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COMMENT

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Comment

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1 INTRODUCTION

On 20 March 2013, the Indonesian Constitutional Court handed down its decision in the *Traditional Forest Community Case* (2013).[1] In this decision, the Court invalidated provisions of the 1999 Forestry Law[2] under which the Indonesian central government had assumed ownership over forest land that traditional communities had occupied and used for generations. According to the complainants – several traditional communities and AMAN (*Aliansi Masyarakat Adat Nusantara*),[3] a non-government organisation – the state had then used its control over that land to issue concessions to commercial enterprises to exploit it, including for industrial logging, pulp and paper and palm oil. The Court decided that the provisions were unconstitutional because the state was constitutionally required to recognise and respect the customary (*adat*) rights of traditional forest communities. The state could not, therefore, award these concessions without approval from those communities. AMAN has since claimed that this decision, in effect, awards rights to an estimated 40 million traditional community members inhabiting around 40 million hectares of forest land across Indonesia.[4] AMAN and other NGOs working on traditional land rights have encouraged forest communities to mark out their territory using posts and signs, amidst fears, expressed by some community leaders, that this will lead to disputes and conflict.[5]

Although hailed as a 'landmark',[6] this case is merely the latest in a string of important but hitherto largely unheralded decisions in which the Indonesian Constitutional Court has upheld the constitutional rights of traditional communities. Like the *Traditional Forest Community Case* (2013), these cases have been challenges brought by traditional communities against national statutes under which the state has permitted itself to grant concessions to commercial entities – some of which are foreign – to exploit land and the natural resources contained therein, often without adequate, or any, consultation with or compensation for the traditional communities that occupy that land.

This article analyses the cases in which the Court has, since its establishment in 2003, upheld traditional rights over natural resources. Its primary aims are to explain the Court's reasoning and to consider whether these decisions are, in practice, likely to improve recognition and respect for those rights.

The article is divided into three parts. Part I introduces the Indonesian Constitutional Court, covering its jurisdiction, the standing requirements for traditional communities, aspects of its decision-making, and the effect and enforceability of its decisions. Part I then provides some jurisprudential context to the *Traditional Forest Community Case* (2013) by briefly discussing previous important Constitutional Court cases which involved state control over natural resources. As we shall see, the *Traditional Forest Community Case* (2013) can be seen as part of a broader category of decisions in which the Court has held that, in post-authoritarian Indonesia, the central government cannot 'do as it pleases' in respect of natural resources as may have been possible during the Soeharto period (1966-1998).

Part II begins by outlining well-documented legal problems that traditional communities have faced when seeking to have their traditional rights respected, particularly by the state, focusing on the particularly weak position of customary law within the Indonesian legal system. Part II then describes and analyses the cases in which the Court has invalidated legislation for breach of traditional rights. These cases are the *Traditional Forest Community case* (2013),[7] the *Plantations Law case*

1 Constitutional Court Decision 35/PUU-X/2012, reviewing Law 41 of 1999 on Forestry, issued 20 March 2013 (*Traditional Forest Community case* (2012)).

2 Law 41 of 1999 on Forestry.

3 The word '*aman*' means 'safe' in Indonesian.

4 Wimar Witoelar, 'Restoring forest rights restores sense of nationhood', *Jakarta Post*, 5 June 2013.

5 Prodita Sabarini, 'Indigenous Communities Set to Mark Out Their Territory', *Jakarta Post*, 24 June 2013.

6 Camelia Pasandaran, 'Constitutional Court annuls government ownership of Customary Forests', *Jakarta Globe*, 17 May 2013.

7 *Traditional Forest Community case*, note 1 above.

(2011)[8] and the *Coastal and Remote Areas Law* case (2011).[9]

Part III concludes by assessing whether these cases represent a turning point for the protection of traditional land rights in Indonesia, or whether they are unlikely to assist traditional communities with land claims.

2 THE CONSTITUTIONAL COURT AND NATURAL RESOURCES CASES

The Constitutional Court, established in 2003, represents one of the most successful products of the reformation (*Reformasi*) movement that emerged in Indonesia when Soeharto fell in 1998 after 33 years in power. It comprises nine judges, three of whom are chosen by the Supreme Court, three by the national parliament, and three by the President.[10] By most accounts, the Court has performed with professionalism and integrity unmatched by Indonesia's other judicial institutions, perhaps even in Indonesian legal history,[11] at least under the Chairmanships of founding Chief Justice Professor Jimly Asshiddiqie (2003-2008) and his replacement Mahfud MD (2008-early 2013). Under their stewardship, the Court built a deserved reputation for being largely competent, reliable and impartial in its decision-making and for being independent from government. This was a significant achievement in a political environment in which some politicians are still unaccustomed, even openly hostile, to subjecting their laws to review.

However, in early October 2013, the Court's reputation nosedived, when its newly-appointed Chief Justice, Akil Mochtar, who had served as a judge of the Court since 2008, was arrested by Indonesia's Anticorruption Commission for allegedly receiving bribes to fix electoral disputes. The police was also investigating Mochtar for narcotics offences, after investigators found a small quantity of illicit substances in his chambers.

The Mochtar incident is highly significant because the Constitutional Court has no formal powers of enforcement. The Court had relied heavily on its former charismatic chairpersons and its reputation for integrity, both of which attracted a strong public support base, to 'persuade' the government and others to comply with its decisions.[12] With these now gone, there is a real question as to whether the decisions discussed in this article will continue to carry significant political, and legal, weight. It is quite possible that the government might now easily circumvent them with little consequence, whether legal or reputational. Much will depend on the way the new Chief Justice, Hamdan Zoelva, handles the controversy. In particular, the Court will need to clearly delineate between its judicial review decisions (which to date have not been tainted by allegations of impropriety) and its decisions in electoral disputes (to which the allegations against Mochtar relate).

2.1 Jurisdiction

The Constitutional Court's jurisdiction is defined in Article 24C of the Indonesian Constitution and in Article 10 of the statute under which the Court was established: Law 24 of 2003 on the Constitutional Court. Its primary function – for the purposes of this article, at least – is constitutional review. When exercising this function, the Court reviews legislation enacted by Indonesia's national parliament to ensure that it is constitutional. It is

8 Constitutional Court Decision 55/PUU-VIII/2010, reviewing Law 18 of 2004 on Plantations, issued 6 September 2011 (*Plantation Law case* (2011)).

9 Constitutional Court Decision 3/PUU-VII/2010, reviewing Law 27 of 2007 on the Management of Coastal Areas and Small Islands, issued 16 June 2011 (*Coastal and Remote Areas Law case* (2011)).

10 Article 24C(3) of the 1945 Constitution of Indonesia.

11 With the possible exception of the religious courts, which have a reputation for being corruption-free. *See* Cate Sumner and Tim Lindsey, *Courting Reform: Indonesia's Islamic Courts and Justice for the Poor* (NSW: Lowy Institute, 2010).

12 For some exceptions, *see* Simon Butt and Tim Lindsey, 'Economic reform when the Constitution matters: Indonesia's Constitutional Court and Article 33' 44/2 *Bulletin of Indonesian Economic Studies* 239 (2008).

Indonesia's first judicial institution to have been granted this function, let alone exercise it.

In the decade since its establishment, the Court has drawn much praise for performing constitutional review actively, striking down statutory provisions that breach the Constitution, which was amended four times from 1999-2002. These amendments, *inter alia*, inserted an extensive Bill of Rights, established separation of powers, decentralised many functions and powers of government to regional administrations and reconfigured Indonesia as a democracy.[13] The Constitutional Court is, therefore, at the forefront of maintaining Indonesia's post-authoritarian system.[14]

However, the Court's formal constitutional review jurisdiction is limited: it can only review national statutes against the Constitution. This is a significant limitation because it takes the 'bulk' of Indonesian law – contained in lower-order legal instruments, such as executive regulations and local government bylaws –beyond the Court's purview. Only the Indonesian Supreme Court has the power to review these types of lower order laws, but against statutes, not other types of laws including the Constitution.[15] Unlike many European constitutional courts, the Court also lacks jurisdiction to hear 'constitutional complaints' – that is, applications that seek to challenge government action, rather than government laws.

2.2 Standing

Article 51(1) of the 2003 Constitutional Court Law governs standing. This provision allows a claim to be brought before the Court by a wide variety of people and entities: individual citizens, a representative of an *adat* (customary or traditional law) community, a public or private legal entity, or a state institution. In short, all Indonesian individuals and entities – whether private, public or government – can apply to the Court. Only foreign individuals and entities appear to be precluded from doing so.

To be granted standing under Article 51, applicants must prove damage to their constitutional rights. The Court has required that applicants meet five prerequisites in order to prove this damage:

a. the applicant has a constitutional right and/or obligation, provided by the 1945 Constitution;

b. the applicant considers that this constitutional right and/or obligation has been damaged by the statute for which review is sought;

c. the damage to the constitutional rights and/or obligation is specific and actual, or at least potential, provided that according to logical reasoning it will be certain to occur;

d. there is a causal relationship between the damage to the right and/or obligation and the statute for which review is sought; and

e. there is a possibility that if the application is upheld, the damage to the constitutional right and/or obligation will not occur or will not occur again.[16]

The Court has thrown out very few cases for lack of standing in its decade-long history. In most cases, the applicants, with a large range of generally-worded rights now contained in the Constitution from which to choose, have had no difficulty meeting these various requirements to the satisfaction of the Court. For example, in the three cases discussed in Part II

13 Simon Butt and Tim Lindsey, *The Constitution of Indonesia: a Textual Analysis* (Oxford: Hart Publishing, 2012).

14 The Court has several other constitutional functions not relevant to this article but which I mention here for completeness. These include resolving disputes between state institutions established by the Constitution about their relative jurisdictions, about the dissolution of political parties, and about general election results. The Court must also 'provide a decision' if the national parliament refers to it a suspicion that the president or the vice president has committed an act of treason, corruption, or bribery; another type of serious crime or improper conduct; or no longer fulfills the constitutional requirements to hold office.

15 Article 24A(1) of the Constitution; Law 4 of 2004 on the Judiciary (Article 11(2)(b)); Law 14 of 1985 on the Supreme Court (Article 31(1)).

16 The Court first set out this formulation in Decision No 006/PUU-III/2005, 31 May 2005 and then in Decision 11/PUU-V/2007, 20 September 2007. It has, to the knowledge of the author, restated these requirements in every judicial review decision since, in the section of its decision dealing with the standing of the applicant(s).

below, the applicants were individuals (who had been excluded from their traditional land),[17] representative organisations (who had worked on matters relevant to the dispute)[18] or *adat* law communities themselves (represented by an individual of that community).[19] To successfully prove constitutional damage, they simply set out, in their applications, the provisions of the statute they sought to challenge and the constitutional provisions they claimed had been breached.

2.3 Aspects of Decision-making

Formally, the Constitutional Court is not bound to follow its own previous decisions. As a civil law country, Indonesia does not have a formal system of precedent, and no provisions in the Constitution, or in the 2003 Constitutional Court Law, require the Court to issue consistent decisions. However, the Court generally does follow and quote from its own previous decisions.[20] The Court is also clearly willing to extend its reasoning in cases involving particular natural resources or important industries – such as electricity, mining and waterways – to other resources or industries, such as land, forests and petroleum. So, for example, the *Electricity Law case* (2003), discussed below, established the Court's interpretation of the words 'state control' in Article 33(2) of the Constitution. The Court has repeatedly cited and applied this interpretation in subsequent cases in which it has reviewed statutes against both Article 33(2) (which deals with 'state control' over important industries) and Article 33(3) (which covers 'state control' over natural resources).

The Court has, generally speaking,[21] given its decisions only prospective effect. In other words, if the Court decides that a statute breaches the Constitution and declares that statute to be invalid, that statute will only be invalid from the moment the Court finishes reading its decision. Any action taken under the statute between its enactment and its invalidation is not affected by the declaration of invalidity and therefore remains legal.[22] The Court has emphasised the prospectivity of its decisions in several natural resource cases discussed in this article,[23] declaring that contracts or concessions made or issued on the basis of a provision that the Court later declares invalid remain valid until their expiry.

2.4 Enforcement

The Court has no formal powers to ensure compliance with its decisions. Neither the Constitution nor the 2003 Constitutional Court Law provide mechanisms for enforcement or impose sanctions for contravening its decisions. Yet, for the most part, national parliament members and politicians have publicly accepted the Court's decisions – albeit sometimes reluctantly, particularly in the Court's earlier years. The Court is publicly popular,[24] and it is likely that politicians see little benefit in criticising it, at least openly.

More common, has been legislative failure to amend or enact new legislation in response to invalidations made by the Court. The result of this inaction has

17 As in the *Plantations Law case*, note 8 above.

18 So, for example, in the *Coastal and Remote Areas Law case*, note 9 above, the Court found that the various non-government organisations that were applicants in the case – including the People's Coalition for Fishery Justice and the Indonesian Human Rights Committee for Social Justice – were 'known for fighting for human rights, especially in the marine sector and amongst coastal communities, and for fighting against inequities in access to agrarian resources and for the rights of traditional communities in Indonesia' (at 138). These activities, the Court noted, were listed in the Articles of Association of those organisations (at [3.7]).

19 In the *Traditional Forest Community case*, note 1 above, for example, the Court accepted that applicants were customary law communities because they had been recognised as such in bylaws issued by the regional governments with jurisdiction over the area in which those communities were located.

20 Simon Butt, 'Judicial Review in Indonesia: between Civil Law and Accountability – a Study of Constitutional Court Decisions, 2003-2005' (Doctoral Dissertation, University of Melbourne, 2006).

21 For limited exceptions, *see* Simon Butt, *Corruption and Law in Indonesia* (UK: Routledge, 2012).

22 Simon Butt, 'Indonesia's Constitutional Court – The Conservative Activist or Pragmatic Strategist?', in Bjoern Dressel ed., *Judicialisation of Politics in Asia* 108 (UK: Routledge, 2012).

23 For example, *Coastal and Remote Areas Law case*, note 9 above, at [3.15.13]; Constitutional Court Decision 36/PUU-X/2012, reviewing Law 22 of 2001 on Oil and Natural Gas (*Oil and Natural Gas Law case* (2012)), at [3.21].

24 Butt, note 22 above; Björn Dressel and Marcus Mietzner, 'A Tale of Two Courts: The Judicialization of Electoral Politics in Asia' 25/3 *Governance* 391 (2012).

been that when the Court invalidates statutory provisions, it has left legal lacunae, many of which are filled years later or not at all. The Court's main solution has been to issue decisions in which it declares statutory provisions to be either 'conditionally constitutional' or 'conditionally unconstitutional'. Some of the decisions discussed in Part III fall into this category. The effect of these decisions is that the statute under review will be invalid unless interpreted in line with conditions imposed by the Court. As we shall see, these conditions are often quite specific, so that the Court, in essence, amends the legislation under review. However, the Court refuses to acknowledge this, preferring to proclaim itself as a negative legislator (that is, it can only strike down legislation) and denying being a positive legislator (that is, it can make law).[25]

2.5 Court's Jurisprudence in Natural Resource Cases

Most of the decisions about natural resources issued by the Constitutional Court since its establishment have turned on its interpretation and application of Article 33 of the Constitution. Article 33 states:

> 1) The economy shall be structured as a common endeavour based upon the family principle.
>
> 2) Branches of production that are important to the state, and that affect the public's necessities of life, are to be controlled by the state.
>
> 3) The earth and water and the natural resources contained within them are to be controlled by the state and used for the greatest possible prosperity of the people.
>
> 4) The national economy is to be run on the basis of economic democracy, and the principles of togetherness, just efficiency, sustainability, environmentalism, and independence, maintaining a balance between advancement and national economic unity.
>
> 5) Further provisions to implement [Article 33] will be provided in legislation.[26]

The Constitutional Court has invalidated many statutory provisions for breaching Articles 33(2) and 33(3).[27] These cases have primarily concerned the extent to which 'state control' and the 'greatest prosperity of the people' leave space for private sector participation in the important industries and natural resources encompassed by Articles 33(2) and 33(3). In the cases in which the Court has invalidated statutory provisions, the Court has found that those provisions have either reduced the 'control' held by the state below a level permitted by the Constitution, or, in the case of natural resources at least, that the state has not exercised its control for the purpose of the greatest prosperity of the people. Of course, these cases have turned largely on the Court's views about what level of 'state control' is constitutionally required and what the 'greatest prosperity of the people' entails. The decisions in which the Court has discussed these issues have been the focus of other academic literature,[28] so I provide only a brief summary of the Court's Article 33 jurisprudence here.

The Court first considered the meaning of 'state control' in Article 33(2) in the *Electricity Law case* (2003). Law 20 of 2002 on Electricity had been enacted, in part, to introduce competition into the Indonesian electricity sector, which had formerly been largely monopolised by state-owned enterprises. The Law divided the electricity market into various activities, including generation, distribution and sale, and permitted the private sector to run them. The main question facing the Court was whether this 'unbundling' relinquished too much state control over the sector, thereby breaching Article 33(2).

25 For a critique of the Court's position and an analysis of the compliance of conditional (un)constitutionality with the rule of law, *see* Simon Butt, 'Conditional Constitutionality, Pragmatism and the Rule of Law', *Hukumonline*, 2 May 2008.

26 I have taken this translation from Butt and Lindsey, note 13 above, at 250-51.

27 For a discussion of two cases in which the Court has invalidated provisions on the basis of Article 33(4), *see* Butt and Lindsey, note 13 above, at 264-66.

28 *See* generally Simon Butt and Fritz Siregar, 'The BP Migas case: implications for the management of natural resources' 31/2 *Journal of Energy & Natural Resources Law* 107 (2013); Butt and Lindsey, notes 12 and 13 above; Mohamad Mova Al Afghani, 'The Elements of State Control', *Jakarta Post*, 14 January 2013.

The Court decided that 'state control' required the state to do more than merely regulate and monitor the sector, such as by enacting and enforcing the Electricity Law. This was because the state already had inherent power to regulate, even absent Article 33(2). Rather, 'state control' comprised five activities – policymaking, administration, regulation, management and supervision – all of which the state was required to perform for one purpose: the greatest prosperity of the people. The government could, for example, 'administer' by issuing and revoking licences and concessions. It could 'manage' through share ownership or by running the enterprise as a state institution. The Court found that the Electricity Law's main thrust was to privatise aspects of the electricity sector, which breached Article 33(2), and decided to invalidate the entire statute rather than only the provisions that unbundled the sector.

The Court has since reviewed statutes dealing with many of the natural resources that once were, or still are, plentiful in Indonesia – including land, forests, water, oil, natural gas, coastal areas, minerals and coal – and invalidated or declared various provisions 'conditionally constitutional'. The *Oil and Natural Gas Law case* (2013) is amongst the Court's most significant recent decisions in this context. Law No 22 of 2001 on Oil and Natural Gas had established a government body – 'BP Migas'[29] – to regulate and supervise the sector, and to enter into cooperation contracts with private sector entities for exploration and exploitation.[30] The applicants argued that, in so doing, the state had relinquished the requisite control over the sector.

An eight to one majority of the Constitutional Court upheld the challenge. The majority categorised the five activities of 'state control' identified in the *Electricity Law case* into 'tiers' of importance, depending on the extent to which, in the majority's view, the activity achieved the greatest possible prosperity of the people.[31] For the majority, 'direct management' of the natural resource, preferably performed by a state owned enterprise, was the 'first-order form of state control'[32] because profits would flow to the state, thereby bringing maximum benefits to the Indonesian people. By contrast, private sector participation meant that profits needed to be shared, leaving less for the people. In the majority's view, Article 33(3) required the state to fully manage natural resources if it had the capital, technology and capacity to do so. Only if these were absent could the state provide opportunities to foreigners.

Because upstream oil and gas activities were managed by the commercial entities with which BP Migas contracted, the majority found that BP Migas did not 'directly manage' the sector. According to the majority, these contracts also deprived the state of absolute sovereignty over natural resources, thereby impeding the state's unbridled freedom to regulate the sector. Further, these dealings with private enterprises thwarted the achievement of the greatest possible prosperity of the people, because any profits would need to be shared. BP Migas's statutory functions did not, therefore, meet the twin 'state control' and 'people's prosperity' requirements of Article 33(3). For these reasons, the majority decided to excise from the 2001 Oil and Natural Gas Law all references to BP Migas, including the provisions granting it powers and functions, thereby disbanding it.[33]

Maintaining unbridled state sovereignty over natural resources was also of primary concern to the Court in the *Investment Law case* (2007).[34] In it, the Court invalidated provisions of the 2007 Investment

29 BP Migas refers to Badan Pelaksana Kegiatan Usaha Hulu Minyak dan Gas Bumi, literally, 'Implementing Authority for Upstream Oil and Natural Gas Activities'.

30 Articles 44(1) and (2). BP Migas also advised the Energy and Mineral Resources Minister on cooperation contracts, production plans, budgets and the appointment of oil and gas sellers, again in the interests of securing the largest possible benefit for the people via the state (Article 44(3)).

31 The Court did not explain why it decided to rank direct management as the most important component of 'state control'. The rationale for choosing direct management as the most important aspect of state control over regulation is unclear, because it appears that 'regulation also [includes] supervisory activities, as well as license-granting, standard-setting, in addition to the traditional understanding of enacting rules': Afghani, note 28 above.

32 *Oil and Natural Gas Law case*, note 23 above, at [3.12]. Of secondary importance were, equally, policymaking and administration. Both regulation and monitoring fell within the third tier.

33 *Oil and Natural Gas Law case*, note 23 above, at [3.13.5].

34 Constitutional Court Decision 21-22/PUU-V/2007, reviewing Law 25 of 2007 on Investment (*Investment Law case* (2007)). This description draws on Butt and Lindsey, note 13 above.

Law[35] that allowed foreigners to obtain 'upfront' extensions to various rights over land upon which they could run commercial enterprises. Before the 2007 Investment Law was enacted, after expiry of the initial grant of between 25 and 35 years (depending on the right)[36] these rights could be extended, at the absolute discretion of the government, for 20 to 30 years (again, depending on the right). The 2007 Law purported to allow investors to extend these rights at the time of their initial grant. The state could revoke these land rights, but only in particular circumstances listed in Article 22(4) of the Law.[37]

After confirming that land fell within Article 33(3) and that the state was therefore required to 'control' it, the Court held that upfront extensions were unconstitutional because they had the potential to 'reduce or remove' that control.[38] The Court seemed concerned that upfront extensions left the state without the absolute discretion to revoke or refuse to extend these rights – a discretion that it had enjoyed under the pre-existing law. In this context, the Court also found that Article 22(4), which limited the state's power to revoke the grant, impeded – and perhaps even relinquished – the state's right of absolute control.[39]

3 TRADITIONAL RIGHTS BEFORE THE CONSTITUTIONAL COURT

Most Indonesian rural land and forest is held, and used, under *adat* (customary) law, which governs fundamental issues such as who owns and controls land, the purposes for which it can be used and for how long.[40] Under some *adat* systems, land can be held by individuals, but in most it is held communally under the so-called *hak ulayat*: the *adat* community's control of the allocation and use of land, usually decided by the village head.[41]

The position of customary law within the Indonesian legal system has, on the whole, been extremely weak for centuries. In particular, state law has generally prevailed over *adat* to the extent of any inconsistency, allowing *adat* to autonomously apply only in the absence of state law. This has given *adat* very limited space in which to flourish within the formal legal system. Nevertheless, in practice, particularly in rural parts of Indonesia, many traditional communities are said to prefer *adat* over state law and have continued to largely live their lives under those customs.[42] However, customary laws and the rights they provide to traditional communities have not fared well when pitted against the interest and laws of the state, whether colonial or independent.[43]

35 Law 25 of 2007 on Investment (which replaced Law 1 of 1967 on Foreign Investment and Law 6 of 1968 on Investment).

36 Such as the right to cultivate (*hak guna usaha*), build (*hak guna bangunan*) and use (*hak pakai*) land.

37 Article 22(4) allowed the state to revoke the land right if the investor abandons the land, damages the public interest, uses or exploits the land contrary to the purpose for which it was granted, or breaches land laws.

38 *Investment Law case*, note 34 above, at 263.

39 *Id.*, at 258. The Court also emphasised Article 32 of the Investment Law, which allowed foreign investors to arbitrate disputes with the government before international fora. Such disputes could arise if Article 22(4) was applied against an investor. If the state were to lose such arbitrations, its 'control' would be lost – at least for the remainder of the term of the land right.

40 For an excellent introduction, *see* M.B. Hooker, *Adat Law in Modern Indonesia* (Oxford: Oxford University Press, 1978).

41 Daniel Fitzpatrick, 'Disputes and Pluralism in Modern Indonesian Land Law' 22/1 *Yale Journal of International Law* 171 (1997).

42 Satjipto Rahardjo, 'Between Two Worlds: Modern State and Traditional Society in Indonesia' 28 *Law and Society Review* 493, 495-96 (1994); Matt Stephens 'Local-level Dispute Resolution in Post-reformasi Indonesia: Lessons from the Philippines' 5/3 *Australian Journal of Asian Law* 213 (2003).

43 The literature on traditional communities, including those who live in forests, and *adat* in Indonesia is vast. *See* Franz Von Benda-Beckmann and Keebet von Benda-Beckmann 'Myths and Stereotypes about Adat Law: a Reassessment of Van Vollenhoven in the Light of Current Struggles over Adat Law in Indonesia' 167/2-3 *Bijdragen tot de Taal-, Land- en Volkenkunde* 167 (2011); John McCarthy and M. Moeliano, 'The Post-Authoritarian Politics of Agrarian and Forest Reform in Indonesia', in Richard Robison ed., *Routledge Handbook of Southeast Asian Politics* (Routledge: London, 2011); Christopher Barr et al., *Decentralisation of Forest Administration in Indonesia: Implications for Forest Sustainability, Economic Development and Community Livelihoods* (Bogor, Indonesia: Center for International Forestry Research, 2006); Myrna Safitri, Forest Tenure in Indonesia: the Socio-Legal Challenges of Securing Communities' Rights (PhD dissertation, University of Leiden, Netherlands, 2010).

The susceptibility of *adat* to override by laws of the state, particularly in matters of land law, is highlighted in the leading academic works on the Basic Agrarian Law (BAL) of 1960.[44] On the one hand, the BAL claims, in Article 5, that Indonesian land law was based on *adat* – probably to provide the law with legitimacy in the eyes of the populace. On the other hand, the Law itself established a new range of statutory rights that overrode *adat* law and left *adat* with very little autonomous authority. Many of these new land rights were particularly Western in nature, and many of them were contrary to principles recognised in many *adat* systems. Most notably, the BAL established as the 'fullest' and 'strongest' right the 'right of ownership' (*hak milik*) which is capable of being registered, transferred and mortgaged. Hooker observes that this ownership right is similar to Western legal notions of land ownership and represents 'a radical departure from traditional [adat] views on ownership' represented by *hak ulayat*.[45]

While mentioned in the BAL, *hak ulayat* land is not protected by it. Indeed, *hak ulayat* land is not even registrable under the BAL. To the contrary, the BAL declares that the exercise of *hak ulayat* must conform to national interests,[46] suggesting that it had obstructed 'development',[47] one of the key ideological mantras of the New Order regime. This allowed the Soeharto government, and the post-Soeharto central and regional governments that followed, to treat *hak ulayat* land as state property, often by reference to the BAL and, before the *Traditional Forest Community case* at least, the 1999 Forestry Law.[48] *Hak ulayat* is, therefore, vulnerable to being taken over by the state, or by those who claim statutory rights over the same land.[49]

However, with the fall of Soeharto in 1998, and the constitutional amendment process that followed, traditional rights were given formal constitutional legal recognition. Article 18B(2) of the Constitution now reads:

> The state recognises and respects customary law communities and their traditional rights provided they still exist and are in accordance with community developments and the principle of the unitary Republic of Indonesia as regulated by statute.

This constitutional legal recognition was translated into various statutes concerning natural resources enacted from 1999. These statutes included the 1999 Forestry Law,[50] the 1999 Human Rights Law,[51] the 2004 Regional Government Law,[52] the 2004 Fisheries Law,[53] the 2004 Plantations Law,[54] and the 2007 Coastal Area and Small Island Management Law.[55] However, these laws did not provide sanctions for non-compliance and it appears that they were inadequately enforced, if at all. Despite strong 'on-paper' protection, then, traditional rights remained vulnerable to expropriation with inadequate or no compensation.

However, the tide now appears to be changing in favour of traditional communities, at least in the

44 Law No 5 of 1960. *See* Hooker, note 40 above; Fitzpatrick, note 41 above.

45 Hooker, note 40 above, at 118.

46 Article 3 of the Basic Agrarian Law.

47 *See* explanatory memorandum, Part A(3), paragraph 2. The Elucidation to Article 5 even states 'it is unjustifiable' for a customary law community to use their *hak ulayat* to block various land concessions if doing so would contravene 'broader interests of the nation and state', such as development.

48 Fitzpatrick, note 41 above, at 186.

49 More recently, Agrarian Minister/National Land Affairs Head Regulation 5 of 1999 on Guidelines for Resolving *Adat* Community *Hak Ulayat* Issues was issued. This Regulation leaves it to regional governments to determine and recognise *hak ulayat* in their respective regions by issuing bylaws (Article 5). The 1999 Regulation specifies that *hak ulayat* claims must be supported by a legally defined community that continues to observe *adat* in its daily life and has effective customary law institutions which regulate control and use *ulayat* land. Even though the Regulation provides for mapping of *hak ulayat* (ie determining boundaries), it does not provide for registration of *hak ulayat* based on those boundaries.

50 Law 41 of 1999 on Forestry, Article 67.

51 Law 39 of 1999 on Human Rights, Article 6.

52 Law 32 of 2004 on Regional Government, Article 2(9).

53 Law 31 of 2004 on Fisheries, Article 6.

54 Law 18 of 2004 on Plantations, Article 9.

55 Law 27 of 2007 on the Management of Coastal Areas and Small Islands, Articles 21(4)(a), 21(4)(c), 61 and 62.

Constitutional Court. As mentioned, in several recent decisions discussed below, the Court has held that awarding concessions over resources and land relied upon -by recognised customary law communities may breach various constitutional rights, including Article 18B(2). The Court has identified two additional constitutional rights as grounds for invalidating these concessions. The first is Article 28A, which declares that '[e]very person has the right to live and the right to maintain their life and livelihood'. The second is the following passage from the Preamble to the Constitution:

> the purposes of establishing the state of Indonesia include to protect the entire nation … to advance public prosperity, to enlighten the life of the nation, and to participate in realising world order based on independence, civilised peace, and social justice.

In one case, discussed below, the Court has even found that issuing concessions over traditional land can breach Article 33(3). As mentioned, perhaps the most significant of the cases in which the Court has upheld traditional rights is the *Traditional Forest Community case*. It is to this case that I now turn.

3.1 Traditional Forest Community Case (2013)[56]

As mentioned, two customary law communities[57] and AMAN brought this case before the Constitutional Court. They pointed to several instances in which the government had treated customary forests as state-owned forest.[58] This, they claimed, was possible because the Forestry Law categorised traditional forest as 'state forest', which falls within the exclusive control of the state. For example, Article 1(6) of the Forestry Law defines customary forest as 'state forest that is located within a customary law community area'. Similarly, Articles 5(1) and 5(2) state that:

(1) Forests, based on their status, consist of:

(a) state forest (*hutan negara*), and

(b) forests over which rights have been granted (*hutan hak*).

(2) State forest, as referred to in Article 5(1)(a) can take the form of customary forest.

The applicants argued that these provisions had allowed the state to award rights over traditional forests to commercial entities without obtaining the agreement of the traditional communities that used or occupied those forests, and without being required to compensate its members. The result was that traditional communities were being excluded from forestry resources they had accessed for generations.[59] The applicants asked the Court to invalidate the provisions that defined state forests to encompass customary law forests, and to 'reformulate' provisions that, they argued, otherwise breached their constitutional rights.

The Court agreed with the applicants' principal arguments and, by issuing declarations of conditional constitutionality, amended the 1999 Forestry Law to remove customary forests (*hutan adat*) from the definition of 'state forest'. More specifically, the Court decided that Article 1(6) of the Forestry Law would be invalid unless it was interpreted to remove the word 'state'. The Court thus redefined customary forest as 'forest located within a customary law community area'. The Court also imposed a condition upon the constitutionality of Article 5(1), deciding that it would be unconstitutional unless interpreted to add: 'State forest, referred to in (1)(a), does not include customary forest'. The Court also invalidated Article 5(2).

The main legal arguments the Court employed to reach its decision were as follows: Article 18B(2) of the Constitution gave traditional communities the right to recognition and to have their traditional rights protected as constitutional rights.[60] The Court explained that when the Indonesian people decided

56 Note 1 above.

57 They were the Kuntu and Cisitu communities, located in Riau (a province in Sumatra) and Banten (a province near the capital, Jakarta) respectively.

58 Including in Kasepuhan, Lebak, Banten in 1992: Pasandaran, note 6 above.

59 *Traditional Forest Community case*, note 1 above, at [3.13.1].

60 *Id.*, at [3.12.1].

to establish the state of Indonesia in 1945, they chose a welfare state (*negara kesejahteraan*).[61] This, the Court argued, was clear from the Preamble of the Constitution, mentioned above. This choice was also clear from the national ideology *Pancasila*, particularly the inclusion of 'social justice' as one of its five pillars.[62] Therefore, the state needed to 'work hard' to achieve welfare for all people, including those who lived in traditional communities and relied upon natural resources.[63]

However, while the Constitution recognised traditional communities as 'right bearers' (*penyandang hak*) and legal subjects, the Forestry Law did not grant them the same rights as other legal subjects in respect of forest resources. In particular, the Forestry Law granted clear powers and rights to the state and to entities with state-issued rights over forests, but any entitlements of traditional communities to land and forests were unclear and tenuous.[64] The Law's inclusion of customary law forest as part of state forest, and its failure to clearly provide traditional rights and entitlements, meant that in practice, traditional communities lost access to the forest resources upon which they depend for their livelihoods, often leading to conflict.[65] The result was injustice and legal uncertainty for traditional communities.

> Customary law communities occupy a weak position because their rights are not clearly and firmly recognised when up against the state with very strong control. State control over forests should in fact be used to allocate natural resources justly in the interests of the greatest possible prosperity of the people.[66]

Ultimately for the Court, while the state had 'full authority to regulate and decide the availability, allocation, exploitation, administration and legal relationships occurring in state forests', in respect of customary law forest, its authority was:

> limited by the customary law of the forest community. Traditional community forest (also referred to as kinship forest and sovereign forest, amongst others) is governed by *hak ulayat*, which exists within the territory of a single traditional community. Traditions are followed by its members, and the community has a central governing body with power over the entire territory. The members of a traditional community have the right to clear their customary forests to be controlled and used for the fulfilment of their individual needs and those of their families. Therefore, it is not possible for the rights held by customary law community members to be extinguished or frozen, provided that they meet the requirements of a traditional community as referred to in Article 18B(2) of the Constitution.[67]

In short, the Court appears to have decided that Article 18B(2) prohibits the state from preventing traditional communities from accessing and using forests to fulfil their needs, in line with their respective customary laws. Presumably, to award concessions over traditional land, the state must first secure the 'real' consent of the traditional communities in question and, without that consent, the concession will be unconstitutional.

3.2 The Plantations Law Case (2011)

The *Traditional Forest Community case*, while clearly important and widely reported, was certainly not the first in which the Court decided that statutory provisions had breached Article 18B(2) of the Constitution. These previous cases have, however, escaped significant attention from the Indonesian legal community and mainstream media. One significant earlier case was the *Plantations Law case.*

61 *Id.*

62 *Pancasila* (literally 'The Five Principles'). This embodies a commitment to the following principles:
1. *Ketuhanan Yang Maha Esa* (Belief in Unitary Deity);
2. *Kemanusiaan Yang Adil dan Beradab* (A Just and Civilised Humanity);
3. *Persatuan Indonesia* (The Unity of Indonesia);
4. *Demokrasi* (Democracy); and
5. *Keadilan Sosial* (Social Justice).

63 *Traditional Forest Community case*, note 1 above, at [3.12.1].

64 *Id.*, at [3.12.2].

65 *Id.*, at [3.12.3] and [3.13.1].

66 *Id.*, at [3.12.4].

67 *Id.*, at [3.13].

Article 9(1) of Law 18 of 2004 on Plantations (the 2004 Law) had allowed the state to issue various rights over land to be used for plantations. Article 9(2) required that, if *hak ulayat* existed on land needed for a plantation, then before the rights referred to in Article 9(1) could be granted, the prospective owner needed to first 'deliberate' with the *hak ulayat* holders to reach an agreement about the handover of land and compensation.

The applicants were individual citizens who lived and maintained land that had been designated for plantations under the 2004 Law, and over which rights had been granted to commercial enterprises. This had brought the applicants into regular conflict with plantation companies who held those rights and, the applicants claimed, often threatened them with Article 21 of the 2004 Law, which states: 'Every person is prohibited from performing acts that damage plantations or other assets, using plantation land without permission and or any other activity that causes impediments to plantation businesses.' The Elucidation to Article 21 defines 'using plantation land' as 'using plantation land or occupying it without the permission of the rightful owner in accordance with the law'. Article 47(1) of the 2004 Law provides for a maximum five-year prison sentence and five billion rupiah fine for deliberate contravention of Article 21; Article 47(2) imposes those penalties by half for negligent contravention.

The applicants challenged the constitutionality of Articles 21 and 47, arguing that Article 21 was so loosely worded that it could be interpreted to encompass almost any activity. The Constitutional Court agreed, holding that this over-broadness caused legal uncertainty, which breached Article 28D(1) of the Constitution ('Every person has the right to legal recognition, guarantees, protection and certainty which that is just, and to equal treatment before the law') and even the rule of law (*negara hukum*) itself.[68]

The Court also found that Articles 21 and 47 of the 2004 Law violated Article 18B(2) of the Constitution. The Court noted that 'illegal' occupation of land over which the state had granted concessions for plantations had a long history in Indonesia, beginning during Dutch colonialism. The Dutch had granted concessions over large tracts of land that traditional communities had occupied for generations, and had enacted laws that allowed land rights granted by the state to override traditional rights claimed by those communities. Many traditional communities were evicted without compensation and conflicts ensued. During the Japanese occupation in 1942-45, traditional communities were permitted to retake their plantation land, but were required to work for this, and to share proceeds with the Japanese government. After Indonesia declared its independence in 1945, the national government issued decrees that appeared to allow these traditional communities to continue occupying the former plantation land (although new statutory rights issued by the state appeared to overlap with, and trump, some traditional land rights).[69] In this context, the Court decided that it was 'not appropriate' for Article 47(2) to impose criminal sanctions upon a person who occupies land based on customary law, because customary law rights arose in the first place on the basis of occupation.

3.3 Coastal and Remote Areas Law Case (2011)

Another important predecessor to the *Traditional Forest Community case* was the *Coastal and Remote Areas Law case* (2011).[70] The 2007 Coastal Management Law (the 2007 Law)[71] classified coastal areas into various zones, including conservation areas, fishing areas, shipping lanes, port areas and public beaches. It also purported to authorise the government to grant Coastal Water Concessions *(Hak Pengusahaan Perairan Pesisir)* over coastal waters for aquaculture and tourism to the private sector, including foreigners (Articles 23(2), 23(6) and 23(7)). Concessions could extend over resources contained from the water surface to the ocean floor (Article 16) and could last up to 60 years, with an

68 *Plantation Law case*, note 8 above, at [3.16]. The *negara hukum*, a constitutional principle contained in Article 1(3), is commonly translated as the 'rule of law', but literally means 'law state'.

69 *Id.*, at 102-103.

70 *Coastal and Remote Areas Law case*, note 9 above.

71 Law 27 of 2007 on the Management of Coastal Areas and Small Islands.

initial period of 20 years being twice extendable (Article 16). They could be transferred to another party or used as collateral (Article 20). To obtain a concession, applicants needed to meet various administrative, technical and operational requirements (Article 21).

In this case, various leaders of customary law communities located in coastal areas challenged, with the assistance of NGOs, various provisions of the 2007 Law.[72] These communities had relied upon coastal resources for their livelihoods and were concerned that these provisions would allow concessions that restricted their traditional rights to access and use them, or closed them off altogether.

The Court decided that provisions of the 2007 Law that allowed the government to issue these concessions over coastal areas were constitutionally invalid on several grounds.[73] One of these grounds was Article 33(3) of the Constitution. As a preliminary matter, the Court found that coastal areas, and the natural resources within them, clearly fell within Article 33(3)'s ambit. Following the *Electricity Law case*, the state was, therefore, required to exercise control over coastal resources by formulating policies and issuing regulations, and by administering, managing and supervising them. Using similar reasoning to the *Investment Law case* (2007), the Court decided that the impugned provisions breached Article 33(3) because, by authorising the state to issue these concessions, the provisions had relinquished the requisite state control over the coastal areas.

The Court also seemed to imply within Article 33(3) an obligation upon the state to protect pre-existing rights of traditional communities.[74] According to the Court, when exercising control to achieve the greatest possible prosperity, the state was required to:

> observe existing rights, both individual and collective, held by customary law communities, the rights of customary law communities and other constitutional rights held by the community and which are guaranteed by the Constitution, such as the right to access to pass through, the right to a healthy environment, amongst others.[75]

Bringing 'prosperity to the people' – the main purpose of the state exercising control under Article 33(3) – was, according to the Court, not achieved when the state deprived people of natural resources upon which they relied for their subsistence needs and livelihoods.

The Court also held that, by permitting these concessions, the 2007 Law breached Article 34(2) of the Constitution and the state's obligation to advance public welfare and social justice under the Preamble. Article 34(2) declares that 'the state is to develop a social security system for all people and is to empower weak and poor communities in accordance with human dignity'. According to the Court:

> Providing these concessions breaches the principle of economic democracy [contained in Article 34(2)] which is based on the principle of togetherness and just efficiency. The principle of togetherness must be interpreted as meaning that when running the economy, including managing natural resources for economic benefit, the broadest possible cross-section of the community must be involved and the prosperity of the people must improve. Management of natural resources must not merely observe principles of efficiency to obtain maximum profits, which can advantage a small group of capital owners, but must be able to increase the prosperity of the people in a just fashion. The exploitation of coastal areas and small islands by issuing concessions … will result in [these regions] becoming concession areas

72 On 14 separate grounds: *Coastal and Remote Areas Law case*, note 23 above, at [3.9]. On these grounds, they challenged Articles 1(4), 1(7), 1(18), 14(1), 16(1), 18, 20, 21(1), 21(2), 21(3), 21(4), 21(5), 23(1), 23(2), 23(4), 23(5), 23(6) and 60(1).

73 Articles 1(18), 16, 17, 18, 19, 20, 21, 22, 23(4), 23(5), 50, 51, 60(1), 71 and 75. It seems that some of these grounds overlap, even though they are contained in separate provisions of the Constitution. Indeed, the Court dealt with some of these separate constitutional provisions together.

74 *Coastal and Remote Areas Law case*, note 23 above, at [3.14.4].

75 *Id.*, at [3.15.4].

> controlled by large capital owners. By contrast, traditional fishing communities … who rely for their lives and livelihoods on coastal natural resources will be excluded. In these conditions, the state has failed to fulfil its responsibility to run the national economy in a way that protects and provides justice to the people. More than this … the issuance of these concessions will breach the principle of social justice for the entire Indonesian people as intended in the fourth line of the preamble to the Constitution.[76]

Finally, the Court decided that the concessions would also reduce the level of community participation in determining how natural resources were used. Even though the 2007 Law requires that the community participate in the management of coastal areas, the Court held that this was insufficient to guarantee, protect and fulfil the rights of the community, with the more likely result being exclusion of the community.[77]

The Court mentioned that the 2007 Law violated the following additional constitutional provisions, but did not provide detailed reasoning. First, the Court found that concessions over coastal areas breached Article 18B(2) because they failed to protect, respect and fulfil traditional rights. Second, the Court found that the impugned provisions breached Article 28A because the concessions were likely to exclude traditional communities from the natural resources upon which they relied for their livelihoods.[78] Third, the Court described the provisions governing the issuance of concessions as a form of 'indirect discrimination' because even though the 2007 Law applied generally and appeared neutral, in practice it favoured parties with access to more capital.[79]

4 RAMIFICATIONS AND CONCLUSIONS

Since its establishment in 2003, the Constitutional Court has issued many decisions in which it has sought to limit the state's exercise of control over natural resources. On the one hand, the Court has not permitted the government to simply 'contract out' the exploitation and management of natural resources, such as land, forests, oil and natural gas, to the private sector. This is because, according to the Court's interpretation of Article 33(3) of the Constitution, the state must maintain a high level of control over those natural resources – preferably by directly managing them – in the interest of securing 'maximum' prosperity for the people. On the other hand, state control over natural resources is not absolute. Control is constitutionally now formally subject to the traditional rights of communities who rely upon those resources.

However, it is unlikely that the decisions described above in Part II will, in practice, lead to increased recognition of the land and resource-related rights of Indonesian traditional communities, at least in the short term, for two primary reasons.

The first relates to the Court's limited formal powers. As mentioned, the Court has no power to compel the national parliament to comply with its decisions. Perhaps even more significant is that its jurisdiction is restricted to reviewing statutes against the Constitution. The traditional rights cases discussed in this article were challenges to statutes granting the state legal authority to issue concessions. However, that authority is usually *exercised* by way of subordinate regulations – most commonly ministerial decrees or local government bylaws.[80] The Court has no power to assess whether those decrees or bylaws are constitutional or comply with

76 *Id.*, at [3.15.9].
77 *Id.*, at [3.15.8].
78 *Id.*
79 In this context, however, the Court did not refer to constitutional provisions that provide the right to be free from discrimination.
80 G.B. Indrarto et al., *The context of REDD+ in Indonesia: Drivers, agents and institutions* (Bogor, Indonesia: CIFOR and ICEL, 2012); C. Barr et al., *Decentralization of forest administration in Indonesia: Implications for forest sustainability, economic development and community livelihoods* (Bogor, Indonesia: CIFOR, 2006).

its decisions, let alone strike them down. This means that if central or local executive governments ignore the Court's decisions and continue to issue concessions, the Court can do nothing to stop them, save attempt to publicly shame recalcitrant officials through the media. Actual concessions, no matter how egregiously unconstitutional, are beyond the reach of the Constitutional Court. Furthermore, given the corruption controversy that engulfed the Court from October 2013, discussed above, and the apparent widespread decline in the popularity of the Court, it is unlikely that ignoring decisions of the Constitutional Court would have significant reputational consequences for the state.

Further, as mentioned, the Court has held that its decisions operate only prospectively. In most of the cases described in this article the Court has emphasised that contracts or concessions remain valid even if they were made or issued under a statutory provision that the Court then declares unconstitutional. The Court's decisions do not, therefore, nullify any concessions already issued under the authority of the statutory provisions that the Court does invalidate. The decision merely takes away the statutory basis upon which concessions and contracts might have otherwise been awarded in the future. This means that any concessions already awarded over land subject to traditional rights will remain in force. Traditional communities are therefore likely to continue to be excluded from natural resources until concessions and contracts expire.

The second reason why these decisions are unlikely to assist traditional communities is that, in them, the Court has not addressed any of the practical difficulties facing traditional communities to achieve formal 'recognition' of their status as such. Article 18B(2) appears to require that the traditional community in question meet three requirements in order to claim traditional rights,[81] though to date the Court has not expressly identified these as separate requirements. The first is that the community 'still exists'. The second and third are that the community itself accords with 'community developments' and 'the principle of the unitary Republic of Indonesia' respectively.

In the cases thus far, the Court has not found it necessary to flesh out the second and third requirements. Rather, the Court in the *Traditional Forest Communities case* simply mentioned the rights of traditional communities to clear customary forests for 'the fulfilment of their individual needs and those of their families' and, in the *Coastal and Remote Areas Law case*, the right of access. The Court did not explain the content of these rights or attempt to assess whether they accorded with community developments and the unitary Republic, whatever these concepts mean. The precise extent to which traditional communities are permitted to use or exploit forest resources therefore remains unclear.

By contrast, the Court has held that Article 18B(2) does require that, in order to claim their rights and entitlements, traditional communities must be formally recognised, which appears to encompass the 'still exists' requirement. For example, in the *Plantations Law* case (2011), the Court stated:

> It is appropriate that traditional community rights that have survived and accord with community developments within the framework of the unitary Republic of Indonesia be protected by statute. In this way, Article 18B will be capable of assisting traditional communities that are increasingly marginalised … To overcome the problem of ownership disputes over plantation and *hak ulayat* land, the state should [act] in line with the Elucidation to Article 9(2) of the 2004 Law [in which it is stated that] traditional communities exist if the following five requirements are present: (a) a grouping in the form of a community, (b) institutions in the form of customary law leadership mechanisms, (c) a clear customary law area or region, (d) legal mechanisms, especially clear customary law dispute resolution mechanisms, (e) recognition by regional regulation.[82]

81 *Coastal and Remote Areas Law case*, note 23 above, at [3.13].

82 *Id.*, at 103. The Court noted that these requirements are different to those contained in Agrarian Minister Regulation 5 of 1999 on Guidelines for Resolving Traditional Community *Hak Ulayat* Problems. The Court sets out some of these differences between the Elucidation and the Regulation.

The Elucidation to Article 67 of the Forestry Law sets out similar requirements for recognition as a traditional forest community: the community must exist in its traditional form; it must have institutions and a leader; occupy a defined area; have a legal infrastructure, including a customary law court to which its members adhere; and the surrounding forest area must be traditionally harvested to fulfil the daily needs of the community. Most significant, however, is the requirement that a local government must, under Article 67(2), issue a bylaw (*Peraturan Daerah*, or Perda) to legally recognise the community before that community can exercise any of these rights.

The applicants in the *Traditional Forest Community* case had met these requirements.[83] However, other communities might not find this easy to achieve: some local governments are notorious for their lack of responsiveness to the needs of their constituents, making it hard for traditional communities to convince their local governments to issue the bylaw within a reasonable time, if at all. Traditional communities are likely to have particular difficulties convincing their local governments to formally recognise them by regulation if the local government itself wishes to award some type of permit, licence or concession over the very land that those communities use.

The result is that the Court has left substantial legal stumbling blocks in the way of most traditional communities seeking to enjoy the traditional rights to which they are constitutionally entitled. Simply by pointing to the decision, most traditional communities will be unable to repossess or regain use of land over which the state has granted exclusive rights to another individual or entity; obtain compensation for being excluded from ancestral lands; or prevent the award of future concessions. In this sense, the decision brings few, if any, benefits to traditional communities. Article 67 of the Forestry Law and its Elucidation already provide formal recognition of and protection for the rights of traditional communities, provided that their local governments had formally recognised them. It seems, then, that the Court has done little more than constitutionally confirm pre-existing legislation, without addressing the practical difficulties that communities face when attempting to enforce their traditional rights over natural resources.

83 The first applicants had had been recognised by Kampar Country Regulation 12 of 1999 on *Ulayat* Land; the second applicants by Lebak Regent Decision (430/Kep.318/Disporabudpar/2010).

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