)):

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[16] *Keputusan Menteri Perindustrian No. 250 Tahun 1994 tentang Pedoman Teknis Penyusunan Pengendalian Dampak Terhadap Lingkungan Hidup Pada Sektor Industri*.

> … the spatial unity of all materials, forces, situations and living creatures, including humans and their behaviour, which influences the continuance of life and welfare of humans and other living creatures.

Whilst this definition of 'environment' is sufficiently broad, concepts such as influence on the 'continuance of life' lack clarity: even in environmentally degraded conditions some forms of life are likely to survive. The 'welfare' of humans introduces an unnecessary subjective assessment, as does the 'welfare' of other living creatures. A more objective definition would consist simply of an identification of the component parts of the environment such as land, air and water; the atmosphere; organic or inorganic matter and living organisms; and human-made or modified structures and areas.[17]

- Environmentally sustainable development

'Environmentally sustainable development' is defined as (art 1(3)):

> … a conscious and planned effort, which integrates the environment, including resources, into the development process to ensure capability, welfare and quality of life of present and future generations.

In comparison to the most often quoted and internationally accepted definition of sustainable development – 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'[18] – the Indonesian definition envisages securing the 'capability, welfare and quality of life of both the present and future generations'. This definition lacks the proviso that meeting the needs of the present is not to compromise the ability of future generations to meet their own needs. Therefore, it does not highlight the practical reality that in meeting the needs of the present generation, competing objectives have to be balanced against each other and tradeoffs have to be made.

When applied to the management of water, a more specific interpretation of sustainable development is required, as was discussed in chapter 1. For example, the definition in the Act cannot be readily interpreted as implying a need to preserve a water resource base. It appears to be essentially anthropocentric as there is no explicit reference to the

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[17] *Protection of the Environment Operations Act* 1997 (New South Wales) - Dictionary

conservation of plant and animal species. Thus, it does not accommodate aspects of sustainable development that have been developed internationally or emphasise the need to protect ecosystems.

- Environmental pollution

Environmental pollution is defined in the Act as (art 1(12)):

> … the entry or the entering into by living creatures, substances, energy and/or other components into the environment by human activities with the result that its quality decreases to a certain level which causes the environment not be able to function in accordance with its allocation.

This complex definition entails issues related to causation: it must be shown that environmental quality has decreased because of a particular human activity. As will be discussed in chapters 10 and 11, this definition provides evidentiary obstacles in criminal or civil enforcement.

- Environmental damage

Environmental damage is defined as (art 1(14)):

> … action which gives rise to direct or indirect changes in the physical and/or biological characteristics of the environment which causes the environment to no longer be able to function to support sustainable development

This definition is not directly applicable as it does not indicate which physical and/or biological characteristics of the environment are changed. Also, to make out the definition, it would have to be proved that the environment can no longer function to support sustainable development, which is likely to be complex.

- Standard environmental damage criteria

Standard environmental damage criteria are stated to be the 'threshold limits of physical and/or biological changes in the environment which can be measured' (art 1(13)). It may be that environmental damage criteria include ambient water quality standards, however,

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[18] World Commission on Environment & Development, *Our Common Future* (England: Oxford University Press, 1987) 43.

it is not clear whether that is the legislative intent. This points to a problem of vagueness arising from a lack of detail or specificity.

Lack of definitions

The Act frequently uses other technical words and phrases that are not defined, which leads to opacity and a lack of specificity. It hinders accessibility to those tasked with complying with the Act or enforcing its provisions. Examples of environmental law terminology that would benefit from definition are the following:

- Natural resources
- Spatial management
- Business and/or activity[19]
- Business and/or activity licence[20]
- Environment protection licence
- Environmental audit
- Large and important impact on the environment
- Environmental impact assessment
- Information about the environment
- Community loss

Words in Bahasa Indonesia that encourage vagueness and opacity

A number of Indonesian words that regularly appear in environmental legislation are undefined, inadequately defined or used inconsistently. Whilst they are words from ordinary everyday usage, their implications in relation to environmental management are not clear, nor can they be readily related to well-known legal policy tools in

[19] This would be a first step in clearly identifying the regulated community.

environmental management. This difficulty contributes to an overall vagueness and opacity in the Act. These words are found in the definition of environmental management and appear in other parts of the Act. Environmental management is defined as (art 1(2):

> … an integrated effort to preserve (*melestarikan*) environmental functions which covers policy for the ordering or structuring (*penataan*), exploitation (*pemanfaatan*), development (*pengembangan*), maintenance (*pemeliharaan*), restoration (*pemulihan*), oversight (*pengawasan*) and control (*pengendalian*) of the environment.

It is notable that these words are abstract and do not explicitly relate to legal policy tools such as planning, environmental impact assessment, licensing, information systems, community consultation, reporting, monitoring or market-based instruments. Neither do they refer to enforcement mechanisms.

- Preservation - *pelestarian*

As defined in the Act, preservation (*pelestarian*) of environmental supportive capacity is stated to be (art 1(7)):

> a set of efforts to protect environmental viability against pressures for change and/or negative impacts that arise because of an activity, so that it can continue to support the life of humans and other living creatures.

This definition makes no distinction between protection and preservation. It refers to 'environmental viability' and ignores the specific meaning of preservation, namely, leaving an environment intact so that it is entirely separated from external impacts are avoided as far as possible. Indeed, preservation and protection have distinct meanings: whilst preservation can refer to the goal of keeping an environment unchanged, protection requires judgment as to the level of impact that will lead to change. This lack of clarity is further exacerbated by the use of the word 'preservation' within the Act. The title of Chapter 5 is 'Preservation of Environmental Functions' (*Pelestarian Fungsi Lingkungan Hidup*). It concerns compliance with environmental standards, prohibitions, environmental impact assessment and the management of waste. These activities concern the control of impacts upon the environment rather than preservation.

Comment [BB4]: (These days it is impossible not to have some external impacts, from atmospheric change in particular)

[20] Whilst examples of this licence are given in the Elucidation of article 18(1) as being mining licences and the industry licences, it does not provide a definition of a business and/or activity licence.

There also seems to be an overlap in meaning between preservation and conservation. Conservation (*konservasi*) of natural resources is defined in the Act as (art 1(15)):

> ... the management of non-renewable natural resources to ensure their prudent utilisation and renewable resources to ensure their continued availability through maintaining and improving quality levels and diversity.

This definition is opaque, as it does not clarify the meaning of 'renewable' and 'non-renewable' resources. It is also vague, as in relation to non-renewable resources it requires a value judgment on what is 'prudent' (*secara kebijakan*) and in relation to renewable resources, it requires an assessment of when 'continued availability' is under threat.

- Ordering, structuring - *penataan*

This word is not defined in the Act. 'Ordering and structuring' has implications that overlap with the term for control (*pengendalian*), particularly the references to direction and control.

- Taking care of, keeping, maintenance - *pemeliharaan*

This word concept is also not defined in the Act. There appears to be an overlap in meaning between this term and preservation (*pelestarian*), oversight (*pengawasan)* and control (*pengendalian*).

Comment [BB5]:

- Control and constraint - *pengendalian*

The concept of 'control and constraint' is undefined in the Act. As mentioned above, there is overlap between these concepts and the concept of ordering and preservation. There is also no acknowledgement of the well-recognised distinction between *prevention* of pollution, through the design of facilities and processes to minimize the production of waste and *control* of pollution discharges; this causes vagueness from a lack of specificity and completeness.

- Oversight, supervision, care, surveillance – *pengawasan*

'Oversight' contains distinct components, which are well known in the environmental law

'interpretive community' in countries such as Australia; for example, such as monitoring environmental quality to detect changes, monitoring to detect breaches of the law and monitoring to review whether or not predicted environmental change or lack of change has or has not occurred. These distinctions are not understood in the use of the word *pengawasan*, which as a result suffers from opacity.

The 'integration' word and the veil of opacity

'Integrate' (*memadukan*), integrated' (*terpadu*), 'integratedness' (*keterpadua*n), in an 'integrated manner' (*secara terpadu*) and 'which integrates' (*yang memadukan*) are words and phrases that appear frequently in the Act.[21] In *Bahasa Indonesia*, 'integration' is based on the root of *padu* meaning 'fused' or 'in harmony.' The word 'integrated' takes a central place in the definition of environmental management, which is stated to be:

> an integrated (*terpadu*) effort to preserve environmental functions which covers planning policy, exploitation, development, maintenance, reparation, supervision and control of the environment.

References to integratedness appear in the section in the Act dealing with environmental management, which is to be performed

> in an integrated manner (*secara terpadu*) by government institutions in accordance with their respective fields of tasks and responsibilities, the public and other agents of development while taking into account the integratedness (*keterpaduan*) of planning and implementation of environmental management policy (art 9(2))

and

> …in an integrated (*terpadu*) manner with spatial management, protection of non-biological natural resources, protection of artificial resources, conservation of biological natural resources and their ecosystems, cultural preservation, biodiversity and climate change (art 9(3)).

The Minister for the Environment is given authority for coordinating national environmental management policy in the provision that states (art 9(4)):

> The integratedness (*keterpaduan*) of planning and implementation of national environmental management policy…. is coordinated by the Minister.

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[21] According to Usman, it is the central feature of the Act: Usman R, *Pembaharuan Hukum Lingkungan Nasional* (*The Renewal of National Environmental Law*) (Indonesia: PT Citra Aditya Bakti, 2003) at 94.

The government is also to create integratedness (*keterpaduan*) and harmony in the implementation of national policy on environmental management through delegation of environmental authority to local locally based central government offices and in giving a role to district government to assist the central government (art 12(1))

This approach to the concept of integration is at variance with literature outside Indonesia on the subject. As pointed out by Frankenberg,[22] 'integration signifies a process – the creation of societal cohesion – as well as a result – cohesion, unity, a successfully shaped community'. The process requires a structure of reciprocity.[23] Integration can also be seen in terms of opposites: integration/unity versus disintegration/difference. According to systems theory developed by Luhmann, these opposites can be formulated as the difference between co-operation and conflict.[24] As discussed in chapter 4, the legal rule has the capacity to facilitate cooperation and in so doing, it is likely to assist the achievement of integration. Such an approach to the problem of integration has not been taken up in Indonesia: in its present usage, the concept of integration merely describes the result; it does not enter into the process of how to achieve it.

In relation to the internal workings of a system of management, it is hard to envisage how integration can be achieved without the establishment of systems of coordination. Coordination involves formal avenues of communication for specific ends; effective coordination requires the definition of roles, responsibilities, rights, and obligations in relation to communication. It is at this point that clear and unambiguous expression in procedural rules is required. As stated by Lasswel, to clarify the meaning of communication, one can ask the question 'Who says what in which channel to whom with what effect?'[25] Concerning systems of coordination, the communicator, the message, the media and the recipient should all be specified. By using the 'integration' word, the need for coordinative procedures is obscured and a veil of opacity is hung over the Act as a whole.

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22 Frankenberg G, "Tocqueville's Question. The Role of a Constitution in the Process of Integration" (2000) Vol 13 No 1 *Ratio Juris* 1-30 at 3.

23 ibid., at 4.

24 ibid., at 5 referring to Luhmann (1997).

25 Lasswel H quoted by Basuki J, "*Komunikasi Dan Informasi Lingkungan Hidup*" (Communication and Environmental Information) (1999) Vol 4 No 9 *Buletin Medali* 9-10 at 9.

4. THE ENVIRONMENTAL MANAGEMENT ACT: WEAKNESSES IN RULE FORMATION

Rights without obligations

The Act grants the right to 'every person' to (art 5):

> (1) an environment that is good and healthy
>
> (2) environmental information
>
> (3) participate in the scheme of environmental management in accordance with applicable laws and regulations.

In relation to the right to environmental information, the Elucidation of article 5(2) states that environmental information to which the community is entitled can be:

> …in the form of data, explanation or other information involved in environmental management which according to its nature and goal is such that it is open to be known by the community, such as environmental impact assessment documents, reports and evaluations on results of environmental monitoring, both monitoring of compliance and monitoring of environmental quality changes and spatial management plans.

Notably, neither accompanying obligations nor procedural rules are imposed on government in relation to securing these rights. Accompanying rules could set out more precisely the scope of the right together with obligations and procedures on how such rights are to be secured. They could also define key concepts such as 'environmental information' and 'public authority'.

Comparison may be made with the following rules on public participation in policy making which are drafted as a sequence of rules:[26]

> (a) Before a policy is made, the Environment Protection Authority must publish a notice inviting submissions to the Environment Protection Authority on the draft policy within a specified period.

[26] *Protection of the Environment Operations Act* 1997 (New South Wales) ss 17-19.

(b) During the preparation of the draft policy, the Environment Protection Authority is to consult with such public authorities, organizations or persons as the Minister directs or may consult with such others as the Environment Protection Authority thinks appropriate.

(c) In proceeding with the draft policy, the Environment Protection Authority is to take into consideration any submissions it receives that relate to the policy.

Concerning the right to information, exceptions would need to be formulated and the time specified within which the information must be supplied along with the costs to be charged.[27] There should be provisions that ensure that where the public has contributed to the decision-making process, their views have been taken into account. Some of these issues are likely to be covered in the Freedom of Information Act, a draft of which is proposed for discussion by national parliament towards the end of 2003.[28] However, there are advantages in making specific provision in relation to the environment, as this would more explicitly implement the goals of good environmental governance and sustainable development.[29]

In relation to the right to participate, the Elucidation states that the right to participate includes 'submitting objections', 'participation in hearings' or 'other methods that may be stipulated in laws and regulations'. It is stated that participation may occur 'in the process of evaluating an environmental impact analysis or environmental policy formulation'. It is said to be 'based on the principle of openness'; however, this principle is not defined. The Elucidation merely states that through 'openness' there is a possibility for the community to provide views and join in the process of consideration in decision-making.[30] The grant of the right is weakened by ambiguity in the qualification in article

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[27] These provisions are found in the EC Directive 90/313 on Access to Environmental Information adopted by the Council of Ministers in June 1990 as described by Kimber C, "Understanding Access to Environmental Information: the European Experience" in Jewell T and Steele J (eds), *Law in Environmental Decision-making National, European and International Perspectives* (England: Clarendon Press Oxford, 1998) 139-160 at 146-147. Also, the *Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* 38 ILM (1995) 515 sets out detailed procedural rules for access to environmental information (art 4) and obligations on the collection and dissemination of information (art 5).

[28] *Rancangan Undang-undang No. … tahun 2002 tentang Kebebasan Memperoleh Informasi Publik.*

[29] For example, the German *Environmental Information Act* 1994 provides as follows:
(a) a definition of the authorities who are the subject of the Act and environmental information
(b) a general entitlement to free access to information about the environment
(c) the process for making an application including time limits
(d) that the government entitlement is not entitled to exclude information on the basis of the public interest
(e) the conditions upon which a application may be refused
(f) the exemptions and restrictions on the entitlement to protect private interests
(g) obligations to inform the public about the environment.

[30] Openness is an example of an aspect that should be included in the Act rather than the Elucidation.

5(3), which grants the right 'in accordance with applicable laws and regulations'. This qualification could have one of two meanings: one is that participation is a right only where provided for by other legislation and the other is that the right to participate exists in all situations irrespective of whether or not it is referred to elsewhere in specific legislation.[31]

In another provision, 'the community' is granted the opportunity to participate in environmental management by article 7(1), which states:

> The community has the same and the broadest possible opportunity to play a role in environmental management.

In order to give this 'opportunity' more substance, this rule could be re-formulated as

> *Where* the government exercises its authority in environmental management *then* the community has the same and the broadest possible opportunity to play a role in environmental management.

Comment [BB6]:

Comment [BB7]: I know that this is not consistent with the "if" used elsewhere, but it makes for a more elegant expression of the idea.

When re-formulated in this way it can be seen that the consequence of the rule is both vague and opaque. There is no definition of 'community' in the Act, neither is there a distinction between 'opportunity' and 'right' and, as a result, the distinction between this provision and article 5(3) is not readily discernable. In addition, the phrase 'play a role' (*berperan*) is non-specific, neither is any further explanation given in the Elucidation. The expression of the consequence makes the rule vague: it is not clear what is meant by the 'same' opportunity (*yang sama*) - the same as whom? Is this intended to convey an equal partnership with government or some other meaning?

A further provision states that the implementation of article 7(1) consists of a number of activities, which are listed as:

(a) increasing independence, community empowerment and partnership
(b) giving growth to community capability and initiative
(c) increasing community responsiveness in carrying out social supervision
(d) providing suggestions
(e) conveying information and/or conveying reports.

This provision can be re-formulated as stating:

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[31] Santosa MA and Fjellstrom K, "The Indonesian Environmental Management Act 1997" (1997) Vol 2 No 3 & 4

If the government exercises its authority in environmental management *then* it is to implement the community's right to play a role in environmental management by the activities listed.

To the extent that the 'opportunity' of the community is enforceable, this provision may create an obligation even though it is not expressed as a prescriptive rule. However, the consequence is non-specific. It would benefit from procedural rules on such matters as the holding of community consultations, the form of the consultation, the provision of representatives for the local community and the account to be taken of submissions received from the public. The 1998 *Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*[32] shows the acceptance internationally of the importance of procedural rules on public participation.

Natural resources management: general legislative and administrative permissions

Article 8(1) confers power upon the state to control the natural resources of Indonesia, coupled with a duty that natural resources are to be 'utilized for the greatest possible public welfare and that arrangements thereof are to be determined by the government'. This provision repeats article 33(3) of the Indonesian Constitution and contains the same inadequacies discussed at the beginning of this chapter.

The Act goes on to state that to implement its authority, the government does certain things, namely it (art 8(2)):

(a) regulates and develops policy in the scheme of environmental management

(b) regulates the supply, allocation, use [and] management of the environment and the re-use of natural resources, including genetic resources

(c) regulates legal actions and legal relations between persons and/or other legal subjects as well as legal actions regarding natural resources and artificial resources, including genetic resources

(d) controls activities which have social impact

(e) develops a funding system for efforts to preserve environmental functions.

Asian Pacific Journal of Environmental Law 366-372 at 367.

[32] *Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* 38 ILM (1995) 515 art 6(2).

This provision can be re-formulated as stating that:

> *If* the government implements its authority under article 8(1) *then* it (a) regulates and develops policy (b) ….

By way of comparison, this provision may be compared to the following provision, which imposes an obligation relating to a quasi-legislative function:[33]

> The authority is required to develop environmental quality objectives, guidelines and policies to ensure environmental protection

A fundamental weakness in these provisions, as well as the provisions on policy making on environmental and spatial management and the activities of environmental management (discussed below), arises from the reference to 'the government' as a generic actor, rather than a specific authority, as can be seen in the example given above. If seen as providing legislative and administrative rules concerning the management of natural resources then there is no statement on exactly who is responsible. For this reason, no one particular person or agency can be held accountable in accordance with the Act. In Indonesia, where systems of accountability are widely recognised as being in need of development, it would foster greater accountability if the Act identified in a more detailed way *who* is involved and *how* the various actors are to share responsibility.

Another issue concerns the consequence ('*then* Y'), which does not contain explicit language of obligation such as would be conveyed by the use of words must (*harus*), oblige (*wajib*) or duty (*kewajiban*). As a result, the provision could be seen to be permissive. This would not be inappropriate, as the Act can be seen as a means to authorise government to carry out certain activities. However, at least one commentator has interpreted this provision as imposing an obligation.[34] Whilst, clearly this would be a desirable interpretation, it is not immediately apparent from the statutory language. This practice points to a wider problem: the failure to use language that is explicit regarding the intended level of normativity.

It can be seen that the linguistic structure of the consequence, which sets out the activities that the government is to carry out lacks specificity. This arises from the choice of words

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[33] *Protection of the Environment Administration Act* 1991 (New South Wales) s 9(1)(a).
[34] Usman, Note 21 at 89.

and sentence construction. The tasks in (a), of regulating and of developing policy, are distinct tasks and should be referred to separately. The phrasing in (b), of 'regulating the supply … of the environment' is clumsy and unclear. The authority in (c) to 'regulate legal actions and legal relations' does not convey any clear meaning. In relation to (d), the 'control of activities which have a social impact' is wide open to interpretation. Actions referred to in (e) presumably include the development of market-based instruments; however, there is no explicit statement in this regard. Each of these matters is stated to be the subject of government regulations (art 8(3)). Hence, the Act does not cover the management of natural resources; it simply postpones the legislative process. This raises issues concerning the position and status of rules contained in such delegated legislation.

Environmental management: administrative rules lacking specificity or procedure

Obligations without procedural rules in policy making

The Act goes on to state that (art 9(1)):

> The government determines national policies on environmental management and spatial management whilst always taking into account religious values, culture and traditions and the living norms of the community.

As with the provision on natural resources management, this provision could be interpreted as a permission or an obligation. Whilst there is a lack of explicit normative language, it would be desirable to interpret this provision as an obligation. In comparison, the words 'whilst always taking into account', clearly connote an obligation and constitutes a substantive administrative rule to control the government's discretion in the formulation of policy. The Elucidation states that 'attention must (*wajib*) be given to the potential, aspirations, and needs along with values which emerge and develop in the community'. This makes the obligation definite, but why it has been placed in the Elucidation rather than the statute itself? Notably, there are no procedural rules to ensure that the matters listed will be taken into account in the making of policy**.**

This rule can be compared to the following, which states the matters to be taken into consideration in preparing a policy as follows:[35]

> The Environment Protection Authority must take into consideration:
>
> (a) the environmental, economic and social impact of the policy;
>
> (b) the simplicity, efficiency and effectiveness of the administration of the policy;
>
> (c) any environmental planning instruments that the Environment Protection Authority considers relevant; and
>
> (d) any regional environmental differences within the region.

More sophisticated forms of rule making involving conditional permissions have not been utilized such as the following example in relation to policy making.[36]

> The Environment Protection Authority may prepare a draft of the policy; and if it does so, must prepare an impact statement relating to the draft policy

Obligations to carry out non-specific activities in environmental management

It is stated that 'in the scheme of environmental management the government *must*' carry out certain actions. Whilst this provision clearly imposes an obligation, the actions set out in the consequence of the rule are expressed in non-specific terms. They are expressed as actions to (art 10):

(a) form, develop and increase awareness and responsibility of decision-makers in environmental management

(b) form, develop and increase the awareness of community rights and responsibilities in environmental management

(c) form, develop and increase partnerships between the community, business and the government in the effort to preserve environmental supportive capacity and carrying capacity

(d) develop and apply national policy for environmental management which ensures the maintaining of environmental supportive capacity

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[35] *Protection of the Environment Operations Act* 1997 (New South Wales) s 13.
[36] ibid., s 16.

(e) develop and apply instruments of a pre-emptive, preventative and proactive nature in the effort to prevent decreases in environmental supportive capacity and carrying capacity

(f) exploit and develop environmentally sound technology

(g) carry out research and development in the environmental field

(h) provide environmental information and disseminate it to the community

(i) give awards to meritorious people or foundations in the environmental field.

Notably, this rule does not distinguish between the legislative and administrative functions of government. This leads to a lack of specification on the nature of the government's obligations. For example, it is conceivable that the activities set out in (a), (b), (c), (d) and (e) require law making but alternatively, it could be argued that government can carry out most of the activities listed without law making, apart from (d) and (e). .

In addition, the rule does not specify *how* each of the activities is to be carried out. For example, in relation to (e) above, market-based instruments are not expressly referred to such as taxes, fees, subsidies, load-based licensing and tradable permits. If this area of law is to be developed at the regional level, (as discussed in the next chapter), the concept of market-based instruments could be introduced nationally in more detail to provide the foundation for the formulation of regional regulations. No other obligations are imposed upon government through the formulation of administrative rules beyond those set out in relation to licensing (discussed below). However, the Elucidation of article 18(3) imposes a convoluted and vague obligation 'to assert the obligations associated with compliance'. It is not apparent why this rule is found in the Elucidation rather than the Act, nor is its meaning clear.

References to environmental supervision in the abstract

It can be seen that many of the provisions on supervision are overly abstract in their expression. The Act states that (art 22(1)):

> The Minister carries out supervision of the compliance of those responsible for a business and/or activity to stipulations that have already been applied in laws and regulations in the environmental field.

If re-phrased as an '*if* X *then* Y' formulation, it could be expressed as follows:

> *If* a stipulation is applied in a law or regulation in the environmental field *then* the Minister carries out supervision of compliance of those responsible for a business or activity.

If viewed in this way, the scope of this provision can be seen to be vague. What is a law or regulation in the environmental field: does it only refer to laws issued by the Ministry for the Environment or does it also refer to sectoral environmental law? In relation to the consequence, the lack of expressly normative language means that it is not clear whether the provision permits such actions by the Minister for the Environment or *requires* the Minister to carry out these activities. If it is a requirement, why has the word *wajib* not been used, as in article 10? If it requires the Minister to carry out supervision, what is the role of sectoral Ministers? Furthermore, the drafting of the consequence is overly abstract. Why is there no mention of recognisable concrete activities such as monitoring, inspection and enforcement? For example, by way of comparison, a rule that more clearly allocates responsibility for oversight is the following:[37]

> The authority has general responsibility for investigating and reporting on alleged non-compliance with environmental legislation for the purpose of prosecutions or other regulatory action.

A further provision states (art 22(2)):

> [t]o carry out the supervision provided for in (1) above, the Minister can (*dapat*) appoint officials with authority to carry out supervision.

This provision could be re-formulated as

> *If* the Minister so desires *then* the Minister can appoint officials with authority to carry out supervision.

This provision authorizes the Minister to appoint officials to carry out supervision but the decision lies within the absolute discretion of the Minister. The Elucidation states as follows:

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[37] *Protection of the Environment Administration Act* 1991 (New South Wales) s 7(2)(e). The authority is defined as the Environment Protection Authority.

> In the case where an official who has authority from another government agency is appointed to carry out supervision, the Minister carries out coordination with the leadership of the agency concerned.

This statement could be re-formulated to the effect that

> *If* the Minister appoints an official from another government agency to supervise, *then* the Minister carries out coordination with the leadership of the agency concerned.

This highlights a failure to differentiate in a concrete way between *coordination of supervision*, and *supervision.* How the Minister is to *coordinate* with the leader of another agency is left vague: there is no detail on how it is to occur. Is *coordination with* different from *coordinating*? Is the choice of the words *coordinate with* intended to differ from *cooperate with*? If so, is the position of the Minister for the Environment intended to be one of leadership?

Environmental quality control: only four prohibitions in public regulatory rules

Four prohibitions

As mentioned in chapter 5, a prohibition may be expressed as a blanket command not to do something and if so, it is a powerful regulatory tool. Examples of strong environmental prohibitions are:

> A person must not pollute any waters.[38]

> Solid waste may not be introduced to a body of water for the purpose of disposal.[39]

The Act only imposes four prohibitions in public regulatory rules. One is a prohibition against the breach of environmental standards, the second is a prohibition against waste disposal without a licence and the third and fourth relate to the importation of hazardous and toxic waste. This minimalist approach may be compared to the approach to

[38] *Protection of the Environment Operations Act* 1997 (New South Wales), s 120(1).
[39] German *Act on Managing Water Resources (Federal Water Act)* 1996 (as amended in 2000) art 26(1).

environmental law in the USA, where it has been stated that 'all the great laws are prohibitive and sweepingly so'.[40] The prohibitions are as follows:

- Prohibition One: breaching environmental quality standards and standard criteria of environmental damage

The first prohibition is stated as follows:

> To guarantee the preservation of environmental functions, every business and/or activity is prohibited from breaching environmental quality standards and standard criteria of environmental damage (art 14(1)).

This rule is normative and can be readily re-formulated into an '*if* X, *then* Y' structure. It can be re-stated as:

> *If* a business and/or activity breaches environmental quality standards and standard criteria of environmental damage *then* such actions leading to the breach are prohibited.

However, the function of the words 'to guarantee the preservation of environmental functions' is not clear: is this merely an introduction with no operative effect, is it an additional requirement on business to preserve environmental functions, or is it a qualification on the prohibition? When re-stated as a legal rule, it can be seen that to avoid opacity in the scope, 'business and/or activity' should be defined.

To apply the rule, it is necessary to consider the meaning of 'environmental quality standard' and 'standard criteria of environmental damage'. Environmental quality standards are defined as (art 1(11)):

> Threshold limits or levels of living creatures, substances, energy or components that exist or must exist and/or polluting elements the existence of which in a certain resource as an element of the environment is set at a certain level.

Standard environmental damage criteria are defined as (art 1(13)):

> Threshold limits of physical and/or biological changes in the environment that can be measured.

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[40] Rodgers WH "The Seven Statutory Wonders of US Environmental Law: Origins and Morphology" in Percival RV and Alevizatos DC (eds), *Law and the Environment* (USA: Temple University Press, 1997) 320-327 at 326.

It seems that these standards are ambient standards rather than discharge standards. If so, they are difficult to apply: proof of a breach of the prohibition would require evidence that the accused's activities resulted in a lowering of a relevant ambient standard. This creates an unnecessarily complex rule (also discussed in chapter 10 concerning difficulties in proof of causation in criminal prosecutions).

- Prohibition Two: disposing of waste to an environmental medium

The second prohibition in the Act is as follows:

> Without a licensing decision, every person is prohibited from disposing of waste to an environmental medium (art 20(1)).

This provision can be re-stated as:

> *If* a person disposes of waste to an environmental medium without a licensing decision *then* that disposal of waste is prohibited.

This provision reads as a prohibition. However, it is actually a conditional permission as, in practice, a person is permitted to dispose of waste on condition that they hold a licence. It would be clearer to have divided the provision into two rules: one to establish a general prohibition against the disposal of waste to an environmental medium and the other to state a conditional permission, which would appear as follows:

> *If* a person holds a licence for the disposed to an environmental medium and complies with the conditions of the licence *then* that person is permitted to dispose of waste to an environmental medium.

Lack of conditional permissions

From the lack of prohibitions, it follows that there is also a lack of conditional permissions, which as mentioned in chapter 5, could provide useful regulatory mechanisms. An example of a conditional permission is the following:

> Substances may only be stored or deposited in a body of water in such a way that there is no risk that the water will be polluted or that any other negative change to its properties or to the water flow will occur.[41]

Another example is where a defence is provided to a prohibited act such as a rule that states:

> It is a defence in proceedings against a person … that the pollution was regulated by an environment protection licence held by the person or another person.[42]

Where this rule applies to water pollution, it can be re-formulated as a rule stating that *if* a person has a licence obtained from an authorised agency *then* that person will be permitted to pollute waters in accordance with the licence. When re-formulated in this way, a licence can be more clearly seen as a conditional permission.

Public regulatory rules: obligations that lack precision and clarity

A general obligation

A general obligation is imposed upon 'every person' to (art 6(1)):

> … to preserve the continuity of environmental functions as well as prevent and combat environmental pollution and damage.

If re-stated in the '*if* X, *then* Y' format, this provision becomes:

> *If* a person *then* that person must preserve the continuity of environmental functions as well as prevent and combat environmental pollution and damage.

It can be seen that the consequence of this obligation is very broad and as a result, the obligation is wide-ranging in its effect and provides maximum flexibility in its application. However, this also means that any attempt to enforce the obligation will be unpredictable. If the plain meaning were followed, it would be necessary to prove that a person has failed first, to preserve 'the continuity of environmental functions' or second, to 'prevent and combat environmental pollution and damage'.

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[41] German *Act on Managing Water Resources (Federal Water Act)* 1996 (as amended in 2000), art 26(2).
[42] *Protection of the Environment Operations Act* 1997 (New South Wales) s 122(a).

In 1999, this provision was successfully used to base a claim for compensation for damage sustained from water pollution in *Indra Prasetya and 78 Ors v PT Bintang Triputratex, PT Kesmatex and CV Ezri Putusan*,[43] a decision discussed in chapter 11. The claim itemised the deficiencies in the pollution control equipment of each defendant, which was said to violate article 6(1). The court's decision shows how this provision can assist a defendant as long as the court interprets it broadly. However, its lack of specificity does not assist an entity seeking to meet the obligation as it is not readily verifiable and neither does it contain a clear objective.

Narrower obligations

A more tailored obligation is the following concerning environmental impact assessment (EIA) (art 15(1)):

> Every plan of a business and/or activity that can give rise to a large and important impact on the environment must possess an environmental impact analysis.

This rule has a readily discernable '*if* X, *then* Y' structure, as follows:

> *If* a plan of a business and/or activity can give rise to a large and important impact on the environment *then* it must possess an environmental impact analysis.

However, it can be seen that the scope is vague: it does not state *who* is the subject of the obligation nor does it indicate *what* is intended by 'plan of a business or activity'. For this reason, the precise stage at which an EIA is required in the approval process is not clear. Whilst the Elucidation states that the EIA is part of the feasibility study, this explanation also lacks specificity, as it does not relate to any of the specific approvals, which include the location permit, investment approval, building approval and the operating licence.

Criteria to establish whether there is a 'large and important impact' are set out in the Elucidation. These criteria have been the subject of government regulations on EIA and space does not permit further discussion of this aspect of environmental law. However, it is notable that the term 'significant impact', which is commonly used internationally in

[43] Decision No. 50/Pdt.G./1998/P.N. Pk1, 30 July 1999.

EIA has not been adopted. To use this term would have opened up avenues for interpretation by reference to international experience.

The rule is also uncertain in relation to its consequence. It cannot only mean that a business or activity must 'possess' (*wajib memiliki*) an EIA: to be practical, it must mean that the EIA has been submitted to, assessed and approved by an authorised government agency. Whilst it may be intended to convey that the owner or operator of a business or activity is required to furnish an *approved* EIA to the licensing authority before receiving a licence, this is not stated. It would therefore benefit from being placed within a procedural context.

This obligation concerning EIA has been extended to licensing as follows (art 18(1)):

> Every business and/or activity which gives rise to a large and important impact on the environment must possess an environmental impact statement to obtain a licence to conduct a business or activity.

It can be seen that here the consequence has been clarified somewhat by the Elucidation of article 18(3), which states that an application for a business or activity licence must include the environmental impact assessment. Therefore, the obligation would appear to be not simply to 'possess', but to *submit*, an EIA as part of an application for a licence, as noted above.

Another obligation applies to the management of waste as follows (art 16(1)):

> Every party responsible for a business or activity must carry out management of wastes produced by their business and/or activity.

This provision has a slightly different scope as it is directed to 'every party responsible' for a business or activity. The notion of responsibility is not explained. The consequence is also non-specific; for example, it is not clear what the objective of management of wastes is, or how it can be measured.

A similarly vague rule on hazardous and toxic waste is as follows (art 17(1)):

> Every party responsible for a business and/or activity must carry out management of hazardous and toxic materials.

Again, it is not apparent how to assess the extent to which this obligation is being met. It

is stated that the obligation applies to the production, transportation, distribution, storage, use and disposal of hazardous and toxic materials (art 17(2)) but no detail is given in relation to each of these activities.

Licensing: lack of specificity or procedure and failure to distinguish between rule types

As mentioned above, the licence is an authorisation that takes the form of a conditional permission as it permits the licence holder to do certain things that are otherwise prohibited on the meeting of certain conditions. Only two licences are mentioned in the Act, namely the 'business and/or activity licence' and the 'waste disposal licence'. A preliminary observation is that there is no provision for different types of licences to protect the environment; neither is there provision for the tiering of licensing obligations, in accordance with the kind of premises to be licensed or the level of waste that requires disposal. Moreover, there is no mention of integrated licensing through multimedia permits. An integrated approach to licensing was mentioned in chapter 1 as being relevant for integrated water resources management. It would enable the licensing authority to assess the total environmental effect of a facility on a watershed in a holistic way, irrespective of the first receiving environmental medium.[44] Indeed, a number of commentators have criticised the limited nature of the licensing provisions in the Act and have called for integrated licensing in Indonesia.[45]

The business and/or activity licence

The licence that contains environmental protection measures is the business and/or activity licence issued by the relevant sector.[46] Licensing authority is granted to 'the official who has authority in accordance with laws and regulations' (art 18(2)). It would seem that sectors such as the Department of Industry are the subject of obligations in the

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[44] In addition, having one licence for an entire facility, to cover all environmental media streamlines the licensing process, see Potter C. and Makarim N, *Development and Implementation of Water Quality Standards in Indonesia*. (Jakarta: Environmental Management Development in Indonesia (EMDI) Project co-published by the Indonesian Ministry of State for the Environment, 1995) 35.

[45] ibid., at 35. For example: Rangkuti SS and Wijoyo S, "Re-regulating Licensing to Improve Environmental Control and Monitoring in Indonesia" (1997) Vol 2 *Indonesian Journal of Environmental Law* 99-111 at 107-110. Also, Usman, Note 21 at 203-205 who refers to Rangkuti SS.

[46] To fully understand the licensing process therefore, reference needs to be made to sectoral law, a review of which is beyond the scope of this thesis.

assessment of the application for a business or activity licence.[47] As mentioned above, it is stated that every plan of a business and/or activity that can give rise to a 'large and important impact' on the environment must possess an environmental impact analysis to obtain the licence to conduct a business or activity (art 18(1)). The same article goes on to state (art 18(3)):

> In the licence provided for in (1) above are included conditions and obligations to carry out environmental impact control efforts.

This obligation is non-specific about what those 'conditions and obligations' may be. However, the Elucidation provides an explanation. It states:

> The license to carry out a business and/or activity must assert the obligations associated with compliance to stipulations in environmental management, which must be implemented by the party responsible for a business and/or activity in carrying out their business and/or activity. For a business and/or activity which is obliged to make or implement an environmental impact analysis, the environmental management plan and monitoring plan which must be implemented by the party responsible for the business and/or activity must be included and clearly formulated in the license to carry out the business and/or activity.

The provision is poorly constructed in that it contains a number of significant rules that run on from each other in a confusing way. Those rules can be extracted as follows:

(a) *If* a license to carry out a business and/or activity is being assessed *then* it must assert obligations to comply with legal provisions on environmental management , which must be implemented by the party responsible for a business and/or activity.

(b) *If* a business or activity is conducted *then* the party responsible for the business and/or activity must implement its licence conditions.

(c) *If* a business and/or activity is obliged to make or implement an environmental impact analysis *then* the environmental management plan and monitoring plan must be included and clearly formulated in the license.

The consequence in (a) and (c) is drafted in a cumbersome way but it is comprehensible. The rule in (b) is an unproblematic expression of an obligation; however, it lacks a definition of 'the party responsible'. A question that arises about these rules is - why are

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[47] This has implications for enforcement activity, the authority for which also lies with the sectors rather than the State Minister for the Environment.

they in the Elucidation and why are they compressed into one paragraph in this way? Why were they not drafted in the Act as separate rules: two addressed to government and one addressed to the public?

Of major significance are the rules governing an application for a business and/or activity licence where an EIA is not required, as not all heavily polluting industry is required to carry out an EIA, either because it is a pre-existing industry or because it is not listed as

requiring an EIA.[48] In this regard, the Act imposes an obligation upon government to take into account (*wajib diperhatikan*) the following (art 19(1)):

a. spatial management plans

b. public opinion

c. considerations and recommendations of authorised officials who are involved with such business or activity

This provision is a substantive administrative rule that could be developed to assist in the creation of accountability in decision-making. At present, it applies generally to 'the government' and is vague in its generic description of the factors to be taken into account.

The waste disposal licence

Authority is granted to the Minister for the Environment to license the 'disposal of waste to an environmental medium' (art 20(3)). This provision initially caused considerable confusion,[49] as it is not apparent how it relates to the sectoral authority to issue the business or activity licence containing environmental protection provisions. Another question arises in relation to how it can apply to the Minister of the Environment who, as a Minister of State, does not have a department and as such is not authorised to carry out regulatory activities.[50] It is not clear whether it refers to pollution licences. In practice, this provision has been interpreted by the Ministry as applying to licences for the disposal of hazardous and toxic waste;[51] however, this is not explicitly stated in the Act.

In relation licensing waste disposal, the lack of substantive administrative and procedural rules is notable. A substantive administrative rule could set out the relevant factors to be

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[48] A comparison between those industries covered in the PROKASIH program mentioned in chapter 1 and the list of industries as set out in regulations required to conduct an EIA reveals this to be so. For example, heavily polluting industry such as sugar processing, textiles, leather tanning, slaughterhouses, tapioca and tofu production will not necessarily require an EIA. Also, the regulations do not have a bearing on many industries that are listed as producing hazardous and toxic waste unless the collection, exploitation, processing or storage of the waste is a primary activity of the enterprise, see Waddell S, *Environmental Law in Indonesia – A Gap Analysis*. Jakarta: GTZ, 2002 at 86-88.

[49] This impression was gained by the writer from discussion with departmental officers, academics and officers at BAPEDALDAs.

[50] Rangkuti SS "*KLH Harus Menjadi Departemen*" (The Ministry for the Environment Must Become a Department) (2000) *Ozon* 34-36.

[51] As can be seen by the implementing government regulations and ministerial decrees.

taken into account in considering a licence application. Such a rule could provide a source of control over the exercise of administrative discretion in licensing decision-making.

Notably there are no rules to guarantee procedural fairness in licence decision-making such as the following rule:[52]

> The appropriate authority must not refuse an application for a licence unless before doing so:
>
> (a) it has given notice to the applicant that it intends to do so, and
>
> (b) it has specified in the notice the reasons for its intention to do so, and
>
> (c) it has given the applicant reasonable opportunity to make submissions in relation to the matter, and
>
> (d) it has taken into consideration any such submissions by the applicant.

Furthermore, there are no procedural rules to support public participation such as a rule to ensure that neighbours are notified of a licence application and can file an objection to a licence application.

5. LACK OF ADMINISTRATIVE RULES TO ALLOCATE ROLES AND RESPONSIBILITY

Uncertainty about environmental responsibility at the national level

As mentioned earlier in this chapter, the Act does not identify any one particular entity within government as being responsible for the state of the environment. This absence of an allocation of ultimate responsibility may be related to political considerations about how much power to give the Minister for the Environment rather than legal drafting. However, it seems also to accord with the general style of legal drafting of environmental law discussed in this chapter, which favours vagueness and lack of specificity.

Agenda 21 proposes independent regulation and monitoring at the national level as a desirable goal;[53] however, the arrangements of authority at the central level of government appear to preclude this outcome and the role of the Minister is made even more uncertain in light of the changes brought by regional autonomy. The licensing power of the Minister does not conform to regional autonomy and neither does the power

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52 *Protection of the Environment Operations Act* 1997 (New South Wales) s 55(2).

53 Agenda 21, United Nations 1992 UN Doc.A/CONF.151/26/Rev.1 at 18.12(o)(ii) on freshwater resources.

of the Minister to determine sites for the disposal of waste. The power to 'supervise compliance' with laws and regulations, and to appoint officials with authority to supervise, could also be interpreted as conflicting with regional autonomy law. These problems point to two issues: first, the past avoidance of allocating specific authority and responsibility to the Minister for the Environment and second, the limited role of the Ministry as a regulator under regional autonomy.

Central government's power under the Act to regulate and control (art 8(2)) appears to be incompatible with Government Regulation No. 25 of 2000 on the Authority of Central and Regional Government in Regional Autonomy (*Peraturan Pemerintah No. 25 Tahun 2000 tentang Kewenangan Pemerintah Dan Kewenangan Propinsi Sebagai Otonomi*) ('the Regional Autonomy Regulation') discussed in chapter 7. Whilst, the Regional Autonomy Regulation does not directly concern the Minister for the Environment, as it covers central government in general. The same approach is reflected in Presidential Decree No. 2 of 2002 on Amendment of Presidential Decree No. 101 of 2001 on the Position, Tasks, Functions, Authority, Organisation and Work Patterns of State Ministries (*Keputusan Presiden No. 2 Tahun 2002 tentang Perubahan Atas Keputusan Presiden No. 101 Tahun 2001 tentang Kedudukan, Tugas, Fungsi, Kewenangan, Susunan Organisasi, dan Tata Kerja Menteri Negara*).

Within these arrangements, it is not clear what power the Minister for the Environment would have in the following situations:

- A regional government fails to prosecute the pollution of a major waterway from the disposal of tailings from a mine.

- A regional government allows a development that is likely to damage a wetland following an inadequate environmental impact assessment.

- There is a major water pollution problem from a factory, which is disturbing the local community, but the regional government refuses to take action.

Provisions for central government oversight appear to have little relevance for the Minister for the Environment. According to article 7 of the Regional Autonomy Regulation, the central government is authorised to take administrative action concerning

a region in the event of "negligence and/or a violation of the enforcement of prevailing laws". The elucidation states that an administrative action shall be a warning, a rebuke or a cancellation of a policy of a regional head, and a regional regulation. This seems to fall short of being able directly secure compliance. Government Regulation No. 20 of 2001 on the Fostering and Oversight of the Execution of Regional Government (*Peraturan Pemerintah No. 20 Tahun 2001 tentang Pembinaan Dan Pengawasan Atas Penyelenggaraan Pemerintahan Daerah*) introduces the concept of central government oversight. However, oversight is to be carried out by the Minister for Home Affairs (or delegated to a governor) (art 9), *not* the Minister for the Environment. As the representative of the President, the Minister for Home Affairs can cancel a regional law or regulation that "conflicts with the general interest or a higher national law or other law" (art 10(1)). It is also stated that central government can sanction regional government (art 16) but the precise meaning of this provision is not elaborated.

It is widely accepted that amendment of the Act is required to accommodate the changes brought by regional autonomy;[54] however, the limited role envisaged for the Ministry for the Environment remains unchallenged. The possibility of failure by regional government to meet their environmental responsibilities is made more real by the limits that have been placed on central government law making. As discussed in chapter 7, many of the details of environmental management passed at the national level are non-binding. It seems there is a need for a more formal arrangement authorising the Minister for the Environment to monitor implementation of national policy within the regions and to take action where there are failures in implementation.

Uncertainty about the division of responsibility within regional government

As at mid-2001, Regional Environment Agencies (*Badan Pengendalian Dampak Lingkungan Daerah*) (BAPEDALDA) had been established in 28 provinces and 149 districts.[55] BAPEDALDAs were established during the New Order before the introduction of regional autonomy pursuant to the Decree of the Minister for Home Affairs No. 98 of 1996 on Regional Environmental Impact Control Boards (*Keputusan*

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54 As discussed with officers from the State Ministry for the Environment.

55 BAPEDAL, *Kelembagaan Pengelolaan Lingkungan Hidup Di Era Otonomi Daerah* (*Environmental Institutions in the Era of Regional Autonomy*). Jakarta: BAPEDAL, 2001 at 15.

Menteri Dalam Negeri No. 98 Tahun 1996 tentang Pedoman Pembentukan, Organisasi dan Tata Kerja Badan Pengendalian Dampak Lingkungan Daerah) ("the Decree"). A summary of the tasks and functions of the Provincial and District BAPEDALDA as set out in the Decree are summarised in Table 4 below.

Table 4: Tasks and Functions of Provincial and District BAPEDALDAs

PROVINCIAL BAPEDALDA	DISTRICT BAPEDALDA
Art 5(a) Formulation of operational policy for the prevention and handling of pollution, environmental damage and restoration of environmental quality	
Art 5(b) Coordination of the implementation of prevention and handling of pollution, environmental damage and restoration of environmental quality	**Art 47(a)** Control of environmental impact through prevention and handling of pollution and environmental damage **Art 47(c)** Implementation of the restoration of environmental quality
Art 5(c) Expansion of the institution building program Increasing institutional capacity for the control environmental impact	
Art 5(d) Establishing the technical aspects of prevention and handling of pollution environmental damage restoration of environmental quality	
Art 5(e) Establishment and technical control of Environmental Impact Assessment	**Art 47(d)** Technical control of the implementation of Environmental Impact Assessment
Art 5(f) Carrying out oversight of the control of environmental impact and damage	**Art 47(b)** Oversight of sources and activities that cause pollution and environmental damage Oversight of the implementation of environmental impact assessment
	Art 47(c) Implementation of the preservation of environmental quality
	Art 47(d) Application and oversight of environmental management plans and environmental monitoring plans prepared by licensees.
	Art 47(e) Application and expansion of environmental information.
	Art 47(f) Increasing public participation

Comparable functions are on the same row in the table to indicate how they have been apportioned between the different levels of government. Comments on this arrangement are made as follows:

Provincial BAPEDALDA

The emphasis at the regional level is on coordination (art 5(b)). This vague term has not been clarified, despite its appearance in relation to many of the functions of the provincial BAPEDALDA. In relation to oversight and control (art 5(f)), the Decree states that coordination is to take place in relation to pollution control (art 15(d) & 37(c)); environmental damage control (art 15(e) & 37(d)); and waste disposal licensing (art 15(f) & 37(e)). It also refers to coordination of monitoring (art 19(b)) & 41(b)) and restoration (art 19 (c)) & 41(c)). There are no administrative procedural rules setting out how coordination is to take place, neither is there an obligation on regional government to pass such laws.

In particular, the distinction between the 'coordination' role of the province and the 'control' role of the district remains difficult to discern. This is exacerbated by overlapping authority for enforcement; authority for enforcement has been granted in identical terms to the provincial BAPEDALDA (arts 12(2) & 24(d)) and district BAPEDALDA (arts 54(2) & 68(2)). Both BAPEDALDA have been given an enforcement function; there are no rules setting out the circumstances that will warrant action being taken by one level of government rather than another.

The lack of jurisdictional, substantive and procedural administrative rules on the tasks and functions of provincial BAPEDALDAs leads to a number of questions including:

- What are the tasks of the provincial BAPEDALDA in 'coordinating' the prevention and handling of pollution, environmental damage and the restoration of environmental quality? For example, could the provincial BAPEDALDA pass a policy that becomes binding on district government in certain circumstances?

- What is involved in the 'oversight of the control' of environmental impact and

damage, in practical terms?

- When will provincial BAPEDALDAs be able to take enforcement action? What actions, if any, should be available to a provincial BAPEDALDA where a district government fails to fulfil its responsibility for environmental management?

District BAPEDALDA

In comparison with the provincial BAPEDALDA, the district BAPEDALDA has a more direct function in controlling environmental impact through the prevention and handling of pollution and environmental damage. It is also required to 'implement' environmental restoration. The district BAPEDALDA has been described as an 'operational' environment management agency.[56]

It is tasked with implementing the preservation of environmental quality, the application and oversight of the Environmental Management Plan and the Environmental Monitoring Plan that are part of the environmental impact assessment procedure, the expansion of environmental information systems and increasing the role of the community in environmental management. In relation to oversight and control, the district BAPEDALDA is tasked with 'preventing and handling' water, air and land contamination (arts 57(a) & 75(b)). It is also tasked with 'preventing and handling' environmental damage (art 57(c) & 75(c)) and the 'oversight and control of licensing waste disposal' (art 57(d)&75(d)). Its role in relation to monitoring is also direct, in that it is tasked with 'implementing monitoring and restoration of environmental quality'.

The words used to set out activities are prevention and handling, implementation, technical control, oversight, application and oversight, application and expansion. However, these terms suffer from opacity as they lack concreteness in terms of specific regulatory tools such as the different forms of licensing and approvals that affect environmental management, monitoring environmental performance, monitoring the state of the environment, auditing, administrative enforcement, criminal and civil enforcement, market-based instruments and access to information.

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[56] Asian Development Bank, *The Role and Function of BAPEDALDA - Working Paper No. 4 in Master Plan for Capacity Building in BAPEDALDA (ADB TA No. 2598-INO)* (Jakarta: Asian Development Bank, 1997).

The need for a clear and detailed allocation of roles and responsibility through the drafting of jurisdictional, substantive and procedural administrative rules is of vital importance, as was shown in a class action arising from the 2002 Jakarta floods. In *15 People v President, the Governor of DKI Jakarta and the Governor of West Java* against the President, proceedings were brought for compensation from for loss of life, sickness, lost property, damage to property and loss of profit.[57] The claim was dismissed on the basis that the plaintiffs did not proceed against the right party. The Central Jakarta District Court held that although the Governor, as the 'Head of Coordination of the Implementation of Flood Handling' (*Ketua Koordinasi Pelaksanaan Penanggulangan Bencana*) had the task and function of 'implementing coordination and control of activities to handle floods', this could be distinguished from the task and function of the Mayors to 'implement' flood handling within their districts. On this basis, the court decided that the plaintiffs should have proceeded against the relevant Mayors rather than the Governors. If greater specificity had been provided in the governing legislation in the form of administrative rules on the exact nature of the tasks and responsibilities of each level of government in concrete terms, this outcome may have been avoided.

Conclusion

The analysis of the environmental law framework presented in this chapter has revealed the nature and extent of the weaknesses in the formal aspects of environmental law in Indonesia. It has been shown that the effect of the new constitutional right to a 'good and healthy' environment is uncertain. Article 33(3) of the Constitution is inadequate for the task of providing a constitutional foundation to protect the environment as the state obligation is vaguely expressed. The recent amendment, contained in article 33(4), does not make a tangible contribution to rectifying the situation and resorts to opaque terminology in the words 'sustainability' and 'environmentalism'.

The overall impression of the Act is that, whilst it promises much, it is largely symbolic. It covers a limited area of environmental management. The allocation of environmental responsibility to 'the government' means that environmental law making occurs across the legal system, rather than in one specific locus of responsibility. This undermines the development of a clear identity for environmental law in Indonesia as important

[57] Central Jakarta District Court, Decision No. 83/PDT.G/2002/PN.JKT.PST

environmental provisions are likely to be found as individual articles in a range of statutes, regulations and guidelines, whose topics do not necessarily concern protection of the environment. Many aspects of environmental law are postponed to the passing of government regulations. As will be seen in the next chapter, this pattern is repeated in government regulations, with the effect that important provisions are located in low level, and frequently inaccessible, legal instruments.

In this chapter it has been shown that there is a pervasive difficulty with linguistic structure caused by a failure to define terms, and where terms are defined, a lack of specificity and concreteness. Furthermore, a number of words that frequently occur within the Act are unclear and ambiguous. Some of these words have overlapping meanings and most bear no clear relation to recognisable legal policy tools such as licensing, monitoring or enforcement.

The analysis of the rule-basis of provisions in the Act reveals serious weaknesses. Where express obligations have been imposed on government, the consequence has been drafted using vague or non-specific language without any mention of procedure. Many provisions lack expressly normative phrasing. The only effective administrative rule is a procedural rule stating that an EIA is to be incorporated into the conditions of a business or activity licence; however, it is found in the Elucidation rather than the body of the Act.

The general lack of procedural rules for the exercise of administrative authority is a major shortcoming. Whilst there are frequent references to coordination, there are no procedural rules to indicate how such coordination is to occur. In the public participation provisions on access to information, there is an absence of detail on how information is to be provided to the public. The different points at which public participation is to occur and the manner of carrying out these activities are not set out.

The strongest rules contained in the Act are the public regulatory rules. However, the obligations are of uncertain effect: their application and enforceability are likely to be affected by a lack of defined terms. The more specific obligations on licensing and environmental impact assessment are a blend of administrative and public regulatory rules, which obscures their function and purpose.

The respective roles of provincial and district BAPEDALDAs leaves a wide scope for

conflicting interpretation. The extent to which central government should be concerned with drafting rules on the tasks and functions of BAPEDALDA may be controversial as the regions may resent an interventionist approach from central government. However, there are likely to be ways of drafting clearer national administrative rules to set out the respective roles of the two levels of BAPEDALDA to establish a sufficient level of national consistency.

CHAPTER NINE

WATER QUALITY MANAGEMENT AND POLLUTION CONTROL

Introduction

As mentioned in chapter 1, the goal of the reform of water resources management in Indonesia is to introduce a new watershed-based system to manage the quantity and quality of surface water and groundwater in support of the concept of integrated water resources management (IWRM). In seeking to reform water resources management, policy makers face a dilemma in deciding whether to link the regulation of water quality and quantity in a single water law or deal with the quality aspects in a separate environmental law.

In Indonesia, water quality aspects are provided for separately under the framework of environmental law. Government Regulation No. 82 of 2001 on Water Pollution Control and Management (*Peraturan Pemerintah No. 82 Tahun 2001 tentang Pengendalian dan Pengelolaan Pencemaran Air*) ('the Regulation') was passed in December 2001 under Act No. 23 of 1997 on Environmental Management but is also part of the broader drive to reform water resources management discussed in chapter 2. The Regulation was introduced to replace Government Regulation No. 20 of 1990 on the Control of Water Pollution (*Peraturan Pemerintah No. 20 Tahun 1990 tentang Pengendalian Pencemaran Air*). During the decade in which this regulation was in operation, there was very little formal control over industrial pollution.

The review of the Regulation begins by commenting on issues concerning the rule dimensions of position in the legal hierarchy and linguistic structure. A critical analysis of the rule content on water quality management and control is provided. It is shown that the Regulation suffers from similar weaknesses in utilising rule dimensions that were identified in the last chapter. Finally, there is an appraisal of the likely impact of the Regulation in view of the goals of IWRM.

1. ONGOING ISSUES CONCERNING RULE DIMENSIONS

Only a framework regulation: positioning measures in national guidelines

Uncertainty of legal status

The Regulation contains a large number of provisions indicating that guidelines (*pedoman*) are to be passed by the Minister on certain subject matter including the following:

- analysis of water for the classification of water bodies (art 9(4))
- raising ambient water quality standards or the addition of parameters by provincial government (art 12(3))
- determining the status of the water quality in a water body (art 14(2))
- making of an inventory on sources of pollution (art 21(4))
- determination of carrying capacity (art 23(4))
- reporting obligations of industry (art 34(4))
- licensing procedure and conditions (art 35(3))
- investigation carried out by an applicant into the application of waste water to land (art 36(7))
- investigation carried out by an applicant seeking to discharge waste water to water or water resources (art 41(8)).

These instruments are stated to be guidelines but they are also ordered by the Regulation. Their legal status is made uncertain by this arrangement (see the discussion in chapter 7):

does it mean that these guidelines are legally binding? If so, why are they merely guidelines?[1] Some instruments are to be issued as Ministerial Decrees, such as:

- mechanisms and procedures in monitoring water quality (art 13(5)) and
- national water quality standards (art 21(1)).

It is not clear whether this has been done to indicate that they are binding, in a manner that differentiates them from the guidelines referred to above.

The status of measures for good environmental governance

Furthermore, the practice of postponing law making on such a wide range of areas gives the impression that the Regulation operates merely to provide a second level framework under the authorising statute, namely Act No. 23 of 1997 on Environmental Management. This raises issues concerning the position of measures that will be contained in guidelines. Whilst some of the matters to be dealt with by guidelines are technical,[2] other subject matter relates to the implementation of good environmental governance. There is an argument that this subject matter should be contained in national law, for national consistency and to avoid replication of effort across every district and province required to render national guidelines into regional law.

An area in which this issue arises is the classification of water bodies (art 9(4)). The Elucidation states that the guideline is to cover the determination of existing water quality, the design of water use plans and the establishment of water quality objectives. To support the goals of IWRM, the guidelines should include procedures for public participation, state the matters to be taken into account in decision-making, and ensure public access to information. If these aspects of good governance are to be merely contained in a guideline, which is not considered to be binding, there will be little compulsion on regional governments to fully assume their responsibilities and no legal

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1 According to information received from the Ministry for the Environment in mid 2003, they were being drafted as ministerial decrees.

2 For example:
- the calculation of carrying capacity and the system of data collection
- the use of liquid waste to improve the land
- measurement and analysis of water quality
- determination of water quality.

basis upon which to call decision-makers to account. It is also questionable whether all aspects of setting water quality objectives are appropriate for national guidelines. As will be discussed below, the formulation of an objective is not a scientific process but a political process that requires an assessment of national and local priorities.[3]

The same issues arise in relation to the guideline to be prepared by the Minister concerning the raising of water quality standards or the addition of parameters (art 12 (3)). The guideline will provide an opportunity to formulate a process, list the considerations to be taken into account and detail stakeholder involvement and public participation. If implemented, the process could contribute to a shared commitment to a water quality program; however, if these aspects are merely dealt with in a non-binding guideline, no legal obligation concerning these activities will be created to ensure they will be implemented.

Positioning measures at the district level

There are a number of substantive rules that require district level government to draft law on certain subject matter, which imposes burdensome law-making obligations on district government. For example, in relation to licensing there is a provision stating that the wastewater disposal licence conditions and procedures shall be determined by the Mayor 'with due regard to guidelines established by the Minister' (art 41(7)). To authorise the imposition of conditions within a licence, an authorising legal instrument must exist. The Regulation contains only a small number of licence conditions, as discussed below. If further provision is to be made by way of a national guideline, then its contents will need to be converted into legal form at the district level to authorise the administrative actions of the Mayor. This rule imposes a heavy law-making burden on district government. It also raises the issue as to whether rules on licence conditions and procedure should be contained in a national guideline or in national law.[4]

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[3] An objective is usually considered to be a numerical concentration or narrative statement which is established to support and to protect the designated use of water at a specific site, river basin or part thereof. It is different from a standard, as it is not recognised as being enforceable. The baseline of an objective is the criteria together with information on water uses and site-specific factors, see Enderlein US, Enderlein RE and Williams WP, "Water Quality Requirements" in Helmer R and Hespanhol I (eds), *Water Pollution Control – A Guide to the Use of Water Quality Management Principles* (London: UNEP Water Supply and Sanitation Collaborative Project and WHO E&F Spon, 1997) 11-40 at 14.

[4] The Regulation does not foreshadow the formulation of a national guideline on licence conditions and procedures.

Similar issues arise in relation to market-based instruments for the disposal of wastewater. The Regulation states that a fee (*retribusi*) can be imposed for the disposal of wastewater through a government processing plant (art 24(1)) and that the fee is to be determined through the issuing of a district regulation (art 24(2)). This provision imposes a law-making burden on the districts if they are to establish an economic-oriented system for wastewater management. There is no reference to a national guideline being drafted; neither is there any mention of the content of district law such as the factors to be taken into account in setting the level of the fee. These issues are central to improving water quality in Indonesia. In countries such as the USA, the primary emphasis in improving water quality has been through the public construction of wastewater treatment works.[5] There is a huge need for such plants to be established in Indonesia and the use of market-based instruments would enable the financing of the establishment of such plants.

Linguistic structure: the persistent tendency towards vagueness, complexity and opacity

Similar issues arise in the Regulation as were discussed in the last chapter concerning definitions: there is a failure to define terms and terms that are defined tend to be done so in an overly complex manner as discussed below:

- Watershed

The only reference to the watershed is found in the Elucidation of article 2, which states that

> Integrated water quality management and water pollution control is coordinated between administrative regions situated in a water ecosystem unit (*kesatuan ekosistem air*) and/or water resources management unit (*kesatuan pengelolaan sumber daya air*), among others within a watershed (*daerah aliran sungai* (*DAS*)) or river basin (*daerah pengaliran sungai* (*DPS*)).

This statement is not clear: it refers to a water ecosystem unit, a water resources management unit as well as the watershed and river basin. None of these terms is defined.

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[5] Spulber N and Sabbaghi A, *Economics of Water Resources: From Regulation to Privatisation* (The Netherlands:

- Good quality water

The right to 'good quality water' (*kualitas air yang baik*) (art 30(1)) is not followed by a definition of 'good quality water'. Without such a definition it is not clear whether 'good quality' means drinking water or water quality of a lesser standard, such as water that can be used for cooking, bathing and other domestic needs.

- Groundwater

As mentioned in chapter 1, an important aspect of IWRM is the integration of the management of surface and groundwater. Progress in this regard has been made through the inclusion of water below the surface of the earth in the definition of water. However, there is no comprehensive definition of groundwater and an inconsistent use of terminology. The definition of water refers to all water below the surface of the earth (*air bawah permukaan tanah*). In referring to the scope of the management of water quality, the Regulation (art 4(3)) refers to management of water quality in deep groundwater aquifers (*akuifer air tanah dalam*) and the Elucidation refers to deep groundwater (*air tanah dalam*).

- Water pollution

Most of the provisions of the Regulation hinge on the definition of water pollution, which is defined as (art 1(11)):

> The release or introduction of living organisms, substances, and/or components into water as a result of human activity that causes depletion in water quality to a level where it cannot be used in accordance with its designated use.

This definition leaves open a number of questions: how to assess the deterioration of water quality, its designated use, how to establish that water is 'no longer able to be used in accordance with its designated use' and how to show that the substances that have entered the water have caused the deterioration? This formulation is overly complex and difficult to apply in enforcement proceedings. A simpler definition would rely on proof

Kluwer Academic Publishers, 1994) 175-176.

of breach of discharge standards or simply a change in the quality of the water.[6] This would greatly assist in enforcement (see discussion in chapters 10 and 11).

2. WATER QUALITY MANAGEMENT

Lack of specificity in jurisdictional and substantive administrative rules on policy making

Power is conferred on the Minister to formulate policy on water quality management and pollution control 'based on the results of the inventories' (art 22); however, there is no express obligation and it is not stated *how* policy is to be based on the results of inventories. In a separate reference to policy making, the Regulation states that each level of government builds and improves (*melakukan pembinaan*) guidance (art 43(1)), including the determination of policy on incentives and disincentives (art 43(2)(b)). This provision is particularly vague, as it does not mention a particular level of government as being responsible for formulating policy on incentives and disincentives or the laws that will introduce the necessary instruments. Whilst the Elucidation lists instruments that may act as incentives and disincentives, no further detail is provided on how they are to be formulated and applied.

Allocation of responsibility: incomplete provisions

Unclear criteria for determining the level of government

It is stated that central government carries out water quality management where water bodies span provincial boundaries and/or international borders (art 5(1)). Provincial government carries out quality management across district government boundaries (art 5(2)) and district government carries out water quality management within the district (art 5(3)). Central government is may (*dapat*) delegate its responsibilities to provincial or district government (art 6).

Whilst the Regulation sets out the arrangements between each level of government concerning their respective authority for water quality management, it will depend on whether 'water quality management crosses government boundaries' (art 5). This

[6] For example the definition of water pollution contained in the *Protection of the Environment Operations Act* 1997 (New South Wales) - Dictionary

provision does not address the basis upon which water quality management can be said to cross a government boundary. It may be that it is intended that water quality management is based on the watershed, but this is not stated in the Regulation.

Lack of a lead agency

A lead agency responsible for water quality within each level of government has not been appointed. As a result, it is not clear which agency will have responsibility for carrying out such functions as the valuation of water bodies, the classification of water bodies or planning water quality improvement. Power is conferred on the Mayor to monitor compliance with licenses (art 44(1)) but the agency within district government is not indicated. Other provisions on monitoring simply state that monitoring is to be carried out (*dilaksanakan*) by the respective levels of government. Neither is it stated which government agency within each level of government is to have final responsibility for monitoring water quality (art 13(1)).

The need to appoint a lead agency with defined powers and responsibilities is fundamental. A lead agency is the agency with an independent voice in supervising, controlling and reporting on the environmental performance of both the private and public sector that is ultimately accountable for water quality. Without a lead agency, the sectoral dispersal of responsibility that has characterised arrangements to date is likely to continue.[7]

The reluctance to identify a lead agency may be a political one rather than a problem related to legal drafting. The failure to indicate relevant agencies at the regional level may be driven by an intention to leave this decision to regional government. It is also conceivable that lawmakers uninterested in environmental protection see advantages in

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[7] Oversight of surface water quality is dealt with in the Regulation of the Minister for Public Works No. 45 of 1990 on the Control of Water Quality in Water Resources (*Peraturan Menteri Pekerjaan Umum No.45/PRT/1990 tentang Pengendalian Mutu Air Pada Sumber-sumber Air*). It gives authority and responsibility for water quality to the Minister for Public Works (art 5) but if a river basin falls within a province, to the Governor (art 6). The collection of data is to be based on water quality standards passed by the Minister for the Environment (art 7(2)). This data is to be used for considering the exploitation of water resources, the grant of waste disposal licences and the assessment of pollution levels (art 8). However, as discussed in the last chapter, sectoral agencies are responsible for environmental licenses. The Department of Health, on the other hand, is responsible for the quality of drinking water. The now disbanded National Environmental Impact Management Agency (*Badan Pengendalian Dampak Lingkungan*)(BAPEDAL) was concerned with surface water quality through its program PROKASIH mentioned in chapter 1.

leaving such provisions vaguely worded. However, the point to be made here is that if a clearer, more specific style of legal drafting were to be adopted in Indonesia, such an omission may be more obvious and less acceptable.

Historically, an obstacle for the licensing of the disposal of liquid waste has been the failure to allocate licensing to a particular government body. The previous regulation, Government Regulation No. 20 of 1990 on the Control of Water Pollution (*Peraturan Pemerintah No. 20 Tahun 1990 tentang Pengendalian Pencemaran Air*) empowered the Governor to issue a water pollution licence but in practice, few water pollution licences were issued.[8] Regional autonomy has moved the responsibility for licensing down to district government: a licence is to be obtained from the Mayor (art 40(1)). However, as with other aspects of the Regulation, there is no jurisdictional rule to identify the government body within district government that is to carry out licensing. Unless a specific allocation of authority is made at the national level, there will be variation across the country. The question is whether it should be allocated to the Regional Environmental Impact Management Agency (*Badan Pengendalian Dampak Lingkungan Daerah* (BAPEDALDA)) or remain with the relevant sectoral departments such as the Department of Industry. The sectoral departments are likely to have a bias towards protecting their sector, as they manage the resources of the sector and are not primarily

[8] In late 2000, inquiries with the East Java Regional Environmental Impact Management Agency (*Badan Pengendalian Dampak Lingkungan Daerah* (BAPEDALDA) indicated that only four licences had been issued in that province. Government Regulation No. 20 of 1990 on the Control of Water Pollution gave authority to the Governor to issue a pollution licence (art 26(1)). This in turn was to be included in the Hinderance Ordinance (*Undang-undang Gangguan (Hinder Ordonnantie) 1926 Stbl. Nomor 226*). Every activity that could give rise to disturbance was to possess a Hinderance Ordinance (*Ordanansi Gangguan* (HO)) issued by the Mayor at the district level (art 26(2)). This arrangement necessitated coordination between provincial and district government, but it was not stated how coordination was to be achieved. The devolution of responsibility under the Regulation will avoid the duplication involved in having both a discharge licence and a HO. It seems the HO is still in force as a form of pollution control although the Regulation does not refer to it.

concerned with environmental protection.[9]

Aspects of water quality management: problems with substantive administrative rules

The Regulation sets out the levels of government that have responsibility for the management of water quality and control of pollution. It provides for planning water use, the classification of water quality and the use of water quality criteria to determine each classification. It also provides for ambient water quality standards, monitoring ambient water quality and determining the status of water quality within a water body and strategy making. The following section contains a commentary on the rule content of the Regulation in relation to a number of aspects of water quality management. Vagueness frequently arises from a lack of detail to sufficiently convey an intended meaning or to address the issues that arise in a given context. It also arises from evaluative words and phrases, and generic terminology. In addition, there are problems with opacity and unnecessary complexity.

Definition of water

As mentioned in chapter 1, an important aspect of IWRM is the integration of the management of surface and groundwater. Progress in this regard has been made through an expanded definition of water, which now includes groundwater (art 1(1)):

> All water found on the surface and below the surface of the earth, with the exception of seawater and fossil water.

[9] It has not been possible to undertake a review of licensing practices at the regional level. However, if the Special District of Yogyakarta can be taken as an example, it is likely that licensing procedure is being developed, at least in some provinces. In Yogyakarta, the Decision of the Governor No. 32 of 2000 on Technical Directions for the Implementation of Regional Regulation No. 3 of 1997 on the Control of the Disposal of Liquid Waste (*Keputusan Gubernur Kepala DIY No. 32 Tahun 2000 tentang tetunjuk Teknis Pelaksanaan Peraturan Daerah Propinsi DIY No. 3 Tahun 1997 tentang Pendendalian Pembuangan Limbah Cair*) states that every enterprise or activity is obliged to obtain a license, based on the size of the enterprise or activity and the amount of waste produced (art 1(2)). This includes industry, health, tourism and other activities. It goes on to state that the application for the license must contain certain features both technical and administrative (art 2(2)), and it is to follow a certain formula (art 3(1)(a)). A team formed by the head of the BAPEDALDA is to consider the application (art 2(3)). There is a licence fee based on the quantity and quality of the waste, as set by the head of BAPEDALDA (art 4(4)). At the time of writing, a review of the effectiveness of the arrangements for pollution control was being carried out by the Yogyakarta Provincial BAPEDALDA.

Planning water use

Each level of government may plan water use. In doing so, there is an obligation (*wajib*) to 'give attention to' economic, ecological and religious factors as well as local culture and traditions (art 7(2)). The plan is to address the capacity for water use, reservation based on availability, water quality and quantity as well as the ecological functions of water (art 7(3)).

However, whilst a substantive administrative rule imposes an obligation to give attention to (*wajib memperhatikan*) 'economic, ecological and religious factors as well as local culture and traditions' (art 7(2)), there is a lack of explanation concerning each of these factors so that the rule is opaque. This rule is followed by a statement on the content of the water plans; however, there is no express obligation. The statement also lacks accessibility as to what is intended in the references to 'capacity for water use', 'reservation of water based on availability' and 'ecological function of water' (art 7(3)).

The provisions may be compared to a rule such as:

> A water management framework plan must take into account the usable water resources, the requirements of flood protection and pollution control of the body of water. The water management framework plans and the requirements of urban planning shall be harmonised.[10]

The valuation of water bodies: use values or environmental values?

The Regulation does not deal with the well-recognised distinction between use values and environmental values. The valuation of a water body is the practical point at which to commence water quality management. A choice is presented between assessing 'use values' or 'environmental values'. Use values are human, health-oriented values such as the quality of water for drinking, agriculture or aquaculture. Environmental values go further to include ecosystem protection. Use values do not see an ecosystem as a complex whole and assume that factors controlling its function may be easily identified. It is now recognised that the relationships between key ecological processes and their components

[10] German *Act on Managing Water Resources (Federal Water Act)* 1996 (as amended in 2000) art 36(2).

are complex, variable and probabilistic[11] and use values alone are not considered an adequate basis for water quality management.[12]

The Preamble to the Regulation states that attention is to be given to the present and future generations. In article 2 there is a statement that the management of water quality and the control of pollution are implemented in an 'integrated' way using 'an ecosystem approach'. This provision could operate as a substantive administrative rule except that it is fundamentally vague. The concept of making 'efficient use of water' (*pendayagunaan air*) in article 7 states that in composing the plan for water use, the relevant level of government is to take into account the economic and 'ecological function' of water (art 7(2) & (3)); however, there is no further detail in this regard.

Classification of water bodies

A system to classify water according to designated uses is established as follows (art 8(1)):

Class One	Drinking water, water used for religious purposes or similar uses.
Class Two	Recreation, freshwater aquaculture, livestock, crop cultivation or similar uses
Class Three	Aquaculture, livestock, crop cultivation or similar uses
Class Four	Crop cultivation or similar uses.

The Regulation states that the classification of water bodies is based on 'result of investigations carried out by the level of government responsible for the water body' (art 9(2)). This provision does not impose an obligation upon any particular authority within

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[11] National Water Quality Management Strategy: Australian and New Zealand Guidelines for Fresh and Marine Water Quality 2000 at paragraph 2.1 http://www.ea.gov.au/water/quality/nwqms/pubs/wqg.ch2.pdf [accessed 25 July 2003]. Nutrient cycles, carrying capacities and ecological limits are generally not well understood in the tropics according to Whitten T, Soeriaatmadja RE and Afiff SA, *The Ecology of Java and Bali*: *The Ecology of Indonesia Series Vol II* (Canada: Dalhousie University, 1999) 413. For example, Java has about 130 species of native freshwater fish but little is known of their abundance, status, migratory habits or ecological role, at 435.

[12] The need to assess both the environmental value as well as the use value is indicated in the general objective of Agenda 21 relating to water resources which is "to make certain that adequate supplies of water of good quality are maintained for the entire population of this planet, while preserving the hydrological, biological, and chemical functions of the ecosystems, adapting human activities within the capacity limits of nature …', see Agenda 21, United Nations 1992 UN Doc.A/CONF.151/26/Rev.1 at 18.2.

government to classify water bodies. Neither the pre-classification investigation nor how the results of the investigation is to become the basis for the classification is explained.

'Water quality criteria' are defined as 'a standard of water quality for each water quality classification' (art 1(7)). The definition of a water quality standard is (art 1(9)):

> … a measure of a degree or concentration of living organisms, substances, energy, or essential components, and/or the acceptable degree or concentration of pollutants in water.

Water quality criteria for each classification are contained in the appendix to the Regulation (art 8(2)). There is no category for the protection of aquatic ecosystems. The classification is based on the results of an analysis carried out by the relevant level of government in accordance with prevailing laws and regulations (art 9(2)).

National ambient standards

Ambient water quality standards are based on the findings of the water quality analysis and water quality criteria (art 10). The central government (arts 11(1)) and provincial government (art 12(1)) may (*dapat*) set more rigorous water quality standards than those set out in the Regulation. There is no similar provision for district government, presumably as it is the provincial government that has authority to coordinate.

Ambient water quality standards represent the required level of water quality and are the cornerstone for the implementation of water quality management. To sustain the classification of a watercourse, a certain ambient level of water quality must not be exceeded. The experience in other countries is that standard setting is a difficult and intensive process and requires clear national policy.[13] Given the diversity of environments throughout Indonesia, a balance needs to be struck between flexibility and national consistency in setting ambient water quality standards. This requires substantive administrative rules that set out the factors to be taken into consideration in setting ambient standards. Such rules are absent in the Regulation.

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[13] Savage RH "Clean Water Act Reauthorization, The State's Perspective on National Water Resources Regulation. Where is the Environmental Pendulum Now?" Holme H (ed.), *American Society of Civil Engineers* (New York: American Society of Engineers, 1994) 34-52 at 40.

Monitoring water quality

Each level of government is involved in monitoring water quality (art 13(1)). Monitoring is to be carried out at least every six months (art 13(3)) and the results are to be handed to the Minister for the Environment (art 13(4)). The Elucidation states that mechanisms and procedures for monitoring include monitoring plans, harmonising water quality monitoring operations, reporting and data processing of the findings of monitoring. This explanation does not provide sufficient information regarding monitoring activities. The mechanism and procedure for monitoring is to be the subject of a national guideline (art 13(5)) which gives rise to issues about its binding nature. Whilst the Mayor is obliged to carry out monitoring to ensure compliance with licence conditions (art 44(1)), there is no other obligation in relation to monitoring.

Water quality status

A status assessment is to be made by comparing the quality of water with the water quality standard. It will be 'polluted' if water quality does not meet the water quality standard and will be 'of proper quality' if it meets the water quality standard (art 14(1)). A guideline is to be issued by the Minister on assessing water quality status (art 14(2)). Again, this raises issues about the binding nature of the guideline.

Water quality management strategy

A process for establishing a strategy to manage poor water quality or to improve water quality is set out (art 15). There is also a reference to carrying capacity assessment being used to determine water quality objectives, without further explanation (art 23(3)(e)). The Regulation states as follows:

- If water quality does not meet the ambient standard then the relevant level of government (central or regional) takes measures to manage pollution and restore water quality through the establishment of water quality objectives (art 15(1)).

- If water quality does not meet the ambient standard then government takes measures to maintain and/or improve water quality (art 15(2)).

Water quality objectives have been defined in the Elucidation of article 15(1) as:

> The water quality to be achieved within a certain period of time through the implementation of a work plan for the control of pollution and the restoration of water quality.

These provisions lack express obligations and specificity. In particular, there is no explanation as to how an objective is to be established or what it is to consist of.

An approach to set objectives can utilise two stages. First, each water body is assessed according to its specific characteristics and relevant criteria and second, it is given an objective that becomes the goal for management. The objectives take into account social, cultural, economic or political constraints.[14] They can be formulated as a set of indicators to define the target value for key ambient water quality parameters. As the setting of objectives takes into account social and economic considerations, there should be stakeholder involvement, using a similar mechanism to that adopted in the classification of the water body. This facilitates the integration of environmental, economic and social concerns and contributes to a shared commitment to water quality. This sort of detail has not been provided in the Regulation.

Strategy making

The Regulation lacks detail on the formulation of a strategy either to restore water quality or to maintain and improve water quality. Whilst the combination of water quality standards and a system of classification provide a starting point to identify goals in Indonesia, it does not cater for all the kinds of goals contemplated in IWRM. For example, a goal could be stated as the return of a particular species of fish in a specified water body. Substantive rules could command that a strategy define first, the goals that are the aim of the strategy and second, the means to achieve them, through setting short-term and medium-term targets or objectives and specifying the required resources to meet those targets.

The Regulation could also contain a substantive rule that requires the strategy to contain an implementation schedule. It could be stated that the schedule must include an assessment of existing regulations, policies and institutions to indicate whether there is

sufficient regulatory power to implement the strategy; for example, zoning ordinances, wastewater treatment management programs, sewerage treatment systems, rubbish disposal, management of hazardous materials and management of pesticide and herbicide application. The provisions on the strategy could also require that sources of financial support be identified. None of these aspects has been addressed in the Regulation and neither does the Regulation expressly foreshadow that a national guideline will be prepared on strategy making.

The absence of procedural rules

A review of the provisions on water quality management shows a complete absence of procedural rules at the national level. For example, there are no procedural rules for public participation in policy making. This has major implications for public participation and good environmental governance. The inclusion of community expectations in processes such as planning, classification, water quality improvement and strategy making is fundamental to the approach envisaged in IWRM but cannot be guaranteed without procedural rules.

Planning

In relation to planning water use, there is no mention of procedure; hence, there is no mechanism to ensure public participation. To involve all legitimate interests, planning is likely to require facilitated processes over a considerable time. However, through the process, community awareness of water quality issues is likely to grow, together with a sense of ownership and responsibility for water resources in the locality. This kind of vision for water quality management is not supported by procedural rules in the Regulation.

Classification

In the classification of water, procedural rules could state a time to allow adequate opportunity for public discussion. Stakeholders could be listed such as planners, regulators, the scientific community, large-scale users (such as industry and farmers),

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[14] Australian and New Zealand Guidelines for Fresh and Marine Water Quality 2000, Note 11 at paragraph 2.1.1 and 2.1.5.

residents and non-government organisations. The process could include a statutory period for making written submissions as well as holding information and discussion forums. It is conceivable that opinions within the community may differ on the value to be attributed to a water body. For example, small businesses that want to use water in their industrial processes may not agree with householders who want drinking water. The issues are likely to be complex and require an effective process of consultation or mediation, as often a benefit to one sector of the community will be a cost to another. Rules to allow this to occur are needed at least to ensure that water bodies are in fact assessed.

Standard setting

If central government embarks on an investigation into ambient water quality standards, it is to be done 'with attention to the opinion of relevant sectors' (art 11(2)). However, there are no procedural rules to coordinate obtaining that opinion. The administrative provisions on setting water quality standards by regional government also lack procedure: it is simply stated that either the national criteria for the water classification are adopted or an investigation is undertaken to determine whether a more stringent standard is required at the regional level. There are also no procedural rules on the setting of wastewater discharge standards.

Monitoring water quality

There is a lack of procedural rules on practical aspects of monitoring such the information for the monitoring report, frequency of sampling, the location of the sampling, analytical methods or report formats.[15]

Water quality improvement

There are no procedural rules that address the formulation and implementation of water quality programmes. In the provisions that apply to a polluted water body, it is merely stated that the government takes measures to manage the pollution and restore water quality by establishing water quality objectives (art 15(1)). A similar pattern is found in

the rule that applies to 'good' quality water where it is stated that government takes measures to maintain and improve the quality of water (art 15(2)).

A prerequisite for linking water quality objectives and the means for their achievement is that there is sufficient data in respect to a particular river basin. The establishment of a water quality database and the estimation of future water quality are scientifically and technically complex operations. There should be procedural rules that ensure the sharing of information on a watershed basis and a link both in terms of procedure and institutional coordination between the water resource plan and the water quality strategy through inventory making, setting the boundaries of the river basin and the formulation of the plan.

Strategy making

It is notable that the Regulation does not identify goal setting as a procedure that precedes strategy making. This is significant, as a key element of watershed management is the adequate identification of goals; logically, a strategy will depend on the goals to be achieved.[16] The goals will depend on the particular needs of a community or communities in the area. The provisions in the Regulation on the process of strategy making do not mention public participation in detail. Even the provisions for granting public access to the status assessment are not couched in clear terms. For example, although a right has been granted to every person to obtain information on the status of water quality, there is no express obligation to publish the assessment or make it publicly available. This goes against the understanding in environmental management circles that effective environmental management depends upon the government making choices that are understood and accepted, not only by experts, but also by the public and affected communities. Watershed management has as an underlying principle, the idea that the watershed and its health are the responsibility of all residents of the watershed.

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[15] The need for this level of detail was emphasised in Patzer RA, *Environmental Law Compliance and Enforcement* Environmental Management Development in Indonesia Project (EMDI) (Canada, Dalhousie Printing Centre, 1995) 5.

[16] Doyle-Breen JA, "Coastal Watershed Management" in Reimold RJ (ed.), *Watersheds – An Introduction in Watershed Management – Practice, Policies and Coordination* (USA: McGraw Hill, 1998) 299-312 at 305-306.

3. WATER POLLUTION CONTROL

The provisions concerning the control of water pollution set out the circumstances in which each level of government carries out the control of water pollution (arts 18 & 19). They also list the activities that are authorised to take place in relation to water pollution control such as inventory making, identification of sources of pollution, the determination of carrying capacity, provision of conditions for the disposal of liquid waste to land and water, and monitoring water quality and other factors that may change the quality of water (art 20).

Aspects of water pollution control: weaknesses in administrative rules

Effluent standards

Wastewater quality standards are to be determined by the Minister for the Environment by the passing of a Ministerial Decree with attention being given to suggestions from the relevant sectors (art 21(1)). They are to become the subject of a Provincial Regulation with the same or more rigorous provisions as set out nationally (art 21(2)). Thus, the Regulation opens the way for the tailoring of emissions to specific water bodies through the possibility that regional government will set effluent standards that are more stringent than the national standard. Effluent levels can be raised to take into account the effect on downstream populations or ecosystems or the impact on the marine environment at the mouth of a river flowing directly to the sea.[17] The emphasis on carrying capacity (see below) also allows for greater consideration of site-specific needs. However, the Regulation offers no guidance in the form of a substantive administrative rule concerning the factors to be considered in setting effluent standards that are higher than the national standard.

Carrying capacity

Carrying capacity is defined as 'the capacity of a water resource to receive a pollution load without becoming polluted' (art 1(13)) and is stated as being determined at least

[17] As has been done in USA and Canada. See United Nations Commission on Sustainable Development Report, *Comprehensive Assessment of the Freshwater Resources of the World*. New York: United Nations, 1997, http://www.un.org/esa/sustdev/freshwat.htm [accessed 30 May 1998] at Point 114.

every five years (art 23(2)). The assessment of carrying capacity is to be used for (art 23(3)):

(a) the grant of location licences;

(b) managing water and water resources;

(c) determining the spatial plan;

(d) licensing the disposal of liquid waste; and

(e) determining water quality objectives and the work program for the control of water pollution.

Whilst the concept of carrying capacity (*daya tampung beban*) assumes significance in the Regulation, there is a lack of specificity on how it is to be used. The provision that sets out the uses of carrying capacity information does not use normative vocabulary (art 23(3). Thus, it is not explicit that, for example, an application *must* be refused for an industrial development whose water use will exceed the carrying capacity of the watershed. It does not lock-in consideration of the health of the watershed to other aspects of environmental management, or even ensure that a work program on the control of pollution will be guided by the assessment of carrying capacity.

Licensing

A licensing system is established for both the application of liquid waste to land (arts 35 & 36) and the disposal of liquid waste to water (arts 37- 42). In relation to water, the Regulation imposes an obligation on every industry or activity that releases liquid waste to water or water resources to prevent and manage pollution (art 37). Every person responsible for a business or activity that releases liquid waste to water or water resources is obliged to comply with licence conditions (art 38(1)).

The Regulation lists minimum conditions that must be contained in a licence (art 38 (2)). The discharge standard provided in the licence is based on the carrying capacity of the water body (art 39(1)). If this has not been calculated, it is to be based on the national standard (art 39(2)). There is an obligation on all businesses or activities that dispose of liquid waste to obtain a written licence from the Mayor (art 40(1)). The request is to be based on the environmental impact assessment or an environmental monitoring plan and

environmental management plan (art 40(2)).

A procedure is set out for the licence application. Similar provisions apply to both the application for a license to dispose of liquid waste to land (art 36) and water (art 41). Where an applicant applies for a licence to dispose of liquid waste to water, the applicant carries out an investigation into the disposal of waste to water or water resources (art 41(1)) and this is to include at least the influence on the following (art 41(2)):

- fish farming, livestock and crop cultivation
- the impact on soil quality and groundwater quality and
- community health.

Based on the results of this investigation, the applicant submits the licence application to the Mayor (art 41(3)). The Mayor then carries out an evaluation of the investigation prepared by the applicant (art 41(4)). If the evaluation indicates that the waste disposal is environmentally appropriate (*layak lingkungan*) then the Mayor issues a licence for waste disposal (art 41(5)) within 90 days from receiving the application (art 41(6)). A guideline is to be issued by the Minister concerning the applicant's analysis of the disposal of waste to water or water resources (art 41(8)). Provisions on the wastewater disposal permit and procedures are to be determined by the Mayor 'with due regard to guidelines established the Minister' (art 41(7).

The provisions on licensing are notable for the lack of prohibitions. For example, there are no rules similar to the following:

> Approval shall be denied where it will result in a restriction in general well-being, such as a threat to the supply of public water ….[18]
>
> If it is to be expected that the usage will have a negative effect on the rights of another party and if the affected party raises objections, the approval may only be issued if the negative effect is prevented or compensated for by means of conditions.[19]

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[18] German *Act on Managing Water Resources (Federal Water Act)* 1996 (as amended in 2000) art 6(1).
[19] ibid., art 8(3).

Neither is there a rule limiting the circumstances in which a permit can be granted. An example of such a rule would be a provision stating that a permit may only be granted if the pollutant load of the wastewater is kept as low as possible while maintaining the procedures according to the state-of-the-art[20] or a rule that it may only be granted if the use complies with a specific plan.[21] In relation to groundwater, a rule could state that a permit for the discharge of substances to the ground may only be granted if there is no need for concern about harmful pollution of the groundwater or any other negative change to its properties.[22]

Licence conditions

Further detail could have been provided on each of the minimum licence conditions, which in summary are stated to be conditions concerning (art 38 (2)):

(a) an obligation to process waste

(b) the quality and quantity of waste that is permitted to be disposed;

(c) the method of disposal;

(d) the means and procedure to manage emergencies;

(e) the monitoring of the quality and discharge of waste;

(f) requirements determined on the basis of the findings of an environmental impact assessment;

(g) a prohibition against bulk disposal of waste;

(h) a prohibition against dilution of waste; and

(i) an obligation to carry out self-monitoring and to report the results of monitoring.

For example, the reference to self-monitoring is opaque as there is no explanation of what self-monitoring includes: the operation or maintenance of premises or plant; discharges

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[20] ibid., art 7a(1) as specified by statutory ordinances. State-of-the-art is defined as procedures, facilities or modes of operation that can be implemented technically and economically that are practically suitable as the best available techniques to limit emissions (art 7(5)).

[21] ibid art 8(2)2. Savage RH "Clean Water Act Reauthorization, The State's Perspective on National Water Resources Regulation: Where is the Environmental Pendulum Now?" Holme H (ed.), *American Society of Civil Engineers* (New York: American Society of Engineers, 1994) 34-52.

[22] German *Act on Managing Water Resources (Federal Water Act)* 1996 (as amended in 2000) art 34(1).

from premises; ambient conditions in or outside premises; and anything required by the conditions of the licence.

The Regulation does not indicate optional conditions. Within administrative law, a power to impose conditions in a licence is limited: it must be referable to a legislative grant of power. The specification of optional conditions is important to enable the licensing agency to take into account site-specific conditions. Optional conditions could include a requirement to determine the condition of the environment before usage and to monitor any negative effects resulting from usage.[23] To enable the introduction of market-based instruments, there would need to be a rule empowering the inclusion of conditions concerning market mechanisms such as the payment of an annual licence fee, or load-based fees, and the maintenance of records required to calculate fees. The authorising provision could also grant permission to impose conditions such as compliance with an environmental audit, the conduct of a study into an aspect of environmental impact or the introduction of management practices for cleaner production or a pollution reduction program.[24]

Factors to be taken into account in licensing decisions

For new enterprises, there is a reliance on the results of the environmental impact assessment or the preparation of the environmental management and monitoring plan (for those activities that do not require an environmental impact assessment). For pre-existing enterprises, there is a reliance on the analysis of wastewater disposal prepared by the applicant. It is stated that the Mayor 'makes an evaluation of the findings of the analysis submitted by the applicant' (art 36(4) and 41(4)), but there are no rules to constrain the exercise of the Mayor's discretion. A level of regulatory control over the exercise of discretion is required to provide guidance to officials and impose a level of accountability in the licensing process. It would help to avoid the tendency to give greater weight to interests other than environmental ones under pressure of local circumstances.

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[23] German *Act on Managing Water Resources (Federal Water Act)* 1996 (as amended in 2000) art 4 (2) 1. Such a provision would help address issues of the cause of environmental damage discussed in chapters 10 and 11.

[24] For example, the introduction of a closed system of water use or double reticulation in housing complexes to manage sewage, grey water and water supply.

The Regulation does not provide substantive administrative rules on the factors that must be taken into account in considering a licence application. In this regard, a comparison can be made to the following rule:[25]

> In exercising licensing functions, the regulatory authority is required to take into consideration such of the following matters as are of relevance:
>
> (a) any protection of the environment policies;
>
> (b) the objectives of the Environment Protection Authority;
>
> (c) the pollution being or likely to be caused by the carrying out of the activity or work concerned and the likely impact of that pollution on the environment;
>
> (d) the practical measures that could be taken:
>
> (i) to prevent, control, abate or mitigate that pollution, and
>
> (ii) to protect the environment from harm as a result of that pollution;
>
> (e) any relevant tradeable emission scheme or other scheme involving economic measures;
>
> (f) whether the person concerned is a fit and proper person;
>
> (g) any documents accompanying the application;
>
> (h) any relevant environmental impact statement, or other statement of environmental effects, prepared or obtained by the applicant;
>
> (i) any waste strategy in force under the Environmental Management Act; and
>
> (j) any public submission in relation to the licence application received by the regulatory authority under this Act.

This kind of rule is particularly important as a mechanism to foster legal accountability in the exercise of administrative discretion. Such rules rarely appear in Indonesian national environmental legislation. Where they do exist, the matters to be taken into account are drafted in vague and imprecise terms.[26]

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[25] *Protection of the Environment Operations Act* 1997 (New South Wales) s 45.

[26] In the examples given, it can be seen that despite the appearance of the words 'must' or 'is required'; the rule merely lists the matters "to be taken into consideration'. The weight to be given to a particular matter is not specified; to fulfil the obligation, the matter need only be considered.

Oversight

The Mayor is obliged to carry out oversight of compliance with licence conditions (art 44(1)) and this is done by an environmental oversight official (art 44(2)). Powers are granted to the official to carry out oversight such as the power to make records, enter premises and take samples (art 46(1)). This provision is quite clear in its effect but lacks legal force. For example, there is nothing like the following rule:

> The Administrator shall establish national programs for the prevention, reduction, and elimination of pollution and as part of such programs shall establish, equip, and maintain a water quality surveillance system for the purpose of monitoring the quality of navigable waters and ground waters and as part of such program shall … [27]

Household waste

It is stated that each level of government carries out the management, or fosters the management of, household waste (art 43(3)). The management of waste may (*dapat*) be done through the development of integrated facilities and infrastructure for the management of household waste (art 43(4)). It is also may (*dapat*) be carried out in cooperation with third parties in accordance with existing legislation (art 43(5)). It can be seen that these rules do not appear to be normative.

Weaknesses in procedural rules

Pollution inventory

The logical first place to commence a pollution control program is to identify sources of pollution. This requires evaluating land use within the watershed, surveying businesses and communities and correlating areas of poor water quality with potential upstream contamination sources. Pursuant to the Regulation, each respective level of government is authorised to make an inventory of sources of pollution and other factors that may cause a change in water quality (arts 20(b) and 21(3)). A national guideline is to be prepared in this regard (art 21(4)) and national policy is to be based on the results of the

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[27] USA *Federal Water Pollution Control Act* (1972) 33 USC 1251 § 1254.

inventory (art 22). There is no express obligation to make an inventory (art 20(b)). The regulation does not clarify the steps involved in carrying out the inventory neither, nor does it outline any system for coordination between different institutions, organisations and individuals in making the inventory of pollution sources.

Licensing procedure and public participation

There is a lack of procedural administrative rules in licensing. This means that there is also no provision for public participation.[28] Whilst public participation provisions within environmental impact assessment will apply in the procedure for granting licences for new enterprises, they will not apply to existing enterprises. Furthermore, not all activities that will require a pollution licence are required to undergo environmental impact assessment.[29] An overarching rule could state that approval can only be granted as part of a procedure that ensures that the affected parties and the authorities concerned can raise objections.[30]

Comparison can be made with the following rule, which requires public notification in licensing: [31]

> The appropriate public authority must give public notice of a licence that is to be reviewed as follows:
>
> (a) a notice to be published in a newspaper circulating throughout the district;
>
> (b) the notice is to be published not less than one month and not more than 6 months before the decision on the licence application is to be taken; and
>
> (c) the notice is to specify the activity or work to which the licence relates and the address of the premises at which it is carried out.

Procedural rules on licensing are also notable for the lack of prohibitions. For example,

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28 A comparison can be made with the *Undang-Undang Gangguan (Hinder Ordonnantie) 1926 Stbl. Nomor 226*. It contains procedural rules for public participation in the decision whether or not to grant a permit for a development which could cause public disturbance, including provision for the lodging of objections, a public hearing of objections, public notification of the decision and appeal provisions.

29 As mentioned in the previous chapter, there are a number of kinds of industrial enterprises which are heavily polluting but which are not listed as requiring an EIA.

30 German *Act on Managing Water Resources (Federal Water Act)* 1996 (as amended in 2000), art 9.

31 *Protection of the Environment Operations Act* 1997 (New South Wales) s 78(2).

there are no procedural rules to the following effect:[32]

> The appropriate authority must not refuse an application for a licence unless before doing so:
>
> (a) it has given notice to the applicant that it intends to do so, and
>
> (b) it has specified in the notice the reasons for its intention to do so, and
>
> (c) it has given the applicant reasonable opportunity to make submissions in relation to the matter, and
>
> (d) it has taken into consideration any such submissions by the applicant.

In addition, there are no procedural prohibitions designed to ensure that coordination between agencies. An example of such a rules is as follows:

> A licence that relates to controlled development must not be granted by the appropriate regulatory authority, unless development consent has been granted for the controlled development.[33]

This rule shows that the '*then* Y' can be tailored not just to prevent something from happening but also to authorise it to happen if a certain procedure is followed. The circumstances in which it is authorised are important for coordination between government departments.

Reporting obligations on the public and obligations on the government to respond

An obligation is imposed on every person to report a pollution incident (art 27(1)). An obligation is imposed on the officer who receives the report to note certain information about the incident (art 27(2)) and to hand over the findings to the head of the relevant level of government within three days (art 27(3)). The head of government (Mayor, Governor or Minister) is required to 'quickly' (*segera*) verify[34] whether there has been a breach of environmental management or the occurrence of pollution (art 27 (4)). If a breach has occurred then they are obliged to order the polluter to 'handle the breach and or pollution along with its impact' (art 27(5)). If they fail to do so, the head of

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32 ibid., s 55(2).
33 ibid., s 50(2).
34 This phrase could be interpreted as quickly or immediately which leaves its meaning unclear: does it mean the same day or same week?

government may (*dapat*) undertake or appoint a third party to undertake any action that needs to be carried out, with the cost to be borne by the person responsible for the industry or activity (art 28).

A weakness in this arrangement arises from the use of the evaluative words 'must soon' (*wajib segera*) verify whether an illegal action or water pollution has occurred (art 27(4)). In addition, the obligation that follows a positive finding is opaque where it is stated that the head of government is obliged to order the responsible agent to 'tackle the breach or pollution along with its impact' (*menanggulangi pelanggaran dan atau pencemaran serta dampaknya*). The option is given to the government to ask a third party to take certain steps (art 28); however, there is no detail concerning who this third party may be, the steps they can be asked to take, or how the government is to recoup the cost of taking such action.

Rights to information

A number of rights are provided under the Regulation, namely: the equal right to good quality water (art 30(1)); the right to obtain information on the status of water, the management of water quality and the control of pollution (art 30(2)); and the right to participate in the management of water quality and the control of water pollution in accordance with existing legislation (art 30(3)). An obligation is imposed on government to provide information to the public on the management of water quality and the control of water pollution (art 33).

It can be seen that the right to obtain information on the status of water, the management of water quality and the control of pollution (art 30(2)) is not supported by procedural rules. Furthermore, the right to participate in the management of water quality and the control of water pollution 'in accordance with existing legislation' (art 30(3)) suffers from the same ambiguity that was discussed in relation to the expression of the right to participate in the Act. The Elucidation states that participation includes participation in:

> The decision-making process by providing the opportunity to raise objections and give input or by other means established by existing laws and regulations.

Whilst the Elucidation states that participation includes 'participation in the process of

evaluating and/or formulating water quality management and water pollution control policy and in making observations', it does not provide procedural rules in this regard.

Regulation: the minimalist approach to public regulatory rules

Prohibitions

The Regulation only imposes one prohibition: a prohibition against the disposal of solid or gaseous waste to water or water resources (art 42).[35] It does not contain a prohibition against discharging liquid waste to water or a more general prohibition against polluting the waterways. It also does not contain prohibitions relevant to groundwater quality such as prohibitions against the disposal or release of liquid waste or chemical substances to land, or the dumping of solid waste that can contaminate land.

Public obligations

In comparison with prohibitions, a large number of obligations have been imposed, namely obligations to:

- prepare a plan for handling pollution in the event of an emergency or other unanticipated event (art 25)
- report (arts 27-29, 34)
- preserve the quality of water in water resources in protected forests, springs outside protected forests and deep groundwater aquifers (art 31(a) & art 4(3))
- control pollution in water resources (art 31(b) & art 4(4))
- provide true and accurate information on their obligations to manage water quality and control water pollution (art 32)
- obtain a written licence from the Mayor for the application of wastewater to soil (35(1))
- prevent and handle the occurrence of pollution in the disposal of liquid waste to water or water resources (art 37)
- comply with liquid waste disposal standards stipulated in a licence (art 38(1))

[35] This includes sludge (Elucidation art 42).

- obtain a written licence from the Mayor for the disposal of wastewater to water or water resources (art 40(1))

- obtain a licence from the Mayor for the application of wastewater to soil within one year from the date of the Regulation (art 53(1))

- obtain a licence from the Mayor for the disposal of wastewater to water within one year from the date of the Regulation (art 53(2))

The strongest obligations are those with a clear consequence: to obtain a licence, to report; to provide true and accurate information; and to comply with liquid waste disposal standards stipulated in a licence. The key obligation is an obligation imposed on every person who disposes of wastewater to water or water resources to obtain a licence from the Mayor (art 40(1)). A similar licensing obligation has been imposed for activities or businesses that use liquid waste for application to soil (art 35(1)). The other obligations are widely cast in the sense of the required activity. Phrases such as 'protecting the function of water', 'handling pollution' and 'restoration of water quality' are so general as to be vague; although this wording provides flexibility, it is uncertain how these obligations can or will be applied.

It can be seen that there are no targeted obligations which detail the '*if* X' part of the rule such as the following:

> Anyone who introduces or discharges substances into a body of water or anyone who affects a body of water in such a way that the physical, chemical or biological properties of the water are changed shall be obliged to compensate for the damage thereby caused to the other. [36]

Neither is there an obligation to specifically formulate obligations such as the following:

> The creation, removal or fundamental redesign of a body of water or its banks (development) shall require plan approval process, which is in line with the requirements of the Act on the Assessment of Environmental Impacts.[37]

[36] German *Act on Managing Water Resources (Federal Water Act)* 1996 (as amended in 2000) art 22(1).
[37] ibid., art 31(2).

Licensing procedure

The licensing obligation lacks detail concerning the manner in which the licence application is to be made. It contains a requirement that the applicant base their application on an environmental impact assessment or the environmental management and monitoring plan (where no environmental impact assessment is required). As mentioned above, there is also a requirement that the applicant prepare an analysis of the effect of the proposed waste disposal. However, there is little detail on the content of the analysis. Whilst further provision is to be made by way of a national guideline, this again raises issues about the appropriateness of a national guideline for the subject matter involved.

Market-based instruments

The Regulation introduces the concept of a fee (*retribusi*) for the disposal of liquid waste by a district government processing plant; however the provisions on market-based instruments are undeveloped. It merely states that every person who disposes of wastewater in wastewater treatment plants and/or facilities provided by district government is liable to a fee (art 24(1)). This is to be the subject of a regional regulation issued by district government (art 24(2)). There is also reference to the respective levels of government determining policy on incentives and disincentives (art 43(2)(b)).

4. OBSERVATIONS ON THE LANGUAGE OF OBLIGATION

Expressly normative language can be seen most frequently in the public regulatory rules cited above. These rules use the word must (*wajib*) in a consistent manner to indicate that certain actions are a public obligation. In comparison, administrative rules generally lack expressly normative vocabulary. Ridwan has said that legal rules can be easily discerned in provisions of civil or criminal laws. However, legal rules in administrative law must be looked for within the full range of legislative instruments starting from statutes, where they take a general abstract character to the lowest level, where they take

an individual concrete character.[38] The question is, whether this an effective way to draft administrative law and, in particular, administrative aspects of environmental law?

If the language contained in the Regulation is analysed, the only explicit obligations in administrative rules are the following, noted below alongside the actor:

- to provide information to the public on water quality management and pollution control: Central/Provincial/District Government (art 33)
- to include certain minimum conditions in licences: Mayor (art 38(2))
- to carry out oversight on compliance with licence conditions: Mayor (art 44(1))
- to provide a letter of instruction and/or identity card: Supervising official (art 47)
- to determine carrying capacity within 3 years from the date of the Regulation: Mayor (art 54)
- to adjust previously established water quality standards so as to comply with the Regulation within 3 years from the date of the Regulation: no named actor (art 56(1)).

It is possible that administrative rules without normative vocabulary can be interpreted as having normative force; however, it begs the question why normative vocabulary is used in some situations in administrative rules and not in others, and why it is more consistently used in public regulatory rules. It also opens the way for a dispute over interpretation – where there is no normative vocabulary, is it intended to convey a command, a conditional permission or an unconditional permission?

This practice becomes more significant in light of occasional use of *dapat*, which in *Bahasa Indonesia* can be translated as expressly permissive. For example, concerning central government's authority in water quality classification, it is stated that central government may (*dapat*) delegate the task of conducting the analysis to provincial government (art 9(3)). In addition, provincial government may (*dapat*) set ambient water

[38] Ridwan HR, *Hukum Administrasi Negara* (State Administrative Law) (Indonesia: UII Press, 2002) 98.

quality standards that are more stringent than the national standards (art 12(1)). There is also a list of activities that the respective levels of government are authorised to carry out such as making the inventory and formulating licence conditions (art 20). These provisions would appear to be unconditional permissions.

Another point of comparison within the Regulation is the use of the passive voice. In public regulatory rules, the active voice is often used together with normative vocabulary. The only instances where the passive voice is found is in relation to the use of government wastewater treatment facilities (art 24(1)) and in the procedural rule that requires the self-monitoring report be handed over to the Mayor every three months (art 34(3)). In contrast to public regulatory rules, many of the administrative rules are cast in the passive voice. For example, in relation to minimum licence conditions, whilst a word that connotes obligation (*wajib*) appears, the verb is in the passive voice (*dicantumkan*) and does not mention the actor who is the subject of the obligation. The passive voice is found in the following rules:

- Water quality classification (non-normative, actor: government) (art 9(2))
- The establishment of more rigorous national water quality standards (non-normative, actor: Minister) (art 11(2))
- The establishment of water quality standards through the passing of a regional regulation (non-normative, actor: regional government) (art 12(2))
- The monitoring water quality (non-normative, actor: government) (art 13(1))
- The regularity of monitoring water quality (non-normative, actor: government) (art 13(3))
- Determining the status of water quality (non-normative, actor: government) (art 14(1))
- The determination of national wastewater quality standards with consideration being given to recommendations from relevant agencies (non-normative, actor: Minister) (art 21(1))

- The submitting of the inventory and sources of pollution to the Minister yearly (non-normative, actor: government) (art 21(3)).

The observation made in relation to Table 1 in chapter 5 that the passive voice creates more 'shades of meaning' is relevant here. In many of these provisions, the actor is generic: it is 'the government'. In effect, the provision does not resolve for the reader 'who is to do what'.

The point to be made here is that rules constructed in the active voice are more likely to lead to a clear identification of the actor bound by the rule. Because the active voice is direct and unequivocal, it is also likely to convey greater authority. There are a number of provisions that use the active voice; however, it is notable that the majority are power-conferring provisions rather than substantive or procedural rules. It would seem that substantive rules, which define and regulate the exercise of official power and thereby establish mechanisms for accountability, are more likely to be in the passive voice with a non-specific actor. Similarly, the rules that provide for procedures to support environmental good governance are likely to be in the passive voice.

5. TOWARDS INTEGRATED WATER QUALITY MANAGEMENT?

In attempting to assess the impact of the Regulation in contributing towards the re-shaping the approach to water resources management in Indonesia, it is useful to refer back to the concept of integrated water resources management (IWRM) as presented in chapter 1. It was suggested in chapter 1 that there are three aspects to consider, namely, the movement of water within a watershed, the establishment of an administrative system to manage water and the provision of a socio-economic system for water use.

The natural system: the movement of water within a watershed

Acknowledgement of the natural function of the watershed

As mentioned above, there is only one reference to the watershed in the Regulation and that reference is in the Elucidation. Furthermore, references to water ecosystem unit and a water resources management unit, as well as the watershed and river basin, are not defined. This reveals a fundamental weakness in the Regulation.

Consideration of interactions between land and water both upstream and downstream

If the watershed or sub-watershed had been stated to be the basis of management decision-making, the Regulation could have included provision for an assessment of the existing resources of watersheds or sub watersheds or, alternatively, linked up with an assessment made under other legislation. Ideally, this would involve the identification of vegetation cover types, including both upland and wetland habitats, wildlife species present in the watershed and their habitat requirements, fishery areas, sensitive habitats, critical areas for threatened or endangered animals and plants, soil and geological features, groundwater locations and current land uses throughout the watershed.[39]

Surface water and groundwater quality management and pollution control

The Regulation does not make sufficient provision for the management of groundwater quality and control. In licensing the application of wastewater to land, there is a requirement that the applicant investigate the impact on ground water quality. However, apart from this provision, the Regulation does not provide for the particular requirements of groundwater quality management and control. The connection between groundwater pollution and land contamination is not covered. Furthermore, the provision that states that the protection of deep groundwater aquifers is to be made by way of separate legislation (art 4(3)(c) & art 4(5)) ignores aquifers that are not deep groundwater aquifers.[40]

Joint management of water quantity and quality

A connection between the management of water quantity and quality has been made in planning water use (art 7(3)). However, the provisions on planning are cast in general terms. Explicit linkage between managing water quality and quantity has not been made

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[39] Doyle-Breen, Note 16 at 301 on coastal watershed management but these comments are applicable generally.

[40] This provision does not operate as a legislative rule as it does not follow the legal hierarchy. The Regulation is not able to provide criteria of validation for legislation at a higher or the same level in the hierarchy. It would appear to merely serve the purpose of indicating that this area will be dealt with separately. There is no national legislation specifically on the environmental protection of groundwater. There are, however, a number of instruments that concern groundwater quality issues, including the following:

Ministerial Regulation of the Minister for Health No. 528/MEN.KES/PER/XII/1982 on the Quality of Groundwater Connected With Health (*Peraturan Menteri Kesehatan No. 528 MEN.KES/PER/XII/1982 tentang Kualitas Air Tanah Yang Berhubungan Dengan Kesehatan*).

Ministerial Regulation of the Minister for Mines and Energy No. 02.P/101/M.PE/1994 on the Administration of Groundwater (*Peraturan Menteri Pertambangan Dan Energi No. 02.P/101/M.PE/1994 tentang Pengurusan Administratif Air Bawah Tanah*).

in other areas of the management and control of pollution; for example, there is no link between licensing the discharge of wastewater from industry with the licensing of water use.

Balancing the human need for water and the need for water by dependent eco-systems

The Regulation refers to employing an 'ecosystem approach' (art 2(1)); however, there is no explanation as to what this actually means. In the Elucidation, it is stated that water quality management is 'integrated between administrative regions and based on the characteristics of their ecosystems so as to achieve efficient and effective management.' This appears to make the ecosystem a basis for the division of administrative units rather than a consideration within management decision-making. It is stated that the ecological function of water is part of planning water use (art 7(3)); however, there is no further explanation of what this involves. In particular, there is no mention of environmental values in the classification of water. The approach is essentially human-centred: there is no reference to the protection of aquatic life or the protection of ecosystems. The Regulation briefly mentions the concept of biological indicators in the Elucidation but the role of biological indicators is not fully set out and there is no explanation of the different roles played by physical, chemical and biological indicators. The inclusion of biological indicators in the Regulation would have enabled the consideration of ecological factors and a biological assessment in water quality management.[41] Biological indicators are significant as they can be the ultimate test of ecological health through, for example, the return of fish species.

[41] The appropriate use of indicators is a common problem worldwide, as the development of biological assessment techniques applicable to the protection of aquatic ecosystems is in its infancy. The 1992 Dublin International Conference on Water and the Environment (ICWE) proposed the development and application of water quality criteria for ecosystems and health protection at the international, national, provincial and local level, see Young GJ, Dooge JCI and Rodda JC, *Global Water Resource Issues* (UK: Cambridge University Press, 1994) 76 (Table 18). The conference recommended that the traditional emphasis on chemical indicators be supplemented by more comprehensive indicators based on the total properties of a water body, including the physical, chemical, biological, radiological and ecological parameters, see Young, Dooge, and Rodda at 73. Also, see Australian and New Zealand Guidelines for Fresh and Marine Water Quality 2000, Note 11 at paragraph 3.2 and Karr JR, "Clean Water Is Not Enough" (1995) Vol 11 No 1 *Illahee* 51-59.

The administrative system: management based on the watershed

Coordination

There are no coordinating rules in the Regulation. It is broadly stated that integration is carried out in planning, implementation, oversight and evaluation (art 2(2)). The Elucidation only mentions integration between administrative regions; it then goes on to refer to 'cooperation' between regions rather than coordination or integration *within* a region. How cooperation is to be achieved is not explained beyond the establishment of a Board made up of representatives of sectors related to water quality. The narrow coverage of the issues that affect water quality within a watershed also limits its capacity to provide for coordination. Not all water quality problems can be managed through the licensing of wastewater disposal. A focus on the watershed would highlight the existence of other sources of water quality degradation including pesticides, sedimentation, temperature, total dissolved solids and unknown toxicants.[42] It is unlikely that district level government will have the human or financial resources to effectively assess carrying capacity, which is the primary coordinative mechanism.[43]

Data driven decision-making

The lack of substantive and procedural rules governing administrative decision-making results in a lack of guidance concerning the reasons upon which decisions can be based. It also means that there is no requirement that decision-making is information-based.

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[42] This is a summary of the range of common pollutants taken from Reimold RJ, "Watersheds: An Introduction" in Reimold RJ (ed.), *Watersheds – An Introduction in Watershed Management – Practice, Policies and Coordination* (USA: McGraw Hill, 1998) 1-9 at 5.

[43] Furthermore, the concept of carrying capacity is now under review. A perceived difficulty is that the upper limit identified through modelling may become 'the goal' thereby not allowing for anything in reserve. Carrying capacity could be exceeded if the situation changed, for example, from an unexpected population increase, land use changes, the establishment of new industry or if standards were to be reviewed downwards: interview with John Court, Leader of Pollution Control Implementation (PCI) Project, East Java, 1998. This AusAID project provided technical advisors fellowships and training, demonstration projects and program support to both the BAPEDAL central office and the East Java Environment Bureau (*Biro Lingkungan Hidup Jawa Timur*).

The participatory approach

The widespread absence of procedural administrative rules to ensure public participation has been noted in relation to the valuation of water bodies, classification, the establishment of a water quality strategy and licensing. Whilst the Regulation contains sweeping statements that are supportive of public participation, they are not backed up by the imposition of obligations upon government.

Integrated pollution prevention and control

The Regulation refers to pollution prevention, for example, the control of water pollution is stated to be 'the effort to prevent and manage pollution' (art 1(4)). In addition, there is an obligation on every person responsible for a business or activity that disposes of liquid waste to water to prevent and manage water pollution (art 37). However, at no point is the distinction made between pollution prevention and pollution control and as a result prevention is not given specific content.

The socio-economic system for water use

The Regulation only goes as far as conferring power on each level of government to develop policy for a market-based approach. The capacity of regional government to develop market-based mechanisms is questionable in light of the complexity of this area of environmental management.

Conclusion

The Regulation represents a recent example of deficient law-making practices identified and discussed in chapter 8. It contains numerous provisions that delegate and postpone the formulation of environmental measures to guidelines of uncertain legal status. Whilst some matters are technical, others cover aspects of environmental management that have a dimension of public rights and obligations concerning good environmental governance. Furthermore, the extent of delegation to the district level is questionable, given the complexity of the subject matter. It imposes a heavy burden on district government and is likely to lead to inconsistency between the hundreds of district governments across Indonesia.

Poor utilisation of linguistic structure is a feature of the Regulation. Provisions are marred by vagueness, opacity and unnecessary complexity. There is a lack of definition of terms and a general lack of the kind of detail required to bring a new management system into existence.

There are no jurisdictional administrative rules within the Regulation to establish a lead agency or to identify the agencies within regional government with responsibilities in managing water quality. There are few substantive administrative rules containing standards to guide discretionary decision-making. There is also an absence of procedural rules to guide decision-making processes. This may reflect a desire to grant regional government autonomy in deciding such matters in keeping with regional institutions; however, this approach also avoids responsibility for implementation.

The aspects of water quality management that have been identified as lacking substantive and procedural administrative rules are the planning of water use, the valuation of water bodies, the classification of water bodies, monitoring water quality, setting objectives and strategy making. Aspects of water pollution control that require specific administrative rules are the determination of effluent standards and licensing. Notably, the provisions on these aspects consistently use the passive voice and vocabulary that is not expressly normative, which detracts from their authority.

In the public regulatory rules, the unnecessary complexity in the definition of water pollution is likely to cause difficulties in enforcement. In this regard, it repeats the pattern of legal drafting in the Act. The lack of prohibitions is notable. As observed in chapters 5 and 8, a prohibition has the potential to be a stronger command than an obligation and it enables the formulation of authorisations in the form of conditional permissions. Whilst there are a number of rules imposing obligations on the public, the only obligations with a clearly drafted consequence are those on licensing, reporting, the provision of true and accurate information and compliance with liquid waste disposal standards.

Overall, it has been shown that the Regulation falls short of meeting the requirements to reform the management and control of water quality in Indonesia. It does not fulfil the aspirations of IWRM. The ongoing deficiencies in form and style show that despite

reformasi, new law that is being created is not adequate to the tasks ahead. The next chapter looks at difficulties caused by inadequate drafting of rules on administrative and criminal sanctions.

CHAPTER TEN

OFFICIAL SANCTIONS

Introduction

A perplexing issue in Indonesia is how to create a sense of obligation that protecting the environment is 'the right thing to do' - for the benefit of society as a whole, future generations and the protection of ecological processes that sustain life. How can the legal norms contained in legislation become accepted as social norms and then become generally accepted as a desirable pattern of social behaviour?

Hart presented a figure of obligation, where obligations are imposed by 'the group or their official representatives', who 'insist on performance or exact a penalty'.[1] In environmental law, this figure can be interpreted as referring to government agencies, where they call offenders to account, penalise, punish and require offenders to meet the cost of restoring the environment.

In exploring this idea, this chapter will first look at the legislative provisions on administrative sanctions and second, look at the drafting of criminal sanctions.[2] The sanction was presented in chapter 6 as the rule dimension that ultimately determines the status of a rule. Strong sanctions are needed to give prestige to new law. The existence of a sanction will signal that a command has been created; however, the force of that signal will depend on the assessment of the likelihood that a breach of the rule will actually lead to the imposition of sanctions. This assessment is likely to be influenced by the effectiveness of the drafting of legal rules within the sanctions themselves.

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1 Hart Hart HLA, *The Concept of Law: With a Postscript Edited by Raz J and Bullock PA* (England: Clarendon Press Oxford, 2nd ed., 1994) 87.

2 Space has not permitted the discussion of civil enforcement; however, it is noted that this important avenue for enforcement is still developing in Indonesia. Arguably, civil law can achieve all the objects of criminal law enforcement such as deterrence, some measure of punishment and provision for some means of restitution. Advantages derive from the lighter burden of proof and a wider range of enforcement measures in comparison with criminal enforcement. For a comparison between the two systems, see Wilson W, *Making Environmental Laws Work – An Anglo American comparison* (Oxford: Hart Publishing, 1999), at chapter 6. Also see, Naysnerski W and Tietenberg T, "Private Enforcement of Federal Environmental Law" in Tietenberg TH (ed), *Economics of Environmental Policy* (USA: Edward Elgar, 1994) 254-276 at 255.

In this chapter, it is shown that in relation to administrative sanctions, obstacles arise from the lack of substantive administrative rules setting out cause and effect relationships between a breach of an obligation or prohibition and the consequence in terms of an administrative sanction. This creates very broad discretion and a lack of transparency or accountability. In relation to criminal sanctions, it is shown that the criminal sanction rules are drafted in a complex way with an evidential burden involved in the proof of intention or negligence. The targeting of the liable party is also drafted in an unclear way, which is likely to dampen the enforcement effort and thwart the likelihood of successful prosecutions. The discussion at the end of this chapter returns to issues raised in chapter 4 concerning the role of the interpretive community in giving meaning to legal rules and the central position of the courts in this process.

1. THE CAPACITY TO YIELD TO A SANCTIONING APPROACH

The need to be able to move easily from self-regulation to intervention

It is widely recognised that an effective enforcement program is needed in environmental law.[3] Enforcement may be characterised as the application of a set of informal or formal legal tools designed to impose legal sanctions for ensuring compliance with a defined set of requirements.[4] It is said that seeking to achieve compliance in environmental law, there is a 'tightrope' to be walked between a cooperative approach and the imposition of sanctions[5] and that an 'appropriate balance' needs to be struck between the more interventionist approach of 'command-and-control' and self-regulation.[6] 'Command-and-control' is a sanction strategy involving a system of direct control, which relies on the formal machinery of law, operationalised through a range of structures and

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[3] The importance of an effective compliance effort is difficult to overstate according to Michael M Stahl, the US Environment Protection Authority's Deputy Assistant Administrator of the Office of Enforcement and Compliance Assurance as quoted by Markell DL, "The Role of the Deterrence-Based Enforcement in a 'Reinvented' State/Federal Relationship: The Divide Between Theory and Reality" (2000) Vol 24 No 1 *The Harvard Environmental Law Review* 1-115 at 5.

[4] Wasserman C, "Overview of Compliance and Enforcement in the United States: Philosophy, Strategies and Management Tools" in *International Conference on Environmental Enforcement*: *Workshop Proceedings May 8-10, 1990, Utrecht* (The Netherlands: Ministry of Housing, Physical Planning and Environment (VROM), 1990) 7-47 at 9.

[5] Hawkins K, *Environment and Enforcement: Regulation and the Social Definition of Pollution* (Oxford: Oxford University Press, 1984) 4.

[6] This has emerged as a point of agreement, see Hutter B, *Compliance: Regulation and Environment* (Oxford: Clarendon Press, 1997) 245. 'Responsive regulation' accommodates different styles and techniques, see Ayres I

procedures with punishment being available through resort to the court system. Self-regulation allows the regulated entity to assume responsibility for regulating its own affairs and relies on private negotiation and cooperation.[7] Gunningham has discussed appropriate mixes of legal instruments. He concludes that interventionist measures that impose negative pressure rate badly in terms of efficiency, effectiveness and political acceptability and that 'all else being equal,' less interventionist approaches should be preferred to more interventionist ones.[8]

In Indonesia, there is generally a lack of social attitude that people ought to comply with environmental; legal obligations and prohibitions are only rarely seen as standards of conduct, concerning what should be done irrespective of whether sanctions are likely to be imposed. For this reason, the debate about the extent to which government activity should be 'interventionist' will not be entered into here. Rather, the concern is with a compliance strategy that can yield to a sanctioning approach if informal attempts to secure conformity fail. The capacity to adopt a responsive form of regulation, where the escalating forms of government intervention are clearly set out appears to be of particular significance in Indonesia. This capacity will actually reinforce and help constitute less interventionist and more efficient forms of regulation such as market regulation.[9] To quote Ayres and Braithwaite:

> By credibly asserting a willingness to regulate more intrusively, responsive regulation can channel marketplace transactions to less intrusive and less centralised forms of government intervention. Escalating forms of responsive regulation can thereby retain many of the benefits of laissez-faire governance without abdicating government's responsibility to correct market failure.[10]

There are additional issues in Indonesia that arise from the lack of financial and human resources at the regional level. A preference for a voluntary approach through self-regulation arises from the reality that enforcement tools such as close monitoring, inspection and assessment of compliance are expensive. A cooperative solution is

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and Braithwaite J, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992).

7 Hawkins, Note 5 at 4. He stresses that they are not polar opposites but merely shifting points in a continuum.

8 Gunningham S and Grabosky P (with Sinclair D), *Smart Regulation: Designing Environmental Policy* (Oxford: Clarendon Press, 1998) 392. Concerning the mix of policy instruments, they review the various possibilities and propose that certain mixes will be positive, negative, duplicative or contextual, at 422-448.

9 Ayres and Braithwaite, Note 6 at 4.

10 ibid.,

attractive as it presents the possibility of a compromise that may benefit the environment whilst minimising the economic impact. Negotiation is also more culturally acceptable as it is less overtly confrontational. However, the lack of transparency inherent in cooperative solutions also provides opportunities for the abuse of authority. The benefits to be obtained from a rule basis to the imposition of sanctions coincide with the benefits from the use of rules more generally as discussed in chapter 5. Predictability is fostered as it enables a system to be worked out in advance to ensure that a response is proportionate to the level of environmental damage or the damage to health or property sustained by the community. It also assists fairness as rules can be drafted to ensure that benefits do not result from non-compliance and that all non-complying parties will receive equal treatment.

Comment [BB8]: (Style)

Rules for administrative sanctions

Administrative sanctions are sanctions that may be directly imposed by government authorities. The use of administrative sanctions to achieve compliance has many advantages in comparison to reliance on the courts system as they can be carried out quickly and efficiently. Administrative sanctions can also be readily used for preventative action.[11]. Administrative sanctions are often regarded as being an effective and efficient means of promoting compliance for less serious violations;[12] however, in Indonesia they can also be applied to serious infringements and include the closure of a facility through the withdrawal of an operating licence. The advantages of administrative sanctions have been emphasised in Indonesia, with the proviso that they be used firmly and consistently.[13]

The extent of the use of administrative sanctions in Indonesia is difficult to discern, as there is no systematic record keeping at the national level.[14] There would appear to be a preference for self-reporting. Information on the extent of follow-up action after

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[11] Reliance on administrative sanctions is common in other jurisdictions such as in the USA – Reich EE and Shea QJ, "A survey of US Environmental Enforcement Authorities, Tools and Remedies" in *International Conference on Environmental Enforcement*: *Workshop Proceedings May 8-10, 1990, Utrecht* (The Netherlands: Ministry of Housing, Physical Planning and Environment (VROM), 1990) 55-102 at 63.

[12] ibid., at 7.

[13] Usman R, *Pembaharuan Hukum Lingkungan Nasional* (The Renewal of National Environmental Law) (Indonesia: PT Citra Aditya Bakti, 2003) at 217.

[14] The Ministry has been collecting data on administrative sanctions but the research is not complete according to enquiries made by the writer with the State Ministry for the Environment.

warnings are issued for a failure to self-report, or when there has been a failure to comply with an agreed plan to install a waste treatment plant, is not readily available.[15]

The rule type that is relevant to imposition of administrative sanctions is the administrative rule. It has the capacity to:

- appoint and impose obligations on enforcement agencies to issue sanctions (jurisdictional administrative rules)
- define and regulate the exercise of the power to administer sanctions (substantive administrative rules); and
- establish procedures to be followed by an enforcement agency in imposing sanctions (procedural administrative rules).

The following is a rule-based critique of the provisions in the Act covering administrative sanctions.[16]

Lack of jurisdictional administrative rules

Act No. 23 of 1997 on Environmental Management (*Undang-Undang No. 23 Tahun 1997 tentang Pengelolaan Lingkungan Hidup*) ('the Act') grants authority to the Governor to (art 25(1)):

- 'carry out administrative sanctions'
- 'prevent and end the occurrence of an infringement'
- 'deal with the consequences given rise to by an infringement
- carry out safeguarding, mitigating and/or remedial measures at the expense of the party responsible for a business and/or activity'

except as otherwise stipulated in legislation.

This authority may be transferred to the district level (art 25(2)).

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15 This conclusion was reached after discussions with the BAPEDALDA in DKI Jakarta in November 2000.

16 A useful practical review of the provisions can be found in Usman, Note 13 at 213-236.

It has been said that article 25 provides the basis for the exercise of authority to impose sanctions by the governor/mayor.[17] As with similar provisions elsewhere in the Act, it is not clear whether these provisions amount to jurisdictional administrative rules. Whilst it confers power on provincial government to impose administrative sanctions, it appears to merely authorise the imposition of administrative sanctions by a governor and, as such, amounts to an unconditional permission.

This provision is also opaque in its choice of words: it does not refer to recognised activities such as monitoring and inspection activity, warnings, notices, orders, revocation of licences, suspension notices, closure of discharge pipes, closure of activities, clean up operations, the issuing of orders for clean up and/or restoration or the commencement of criminal enforcement proceedings.

These weaknesses have not been addressed by Government Regulation No. 82 of 2001 on Water Pollution Control and Management (*Peraturan Pemerintah No. 82 Tahun 2001 tentang Pengendalian dan Pengelolaan Pencemaran Air* ('the Regulation'). There is a power-conferring provision granting authority to the Mayor to impose administrative sanctions but no mention of the agency that will carry this out or the sanctions that can be imposed. Article 48 states that the Mayor has authority to impose administrative sanctions where there has been a breach of the prohibition against the disposal of solid waste or gaseous waste to water or water resources or a breach of the following obligations:

- pay a fee for wastewater treatment (art 24 (1))
- prepare a plan to cope with pollution if there is an emergency (art 25)
- restore the environment (art 26)
- provide true and accurate information on the implementation of environmental obligations (art 32)

[17] Usman, Note 13 at 227.

- provide a report on procedures implemented to conform to permit requirements concerning application of wastewater to land, disposal of wastewater to water or water resources every three months (art 34)

- obtain a licence for the application of wastewater to land (art 35)

- prevent pollution to water or water resources in the disposal of wastewater to water (art 37)

- comply with conditions in a licence to dispose of wastewater to water or water resources (art 38)

- comply with an obligation to obtain a licence to dispose of wastewater to water or water resources (art 40).

It is notable that there are no provisions conferring power to impose financial penalties. Fines can operate as an effective deterrent, especially if they are calculated based on the total economic gain made by a firm in failing to comply with the law. Another aspect of administrative enforcement that has not yet been developed is the environmental protection order that is directed at protecting a particular aspect of the environment, for example, an order that protects an area of environmental significance such as a wetland or spring from interference or alteration of any kind.

Substantive administrative rules

There are no substantive administrative rules on the type of sanctions to follow each of the breaches mentioned above, to set up a cause and effect relationship between the breach and the sanction. This could be done in a series of administrative rules making up a hierarchy of sanctions and forming the basis for responsive regulation. Such a hierarchy would assist predictability and provide greater guidance to enforcement officers. The hierarchy could include at least the following:

(a) Warnings

(b) Notice to prevent a pollution incident

(c) Order to cease discharges

(d) Revocation of licence to discharge liquid waste

(e) Order to suspend polluting activities

(f) Closure of discharge pipes

(g) Partial or complete closure of a firm

(h) Order to limit the spread of pollution

(i) Order to clean up or restore the environment

(j) Compulsory environmental audits

(k) Recovery of costs.

Comment [BB9]: Indicate the precedent from which you draw this? – not precedent…

If a power were to be granted to impose financial penalties, in order to ensure an equitable application, substantive rules could be drafted to ensure that the size of the fine is appropriate to the seriousness of the offence and the resultant environmental damage. In order to foster fairness, substantive rules could require a consideration of the economic gain of the polluter from the acts of pollution such as:

- financial advantages from delaying the installation of pollution control equipment;
- savings gained by refusing to operate and monitor pollution control equipment; and
- advantages gained over competitors from not complying with legislation.

Procedural rules

Neither the Act nor the Regulation contains procedures to be followed by an enforcement agency in imposing sanctions.

Regional law

Under the Act, authority for administrative sanctions has been granted to the provincial Governors. Whilst a review of administrative sanctions at the provincial level has not

been carried out in the preparation of this thesis, reference has been made to administrative sanctions in East Java and Yogyakarta. In East Java, administrative sanctions are found in Regulation No. 5 of 2000 on the Control of Water Pollution (*Peraturan Daerah Propinsi Jawa Timur No. 5 Tahun 2000 tentang Pengendalian Pencemaran Air*). This regulation grants authority to the Governor to implement administrative sanctions. It states that sanctions should be preceded by a letter from the Governor and then states four types of administrative sanctions that may be imposed (art 19). In Yogyakarta, a Decision of the Governor (a non-binding instrument) sets up the discharge standards for the health, industrial and tourism sectors and provides for administrative sanctions.[18] The provisions lack substantive administrative rules. On this basis, it may be anticipated that administrative sanctions will often suffer from similar deficiencies that exist at the national level. Furthermore, detail on the imposition of sanctions is likely to be contained in non-binding instruments, which inhibits transparency and allocates a low non-legal status to administrative enforcement.

The *Indorayon* case: problems in accountability

The wide scope for the exercise of discretion in administrative enforcement, which arises from a lack of substantive or procedural administrative rules, opens up questions about the manner in which administrative sanctions are being administered. These issues have arisen in a dramatic way in the handling of environmental damage caused to the Asahan River in North Sumatra by *PT Inti Indorayon* ('Indorayon').[19]

Background and court proceedings

In the mid-1980s, Indorayon established a major industrial complex near Lake Toba to produce pulp and paper and rayon fibre.[20] Controversy followed the initial proposal to establish the industrial complex in 1983, when the local community expressed concern about possible environmental damage from logging operations, water and air pollution as well as disruption to the life of the local community.

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[18] For example, Decision of the Governor Yogyakarta No. 65 of 1999 on Liquid Waste Quality Standards for the Health Sector (*Keputusan Gubernur Kepala DIY No. 65 Tahun 1999 Baku Mutu Limbah Cair bagi Kegiatan Pelayanan Kesehatan Di Propinsi DIY*).

[19] Since 6 February 2002, Indorayon has been re-named as *PT Toba Pulp Lestari Tbk*.

In 17 March 1987, a letter from the Minister of Public Works to the Minister of Forestry alleged that deforestation had caused loss of irrigation water in 210 of 760 hectares of rice *padi* and a significant drop in water level. Despite the community's concerns, the company obtained all the necessary approvals for the establishment of the facilities and commenced operations in early 1988. In September 1988, an artificial lake containing industrial waste burst, releasing of approximately 400,000 cubic tons of toxic waste to the Asahan River. It was reported that the smell could be detected at a distance of 40 km down stream and that the colour of the river water had turned black.

In 1988, a claim brought by Indonesian Forum for the Environment (*Wahana Lingkungan Hidup Indonesia* (WALHI)) concerning the environmental damage caused by Indorayon was heard by the Jakarta District Court. In *WALHI v Five Government Agencies and Indorayon Pulp and Paper Co,*[21] proceedings were brought against five national government agencies and *PT Inti Indorayon* seeking orders for, inter alia:

- declarations to the effect that actions taken by the defendants were illegal and that approvals granted by government agencies were invalid and
- damages equivalent to the cost of restoring damage caused to the Sibatu Loting Forest and the Asahan River.

The case became a *cause célèbre* when WALHI succeeded in gaining standing, as this was the first time an environmental organization had been granted legal standing. However, the court dismissed the main application.

In 1989, a claim for compensation arising from pollution of the Asahan River was heard by the Medan District Court in the case of *Samidun Sitorus and Nine People v Pt Inti Indorayon Utama.*[22] It was alleged that severe pollution had caused the river water to change colour and smell, loss of fish stock, and an inability to be used for daily needs or for income generation. The claim was rejected by the court on the basis that the procedure for processing compensation claims, which was to be the subject of a

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[20] The facility had a total production capacity of 240,000 metric tons of pulp and 60,000 metric tons of rayon fibre per year: "Indorayon to resume pulp production" *Jakarta Post* (11 May 2000). Indorayon is 86% owned by foreign shareholders.

[21] No. 820/PDT.G/1988 PN. JKT. PST.

[22] Medan District Court, North Sumatra Decision No. 154/Pdt.G/1989/PN. Medan 27 November 1989.

regulation, had not been passed.[23] In 1993, there was a further incident when a chlorine gas pipe and a wastewater pond broke releasing 60,000 tons of chlorine sulphide gas and 10,000 tons of hydrogen sulphide to the water of the Asahan River. The air pollution created a bad odour as well as acid rain.

Administrative decision-making

In June 1998, after a decade of disputes between the company and the local community, the then President BJ Habibie suspended operations and ordered an environmental audit. This decision followed months of violent confrontation between the local community and security forces.

On 19 January 2000, the Minister for the Environment recommended refusal of permission to recommence production; however, in a competing exercise of authority there was intense pressure by the State Minister for Investment and Development for the company to be allowed to recommence operations. In early April 2000, the company gave the government one week to decide whether to allow it to re-commence activities or be taken to international arbitration through the International Centre for the Settlement of Disputes in Washington DC for unlawful closure. [24]

On 10 May 2000, the Cabinet granted permission to the company to recommence pulp and paper operations but not rayon production. The basis of the decision was said to be that an environmental audit had found that the pollution from the rayon production was far more serious than the pollution from the pulp and paper production.[25] It was also said that the government would conduct a further environmental audit within 12 months to determine whether the pulp and paper operations would be allowed to continue. A legal regulation to provide the legal basis for the resumption of operations was to be issued.[26] At the same time, the government was not able to say when the company could resume

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23 Act No. 4 of 1982 on the Basic Provisions for Environmental Management (*Undang-undang No. 4 Tahun 1982 tentang Ketentuan-ketentuan Pokok Pengelolaan Lingkungan Hidup*). This procedure was never passed under the 1982 Act.

24 The company claimed that its inability to operate had resulted in a drop of its market capitalisation value from US $1.4 billion in 1996 to only $40 million in May 2000. By early 2000, both the Jakarta Stock Exchange and the United States Stock Exchange had threatened to de-list Indorayon from their trading board: "Indorayon's fate to be decided next month" *Jakarta Post* (1 May 2000).

25 "Indorayon to resume pulp production" *Jakarta Post* (11 May 2000).

26 "Indorayon to resume pulp production" *Jakarta Post* (11 May 2000).

operations. The plan to file proceedings in the International Centre for Settlement of Foreign Investment Disputes was dropped immediately after the government's decision. The decision has been strongly criticised and vigorously opposed by local community groups.[27]

Over two years later, on 30 November 2002, the Minister for Manpower and Transmigration announced that operations would be re-started after a period of '*sosialisasi'* (an Indonesian concept which involves general community education, and specifically, in cases such as this, securing the support of those affected by a new policy or a decision). The *sosialisasi* was to include the local and provincial government, the Department of Industry and the Minister for the Environment.[28] In mid-December 2002, it was reported that a difference of opinion had occurred between the provincial government, which had opposed the re-opening of the plant and the relevant BAPEDALDA. In the meantime, 16 demonstrators were in police custody.[29] In late December, it appeared that the district government was also opposed to the re-opening but that the Minister for the Environment was supportive of a trial period of three years during which intensive monitoring would be carried out.[30]

Comment

The history of the *Indorayon* case highlights serious deficiencies in the system for administrative enforcement. For many years of the dispute, no administrative sanctions were imposed. When administrative action was taken, the dispute remained unresolved, to the disadvantage of all concerned, as the sanctions were not effectively imposed. The numerous parties within central government who have had a role to play in decision-

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27 "*Keputusan Pemerintah Soal PT IIU*" ('Government's Decision on PT IIU'), *Kompas* (15 May 2000) and "*Keputusan Pemerintah Soal IIU tidak Memuaskan*" ('Government's Decision on IIU Not Satisfactory') *Kompas* (19 May 2000).

28 "*Pemerintah Restui Indorayon Beroperasi*" ('Government Allows Indorayon to Resume Operations') *Kompas* (2 December 2002).

29 "North Sumatra Council rejects possible re-opening of sawmill" *Jakarta Post* (19 December 2002).

30 "*Indorayon Tak Selayaknya Dibuka bila Masyarakat Menolak*" ('Indorayon Should Not Be Opened if the Community Refuses') *Kompas* (26 December 2002).

making can be seen. As well as the President, the following ministers have been involved: Minister for Public Works, Minister for Forestry, State Minister for the Environment, State Minister for Investment and Development, Minister for Manpower and Transmigration and the Minister for Industry. No single entity had final authority for decision-making, which was compounded by a failure to coordinate between the Ministers. Furthermore, there was a high level of discord in decision-making without an effective vehicle for the participation of all stakeholders including the public. It leads to the question, why this occurred and whether it can be related to an absence of more detailed and definitive rules on administrative sanctions.

2. CRIMINAL SANCTIONS

The supporting role of criminal law

Criminal law is seen as playing a supporting role in enforcement in most countries. Organisational filtering results in prosecution being employed in only a few of the cases that could be potentially brought to court.[31] As stated in the introduction to the Elucidation of the Act, in Indonesia it should only be used where: [32]

> …sanctions in other fields of law, such as civil and administrative sanctions and alternative dispute resolution are not effective and/or the level of blameworthiness of the party concerned is relatively serious and/or the results of the activity are relatively large and/or the action gives rise to uneasiness in the community.

The reluctance to resort to criminal law is in keeping with the view that the use of formal law is the culmination of the enforcement process, rather than a standard component.[33]

In Indonesia, there has been very little enforcement of environmental criminal law. It is difficult to obtain a complete picture, as only the Supreme Court (*Mahkamah Agung*) publishes judgments and they are not published according to jurisdiction or category of

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31 Snider L, "Cooperative Models and Corporate Crime: Panacea or Cop-Out?" Shover N and Wright J (eds.), *Crimes of Privilege – Readings in White-Collar Crime* (New York: Oxford University Press, 2001) 419-429 at 421.

32 Elucidation, General: Part 7.

33 Hawkins, Note 5 at 178 also chapter 10: "Law as Last Resort".

proceedings. The cases of which the writer is aware all pertain to proceedings brought before the passing of Act No. 23 of 1997 on Environmental Management and are as follows:[34]

Table 5: List of water pollution prosecutions

Date	Name of the case	Category	Location	Court Decision	Status
Not Known	Gudang Pupuk, Lumajang (fertilizer production)	Groundwater pollution of community water supply	Lumajang, East Java	2 months suspended sentence with minimum 5 months probation	No Appeal
20.3.93	State v Bambang Goenawan (the Sidoarjo case)[35]	Water pollution from bean curd production and pig farm	Sidoarjo, East Java	3 months suspended sentence with minimum 6 months probation & fine of Rp. 1 million	Decision of Supreme Court
31.8.94	State v Mulyadi Salim (the PT Menara Jaya case)[36]	Groundwater pollution of community water supply from electro-plating waste containing heavy metals	East Jakarta	6 months suspended sentence with 12 months probation & fine of Rp. 500,000.	Appeal to Supreme Court pending
27.9.95	State v Suwandi (the PT Surabaya Mekabox case)[37]	Water pollution from oil spill (3,000 litres) to Surabaya river	East Java	3 months imprisonment	Not known

There are likely to be a number of reasons for the low level of criminal enforcement activity in Indonesia. Limited resources are a major factor given the financial constraints facing government.[38] Perceived uncertainty of outcome combined with time delays and the heavy workload involved in preparing a criminal prosecution and the likelihood of a light penalty is likely to be disincentives. Deference to the social status of the owner of an industrial enterprise may also play a role.[39]

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34 Some of these cases were listed in Sembiring SN (ed.), *Hukum dan Advokasi Lingkungan* (Law and Environmental Advocacy) (Jakarta: Indonesian Centre for Environmental Law 1998) 119. Inquiries made with the Indonesian Centre for Environmental Law in early 2003 did not reveal information about other prosecutions in water pollution.

35 Discussed later in this chapter.

36 Decision of the District Court of Jakarta, Decision No. 175/PID/B/1993/PN.Jkt.Tim.

37 Decision of the Gresik District Court, East Java, Decision No. 04/PID.B/1995/PN/Gs.

38 This is a complaint in most countries, see Hawkins, Note 5 at 191.

39 These factors were suggested in December 2000, during an interview with an enforcement officer at the DKI Jakarta BAPEDALDA office.

Notably, there are no substantive administrative rules or guidelines setting out clear lines of responsibility for investigation of offences or the basis for the exercise of discretion in deciding whether or not to prosecute. Some countries have a national enforcement code or guidelines to cover both administrative and criminal enforcement.[40] In Indonesia, no single agency is responsible for enforcement: a number of government officers are involved, namely, environmental investigators (from environmental agencies and sometimes also from sectoral agencies), the police and prosecutors. This arrangement is likely to lead to problems in communication unless a clear *modus operandi* has been developed.

Additional obstacles are likely to be caused by the absence of authority in environmental agencies to pursue an investigation and take it to court directly. Rather, authority is spread between the environment agencies, the sectoral agencies responsible for the activity and the police[41] who brief the attorney-general's office to commence proceedings. This arrangement provides opportunities for corrupt practices to develop.[42] On the completion of an investigation, the police may refuse to accept a file. Even if a case is accepted by the police, the attorney-general's office may be unwilling to launch a prosecution. It is notable that the newly established Corruption Eradication Commission is authorised to pursue a case from the stage of investigation through to the court appearance.[43] Economic, social and political causes for the lack of prosecution in Indonesia are not considered here; rather, the analysis is concerned with the content of the sanction provisions. It should be assumed that a criminal charge would be vigorously defended. If a criminal provision is drafted in a complex way, it will be difficult to understand and be less accessible to government officials. In addition, if there is any uncertainty or ambiguity in the legislation, this is likely to provide a disincentive to a government agency considering its enforcement options.

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40 The UK Environment Agency has an Enforcement Code: Ball S and Bell S *Environmental Law – The Law and Policy Relating to the Protection of the Environment* (London: Blackstone Press Ltd, 4th ed., 1997) 147-148. In New South Wales, the EPA has published Prosecution Guidelines which identify key aspects of running a prosecution such as the basis upon which the EPA makes a decision to prosecute, the factors to be taken into account to deciding upon the appropriate defendant, the selection of charges, the mode of trial and mitigating factors in sentencing: http://www.epa.nsw.gov.au/legal/pprosguid.htm [accessed 25 July 2003].

41 Act No 23 of 1997 on Environmental Management (art 40).

42 Santosa touches on some of these factors: Santosa MA, *Good Governance dan Hukum Lingkungan* (*Good Governance and Environmental Law*) (Jakarta: Indonesian Centre for Environmental Law, 2001) at 253-254.

43 "Screening of graft court judges passes almost unnoticed" *Jakarta Post* (21 June 2004) at 2.

The criminal sanction rules

Pre-sanction obligations and prohibitions

As discussed in chapter 6, when a rule is backed by a sanction, the sanction may be considered as a separate rule. The prohibitions and obligations that form the pre-sanction rules in the Act were discussed in chapters 8 and 9. It was noted that the definition of 'environmental pollution' entails proof of causation, as does the definition of water pollution. Under the Regulation, a pre-sanction rule is established in the prohibition against disposal of solid waste or gaseous waste to water or water resources (art 42). Pre-sanction rules are also established in the obligations to:

- respond and restore the environment after an accident (art 26)
- preserve the quality of water in water resources, namely resources within protected forests, springs outside protected forests and aquifers (art 31(a) & 4(3))
- control water pollution in a water resource (art 31(b) & 4(4))
- provide true and accurate information (art 32)
- prevent and respond to a pollution incident (art 37)
- comply with licence conditions in the disposal of liquid waste to water (art 38)
- carry out an investigation on the disposal of liquid waste to water or water resources in the process of applying for a liquid waste disposal licence (art 41)

Each of these pre-sanctions rules can only be enforced using the sanction rules in the Act.

The sanction rules

The offence provisions in the Act are divisible between those that require proof of actual damage and those that do not, as follows:

	PROOF OF DAMAGE ***Delik materiil***	**NO PROOF OF DAMAGE** ***Delik formal***
INTENTIONAL CONDUCT	Article 41(1)& (2)	Article 43 (1) & (2)
NEGLIGENT CONDUCT	Article 42 (1) & (2)	Article 44 (1) & (2)

Heavier penalties are available for intentional rather than negligent actions. A distinction has been made between situations where damage has actually occurred and where there is the potential for an action to give rise to environmental pollution or damage. There is a further distinction between criminal actions carried out by individuals and legal entities such as a company, association, foundation or other organisation, whereby the fine imposed on legal entities is increased by a third (art 45).

- Damage has occurred (*delik materiil*)

(a) Intentional actions that result in environmental pollution or damage

> Article 41
>
> (1) Any person who in contravention of the law intentionally carries out an action which results in environmental pollution and/or damage, is criminally liable to a maximum imprisonment of 10 (ten) years and a maximum fine of Rp. 500,000,000 (five hundred million rupiah)
>
> (2) If a criminal action as provided for in (1) above causes the death or serious injury of a person, the person who carried out the criminal action is criminally liable to a maximum imprisonment of 15 (fifteen years) and a maximum fine of Rp. 750,000,000 (seven hundred and fifty million rupiah).

This is the most serious offence with the heaviest sanction. It requires proof of the following elements of the offence:

a. contravention of a law

b. by an intentional action

and

c. the action resulted in environmental pollution and/or damage.

There is an aspect that is not clear from the drafting, namely, whether the intention goes only to the actions or the result of the actions. This issue may arise in a prosecution and, if so, would have to be dealt with by the court.

(b) Negligent performance of actions that result in environmental pollution or damage

> Article 42
>
> (1) Any person who due to their negligence performs an action that causes environmental pollution and/or damage, is criminally liable to a maximum imprisonment of three years and a maximum fine of Rp. 100,000,000 (one hundred million rupiah).

This offence carries a lesser penalty. The fine is increased to Rp. 150,000,000 and a maximum of 5 years imprisonment if serious injury or death is caused (art 42(2)). Notably criminal proceedings under article 42 do not seem to require the breach of any law. Thus, the components of this offence are:

a. negligent performance of an action

   and

b. the action causes environmental pollution and/or damage.

- Potential damage (*delik formal*)

(a) *Intentional release of substances knowing or with good reason to suppose environmental pollution or damage will occur*

> Article 43
>
> Any person who in violation of applicable legislation, intentionally releases or disposes of substances, energy and/or other components which are toxic or hazardous onto or into land, into the atmosphere or the surface of water, imports, exports, trades in, transports, stores such materials, operates a dangerous installation, whereas knowing or with good reason to suppose that the action concerned can give rise to environmental pollution and/or damage or endanger public health or the life of another person, is criminally liable to a maximum of six years imprisonment and a maximum fine of Rp. 300,000,000 (three hundred million rupiah) (emphasis added)

The provisions contained in article 43 constitute a *delik formal*, which does not require proof of the consequence of an action.[44] It would be simpler prosecute an offence under article 43, as it is only necessary to prove that the action could give rise to (*dapat menimbulkan*) pollution and/or environmental damage or endanger public health or the life of another person.

Notably, this provision can be applied to a situation where public health has been affected or someone's life has been endangered. This provision applies to "substances, energy and/or other components which are toxic or hazardous". As regulations have been passed pursuant to the Act for the management of hazardous and toxic material, these regulations should be referred to in identifying hazardous and toxic substances. In addition, a prosecutor would have to prove the following:

a. breach of applicable legislation

and

b. intentional release or disposal of substances, energy and/or other components that are toxic or hazardous to land, air or water

or

c. intentional importation, export, trading in, transportation, storage of substances, energy and/or other components that are toxic or hazardous or intentional operation of a dangerous installation

and

d. knowledge or evidence to show that the person had good reason to suppose that the action concerned can give rise to environmental pollution and/or damage or endanger public health or the life of another person

(b) Negligent breach of legislation

Article 44

(1) Any person who in violation of applicable legislative provisions, because of their negligence performs an action as in article 43 is criminally liable to a maximum of three years imprisonment and a maximum fine of Rp. 100,000,000 (one hundred million rupiah).

In addition, if death or serious injury is caused then pursuant to article 44 (2) the fine is increased to Rp. 150,000,000 and a maximum of 5 years imprisonment.

Under this provision, there is no need to prove intention or damage and for this reason, it provides a simpler basis for a prosecution in comparison to the other provisions. However, many of the components of the offence in article 43 will still need to be established. It would appear that a prosecutor would need to provide evidence that:

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[44] Koesnadi, H, *Hukum Tata Lingkungan* (Environmental Law) (Yogyakarta: Gadjah Mada University Press, 7th ed., 1999) 409. Also Rangkuti SS, *Hukum Lingkungan dan Kebijaksanaan Lingkungan Nasional* (Surabaya: Airlangga University Press, 2nd ed., 2000) 330.

a. there was a breach of applicable legislation

and

b. negligent release or disposal of substances, energy and/or other components that are toxic or hazardous to land, air or water

or

c. negligent importation, export, trading in, transportation, storage of substances, energy and/or other components that are toxic or hazardous or operation of a dangerous installation.

Difficulties that arise in proof of causation

The provisions in articles 41 and 42 along with the definition of 'environmental pollution', 'environmental damage' and 'water pollution' requires consideration of causation. Proof of causation often poses major hurdles in environmental law cases. An objective assessment needs to be made, guided by expert evidence.[45] For example, in a water pollution prosecution, scientific evidence of water conditions before and after the polluting activities of the defendant may be required. Furthermore, a prosecutor must be ready to address the argument that the cause of the water pollution was in fact unrelated to the actions of the defendant.

Actual damage will need to be established for either of the *delik materiil* provisions. Under articles 41 and 42, a prosecutor will be required to establish a causal connection between the actions of the defendant and the pollution or environmental damage that is alleged to have occurred. This means that the defendant's action (or inaction) must be shown to be a cause that can reasonably be considered the cause of the environmental damage or pollution.[46] This aspect of the sanction rule produces an onerous burden on a would-be prosecutor. However, the burden is likely to be justified by the weight of the sanction; such heavy sanctions should only apply to especially serious behaviour.

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[45] As recognised in the Indonesian context by Koeswadji HH, *Hukum Pidana Lingkungan* (Bandung: Penerbit PT Citra Aditya Bakti, 1993) at 59.

[46] ibid., at 55.

Unnecessary complexity

Other difficulties are caused for would-be prosecutors from the legal drafting of the provisions.[47] First, the mental element, namely the component of intention or negligence, adds to the complexity of the scope of the sanction rules.

The burden of proving intention or negligence exists in all environmental law offences.[48] The difficulty of proving intention is attested to by the fact that in the three successful prosecutions for water pollution, each of them failed to establish intention and were only successful in the claims for criminal negligence. It has been held that intention requires proof of both a wish to do something and knowledge of the consequences that will result from the action.[49] The mental element is particularly difficult to establish when a corporation or other legal entity is being sued. The Act establishes corporate liability by defining 'a person' as an individual person and/or a group of people and/or a legal body (art 1(24)).

A trend in some countries, particularly in England and Australia, has been to remove this evidential burden by imposing absolute or strict liability in relation to lesser environmental offences. This has been done for policy reasons where offences are in the nature of public nuisance or public welfare offences. It means that proof of a violation is relatively simple:

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47 Problems that may be caused by the rules of evidence are beyond the scope of this book. This applies to both criminal and civil enforcement. The rules of evidence for criminal enforcement require the offence to be established through at least two forms of evidence from the following (Act No. 8 of 1981 on Criminal Procedure *Kitab Undang-undang No. 8 Tahun 1981 tentang Hukum Acara Pidana* (KUHAP) (arts 184-189)):
(1) evidence from a witness
(2) expert evidence
(3) documentation attached to a sworn statement
(4) indication (from information from a witness, a document or information from the accused)
(5) evidence of the accused.

48 It may be difficult to alter perceptions on the benefits to be obtained by removing these requirements. The element of fault (*kesalahan*) along with responsibility (*pertanggungjawaban*) and punishment (*pidana*) are deeply embedded in the legal system: Koeswadji, Note 45 at 43.

49 *PT Surabaya Mekabox* Gresik District Court, East Java, Decision No. 04/PID.B/1995/PN/Gs.

all that needs to be established is that an activity resulted in pollution.[50] For example, in Australia where an offence is one of strict liability, proof of a specific state of mind - motive, intention, knowledge or advertence - is not necessary.[51] In strict liability, intention to commit an offence is presumed to be present unless evidence is provided by the defendant of an honest and reasonable, but mistaken belief of facts, which, if true, would have made the conduct not criminal.[52] These altered rules of liability assist prosecutions, particularly corporation prosecutions, where it may be difficult to prove actual intention or negligence. The extent to which strict liability is compatible with the Criminal Code (*Kitab Undang-undang Hukum Pidana* (KUHP)) would need to be assessed. However, both the KUHP and the KUHAP[53] are in the process of revision, which provides an opportunity to consider the special requirements of prosecuting corporate offences in Indonesia.

Lack of precision and clarity in targeting the offender

The second major weakness is the lack of precision in identifying the entitity/ies that can be sued. An important aspect of securing a conviction is the prosecution of the correct entity. In this regard, examination of the provisions that establish corporate and managerial liability is required. Corporate and managerial liability is provided for in article 46(1), which states:

> If a criminal action is carried out in the name of a legal body, company, association, foundation or other organisation, criminal charges may be made and criminal sanctions are imposed both against the legal body and against those who give the order to carry out the criminal action concerned or who act as leaders in the carrying out of it and against the two of them.

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[50] Hawkins, Note 5 at 5. This is also the case in European Community law as discussed by Bergkamp L, in "The White Paper on Environmental Liability" (2000) Vol 9 No 4 *European Law Review* 105-114 and (2000) Vol 9 No 5, *European Law Review* 141-147 at 105. Strict liability is seen to be relevant for conventional and environmental damage caused by activities regarded in European Community law as "dangerous" (virtually all industrial activities). Fault liability is for natural resources damage from non-dangerous activities.

[51] *Majury v Sunbeam Corporation Ltd* [1974] 1 NSWLR 659 at 664; *Cooper v ICI Operations P/L* (1987) 64 LGRA 58 at 65; 31 A Crim R 267 at 271; *Tiger Nominees v SPCC; Kristin Nominees Pty Ltd v SPCC* (1991) 24 NSWLR 715 at 719-720.

[52] This defence is not available in UK where liability is absolute and as a result there is no defence of honest and reasonable mistake of fact nor is there a defence of "due diligence". In Australia, strict liability may lead to a debate over whether or not the defendant has made an honest and reasonable mistake of fact, see *He Kaw Teh v R* (1985) 157 CLR 523; *Jiminez v R* (1992) 66 ALJR 292, *EPA v Water Board* (1993) 79 LGRA 103.

[53] See note 47.

Vicarious liability

In Indonesia, it is not expressly stated that where an employee who is acting in the normal course of his employment commits an offence, the employer (a person or a corporation) will be vicariously liable. Indeed, in the *PT Surabaya Mekabox* case the employee, who was an operator, was prosecuted. However, that case was heard in 1995, prior to the 1997 Act.

Article 46 (2) seems to provide for vicarious liability in environmental offences. It states:

> If a criminal action, as is provided for in this Chapter, is done by or in the name of a legal body, company, association, foundation or other organization, and is done by persons, both based on work relations and based on other relations, who act in the sphere of a legal body, company, association, foundation or other organization, criminal charges are made and criminal sanctions imposed against those who give orders or who act as leaders regardless of whether the people concerned, both based on work relations and based on other relations, carry out the criminal action individually or with others.

The mention of actions 'done by persons, both based on work relations and based on other relations, who act in the sphere of a legal body …' could mean that where an employee acts in the normal course of their employment, the director or manager of the company will be made liable rather than the employee.[54] However, this provision raises some questions. For example, what is required to establish that a criminal action '*is done by or in the name of* a legal body … ' and that it is done 'based on work relations'? Normally, a polluting event can be related to the action of an employee. Does this mean that an employee who is acting in the normal course of his employment will be regarded as acting 'by or in the name of' his employer?

Managerial liability

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[54] In Australia, strict liability has facilitated the acceptance of vicarious liability. The reasoning has come from tort law where an employee who acts in the course of his employment may expose an employer, who is not personally at fault, to a penalty as well as to liability for damages, see *SPCC v Tiger Nominees Pty Limited*; *SPCC v Kristin Nominees Pty Limited* (Land and Environment Court, 9 May 1991) confirmed by the Court of Criminal Appeal (1992) 25 NSWLR 715 (Gleeson CJ, Mahoney JA, Campbell J) 17 February 1992, Gleeson CJ at 720.

Those who 'give the order to carry out the criminal action concerned' or 'who act as leaders' are made liable under the Act (art 46(1) & (2)). Thus, before launching a prosecution, the investigators of an offence should identify such persons within the company structure. It may not be easy to identify the relevant person; access to internal company records and documentation may be required. In other countries, such information can be obtained through court processes that allow the prosecutor to obtain evidence to prepare for the trial. Perhaps this difficulty is helped by the provision that states (art 46(3)):

> If charges are made against a legal body … represented by someone who is not a manager, the judge can make an order so that management face the court in person.

This provision, accords with the trend to remove any insulation of top-level management from personal responsibility. However, it does not clarify exactly who will be made liable. For example, in a large company, will it be environmental officer, the chief executive officer or the company directors who is made liable? Until recently, there were no cases brought against companies in environmental enforcement, but in a prosecution for environmental damage arising from forest fires against PT Adei, the President was prosecuted. A fine of Rp 100 million and a gaol sentence of eight months was imposed but it was not clear in the judgment who would serve the gaol sentence.[55]

In practice, it may prove difficult to identify an appropriate person, especially if the regulatory authority is dealing with an Indonesian conglomerate or a multinational company where decision-making is delegated from corporate headquarters to branch managers. The means to identify such people should be set out in the legislation by reference to the Memorandum and Articles of Association, the board of directors or managing director, or those who received a delegation of part of the functions of the board of directors or managing director.

Corporate liability

Article 46(1) states that charges are to be made 'both against the legal body *and* against those who give the order to carry out the criminal action concerned or who act as leaders in the carrying out of it and against the two of them'. This provision seems to exclude

proceeding solely against a legal entity such as a corporation, which would be a simpler approach. The requirement for intention or negligence (where retained in more serious offences) could be accommodated by a provision that 'evidence that an officer, employee or agent of a corporation (while acting in his capacity as such) had, at any particular time, a particular intention, is evidence that the corporation had the intention'.[56] This would avoid the need to find fault in the board of directors, the managing director or persons who received a delegated function from the board of directors.

If a prosecution could take place against a corporation then it could be combined with a presumption that each person who is a director of the corporation *or* who is concerned in the management of the corporation is taken to have contravened the law *unless* they are able to produce evidence to the contrary. In this way, the possibility of director's or managerial liability is simplified and the burden is shifted to the directors or management of the corporation to establish (using information to which they have easy access) that they should not be held liable.[57]

3. THE 'INTERPRETIVE COMMUNITY' AND THE COURTS IN INDONESIA

In chapter 6, there was discussion about inevitable difficulties in effective rule making which arise from the open texture of language and the problem of interpretation. The role of the courts in the 'interpretive community' was also discussed. The leader of the interpretive community is the judiciary as it provides the final interpretation of a legislative provision. The figure of a cycle of knowledge was presented to show how meaning is derived through use and how legal interpretation by the courts feeds into the development of a legal drafting tradition.

It is a fundamental expectation within the cycle of knowledge, and within the rule of law, that judicial decisions be reason-based. The method of interpretation in Indonesia has been said to consist of the following steps:[58]

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55 Down to Earth No. 53-54 August 2002 "Legal Action on Forest Fires" http://dte.gn.apc.org/53act.htm

56 *Protection of the Environment Operations Act* 1997 (NSW), s 169(4).

57 As is done in *Protection of the Environment Operations Act* 1997 (NSW), s 169(1) which provides defences where the corporation contravened the provision without the knowledge actual, imputed or constructive of the person, or the person was not in a position of influence or the person used all due diligence to prevent the contravention.

58 Kusumaatmadja M dan Sidharta BA, *Pengantar Ilmu Hukum – Buku 1* (Indonesia: Alumni, 2000) 99-111.

1. grammatical construction

2. reference to statutory history

3. reference to other parts of the text or other relevant legal instruments in a systematic way

4. sociological interpretation

5. teleological interpretation or purposive approach.

Judges are said to construct or 'refine' the law through the application of reasoning;[59] however, judicial decisions in Indonesia frequently do not exhibit reason-based decision-making. The causes for this are likely to be many, not the least being the widely acknowledged corruption in the court system. Space does not permit a full exploration of the reasons for the quality of judicial decision-making that is encountered in Indonesia. However, it is suggested that difficulties that arise from legal drafting and poor quality of judicial reasoning are likely to be linked, each influencing the other. This possibility is demonstrated in the *Sidoarjo* case considered below, where complex statutory requirements were sidestepped by the courts to achieve a conviction.

Comment [BB10]: That is, if you include the comment I suggested previously

The *Sidoarjo* case: avoidance of burdensome rules

Before the 1997 Act, the failure to prosecute pollution offences in Indonesia was attributed partly to the difficulties in establishing the causal connection between the breach of effluent guidelines and a decrease in ambient standards.[60]

Nature of the prosecution

In *State v Bambang Goenawan* (the *Sidoarjo* case)[61] concerned pollution of the Surabaya River between March 1986 and July 1988 by *PT. Sidomakmur* and *PT Sidomulyo* trading as *PN Sidoarjo*. The director of both the companies was Bambang Goenawan, who was prosecuted personally. Based on the test results of the Technical Bureau for Environmental Health (*Balai Teknik Kesehatan Lingkungan* (BTKL)) it was alleged that

[59] ibid., at 111.
[60] ibid., at 58.
[61] Supreme Court Decision No. 1479 K/Pid/1989.

during the period from March 1986 and July 1988:

(a) *PT Sidomakmur* discharged levels of wastewater from the production of tofu consisting of BOD 3,095.4 mg/l and COD 12,293 mg/l; and

(b) *PT Sidomulyo* discharged waste from its piggery consisting of BOD 462.3 mg/l and COD 1,802.9 mg/l.

These levels exceeded the maximum levels then prescribed by a Decision of the Governor of East Java[62] of BOD 30 mg/l and COD 80 mg/l. The court of first instance acquitted the accused but this decision was overturned by the Supreme Court (*Mahkamah Agung*).

The evidence

The prosecution evidence was based on the simple allegation that the defendant had intentionally polluted the water of the Surabaya River in contravention of section 22(1) of Act No. 4 of 1982 on the Basic Provisions for Environmental Management (*Undang-undang No. 4 Tahun 1982 tentang Ketentuan-ketentuan Pokok Pengelolaan Lingkungan Hidup*). In the alternative, it was claimed that the defendant had negligently polluted the water of the Surabaya River in contravention of section 22(2) of the same statute. These provisions are similar to articles 41 and 42 in the Act discussed above, which require proof environmental damage or pollution has resulted from an action. They also rely on a definition of pollution that requires proof that the pollution caused depletion in water quality. As previously suggested, this definition is unnecessarily complex and burdensome for enforcement where there are multiple sources of pollution.

During the investigation, an official of the Department of Fisheries gave evidence that whilst industrial pollution in the Surabaya River had caused fish kills, there were many other polluting factories. Another witness, an official of the Drinking Water Supply Company (*Perusahaan Daerah Air Minum*)(PDAM)), said that PDAM spends a lot of money to normalise the quality of drinking water taken from the Surabaya river and that it was not certain whether waste that caused poor water quality came from the defendant's companies. The court conducted a view of the premises and made a number

of favourable findings for the defendant concerning arrangements made for handling their waste. A second set of sample results was available to the court, which yielded dramatically lower results than the original sample results in the prosecution case.[63]

Court finding

Causation was the major issue in the case at first instance. The trial judge dismissed the charge and found that although it was proven that waste had been discharged to the river by the defendant, there was no evidence on the impact of the waste.[64] This became the determining issue rather than the difference between the two sample results. It is suggested here that the decision of the judge at first instance was a correct reading of the Act even though the implication is that it would be difficult to establish an offence in any situation where there is a cumulative impact from the discharge of numerous sources of industrial waste.

The appeal was heard by the Supreme Court.[65] In a judgment dated 20th March 1993, the Court reversed the decision at first instance. The Court found that:

- Even though there were other sources of pollution, the defendant significantly added to the level of pollution in the Surabaya River.

- The charge of intentional discharge failed, as an effort had been made by the defendant to improve its method of disposal of waste, even though the result was unsatisfactory. The alternative charge of negligent disposal of the waste was proven.

Comment

The decision of the Supreme Court was hailed as providing the basis for further prosecutions.[66] However, the finding of criminal negligence without evidence that the

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62 Governor's Decision No. 43 of 1978.

63 It is not clear from the judgment whether further sampling was requested by the court or whether it was part of the defendant's evidence. The results for the tofu production were 17.54 mg/l BOD and 68.58 mg/l COD as tested by the Bureau of Development and Industrial Research (*Badan Penelitian Industri Kanwil Departemen Perindustrian*)(BPPI) Department of Industry, East Java.

64 Decision of the Surabaya District Court, East Java, Decision No. 122/Pid/B/1988 PN, dated 6 May 1989.

65 From the Supreme Court Decision it appears that there was no hearing by the High Court.

discharge of the waste actually resulted in the pollution of the waterway lacks a legal basis.[67] Rangkuti has argued that the prosecution should have been required to prepare supporting evidence on the quality of the river water, in addition to the quality of the liquid waste. The evidence of the prosecution should have consisted of samples taken upstream of the discharge, at the point of discharge and downstream of the discharge, to provide a causal connection between the discharge and pollution in the river.[68] Another difficulty with the decision was that at the time of the hearing there was no provision stating that the breach of a water quality discharge standard could provide the basis for a criminal conviction.[69] As identified by Rangkuti, it was erroneous to base criminal proceedings on a Decision of the Governor, which is merely an administrative decision with the status of a guideline.[70]

Reflections on interpretation of legal rules

In two of the success prosecutions mentioned in Table 5 above, involved relatively simple factual situations. In the *PT Menara Jaya* case, there was evidence from the local community to the effect that polluted groundwater had been drinkable before the establishment of the company's operations but was no longer drinkable after the company had commenced operations. The pollution was of a distinctive quality containing heavy metals that could only have come from the defendant's premises. The *PT Surabaya Mekabox* case concerned an oil spill, which was a distinct event leading to the discharge of 3,000 litres of oil. In such cases, there appear to have emerged core meanings in the application of legislative provisions.

However, the *Sidoarjo* case presented a more complex factual situation as the water alleged to have been polluted by the company was already polluted from multiple sources of pollution. To achieve an environmentally acceptable outcome, the court did not apply the statutory rules. Why this occurred is a matter for conjecture; however, it is possible that the court wanted to secure a conviction but found the requirements of the Act to be

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66 Riyanto ES, *Penegakan Hukum Lingkungan dalam Perspektif Etika Bisnis di Indonesia* (Environmental Law Enforcement from the Perspective of Business Ethics in Indonesia) (Jakarta: Gramedia Pustaka Utama, 1999) 24 citing Patzer R. a consultant advising BAPEDAL in 1994 as part of the EMDI project.

67 Rangkuti SS, *Hukum Lingkungan Dan Kebijaksanaan Lingkungan Nasional*, (Surabaya: Airlangga University Press, 1st ed., 1996) 209.

68 Riyanto, Note 66 at 20

69 Rangkuti, Note 67 at 209

overly complex. The deviation from the words of the statute presents an obstacle to the development of the knowledge cycle about the formulation and interpretation of legal rules discussed in chapter 6 (see Figure 4).

If the court had applied the rules, even though the result would not have been favourable to those seeking to protect the environment, it would have provided guidance for the preparation of evidence for future prosecutions. The decision inhibits the development of common expectations of the meaning of statutory provisions and, more broadly, how language can be used to serve institutional purposes in environmental law. It also undermines the development of linguistic and pragmatic competence in legal drafting.

Under 1997 Act, distinct offences are created: the *delik materiil* and *delik formal*. However, it remains to be seen how the court will interpret the *delik materiil* provisions. Will it again try to side-step the causation requirements where there are multiple sources of pollution? It is notable that despite this 'success', there have been no new prosecutions under the 1997 Act (to the writer's knowledge). The lack of prosecutions in water pollution means that the courts have yet to play their role as an interpretive community in giving real meaning to the provisions of the 1997 Act.

Conclusion

This chapter has reviewed the rule content concerning official sanctions. It has been shown that provisions on administrative sanctions are essentially permission-granting and that there are no substantive administrative rules to align a particular sort of breach with a particular administrative sanction. There are also no national procedural rules governing the manner in which administrative sanctions are to be imposed. This has relevance for consistency, predictability, proportionality, procedural fairness and accountability.

The lack of enforcement of criminal sanctions for water pollution has been noted and it has been suggested that the criminal sanction provisions are drafted in an unnecessarily complex way. The requirements for proof the mental element of offences are particularly onerous. The targeting of entities that may be subjected to liability within the scope of the sanction rule also lacks precision, which may make a prosecutor

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[70] ibid., at 208.

uncertain about which entity to prosecute - a director, the company or an individual within the company.

Involvement of the courts in enforcing environmental obligations and prohibitions is central to the existence of environmental law as a legal sub-system. The judiciary, as the leader in the interpretive community, can interpret rules and contribute to the creation of core meanings. However, unless the courts are able to play this role through the launching of pollution prosecutions the knowledge cycle will not be begin.

A simplification and rationalisation of the rules making up the criminal sanctions provisions may encourage pollution prosecutions. If obligations and prohibitions are actually enforced, legal rules will cease to be viewed as optional instructions. If statutory provisions are enforced through the courts, there will be a basis for genuine rules to develop and meaning will be settled. However, if the courts fail to apply reason-based decision-making, this will undermine rule formation. The stage of statutory drafting is a logical point at which to reinforce this cycle.

CHAPTER ELEVEN

COMMUNITY SANCTIONS

Introduction

This final chapter continues the exploration from the previous chapter on how to cultivate the sense within the community of having an obligation to protect the environment in Indonesia. It explores the idea that the community may be able to assist the task of creating the social pressure necessary to generate the component of obligation currently absent in Indonesian law. This avenue, which involves both criminal and civil proceedings, will be referred to broadly as the 'community sanction'. The legal rules that allow community groups in Indonesia to assert environmental rights and obligations through the courts are reviewed in this chapter.[1]

In water pollution law, community enforcement is relevant where a dispute arises between a polluter and a community that suffers from the effects of water pollution. Whilst there is no systematically compiled research in Indonesia on the number of such disputes, it is likely that there are many.[2] In 1997, new rights were created to enable class actions and the recognition of legal standing for environmental non-government organisations. These changes would support the development of public interest litigation which underlies civil enforcement procedure; however, it is shown that in a similar way to criminal sanctions, difficulties arise from the drafting of rules for community sanctions, particularly concerning causation and the range of available legal remedies.

It is suggested that the concepts behind community sanctions deserve further attention in Indonesia. Whilst community sanctions can be seen as generally supportive of *reformasi*

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[1] This chapter will not consider cases that have been resolved through alternative dispute resolution (ADR), which by its private nature makes it less effective as a means for generating social pressure or determining meaning to rules.

[2] During 1997, it was estimated that there were at least 19 unresolved disputes about industrial water pollution in Central Java alone, see Gita Pertiwi, *Report on Advocacy and Management of the Issue of Pollution in Central Java, 1997*. Solo: Gita Pertiwi, 1997. Typically, the affected communities are villagers in farming or fishing

aspirations of public participation and community empowerment, there are deeper issues at stake. Those issues concern the means available to internalise legal rules and to turn obligations expressed in legal rules into social norms and moral obligations.

1. GENERATING SOCIAL RULES TO SUPPORT COMPLIANCE

Building the internal aspect of legal rules

The official enforcement activity discussed in the last chapter is 'necessary but not sufficient' for compliance with legislative obligations. The achievement of compliance cannot rely on the capacity of enforcement agencies to impose sanctions against every violation; this is not physically possible. It is clear that something more is required, particularly in the form of social pressure arising from widespread identification with the objectives of environmental law, whether or not harm is incurred personally, followed by expressed indignation when it is breached. Ideally, the majority of the population act in a law-abiding manner because of a sense of personal values that relate to the collective. Informal social control has been found to exert more power over human behaviour than formal social control.[3] Often a sense of shame or embarrassment will be felt, regardless of whether an illegal act is discovered. For Indonesia, the question that arises is how can a situation be created where the majority of the population comply with environmental laws because they feel it is 'the right thing to do.

The existence of a social rule will contribute to a person sensing that they have an obligation, as a social rule makes a certain type of behaviour a standard. For a social rule to exist, there needs to be a combination of regular conduct with a distinctive attitude to that conduct as a standard. It also involves normative vocabulary such as 'ought', 'must', should' to draw attention to a standard of conduct. The social pressure that supports the rule may take the form of hostile or critical reaction. It may arise from feelings of shame, remorse or guilt to create moral pressure and not need physical sanctions. As stated by

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areas undergoing rapid industrialisation. Frequently, industry dumps its waste directly onto land or into waterways without pre-treatment and as a result, fishponds, land, groundwater and rivers are polluted.

[3] Fisse B and Braithwaite J, *The Impact of Publicity* (Albany: State University of New York Press, 1983) 246-247 and Braithwaite J *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989) 144-145.

Hart, 'the social pressure appears as a chain binding those who have obligations so that they are not free to do what they want'.[4]

> The other end of the chain is sometimes held by the group or their official representatives, who insist on performance or exact a penalty: sometimes it is entrusted by the group to a private individual who may choose whether or not to insist on performance or its equivalent in value to him. The first situation typifies the duties or obligations of criminal law and the second those of civil law where we think of private individuals having rights correlative to the obligations.[5]

In the absence of strong social rules, pressure needs to be actively generated. According to Hart, where a society is organised according to rules, this in itself becomes a reason or justification for a hostile reaction from the community upon the breach of a rule. Hart referred to this as the 'internal' aspect of rules.[6] Where a society lives by rules, those rules will be internalised so that a part of society will see their own and other people's behaviour in terms of those rules. They will accept and voluntarily cooperate with maintaining the rules. They are likely to view with hostility those who do not obey the rules, as they identify with the system of rules as being necessary and valuable for the maintenance of social values and the society generally.

If this Hartian insight is applied to environmental law in Indonesia, voluntary compliance with environmental law will not be achieved until the society internalises the rules within environmental law and compliance is seen as being necessary for the well-being of society. It is for this reason that the discussion of the system of primary and secondary rules contained in chapter 4 is not only relevant to understanding the minimum requirements for the existence of a legal system; it has wider implications for the development of social rules within society.

With the strengthening of social rules, a legal obligation is not just a legal obligation - it is also a moral obligation. The morality comes not from a higher order of moral

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4 *Hart HLA, The Concept of Law: With a Postscript Edited by Raz J and Bullock PA* (England: Clarendon Press Oxford, 2nd ed., 1994) at 87.
5 ibid., at 87-88.
6 ibid., at 84.

obligations but from the justification of the practice:[7] from the sense that there is a justification in terms of community-wide interests or interests that may be of a reciprocal nature between members of the community or between humans and the natural environment. As a result, even where certain individuals have not suffered directly because of a breach of a legal rule, they may choose to take legal action to ensure compliance with certain legal rules, if they have the right to do so. This possibility is at the heart of provisions allowing for community enforcement, particularly the right to obtain legal standing granted to non government organisations. The relevant provisions in Indonesian legislation for facilitating this participation will be considered below.

Only limited community rights to date

Civil actions for compensation or to require that 'certain actions' be carried out

Act No. 23 of 1997 on Environmental Management (*Undang-undang No. 23 Tahun 1997 tentang Pengelolaan Lingkungan Hidup*) ('the Act') contains a legal rule imposing an obligation to pay compensation and to carry out 'certain actions' where environmental pollution or damage has been caused. Article 34(1) states:

> Every action, which infringes the law in the form of environmental pollution and/or damage which gives rise to adverse impacts on other people or the environment, obliges the party responsible for the business and/or activity to pay compensation and/or to carry out certain actions.

In the Elucidation, 'certain actions' are said to be 'legal measures' including 'orders to install or repair a waste treatment facility, restore environmental functions and to remove or destroy the cause of the pollution or damage'.

[7] A point made by Smith JC, *Legal Obligation* (London: The Athlone Press, 1976) 87.

Class actions

Article 34 is supported by the grant of a right to communities that have suffered from pollution or environmental damage to commence proceedings to enforce the obligation as a class action. Article 37(1) provides:[8]

> The community has the right to bring a class action to court and/or report to law enforcers concerning various environmental problems that inflict losses on the life of the community.

The Elucidation says that a small group will have the right to represent a larger number of people in the community where there are common problems, legal facts and demands.[9] In 1997, the class action was a new concept in Indonesia, which was only understood by few practitioners or legal experts. Indeed, it has been noted that there has been some confusion between the concept of class action and legal standing.[10] However, it can be broadly seen to seek to apply mechanisms developed in Anglo-American law opening up the courts to citizen groups in public interest litigation, which is able to protect the public interest in the face of administrative agencies proving inadequate.[11]

The provision on class actions is combined with another provision concerning the reporting of environmental problems to law enforcers. Logically, the two provisions are unrelated as they present two alternatives available to a community that has suffered as the result of environmental damage,[12] namely to seek a remedy through the court system by commencing a class action or to rely on the government enforcement agency to represent their interests. This would appear to be an example of poor legal drafting.

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8 Notably, this distinct provision is mentioned in one sentence together with a very different kind of right, the right to report.

9 Procedures for Class Actions have been passed pursuant to Regulation of the Supreme Court No. 2/2002 dated 26 April 2002.

10 Santosa MA, *Good Governance dan Hukum Lingkungan* (*Good Governance and Environmental Law*) (Jakarta: Indonesian Centre for Environmental Law, 2001) at 309.

11 Sax J, Defending the Environment: A Strategy for Defending the Environment (New York: Alfred A Knopf, 1971)

12 As will be shown below, a different interpretation has been taken by the court.

Legal standing

The right to legal standing has been confirmed in the Act in article 38(1), which states:

> In the scheme of implementing responsibility for environmental management consistent with the partnership principle, environmental organisations have the right to bring a legal action in the interest of environmental functions.

This provision enables non government organisations to act in the name of the environment; it does not limit the jurisdiction in which legal standing may be granted. The only limitation is the exclusion of legal standing for compensation claims. Article 38(1) gives the environment an independent status or value as distinct from rights conferred on individuals or communities and lays the foundation for the development of civil law under which redress is available for purely environmental harm.

As with the provisions on class actions, the grant of legal standing to environmental groups follows developments in the Anglo-American legal system, which have provided for the gradual extension of legal rights to broader and broader legal classes. It allows for the possibility that actions to be brought on behalf of natural objects in the environment.[13]

To qualify for legal standing to act on behalf of the environment, pursuant to article 38(3) and the Elucidation, an organisation will have to establish that:

(a) it is a legal body or foundation;

(b) the articles of association state clearly that the organisation was founded for the purpose of preservation of the environment; and

(c) activities consistent with its articles of association have already been carried out in support of the environment consistently with its articles of association.

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[13] See Christopher Stone's famous article arguing that 'trees should have standing': Stone CD "Should Trees Have Standing? – Toward Legal Rights for Natural Objects", 1972 45 *S. Cal. L. Rev*. 450 as reprinted in Percival RV and Alevizatos DC *Law and the Environment – A Multidisciplinary Reader* (Philadelphia: Temple University Press, 1997) 306-312.

The issue of legal standing for environmental organisations came to a head in *WALHI v Five Government Agencies and Indorayon Pulp and Paper Co*,[14] the dispute between *PT Inti Indorayon* and the local community discussed in the previous chapter. In the decision of the Jakarta District Court in 1988, the Indonesian Forum for the Environment (*Wahana Lingkungan Hidup Indonesia* (WALHI)) was granted standing to sue five national government agencies and PT Inti Indorayon. WALHI had been established since 1980 as an environmental advocate and had some 400-500 environmental organizations as members.[15] Although the court dismissed the substantive application, standing was granted to WALHI based on an interpretation of articles 5 and 6 of Act No. 4 of 1982 on the Basic Provisions for Environmental Management (*Undang-undang No. 4 Tahun 1982 tentang Ketentuan-ketentuan Pokok Pengelolaan Lingkungan Hidup*).

An example of the utilisation of the right to legal standing, since the passing of the 1997 Act, was WALHI's successful action against PT Freeport Indonesian Company (Freeport), Irian Jaya, for failure to provide true and accurate information on environmental management as required by article 6(2) the Act.[16] The claim was sparked by an incident in 4 May 2000 when toxic sludge were released from a tailings dam, as a result of an overburden on the site of the mine, into the Wanagon River and to the Banti village killing four people. WALHI challenged the veracity of press releases, statements made to a DPR Commission and the defendant's 1998 Annual Report concerning knowledge of the risk that such an event would occur, the precautions taken and the damage caused.

On 28 August 2001, WALHI was successful in obtaining a declaration from the South Jakarta District Court that in relation to announcements made following the release of the tailings, the defendant had breached the law. The consequential order sought by WALHI that public apologies be published in 10 national newspapers as well as in certain international publications, local and international televisions stations was refused. An alternative order was issued to the defendant that they take maximum steps to minimise

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[14] No. 820/PDT.G/1988 PN. JKT. PST

[15] Sembiring SN, "Recognition of Standing in Environmental Litigation" (1996) Vol 1 No 1 *Indonesian Journal of Environmental Law* 79-89 at 79.

[16] *WALHI v PT Freeport Indonesia Company* Decision No. 459/Pdt.G/2000/PN.Jak.sel.

the risk of landslides occurring from overburdens and to minimise the toxicity of the sludge released so that it complies with standards appropriate for the dam and the river. This decision indicates a failure to tailor the remedy to the nature of the claim, which could be related to the confusing way in which article 38(2) has been drafted.

Proceedings for administrative review

As mentioned in chapter 6, in relation to sanctions and designing rules for institutional purposes, in a strict sense there is no sanction for an administrative decision that does not adhere to administrative rules; however, such a decision may be reviewed and overturned by the courts. In Indonesia, applications for review of administrative decisions may be filed in the Administrative Court pursuant to Act No. 5 of 1986 on the Administrative Judicature Law (*Undang-undang No. 5 Tahun 1986 tentang Peradilan Tata Usaha Negara*) ('the Administrative Court Act'). The grounds of review are (art 53(2)):

> the administrative decision is contrary to prevailing law and regulations;
>
> the administrative body or official at the time of issuance of the decision ... has used its administrative power for other purposes than the intention of the given power;
>
> the administrative body or official at the time of issuance or non-issuance of an administrative decision ... should have not come to the issuance or non-issuance of the said decisions after having taken into consideration all the related interests to that said decision.

An additional ground, principles of proper administration, is now recognised as a ground for review.[17]

The Elucidation of article 38(3) in Act No. 23 on Environmental Management 1997 grants standing to environmental organizations to commence an action in the Administrative Court. To date there have been few environmental disputes brought before the Administrative Court, which has primarily been concerned with civil servant law, land law

[17] These are a set of criteria for judging administrative acts, which were developed by continental administrative court judges. Some important principles are formal carefulness, fair play, motivation, formal legal security, material legal security, trust, equality, material carefulness and proportionality, see Bedner A, *Administrative Courts in Indonesia – A Socio-Legal Study* (Ph.D Thesis) (The Netherlands: University of Leiden, 2000) 97-8.

and some constitutional matters.[18] The Administrative Court does not have a tradition of third parties seeking review: in 1995, the Administrative Court struck out proceedings brought by WALHI (brought under the 1982 Act) on the basis that it had not made out the legal standing requirement in article 53(1) of the Administrative Court Act.[19] As the Environmental Management Act is a later and more specific Act, this obstacle seems to have been overcome. However, a practical problem is caused by the provision that civil law procedure is to apply to environmental claims (art 39) as proceedings in the Administrative Court use administrative law procedure.[20]

It is not surprising that administrative review procedures are rarely utilised in environmental law. As mentioned elsewhere in the thesis, there is a general lack of confidence in the judicial system. In addition, as pointed out by Rangkuti, an environmental impact assessment (EIA) or even a recommendation based on an EIA does not qualify as a reviewable administrative decision, which must be written, concrete, individual and final.[21] A licence decision will meet the requirements of an administrative decision; however, the most important licence decision, which is the grant of the business or activity licence, is granted under sectoral law (art 18(2)).

As mentioned in chapter 9, water pollution licenses have only recently started to be issued by regional government. The lack of detailed public participation provisions in pollution licensing (such as procedure to provide access to information or the right to participate in the decision) is likely not to encourage the public in taking up such review opportunities. The most obvious ground to seek administrative review based on the Act would be a failure to complete the EIA procedure prior to the grant of a business or activity licence, as is provided for under article 18(1) or a failure to take into account the factors mentioned in

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[18] Relating to freedom of religion, freedom of movement, freedom of opinion, the performance of civil rights, the right to legal counsel, restrictions on political parties and village head elections, see Bedner, Note 17. Also, Bedner A. "Administrative Courts in an Executive-Dominated State: The Case of Indonesia" in Yong Zhang (ed.), *Comparative Studies on Judicial Review Systems in East and South-East Asia* (The Netherlands: Kluwer Law International, 1997) 183-210.

[19] *WALHI v Secretary General for Mining and Energy* Decision No. 053/G/1995/Ij/PTUN-Jkt.

[20] Wijoyo S, *Penyelesaian Sengketa Lingkungan* (Surabaya: Airlangga University Press, 1999) 70.

[21] Rangkuti SS, *Hukum Lingkungan dan Kebijaksanaan Lingkungan Nasional* (Environmental Law and Policy) (Surabaya: Airlangga University Press, 2nd ed., 2000) 130-131.

article 19(1) in issuing a business or activity licence. The weaknesses in these provisions were discussed in chapter 8.

Towards broader community rights?

Private enforcement

It is revealing to compare the provisions in articles 37 and 38 of the Act with legislation which grants wider rights such as the citizen suits in the United States and provisions in the *Environmental Planning and Assessment Act* 1979 (New South Wales) in Australia. In the USA, a citizen suit enables the private enforcement of environmental obligations through actions seeking an injunction and in some cases a financial penalty. In most US environmental statutes, there is a 'citizen suit' provision, particularly in national legislation dealing with the Regulation of a specific environmental media. For example under the *Federal Water Pollution Control (Clean Water) Act 1988*[22] citizens can sue private parties or the government in civil claims on the basis of strict liability for the breach of water pollution laws. The *US Clean Air Act* 1970 was the first federal environmental statute to provide for a citizen suit and is the precedent for citizen suit clauses in almost every other major piece of federal environmental legislation in the USA. The citizen suit provision in the Clean Air Act 42 U.S.C. 7604 states:[23]

> … any person may commence a civil action on his own behalf – 1) against any person (including (i) the United States and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of … (A) an emission standard or limitation under this chapter or (B) an order issued by an administrator or a State with respect to such a standard or limitation.

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[22] §505, 33 U.S.C. §1365 (1988).

[23] However, in the USA there are standing requirements. A plaintiff must have "an interest which is or may be adversely affected'. This involves a two-pronged test. First, the act complained of must cause injury to the plaintiff or the plaintiff's members if the plaintiff is an organization. Second, the injury must be within the zone of interest of the pollution control statute. These provisions have been interpreted liberally by the courts, see Naysnerski W and Tietenberg T, "Private Enforcement of Federal Environmental Law" in Tietenberg TH (ed), *Economics of Environmental Policy* (USA: Edward Elgar, 1994) 254-276 at 305 at 257.

In Australia, section 123 Environmental Planning and Assessment Act 1979 in New South Wales[24] gives 'open standing' to any person to approach the court to remedy or restrain any actual or anticipated breach of the Act. It states:

> (a) Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.
>
> (b) Proceedings under this section may be brought by a person on his or her own behalf or on behalf of himself or herself and on behalf of other persons (with their consent), or a body corporate or unincorporated (with the consent of its committee or other controlling or governing body), having like or common interests in those proceedings.

This provision does not impose any conditions upon the grant of legal standing. It does not require that a plaintiff act in a representative capacity nor does it confine legal standing to certain organizations.

Community rights in criminal proceedings

In some countries, it is possible for members of the public to commence a criminal prosecution with the leave of the court where the enforcement agency has failed to act. For example, in Australia enforcement may be commenced by a member of the public on the fulfilment of certain requirements as follows:[25]

(a) the relevant environmental agency has been notified of the proceedings;

(b) the relevant environmental agency has decided not to take any action or has failed to decide within 90 days;

(c) the proceedings are not an abuse of the court; and

(d) the particulars of the case disclose that a case can be made out.

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[24] There is a similar provision under the Protection of the Environment Operations Act 1997 (New South Wales) ss 252 and 253.

This concept of community enforcement in Indonesia would give real 'teeth' to the *reformasi* rhetoric on community empowerment and would ensure greater accountability in enforcement.

2. CIVIL PROCEEDINGS: DIFFICULTIES IN ENFORCING OBLIGATIONS

Unnecessary complexity in the scope of environmental obligations

If the courts apply the provisions on compensation and class actions based on the ordinary and natural meaning of the statute, a plaintiff will be required to establish each of the components of article 34(1). These components make up the scope of the rule with the effect that a plaintiff must establish the following:

(a) a law has been infringed;

(b) environmental pollution or damage has arisen from of the infringement; and

(c) the environmental pollution or damage caused has given rise to adverse impacts on people or the environment.

In a similar way to that discussed in the last chapter in relation to the scope of the criminal sanction, these requirements create unnecessary complexity. An alternative formulation would simply require proof of an infringement such as the breach of a discharge standard combined with a reversal of the burden of proof so that the polluter must prove that environmental damage was *not* the result of their pollution.

Proof that environmental pollution or damage has arisen from of the infringement

The proof of causation referred to in (b) above, will require proof that environmental pollution or damage has arisen from the infringement. This aspect of making out a claim is likely to cause difficulties for a community seeking to assert its rights in already heavily polluted areas where there are multiple sources of pollution. The courts have

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[25] *Protection of the Environment Operations Act* 1997 (New South Wales), s 219(2). There are similar limitations in the USA citizen suit provision including a 60-day notice period, a 45-day review period and a 'diligent

held that it is necessary to prove that the actions of the defendant in particular have caused the deterioration of water quality so that it is no longer able to "meet its function".

The failure to establish a causal relationship between an infringement and damage to the environment has proved a fatal obstacle in a number of cases. In April 1992, in *171 People v Mobil Oil and Pertamina*, the Aceh District Court refused compensation to a community for damage to their fishponds that resulted in a financial loss of hundreds of millions of rupiah as the farmers were not able to establish that the defendants, Mobil Oil and Pertamina, had caused the pollution.[26] It was also the primary reason for the failure of proceedings brought in 1996 by a local community against a large factory, which produced chopsticks, tissue paper and paper, for pollution of the Belumai River in North Sumatra. In the case of *263 People v Pt Sari Morawa*,[27] the claim was rejected by the court on the basis that causation had not been made out. This finding was reached despite:

- evidence of serious breaches of discharge standards
- expert evidence that the waste discharged would have caused the pollution in question.
- evidence from the local community of a serious decline in water quality over a period of four years after the commencement of the company's operations
- acknowledgment from the company that it had only recently taken steps to install a waste treatment plant.

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prosecution' bar, see Naysnerski and Tietenberg, Note 23 at 257.

[26] *Serambi Indonesia* "*Jakgung Minta Dikirimi Berkas Perkara Pencemaran Limbah MOI*" ('Attorney General Requests Pollution File be Sent MOI') 28 October 1992. The writer was unable to obtain a copy of this decision, as it is located within the District Court in Aceh.

[27] Decision of the High Court of Medan, North Sumatra, Decision No. 24/PDT/G/1996/PN-LP.

The decision was disappointing for those involved in environmental protection and lead to criticism of existing laws as being inadequate to deal with pollution disputes.[28] Whilst it could be argued that the case failed because of the court's evaluation of the evidence on causation, the decision highlights the problems that can arise in establishing causation of environmental damage under the present formulation.

Proof of adverse impacts on people or the environment

Difficulty may arise in proving that the environmental pollution or damage has caused adverse impacts on people or the environment. Where a substance is non-toxic, the harm may be temporary even though it may contribute to the accumulation or regularity of harm that is the cause of long-term environmental damage or damage to human health. Where water pollution contains heavy metals or other toxic substances, it is likely to be difficult to prove the cause of 'harm' for other reasons. For example, it may be necessary to prove the fate of a substance in the environment, conditions under which it is converted into more toxic substances, its bio-accumulative quality, its persistence, its ability to translocate or its impact on particular species. There may also be scientific dispute about such matters.

For these reasons it is often difficult for victims of pollution to obtain the necessary scientific evidence to establish the evidential basis of their claim. The problem of proving that the pollution emanating from a particular source caused a specific condition, environmental damage or illness, has been recognised as the greatest hurdle in toxic torts claims.[29] In the UK, allowance for these difficulties is made through the requirement that the plaintiff must show that the act or omission complained of was 'probably a material cause although not necessarily the only one'. In this way, inability to identify

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[28] Arifin S, "*Pencemaran Sungai Belumai Antara Harapan Dan Kenyataan Yuridis*" [Pollution of the Belumai River, Between Hope and Legal Reality'] (1999) Vol 19 No 1 *Lingkungan dan Pembangunan* 29-41. As pointed out by Nicholson, the reasoning conflicts with the reasoning of the Supreme Court in the *Sidoarjo* case (discussed in chapter 10), see Nicholson D, "Environmental Litigation in Indonesia" 2001 Vol 6 No 1 *Asian Pacific Journal of Environmental Law* 47-78 at 60.

[29] Pugh C and Day M, *Pollution and Personal Injury Toxic Torts II* (London: Cameron and May, 1994) 59.

the precise cause will not preclude the court from making the inference, on all the facts, that the defendant's negligence materially contributed to the plaintiff's injury.[30]

In Indonesia, Rangkuti has called for an approach in relation to human health that avoids the need to establish scientific detail such as dose-response effects.[31] She refers to the approach adopted in Japan, where a plaintiff is only required to do the following:[32]

(a) discharges of the polluting agent preceded the outbreak of disease;

(b) wherever there was an increased exposure there was an increased occurrence of disease;

(c) areas of low pollution were associated with low prevalence; and

(d) statistical inferences of causality are not contradicted by clinical or experimental evidence.

Civil procedure in Indonesia

In bringing a civil claim, civil procedure is to be followed as is stated in article 39 EMA. Unfortunately, the civil procedure that applies in the general courts has not been codified. The sources of civil procedure law are found in a range of colonial laws and Indonesian statutes.[33] This situation imposes an additional legal burden on individuals or communities who may be contemplating civil proceedings.

Strict liability but in what circumstances?

The Indonesian Civil Code (*Kitab Undang-undang Hukum Perdata*) contains the principle known as liability based on fault (*tanggunggugat berdasarkan kesalahan*),

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30 ibid., at 60.

31 The method for estimating cancer risk to humans is by studying the carcinogenic effects of substances on animals and then to project risks to human beings based on this information. Cranor CF, *Regulating Toxic Substances – A Philosophy of Science and the Law* (New York: Oxford University Press, 1993) 15.

32 Rangkuti SS, *Hukum Lingkungan Dan Kebijaksanaan Lingkungan Nasional*, (National Environmental Law and Policy) (Surabaya: Airlangga University Press, 1st ed., 1996) 267.

which is similar to liability based on fault in the Anglo-American system. Article 1365 of the Civil Code provides:

> In regard to every illegal action that inflicts loss on another, the person who is at fault is required to provide compensation to those that sustain loss.

For a plaintiff to meet the requirements of article 1365, it would be necessary to prove that:[34]

> (a) there was an illegal action
>
> (b) the defendant was at fault and
>
> (c) financial loss or detriment was sustained by the plaintiff.

To overcome difficulties posed by the proof of fault, the Act introduced strict liability (*tanggunggugat mutlak*) for certain civil actions. The Act states that (art 35 (1)):

> The party responsible for a business and/or activity which gives rise to a large impact on the environment, which uses hazardous and toxic material, and/or produces hazardous and toxic waste, is strictly liable for losses which are given rise to, with the obligation to pay compensation directly and immediately upon occurrence of environmental pollution and/or damage.

The term 'strict liability' arises in Anglo-American legal system where it arises in criminal enforcement as well as civil law. In explaining this concept, the Elucidation states that strict liability means that a person bringing an action for compensation need not prove the element of fault. Therefore, it would seem that it is only necessary to prove that pollution occurred as a natural result of the defendant's acts; a defendant would also be prevented from arguing an absence of fault in its defence. However, accessibility may be hindered as strict liability is not explained in terms of absence of intention or negligence, in the way that the concept of strict liability is understood in the Anglo-American legal system.

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[33] Usman R, *Pembaharuan Hukum Lingkungan Nasional* (The Renewal of National Environmental Law) (Indonesia: PT Citra Aditya Bakti, 2003) 318-319.

[34] Rangkuti, Note 32 at 432.

Strict liability is limited to abnormally dangerous or hazardous activities. According to the wording of article 35(1), only businesses or activities that give rise to a 'large impact' on the environment, which use 'hazardous and toxic materials' and/or which produce 'hazardous and toxic waste' will be subjected to strict liability. However, the question arises, what are the criteria for assessment to establish when an impact is 'large' or that an activity uses 'hazardous and toxic material' or produced 'hazardous or toxic waste'?

The definition section in the Act states that 'hazardous and toxic material' is:

> every material which due to its nature or concentration, both directly or indirectly, can pollute and/or damage the environment, health, the continuation of human life and of other living creatures.

This definition is difficult to apply. Its application requires interpretation of 'pollute', 'damage' and 'continuation of human life' and the 'continuation of the life of other living creatures'. Since the enactment of the Act, a number of regulations have been passed on 'hazardous and toxic waste'. These regulations cover specifically defined waste. If the courts were to take the lead from the regulations passed on hazardous and toxic waste, strict liability may not be available for what may be considered relatively less serious cases of industrial water pollution. The case studies referred to later in this chapter indicate that the courts might not be narrow in their interpretation of what is 'hazardous and toxic'. If so, this would contradict the regulations on hazardous and toxic waste.

3. THE NEED FOR BROADER LEGAL REMEDIES

Lack of detail on actions for compensation or to require that 'certain actions' be carried out

Article 34(1) in the Act creates two remedies: compensation for environmental pollution or damage and an obligation to carry out 'certain actions'. These remedies can be seen as being the consequence ('*then* Y') of the rule granting rights to commence civil proceedings. They are broadly drafted leaving a wide scope for the exercise of the courts discretion. However, as will be shown, they are more narrowly explained in the Elucidation and greater guidance would be provided by more detail.

Compensation

The Act does not mention the types of compensation that may be awarded such as compensation for lost income, for pain and suffering or for loss of amenity. There is also no mention of compensation for environmental damage or to cover the cost of environmental restoration.

Carrying out 'certain actions'

The phrase 'certain actions' is very general and grants a wide scope for the court's discretion. The Elucidation of article 34(1) says that the phrase 'carry out certain actions' includes measures to for example:

(a) install or repair a wastewater treatment unit so that waste complies with environmental quality standards

(b) restore an environmental function

(c) remove or destroy the cause of the pollution or environmental damage.

. It seems to be drafted in terms that mean that the court can *require* certain things to occur. The examples provided in the Elucidation to do not appear to be exhaustive of the

actions that can be required; however, given that these actions are quite limited it would have been helpful to set out a full range of remedies. .

The explanation in the Elucidation may be compared to the court's ability in the Anglo-American legal system to grant an injunction, which is said to be the most powerful and flexible weapon in the armoury of a court in environmental litigation.[35] Injunctions often take the form of a *prohibitory injunction*, that is, an order restraining the commission or continuance of some wrongful act or omission. In exceptional situations, a *mandatory injunction* may be granted requiring certain actions to be carried out.[36] These remedies can be understood as representing a general capacity of the court, unlike the narrow range of examples given in the Elucidation.

The Elucidation does not expressly cover how to deal with emergencies. In the Anglo-American system, an interlocutory injunction may be sought to afford temporary relief to a plaintiff pending trial. The court will grant an interlocutory injunction where it is satisfied that there is a serious triable issue and the balance of convenience favours the grant; for example, where the likelihood of serious environmental harm outweighs the damage to the defendant from restraint on their activity. Nothing in the Act specifies this level of detail in the remedies available in civil claims. Furthermore, nothing indicates the range of orders that may be sought by a plaintiff. Orders that commonly accompany the grant of an injunction in the Anglo-American system include:

(a) compliance with a statutory requirement;

(b) adherence to a compliance schedule;

(c) closure of a facility; or

(d) restoration of a damaged site.

It can be seen therefore that article 34(1) does not set out a comprehensive range of remedies. Whilst Government Regulation No. 82 of 2001 on Water Pollution Control

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[35] Pugh and Day, Note 29 at 189.
[36] For example, in *Redland Bricks Ltd v Morris* [1970] AC 652.

and Management (*Peraturan Pemerintah No. 82 Tahun 2001 tentang Pengendalian dan Pengelolaan Pencemaran Air*) ('the Regulation') also mentions these matters in the Elucidation of article 50 on compensation, it merely repeats the approach taken in the Act.

Unclear remedies available on the recognition of legal standing

The Act states that legal standing is 'limited to a demand that particular measures be carried out' (art 38(2)). This can be analysed as the consequence of the achieving of legal standing, which states '*if* legal standing has been granted *then* the following remedies will be available'. On further examination, the consequence is not entirely clear. It is elaborated in the Elucidation rather than the Act, where the measures are said to consist of:

(a) an 'application to the court for a person to be ordered to undertake certain legal actions that are involved with the goal of preservation of environmental functions'.

(b) an 'order asserting that a person has carried out an action in infringement of the law because they have polluted or damaged the environment'

(c) an order 'that a person who carries out a business and/or activity install or repair a waste treatment unit.'

Concerning (a) it would seem that an environmental organisation with legal standing could commence proceedings seeking an order that someone take certain legal action to meet their environmental responsibilities. If a comparison were made with the Anglo-American system, this would appear to approximate a mandatory injunction. However, the meaning of 'certain legal actions' is not clarified; for example, it is not made explicit whether or not this is only a power to require positive action to be taken or whether it also includes a power to prohibit activities such as would be available through a prohibitory injunction. The remedy in (b) would appear to be a declaration but this is also not made explicit. The remedy in (c) would appear to be a limited form of mandatory injunction directed towards private entities to install or repair a waste treatment unit.

A limited range of remedies in community-based proceedings

In an endeavour to summarise the remedies available under the Act, the following table has been prepared in reference to remedies that are available in the Anglo-American legal system.

Table 6: Remedies in community enforcement in Indonesia

	Damages	**Declaration**	**Prohibitory injunction**	**Mandatory injunction**	**Penalties**
Individual plaintiffs	X		?	X	
Class actions	X		?	X	
Environmental organisations		X		X	

This table indicates that individual plaintiffs and plaintiffs in a class action do not have available to them the remedy of a declaration. As noted above, the equivalent to a prohibitory injunction includes a causation component, which makes it unnecessarily complex. Environmental organizations with standing are not able to seek damages or an equivalent to a prohibitory injunction. Moreover, the remedy of the civil penalty is not available in any community-based proceedings. This is a weakness in the system as the ability of the court to impose a penalty is another opportunity to obtain a deterrence effect. It has been found that non-complying firms facing a penalty and an injunction are more likely to take precautions than firms only facing an injunction.[37]

[37] Naysnerski and Tietenberg, Note 23 at 305.

4. CASE STUDIES IN CIVIL LAW

Since the promulgation of the Act, only a few environmental disputes concerning water pollution have been brought to the courts. Three case studies presented below are examples that indicate deficiencies in court's construction of statutory provisions. In each case, the court does not display judicial reasoning in applying the legislation. No reason is given for departures from words found in the legislation, such as the existence of gaps in the legislation that may justify turning to non-legal sources. Neither is there is any reference to other sources of standards such as policy goals or principles.

The point to be made here is that weakness in the drafting of environmental law as well as serious problems with the level of reasoning displayed in decisions handed down by judges in environmental disputes. If the closing of the cycle of knowledge in the formulation, interpretation and application of legal rules is to be a goal, legal drafting provides a stage at which to break these patterns. Simpler, clearer and more explicit legislation could provide guidance to judges who would find it more difficult to justify deviation from the legislative wording.

The right to a good and healthy environment: claim for compensation

In *Indra Prasetya and 78 Ors v PT Bintang Triputratex, PT Kesmatex and CV Ezri*,[38] seventy-nine plaintiffs who lived along the riverbanks of the Banger River made a claim for compensation against three textile factories. The claim was heard by the District Court of Pekalongan in Central Java. The plaintiffs traditionally used the river water for drinking, bathing, washing, fishing and farming.

Nature of the claim

The plaintiffs claimed that pollution discharged by the defendants had polluted the river and caused them financial loss. The claim for compensation was made under articles 5 and 34(1) of the Act and pursuant to article 1365 of the Civil Code. The claim relied on

[38] Decision No. 50/Pdt.G./1998/P.N. Pk1 30 July 1999.

the provisions establishing the right to an environment that is good and healthy (art 5(1)), the right to play a role in the scheme of environmental management (art 5(3)) and an obligation to pay compensation for actions infringing the law in the form of environmental pollution or damage (art 34(1)). It was claimed that the Act, together with *Act No. 5 of 1984 on Industry*, meant that every person and every industrial enterprise has a responsibility to protect the natural resources of the country.

The plaintiffs sought the following orders:

(a) compensation for financial loss - itemised as the inability to harvest, loss of livelihood as fishermen and loss of livestock (the period does not appear to have been specified but probably from a date in 1992 until 1997)

(b) compensation for the loss of groundwater

(c) compensation for non-material loss, that is, anxiety and suffering from stress caused by the pollution

(d) a declaration that a maximum capacity pollution control unit be installed and

(e) payment for each day of delay in the installation of the facility

The evidence in support of the claim included:

(i) a warning letter from the Governor in July 1992

(ii) lay witness statements and photos on the level of pollution between 1993 and 1995

(iii)
test results dated 22 August 1995

(iv) an ineffective installation of a wastewater treatment plant in 1992 and the requirement to replace the system in 1996

(v) the revocation in 15 October 1997 of a licence (Hinderance Ordinance) applying to each of the companies on the basis of their failure to restrain the discharge of pollution and

(vi) a Decision of the Governor dated 5 June 1998 that confirmed a breach of discharge standards.

Argument before the Court

The defendant's arguments included the following:

1. The plaintiffs did not have sufficient legal interest to make the application, as they did not share a common interest. Not all the plaintiffs were connected in the same way to the river: although some were fishermen, others were farmers and breeders of livestock, pan miners and small restaurant (*warung*) operators without an interest directly connected with the river. In this regard, the defendants also asked the Court to make a distinction between the water obtained from the river and groundwater from the wells.

2. Other industries discharged industrial waste to the river.

3. Sufficient detail of the claim had not been provided and that the claim for compensation could not be received.

Findings of the Court

The court found that the plaintiffs as a whole had sufficient legal interest to bring the proceeding jointly even though the source of income of some of the group was not directly connected to the river. The court noted that the Act says that everyone has a community obligation to protect and conserve the environment and considered court proceedings to be part of the obligation to protect the environment.

At the hearing, the court found that from 1980-1990, the defendants discharged liquid waste directly into the Banger River and that this severely polluted the river. Although community pressure led to a wastewater treatment system being installed in 1992, it did

not function effectively. The polluted water destroyed a source of drinking water for livestock, killed livestock and destroyed aquaculture for fish and rice paddies. The non-classification of the river did not prevent the plaintiffs from filing claims based on water for drinking and bathing as well as for fish farming. The Court endorsed the principle that the quality of the environment should be sufficient to sustain life. It held that it could not be argued that the river need not provide water for drinking or bathing or water for plants and animals.

The Court accepted the plaintiff's evidence of repeated warnings over the period in question. The court stated that the defendants have an unconditional obligation to control activities that give rise to a large or important impact on the environment, impliedly saying that the defendants' activities should be regarded as falling into this category. The court gave credit to the companies for installing the wastewater treatment plant, but noted that from 1992 to 1997 the defendants were still in breach of discharge standards and liable for compensation. The court accepted the monitoring results between April 1998 and 1999, which showed that the defendants complied with the discharge standards. There was little discussion in the judgment as to why the Court accepted the defendants' evidence on pollution levels in preference to the evidence from the plaintiff.

In assessing the award of compensation, the Court awarded individual damages. The amounts granted were for loss of livestock, temporary loss of livelihood, loss of rice harvest and loss of fish catch. Only 38 of the 79 plaintiffs received compensation and they did not receive the full amount claimed. Many plaintiffs only received amounts for fish loss. A total amount of Rp.49,184,000 was granted by way of material compensation compared to the amount claimed in the sum of Rp.1,332,303,500. There was little explanation from the Court as to why the claim had been reduced so drastically. The court found that insufficient evidence had been provided in support of the claim for non-material damage.

Appeal

The first defendant appealed the decision to the High Court of Central Java in Semarang, which rejected the appeal on 1 April 2000.[39] The court increased the amount of compensation for material damage and awarded it as a global figure. It also awarded compensation for non-material damage in the sum of 250 million. A fine per day of failure to optimalise the productivity of the waste treatment system was imposed. However, the judgment does not set out the basis of its decision. At the time of preparing the thesis, an appeal was pending with the Supreme Court.

Comment

The court took liberties with applying statutory terms so that it could achieve a satisfactory outcome. However, in doing so, it has undermined certainty in the application of provisions in the statute.

1. The acceptance by the court of the group proceedings even though they were not brought as a class action contradicted the provisions in the Act on class actions. It seems to been designed to overcome the lack of procedures at the time for class actions. In particular, the approach taken by the court to the argument that they did not share a common interest is not based on the Act.

2. The plaintiffs were not required to prove intention or negligence in the claim for compensation arising from industrial water pollution even though the claim was not based on the strict liability provisions in the Act. This approach is contrary to the Act but may have been adopted to overcome the onerous evidential burden that would otherwise have been imposed.

3. The nature and impact of the pollution was not discussed in detail in the judgment, which nonetheless concluded that a 'large and important impact' had occurred. This

may be attributable to the generality of this phrase or indicates a desire by the court not to be limited by a narrow interpretation.

4. There was no explanation of the court's approach to proof of causation or the impact of the pollution on the environment. The court seems to have 'overcome' the problem of proof of causation by referring to an obligation upon every person to protect the environment. .

5. The lack of any discussion about the amount of the award of compensation is likely to be due to the lack of any rules in the legislation regarding the award of compensation. It means that the approach of the courts may vary significantly between cases.

Strict liability: claim for compensation

In *Muhaimin CS and Anors v PT Condro Purnomo Cipto and Anors*[40] proceedings were brought by nine villagers against six companies, namely three leather tanning factories, a textile factory, a paper mill and a cold storage facility, all situated along the Babon River in Central Java.[41] The plaintiffs sought compensation for the loss of shrimp from their coastal fishponds, alleged to have been caused by effluent discharged into the Babon River from factories owned by defendants.

Nature of the claim

The pollution took the form of BOD, COD, ammonia, chlorine and sodium chloride. The claim was based on articles 34(1) and 35(1) of the Act and article 1365 of the Civil Code. Therefore, it did not take the form of a class action; however, it did rely on the strict liability provisions of the Act.

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[39] Central Java High Court, Semarang Decision No. 539/Pdt/1999/Pt.Smg. 1 April 2000.

[40] Semarang District Court, Central Java, Decision No. 42/PDT.G/1998/PN. SMG 13 October 1998.

[41] The plaintiffs were assisted by a non-government organisation based in Solo, *Gita Pertiwi* and represented by a legal aid bureau, *Yayasan Pengabdian Hukum Indonesia (YAPHI).*

There were two parts to the compensation claim. One part was for the lost earnings over a four-month period from September – December 1994, which resulted from the loss of shrimp. The other part of the claim was an ongoing claim for an estimated 70 percent loss of shrimp from January 1995 to the date of the hearing. The total claim was for an amount of Rp.186,780,000. Orders were also sought to establish security for the payment of the compensation and for the restoration of the environment.

Passing mention was made of article 35 on strict liability. It appears from the judgment that there was little argument as to its application. The compensation claim was made as a whole and no attempt was made to establish the respective contribution of each defendant. One claim was dismissed due to a failure to properly identify the defendant. Another defendant, a leather tanning factory, successfully argued that it had obtained the necessary approval based on an environmental impact assessment and that monitoring results showed that the company did not breach wastewater discharge standards. The proceedings against this company were dismissed. There was no argument regarding the retrospectivity of the claim regarding activities in 1994.

Argument before the Court

The remaining defendants argued that the claim did not specify with sufficient clarity the respective contribution of each defendant to the pollution. The court did not accept this argument. Rather, the Court assumed that each defendant contributed equally to the pollution. Because of the Court decision not to entertain claims against two of the six defendants, the amount of compensation payable was reduced by one third. This indicates a very broad-brush approach to the apportionment of liability.

The defendants argued the issue of causation saying that there was no proof that the pollution in the ponds came from the defendant companies: the fishponds were located too far from the factory for the factory pollution to have reached the ponds and, furthermore, the river flowed towards the sea and not the fishponds. This argument was supported by data and topographical information.

In relation to the ongoing claim for compensation, the defendants argued that in December 1994, they installed waste management systems, which reduced their discharges to the legal limit. This argument was supported by evidence from the Regional Environmental Impact Management Agency (*Baden Pengendalian Dampak Lingkungan Daerah* (BAPEDALDA). It was contradicted by the plaintiff's sample results that showed high levels of organic and inorganic waste but as the samples were not taken at the point of discharge the results were of questionable value.

The findings of the Court:

The plaintiffs were partially successful in their claim. The court found that the defendants had polluted the Babon River by disposing of industrial waste into the river. The court accepted the plaintiffs' expert evidence in support of the claim for the damage over the four-month period, that the defendants had discharged pollution to the Babon River, that the pollution had found its way to the fishponds via the sea and that, as a consequence, the shrimp in the fishponds died. However, there was little explanation in the judgment as to why the Court accepted the plaintiffs' contradictory expert evidence. There does not appear to have been any strong argument between the parties on causation of the loss of shrimp over the four-month period.

The court did not accept the defendants' argument that they could not be held liable, because there were other sources of pollution. It said that the defendants had failed to establish they did *not* owe an obligation to the villagers. Thus, the Court appears to have taken the view that as long as a plaintiff can show that a defendant caused environmental damage, the onus is upon the defendant to show why they are not obliged to pay compensation.

Concerning the ongoing claim, the Court relied on the evidence from the head of the BAPEDALDA to the effect that whilst the river was polluted in 1993 and had polluted the fishponds, it had subsequently improved when the defendants joined the Clean Rivers

Program (*Program Kali Bersih* – PROKASIH).[42] Three of the companies fulfilled wastewater discharge standards and two had taken steps to do so.

The court found that:

- there were 15 other industrial enterprises that continued to discharge pollution to the river;
- the cause of the death of the shrimps the farmers' evidence was not clear; and
- there was no physical connection between the river water and the fishponds, which obtained water directly from the sea.

The court refused the ongoing compensation claim. The court rejected the plaintiff's scientific evidence as inconclusive and stated that the evidence to support the claim for restoration of the fishponds was insufficient. The court accepted that after December 1994, the situation had improved as the majority of the defendants had brought their discharges within the legal limit. This was regarded as being sufficient to refuse the claim as a whole, despite the evidence that two of the companies failed to comply with waste discharge standards. Concerning the paper-processing factory that continued to breach the standards, the Court took into account that it had employed a waste management consultant in an effort to control its waste disposal. The court did not apportion the claim between the respective defendants even though their levels of environmental compliance differed.

The court accepted that each of the plaintiffs had a common interest and decided that the compensation should be shared equally between them.

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[42] See chapter 1: this was an ad hoc program set up by the State Ministry for the Environment.

Decision:

In regard to the period claim, the plaintiffs sought an amount of Rp.6,600,000 by way of damages over the 4-month period. They received an award of compensation in the sum of Rp.4,400,000. The reduction was due to the dropping out of two defendants. The plaintiffs were unsuccessful in the ongoing claim in the sum of Rp.180,180,000. There was no order made for the restoration of the environment.

Comment

The overall approach of the court did not seek to strictly apply the words of the statute and neither did it fully explain the basis for its decision. This was apparent in relation to the interpretation of strict liability, the acts of pollution, causation and the apportionment of liability.

1. The court interpreted the strict liability provisions of the Act liberally. It appears that the decision may be authority for the proposition that a plaintiff will not be required to prove intention or negligence regarding a claim for compensation arising from industrial water pollution in the form of BOD, COD and other material. This creates inconsistency with hazardous and toxic waste regulations. The approach of the court appears to be a consequence of the vagueness of the definition of 'hazardous and toxic material' mentioned above.

2. An unsystematic approach was taken by the Court concerning evidence of acts of pollution. In the ongoing claim that failed, it is not clear from the judgment what the defendant's evidence (the monitoring results of BAPEDALDA) actually established concerning the date pollution discharges reached acceptable levels and the impact on pollution in the river. The court did not entertain this level of detail. It did not investigate the patterns of discharges from December 1994 to late 1998. It did not make a distinction between the companies that complied with pollution standards and those that did not. This could be attributable to the complexity inherent in the definition of pollution, which is not simply based on proof of breach of discharge standards.

3. The court sought to overcome difficulties of causation by saying that as long as there is *prima facie* evidence that the defendants have contributed to environmental damage, the onus will be upon the defendants to prove they are not obliged to pay compensation. However, there is no provision in the Act to support this approach and so there is no certainty that it will be taken in other proceedings. The approach of the court can be attributed to the onerous requirements to prove causation as set out in the Act.

4. The defendants were found to be equally liable even though their likely contribution to environmental damage is not likely to be the same. This approach could be due to the lack of rules on apportioning responsibility between defendants. Furthermore, the court took the approach that should a claim not succeed against one defendant, the total claim will be reduced rather than the total amount divided by those remaining, can lead to unfair result for plaintiffs and defendants.[43]

Environmental obligations: class action for compensation

In *27 People v PT Vewong Budi Indonesia, PT Sinar Bambu Mas and PT Budi Acid Jaya*[44], 27 fishermen filed a class action on behalf of 1,145 heads of families in eleven villages in the Way River basin, Lampung, South Sumatra. The claim was brought against a spice factory (first defendant), paper mill (second defendant) and a tapioca factory (third defendant).

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[43] The issue is whether the remaining parties should be liable for the full amount, (joint and several liability), or is the total to be reduced proportionally (proportional liability). The US experience with joint and several liability has been criticised as leading to 'over deterrence' and producing unfair results where one or more polluters are insolvent or unavailable and the remaining polluter is held liable for the total damage. It also involves high administration costs due to cross-claims. There is uncertainty inherent in joint and several liability and, on insurance grounds, proportional liability is preferred: Bergkamp L, 'The White Paper on Environmental Liability' (2000) Vol 9 No 5, *European Law Review* 141-147 at 141. The Working Paper produced by the EC in November 1997 on Environmental Liability envisages a 'mitigated, joint and several liability' regime for situations involving multiple liable parties: Bergkamp at 141, citing Commission of European Communities, Working Paper on Environmental Liability, Brussels, 17 November 1997. If some form of joint and several liability is not introduced in Indonesia, however, a plaintiff will be unable to recover the full amount due to them, simply because one of the wrongdoing parties is unable to be joined to the proceedings.

[44] *27 People v PT Vewong Budi Indonesia, PT Sinar Bambu Mas and PT Budi Acid Jaya,* Medan District Court, Decision No. 04/Pdt.G/2000/PNM 4 September 200.

Nature of the claim

It was claimed that from 26 April to 2 May 1999, pollution from the three factories polluted the river and, as a result, the colour of the river changed to red, it smelt and there was a large loss of fish. The people in the locality were unable to use the water for their daily needs and financial loss was sustained by the fishermen. On 7 May, the local PROKASIH team took samples from effluent discharges from the defendant companies, which showed they exceeded the legal levels of pollution. Negotiations with the companies on the operation of their waste treatment plants commenced on 19 November 1999.

The claim itemised the deficiencies in the pollution control equipment of each defendant. It was claimed that this amounted to a violation of article 6(1) of the Act, which requires every person 'to preserve the continuity of environmental functions and to protect and combat environmental pollution and damage'. The claim was also based on an obligation in article 6(2) to provide true and accurate information. The claim for compensation was based on article 34(1) the Act and the strict liability provision in article 35(1).

Argument before the Court

All the defendants raised issues related to causation and criticised the sampling technique of the local PROKASIH team, which had not taken samples of the ambient river quality or drawn conclusions on the connection between the discharges and the pollution. The first and third defendants also argued that the local BAPEDALDA, which had been involved in investigating the case, had failed to find any wrongdoing.

It was argued by the second defendant that the proceedings could not proceed as article 37 (2) had the effect that the environment agency must be joined to the proceedings. Article 37(2) states:

> If it is known that the community suffers as a result of environmental pollution and/or damage to such an extent that it influences the basic life of the community, the government agency which is responsible in the environmental field may act (*dapat bertindak*) in the community's interest.

The second defendant also argued that the plaintiffs were not permitted to make a claim against three defendants in one claim, without establishing any connection between them. In relation to the strict liability claim, it argued that it was not applicable, as the impact was not 'large and important' and the pollutants were not 'hazardous and toxic'. It also argued a lack of causation between its activities and the environmental damage.

Findings of the Court

The court accepted the preliminary issue raised by the second defendant. It held that an environmental agency is required to be joined to such a claim; by failing to do so, it did not fulfil its supervisory functions as set out in articles 22-24 in the Act. The relevant environmental agency was the Lampung BAPEDALDA, and on the basis that it had not joined the claim, it was struck out.

Comment

1. Whilst the substantive arguments put by the second defendant did not need to be dealt with by the Court, they demonstrate the kind of issues likely to be raised by a well-resourced defendant such as a paper mill. They highlight difficulties already mentioned in this chapter that are likely to be encountered by a plaintiff, namely, weaknesses in drafting the strict liability provisions and problems in proving causation and throw into question whether the court in this instance would have taken the same approach as the courts in the cases mentioned above.

2. The outcome on the preliminary issues confuses the function of a class action with the regulatory role of an environment agency. It shows the dangers that arise from a failure to clearly distinguish between the different sorts of proceedings and the circumstances in which they can be launched. It also reveals the resistance that is likely to be encountered in introducing *reformasi* concepts, particularly where they may challenge traditional ideas concerning relations between the state and the community.

3. The court's decision was made possible by the open-ended drafting in the Act and the absence of a settled approach to the creation of normativity. The provision that states the

government agency 'may act' (*dapat bertindak*) in the community's interest does not imply an obligation and yet the court construed an obligation to exist. If there were fixed legal drafting practices in the use of normative words such as 'dapat', 'harus' or 'wajib', this error is less likely to have occurred.

4. The decision was also assisted by the poor drafting of article 37(1). It was noted above that the provision on class actions is combined with another provision concerning the reporting of environmental problems to law enforcers. These two provisions are unrelated as they present two alternatives available to a community that has suffered as the result of environmental damage, namely to seek a remedy through the court system by commencing a class action or to rely on the government enforcement agency to represent their interests.

4. Even if article 37(1) imposed an obligation on the BAPEDALDA to act in the community's interest, there is no indication in the Act that a class action cannot proceed without BAPEDALDA having joined the proceedings. The Court created an additional requirement, which was also made possible by a lack of specificity in the drafting of the provisions on class actions. The concept of a class action seeking compensation is logically distinct from enforcement action brought by an environmental agency: they fall into different types of legal proceedings. The decision of the Court takes away the independence of a community to seek compensation as a class action where they have been unable to obtain the support of the local environment agency. This is erroneous conceptually and contrary to *reformasi* aspirations.

Conclusion

This chapter has explored the statutory provisions that entrust to the community the task of creating social pressure to generate a sense of obligation in environmental protection. The Act establishes the basis for this to occur through the grant of the right to commence a class action and to obtain legal standing. However, the provisions on community sanctions is still limited and fall short of broader legal rights that have been granted in other countries such as the USA and Australia.

Furthermore, significant weaknesses exist in the rules relating to community sanctions, which are likely to reduce their overall effect. Complexity in the scope of the environmental obligation enforceable by a community imposes an onerous evidential burden for those seeking to claim compensation, particularly where a site is already polluted or environmentally damaged. This burden is lessened by strict liability provisions; however, the lack of definition of 'large impact' and 'hazardous and toxic' creates uncertainty in the application of the strict liability. Additional obstacles arise from the failure to set out the full range of available legal remedies. The rule that grants the right to obtain legal standing lacks a well-formulated range of remedies available to an organization with legal standing.

The case studies show poor statutory construction and legal reasoning applied by the courts. It is suggested that this is made possible by the open-ended form and style of legal drafting. In the first case, the courts achieved a favourable outcome by departing from burdensome statutory requirements. In the second, the court did not strictly apply the words of the statute and neither did it fully explain the basis for its decision. In the third case, the courts construed an obligation that does not appear in the statute. This interferes with the development of a knowledge cycle about drafting, interpreting and applying the legal rules set out in chapter 6.

The lack of reason-based judicial decisions is possibly attributable, at least in part, to difficulties faced by the judiciary from interpreting provisions that have been poorly drafted. At the same time, detailed and precise public regulatory rules and administrative rules that plainly express the extent of obligations and the consequence of their breach would make it more difficult for the courts to depart from the terms of the legislation, should there be an urge to do so. Greater rationality in judicial decision-making would help, in turn, to close the cycle of knowledge about the use of language for institutional purposes. When combined with wider access to the court system, it could assist the development of the internal aspect of legal rules so that compliance with obligations does not always require enforcement but becomes part of the social norms on the 'right thing' to do in protecting the environment.

CHAPTER TWELVE

CONCLUSION

The original research questions as stated at the beginning of the thesis were as follows:

- How can environmental law in Indonesian best be characterised in light of general jurisprudential analysis?
- Is environmental legislation on water quality management and pollution control adequate to achieve its purpose? If not, why not?
- Under what conditions can more adequate environmental law be generated in the *reformasi* era?

Finally, it was suggested that answers to these questions could assist in identifying strategies to strengthen the legal system in Indonesia as far as it concerns environmental management and water pollution in particular.

The following is a summary of the conclusions reached in response to these questions.

How can environmental law in Indonesian best be characterised in light of general jurisprudential analysis?

If a jurisprudential approach is taken to characterising Indonesian environmental law, it can be seen that it is not satisfactory to simply characterise the system of environmental law as being 'good' or sufficient' but lacking in implementation. If it is accepted that a legal system consists of interrelating primary and secondary rules that perform specific functions then real dilemmas are posed in seeking to characterise environmental law in Indonesia. It is arguable that the system of environmental law in Indonesia is not merely 'ineffective' or even 'dysfunctional' but is more accurately described as a nascent system that does not yet effectively exist: whilst some of the parts have been created, it does not yet amount to a legal sub-system.

The reason for characterising environmental law in Indonesia as being a 'nascent' legal sub-system can be found in the widespread lack of obedience to primary rules and the high level of uncertainty within the secondary rules that govern the creation of environmental law in Indonesia.

To any casual observer it is apparent that there is little compliance with environmental law in Indonesia. In particular, the highly polluted state of Indonesia's rivers is enough to indicate the failure to comply with laws on water quality and pollution control. If this situation is not seen as invalidating the existence of a system of environmental law then according an alternative analysis there still needs to be 'sufficient people' with 'sufficient conviction' that an arrangement constitutes a legal system. A standard to determine whether 'sufficient people' with 'sufficient conviction' exists has to be formulated before this question can be properly answered. Whether or not this standard is met could be determined through empirical research measuring people's opinions. At this stage, a subjective assessment that there are not sufficient people with sufficient conviction in Indonesia that the present arrangement actually constitutes a legal system seems justifiable.

In addition, a further issue remains regarding the secondary rules that govern the creation of the system. There needs to be a level of certainty in interpreting the rules that govern the construction of the system. It has been suggested here that it is questionable whether the rules making up the legal hierarchy as supplemented by regional autonomy law are adequate to produce a sufficient level of shared understanding about the construction of the system of environmental law across Indonesia.

Is environmental legislation on water quality management and pollution control adequate to achieve its purpose? If not, why not?

The argument put forward in this thesis is that environmental legislation on water quality management and pollution control in Indonesia may be sufficient to *permit* environmental protection but is inadequate to achieve its purposes because of a failure to recognise the central importance of the legal rule in the Indonesian legal system. That

the legal system as a whole lacks a strong rule-based identity can be seen from the tendency to pass general and vaguely worded legal instruments that defer operative measures to delegated legislation of non-binding or uncertain legal status. It can also be seen in the level of optionality that accompanies legislative statements from legal drafting style and the weak capacity to yield to a sanctioning approach in the enforcement of obligations.

It has been suggested in the thesis that rule dimensions are relevant to assessing the adequacy of laws. For environmental laws to be adequate to achieve their purpose, they need to be accessible, reasonably capable of conveying meaning to those who are expected to apply or comply with them, entail a level of compulsion and directly address the environmental problems to which the laws are directed.

Accessibility:

The tendency to defer law making has the effect that laws are not contained within single instruments but are scattered in time and place. This hinders accessibility to both the public and different government agencies, which are expected to implement environmental law.

Capability of conveying meaning:

This thesis has given many examples of vagueness and opacity in legal drafting, which creates obstacles in communicating fundamental ideas in environmental management. These difficulties arise from a lack of comprehensive and concrete definitions, a choice of words and phraseology that favours the abstract over the concrete, poor grammatical structure and a lack of specificity.

Level of compulsion:

The inability to readily yield to a sanctioning approach and, where necessary, to enforce environmental prohibitions and obligations is another fundamental source of inadequacy. The capacity to enforce environmental prohibitions and obligations is marred by a lack of prohibitions and the generality in which obligations have been expressed in public

regulatory rules. There is a lack of administrative rules to provide for the imposition of administrative sanctions in a systematic fashion. The expression of criminal sanction rules is unnecessarily complex. The requirements for pollution offences impose an onerous evidential burden on an environment agency contemplating the commencement of a pollution prosecution. The same problems arise in the provisions that enable the public to enforce environmental obligations.

Furthermore, as long as environmental law does not fully address the control of administrative discretion in government decision-making it will be inadequate. The legislation reviewed in the thesis contains very few administrative rules designed to control the exercise of administrative discretion, neither does it anticipate the formulation of such rules. Community rights are not juxtaposed with accompanying obligations upon government. Where obligations have been imposed on government, the consequence has been drafted using vague or non-specific expressions. In relation to licensing, an obligation is imposed on government to take into account certain matters, but those matters are expressed generically and are therefore open to interpretation. There is a total absence of procedural rules on the exercise of administrative discretion and no reference to the need for procedural rules. Public participation provisions focus on the public's right to information; however, there is no mention of how information is to be provided to the public. The different stages at which public participation is to occur such as planning, environmental assessment, licensing, monitoring and enforcement are not mentioned.

Directly address environmental problems:

The review in the thesis has shown the environmental legislation fails to directly address the nature of the environmental problems that arise in Indonesia due to a lack of detail and specificity. If the purpose is to support the reform of water resources management through the introduction of integrated water resources management, the present laws do not go into sufficient detail to deal with the ambitious nature of the reforms required.

Under what conditions can more adequate environmental law be generated in the *reformasi* era?

There needs to be a greater awareness amongst legal drafters of the rule-basis to both law making and the content of new environmental law. In this regard, the significance of constitutional changes that have occurred in Indonesia since the fall of Suharto is still difficult to discern. On the one hand, changes that have occurred since *reformasi* have the potential to work in favour of a stronger rule-basis to the legal system in Indonesia as a whole. Amendments to the Indonesian Constitution have altered the balance of power in the Indonesian state with a strengthening of parliamentary authority and the role of the courts alongside a weakening of executive power. Past socio-legal conceptions now have a reduced influence. There has been a retreat from the official interpretation of *Pancasila* and the concept of the *integralistic state* is fading.

However, the recent constitutional amendments on environmental protection do not foreshadow a change in approach to the formulation of environmental law. The Constitutional provision for environmental protection in article 33(3) has been criticized in this thesis for its vague and ambiguous conferral of power. This article remains unaltered. Rather, a provision has been added, namely article 33 (4), which resorts to the non-specific and opaque words 'sustainability' and 'environmentalism'. The new Constitutional right to a 'good and healthy' environment also contains evaluative words that allow wide scope for interpretation and are therefore of uncertain effect.

Furthermore, an awareness of the rule-basis to law making does not appear to be growing. The whole-scale devolution of authority to the regional level that has occurred through regional autonomy has a flimsy rule foundation. The extent of central government's authority for legislating on environmental management has not been indicated with sufficient precision to develop a shared understanding of what can be achieved nationally. Determination of the extent of provincial government authority for law making requires an assessment of the extent of central government authority and the application of provisos which are overly complex and vague. District government, as the holder of residual responsibility for environmental management, bears the weight of an

accumulation of imprecision in the definition of central government and provincial government law-making authority.

In addition, ongoing confusion about basic legal concepts indicates the persistence of a weak conception of what environmental law actually is and its function in society. Much activity at the national level is being directed to the production of ministerial decrees, which have an uncertain legal status. This practice is particularly questionable where subject matter concerns aspects of good governance necessary to support sustainable development or where it will result in the imposition of a heavy law-making burden on regional government. Whilst this thesis has not addressed law making at the regional level in detail, reference has been made to some provincial law. It appears that detail missing from national law is unlikely to be found at the regional level. Even if regional governments possess the capacity to embark on environmental law-making programs, with around 440 district governments, inconsistencies and resultant inefficiencies will unavoidably develop across Indonesia.

Government Regulation No. 82 of 2001 on Water Pollution Control and Management (*Peraturan Pemerintah No. 82 Tahun 2001 tentang Pengendalian dan Pengelolaan Pencemaran Air*), which was passed in the *reformasi* of water resources management, does not show any change in approach to legal form and style. This can be seen in the lack of detailed or specific administrative rules at the national level to govern the exercise of discretionary authority and foster the development of legal accountability. There has been no appointment of a principal agency at the national level nor is provision made for the appointment of principal agencies at the regional level. There are no standards to be followed in discretionary decision-making; neither are there procedural rules to structure decision-making processes concerning relations between the public and government, between sectors and between levels of government. Major aspects of water quality management lack substantive and procedural administrative rules including the planning of water use, the valuation and classification of water bodies, monitoring water quality, setting objectives and strategy making.

The lack of any change in approach is also evident in the pollution control provisions. Detailed and specific administrative rules are needed for licensing, monitoring and enforcement. The provisions related to sanctions do not assist enforcement agencies to readily yield to a sanctioning approach where there is a failure to achieve compliance. Only one prohibition has been created and the only obligations with a clear consequence are those concerning licensing, reporting, the provision of true and accurate information and compliance with liquid waste disposal standards. Furthermore, the obligations and prohibitions all concern a definition of water pollution that is overly complex and likely to cause difficulties in enforcement.

What strategies are likely to strengthen the legal system in Indonesia as far as it concerns environmental management and water pollution in particular?

The establishment of more effective laws on water quality management and pollution control will require an attitudinal break to the nature of environmental law in Indonesia leading to a much clearer focus on the role of the legal rule, both in the process of law making and in legal content.[1] Key features of such an attitudinal break in relation to environmental law are as follows:

Law on law making

There is a need for a comprehensive law on law making containing criteria of validity to govern the process of law making at each level of government. Such a law should be directed towards meeting the requirements of good governance and sustainable development. It would also aim to ensure the necessary level of autonomy at the regional level so that substantive programs and values are not imposed through centralised law making. Devolution of power without ongoing oversight by central government has the potential to destroy *reformasi* aspirations. The goal should be to fulfil *reformasi* aspirations without threatening the autonomy granted to the regions to develop their own programs, make their own decisions and pass their own laws.

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[1] Some of the strategies suggested below are applicable to the development of the Indonesian legal system more broadly.

Towards clearer and more specific rules for environmental law making

In establishing a clearer structure for environmental law making, central government needs to consider the relevant policy objectives, assess which level of government can wield influence to achieve those objectives and formulate strategies to assist that level of government to act appropriately. Within regional autonomy, the issue for central government becomes which legal measures should be located within national as opposed to regional law. Substantive rules could cover policy tools available to protect the environment and state whether they are to be the subject of legislation passed by central, provincial or district government.

The aspirations of *reformasi* and environmental good governance are supportive of a view that considers certain basic national protections and guarantees to be a national concern. On this basis, it is arguable that rule content at the national level should include:

- aspects of environmental law that involve good governance such as procedures that ensure rights and obligations, access to environmental information, transparency in decision-making, public participation and measures to ensure legal accountability
- fundamental protective rules concerning essential prohibitions and obligations, environmental standards, licensing, environmental impact assessment and monitoring obligations
- sanctions (administrative, criminal and civil)
- institutional structures for good environmental governance at the regional level
- mechanisms to assist coordination between the relevant sectors.

It is also arguable that it would be preferable for these aspects to be complete at the national level so that they are effective and workable in a stand-alone sense even though they can be refined and adjusted to take into account regional conditions.

Aspects that would appear to be appropriate to be carried out at the regional level include the following:

- inventory making
- environmental planning
- environmental management systems
- market-based instruments and incentives such as taxes, fees, subsidies and tradeable permits

However, it is desirable to establish national procedures, even in relation to these matters, so that decision-making supports principles of good governance through following procedures that ensure rights and obligations, access to environmental information, transparency in decision-making, public participation and measures to ensure legal accountability. In this regard, ideas of reflexive rationality discussed in chapter 6 become relevant. National procedural law can enable the substance of laws to be determined at the regional level whilst guaranteeing democratic processes.

Suggested rules for law making

A way through the difficulties in environmental law may be to consider the situation in terms of jurisdictional and substantive rules which link subject matter, generic content, types of instruments and levels of government. There could be a jurisdictional rule for each form of national law. Similar rules could be drafted to apply at the provincial and district level to determine when subject matter is to be contained in a regional law or guideline. For example, in relation to statutes, it could be stated that subject matter that falls into the following generic categories shall be contained within a statute and made fully operational by that statute:

(a) a substantive right, obligation, prohibition, or authorisation in relation to either government or the public;

(b) procedures to support such right, obligation, prohibition or authorisation; and

(c) sanctions (administrative, criminal and civil).

where such right, obligation, prohibition, authorisation, procedure or sanction is a national standard to be applied throughout Indonesia for the purpose of good governance, sustainable development or national consistency.

It could also be stated that where subject matter is already provided for in a statute but is not made fully operational by that statute it shall made fully operational by a government regulation where it concerns statutory subject matter.

In relation to national guidelines, there could be a rule to the effect that any subject matter may be placed in a national guideline if it is of national importance and not necessary to be contained in a legally binding instrument.

Substantive content of laws

The rules mentioned above could operate together with additional rules that refer to legal policy tools. Table 7 below has been prepared to suggest the desirable level of law making in relation to implementing environmental legal policy tools, within regional autonomy.

Table 7 – Legal policy tools and levels of government for law making

	Central Government	Provincial Government	District Government
Inventory making procedure	X		
Environmental classification systems	X		
Environmental planning	X	X	X
Environmental management systems	X	X	X
Environmental Impact Assessment	X	X	
Standards – waste discharge standards, ambient standards	X	X	
Licensing and other environmental approvals – substance and procedure	X	X	
Compulsory audits	X		
Monitoring by government	X	X	
Self-monitoring	X	X	X
Voluntary audit	X	X	X
Administrative enforcement	X		
Civil enforcement	X		
Criminal enforcement	X		
Community enforcement - rights and procedures	X		
Dispute resolution outside the court system	X		
Restoration and rehabilitation	X		
Re-evaluation of environmental conditions	X	X	X
Rights to public participation	X		
Access to environmental information by citizens	X		
Environmental taxes	X	X	X
Fees	X	X	X
Subsidies	X	X	X
Tradeable Permits	X	X	X

If there is no cross in the column for district government, this indicates that the laws should be complete at a higher level. If there is no cross for provincial government, this indicates that the laws should be complete at the national level. This still leaves open the option to expand upon 'higher level' law for addressing local conditions; however, it indicates that the laws at that higher level can be implemented directly.

The suggested level takes into account the need for national consistency and the law-making burden on regional government. Substantive legislative rules along the lines suggested above could guide lawmakers in choosing the level of government responsible for passing a legal instrument containing a particular legal policy tool. The jurisdictional rules would then determine what sort of instrument (a law or guideline) is issued by that level of government, taking into account the generic subject matter.

Legal form: utilising the full range of available rule types

It is also fundamental to consider the legal forms that enable environmental law to have its effect. Drafting of appropriate legal rules is central to drafting laws to support the policy goals of environmental protection. In this regard, there is a need to concentrate on the rule types that make up environmental law and then to design the content of rules to match the circumstances and address the needs of Indonesia. The rule content will provide 'home-grown' solutions nationally and regionally.

As a key to environmental good governance is legal accountability, it should be the focus in formulating administrative rules. An allocation of ultimate responsibility for environmental outcomes must be made through the formulation of specific jurisdictional administrative rules that establish obligations upon government to take certain actions to protect the environment. The formulation of detailed substantive administrative rules is required to require government agencies to do certain things in carrying out their responsibilities. This should be expressed in terms of obligations, prohibitions and conditional permissions. In addition, procedural administrative rules expressed as national obligations on all levels of government would greatly assist legal accountability,

particularly where they establish mechanisms for transparency in government processes, openness, public participation and community empowerment.

To strengthen the sanctioning approach, the blurring of the administrative rule and the public regulatory rule needs to be avoided so that the identity of the rule type is explicit. This is particularly important in relation to licensing, where obligations need to be expressed with normative vocabulary and imposed on a definite entity. The recipient of obligations needs to be stated, so that it can be known whether that which is at stake is a conditional permission in a public regulatory rule or an obligation in a procedural administrative rule.

Greater attention needs to be given to developing a wider range of commands and authorisations in public regulatory rules. These rules need to be tailored to the requirements of enforcement agencies so that they can easily move into a sanction mode when appropriate. To do so, the number of prohibitions needs to be increased. There also needs to be greater utilisation of the authorisation as a conditional permission. This would be made possible by the creation of a greater number of prohibitions, as the conditional permission makes certain activities possible despite the existence of a prohibition.

Awareness of legal style: strengthening legal rules

In addition to concentration on rule-types, there is a need for greater awareness of problems caused by the style of law making in Indonesia. This requires an approach to legal drafting that focuses on dimensions of rules: their position in the legal hierarchy, their linguistic structure and their sanction.

- Position in the legal hierarchy

To ensure that rules have been created greater attention needs to be given to the generic content of statutes, regulations (national and regional) and presidential decrees. As only the statute has democratic credentials, there needs to be a re-examination of the content of statutes in Indonesia. There should be a rule to the effect that all subject matter which is fundamental to upholding national standards of good governance, sustainable development or national consistency and which concerns a substantive right, obligation, prohibition, or authorisation in relation to the government or the public must be contained in a statute. In addition, basic procedures to support such rights, obligations, prohibitions and authorisations must be contained in the same statute. Sanctions (administrative, civil and criminal) must be provided for in a statute along with procedures for their implementation.

A clearer idea also needs to be developed concerning the content of regulations in relation to guidelines. General rules are needed to set out when material must be the subject of a government regulation rather than a guideline. This needs to be done at the national and regional level so as to give law an identity as consisting of rules that bind rather than being made up of optional instructions.

- Linguistic structure

There needs to be an Act (similar to Acts known elsewhere as the Acts Interpretation Act) which sets out the agreed meaning of common words used in statutory drafting in *Bahasa Indonesia*. Failure to use expressly normative vocabulary in legislative drafting that has been noted throughout this thesis is a cause of vagueness. However, its effects go further: it means the very existence of a legal rule can be the subject of dispute and conflicting interpretation. The use of expressly normative vocabulary is one aspect that should be covered in such an Act.

Detailed guidelines are needed on statutory drafting. They should include a recommendation against the use of the passive voice so that a specific actor always identified. They should recommend against use of generic and evaluative words unless they are deliberately used to provide an area for the exercise of discretion. The use of simple, concise, clear and concrete words must be encouraged alongside the development of consistent and comprehensive national definitions of environmental terminology. The importance of clarity and concreteness cannot be over- emphasised and neither can the need for simple sentences and orderly grammatical structures.

- Sanctions

The central role of the sanction in converting optional instructions into legal rules also needs to be more widely promoted. The administrative rules behind the imposition of administrative sanctions need to be developed to establish a hierarchy of sanctions supportive of responsive regulation. Criminal sanctions need to be simplified to reduce the evidential burden imposed upon enforcement agencies. Unless this is done, the complexity of offences will undermine any attempts to give criminal sanctions a higher status through heavy sanctions.

A sanction-oriented approach would also be strengthened by the expansion of this area of control to the community through a broadening of community sanctions. In chapter 11, the rules that entrust environmental protection to the community were discussed, particularly the obligations enforceable through class actions and provisions on legal standing to defend the environment. However, the grant of rights is limited; for example, standing is not 'open standing', and the community is not able to carry out a criminal prosecution. The remedies that are available through imposing such community sanctions also need to be clarified. The implementation of this recommendation presents particular challenges. Despite rhetoric of community empowerment in post-Suharto Indonesia, the ongoing influence of ideas previously used to support the concept of the *integralistic state* such as the value of maintaining harmonious social relations, respect for authority and the family-based conception of the state, are likely to persist, at least in some areas of Indonesia such as Java.

Reflections on judicial decision-making: the relationship between reason-based judicial decisions and the rule-basis of legislation

The minimal court involvement in environmental law noted in chapters 10 and 11 detracts from the creation of legal rules in environmental law. Language is a social phenomenon, including the language of law: where we are concerned with how a rule will be interpreted and applied, the role of shared judgments in the meaning and application of the rule is central. Meaning cannot be established without reference to some community in which there is agreement as to definitions and judgments. In this regard, Wittgenstein's slogan that 'meaning is use' and Bloor's elaboration that 'use is not to be explained by reference to meaning, as meaning comes from use; meaning does not have a pre-existing reality',[2] is of particular relevance in Indonesia. There may be various competing interpretations of a statutory provision but as Wittgenstein argued, '[i]nterpretations by themselves do not determine meaning'.[3]

There will only be genuine rules in environmental law in Indonesia when rules in legislation are actually *used*. Usage establishes an internal relation between a rule and an act. Only when there is an established technique of application of a rule in environmental law and a context in which the rule is 'standardly involved in explanation and justification',[4] can questions arise in interpretation. Use can be said to occur when officials are seen to apply rules and, in particular, when the courts adjudicate upon challenges to the exercise of administrative discretion, enforcement proceedings or environmental disputes.

The role of the courts is particularly important. When a judicial decision is handed down, a public definitive pronouncement on the interpretation of words in the text of legislation is provided and the core meaning of rules begins to take shape. Without this process, 'rules' in environmental legislation in Indonesia will remain simply as words

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2 Bloor, *Wittgenstein, Rules and Institutions* (London: Routledge, 1997) 136.

3 Hacker PMS, *Wittgenstein: Connections and Controversies* (England: Clarendon Press Oxford, 2001) 282 quoting Wittgenstein, *Philosophical Investigations* Part 198.

4 ibid., at 281.

within a text, subject to conflicting interpretation and possible misapplication. The responsibility of the courts is a heavy one. A rule that the courts refuses to apply will not be part of the legal system, even if it is contained in lawfully enacted legislation. Furthermore, if the courts consistently interpret a rule contrary to its original or literal meaning, their reading of it, not its original sense, becomes law.

Recommendations about increasing the role of the courts in environmental law have to be given under the proviso that there be an improvement in the quality of legislative drafting. The analysis of the case studies shows that statutory provisions are frequently not applied by the courts. This is likely to be attributable, at least in part, to difficulties faced by the judiciary from poor legislative drafting. The lack of clarity, unnecessary complexity and opacity that bedevils legal drafting in environmental legislation in Indonesia has been consistently noted in this thesis. Prescriptive, clear and precise language would make it more difficult for the courts to depart from the terms of statutes and regulations.

These issues are fundamental to the working of the system of environmental law as a whole. Unless a system built on obligations, prohibitions and conditional permissions is actually used, core meanings will not develop and legislative provisions will continue to be open to boundless interpretation. As a result, rules will be seen as mere optional instructions; the internalisation of legal rules will not occur and attitudes will not develop concerning what is the 'right thing to do' in relation to environmental protection, which is surely the ultimate goal of any system of environmental law. The implications of the findings set out above are confronting and demonstrate the need for a deep approach to environmental law reform: one that does not merely concern the content of particular statutes, regulations and guidelines but which addresses the underlying conditions necessary to bring the Indonesian system of environmental law to life.