Cases and sectors

JOHN F. McCARTHY

The limits of legality

State, governance and resource control in Indonesia

As anyone reading the Indonesian press or scholarly literature will inevitably note, the problem of illegality plagues discussions of natural resource management – with so much debate devoted to the problems of ‘illegal’ mining, logging and fishing.¹ According to reports 90% of community mining in Indonesia is regarded as ‘illegal’, with illegal mines employing between 465,000 and a million people, and operating in an estimated 77,000 mining sites (Lestari 2008; Manaf 1999). The extent of production is also immense, with ‘illegal’ mines in South Kalimantan alone extracting up to 9.4 million tons of coal per year (Manaf 1999). These mining operations involve large trucks, excavators and machinery including smelters and ships, with large illegal stockpiles of minerals standing by ports equipped with barges waiting to ship the mineral out for export. Given the very large sums of money required, these mining operations are clearly funded by large business networks. According to these accounts the ecological impacts are also extensive, with landslides, soil erosion, sedimentation in streams, acid rock drainage, together with mercury, cyanide, tailing and toxic fumes poisoning the water, land and atmosphere and affecting fishing and farming activities (Lestari 2008).

News and development agency reports have often stated that ‘illegal logging’ extends in a similar fashion, amounting to two-thirds of the annual timber harvest in Indonesia.² In 2002 one report estimated that Indonesia’s illegal logging industry was worth around US\$5 billion per year. At the high tide of ‘illegal logging’ after 1998, this involved a clientelist system extending from highly capitalized actors with extensive funding and large, industrial scale business operations, to mid-size district-based timber barons, down to the capillaries of the system which included village-based logging teams deploying buffalo and chain saws.³

¹ Schulte Nordholt and Van Klinken 2007a; Resosudarmo 2006; Warren and McCarthy 2008.

² DFID 2007. For discussions of the illegal logging problem see also Tacconi 2007.

³ For accounts, see McCarthy 2006, 2007b.

While these illegalities are clearly complex phenomena, in donor and policy narratives the environmental problem revolves around the question of legality. As the UK's aid agency website noted in 2007:

A major factor that has allowed illegal logging to thrive is confusion over the law. This is why the governments of Indonesia and the UK got together in 2002 to agree on a definition of what was and was not legal. The resulting Memorandum of Understanding (MoU) set out clearly the laws on logging, making it much easier for the courts to prosecute offenders (DFID 2007).

The problem of 'uncontrolled' logging and mining is naturalized as a legal question in large part because virtually all natural resource policies, plans and projects are ultimately expressed in legal terms. In all sorts of ways state agencies set about using the law to control access and use of natural resources, in order to lead to some desired set of environmental consequences, to change people's behaviour for environmental ends, to generate revenue, and so on. The problem, as simply framed in press, natural resource management and governance narratives, is a question of legality: why can't the state implement its laws? Why does it so often fail?

While state failure in environmental management contributes to environmental decline, it also brings up the very question of the state. It is commonly observed that state legitimacy rests on avoiding political instability through administrative effectiveness and maintaining political order. State environmental management – encompassing the protection of collective resources and public health – plays a key role in establishing that legitimacy. The role of natural disasters in traditional cosmologies suggests as much, as does, more recently, the perception of environmental collapse posed by the forest fires during the legitimacy crisis that led to Suharto's downfall in 1997-1998, and the role of cyclone Katrina in the decline of President Bush. The state is considered the essential provider of key public goods through regulating natural resource management, and securing desirable environmental outcomes upon which so many livelihoods, production activities and underlying environmental services depend. The problem, as Evans (1995:5) has noted, is that 'all states would like to portray themselves as carrying out a project that benefits society as a whole, but sustaining this image requires continuous effort'.

This chapter is concerned with the question: why has the pervasive illegality in natural resource sectors persisted for so long in the face of so many campaigns, donor initiatives and legal changes aimed at its eradication? While these interventions continue to meet with limited success, the illegality narrative continues to pose the problem in the same terms. Accordingly, here I will consider a number of uncomfortable questions: what purpose does the policy narrative of illegality serve? Does it perhaps support particular po-

litical projects? What role does it play in justifying particular interventions? How does it help envision a rational-legal, bureaucratic state even when any study of illegality in this sector points to its very absence? If it does this, does it not conceal as much as it reveals? How might we reframe the legality/illegality opposition in order to more usefully understand the logic of illegality?

In the first section I discuss the question of legality with respect to the concepts of law and the state before, in the second section, considering the historical genesis of this problem in relation to the state in Indonesia. In the third section I discuss Indonesia's most recent experiment with governance approaches, focusing on the role of narratives of illegality during the decentralization reforms.

The idea of the state and the limitations of legality

Lurking behind illegality narratives are a set of Western ideas about law derived from a tradition of political thought stretching back to the Enlightenment and beyond. Reason should serve as the primary basis of authority, and law represents the most rational foundation for the social order (Griffiths 2002). In this tradition authority, centralized in the state and represented through government, is legitimate if the state 'as an organized entity is conceived to be limited by laws and by fundamental principles of legality'. In other words authority needs to accord with 'values of procedural fairness or due process' that are applied in the ways laws are enacted and implemented (Allan 1998). In contrast, an activity is 'illegal' and hence deemed unacceptable if it violates state law. In this way, in so many contemporary discussions of 'illegal logging' or 'illegal mining', the state and its laws *ipso facto* gain legitimacy merely because state law should have precedence over other possible normative orders. In other words the state, through its capacity to define (if not implement) rules, sets the parameters of the policy discourse which frames how the issue is typically considered.

For example, in policy and press narratives 'illegal logging' – known as 'anarchic', 'uncontrolled' or 'wild logging' (*penebangan liar*) – has long been considered the main critical problem to be addressed in forest management. Clearly it is indeed a major issue, especially when loggers enter into national parks and steep protection forests, as this is seen to contribute to biodiversity loss, floods, erosion, landslides and carbon emissions. Yet, arguably poorly managed but legally sanctioned extractive industries can have even more significant ecological impacts. For instance, industrial timber extraction carried out under the selective logging system developed under the framework 1967 forestry law led to significant forest degradation. According to the Ministry of Forestry's own figures, there are now 59 million hectares of 'degraded for-

est land' (Departemen Kehutanan 2008), mostly areas logged under the legal timber regime. Rather than sustainable production, legal timber production had dropped from 27 million cubic metres in 1990 to 5.8 million cubic metres in 2005.

Drawing on this historical inheritance, the governance discussion places 'the rule of law' alongside democracy, a free press and free and fair elections as critical achievements of modernity. This is reflected in attempts to measure the extent to which 'agents have confidence in and abide by the rules of society'. For instance, quantifiers have developed a 'World Map of the Rule of Law Index' that colours in the world map from green (in Western Europe, Australasia and North America, where we have the rule of law) to red (the bottom, predominantly African, quartile, where law is problematic). With all its problems applying state law, Indonesia finds itself painted pink – somewhere in the middle. The aim of development policy then would be to stimulate the process of evolution towards the green quartile.⁴

While without doubt the law remains a critical element in the dynamics leading to poor social and environmental outcomes, the problem with this policy narrative is that it is somewhat reminiscent of modernization theory: the assumption is that with the right assistance and governance support, the Indonesian state will evolve towards Weber's ideal typical rational-legal, bureaucratic state.⁵ Yet, as earlier attempts to transplant a foreign legal culture during the time of the 'Law in Development' movement found during the 1960s, institutional arrangements are not so readily reformed.

This line of inquiry suggests that we need to bear in mind the role that the concept of legality – or what we might call a narrative of illegality – plays in relation to what Abrams (1988) called the 'idea of the state'. From Abrams' perspective the state is an ideological effect, acting to homogenize and legitimize a disparate collection of actors and institutions as 'the state'. 'The idea of the state' leads us to imagine a coherent national state extending from central government agencies to encompass local authorities, thus delocalizing a disparate set of actors and practices. It does this by applying the 'state' label to local agents who, although claiming to be working in the name of 'the state', are actually focused around localized political concerns (Gupta 1995). As Pierce writes of Nigeria, from this perspective 'the state's primary power is an ideological figure that allows government actors to present their actions as being fully rational.' Through the operation of the state-effect, 'officials can claim legitimacy for actions and projects that, were they not labelled state actions, would be wholly illegitimate'. In other words the function of the state idea is

⁴ Kaufmann et al. 1999; Methodologies in the Promotion of the Rule of Law [http://www.passia.org/seminars/2007/Seminar 20 Nov/Methodologies in the Promotion of the Rule of Law.ppt](http://www.passia.org/seminars/2007/Seminar%20Nov/Methodologies%20in%20the%20Promotion%20of%20the%20Rule%20of%20Law.ppt) (accessed 1-6-2010).

⁵ As Pierce (2006:900) has noted in an African context, the modernization idea of a modern state governing traditional peoples retains its salience.

to enable particular political projects, opening up 'possible avenues of action' while 'masking their political content' (Pierce 2006:898). The idea of the state and its concomitant legality generates 'possibilities for on-the-ground action', nowhere more so than with respect to the control of natural resources.

Illegality can then be considered a state effect: through the working of the narrative of 'illegality', paradoxically we come to imagine a coherent, rational-legal state actor as the answer to the problem. If we had a coherent state agency with ample capacity, this narrative suggests, we could clean up these 'wild' or 'chaotic' activities. In other words, the 'idea of the state' is invoked through its very absence in the regulation of logging and mining. As Pierce (2006:899) has observed in the Nigerian context, the logic of the idea of the state acts to cover the state's 'inability to act as it ought'.

Further, the narrative of 'illegality' involves labelling a disparate 'collection of individual actions and practices embedded in particular circumstances', in the process reducing these to 'a general condition' (Pierce 2006:899). In this way the illegality narrative closes discussion. For while research into extra-legal timber and mining activities point to their complex nature, the narrative simply fixes these disparate phenomena as 'illegal', reducing our need to inquire further into their causality.

The function of the illegality might be compared to the phenomenon of 'displacement' in Freud's *Interpretation of dreams*. According to Freud (1991), under the censoring influence of the moral component of the psyche, threatening impulses during dreams are displaced so that the essence of dream-thoughts only find passing and indistinct representation in dreams. In a similar way, under the influence of the dominant political forces, narratives of illegality shift policy attention away from the unacceptable topics of how access to resources is shaped by the political economy and property relations onto the comparatively safe issue of law enforcement. Accordingly, rather than unsavoury discussions of how laws open the door to a political economy linked to legal entitlements that disregard long-standing property claims (discussed later), the policy community and the press focuses on better mechanisms of law enforcement. For, if these illegal activities are simply examples of breaking the law, we need donor interventions and governance reforms to 'strengthen state capacity' (an opaque expression) and reduce corruption. But these easy assumptions – sustained by the ideological function of narratives of illegality – do not sweep the problem away.

This fissure has never been missed by regional communities. They have witnessed state-licensed timber and mining extraction in areas subject to local property claims, and the enclosure of nearby areas for nature conservation, even as their own small-scale activities were deemed 'illegal'. By the time of the economic crisis of 1997, rent-seeking combined with a highly partial use of the law to support large-scale extractive industries licensed from Jakarta –

often in disregard of local sensibilities – had worked to de-legitimize all state environmental management, including that of national parks and protected forests. This was especially the case where the considerable coercive capacity of the central state had been used by politico-bureaucratic business coalitions to over-ride locally embedded property rights. With the temporary collapse of the state coercive apparatus after 1997, this contributed to a pandemic of ‘illegality’ in the natural resource sector (McCarthy and Warren 2008). In contrast, a more nuanced approach would require us to unpack the legality/illegality opposition, and to examine the mismatch between legal logic and everyday practices. Such inquiries should reveal the role of ‘illegality’ in its wider context, where it becomes part of an underlying logic of political relationships that actually sustain it.

A social theory approach to the state and its laws suggests that the law reflects power relations. We need to study who makes the law, who uses it, and how. This perspective points to the need to investigate how the ‘illegal’ is constituted, how and why particular resource entitlements are legally protected while others are not. For the state system – the police, army, forestry and mining agencies – clearly sustains some entitlements while seeking to quash others. Those with these entitlements can gain access to law enforcement and dispute resolution processes such as the courts, while others remain subject to informal dispute resolution processes and extra-legal modes of resource control embedded in asymmetrical power relations.

Law is a fundamental expression of state power. On the one hand, through law the state works to create, strengthen, limit and legitimize particular patterns of resource use by granting resource entitlements legal status (for example, timber or mining concessions). On the other hand, as these legal rules are invoked in negotiating access and control of natural resources, they affect the distribution of benefits from resource extraction: state law can shape the power relations so central to resource control. Further, the state’s capacity to legitimize the exercise of power and to apply this power in particular contexts clearly affects the pattern of resource use. The sociology of law suggests that we can’t assume a direct relationship between a legal rule and an outcome. We need to understand interactions in the specific setting, including the strategies various actors take up and how they make use of various regulatory orders to pursue their interests. Law both constrains and is a resource. Law often ‘follows rather than determines social relationships’ (Crook and Houtzager 2001). The processes of interpretation and transformation that occur in local settings give law a local and a specific character.

Studying the state: placing 'illegal' practices in a historical and institutional context

In short, the foregoing discussion suggests that we need first to restore the heavily laden terms 'the state' and 'the law' to their historical context, and then consider again how applicable they are to the management of Indonesia's environment. Inevitably this leads to a discussion of state formation, the emergence and extension of state legal norms, and of the social interests that underlie particular areas of environmental regulation in history.

State law emerged in Indonesia at 'the cutting edge of colonialism' (Merry 1991:46). It was essential to the colonial project to govern its subjects and control its territories. With respect to natural resources, European law played a primary role in state objectives – including the extraction of timber, the control of land for plantation development, the creation of a wage labour force, and the redefinitions of property relations in rural domains. Yet, while the Dutch brought with them the European concept of the state and 'its corresponding institutional arrangements', as elsewhere in the colonial era, they had to contend with 'other surviving concepts and structures – different from and antagonistic to the new concept' (Nandy 1992:266).

The Dutch colonial state practice of indirect rule involved recruiting indigenous leaders, allowing that areas of life should be left to local, 'customary' or indigenous law, and repackaging indigenous institutions to incorporate them into the bottom rung of the colonial state. Inevitably, this involved allowing space for locally embedded patronage networks sustained by all sorts of payments for access to the local state and use of resources in the local domain. These 'informal' payments defied state attempts to formalize them (McCarthy 2006). Given the poor penetration of the Dutch colonial state, locally embedded institutional arrangements governing natural resources, particularly property rights, remained strong, especially in those 'remote' areas outside the core colonial economic domains.

In many respects these practices have remained, if not intact, at least normatively relevant, constituting an informal route to access that has often worked in parallel with the state system. There are two reasons for this persistence. First, after independence, the state failed to develop the fiscal capacity to support local state agencies sufficiently. Local state-based actors, including military commands and party apparatuses, needed to fund the patronage networks that kept the machinery working. Consequently, local state-based actors developed 'off budget' sources of revenue to support their operations, particularly after President Sukarno introduced the chaotic Guided Democracy period in 1959 (Obidzinski 2002). Second, the official system of resource entitlements either insufficiently provided room for local resource practices and property rights or created formal and expensive barriers to ac-

cess (for example, red tape and the difficulty and expense of processing permits). This left much local mining and timber activity in the 'illegal' category.

Here it is important to bear in mind a critical tension brought to light by studies of the Indonesian state during previous decades. On the one hand, building on the vestiges of the colonial bureaucracy, Suharto was held to have forged a state with considerable coercive and autonomous capacity, an order vested in the trappings of a rational-legal, coherent bureaucracy. Here, power and governance were structured 'around institutions qua institutions' (Kuhonta 2008). On the other hand, Suharto's regime was often portrayed as dominated by powerful 'politico-bureaucrats' who were entangled with big business (Robison and Rosser 1998). Their interests penetrated the state to the extent that they hijacked natural resource policy in significant ways. The archetypal example was the capacity of Bob Hasan to dominate forestry policy (Barr 1998).

Yet, at the time of independence Indonesian nationalists, as in so many other newly decolonized states, had hailed the modern state as 'the clue to western success and political dominance' (Nandy 1992:266). Embracing the Enlightenment concept of rational governance, they embarked on an ambitious project to establish the primacy of the state system. Nationalist state building projects judged all other political arrangements only in terms of how they served 'the needs of or conform[ed] to the idea of the nation state' (Nandy 1992:267). This insistence on conformity caused serious problems for natural resource management in Indonesia.

As numerous NGO critiques of state resource management frameworks have suggested, the post-colonial state proved either unable or unwilling to expunge the colonial legal assumptions embedded in natural resource law. Rather than erasing these assumptions, in many cases the concepts were reformulated and reapplied in various ways. For instance, the colonial state had developed the concepts of state domain and idle land, concepts that had been used in various ways under the agrarian and forest laws. The 'domain declaration' (*domeinverklaring*) facilitated the development of the Dutch plantation system by allowing that all lands without statutory certified ownership (*eigendom*) remained 'waste' land not under permanent use and hence the 'free' domain of the state.⁶

Post-independence, a clause in the Indonesian constitution stated that the new nation's natural wealth should be regulated by the state 'for the welfare of the nation'.⁷ During the early Suharto years this 'state right of regulation' (*hak menguasai negara*) was extended under the Basic Mining Law (UU no. 11/1967) and the Basic Forestry Law (UU no. 5/1967). The Basic Forestry Law

⁶ Tjondronegoro 1991; Peluso and Vandergeest 2001; Heryani and Grant 2004.

⁷ 'Bumi dan air dan kekayaan alam yang terkandung didalamnya dikuasai oleh negara dan dipergunakan untuk sebesar-besar kemakmuran rakyat' (Clause 33, 1945 Constitution).

of 1967, as given force in the forest mapping process, built on this principle by placing approximately 70% of the national land area at the disposal of the state.⁸ This opened up the possibility of a particular political project – using forest resources to underwrite Suharto's patronage machine. In the name of this 'state right of regulation', Suharto's policy facilitated extractive industries via state-licensed concessions issued irrespective of pre-existing notions of tenure and territory. Thus state laws outlawed long-established rights and practices over a huge area which lacked state permits. The state handed out concessions over this land to retired generals and others close to the regime, as rewards for services rendered.

Earlier, the new state had set out to create a single framework for the regulation of land issues for all Indonesian citizens. The objective was to overcome the pluralism of colonial land law. However, by not providing for an effective system for recognizing complex local property rights systems, and by providing a strong national interest clause that was open to abuse, the Basic Agrarian Law of 1961 at best provided only very weak protection to that majority of rural property right holders whose land remained without full certificates. The New Order then legislated to attract foreign investors, granting them more certain, state-protected property rights. Taken together, these two moves merely exacerbated the legal uncertainty and the conflicts that confound the resource sector in Indonesia. By creating distributional justice problems, such policies ultimately undermined the legitimacy of state control over natural resources while at the same time constituting many of the 'illegalities' that have plagued natural resource management.

Too often the discussion of legality in the resource sector leads into dry unresolved arguments over the constraints 'customary communities' (*masarakat adat*) experience under state law.⁹ The main point here is that, when the contemporary state attempts to exert legal control over land and surface resources, including mineral and petroleum found under the ground, it inevitably bumps up against parallel – albeit overshadowed – normative orders that have much to say about how access should be regulated and benefits distributed. The state attempts to make legitimate and enforceable decisions based on state legal assumptions that insufficiently take into account the locally embedded assumptions regarding how the benefits derived from the local domain should be distributed (McCarthy 2006). This goes some way toward explaining why the state system faces so much difficulty in making locally legitimate and enforceable regulations addressing local environmental problems.

It is tempting, at this stage, to reframe the issue in terms of 'legal com-

⁸ This territorial strategies involved creating what Peluso and Vandergeest (2001) have called 'political forests' – that is lands which the state declares as 'forest' (according to law) irrespective of pre-existing property rights systems.

⁹ For a recent overview of these debates, see Davidson and Henley 2007.

plexity', since state law operates in domains characterized by competing sets of rules derived from the plurality of legislative, executive and bureaucratic activities as well as from the local normative ordering. But this notion of legal complexity can obscure the distinction between legal norms and the power play that is so important in determining outcomes. Local officials have considerable discretion in deciding how policy gets translated into decisions and the extent to which accommodations are made with regional interests and 'local customs'. Hence, local society confronts a 'local version' of the state – that is, a 'policy interpretation' quite different from the (nominal) intentions for which the law may have been created in the distant capital (Von Benda-Beckmann 1989).

During field studies in Aceh in the 1990s I found that localized normative systems continued to regulate areas of social life outside the reach of the state. For instance, poor villagers had long met their livelihood and timber needs through logging practices, in areas informally subject to a local 'right of avail', even though they lacked formal state licences in what state foresters had mapped as conservation areas and state forest. In making decisions that might be legitimate and enforceable locally within a context of overlapping normative systems, state-based actors needed to pragmatically take into account the local moral economy. They were well placed to make use of the ideological device of the state. By threatening to apply the state law against practices that were formally illegal, they gained the capacity to extract rents.¹⁰ Accepting bribes (or extracting 'rents') for permitting 'extra-legal' resource practices obtained degrees of local legitimacy if those practices were more in keeping with local perceptions of justice than the formal law. Moreover, extra-legal rents helped close a chronic budget shortfall. Those with power and resources had the means to acquire the required permits. Villagers living close to the subsistence line did not. They carried out their mining, logging and fishing outside the umbrella of the law. In many cases villagers then sold on their products to actors with officially recognized marketing or processing permits. Accordingly, those in possession of licences had the capacity to render the resources 'legal' and to sell them on at much higher prices, thus winning the lion's share of the benefits. At the time it was hardly surprising that it was rare for cases of 'illegal' mining or logging to get to court. Even if the village logging and mining teams were apprehended, the law enforcement agencies were reluctant to put poor people in jail for small-scale livelihood-related offences. Meanwhile, the well-connected agents behind the operations – who usually had considerable political investments – were hardly ever apprehended.

¹⁰ By outlawing local extractive practices while granting particular actors licences and permits, the system of rent seeking allows the latter to 'launder' resources extracted in the informal 'illegal' sector, in the process extracting the lion's share of rents.

From a 'post-institutionalist' perspective, outcomes emerge from processes rather than from regulatory orders. The focus shifts from the formal institutions to the complex interactions that occur when competing actors attempt to make use of particular repertoires of shifting institutional arrangements and normative orders. They deploy only those particular rules that most work to their advantage (Wollenberg, Anderson and Edmunds 2001). Rather than studying static regulations, we can understand what is occurring more readily from studying actors' expectations and strategies – including their use of law. The processes that actually shape resource outcomes can often be complex and fluid. They diverge substantially from more public forms of decision making and negotiation as set out by state laws. The *de facto* arrangements determining resource outcomes tend to be deeply embedded in the local world where such processes come into play.

This has consequences for outsiders wishing to 'craft' more functional, formally rational institutional orders. They find this state of affairs perplexing. In the social and political world in which an issue is situated, rights of access and compliance with rules are often ambiguous. Outcomes often emerge from continuous processes of dispute and negotiation. In such contexts, outsiders who wish to intervene successfully find it difficult to simply apply the law as it appears on the books. They may need to accept the dynamic nature of institutional practices, and accommodate a variety of partial and contingent solutions (Cleaver and Franks 2003).

However, as Lund (2006:700) notes in his writing on Africa, there is a paradox at work here: too much focus on the contingent, local reality can lead to an 'individualistic, voluntarist and somewhat episodic perspective'. Yet, over time the accumulation of this 'unpredictable fluidity' can lead to 'systemic, general and institutional outcomes'. As in the case of illegal logging and mining, all too often these institutional outcomes are associated with insecurity, conflict and severe environmental impacts. For this reason environmentalists wishing to put an end to such ecological tragedies can readily become nostalgic for the 'rule of law' found in the green quartile in the map discussed earlier.

This paradox can assist in understanding the persistence of illegality. On the one hand, processes of 'regularization' involve the production of 'rules and organizations and customs and symbols and rituals and categories' together with efforts to embody these in robust social forms (Moore 2000:50). These are efforts to 'fix social reality, harden it, and give it form and predictability' (Lund 2006:699). On the other hand, for many of the reasons discussed above, actors often seek to manipulate the rules, or manoeuvre between different repertoires of rules, in a fashion that leads to 'unpredictability, inconsistency, paradox and ambiguity and institutional incongruence'. This manipulation has been called 'situational adjustment'. The reality is that both

regularization and manipulation tend to happen at once. So while institutions claiming to embody the state may seem to be working for formalization, this is undone by the simultaneous workings of 'corruption, political networks and powerful alliances in the same institutions' (Lund 2006:699). Lund observes that we would be in error to assume some kind of 'evolutionary development from incongruence towards congruence' in institutional terms – towards legal integration and the rule of law. Rather, he suggests, processes of situational adjustment work against these outcomes. In Indonesia, the continuing chasm between formal legal stipulations and the requirements of everyday life makes 'situational adjustment' a constant necessity.

Governance approaches

Over recent years the issues surrounding these manifold illegalities in the resource sectors have gained further salience. Since the time of the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro in 1992, interest in the use of legal instruments to protect the environment has only grown. All governance programs in the area of natural resource management stress the importance of law. The greenhouse issue has given the problem international importance, increasing the potential for embarrassment to any state where unregulated exploitation of resources is associated with greenhouse gas emissions.

After 1998, faced by a crisis in state capacity, and under the influence of outside models, the Indonesian state embraced the vocabulary, if not the methods, of 'good governance'. While previously the state was seen as the solution to social problems and placed at the centre of decision making, it was now widely critiqued as predatory and inefficient. The alternative to state-led development was to be found in the unleashing of society-based problem-solving mechanisms. 'Governance' caused a shift in perspective regarding state-society relationships. Rather than command and control, the state was meant to work in concert with other actors to deal with collective action problems. The role of the state became one of 'enabling', establishing the regulatory framework for environmental management (among other things), using partnerships, negotiation and persuasion.¹¹

The governance approach invoked in Indonesia's decentralization reform involved granting enhanced discretionary authority to regional governments, who are said to be closer to the people and thus more locally accountable. Decentralization was meant to 'bridge' the national and the local. It was envisaged as a means to overcome the state's legitimacy deficit by developing locally derived forms of accountability and representation, encompassing

¹¹ Rhodes 1997; Tendler 1997; Pierre and Peters 2000.

more negotiation and persuasion.¹² In other words, the state took up the vocabulary of participation in order to mobilize other social actors for its purposes (McCarthy and Warren 2008).

However, for governance to work, the state needs to retain the capacity 'to make and implement policy, in other words, to steer society' (Pierre 2000). It needs to be strong enough to ensure effective regulation of the economy and social stability. To do so, the state requires sufficient infrastructural power – the capacity to penetrate civil society and to implement political decisions (Mann 1986). In other words, the state needs to retain its autonomy while being sufficiently 'embedded', or enmeshed, in the social networks that put it in close contact with private actors outside the state (Evans 1995). While the first characteristic allows states to pursue policy, the second allows them to pursue governance strategies – working in concert with other actors to deal with collective action problems.

For the Indonesian state after Suharto, governance entailed a profound shift in much more than philosophy. The problem, as Indonesia's mixed experience of decentralization suggests, is that the state system is not well fashioned to apply significant infrastructural power to obtain the collaboration of networks of groups and individuals that could lead to good environmental policy outcomes. In many areas of the archipelago, as noted earlier, state-based actors have used the idea of the state to exploit rules and relationships in the local domain for political and economic ends.

The institutional complexity of state administration exacerbated the state capacity problems. In any bureaucratic system, the state divides management problems into components and designs legal-institutional arrangements for each part (Rhodes 1997). Inevitably, different state institutions are given responsibility for different aspects of decision making and implementing the rules governing their own sector, while overlooking issues related to adjacent sectors. As state agencies have adjacent and often overlapping mandates and agendas, strong coordination is needed to avoid duplication, role confusion, competition and mistrust. Suharto had overseen the conflict between these sectoral agendas, including the contradiction between environmental regulation and the rent-seeking of powerful 'politico-bureaucrats' and their business partners, by combining a modicum of law enforcement with a firm hand that favoured those with access to the inner circle. But under decentralization, with so many different state actors creating rules according to their own agendas, with overlapping authority between different levels of government, the state has lacked a coherent form, let alone a strong coordinating hand (McCarthy 2004). Indonesian administrative arrangements elaborated

¹² In natural resource management this paradigmatically extends to community governance and co-management as a social arrangement for sustainability, and to initiatives to mobilize 'social capital' (a process captured in the phrase 'community-driven development').

different logics of regulation, leading to an 'internal pluralism' of the state institutional order that works against the kind of coherence expected of states (De Sousa Santos 1992:134). The struggle over the logic of state action – between different interests, sectors and coalitions – reduced policy coherence.

In devolving authority to the district, the reforms confronted the deeply rooted state/society nexus that works according to its own logic. It encompassed, as we have seen, long-established and emergent domains of social organization, including clientelist arrangements. The central state had devolved authority to domains that already worked to their own logic, readily confounding attempts by the centre to 'steer' sub-national state and extra-state actors for policy objectives. For instance, a district head might turn a blind eye to 'extra-legal' logging or mining operations while extracting revenue, in order to increase local district revenues (Pendapatan Asli Daerah, PAD) and to develop off-budget funds for the election campaign. At the same time, increased revenues redistributed under the decentralization reforms – including natural resource rents – might be used to fund building projects that provided contracts to key clients.

These relatively autonomous domains accommodated a range of local interests. Local businessmen could make backroom arrangements with agents of local state agencies that now had greater discretionary power. At the same time, the ambiguous and contested state of affairs increased the bargaining position of actors able to use coercion or the threat of it to control access to land or resources. Corporate interests needed to court district elites, entrepreneurs and key village actors, where possible recruiting them into their processes of resource control. As localized actors became more autonomous of central control, more actors benefited. As corporate interests and investors adjusted, their strategies increasingly accommodated local actors. This meant that the fruits of resource extraction, now largely outside the control of central state administration, were now more widely distributed.

Inevitably, this caused chagrin among particular actors in Jakarta. As I will discuss further below, conflict within the state between different interests were often played out in law. Central actors disapproved of many local projects legitimized by decisions and laws passed by local administrations. A district might create its own spatial plan and issue logging and plantation licences, only to find this policy coming into conflict with decisions taken by the Ministry of Forestry. These sorts of conflicts clouded the state's monopoly over the definition of 'legality'. Inevitably, the attention of powerful actors at the centre – alongside the press and the donor community – focused now on the (previously invisible) extra-legal aspect of long-established and emergent local domains of social organization. To be sure, in the absence of effective control, monitoring and supervision, some districts had issued small-scale concession licences all over the place, often with ambiguous legality, exac-

erbing the rapid liquidation of the nation's forest reserves. Yet, to a large extent the narrative of localized illegality also served political ends for central state actors. It justified a retreat to older statist modes of resource control. For instance, while the decentralization reforms initially devolved authority over small-scale logging permits directly to district governments, this authority was later withdrawn.

The struggle culminated in March 2005, when during a high-profile campaign against corruption President Susilo Bambang Yudhoyono launched intensive police operations against illegal logging that had an 'immediate impact' (Soetjipto 2005). Although these operations may not initially have netted the leaders of the major timber networks, higher transaction costs for illegal logging networks due to police enforcement, combined with the increasing scarcity of timber in many places, convinced key actors to move into other comparatively booming sectors of the economy, particularly oil palm (McCarthy 2007b). Over time, Jakarta consolidated its authority over timber licences by moving against those district and provincial governments that had, under their spatial planning authority and interpretations of earlier regional autonomy legislation, been allowing exploitation within the 'forest zone'. As these licences fell in areas that the Ministry of Forestry still classified as 'state forest', technically these concessions violated existing forestry laws. Now, with the swing back to centralized control, several district and provincial heads faced charges for having issued 'illegal' permits. For instance, the governor of East Kalimantan, who had issued hundreds of oil palm plantation permits that disregarded forest boundaries, was jailed in 2006 for illegal forest destruction.¹³

The project of reworking state legitimacy by devolving areas of state authority was thus at best only partially successful. Besides the problems mentioned above, it also had yet to address the vexed question of the legal entitlements to natural resources, including the overlap between local 'customary' entitlements and concession rights issued during the previous period. In the interim, local actors had taken initiatives on their own to increase control over resources, without having these new claims formalized in law. When control shifted back to the centre, village access to resources in the local domain remained subject to state definitions of 'illegality'. As the Ministry of Forestry reasserted its control over access to trees and land in the name of the state, it reverted to its past practice of considering villagers inside the 'forestry estate' as 'forest squatters' and 'illegal loggers'.

For example, after 2003 the Ministry of Forestry gradually began to reapply its legal power over the 'forestry estate' in the province of Jambi. After 1999 ethnic Malay villagers in one district had acted on long-standing

¹³ 'KPK tahan Gubernur Kaltim', *Kompas* 20-6-2006; '10 regents in Kalimantan prosecuted for illegal logging', *The Jakarta Post* 5-12-2005.

grievances over the appropriation of village land for plantations and timber concessions under Suharto. Claiming traditional (*adat*) rights over the land, they occupied plantations and opened gardens in former concession areas. Several NGOs supported them. For some time the district government turned a blind eye to local people 'illegally' opening gardens in the 'forestry estate'. However, the Ministry of Forestry retained *de jure* (if not *de facto*) control over the 46% of this particular district that was mapped as state forest land. Facing the fact that local government and local people were establishing 'facts on the ground', the Ministry allocated the area as a timber plantation concession. Eventually, to enforce this property right and effectively to re-establish the state forest status of the land, a paramilitary Police Mobile Brigade (Brigade Mobil, BRIMOB) special operations unit moved in to shift the 'forest squatters'. The villagers opening rubber or oil palm gardens on state forest land found themselves evicted as 'illegal loggers' (McCarthy 2008). In other well-established areas the Ministry was less able to regain control (Afiff et al. 2005). The Ministry sought to diffuse conflict while retaining the formal forestry status of this land by granting limited access rights to communities already in control of 'forest land'. The Ministry did this by introducing 35-year People's Timber Plantation (Hutan Tanaman Rakyat) leases to villagers over areas already under *de facto* community control (*Peoples Plantations* 2007).

District governments have retained considerable discretionary power in other areas. For instance, while the central government retains ultimate authority to issue long term concession licences (Hak Guna Usaha, HGU), districts hold the authority to issue location permits and plantation licences (*izin prinsip*, *izin lokasi* and *izin usaha perkebunan*). This means that control over land for investment purposes continues to be mediated via the local state, ensuring that investors have to negotiate control of land in the local domain first before proceeding to process the concession licence in Jakarta. With outside interests needing to make significant local investments within the local political domain to secure access to land, corporate interests might strategically accommodate district elites, entrepreneurs and key village actors in processes of 'freeing up' land for development.

Conclusions

Narratives of illegality provide an important frame for policy and aid interventions. The problem is that the prevalent narrative of illegality narrows policy thinking by shrinking disparate actions and practices embedded in particular local circumstances into the simple category of illegality. A rigid narrative of 'illegality' closes discussion of key issues such as the link between 'illegal' practices and the political economy, the distribution of the benefits

of resource access, and property rights. By passing over underlying issues, this can lead to premature analytical closure of intricate problems, and in the process foreshadow disappointment for project and policy interventions.

These narratives help us to imagine that simply creating a coherent, rational-legal state actor is the answer to the problem. In this way they serve to underpin particular types of interventions – usually technically conceived ones that avoid confronting politically unsavoury corruption problems (for example, using satellites to capture illegal loggers in Kalimantan's jungles). Yet, as suggested here, there is no substitute for thinking through the complex dynamics and variety of causalities at work in 'illegal' phenomena. Armed with such knowledge, policy makers may be more likely to be in a position to devise strategies and evaluate their likelihood of success.

A key problem facing attempts to implement the law is state capacity. To be sure, the central state has the capacity to apply its coercive power to affect legal resource control in resource-rich enclaves where foreign investment is at stake, such as for wealthy mineral and oil concessions. However, outside these enclaves, in areas where state capacities are thinner on the ground, resource control may well be a much more negotiated affair, conducted in both formal and informal ways. Local power relations are highly clientelist in nature. Deals are made at the intersection of state legal norms, reinterpreted by local state-based actors, and what passes for 'customary orders' (McCarthy 2006). These latter modes of negotiating resource access have a degree of local legitimacy. They can lead to a wider distribution of resources locally when compared to the state-regulated resource enclaves; they provide a social safety net for the rural poor who find work in logging and mining teams deployed outside the law; and finally, they allow local access to resources that might be subject to a local 'right of avail' that remains unrecognized in state law. Unfortunately, where this 'situational adjustment' occurs in a highly clientelist way without effective governance mechanisms, this overlap between state and local institutional arrangements does tend towards resource depletion and environmental degeneration.

The loss of faith in the state as the custodian of collective resources and public goods – including the environment – in large part provided the motor behind the shift from government to governance. While governance theory suggests a decreasing reliance on formal-legal powers, the political importance of law remains evident, as any witness to the efforts various actors continue to invest in law formation processes can attest. The problem remains that unworkable existing legal definitions sustain a particular political economy of natural resources that benefit powerful actors. As legal change would require confronting these dominant interests, the required legislative and practical policy changes required for dealing with this problem remain intractable.

In governance theory, it is suggested that the devolution of authority to local authorities coupled with the provision of 'effective safeguards against arbitrary exercise of localized power and clear relations of accountability' can change the relationship between local constituents and local decision makers (Lemos and Agrawal 2006:305). By ensuring that the rule-making process reaches down to the local level, where management, enforcement, and dispute resolution occur, this theory suggests that more realistic, locally legitimate and hence more enforceable legal regimes might emerge that do away with the problem of illegality and poor resource management inherited from the past. This requires the combination of localized modes of participation and accountability with the capacity of a central state to carry out the required degree of monitoring, supervision and sanctioning to counteract the power of unaccountable local elites. It remains unclear when or how such state and society capacities will evolve in the rural contexts where most of Indonesia's natural resources exist. Meanwhile the persistent chasm between the local 'informal' social world and the state legal regime may continue to allow maximum space for powerful actors – working locally and at a distance – to use concepts of state legality to pursue political and economic projects. Where this occurs at considerable cost to the local social and natural environment, it will continue to provide the grounds for 'illegal' local adjustments to continue.