THE EFFECTIVENESS OF THE CONSTITUTIONALISATION OF ENVIRONMENTAL RIGHTS IN INDONESIA:
JUDICIAL APPLICATION AND GOVERNMENT COMPLIANCE

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ABSTRACT

As part of amendments adopted in 2000, Indonesia’s Constitution now includes the right to a healthy environment, and several other environment-related rights. It thereby followed a global trend towards the constitutionalisation of these rights.

However, the effectiveness of constitutionalisation of these environmental rights in Indonesia has been mixed. Indonesia’s Constitutional Court – the judicial institution with exclusive authority to ensure that national legislation does not violate the Constitution - has underutilised the right to a healthy environment in its decision making, as have litigants appearing before it, despite ample opportunities.

Nevertheless, the Court has issued many decisions that have urged or required the legislature to pay more attention to environmental sustainability, employing the constitutional rights of indigenous communities and Article 33 of the Constitution to provide environment-related protections.

Yet many of these decisions have been incomplete or vague, which has hampered genuine legislative and executive attempts to comply with these decisions.

Worse, the need to amend or create laws to respond to those decisions has created opportunities for legislators to pursue their own political, institutional and even commercial interests, by effecting legal change that directly contradicts those decisions. By contrast, the decisions reviewing the Forestry Law appear to have prompted the executive, primarily the Ministry of Forestry and Environment, to act by issuing numerous regulations. While some of these appear directed to ensuring that Ministry’s continuing control over the sector, overall they are likely to increase environmental protections, while also respecting the claims of indigenous communities.
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Law No. 8 of 1981 on Criminal Procedural Law.
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<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>AMAN</td>
<td>Aliansi Masyarakat Adat Nusantara</td>
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<tr>
<td>ASEAN</td>
<td>Association of South East Asian Nations</td>
</tr>
<tr>
<td>BP</td>
<td>British Petroleum</td>
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<tr>
<td>CE</td>
<td>Corruption Eradication</td>
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<tr>
<td>CPI</td>
<td>Chevron Pacific Indonesia</td>
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<tr>
<td>DIM</td>
<td>Daftar Inventarisasi Masalah (List of issues)</td>
</tr>
<tr>
<td>DPD</td>
<td>Dewan Perwakilan Daerah (Regional Representative Council)</td>
</tr>
<tr>
<td>DPR</td>
<td>Dewan Perwakilan Rakyat (Parliament)</td>
</tr>
<tr>
<td>ELSAM</td>
<td>Institute for Policy Research and Advocacy</td>
</tr>
<tr>
<td>EPM</td>
<td>Environmental Protection and Management</td>
</tr>
<tr>
<td>FPBB</td>
<td>Moon and Crescent Party Fraction</td>
</tr>
<tr>
<td>GR</td>
<td>Government Regulation</td>
</tr>
<tr>
<td>HGU</td>
<td>Hak Guna Usaha (right to use for commercial purpose)</td>
</tr>
<tr>
<td>HP3</td>
<td>Hak Pengusahaan Perairan Pesisir (right to use coastal water for commercial purposes)</td>
</tr>
<tr>
<td>HSL</td>
<td>Horticulture System Law</td>
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<tr>
<td>IHCS</td>
<td>Indonesian Human Rights Committee for Social Justice</td>
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<tr>
<td>ILO</td>
<td>International Labour Organization</td>
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<tr>
<td>IUCN</td>
<td>International Union for Conservation of Nature</td>
</tr>
<tr>
<td>IUU</td>
<td>Illegal, unreported and unregulated</td>
</tr>
<tr>
<td>KPK</td>
<td>Komisi Pemberantasan Korupsi (Anti-Corruption Commission)</td>
</tr>
<tr>
<td>KPPIP</td>
<td>Komite Percepatan Penyediaan Infrastruktur Prioritas (Committee for the Accelerated Provision of Priority Infrastructure)</td>
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<tr>
<td>MMFA</td>
<td>Ministry of Maritime and Fisheries Affairs</td>
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<tr>
<td>MoASP</td>
<td>Ministry of Agrarian and Spatial Planning</td>
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<td>MoE</td>
<td>Ministry of Environment</td>
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<td>Ministry of Environment and Forestry</td>
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<td>MoEM</td>
<td>Ministry of Energy and Mining</td>
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<td>MoF</td>
<td>Ministry of Forestry</td>
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MoHA  Minister of Home Affairs
MoPWH  Ministry of Public Works and Housing
MoU  Memorandum of understanding
MP  Member of Parliament
MR  Ministerial Regulation
NA  Naskah akademik (academic paper)
NGO  Non-government organisations
PIAPS  Peta Indikatif dan Areal Perhutanan Sosial (Indicative Map of Social Forestry Areas)
PK  Peninjauan Kembali (review mechanism)
PPTKH  Penyelesaian Penguasaan Tanah di Kawasan Hutan (Accelerating Team for Land Entitlement Resolution in the Forest Zone)
SLN  Sumatra Light North
SLS  Sumatra Light South
Tim IPKTKH  Tim Independen Penyelesaian Konflik Tenurial di Kawasan Hutan (Independent Team for Forest Tenure Conflict-handling)
US  United States
WRL  Water Resources Law
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STATEMENT OF ORIGINAL AUTHORSHIP

This is to certify that, to the best of my knowledge, the content of this thesis is my own work and that all assistance received in preparing this thesis and sources have been acknowledged in the text. This thesis has not been submitted for any degree or other purposes.

In preparation of this thesis, I used editing and proofreading services of Elit Editing.

Prayekti Murharjanti
27 June 2019
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INTRODUCTION

There has been a surge in the worldwide adoption of environmental rights — notably, the right to a healthy environment — in national constitutions. This is widely considered by scholars to constitute an advance in support of the goal of achieving higher levels of environmental protection and sustainability, particularly when constitutionalisation leads to the strengthening of environmental legislation.¹ By contrast, other writers have recognised that constitutional protection for the right to a healthy environment is largely meaningless, difficult to implement and ineffective, at least in most countries.²

This thesis examines the extent to which the constitutionalisation of environmental rights has been effective in Indonesia. As part of the amendments adopted in 2000, Indonesia’s Constitution now includes the right to a healthy environment and several other environment-related rights. Therefore, the country has followed the global trend towards the constitutionalisation of these rights. This enquiry is of immense significance in Indonesia today, where environmental degradation is occurring at an alarming rate, and previous legal efforts — which have focused on statutory and other regulatory reforms and improving their judicial enforcement — have largely failed.

The starting presumption for this thesis is that constitutionalisation is meaningless without constitutional review, which is the legal process under which a court has power to assess whether the legislature or executive (or both) have followed the constitution, either in the laws they issue or the action they take (or both).³ However, constitutional review is, by itself, insufficient. It must also be effective. Only a handful of scholars appear to have sought to outline any prerequisites for effective judicial review. In the context of assessing the effectiveness of constitutional courts, Harding, Leyland and Groppi state:

We suggest that the best way of assessing these courts is to look at the from the aspect of constitutionalism, by adopting a two-stage process, which considers i) whether the court’s

interventions are consistent with the norms set out in the constitution ... and ii) whether the court’s pronouncements are then actually embedded in practice, that is whether they are followed.⁴

Addressing more squarely the effectiveness of constitutional review, Stone-Sweet states that Constitutional review can be said to be effective to the extent that the important constitutional disputes arising in the polity are brought to the Constitutional Court on a regular basis, that the judges who resolve these disputes give reasons for their rulings, and that those who are governed by the constitutional law accept that the court’s ruling have some precedential effect. On this definition, effectiveness is a variable: it varies across cases and across time in the same country.⁵

Extrapolating from the statements of Harding et al and Stone-Sweet, this thesis proposes four general prerequisites for effective constitutionalisation of rights. These are:

1. **Constitutional review.** This judicial oversight can be performed by a single court (such as a constitutional court) or shared by various courts. For example, a constitutional court might ensure that the laws enacted by the legislature comply with the constitution, and administrative courts might ensure that the executive complies with the constitution when it performs government actions or issues regulations.⁶

2. **Quality of jurisprudence.** The judicial bodies exercising this oversight in fact exercise that jurisdiction and provide legally-acceptable reasons for their decisions.

3. **Government compliance.** The legislature and executive must comply with those decisions.

4. **General judicial enforcement.** Other courts must also comply with those decisions, as well as the response of the legislature or executive to those decisions (which may, for example, take the form of amended legislation or new regulations).

This thesis argues that Indonesia does not meet any of these prerequisites completely, but meets them all partially. For example, in relation to prerequisite 1 (‘constitutional review’), Indonesia has a Constitutional Court but, as discussed in Chapter II, its jurisdiction is limited to reviewing national statutes against the Constitution. It has no formal power over executive lawmaking or acts. In relation to prerequisite 2 (‘quality of jurisprudence’), Indonesia’s Constitutional Court has exercised its powers of constitutional review, including in environment-related cases, and some of its decisions have been comprehensible. However,

⁶ Harding, Leyland and Groppi (n 4) 3.
in other cases, the Court’s reasoning has been difficult to follow, and it appears to have simply ignored some of the arguments put forward by litigants. Regarding prerequisite 3 (‘government compliance with decisions’), the Indonesian experience has been mixed. There have been examples of successful compliance, partial compliance, non-compliance and even counterproductive responses. Finally, concerning prerequisite 4 (‘general judicial enforcement’), Indonesia’s general courts have followed some Constitutional Court decisions and ignored others, just as they have enforced some environmental statutes but not others. Despite an overall below-par track record in environmental litigation when applying environmental statutes and regulations, the ordinary general courts have nevertheless issued some relatively radical landmark decisions in environmental cases.

**A Original Contributions of This Thesis**

Prerequisite 1 (‘constitutional review’) has largely been covered in the literature written on the Constitutional Court of Indonesia, most of which outlines the Court’s establishment, its jurisdiction, leadership and decision-making. This literature is examined in Chapter II. Prerequisite 4 (‘general judicial enforcement’) has also largely been covered, particularly in the broader literature on environmental dispute resolution in Indonesia, which evaluates the enforcement of Indonesia’s environmental legislation by the general and administrative courts. This is also discussed in Chapter II.

The primary contributions of this thesis relate to prerequisites 2 and 3 in the context of environment-related rights. This thesis focuses on describing the Constitutional Court’s jurisprudence in environment-related cases, as well as compliance with those decisions by the legislative and executive. Regarding the quality of jurisprudence (prerequisite 2), this thesis provides the first comprehensive analysis of the Constitutional Court’s decision-making in environment-related cases. The cases discussed in Part II of this thesis reveal that the Constitutional Court has underutilised the right to a healthy environment in its decision-making, as have litigants appearing before the Court, despite ample opportunities. Further, the Court has not sought to rely on procedural rights that form the basis for constitutional challenges and environmental litigation in other countries. However, this does not mean that the Court has underplayed the importance of the goals of environmental protection and sustainability in its decision-making. In many decisions, the Court has required the legislature to pay more attention to environmental sustainability, but it has relied on different constitutional rights to achieve this. In particular, to provide environment-related protections, the Court has employed the constitutional rights of customary communities and art 33 of the Constitution, which requires the state to control natural resources for the greatest prosperity of the people.

As for government compliance (prerequisite 3), this thesis demonstrates that compliance has been mixed. Although other studies have examined government compliance (or lack thereof)
with Indonesia’s Constitutional Court decisions, this has not been the focus of those studies. This thesis is the first to squarely examine this compliance. It uncovers differences between the legislature and executive in how they view the need for compliance, as well as the factors that motivate their choice of whether to comply and, if so, how to comply. As this thesis demonstrates, while Constitutional Court decisions invalidating statutory provisions in environmental cases have only twice prompted the legislature to amend relevant laws, the legal change has not always corresponded to the Court’s decision. Rather, the opportunity to amend, presented by the Court’s decision, has been used to pursue political, institutional and commercial interests that do not align with the Court’s decision. For the executive, the Constitutional Court’s decisions on Forestry Law and Water Resource Law (WRL) appear to have prompted the Ministry of Environment and Forestry (MoEF) and the Ministry of Public Works and Housing (MoPWH) to issue a barrage of regulations. However, there has been significant legal debate regarding whether these responses are themselves ‘legal’. With these regulations, it appears that the MoEF has been more concerned with ensuring its continuing control over the forestry sector than with environmental protection. For its part, the MoPWH continues to facilitate private involvement in water management because the state’s budget allocation for that sector is inadequate.

B Chapter by Chapter Descriptions

This thesis is divided into three parts and eight chapters. An outline of each chapter and the way it progresses the thesis argument is as follows. Part I provides some context for the constitutionalisation of environmental rights and their application in Indonesia. Chapter I examines the literature, which outlines the global trend towards the constitutionalisation of environmental rights and the benefits that some scholars argue constitutionalisation will provide, and has provided, in some countries. These benefits include promoting stronger environmental law legislation, improving environmental law enforcement (because constitutional recognition should ensure that governments establish and provide a system for law enforcement and compliance monitoring), providing a ‘safety net’ for citizens (because constitutionalisation should help address gaps in legislation and regulations) and strengthening democracy (particularly if it results in strengthening procedural rights). Constitutionalisation also represents the reaching of a political consensus that environmental protection will not depend on parliamentary majorities and will not be impeded by potentially costly and unpopular measures that the government might have otherwise sought to avoid.

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9 Hayward (n 8) 6.
Chapter 2 also discusses some of the key jurisprudence produced by national courts in these countries when they have interpreted and applied some of these rights.

While Chapter I focuses on the international context of the constitutionalisation of environmental rights, Chapter II focuses on the Indonesian context and provides necessary background material for Parts II and III of this thesis. Chapter II begins with a discussion of some of Indonesia’s serious environmental problems and the legal measures taken to address them. These measures have largely taken the form of statutory and regulatory lawmaking, which has resulted in a strong, albeit overly complex, legal framework for environmental management and protection. However, as mentioned, the judicial interpretation and application of that framework has been notoriously lacking. In this context — and particularly in light of the positivity of some of the international literature on constitutionalisation discussed in Chapter I — the insertion of environmental rights into the Indonesian Constitution, which occurred during amendment rounds in 2000, raised the hopes of those seeking improved environmental management and protections. However, much would depend on the way Indonesia’s newly established Constitutional Court exercised its judicial review powers, including in environment-related cases. This Court and its jurisdiction are also discussed in Chapter II.

Part II aims to provide the first detailed account of the Constitutional Court’s jurisprudence in environment-related cases by focusing on cases in which the Court has been asked to review statutes for violating environmental rights included in the Constitution in 2000. Chapter III focuses on the Court’s decisions relating to substantive environmental rights, while Chapter IV examines decisions on procedural rights and Chapters V and VI focus on the public trust doctrine and indigenous rights respectively.

However, compliance with the Court’s decisions has been mixed for various political and personal reasons, as discussed in Part III, and because the Court’s decisions generally lack clarity. Chapter VII briefly considers key scholarly literature that examines theories of government compliance with judicial decisions before turning to legislative responses to the Court’s decisions discussed in Part II. Chapter VIII then examines regulatory compliance: that is, efforts made by the executive — usually ministers — to respond to the Constitutional Court’s decisions. The thesis finishes with a brief conclusion that summarises the findings, questions whether the compliance theories discussed in Chapter VII fit the Indonesian experience and examines how the constitutionalisation of environment-related rights can be made more effective.

C Methodology

Research for this thesis proceeded by way of literature review, document collection and fieldwork. The early phases of the research involved collecting and analysing various bodies of literature — particularly on the constitutionalisation of environmental rights, compliance
with judicial decisions, Indonesia’s national legislative process and the Constitutional Court of Indonesia.

The initial focus of the document collection involved obtaining all relevant Constitutional Court decisions, which were easily accessible on the Constitutional Court’s website.\(^\text{10}\) There were 12 decisions relating to environmental management, forestry, coastal, water resources, plantation and mineral mining. I then began an initial survey of laws — statutes, regulations and other instruments — that could have been taken to constitute compliance with the Court’s decisions. This involved trawling the national parliament website and the main Indonesian Government websites that contained ministerial and other types of regulations.\(^\text{11}\) The inquiry was confined to laws and regulations that were direct responses to the Constitutional Court’s decisions discussed in Part III. For the purposes of this thesis, these were laws and regulations that referenced those decisions in their preambles or general elucidations.

It was more difficult to obtain records of parliamentary debates and committee meetings in which lawmakers discussed various rationales for statutory reform, including Constitutional Court decisions. Although these are supposedly ‘public’ documents, they were often difficult to access. I made formal requests for these documents, but the parliament’s information unit either did not respond to my request or only provided partial documents. This led me to personally contact the parliamentary officers and people involved in the debates themselves. However, it was not possible to obtain formal notes associated with the deliberation and drafting of all laws discussed in this thesis because they do not exist. This was particularly true of the regulations discussed in Chapter VIII. While draft statutes are usually accompanied by formal ‘academic drafts’ (which explain the rationale for new legislation or amendments) and records are usually kept of committee meetings in which members of parliament debate the provisions of those drafts, no such accompanying materials were available for the government regulations discussed in Chapter VIII. Therefore, in that chapter, greater reliance is placed on media reportage and government and non-government reports relating to those regulations.

The fieldwork was conducted in Indonesia between June and August 2017. During this time, I conducted face-to-face interviews with 22 resource persons, including members of parliament and parliament officials involved in the deliberation of the statutes covered in this thesis, officials from the MoEF and the Ministry of Law and Human Rights, officials from the Constitutional Court, academics, and several lawyers and applicants of the judicial review cases studied in this thesis. I also conducted phone interviews with officials from the Ministry of Maritime and Fishery Affairs, as well as academics, activists and parliament officials who

\(^{10}\) The Constitutional Court of the Republic of Indonesia <www.mahkamahkonstitusi.go.id>.
were involved in the judicial review cases or in drafting the laws and regulations discussed in this thesis. These face-to-face and telephone interviews were semi-structured.

For reasons of space, I confined my focus to specific environmental ‘sectors’. Therefore, I was unable to consider, for example, air and water pollution control and climate change, despite their importance. I also limited myself to considering national legislative and regulatory responses to Constitutional Court decisions. I chose not to examine some of the laws issued by local governments in response to Constitutional Court decisions. This allowed me to focus on compliance without the distraction of the effect of conflicting national and local laws that plague Indonesia’s legal landscape.

All translations in this thesis are mine, unless otherwise indicated. The thesis was up to date as of 1 January 2019.
PART I: CONSTITUTIONALISATION OF ENVIRONMENTAL RIGHTS
GLOBAL CONSTITUTIONALISATION OF ENVIRONMENT-RELATED RIGHTS

As mentioned in the Introduction, many nations have adopted environment-related rights in their constitutions in recent decades, including Indonesia. To place Indonesia within this global trend in subsequent chapters of this thesis, this chapter introduces the key international literature on the constitutionalisation of environmental rights. As we shall see, the literature on this topic is relatively slim. The discussion is divided into four categories of rights that are pursued in Chapters III–VI: substantive environmental rights, procedural human rights, indigenous rights and the doctrine of public trust. For each category, I provide a brief description of the broad trends of internationalisation of the right and doctrine, followed by their constitutionalisation and enforcement by national judicial institutions.

A Environmental Rights

The precise scope of ‘environmental rights’ is contested. They can be construed as rights held by nature or the environment.¹ In this construction, human beings are part of the environment and their rights are subsumed under the rights of the environment.² The term can also refer to ‘the reformulation and expansion of existing human rights in the context of environmental protection’.³ In debates over ecocentric and anthropocentric approaches to environmental protection, some see this definition as ‘an intermediate step between simple application of existing rights to the goal of environmental protection and recognition of a new full-fledged right to environment’.⁴ The term is also used to describe the right to access a quality environment and to sustainable use of natural resources, such as water and food supplies, to obtain a quality environment.⁵ Other scholars define environmental rights as ‘legal provisions guaranteeing citizens a certain level of environmental quality’.⁶ This definition does not constitute a rejection of an ecocentric approach to environmental protection; rather, it recognises that ‘a distinct right to a healthy environment gives the victims of environmental abuse another avenue to seek redress, complementing the eco-centric approach’.⁷

¹ Joshua C Gellers, Global Norms and Green Constitutions: Explaining the Emergence of Constitutional Environmental Rights (University of California, 2014) 4.
³ Ibid 117.
⁴ Ibid.
Generally, scholars categorise two main types of environmental rights: substantive environmental rights and procedural environmental rights. Substantive environmental rights typically denote the right to a healthy environment and other environmental-related rights, which are basically substantive rights in the corpus of international human rights instruments, such as the right to life, the right to health and the right to an adequate standard of living. In contrast, procedural environmental rights are those promoting transparency, participation and accountability, thereby forming the foundation of environmental governance. They provide opportunities for individuals to participate in the policy-making process regarding issues pertaining to the environment. In more recent years, there have been attempts to push for a bolder formulation of this right to include the right of indigenous people, local communities and marginalised people to participate in environmental decision-making and pursue sustainable traditional practices. One example can be found in the International Union for Conservation of Nature (IUCN) Draft Covenant on Environment and Development, which acknowledges that a certain level of economic wellbeing of indigenous communities and marginalised people is a precondition to sustainable development. I now turn to discuss substantive and procedural rights in more detail.

B Substantive Environmental Rights

Substantive environmental rights aim to ensure that people can enjoy environmental conditions that meet certain minimum standards and a level of environmental quality that does not jeopardise their health or wellbeing. While several substantive rights can be used to address environmental problems that affect human life, such as the right to life, the right to health and the right to an adequate standard of living, this thesis primarily refers to the express right to a healthy environment. Despite debates about whether the right to a healthy environment should be recognised as an independent, internationally recognised human right and whether it is a negative or positive right, this type of right is considered the most

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9 Atapattu (n 7) 72; Turner (n 8) 18–22.
13 Atappatu (n 7) 96.
14 Lee (n 8); Rebecca M Bratspies, ‘Do We Need a Human Right to a Healthy Environment (Symposium: Environment and Human Rights)’ (2015) 13 Santa Clara Journal of International Law 81.
common exponent of national environmental constitutionalism.\textsuperscript{16} Most countries in the world use the term ‘healthy’ to describe the quality environment to be protected in their constitution, but some use different adjectives, such as ‘balanced’,\textsuperscript{17} ‘favourable’\textsuperscript{18} and ‘sound’.\textsuperscript{19} Regardless of the descriptor, it is clear that this right imposes an obligation on the government to take action to ensure citizens’ right to environmental quality and to refrain from taking action that impairs that quality. What is not clear is the level of environmental quality that should be protected and what constitutes a violation of such a right.\textsuperscript{20}

1 Internationalisation

There is no treaty that explicitly recognises universal substantive environmental rights.\textsuperscript{21} However, certain declarations have acknowledged the link between human rights and the environment.\textsuperscript{22} The 1972 Stockholm Declaration is widely regarded as the first of these declarations. Principle 1 of the Declaration states that ‘Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations’.\textsuperscript{23}

Thus, this Declaration implies that a quality environment is a prerequisite for the enjoyment of human rights. While not all human rights violations are necessarily linked to environmental degradation, some human rights are directly threatened by environmental deterioration, such as the right to life, the right to health, the right to privacy, the right to suitable working

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\textsuperscript{17} For example, Bolivia (art 33 of the Constitution 2009: ‘Everyone has the right to a healthy, protected, and balanced environment. The exercise of this right must be granted to individuals and collectives of present and future generations, as well as to other living things, so they may develop in a normal and permanent way’) and Mozambique (art 90.1. of the Constitution 2004: ‘All citizens shall have the right to live in a balanced environment and shall have the duty to defend it’) \url{https://www.constituteproject.org/}.

\textsuperscript{18} For example, Bulgaria (art 55 of the Constitution 1991 with amendments through 2015: ‘Everyone shall have the right to a healthy and favourable environment corresponding to established standards and norms. They shall protect the environment’) and Kyrgyzstan (art 48.1. of the Constitution 2010 with amendments through 2016: ‘Everyone shall have the right to environment favorable for life and health’) \url{https://www.constituteproject.org/}.

\textsuperscript{19} For example, Montenegro (art 23 of the Constitution 2007: ‘Everyone shall have the right to a sound environment’) \url{https://www.constituteproject.org/}.

\textsuperscript{20} Boyd (n 12) 25.

\textsuperscript{21} Stephen J Turner, \textit{A Substantive Environmental Right: An Examination of the Legal Obligations of Decision-Makers towards the Environment} (Kluwer Law International, 2009) 7; Lee (n 8) 305.

\textsuperscript{22} Shelton (n 2) 111–112; Atapattu (n 7); May and Daly (n 16).

conditions and the right to an adequate standard of living.\textsuperscript{24} These rights could become meaningless if the environment in which humans live deteriorates beyond a certain level.\textsuperscript{25}

The 1989 Hague Declaration on the Environment also recognises the link between human rights and the environment. It provides that,

‘(B)ecause of the nature of the dangers involved, remedies to be sought involve not only the fundamental duty to preserve the ecosystem, but also the right to live in dignity in a viable global environment, and the consequent duty of the community of nations vis-à-vis present and future generations to do all that can be done to preserve the quality of the atmosphere’\textsuperscript{26}

and it urges a global response to counter global warming and preserve the quality of the atmosphere.

In 1992, the international community again came together to emphasise the inextricable link between human rights and the environment in the Rio Declaration on Environment and Development. Although it has been criticised for being too anthropocentric by placing human beings at the centre of sustainable development, this agreement does not explicitly recognise the human right to a healthy environment. However, it declares that human beings ‘are entitled to a healthy and productive life in harmony with nature’.\textsuperscript{27}

In addition to these international agreements, three major regional instruments on human rights recognise environmental rights in human rights terms. The 1981 African Charter on Human and People’s Rights was the first regional instrument to endorse this right. Article 24 of the African Charter states that ‘All people shall have the right to a general satisfactory environment favourable to their development’. While the right is clearly expressed, this Charter seems to endow the right on ‘peoples’ rather than ‘people’, apparently indicating that it is a collective right rather than an individual right.\textsuperscript{28}

The Organization of American States, another regional institution, also recognises the right to a healthy environment in its 1988 Protocol of San Salvador. Article 11, entitled ‘Right to a Healthy Environment’, provides:

1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
2. The States Parties shall promote the protection, preservation, and improvement of the environment.

\textsuperscript{24} Shelton (n 2) 103.
\textsuperscript{25} Atapattu (n 7) 69.
\textsuperscript{26} The Hague Declaration on Environment, 28 I.L.M. 1308 (1989).
\textsuperscript{27} Rio Declaration on Environment and Development, UN GAOR, 45\textsuperscript{th} sess, Agenda Item 21, UN Doc A/CONF.151/26 1992 Principle 1.
\textsuperscript{28} Atapattu (n 7) 88; Gellers (n 1) 16. Further, it does not articulate states’ obligations when implementing the agreement, which has impeded its effectiveness.
More recently, the Association of South East Asian Nations (ASEAN) has recognised this right. Article 28 of the 2012 ASEAN Human Rights Declaration, under the heading ‘Economic, Social and Cultural Rights’, stipulates that:

Every person has the right to an adequate standard of living for himself or herself and his or her family including:

a. The right to adequate and affordable food, freedom from hunger and access to safe and nutritious food;
b. The right to clothing;
c. The right to adequate and affordable housing;
d. The right to medical care and necessary social services;
e. The right to safe drinking water and sanitation;
f. The right to a safe, clean and sustainable environment.

In another section, entitled ‘Right to Development’, art 35 provides that ‘(T)he right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations’.

2 Constitutionalisation

Countries are increasingly adopting the right to a healthy environment in their constitutions. While only four countries recognised this right in the 1970s, Boyd estimates that 63 countries had adopted the right to a healthy environment in their domestic constitution by 2011, and May and Daly suggest that 75 countries had adopted it by 2015. In February 2018, the Inter-American Court of Human Rights recognised an autonomous right to a healthy environment and state extraterritorial responsibility for environmental damages under the American Convention on Human Rights in an advisory opinion. This new opinion, which was made in response to a request from Colombia, allows a person who is affected by environmental damage generated in another country, including damage by climate change, to file a case before the Court if the state responsible for the environment damage has not complied with obligations presented by the Court. These developments suggest that the right to a healthy environment has become a common, albeit not yet universal, fixture among national constitutions around the world.

29 Ben Boer, *Environmental Law Dimensions of Human Rights* (Oxford University Press, 2015) 179. Although the right to a safe, clean and sustainable development is expressed clearly, it appears to have had little, if any, effect. Generally, environmental violations have continued largely unabated in this region.

30 However, there are variations in the language used in those constitutions to describe the right to a healthy environment, such as ‘clean’, ‘safe’ and ‘favourable’.

31 Boyd (n 12) 62.

32 May and Daly (n 16) Appendix A, 281–292.

33 Inter-American Court of Human Rights, Advisory Opinion OC-23/17.
Proponents contend that recognising the right to a healthy environment in a constitution offers some advantages, such as promoting stronger environmental law legislation, improving environmental law enforcement, offering a safety net to fill gaps in environmental legislation and fostering government accountability.\textsuperscript{34} Moreover, by addressing environmental concerns at the constitutional level, environmental protection need not depend on narrow majorities in legislative bodies and the vicissitudes of routine politics.\textsuperscript{35}

It has been debated whether the constitutional entrenchment of this right has in fact led to positive environmental outcomes in both law and practice. Some argue that environmental laws have tended to be strengthened in many countries after the right has been constitutionally entrenched.\textsuperscript{36} However, others argue that granting constitutional protection to the right to a healthy environment has been largely meaningless, difficult to implement and ineffective, at least in the experience of most countries.\textsuperscript{37} Some of these scholars point out that the right to a healthy environment is unenforceable, particularly in countries where constitutional rights are not self-executing, which makes it difficult to make an admissible case based on a violation of the environmental right. This right is also vague: there is much uncertainty about what level of environmental quality the right requires. A problem frequently referred to by commentators is that it is notoriously difficult to define terms such as ‘good’ and ‘healthy’ in relation to the environment because there may be a subjective element to the concepts, and the parameters of a good or healthy environment may change over time and in different locations.\textsuperscript{38} For others, the right is redundant because it can be subsumed within the right to life if the right to life is given a ‘green interpretation’ in cases involving environmental harm.\textsuperscript{39}

3 Judicial Treatment

Despite the constitutionalisation of the right to a healthy environment around the world, surprisingly, few judicial decisions have implemented it.\textsuperscript{40} Only some constitutional courts have been inclined to give effect to constitutionally entrenched fundamental environmental

\begin{thebibliography}{99}
\bibitem{34} David R Boyd, \textit{The Right to a Healthy Environment Revitalizing Canada’s Constitution} (UBC Press, 2014) 18–19.
\bibitem{36} Jeffords and Gellers (n 6) 136–137; Hayward (n 35); Boyd (n 12); Cullet (n 5).
\bibitem{37} See, eg, James R May and Erin Daly (n 16); Boyd (n 12); Hong Sik Cho and Ole W Pedersen ‘Environmental Rights and Future Generation’ in Mark Tushnet, Thomas Fleiner and Cheryl Saunders (eds) \textit{Routledge Handbook of Constitutional Law} (Routledge, 2013).
\bibitem{38} Ibid.
\bibitem{39} Boyd (n 34)35-36.
\end{thebibliography}
rights provisions. These include constitutional courts in South Africa, Hungary and Turkey. Particularly notable exceptions are the Constitutional Court of Colombia, which has rendered at least 135 decisions concerning environmental rights, and the Federal Supreme Tribunal of Brazil, which has issued at least 26.

May and Daly suggest that there is no single explanation for the relative dearth of cases:

The reasons may be structural. Many constitutions expressly state that fundamental rights provisions are unenforceable by citizens, or contain other obstacles to the courthouse door, such as standing. The reason may be institutional. Courts are generally wary of new claims that had previously been consigned to the political process. They can also feel as though they lack competence and resources to adjudicate fundamental environmental rights. Or they may be political. To jurists and litigants alike, vindicating environmental rights can have negative repercussion, from loss of political station to death. They may be practical. Even under the best circumstances, vindicating environmental rights provisions is most often left to threadbare litigants often represented pro bono by a handful of public interest environmental advocates pursuing some of the most profound issues of the day with virtually no prospect for remuneration.

Writing about Africa, Bruch argues that the scarcity of cases on the right to a healthy environment is due to the novelty of the right, a lack of public interest in environmental litigation and judicial familiarity with public interest litigation, and the failure of governments to set up the machinery to implement their constitutional duties. This suggests that, in some countries at least, the relative inaction might be specific to the nature of the right itself — that is, a lack of familiarity regarding the confines of the right. It might also be explained by factors that are systemic and that operate to hinder the effective application of constitutional rights in most types of cases, of which environment-related cases is only one type.

C Procedural Environmental Rights

Procedural rights in environmental matters are generally considered to consist of access to information, access to participation and access to justice in environmental decision-making processes. These rights are said to be prerequisites to realising the substantive right to a

42 Ibid.
44 Bruch, Coker and VanArsdale (n 10) 18.
quality environment and attaining environmental justice and sustainable development. For communities, the availability of information and the ability to access information in a timely fashion that affects the environment in which they live is vital; without it, they can neither make personal choices nor encourage improved environmental performance by government and industry. For example, communities need to know whether it is safe to consume water from nearby rivers. If they know that the water is polluted, they can avoid drinking it and begin to pressure the government to control related polluting activities.

Although some argue that allowing participation may slow down decision-making processes, others say that participation leads to decisions that are better for the environment and hold the government accountable. With sufficient information, communities can participate in the decision-making processes that affect them by making suggestions, providing criticism where appropriate and pushing the government to employ sustainable solutions to environmental problems. Further, public participation increases public awareness of environmental policies and their effect, fosters empowerment by communities, increases public acceptance of decisions and facilitates government accountability.

Although the way in which scholars define access to justice in environmental matters varies, most agree that it refers to the process rather than substantive outcomes in particular cases. In short, it relates to the extent to which communities are able to use legal system processes, and the nature of that use, rather than issues surrounding the substantive justice of the result obtained. In this context, access to justice is the ability to access fair and impartial in-court and out-of-court environmental dispute settlement. It relates less to securing equitable environmental decisions and more to protecting communities’ rights to information and participation in relation to environment-related decisions that affect them.

46 See, eg, Shelton (n 2) 103; May and Daly (n 16); Bruch, Coker and VanArsdale (n 10); Ole W. Pedersen ‘European Environmental Human Rights and Environmental Rights: A Long Time Coming?’ (2008) 21 Georgetown International Environmental Law Review, 73.


48 Ibid; Hayward (n 35) 144.

49 May and Daly (n 16) 236-238.


1 Internationalisation

The origins of environment-related procedural rights are found in the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Civil and Political Rights. In 1972, the Stockholm Declaration, which was discussed earlier in the context of substantive environmental rights, included an implicit recognition of the right to public involvement in defending and improving the human environment. Two decades later, the 1992 United Nations Conference on Environment and Development explicitly recognised the importance of procedural rights in environmental matters, stating that

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

Following this Declaration, the 1998 Aarhus Convention established more detailed procedural rights and duties on member states concerning decisions that affect the environment. Not only does this Convention impose obligations on states to guarantee the rights of access to information, public participation in decision-making and access to justice in environmental matters, but it also provides an innovative compliance mechanism by which individual citizens and non-governmental organisations may file a petition for enforcement against member states.

2 Constitutionalisation

Studies have suggested that these conventions prompted the constitutional enshrinement of procedural environmental rights. May and Daly identify around three dozen countries that have established procedural environmental rights in their constitution. Younger countries, such as those in Eastern Europe and Latin America, have been more likely to include

52 Universal Declaration on Human Rights (GA Res 217A 1948).
58 Ibid 1.
60 May and Daly (n 16).
environmental rights provisions in their constitution.\textsuperscript{61} For example, the right to access environmental information is explicitly mentioned in the constitution of at least 16 of these countries, including Azerbaijan, Belarus, Georgia and Poland.\textsuperscript{62} Further, the constitution of other countries, such as Thailand, Brazil and Colombia, embodies the right to public participation in environmental matters. For example, the Constitution of Colombia states that ‘Every individual has the right to enjoy a healthy environment. The law guarantees the community’s participation in the decisions that may affect it’.\textsuperscript{63}

In contrast, some constitutions emphasise access to justice rights, such as open standing for citizens and organisations to bring judicial proceedings to pursue environmental rights regardless of whether they have suffered direct loss (Brazil and Kenya\textsuperscript{64}), or standing to bring cases on behalf of the environment or other aggrieved parties (Ecuador, Bolivia and Portugal).\textsuperscript{65}

Despite the growing number of procedural environmental rights enshrined in constitutions around the world, some countries with an older constitution, such as the United States (US) and Canada, do not recognise these types of procedural rights in their constitution. There are several explanations for this, including that those countries have committed to existing human rights conventions and norms that already advance basic rights to information, participation and access to justice.\textsuperscript{66} Therefore, their explicit recognition of procedural environmental rights would be superfluous. Further, some countries with a constitution that does not expressly provide procedural environmental rights have statutory protection for these rights to allow access to information, public participation and justice.

3 Judicial Treatment

Scholars argue that, for courts, it is easier to deal with procedural environmental rights than substantive rights because the boundaries of procedural rights are clearer and their enforcement is more verifiable.\textsuperscript{67} While substantive environmental rights require courts to


\textsuperscript{66} May (n 65) 44–46.

\textsuperscript{67} May and Daly (n 16) 249; Erin Daly, ‘Constitutional Protection for Environmental Rights: The Benefits of Environmental Process’ (2012) 17 International Journal of Peace Studies 71, 71–81.
make difficult judgments, such as what constitutes a healthy environment and whether pollution damages the environment, procedural environmental rights are easier to adjudicate because courts need only to decide whether the issue is in some manner environmental and then whether the constitutionally mandated procedures have been followed. Likewise, it is easier for litigants to prove a violation of procedural environmental rights than substantive rights. For example, it is easier to prove that an information request was denied than to prove that a litigant’s health deteriorated because they consumed polluted drinking water in their neighbourhood. It is often difficult to prove causation – that environmental damage caused damage to health. For this reason, procedural environmental rights are sometimes more efficacious in protecting the environment than substantive rights because courts are more likely to impart additional processes than to impose substantive remedies.

Nevertheless, globally, procedural environmental rights cases have traditionally been relatively rare, except perhaps for the right to information. For example, the Indian Supreme Court recognised the constitutional right to information in 1989 in the Reliance Petrochemical v Proprietors of Indian Express Newspaper case. Here, the Court lifted an injunction on the newspaper, which had prevented it from reporting on the development of oil reserves. Despite the controversy for referring to US Supreme Court jurisprudence, Justice Bhagwati declared that the fundamental right to freedom of speech and expression enshrined in art 19(1)(a) of the Indian Constitution provided a public right to information.

Likewise, in Company Secretary of Arcelormittal South Africa Limited (AMSA) v Vaal Environmental Justice Alliance (VEJA), the Supreme Court of Appeal of South Africa ordered a giant steel company to release records concerning its environmental plan and the closure and rehabilitation of the company’s disposal site. In its consideration, the Court held that

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68 May and Daly (n 16) 249.
70 May (n 65) 46.
72 Reliance Petrochemical v. Proprietors of Indian Express Newspaper (n 75) 7.
Corporations operating within our borders, whether local or international, must be left in no doubt that in relation to the environment in circumstances under discussion, there is no room for secrecy and that constitutional values will be enforced.\textsuperscript{74}

The Court also emphasised that the right to information was guaranteed in the South Africa Constitution\textsuperscript{75} and that this type of information should be captured by the right because South Africa should continue ‘to reset environmental barometer sensitivity’ and develop ‘a greater sensitivity in relation to the protection and preservation of the environment for future generations’.\textsuperscript{76} Courts in other countries, such as Peru and South Korea, have also emphasised the importance of access to environmental information for environmental preservation and protection.\textsuperscript{77}

D Public Trust Doctrine, Indigenous People and Environmental Protection

In addition to express substantive and procedural environmental rights, other approaches have been used to advance environmental rights, including using constitutional provisions pertaining to the public trust doctrine and other independent human rights, such as the right to life, the right to legal certainty and customary rights. All of these have been employed by the Constitutional Court in Indonesia and will be discussed in Chapters V and VI.

1 Public Trust Doctrine

According to the public trust doctrine: a) certain natural resources cannot be subject to private ownership, but instead must be held on public trust, b) the government is the trustee of the trust and c) the beneficiary of the trust — the citizens — can hold the government accountable for the deterioration of the trust.\textsuperscript{78} The public trust doctrine therefore requires the government to manage common natural resources in the interests of its citizens. This doctrine can be traced back to the Roman Empire era in 553 AD, when public ownership of air, running water, sea and seashores was codified.\textsuperscript{79} More recently, some scholars have

\begin{itemize}
\item \textsuperscript{74} Vaal Environmental Justice Alliance v Company Secretary of Arcelormittal Couth Africa Limited (n 73) 32.
\item \textsuperscript{75} Art 32(1)(b) of the Constitution of South Africa stipulates that ‘Everyone has the right to access to any information that is held by another person and that is required for the exercise or protection of any rights’ <https://www.constituteproject.org/>.
\item \textsuperscript{76} Vaal Environmental Justice Alliance v Company Secretary of Arcelormittal Couth Africa Limited (n 73) 33.
\item \textsuperscript{77} May (n 65) 47.
\item \textsuperscript{79} The Public Trust Doctrine was first codified in Corpus Juris Civilis during the Roman Empire. It states that, ‘By the law of nature, these things are common to all mankind, the air, running water, the sea and consequently the shore sea’. See Patrick Deveney, ‘Title, Jus Publicum, and the Public Trust: An Historical Analysis’ (1976) 1 Sea Grant Law Journal 13.
\end{itemize}
argued that this doctrine can be used as a legal tool to fight the exploitation of natural resources to prevent environmental deterioration.\textsuperscript{80}

A number of international treaties have incorporated the principles of public trust, such as the World Heritage Convention\textsuperscript{81} and the UN Convention on the Law of the Sea.\textsuperscript{82} For example, art 4 of the World Heritage Convention states that

\begin{quote}
Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State ...
\end{quote}

Meanwhile, the UN Convention on the Law of the Sea declares that ‘The area (which is the seabed and ocean floor and subsoil thereof, beyond the limit of national jurisdiction)\textsuperscript{83} and its resources are the common heritage of mankind’.\textsuperscript{84} It also declares that all rights of the resources in the seabed and ocean floor, except for certain minerals, are vested in mankind as a whole,\textsuperscript{85} and that activities in the area shall be carried out for the benefit of all mankind as a whole.\textsuperscript{86}

Several countries have recognised the public trust doctrine in their constitution, including Ghana and Bhutan.\textsuperscript{87} Courts in some countries without constitutional recognition of the public


\textsuperscript{81} Convention Concerning the Protection of the World Cultural and Natural Heritage, 1037 UNTS 151; 27 UST 37; 11 ILM 1358 1972.


\textsuperscript{83} Ibid art 1.

\textsuperscript{84} Ibid art 136.

\textsuperscript{85} Ibid art 137 point 2.

\textsuperscript{86} Ibid art 140 point 1.

\textsuperscript{87} For example, Ghana (art 257.1. of the Constitution 1996: ‘All public lands in Ghana shall be vested in the President on behalf of, and in trust for, the people of Ghana’ and 257.6: ‘Every mineral in its natural state in, under or upon any land in Ghana, rivers, streams, water courses throughout Ghana, the exclusive economic zone and any area covered by the territorial sea or continental shelf is the property of the Republic of Ghana and shall be vested in the President on behalf of, and in trust for the people of Ghana’) and Bhutan (art 5 of the Constitution 2008: ‘Every Bhutanese is a trustee of the Kingdom’s natural resources and environment for the benefit of the present and future generations and it is the fundamental duty of every citizen to contribute to the protection of the natural environment, conservation of the rich biodiversity of Bhutan and prevention of all forms of ecological
trust doctrine have also invoked it to protect the environment and natural resources. For example, in the *National Audubon v Superior Court* (1983)\(^88\) (‘Mono Lake’ case), the Supreme Court of California held that the public trust doctrine applied to restrict the City of Los Angeles’ right to divert water from several streams flowing into the Mono Lake because of the environmental harm that might ensue. The Court held that the state had a duty to protect the public’s common heritage of streams, lakes, marshlands and tidelands, and that all uses of water, including public trust uses, must conform to the standard of reasonable use.\(^89\)

In addition to the US, India and the Philippines are said to have produced the most substantial public trust doctrine jurisprudence.\(^90\) The public trust doctrine was invoked for the first time by an Indian court in the landmark case of *M C Mehta v Kamal Nath* (1996).\(^91\) Here, the Indian Minister of Environment and Forests approved a motel to be built at the mouth of a river that was part of a protected forest, as well as a change in the course of the river, which subsequently led to flooding in nearby villages. The Court invoked the public trust doctrine to decide this case, holding that the public trust doctrine was part of the law of the land, even though the Indian Constitution did not express it. The Court said that

This case illustrates the classic struggle between those members of the public who would preserve our rivers, forests, parks and open land in their pristine purity and those charged with administrative responsibilities who, under the pressures of the changing needs of an increasing complex society, find it necessary to encroach to some extent on lands heretofore considered inviolate to change. The resolution of this conflict in any given case is for the legislature and not the courts. If there is a law made by Parliament or the State Legislatures the courts can serve as an instrument of determining legislative intent in the exercise of its powers of judicial review under the Constitution. But in the absence of any legislation, the executive acting under the doctrine of public trust cannot abdicate the natural resources and convert them into private ownership or for commercial use. The aesthetic use and the pristine glory of the natural resources, the environment and the eco-systems of our country cannot be permitted to be eroded for private, commercial or any other use unless the courts find it necessary, in good faith, for the public goods and in public interest to encroach upon the said resources.\(^92\)

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\(^88\) *The National Audubon v Superior Court* [1983] Supreme Court of California 33 Cal.3d 419.


\(^90\) Blumm and Guthrie (n 80) 745.

\(^91\) *MC Mehta v Kamal Nath & Ors* [2002] (SCSuppl) 2002(2)CHN 164.

\(^92\) Ibid.
The Court ordered the cancellation of the lease granted to the motel, the motel to pay compensation for the restitution of the environment and the government to take over the area and restore it to its original natural condition.93

In the Manila Bay case (2008),94 the Philippines’ Supreme Court invoked the Filipino public trust doctrine from the constitutional right to a ‘balanced and healthful ecology’.95 This case was brought by 14 residents of Manila in a class action suit that alleged that 10 government agencies had violated the residents’ constitutional right to life, health and a balanced ecology, as well as numerous statutory duties and the public trust doctrine. They argued that those government agencies had failed to perform their duties to protect Manila Bay and allowed pollution to damage this historic conservation and recreation place. The lower court issued a comprehensive injunction to the government, and the Supreme Court affirmed it with some modifications, ordering the government to clean up, rehabilitate and preserve Manila Bay, and to restore and maintain its water quality for recreational purposes.96 At the end of its reasoning before declaring the judgment, the Philippines’ Supreme Court stated that the judgment was based on public trust doctrine, among others:

So it was in Oposa v. Factora, the Court stated that the right to a balanced and healthful ecology need not even be written in the Constitution for it is assumed, like other civil and political rights guaranteed in the Bill of Rights, to exist from the inception of mankind and it is an issue of transcendental importance with intergenerational implications. Even assuming the absence of a categorical legal provision specifically prodding petitioners to clean up the bay, they and the men and women representing them cannot escape their obligation to future generations of Filipinos to keep the waters of the Manila Bay clean and clear as humanly as possible. Anything less would be a betrayal of the trust reposed in them.97

2 Indigenous Rights

There is a clear link between indigenous peoples, access to natural resources and environmental protection. Indigenous peoples around the world share a close spiritual, cultural, social and economic relationship with the lands they inhabit.98 Many also depend on a geographically distinct traditional territory and to natural resources found there.99 Given this close relationship and dependency, it is widely believed that their laws, customs and

93 Ibid.
95 Section 16 of The Philippines Constitution 1987: ‘The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature’ <https://www.constituteproject.org/>.
96 Metropolitan Manila Development Authority v Concerned Residents of Manila (n 94).
97 Ibid.
practices reflect their attachment to the land and their responsibility for preserving natural resources and the environment. However, substantial numbers of indigenous peoples have been forced to move from their traditional land and have been denied access to natural resources. They also suffer the most from deterioration in environmental quality. For this reason, there is a strong suggestion that upholding indigenous rights helps to protect the environment.

Numerous international treaties have long recognised the critical role of indigenous peoples in sustaining the environment. For example, since 1992, the UN Conference on Environment and Development (1992) has recognised that

Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

Another important international agreement, the Convention on Biological Diversity (1992), also recognises the close dependence of indigenous peoples on biological resources and the desire of sharing benefits arising from traditional knowledge and practices in conserving biological diversity. Governments that have adopted the Convention on Biological Diversity are obliged to introduce domestic legislation or amend their constitutions, to ensure the participation of indigenous peoples in the conservation and sustainable use of their environment. In 1989, the Convention on Indigenous and Tribal Peoples recognised indigenous peoples’ ownership and possession of their lands and territories and established procedures through which they must be consulted if the state retains ownership of the sub-surface natural resources or rights to other resources pertaining to lands.

In more recent years, there have been attempts to push for a bolder formulation of the link between environmental protection, development and indigenous rights to constitute the foundation of a sustainable world. One example of this push can be found in the IUCN Draft

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100 The High Commissioners of Human Rights (n 98) 2.
106 Ibid art 8j.
Covenant on Environment and Development. The Draft embodies a unique formulation combining the right to an ecologically sound environment and the rights of indigenous and marginalised people. Article 14 of the Draft recognises that the right to an ecologically sound environment is to be achieved progressively, that procedural environmental rights — including the rights to environmental information, to participate in environmental decision-making and to access justice — are necessary to protect the environment, and that indigenous people, local communities and marginalised people have the right to participate in environmental decision-making and to pursue sustainable traditional practices. Further, indigenous peoples are to have the collective right to protect the environment, including their lands, territories and resources, in accordance with their traditions and customs. This indicates an increasing acknowledgement that a certain level of economic wellbeing of indigenous communities and marginalised people is a precondition to sustainable development. Conservation and sustainable use of natural resources are impossible when their basic needs are not fulfilled. If adopted, this Draft Declaration would strengthen indigenous rights related to the environment and natural resources, even though it would provide only limited legal rights.

A growing number of countries have recognised indigenous peoples and their rights in their constitution, including Canada, New Zealand, Ecuador and Bolivia, as well as Nepal and the Philippines. The last two countries have also established legal procedures for indigenous participation in land-related issues.

Constitutional and supreme courts of many countries — most notably Latin American countries such as Colombia, Ecuador and Mexico — have recognised environment-related rights of indigenous peoples, primarily the right to participation. For example, the

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108 IUCN, ‘Draft International Covenant on Environment and Development, Fifth Edition’ (n 11). The forward makes it clear that the Draft is intended as a blueprint for an international framework agreement to consolidate and develop existing legal principles related to the environment and development.

109 Ibid art 14 point 1.

110 Ibid art 14 point 3, 4, and 5. Procedural rights are discussed later in this chapter.

111 Ibid art 14 point 6.

112 Ibid art 14 point 6 and art 15.

113 Ibid Commentary 64–66.


116 Ibid.

Colombian Constitutional Court, in its leading decision on the U’wa case,\(^{118}\) established the need for consultation with indigenous communities and defined what constituted ‘appropriate consultation’ with the communities.\(^{119}\) In this case, the Court had to consider a petition presented by the Ombudsman, who represented a group of members of the U’wa indigenous community, against the Ministry of the Environment and the Western Society of Colombia, arguing that they had violated the rights of the community by not conducting a complete and serious consultation before granting a licence for oil exploration within their territory. The Ombudsman requested that the concession be suspended and that the indigenous community be consulted about the project.

The Court granted this request. It suspended the environmental licence and ordered that the U’wa community be consulted within 30 days. In its decision, the Court emphasised that participation was a fundamental right guaranteed by the Constitution, which must be interpreted in line with the Indigenous and Tribal Peoples Convention (ILO C169).\(^{120}\) This meant that when exploiting natural resources, consultations with indigenous communities must seek to give communities complete knowledge of the project and its possible effects on their social, cultural, economic and political development, as well as an assessment of the project’s advantages and disadvantages. The affected communities must be heard and, if they do not reach an agreement, administrative action must not be authoritarian or arbitrary, but objective, reasonable and proportionate.\(^{121}\)

The Supreme Court of Mexico applied similar reasoning in the Yaqui case,\(^{122}\) in which the Yaqui Tribe of Mexico claimed violations of various rights, including the right to consultation and the right to a safe environment, by the proposed construction of the Independencia Aqueduct, which would have removed 60 million cubic metres of water from the Yaqui River for Hermosillo city. The Supreme Court upheld the Tribe’s claims and ordered the government to consult, in good faith and in a culturally appropriate manner, to reach an agreement with the Tribe. As part of this consultation, the Court ordered the government to fully disclose the nature and consequences of the project to the Tribe before and during the consultation.\(^{123}\)

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\(^{118}\) The Constitutional Court of Colombia, Decision SU-039/97, 3 February 1997 <https://oxcon.ouplaw.com/home/MPECCOL>.
\(^{119}\) Courtis (n 117) 64.
\(^{120}\) The Constitutional Court of Colombia, Decision SU-039/97, 3 February 1997 <https://oxcon.ouplaw.com/home/MPECCOL>.
\(^{121}\) Indigenous and Tribal Peoples Convention [1989] (n 107).
\(^{122}\) The Supreme Court of Justice of Mexico, Amparo No 631/2012 (Independencia Aqueduct) 2013 https://www.escr-net.org/caselaw/2013/amparo-no-6312012-independencia-aqueduct.
\(^{123}\) Ibid.
As the next chapter will show, Indonesia has followed the global trend of constitutionalisation of environment-related rights by incorporating many of the same rights that other countries have incorporated. Further, as will be discussed in Part II, the Indonesian Constitutional Court has, like some of the courts mentioned in this chapter, sought to actively enforce some of these rights. However, as Chapters III–VI will demonstrate, like the courts in other countries (for example, India, the Philippines and Colombia), which use other constitutional provisions to protect the environment, the Indonesian Constitutional Court prefers to avoid applying substantive and procedural rights and instead applies provisions that incorporate indigenous rights and public trust doctrine.
II THE CONTEXT OF CONSTITUTIONALISATION OF ENVIRONMENT-RELATED RIGHTS IN INDONESIA

As mentioned in the Introduction, the purpose of this chapter is to describe the constitutionalisation of rights in Indonesia. To this end, this chapter pursues two primary endeavours. First, it discusses the environment-related rights that were inserted into the Indonesian Constitution in 2000, including the debates that surrounded the form of words that should be used to convey those rights. Second, the chapter introduces the Constitutional Court, whose decisions in cases involving those rights are discussed in Part II.

Before considering these constitutional rights and the court charged with interpreting and applying them, I discuss two additional issues that provide context to the discussion of constitutionalisation in Indonesia: the extent of Indonesia’s environmental problems across most natural resource sectors and the failure of ordinary courts to hold those who violate environmental laws to account. As mentioned in the Introduction, the main enquiry of this thesis — that is, whether the constitutionalisation of environment-related rights has been effective — is highly significant in Indonesia today precisely because of the severity of these environmental problems and the inability of the courts to consistently provide any redress in non-constitutional cases. Of course, this judicial inability has existed for many decades; in fact, it has preceded the constitutionalisation of environment-related rights. However, with some notable exceptions, this judicial inability has also persisted despite constitutionalisation. Although it is not the primary concern of this thesis, this failure is a significant impediment to Indonesia meeting prerequisite 4 (‘general judicial enforcement’) for the effectiveness of the constitutional review identified in the Introduction.

A Indonesia’s Environmental Problems

Indonesia is an archipelago with more than 17,500 islands spread across more than 5,000 kilometres from east to west. It has large reserves of mineral and other natural resources. However, achieving sustainable use of these resources has been elusive, and environmental problems are both varied and numerous. The MoEF\(^1\) charted a consistent decline in Indonesia’s environmental quality from 2011 to 2017,\(^2\) with resources exploitation being the most significant factor in the decline. Indonesia has lost an enormous amount of its estimated 170 million hectares of primary forest, mostly from illegal logging and forest fires to clear land for plantations.\(^3\) On average, between 1990 and 2013, around 700,000 hectares of forest

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\(^1\) ‘Profile of the Ministry of Environment and Forestry’, menlhk.go.id <http://www.menlhk.go.id/site/post/101>. During President Jokowi’s administration in 2014, the Ministry of Forestry was merged with the Ministry of Environment (MoE) and became the Ministry of Environment and Forestry (MoEF).


\(^3\) The REDD Desk, ‘Statistics for Indonesia’, The REDD Desk (online, August 2015) <https://theredddesk.org/countries/indonesia/statistics>; Christophe Bahuet, “Multi-Door
were lost each year through illegal activities. Deforestation peaked in 1997–2000, resulting in 3.51 million hectares of forest loss per year and significantly reducing biodiversity. Illegal activity is said to persist in conservation zones that are formally covered by moratoriums on logging as established by presidential decree. Indonesia is the sixth-largest greenhouse gas emitter after China, the US, the European Union, India and Russia, with around 63% of emissions resulting from land use change, deforestation, and peat and forest fires.

Traditionally, this deforestation might have been financially driven by the paper and timber products industries; however, it now appears to be primarily motivated by the need to open up land for oil palm plantations. Indonesia is the world’s leading producer of palm oil, supplying approximately half of the commodity globally. Palm oil is also the largest

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Bahuet (n 3). The Corruption Eradication Commission (Komisi Pemberantasan Korupsi [KPK]) reports that forestry-related crime has caused a significant loss to the state in the form of taxes. It estimates a loss of US$6.47–8.98 billion between 2007 and 2013; Greenpeace Indonesia (n 3).


agricultural industry in Indonesia;\textsuperscript{10} the industry’s contribution to the Indonesian economy and employment is significant, often creating disincentives for reducing deforestation rates and forest fires.\textsuperscript{11} Nevertheless, the president recently issued an instruction to provide a legal basis for the postponement and evaluation of new oil palm plantation licences that relate to productive forest areas.\textsuperscript{12}

Indonesia’s environmental problems are not limited to forestry and plantations; marine and fisheries are also important sectors upon which the government relies to promote economic growth and food security, but which can result in environmental damage if poorly managed.\textsuperscript{13} Both the marine environment and its economic potential are threatened by overfishing, much of it illegal, unreported and unregulated (IUU), which is said to threaten around 65\% of Indonesia’s coral reefs.\textsuperscript{14} The Minister for Maritime Affairs and Fisheries has issued several policies to prevent further damage to marine biodiversity, including a fishing moratorium for foreign fishermen,\textsuperscript{15} a transhipment ban\textsuperscript{16} and a prohibition on using destructive fishing devices such as trawls and seine nets.\textsuperscript{17} The president has also established a special task force to prevent and combat IUU fishing.\textsuperscript{18} This task force conducts compliance audits and law enforcement activities in coordination with other relevant agencies, including the Indonesian police, army and public prosecution service.\textsuperscript{19}

Indonesia has a myriad of other environmental problems. Air and water pollution, waste management and over-exploitation of other natural resources, such as water, remain highly


\textsuperscript{12} Presidential Instruction No 8 of 2018 on Postponement and Evaluation of Licensing of Oil Palm Plantations and Increased Productivity of Oil Palm Plantations.


\textsuperscript{15} Regulation of Minister of Maritime and Fisheries Affairs No 56 of 2014 on Fishing Moratorium in Indonesian Fishing Zones.

\textsuperscript{16} Regulation of Minister of Maritime and Fisheries Affairs No 57 of 2014 on Fishing Businesses in Indonesian Fishing Zones.

\textsuperscript{17} Regulation of Minister of Maritime and Fisheries Affairs No 2 of 2015 on the Prohibition of the Utilisation of Trawls and Seine Nets in Indonesian Fishing Zones.

\textsuperscript{18} Presidential Regulation No 115 of 2015 on the Task Force for Combating Illegal Fishing.

\textsuperscript{19} Ibid.
problematic, as do the environmental impacts of mining and other extractive activities. A broader problem is the effect of these resource-related activities on traditional communities, which may be excluded from the natural resources upon which they have relied for their subsistence needs and a basic livelihood, as agricultural land is converted for other uses. This often forces farmers to move their operations to other areas that might be unsuitable for their farming activities, such as land with low fertility soils, high rainfall and steep slopes, which leads to low yields and can cause disasters such as landslides. Another emerging problem is farmers being required to employ agricultural methods and products, such as seeds, to which they are not accustomed, and which might be inappropriate for use in the areas they farm, leading to soil degradation and excessive water use. Some farmers have pushed back against this, leading to conflicts and serious violence.

B Indonesia’s Environmental Law

Indonesia’s substantive environmental law, at least as it appears ‘on paper’, is not nearly as defective as these environmental problems might suggest. Constitutional recognition of environmental rights is solid, and incremental statutory reforms have strengthened the legal framework for environmental protection and management.

Indonesia has had environmental management legislation since 1982, when the Law on Basic Environmental Management was enacted. This statute provided relatively strong environmental protections and introduced basic environmental law principles such as sustainable development and intergenerational equity. It also introduced rights to a good and healthy environment and to participate in environmental management, imposed a duty on the government and citizens to protect the environment and prevent environmental

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22 Fuhmuddin Agus, ‘Environmental and Sustainability Issues of Indonesian Agriculture’ (2011) 30 Jurnal Litbang Pertanian 140, 141.
25 Law No 4 of 1982 on Basic Environmental Management.
26 Ibid art 3.
27 Ibid art 4(1).
28 Ibid art 6(1)
destruction, 29 established procedures for victims of environmental pollution to obtain redress and remedies, 30 and imposed criminal sanctions for causing environmental harm. 31

The Law was replaced in 1997 with the Law on Environmental Management, 32 which provided stronger procedural environmental rights, including rights to access environmental information and to participate in environmental management. 33 The 1997 Environmental Management Law also introduced new concepts in civil and criminal enforcement, such as out-of-court settlement (mediation), 34 strict liability 35 and corporate liability. This Law also sought to provide more open access to justice, including by giving citizens rights to seek redress and remedies through class actions 37 and open standing for non-government organisations (NGOs) to bring proceedings on behalf of the environment. 38

Indonesia’s legislative framework for environmental protection was further strengthened with the enactment of the 2009 Law on Environmental Management and Protection 39 — Indonesia’s main environmental law at the time of writing. It maintained the protections in the 1982 and 1997 Laws and added several principles, including ‘common but differentiated responsibility’ and ‘polluter pays’. 40 This Law continues the trend towards more stringent enforcement by, among other things, providing the right to a healthy environment, 41 maintaining access to in-court and out-of-court environmental dispute settlement, 42 civil class action mechanisms 43 and open standing for NGOs, 44 as well as guaranteeing that any person who fights for such a right cannot be prosecuted. 45 It also imposes clearer obligations on the government 46 and provides strong recognition of procedural environmental rights. 47

29 Ibid art 6 and 7.
30 Ibid art 20.
31 Ibid art 22.
32 Law No 23 of 1997 on Environmental Management.
33 Ibid art 5(2) and (3)
34 Ibid art 30
35 Ibid art 35
36 Ibid art 45
37 Ibid art 37
38 Ibid art 38
39 Law No 32 of 2009 on Environmental Protection and Management.
40 Ibid art 2
41 Ibid art 65(1)
42 Law No 32 of 2009 on Environmental Protection and Management.
43 Ibid. art 91
44 Ibid art 92
46 See, eg, art 62 of Law No 32 of 2009 on Environmental Protection and Management.
47 Ibid art 65(2), (3), (4) and (5).
C General Judicial Enforcement

Despite these laws, significant legal and institutional obstacles have long prevented, and continue to prevent, effective environmental management and protection.\(^{48}\) The ‘sectoral’ approach to environmental administration\(^{49}\) remains a key problem, as does the weak investigative powers granted to the MoEF, inadequate investigations by civil service investigators from the MoEF and police,\(^{50}\) and lacklustre prosecutions by public prosecutors.\(^{51}\) Although the competence of Indonesian law enforcers is often criticised,\(^{52}\) environmental cases can be particularly difficult because they are highly technical.

One of the most significant impediments to the effective enforcement of these laws is the general and administrative courts, including the appeals from them to the Supreme Court. Both the administrative and general courts are widely considered largely ineffective in enforcing environmental laws. Limited data are available on the number of cases brought before these courts. However, reports indicate that victims of environment-related violations who seek civil redress or remedies are rarely successful in court.\(^{53}\) Even successful plaintiffs generally find it difficult to enforce favourable decisions. There are various reasons for this, which apply equally in many other areas of Indonesian law, including absconding defendants, the government simply ignoring judicial decisions (with almost no consequences), decisions that are so unclear that enforcement is not possible and, in cassation cases, a certified copy


\(^{49}\) Syarif, ibid; Simon Butt and Tim Lindsey, Indonesian Law (Oxford University Press, 2018) 169–175.

\(^{50}\) United States Agency for International Development–Asian Environmental Compliance and Enforcement Network and Indonesian Center for Environmental Law, Environmental Compliance and Enforcement in Indonesia: Rapid Assessment (November 2008); A Memorandum of Understanding on Multi Door Approach (Chief of the Indonesian National Police, Attorney General, Minister of Environment and Forestry, Minister of Finance and Head of the Indonesia Financial Report and Analysis Center, 2013).

\(^{51}\) Ibid.


\(^{53}\) David Nicholson, Environmental Dispute Resolution in Indonesia (KITLV Press, 2009); BAPPENAS, Efektifitas Penyelesaian Sengketa Lingkungan Hidup Di Indonesia (The Effectiveness of Environmental Dispute Resolution in Indonesia) (BAPPENAS and Van Vollenhoven Institute, 2010); Syarif and Wibisana (n 48).
of the decision not being forwarded to the relevant first instance general court for enforcement.

In criminal cases, data from the Supreme Court’s website reveal that between 2011 and 2017, there were only 976 cassation cases related to environment and natural resource management, mostly from the environment, plantation, fishery and mining sectors. This represents only 1.58% of the total number of all types of cases handled by the Supreme Court. However, this number might in fact be lower because not all cases necessarily contain an environmental issue — for example, cases about mining contracts. The perpetrators tend to receive very low, if any, sanctions for environment-related offences, as demonstrated by Supreme Court verdicts in 2015. According to a report, the Court heard 25 environment-related criminal cases in 2015. In 19 cases, the Court issued or confirmed sentences of less than two years’ imprisonment, and in five cases, the defendants were found not guilty or were otherwise released. In only one case, a defendant was imprisoned for 3–5 years. This appears to be consistent with findings in lower court verdicts in 2017, in which 554 perpetrators received 1–2 years’ imprisonment, 65 received 3–5 years, and 11 received more than 6 years.

Several factors contribute to the ineffectiveness of environmental adjudication. For example, Indonesia’s environmental statutes tend to be very generally worded, like almost all other Indonesian legislation. Unfortunately, this is said to make judges uncertain about whether they should apply that law to cases they hear, and there is a general preference to not apply it in the absence of more concrete, detailed regulations. Indonesian judges are generally reluctant to create law, despite being formally authorised to ‘dig and follow’ law and justice based on community values if there is no law applicable to a case before them or if the law is unclear or otherwise inadequate. This reluctance derives from the version of the civil law tradition that Indonesia inherited from the Dutch, where the main reference point for judges when hearing and deciding cases is existing written law, whether statutes or lower regulations. Unlike common law systems, Indonesian judges are not required to follow previous court decisions.

The second factor contributing to this overall ineffectiveness is a general lack of judicial capacity to handle environmental cases using the entirety of the available legal framework. For example, in some cases, judges have applied only the Environmental Management Law

55 The Supreme Court of the Republic of Indonesia (n 54) 64. The precise sentence of each case is unknown. For the Annual Report, the Supreme Court classified sentences into nine categories: <1 year, 1–2 years, 3–5 years, 6–10 years, >10 years, life sentence, death sentence, acquittal and rehabilitation.
56 Pradiptyo et al (n 54) 34.
57 Nicholson (n 53); BAPPENAS (n 53).
58 Art 5(1) of Law No 48 of 2009 on Judicial Power.
and its enabling regulations, and ignored a large set of complementary sectoral laws that may have otherwise been applicable and resulted in a finding of liability or guilt. The converse has also occurred, whereby sectoral laws are applied without considering the applicability of the Environmental Management Law. For example, in some forestry and mining cases resulting in environmental damage, judges have not applied the Environmental Management Law, preferring instead to apply sectoral laws, which commonly impose lower penalties.

Finally, corruption remains a major problem in Indonesia, particularly within law enforcement institutions, including police, the public prosecution and courts. This problem is widely documented, as is its deleterious effects on outcomes in civil and criminal cases. Therefore, it is not surprising that defendants in civil and criminal cases are often suspected of bribing corrupt officials to escape investigation, prosecution, civil liability and criminal conviction. (Corruption is particularly acute in cases involving exploitation of natural resources, where corruption is already extremely rife, particularly in the issuance of concessions and licences. Therefore, it is often said that defendants in these types of cases are even more likely to seek to bribe a law enforcement official or respond to a request for a bribe.)

However, it is worth noting that, in 2011, the Supreme Court introduced a system to certify environmental judges. Under this system, only general and administrative court judges who have been trained and certified can handle environmental cases in their respective courts. This reform has had mixed results. One weakness is that some court registrars, who classify cases to determine where they should be heard and by whom, have insufficient knowledge of substantive environmental issues to make these decisions. Consequently, cases involving substantive environmental issues are sometimes allocated to general court judges with little or no environmental expertise. Moreover, the placement of these certified judges does not correspond to the location of the environmental pollution or damage. That is, judges are not necessarily placed in the appellate or lower court, which are located in regions with high numbers of environmental cases.

However, there have been some notable cases in which the general courts have upheld environmental interests. Perhaps the first ‘landmark’ case was the 1988 *Walhi v PT Inti Indorayon Utama case*, in which the Central Jakarta District Court granted standing to an environmental organisation to sue in the public interest, even though the applicable

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60 Butt, Lyster and Stephens (n 6); Laode M Syarif, ‘Current Development of Indonesian Environmental Law’ (2010) IUCN Academy of Environmental Law 1, 18.
61 Decree of the Supreme Court of Republic of Indonesia No 134/KMA/SK/IX/2011.
63 Ibid.
64 *Walhi v P.T. Inti Indorayon Utama*, Decision of the Central Jakarta District Court No 820/Pdt./G/1988/PN.
environmental law at that time did not expressly permit this. The decision prompted lawmakers to amend, in 1997, the Law on Basic Environmental Management (1982) to formally grant standing to NGOs to bring such claims. In Dedi et al v PT. Perhutani (2004), the Indonesian Supreme Court applied precautionary principles for the first time to establish strict liability in tort law for environmental damage to allow victims to claim compensation for damage resulting from a landslide in an area over which a state-owned company (Perhutani) held a concession. The Kalista Alam case (2012) is another landmark. This civil lawsuit was filed by the Environment Minister against PT Kalista Alam for allegedly burning forest and peatland to clear land in Nagan Raya, Aceh, for an oil palm plantation — a practice prohibited by the Forestry Law. The Court ordered PT Kalista Alam to pay Rp. 336 billion (US$25.6 million) in compensation — the highest payout in Indonesian legal history in an environment-related case.

More recently, the MoEF initiated forestry cases between 2015 and 2018, claiming to have won 567 criminal cases in court, 18 lawsuits against companies, with IDR18.3 trillion (US$1.3 trillion) awarded, and 132 disputes that were settled out of court. However, there have been significant difficulties in securing the enforcement of these decisions, with only a handful of them being enforced by the district court in which the case first emerged.

Having provided background material concerning the extent of Indonesia’s environmental problems and the difficulties that have been faced in pursuing those who violate Indonesia’s environmental laws, this thesis now focuses on environment-related rights in the Indonesian Constitution and the institution that interprets and applies them: the Constitutional Court.

65 Nicholson (n 53) 52.
68 As mentioned, the Ministry of Environment has been merged with the Ministry of Forestry. This case was filed in 2012, before the merger.
Indonesia’s Constitution provides various human right guarantees in arts 28A to 28J of Chapter XA, which draws from the Universal Declaration of Human Rights.\(^\text{71}\) Some of these can be said to be related to the environment — that is, potentially used to pursue environmental ends — even though only a handful have been employed by applicants in Constitutional Court cases, and by the Court itself in its decisions. These cases are discussed in Chapters III–VI. This chapter will briefly introduce these rights.

1 The Right to a Healthy Environment

Today, Indonesia’s Constitution has a relatively robust formulation of substantive environmental rights.\(^\text{72}\) However, like many other countries whose constitution was drafted before the Stockholm Declaration, the original version of Indonesia’s 1945 Constitution did not include a specific right to a healthy environment.\(^\text{73}\) The idea to include this right emerged in the deliberations concerning the first amendment to the Constitution in 1999.\(^\text{74}\) However, given time constraints and other pressing priorities, including establishing important new democratic institutions and maintaining national unity,\(^\text{75}\) the constitutionalisation of human rights, including the right to a healthy environment, only began during the second amendment discussions in 2000.\(^\text{76}\)

The discussion to include human rights in the second amendment of the Constitution took less than nine months, from 19 November 1999 until 18 August 2000, and the process was relatively smooth. Despite some initial differences about whether human rights should be included in the Constitution at all, all factions\(^\text{77}\) finally agreed to include them. The battle then centred around the formulation of the provisions.

In relation to the environmental right, some disagreed over the adjectival denominator to describe the required level of environmental quality. Some factions suggested the right to a


\(^{75}\) See Donald L Horowitz, *Constitutional Change and Democracy in Indonesia* (Cambridge University Press, 2013).

\(^{76}\) Constitutional Court of the Republic of Indonesia (n 74).

\(^{77}\) Factions (fraksi) is a group of parties or people in the parliament that have the same or similar interests on certain issues. During the second amendment, there were 12 factions.
‘healthy’ environment; others, to a ‘healthy and adequate’ environment; and yet others to a ‘good and healthy’ environment. Diverse opinions were expressed about the scope of the right, such as whether it should simply be the ‘right to environment’ or whether it should be the ‘right to dwell and healthy environment’. Later in the discussion, there was an initiative to merge several rights into a single provision because, as one member expressed, ‘there are too many provisions and they should be reduced/summarised (diringkas)’. Some appeared to agree with this suggestion, not anticipating the confusion that might ensue when the provision was implemented.

Finally, the drafters, chaired by Hamdan Zoelva — a politician from the Crescent and Moon Party who later became the fourth Chief Justice of the Constitutional Court (2013–2015) — agreed on the formulation and passed it to the Plenary Meeting of the People Consultative Assembly (Majelis Permusyawaratan Rakyat – MPR) on 18 August 2000, which approved it. The amendment inserted a new chapter on Human Rights, which covers most of the rights stated in the Universal Declaration of Human Rights. The right to a healthy environment was included in art 28H(1) of the Constitution, as follows: ‘Each person has a right to a life of well-being in body and mind, to a place to dwell, to enjoy a good and healthy environment, and to receive health care’.

While some argue that Indonesia now has a green Constitution with robust recognition of the right to a healthy environment, this conclusion cannot yet be drawn because the formulation of this provision remains too broad and vague. On the surface, it is not clear whether this provision guarantees four distinct and independent human rights — the right to a life of wellbeing in body and mind, the right to a place to dwell, the right to enjoy a good and healthy environment and the right to receive healthcare — or one single human right that covers these four aspects. A narrow formulation focusing on the right to a good and

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78 Constitutional Court of the Republic of Indonesia (n 74) 292. Suggestion from the Sovereign People Party Fraction (FPDU).
79 Ibid 302. Suggestion from the United Development Party Fraction (F-PPP).
80 Ibid 298. Suggestion from the Golkar Party Fraction (F-PG).
81 Ibid 281. Suggestion from the Group Delegation Fraction (F-UG).
82 Ibid 286. Suggestion from the National Awakening Party Fraction (F-PKB).
83 Ibid 306, 328.
84 Ibid 335–336. In the 6th meeting of the Commission A.
85 Indrayana (n 71) 217–218.
86 Jimly Asshiddiqie, Green Constitution: Nuansa Hijau Undang-Undang Negara Republic of Indonesia 1945 (Rajawali Press, 2009) 90; Boer (n 72) 167.
87 However, it seems clear that the Constitutional Court considers art 28H(1) to contain four separate rights. This can be observed from two judicial review cases: Constitutional Court Decision 45/PUU-IX/2011 reviewing Law on Forestry (Forest Zoning Case), in which the applicants alleged violation of the right to a place to dwell; and Constitutional Court Decision 013/PUU-III/2005 reviewing Law on Forestry (Log Transportation Case) in which the applicant claimed violation of the right to wellbeing. Although the Court was not required to address the severability of these rights from art 28H(1), it appeared to proceed on the basis that they were separate.
healthy environment would have been preferable because it clearly sets a normative goal and may avoid multi-interpreta-
on. Moreover, it probably has the best chance of gaining acceptance as a human right.  

Chapter XA of the Constitution, which contains the list of constitutional rights, also includes various rights that the Constitutional Court has linked to the right to a healthy environment in some of the cases discussed in Chapter IV-VI. These are

- the right to life (Article 28A)
- the right to just legal recognition, guarantees, protection and certainty, and to equal treatment before the law (Article 28D (1))
- the right to access information (Article 28F)
- traditional rights (28I (3)).

2 Procedural Environmental Rights

As discussed in Chapter I, many countries have enshrined express procedural environmental rights in their constitution. Although Indonesia has not done this, its Constitution provides various generic procedural rights. For example, the Constitution contains provisions that guarantee rights to information and rights to assemble, associate and express an opinion. Article 28F stipulates that

Every person shall have the right to communicate and to obtain information for the purpose of the development of her/his social environment, and shall have the right to seek, obtain, possess, store, process and convey information by using all available type of channels.

Article 28E(3) of the Constitution stipulates that ‘Every person shall have the right to freedom of association, freedom of peaceful assembly, and freedom to express her/his opinions’. Although these provisions are formulated in general terms and do not specifically refer to environmental matters, they are open to broad interpretation as procedural environmental rights, or at least as they extend to providing protection equivalent to those rights. For example, art 28F could encompass the right to access information regarding environmental management and protection. Likewise, the right to express an opinion in art 28E(3) could be interpreted to include the right to participate in environment-related decision-making processes. For example, if people object to a certain development plan, they can express their objections to decision-makers or take other steps to attempt to prevent such developments from adversely affecting their lives and the environment.

The Indonesian Constitution does not provide an express right to access to justice. However, a broad right to access to justice might be drawn from art 28D(1) of the Constitution, which articulates that ‘Every person shall have the right to recognition, guarantees, protection and legal certainty of just law as well as equal treatment before the law’. Article 1(3) of the

Constitution could also be used to establish this right. It states that ‘The State of Indonesia is based on law’.

As discussed in Chapter IV, the Constitutional Court has issued decisions that support access to justice being considered as part of art 1(3)’s ‘law state’ (negara hukum or ‘rule of law’, as it is commonly translated) concept and legal certainty (Article 28D(1)).

3 Other Environment-Related Constitutional Rights

In addition to express rights, both substantive and procedural, Indonesia’s Constitution contains broad statements from which rights and even state duties to protect rights can be ‘implied’ 89 As discussed in Chapter V, these have been applied by the Constitutional Court.

The Court has also imported environmental considerations in its interpretation of art 18B(2) of the Constitution, 90 which stipulates that

The State recognises and respects customary legal communities (masyarakat hukum adat) and their traditional rights provided they remain in existence and in line with social development and the principle of Unitary State of the Republic of Indonesia, as stipulated in law (dalam undang-undang).

This provision has been referred to by litigants and the Constitutional Court to protect customary communities’ rights to access natural resources in several environment-related cases. 91 As discussed in Chapter VI, this interpretation has resulted in decisions that favour environmental protection.

Further, of critical importance in environment-related cases are arts 33(3) and (4) of the Constitution, which state that

(3) The lands, the waters, and the natural resources within are controlled by the State and must be utilised for the greatest prosperity of citizens;
(4) The national economy is organised based on economic democracy in accordance with principles of togetherness, fairness, efficiency, sustainability, environmental soundness, independence, and by maintaining a balance of national economic progress and unity.

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90 Many of Indonesia’s statutes relating to the environment and natural resources management also recognise customary rights, such as the 1960 Basic Agrarian Law and the 1999 Forestry Law.
Article 33 concerns basic principles of the Indonesian economy. The article consists of five sub-paragraphs, of which the first three — including paragraph (3) — remain as initially included in 1945, thereby surviving the four Constitution amendment rounds in 1999–2002 and emphasising the state’s control over the economy and economic resources. The debate over the first three articles during the drafting of the Constitution in 1945 indicates that the Constitution’s drafters intended that state control over natural resource exploitation would be a way to ensure economic growth and social welfare rather than a means to protect the environment. However, as will be discussed in Chapter V, the Constitutional Court has applied art 33(3) for environmental protection purposes.

4 Limits on Constitutional Rights

In addition to providing for explicit and implied rights, the Indonesian Constitution limits constitutional rights. These constitutional limitations can be found in art 28J of the Constitution, which states that

(1) Every person is obliged to respect the human rights of others in the life of order of community, nation, and state;
(2) In exercising their rights and freedom, every person shall be subject to restrictions prescribed by law solely for the purpose to guarantee recognition and respect for the rights and freedoms of others and to meet fair demands in accordance with moral judgment, value religion, security, and public order in a democratic society.

This provision suggests that no rights are intended to be absolute, including the right to a healthy environment. The Court has applied this limitation in environmental cases. For example, in the Horticulture System Law (HSL) case, the Court rejected the applicants’ claim that the impugned Law limited farmers’ freedom to choose the type of vegetation and planting mechanisms to accommodate their subsistence needs, therefore breaching their right to life. According to the Court, the farmers’ freedom to choose the type of vegetation

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93 See Ananda B Kusuma, Lahirnya Undang-Undang Dasar 1945 (Fakultas Hukum Universitas Indonesia, 2004).
94 Boyd (n 73) 63. Boyd identified four types of limits on constitutional rights that are generally found in constitutions: generic limits, restrictions during emergencies, acknowledgement that rights will be fulfilled on the basis of progressive implementation, and limits on who is eligible to enjoy constitutional rights.
95 Indeed, several constitutional rights contained in art 28I(1) are expressed as being ‘non-derogable’. However, as Lindsey and Butt explain, the Constitutional Court has held that even these rights are subject to art 28J(2). See Lindsey and Butt (n 49) 22.
and planting mechanisms as stipulated in the HSL was not absolute. The Court emphasised that

even the human rights are limited by law, which aims to solely guarantee recognition and respect to rights and obligations of others, and to fulfil justice, based on the moral and religious value considerations, and security and public order in a democratic society [vide Article 28J (2) of the Constitution].

E The Indonesian Constitutional Court

As mentioned in the Introduction, Part II of this thesis examines how the constitutional rights described above have been interpreted and applied by the Indonesian Constitutional Court. This chapter now briefly introduces the Constitutional Court, focusing on its jurisdiction and decision-making practices relevant to the decisions discussed in this thesis.

The Constitutional Court is one of Indonesia’s newest judicial institutions. It began operating in 2003 and has several functions, including constitutional review. Using this power, the Court assesses statutes to ensure that they are consistent with, and do not breach, the Constitution. The Court has become a forum in which litigants, including individuals and NGOs, can pursue the government for environment-related harm. In environmental cases, their intention has sometimes been not merely to win the case, but rather to draw the public’s attention to certain policy discourse and influence the attitudes of policy-makers to take environmental concerns into account. Some applicants bring judicial review cases not necessarily because they expect to win, but simply because they are entitled to, and they want to air their grievances about a statute they may have had no opportunity to help shape when it was deliberated. Indonesia’s various forestry statutes and mineral and coal mining statutes have attracted the most judicial review applications (ten and six respectively), while other relevant statutes, such as the Law on Environmental Protection and Management and the Law on Coastal and Small Island Management have each been reviewed once. Despite serious controversies and some jurisdictional limitations, the Court has been a relatively reliable forum for the professional resolution of these types of cases.

A growing body of literature has discussed the Constitutional Court’s institutional design, the way it operates, its decision-making practices, jurisprudence on various issues and its leadership. From an analysis of this literature, several observations about the Court can be made that are relevant to this thesis.

First, the Court’s constitutional review power is limited. The jurisdiction for judicial review is split between the Constitutional Court and the Supreme Court. Article 24C(1) of the Constitution grants the Constitutional Court the power to review the consistency between statutes and the Constitution, while art 24A(1) grants the Supreme Court the power to review the consistency between regulations below the level of statutes with statutes. This means

97 Ibid.
that the Constitutional Court cannot formally review the constitutionality of other types of laws, such as government and ministerial regulations (MRs), or even government action. In practice, this is a very significant limitation given that most Indonesian laws take the form of regulations, as shown in Chapter VIII’s discussion of the complex web of forestry-related regulations. Nevertheless, the Constitutional Court has engaged in reviewing regulations, albeit very occasionally. The most notorious example is the WRL Case 2, discussed in Chapter V of this thesis, whereby the Court tied the review of six government regulations to its assessment of the constitutionality of the Water Resource Law, which it then invalidated.

Second, the Court’s reasoning is often vague and unclear, and its arguments are often not presented logically or chronologically. Sometimes, too, the Court raises important issues but provides no further explanation, commonly ignoring important arguments altogether. This is clear from various environment-related decisions that appear to have been directed towards promoting better protection and management. For example, in the Chevron Bioremediation Case, the Court upheld the constitutional right to a good and healthy environment, but its reasoning was so brief and unclear that it led to confusion about how its decision should be enforced, as well as the implications of its decision for other legislation and future cases. In the Mining in Protected Forest Case, the Court acknowledged the constitutional right to a healthy environment and that significant environmental damage was likely to be caused by mining operations in a protected forest. However, for the Court, these factors were outweighed by the need for legal certainty for investors (who held otherwise valid mining licences) and the need to avoid the government being sued, which the Court anticipated would occur if the mining licences were invalidated. The Court did not explain in detail how it balanced these competing considerations.

A related issue concerning the Court’s decisions is whether the reasoning contained therein is formally binding. It is clear that the government must comply with the Court’s holding (amar putusan), which is a statement at the end of the judgment in which the Court specifies the statutory provisions invalidated or the ‘conditional’ interpretation it provides. Whether the

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98 See, eg, Lindsey and Butt, The Indonesian Law (n 49); Butt and Lindsey, The Constitution of Indonesia (n 89); Simon Butt, ‘Jurisdictional Expansion, Self-Limitation and Legal Reasoning in the Indonesian Constitutional Court’, in Dri Utari Christina Rachmawati and Ismail Hasani (eds), Masa Depan Mahkamah Konstitusi (Pustaka Masyarakat Setara, 2013); Simon Butt, The Constitutional Court and Democracy in Indonesia (Brill Nijhoff, 2015).


101 Hendrianto (n 100); Butt, (n 100); Siregar (n 100).
Court’s reasoning (*pertimbangan hukum*) — that is, the pages leading up to the holding — is also binding is a question of much debate and significant uncertainty.\(^{102}\) If the reasoning is binding, then theoretically, it can be applied to other statutes that the Court might not be reviewing. For example, as discussed in Chapter V, in a review of water legislation, the Court’s reasoning regarding the extent to which the state must exercise control over natural resources under art 33(3) of the Constitution might be applicable to coastal legislation given that coasts are also a natural resource. If only the holding was binding, then the Court’s holding in the review case involving water legislation could only apply to that water legislation, and not to coastal resources.

Third, the Constitution, Constitutional Court Law and Constitutional Court regulations provide no mechanisms by which the Court can enforce its decisions or impose sanctions for failure to comply with its decisions.\(^{103}\) This appeared to make the Court more tentative in its earlier years, preferring to hand down relatively soft decisions that did not bring it into confrontation with the government or the legislature.\(^{104}\) Yet for the most part, its decisions have been respected by parliament and the government.

However, there have been exceptions in some environment-related cases, whereby the government has either simply ignored a Constitutional Court decision entirely or circumvented the Court’s decision by issuing lower-level regulations to replace statutory provisions, and even entire statutes, that the Court invalidated. The most blatant example of the government ignoring a Constitutional Court decision is its response to the Chevron Bioremediation Case. In this case, the Court decided that environmental law enforcement was to be coordinated by the Ministry of Environment (MoE). However, in the aftermath of the massive forest fires case that occurred in 2016, the MoE appears to have ignored this obligation to coordinate law enforcement. The Environment Minister absolved herself of responsibility when, in highly controversial circumstances, the police stopped investigating 13 companies for causing forest fires.

Perhaps in response to the lack of enforcement powers, the Court often issues ‘conditional’ decisions in which the Court usually declares a statutory provision unconstitutional unless the terms of the provision are read down so the provision no longer violates the Constitution.\(^{105}\) These decisions can, at least theoretically, be directly followed without the need for any statutory or regulatory response because the Court usually specifies the precise interpretation of the statute that remedies the constitutional defect. The Court is often

\(^{102}\) See, eg, Butt, (n 100); Butt and Lindsey (n 89).

\(^{103}\) See, eg, Butt, (n 100); Hendrianto (n 100); Stefanus Hendrianto, ‘The Rise and Fall of Historic Chief Justices: Constitutional Politics and Judicial Leadership in Indonesia’ (2016) 25 *Washington International Law Journal* 489.

\(^{104}\) See, eg, Butt, (n 100); Hendrianto (n 100); Siregar (n 100).

\(^{105}\) Simon Butt, ‘Conditional Constitutionality and Conditional Unconstitutionality in Indonesia’ in Jen Yap Po (ed), *Constitutional Remedies in Asia* (Routledge, 2019); Butt (n 98); Siregar (n 100).
criticised for engaging in statutory amendments with these types of decisions, which sometimes leads to calls for the Court to be subject to review or oversight.\textsuperscript{106}

Finally, the Court has imposed various limitations on the effect of its decisions, two of which are mentioned here. First, the Court has declared that its decisions operate prospectively.\textsuperscript{107} This means that if the Court decides that a statutory provision is unconstitutional, it will only be invalid from the moment the Court finishes reading its decision. This means that if the government has already acted under the statutory provision, that action will not be affected by the Court’s decision.\textsuperscript{108} This is particularly significant in environment and natural resources cases because it means that any licence or concession that the government may have issued under an unconstitutional law — before that law was declared invalid by the Constitutional Court — will remain valid, and any environmental damage caused by the activities performed under the licence or concession will likely continue. Second, the Court has decided that it cannot review the effect or implementation of a law,\textsuperscript{109} but only the substantive norms. This means that if any loss is caused by the way a law is applied rather than because of its substance, the Court will refuse to intervene. Nevertheless, the Court has, very occasionally, issued decisions that contravene both limitations.

Having now provided the necessary context, the next chapter will outline and analyse the jurisprudence of the Constitutional Court in environment-related cases.

\textsuperscript{108} Butt, ‘Traditional Land Rights’ (n 107); Butt and Lindsey, The Constitution of Indonesia (n 89).
\textsuperscript{109} Butt, Judicial Review in Indonesia (n 100); Butt and Lindsey, The Constitution of Indonesia (n 89); Butt, The Constitutional Court and Democracy in Indonesia (n 98).
PART II: ENVIRONMENT-RELATED RIGHTS IN THE CONSTITUTIONAL COURT
III Substantive Environmental Rights

Part II, which commences with this chapter, describes and analyses the Indonesian Constitutional Court’s jurisprudence in relation to environment-related constitutional rights. The focus of this chapter is substantive environmental rights, the content of which were explained in Chapters I and II.

Despite continuing environmental damage and increasing environmental conflict in Indonesia, cases involving the right to a healthy environment (art 28H(1)) have rarely been brought before Indonesia’s Constitutional Court. This is surprising, especially given that the right is expressly provided in the Constitution, and persistent uncertainty about Indonesia’s environment-related legislation appears to have contributed to this damage and these conflicts. To date, only five judicial review applications have been lodged with the Constitutional Court that argue violations of this right. Of these, only two applications have employed this right as their central argument; the remainder have used art 28H(1) as a subsidiary argument — that is, only to support the main arguments that were based on other constitutional rights. The following section demonstrates how applicants have used this provision in judicial review cases, and it sets out the Court’s response. The discussion is divided based on whether art 28H(1) was used as a central or subsidiary argument.

A The Right to a Good and Healthy Environment Employed as Central Argument: Mining in Protected Forest and Chevron Bioremediation Cases

The two cases in which art 28H(1) has been employed as the central argument are the Mining in Protected Forest Case (lodged in 13 January 2005) and the Chevron Bioremediation Case (lodged in 7 February 2014). These cases are discussed in turn below.

1 Mining in Protected Forest Case

The constitutional right to a good and healthy environment was employed for the first time in Indonesia in the Mining in Protected Forest Case. This case was triggered by the issuance of an Interim Emergency Law (Perpu) by the then president of Indonesia, Megawati, in 2004. The Perpu was issued to amend the Forestry Law (Perpu No 1 of 2004 on the Amendment of Law No 41 of 1999 on the Forestry Law), which, inter alia, allowed mining operations in protected forests. It stated that all permits given to, and agreements made with, mining companies before the enactment of the 1999 Forestry Law would remain valid until the permit or agreement expired. To implement this Perpu, Megawati issued Presidential

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1 Constitutional Court Decision No 003/PUU-III/2005 reviewing Law No 41 of 1999 on Forestry (Mining in Protected Forest Case).

2 In the case of emergency, art 22(1) of Indonesia’s Constitution gives power to the president to issue an Interim Emergency Law or Peraturan Pemerintah Pengganti Undang-undang (Perpu), which has authority equivalent to that of a statute. To become a law, this type of regulation should be approved by the parliament in the nearest session of parliamentary debate (art 52 of the Law on Law-making).
Regulation No 41 of 2004 on Permits or Agreements on Mining Operations in Forest Zones, which allowed 13 mining companies to continue operating in protected forests. This policy was controversial for three reasons. First, the 1999 Forestry Law clearly prohibits mining operations using open pit procedures in protected forest zones. The Perpu contradicted this prohibition because it allowed companies to continue operating in the protected forests. Second, the choice of regulation form — that is, a Perpu — was questionable, given that there did not appear to be an emergency that required swift action. In response to this concern, the government claimed that there was an emergency: the companies with which it had agreements had threatened to initiate international arbitration proceedings against the Indonesian Government for breach of contract. Third, parliament approved the Perpu and gave it the status of a statute, without amendment, by including it as an annex to Law No 19 of 2004 on the Amendment of Forestry Law. Some saw this as an endorsement of an unjustifiable exercise of presidential lawmaking authority.

Citing these reasons, 11 NGOs working on environmental and human rights issues, along with 81 individuals who were directly or indirectly affected by mining operations in 13 locations throughout Indonesia, filed a judicial review of Law No 19 of 2004 on the Amendment of the Forestry Law on 13 January 2005. Represented by an advocacy team consisting of 30 public interest lawyers, this was the first time the right to a good and healthy environment was used in a judicial review application in the Constitutional Court. The applicants asked the Constitutional Court to conduct both a formal review (of the lawmaking procedures employed) and a substantive review (of the constitutionality of the substance of the law).

Regarding the formal review, the applicants asked the Court to invalidate Law No 19 of 2004 on the Amendment of Forestry Law, including its annex (the Perpu), because it violated Law No 10 of 2004 on Law-making. They argued that there was no emergency that required the issuance of a Perpu, and that the enactment procedure of this Law violated the concept of the ‘law state’ (negara hukum) — Indonesia’s version of the rule of law as stated in art 1(3) of the Constitution. To support this argument, the applicants pointed to the decision-making process, which did not involve genuine public participation. This was obvious from the drafting process of the Perpu, in which the government ignored a recommendation from its expert team that was assigned to conduct a feasibility study, and in the approval process in the parliament, which appeared to ignore public concern about the issuance of the Perpu. There was even some indication of graft in the decision-making process. As mentioned by the

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3 Law No 41 of 1999 on Forestry art 38 (4) stipulates that ‘[o]pen pit mining operation is prohibited in protected forest zone’.
4 The formal name is Law No 19 of 2004 on the Stipulation of Government Regulation in lieu of Law No 1 of 2004 on the Amendment of Law No 41 on Forestry to Become a Law.
5 Decision on Forestry Law (Mining in Protected Forest Case) (n 1) 67.
6 Ibid 72–86.
applicants in their application, several members of parliament even confessed that, three days before the decision was made in the plenary meeting, they were offered Rp 50–100 million to pass the Law. 

The applicants also argued that the Law breached the right to a healthy environment as stipulated in art 28H(1) of the Constitution. According to the applicants, granting permits to mining companies to operate in protected forest zones would reduce the size of protected forests and cause pollution, which would eventually deteriorate environmental function and harm forest ecosystems and human beings. Based on their estimation, the Law would result in the ‘capture’ of 925,000 hectares of protected forests, over which 13 mining companies had been granted permits to operate. This would affect 7 million people whose lives and livelihoods depend on the protected forests. The applicants estimated that the financial loss of open pit mining would be around 70 trillion rupiah (approximately USD 5 billion), and that the likely environmental damage (for example, polluted water and land, loss of biodiversity and global warming) and social and cultural damage (for example, eviction, conflicts and sexual disease) would also be enormous.

Ultimately, the Court rejected these arguments, preferring to focus primarily on the issues of legislative process that the applicants had raised rather than their substantive arguments regarding human rights violations. However, it is important to note that the Court granted standing to the applicants on the grounds that their rights to life and to a healthy environment had been violated by Law No 19 of 2004 on the Amendment of Forestry Law. The Court’s reason for granting standing appeared to contradict its reason for rejecting the application. The Court recognised this type of constitutional loss, stating that

the applicants will suffer a specific constitutional loss, that is environmental damage which will occur if mining activities in protected forests continue to take place because of the enactment of Law No. 19 of 2004, such that there is a causal relationship between loss of constitutional rights and the Law petitioned for review, and that loss will not occur if the petition is granted.

The Court provided several reasons for refusing the applicants’ claims. First, the Court found that the Law and its annex did not violate the Law on Law-making. The president had the power to issue a Perpu, and the notion of a state of ‘emergency’ was a matter for the subjective value judgment of the president. It was also within the parliament’s authority to

8 *Decision on Forestry Law (Mining in Protected Forest Case)* (n 1) 86.
9 In addition to this main argument, the applicants argued that the Law violated the right to legal certainty (art 28D(1)), the right to non-discrimination, the traditional right (art 28I(1, 2, 3)) and the principle of sustainable development (art 33(4)) of the Constitution. The applicants dedicated much less space to these subsidiary arguments.
10 *Decision on Forestry Law (Mining in Protected Forest Case)* (n 1) 92–100.
11 Ibid 110–118.
12 However, the Court granted standing to the applicants.
13 *Decision on Forestry Law (Mining in Protected Forest Case)* (n 1) 401.
assess the *Perpu* objectively at its next plenary meeting and to accept or reject it. However, the Court suggested that when issuing a *Perpu* in the future, the president should have more objective grounds for its issuance, which should be contained in the consideration section of the *Perpu* itself.

Second, the Court found no constitutional fault with the formulation of norms in the Law and the *Perpu*. According to the Court, the insertion of two provisions allowing the operation of open pit mining in protected forests should be treated as ‘temporary exceptions’ from the Forestry Law provisions that prohibited open pit mining. This was a transitional provision, which is common in Indonesian legislation. Although the Court agreed with the applicants regarding the threats posed by open pit mining in protected forests, it accepted that transitional provisions were needed to guarantee the rights of permit holders who had obtained rights before the enactment of the Forestry Law.

However, the Court made several suggestions to the government that appeared to contradict its findings and decisions. First, the Court urged the government to be consistent in determining protected forest zones to ensure legal certainty for all stakeholders and to avoid overlapping policies issued by different ministries — in this case, the Ministry of Forestry (MoF) and the Ministry of Mining.

Second, the Court stated that when formulating a transitional provision, legislative drafters should establish requirements that apply to all mining companies that held licences before the enactment of the Forestry Law. This is because, in principle, once a Law is enacted, all legal relationships (*hubungan hukum*) or legal actions that existed or occurred before and after the enactment must be subject to the provisions of the new Law. Therefore, all provisions in the Forestry Law should ideally apply to *all* permit holders, including those who obtained their permit before the enactment of the Forestry Law. Accordingly, the Court agreed with one of the expert witnesses — Professor Emil Salim, Indonesia’s first Environment Minister — that the six mining companies still conducting feasibility studies and exploration should not carry out open pit mining operations if their exploration and exploitation permits were separate. However, the Court did not seek to prevent those companies from moving on to operations after they completed the exploration and feasibility studies.

Third, the Court required the government to conduct monitoring, evaluation and oversight by considering the costs and benefits for communities and the state, and to amend the contract

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14 Ibid 406.
15 Ibid 408. The Constitutional Court appears to have changed how it views *Perpu*. For example, in more recent years, the Court began assessing whether there was an emergency to justify the issuance of the *Perpu*; Simon Butt and Tim Lindsey, *Indonesian Law* (Oxford University Press, 2018) 48.
16 *Decision on Forestry Law (Mining in Protected Forest Case)* (n 1) 413.
17 Ibid 414.
18 Ibid.
19 Ibid.
requirements to anticipate the impact of mining operations on the environment, for the sake of current and future generations. According to the Court, the government should revoke the permits if the companies infringed any permit conditions.\(^{20}\)

The main weakness of this decision was that the Court did not specify whether these ‘suggestions’ were in fact mandatory or whether allowing companies to proceed to operation and failing to renegotiate or amend contract requirements was ‘unconstitutional’. Presumably, given the ‘suggestive’ language the Court used, the Court did not strictly require compliance; indeed, given the strictly limited jurisdiction of the constitutional review of the Court, discussed in Chapter II, ordering the government to act is probably *ultra vires*. In particular, the Court has no power to impose any sanctions or consequences on the government if it fails to heed these suggestions.

This case also raises a recurring issue of Indonesian constitutional law and, more generally, judicial procedure — that is, whether the Constitutional Court’s reasoning (*pertimbangan hukum*) is binding. The Court’s holdings are clearly binding, and many commentators agree that the reasoning that leads to it is also binding, but this does not reflect any established legal principle, much less a written legal principle.\(^{21}\)

2 *Chevron Bioremediation Case*\(^ {22}\)

All of Indonesia’s Environmental Management Laws (1982, 1997 and 2009) require that anyone who carries out activities that result in environmental damage be held responsible for restoring the lost environmental function. This responsibility was made clear in the 2009 Management Law, which states that restoration can be made through, *inter alia*, remediation or other available techniques that ‘accord with the development of science and technology’. This means that the responsible person or company must use the best available technology that has been approved by the government in the restoration process.\(^ {23}\) For environmental damage caused by oil mining activities, since 2003, the government has relied on an MR to manage mining waste and contaminated land from oil spills using biological substances (bioremediation).\(^ {24}\) These bioremediation techniques have been developed in Indonesia since the 1990s. Chevron Pacific Indonesia Inc. (CPI) developed one of these techniques — ex-situ bioremediation using land farming techniques — and, in 2002, obtained a licence from the

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\(^{20}\) Ibid 415.


\(^{22}\) *Constitutional Court Decision No 18/PUU-XII/2014 reviewing Law No 32 of 2009 on Environmental Protection and Management*.

\(^{23}\) Law No 32 of 2009 on Environmental Protection and Management art 54.

\(^{24}\) Ministry of Environment Regulation No 128 of 2003 on the Procedures and Technical Requirements for the Management of Oil Mining Waste and Contaminated Land from Oil Spills.
Minister of Environment to use the technique.\textsuperscript{25} Between 2002 and 2011, CPI successfully conducted bioremediation in around 130 locations that were subsequently verified as ‘clean’ by the MoE.\textsuperscript{26}

In 2011, prosecutors claimed to have identified indicators of corruption in CPI’s bioremediations in Riau Province in 2006–2011. Prosecutors alleged that Chevron had engineered a ‘fictitious’ bioremediation project and engaged in an improper procurement tendering process. This allegation was based on the prosecutors’ investigation findings, which found that the bioremediation result was ‘negative’, meaning that the land was still polluted. Prosecutors also alleged that CPI conducted the bioremediation project without a licence, and that it had subcontracted the project to two other corporations that lacked qualifications to conduct bioremediation: Green Planet Indonesia Inc. and Sumigita Jaya Inc. According to prosecutors, this caused losses of Rp 200 billion to the state, although how this amount was calculated was never publicly explained.

In 2012, seven people were prosecuted for corruption, including five Chevron officials and two people from the subcontractor companies.\textsuperscript{27} In the first instance Jakarta Corruption Court, prosecutors accused the officials of violating MR No 128 of 2003 on Bioremediation, Law No 20 of 2001 on the Amendment of Law No 31 of 1999 on Corruption Eradication (CE) and Law No 32 of 2009 on Environmental Protection and Management (EPM).

The defendants argued that the alleged bioremediation project was not fictitious. They claimed that CPI had cleaned up contaminated sites itself, while the two subcontractors merely provided non-technical support. Regardless, the Court found them guilty of violating the MR on Bioremediation, the CE Law and the EPM Law. It sentenced them to various terms of imprisonment and ordered them to pay substantial fines. In particular, the Court found that they had caused losses to the state, even though they had not done so to enrich themselves, but to pay the cost recovery fee to CPI, which did not conduct the bioremediation

\textsuperscript{27} ‘Terpidana Korupsi Bioremediasi Chevron Ajukan PK’, \textit{Hukum Online} (online, 29 September 2015) <https://www.hukumonline.com/berita/baca/lt560a0798d7938/terpidana-korupsi-bioremediasi-chevron-ajukan-pk>. In addition to Bachtiar, three of his colleagues were involved in this case, namely Sumatra Light North (SLN) and Sumatra Light South (SLS) Managers, Endah Rumbiyanti, Duri District SLN Team Leader Riau Province, Widodo, and Oil and Gas SLS Team Leader Kukuh. The General Manager of PT Chevron Pacific Indonesia (CPI), Alexiat Tirtawidjaja, was named as a suspect but was not questioned because he remained in the US. Meanwhile, two suspects from the contractor were also found guilty: the Director of PT Sumigita Jaya, Herlan bin Ompo and the Director of PT Green Planet Indonesia Ricksy Prematuri.
project properly. The decisions were appealed to the High Court and later to the Supreme Court.

In 2014, while the High Court’s decision was pending, one of the convicted officials, Bachtiar Abdul Fatah, filed a case before the Constitutional Court, pointing to alleged violations of the right to legal certainty (art 28D(1) of the Constitution) and the right to a good and healthy environment (art 28H(1) of the Constitution). He argued that provisions in the EPM Law were inconsistent, both internally and with other laws, thereby potentially infringing his and others’ right to a healthy environment. Each argument is addressed in turn below.

First, the applicant highlighted the inconsistency between the requirement to obtain a licence to manage hazardous waste in arts 59(1) and (4) of the EPM Law and the application of criminal sanctions in arts 102 and 103 of the EPM Law. Article 59(1) of EPM Law stipulates that ‘Every person who produces hazardous waste must manage the hazardous waste he/she produces’, while art 59(4) stipulates that ‘The management of hazardous waste must obtain a licence from the Minister, Governor or Regent/Major by virtue of their authority’.

Article 102 states that

Every person who manages hazardous waste without license as referred to in Article 59 (4) shall be subject to imprisonment for one year at the minimum and three years at the maximum and a fine amounting to Rp. 1,000,000,000 (one billion rupiah) at the minimum and Rp. 3,000,000,000 (three billion) at the maximum.

Article 103 of the EPM Law declares that

Every person who produces hazardous waste and does not treat it as referred to in Article 59 shall be subject to imprisonment for one year at the minimum and three years at the maximum and a fine amounting to Rp. 1,000,000,000 (one billion rupiah) at the minimum and Rp. 3,000,000,000 (three billion) at the maximum.

These provisions were applied against Fatah, and he was convicted and imprisoned under arts 59(4) and 102 of the EPM Law. The charge was that the company, under his supervision, had remediated the contaminated land to remove spilled oil without a licence as required by art 59(4). The applicant argued that he should not have been punished: he chose to proceed with the bioremediation on behalf of the company without a licence because the company had previously obtained a licence to manage hazardous waste and had, since 2008, sought a licence extension from the MoE. However, the MoE had refused to grant the extension because at that time, the Law that regulated this matter — the 1997 Environmental Protection Law — was in the process of being amended in the parliament. According to the

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28 See Bachtiar Abdul Fatah v Chevron Bioremediation, Decision of the District Court of Central Jakarta Decision No 34/PIDSus/2013/PNJKTPST.
29 Law No 32 of 2009 on Environmental Protection and Management art 116–117. This Law stipulates that an officer of a company can be held liable for decisions made on behalf of the company and that imprisonment or fines imposed are increased by one-third.
applicant, this left him in an impossible position. Although he was not authorised to manage the hazardous waste, if he did not manage it, he would be charged with breaching arts 59(1) and 103 of the EPM Law. He argued that he was ‘trapped’ by these contrary provisions and that they violated his right to legal certainty.\(^{30}\)

In addition to the above arguments, the applicant pointed to art 95(1) of the EPM Law concerning integrated law enforcement.\(^{31}\) Article 95(1) states that ‘In the framework of law enforcement against environmental crimes, integrated law enforcement may be executed by civil servant investigators, police and prosecutors under the coordination of the Minister (of Environment)’ (emphasis added).

Fatah argued that this article was obscure and required interpretative guidance from the Court. According to the applicant, the word ‘may’ in the article authorised law enforcement agencies — the MoE, the police department and the Prosecutor Office — to coordinate among themselves to enforce the Law, but it did not require them to do so. This created legal uncertainty because, in practice, each agency often investigated the same or similar cases, often without any coordination.\(^{32}\) In Fatah’s case, the lack of coordination led to him being investigated by prosecutors, who did not coordinate with investigators from the MoE. Moreover, the term ‘environmental crimes’ in this provision was not clearly defined, which resulted in each law enforcement agency adopting its own conception of such crimes. This meant that different agencies might have different views regarding the culpability of Fatah and the other officials, resulting in selective or even arbitrary law enforcement. This potential subjectivity, in turn, resulted in legal uncertainty.

**The Court’s Decision**

The Court began by stating that the management of hazardous waste to achieve a healthy environment was an important component of the ideals of the welfare state*(cita negara kesejahteraan)* conceived by Indonesia’s founding fathers and expressed in the Indonesian Constitution. The Court pointed out that in a welfare state, every person has various rights, including the right to:

- develop themselves by fulfilling their basic needs, which are to obtain benefits from science and technology to increase their quality of life and to further the well-being of humankind (Article 28C(1));
- protect themselves and their family, honour, dignity and property rights; and to security and protection from threats (Article 28G(1)); and
- physical and psychological well-being, to a place of residence, to a good and healthy environment, and to health care (Article 28H(1)).\(^{33}\)

\(^{30}\) *Decision on Chevron Bioremediation Case* (n 22) 15–17.

\(^{31}\) Ibid 19–21.

\(^{32}\) Ibid 19.

\(^{33}\) Ibid 119.
The Court acknowledged that advancements in science and technology had improved people’s quality of life, but had simultaneously negatively affected the environment and humankind. Nevertheless, the state had a duty to protect the people’s right to a good and healthy environment, and it could achieve this by developing a comprehensive, clear and strong legal system that guaranteed legal certainty.  

The Court then considered the first request of the applicant, which was to declare arts 59(4) and 102 of the EPM Law conditionally unconstitutional. In essence, the applicant argued that the Court should allow those whose licence extension applications were being processed to manage hazardous waste in the meantime. The Court granted this request, declaring that art 59(4) was unconstitutional unless it was interpreted to mean that ‘the management of the hazardous waste requires obtaining a license from the Minister, Governor, or Regent/Mayor … and [those who have sought] a license extension to manage hazardous waste shall be deemed license holders’.

The Court acknowledged that licensing systems allow the state to control and regulate legal objects, and that it is appropriate for the government to employ a licensing system for hazardous waste management. However, obtaining a licence or licence extension can be a lengthy process, and the Court decided that applicants should be deemed to hold a licence if:

1. the application had applied for a license extension in accordance with existing laws and regulations,
2. the delay in obtaining the license was not caused by the applicant,
3. the applicant has met the requirements stipulated in the previous license, as evidenced by an ‘oversight’ report,
4. there were transitional circumstances causing delay in issuing the license, and
5. any delay in managing of the hazardous waste will cause irreversible damage the environment and humankind.  

The Court also declared the word ‘may’ invalid in art 95(1) of the EPM Law following the applicant’s argument. The Court held that environmental law encompasses administrative, civil and criminal law. Therefore, coordination among law enforcement agencies was essential to ensure that infringements were pursued, whether through administrative, civil or criminal law. Coordination was also essential to avoid legal uncertainty and injustice.  

The Court also granted the applicant’s third request, which was to declare the phrase ‘environmental crimes’ in art 95(1) of the EPM Law conditionally unconstitutional unless it was given the meaning to include ‘other crimes related to environmental crimes as stipulated in the EPM’. The Court’s attempt to substantiate this holding was very brief and not particularly clear. Its reasoning was that because one of the objectives of criminal procedural

34 Ibid 119–120.
36 Ibid 124–125.
law was to protect citizens’ rights, limiting the application of integrated law enforcement to predicate crimes caused injustice of the kind that the applicant had endured. Therefore, the scope of environmental crimes should also include other crimes, such as corruption.\(^{37}\) While the Court’s decision in this case was welcome and may have strengthened environmental rights, unfortunately the Court did not sufficiently explain how it reached the decision.

B The Right to a Good and Healthy Environment as a Subsidiary Argument: P3H Law and Water Resource Law (WRL) 1 and 2 Cases

In the other three remaining cases in which art 28H(1) was mentioned in the application, the right to a healthy environment was used as an argument, but was not central to the application and only briefly addressed it.

1 P3H Law Case\(^ {38} \)

In the early 2000s, during the period of the most intensive illegal logging in the country’s history,\(^ {39} \) the Indonesian Government sought to produce stricter legislation to combat illegal logging. However, it was difficult to bring this to fruition because numerous institutional and personal interests resulted in contentious debates in the parliament.\(^ {40} \) On 6 August 2013, almost nine years after debates began, the parliament and the government finally agreed on the draft, including changing the title from the ‘Law on Anti-Illlegal Logging (Undang-undang Anti Pembalakan Liar)’ to the ‘Law on the Prevention and Elimination of Forest Destruction (Undang-undang Pencegahan dan Pemberantasan Perusakan Hutan — P3H)’. As the title suggests, this Law is not only about combating illegal logging, but also about combating other forest-related crimes, such as illegal mining and illegal plantations in forest zones, and it gives extensive power to law enforcement agencies to combat forest-related crimes.\(^ {41} \)

Although civil society was enthusiastic in early discussions of the draft law, this enthusiasm waned as the years passed.\(^ {42} \) They were concerned that the draft, if passed, would limit communities’ access to forests and forest resources, which would in turn engender new conflicts between communities and law enforcement. However, these identified

\(^ {37} \) Ibid 125.

\(^ {38} \) Constitutional Court Decision 95/PUU-XII/2014 reviewing Law No 18 of 2013 on Prevention and Elimination of the Forest Destruction.


\(^ {41} \) Koalisi Masyarakat Sipil Untuk Kelestarian Hutan, Public Review to the Bill on Eradication of Forest Destruction, 2013.

shortcomings were not addressed in the final version approved by parliament in 2013. Within a year of the enactment of the Law, several NGOs and forest dwellers challenged several of its provisions, as well as provisions in the Forestry Law, before the Constitutional Court and requested that the Court invalidate the entire P3H Law. However, the Court denied the applicants’ requests.

The litigants mainly based their application on the violation of the rule of law and the right to legal certainty (arts 1(3) and 28D(1) of the Constitution, respectively) and the right to non-discrimination (arts 18B(2) and 28I(2)), but they also briefly argued violation of the right to a healthy environment (art 28H(1)). Here, I will only focus on the applicants’ arguments and the Court’s decision about the right to a healthy environment.

The applicants called attention to art 46 of the P3H Law, which stipulates that

(1) Evidence in the form of a plantation and/or mining from a case of illegal forest use which has been resolved by final and binding court decision shall be returned to the Government to be reforested in accordance with its function;
(2) Evidence in the form of a plantation as referred to in paragraph (1) shall be used for a maximum of one cycle, until the completion of the process of forest recovery;
(3) In terms of the evidence in the form of a plantation as referred to in paragraph (2), the Government may authorise a state-owned enterprise to manage the plantation;
(4) Evidence in the form of mining referred to in paragraph (1) can be licensed in accordance with laws and regulations.

According to the applicants, the sub-paragraphs of this provision were inconsistent with each other and detrimental to environmental protection. While sub-paragraph (1) required the government to reforest plantation or mining areas that were declared illegal, sub-paragraphs (2) and (3) allowed the mining or plantation to continue operating for a certain period in the forest zone after a court had decided that the zone was illegal. By allowing mining and plantations to continue despite their illegality, the provisions frustrated the objectives of the P3H Law, which were to provide a deterrent to perpetrators of forest destruction and guarantee forest sustainability. According to the applicants, if a court decided that plantation or mining in a forest zone was illegal, then the plantation or mining operations must be shut down and the zone reforested to maintain the quality of the environment.

The Court denied the applicants’ claims and refused to invalidate the statute. It did not squarely respond to the applicants’ arguments based on art 28H(1), preferring instead to make more general observations about the applicants’ arguments regarding criminal provisions and criminal procedures in the P3H Law and the Forestry Law. However, the Court noted that forest destruction in Indonesia had reached an alarming rate and asserted

43 Decision on P3H Law (n 38) 53.
44 Ibid 53–54.
46 Art 46 of Law No 18 of 2013 on Prevention and Elimination of Forest Destruction is under the sub-chapter on Investigation, Prosecution, and Court Trial.
that the government had a constitutional obligation to protect the forests. Critically, the Court recognised that this obligation derived from the constitutional right to a good and healthy environment provided in art 28H(1) of the Constitution. Therefore, the government had the ‘right’ to protect forests by applying criminal provisions and criminal procedures in the P3H Law and the Forestry Law.

However, according to the Court, these provisions and procedures should only be used as a last resort (ultimum remedium) in law enforcement processes and had to be based on several principles of international environmental law, such as prevention of harm, the precautionary principle and sustainable development. The Court interpreted these principles as follows.47 First, based on the prevention of harm principle, the government must ensure that domestic law accords with international standards so that other countries do not suffer detriment from domestic activities. To this end, the government must regulate activities that potentially cause environmental damage, including to forests and other natural resources, because ecosystems are not constrained by state boundaries. Second, the government must apply precautionary principles to protect forests and the environment. Thus, if a threat of serious or irreversible damage to the environment exists, a lack of scientific knowledge and evidence should not be allowed to delay prevention or remedial steps to avoid environmental degradation. According to the Court, this principle could be applied to establish criteria for criminal liability of an individual for negligence, and an individual could be held liable for not applying the precautionary standard. Third, the sustainable development principle requires a quality environment for current and future generations. Thus, the government must balance economic, social and environmental interests.

The Court’s interpretation of these principles appears to be consistent with international environmental law, except in relation to the precautionary principle, which the Court interpreted to establish criteria for criminal liability of an individual for negligence. At its most basic level, the precautionary principle is a principle of public decision-making that requires decision-makers — in cases where there is a threat of harm to the environment or health — to not use any lack of full scientific certainty as a reason for not taking measures to prevent that harm.48 Therefore, this principle places the burden on decision-makers to take precautionary prevention measures. However, the way this principle is interpreted has been contentious, resulting in different regulations, policies and court decisions around the world.49 In its decision, the Court provided very little guidance to the government, legislature and other courts that may be called upon to implement its decision. This is likely to create additional burdens and injustices for indigenous peoples, particularly forest dwellers. It is difficult to imagine an individual, let alone a forest community, being able to effectively assess

47 Decision on P3H Law (n 38) 177–178.
whether their actions meet the precautionary standard, particularly given that there is no Indonesian regulation covering it. Another relevant issue is whether other branches of the government should comply with the Court’s decision on the precautionary principle if the Court’s understanding of that principle is at odds with the international understanding of the principle.

2 Water Resource Law (WRL) Cases 1 and 2

The right to a healthy environment was also referred to in the Water Resource Law (WRL) cases, but again only as a subsidiary legal argument. In 2004–2005, not long after the enactment of the WRL, five different groups of applicants asked the Constitutional Court to review it. The Court heard and decided these applications together. The applicants’ main argument was that the WRL was unconstitutional because it promoted water privatisation and hence potentially violated the applicants’ right to water and art 33(3) of the Constitution, which, as discussed in Chapter V, requires the state to control natural resources, including water, for the greatest prosperity of the people. One group of applicants, which mostly comprised farmers, also argued that the WRL violated the constitutional right to a good and healthy environment. These applicants pointed to art 38 of the WRL, which allowed the use of weather modification technology to create artificial rain. They argued that this could affect the atmosphere and alter the natural cycle of the water. For the applicants, art 38 could lead to flooding, landslides and damage to plants; therefore, this provision violated the right to a healthy environment as stated in art 28H(1) of the Constitution.

The Court refused to invalidate the WRL, finding that the Law did not establish water privatisation. However, the Court addressed the applicants’ argument regarding violation of the right to a good and healthy environment, stating that art 38 of the WRL did not contradict the Constitution because employing weather modification technology required a licence, through which the government could establish strict requirements. The majority of the Court emphasised that if licence holders breached those requirements, the government could impose sanctions, including to provide compensation to affected groups.

However, Justice A Mukhtie Fadjar issued a dissenting opinion. He maintained that the Court should uphold the applicants’ claims, including those relating to art 38 of the WRL. He said that ‘Weather modification should be performed by the Government, and not private

51 As discussed in Chapter V, the right to water was the central argument relied upon by the applicants in this case.
53 Ibid. In particular, Case No 008/PUU-III/2005.
55 Ibid 504.
corporations or individuals, must be based on rigorous research and experiments, and must be able to avoid negative impacts for the environment and people’s lives.”

The second judicial review of the WRL was filed on 23 September 2013 by three religious organisations, a solidarity group with a wide-ranging membership (including street vendors and parking officers) and seven individuals (most of whom were politicians or former government officials). They were represented by a lawyer team from Muhammadiyah, one of the largest Islamic organisations in Indonesia. In recent years, this organisation has been actively engaged in what it calls ‘jihad konstitusi’ (constitutional jihad — a religious term in Islam for holy war or ‘strife’ or ‘struggle’ in Arabic) by bringing judicial review cases to the Constitutional Court, particularly those that are relevant to economic welfare and natural resources management.

While the violation of the right to a healthy environment was mentioned as one of the applicants’ reasons for filing the case, they did not substantiate the use of art 28H(1) with any argument, but referred to the right only when seeking to establish that they had legal standing to bring the challenge. Therefore, the right to a healthy environment was not the main concern of the applicants when bringing this case to the Constitutional Court. This appears to be consistent with the other applications brought by Muhammadiyah as part of its ‘jihad’. These cases appear to be more concerned with remedying perceived economic injustice — such as the commercial exploitation of Indonesian natural resources by foreigners and the private sector — than environmental protection.

C Concluding Analysis: Underutilisation of Substantive Environmental Rights in the Constitutional Court

As discussed in Chapter I, while the right to a healthy environment has been constitutionally entrenched in many countries around the world, scholars have noted that, generally speaking, the right has rarely been relied upon, much less been the basis for successful legal action. This chapter shows that Indonesia has followed this general trend, with its Constitutional Court hearing very few cases in which applicants have relied on the right to a healthy environment. The Court has existed since 2003, but only five applications have used the violation of the right to a healthy environment, and always in combination with other rights. Of these, the applicants in only two cases used the violation of this right as their main constitutional argument: the Chevron Bioremediation Case and the Mining in Protected Forest Case. The applicants were successful only in the Chevron Bioremediation Case. Therefore, it is accurate

56 Ibid 511.
57 Pimpinan Pusat Muhammadiyah, Al Jami’yatul Washliyah and Perkumpulan Vanaprastha.
59 Cases that were brought by Muhammadiyah include the judicial review on Oil and Gas Law (Decision No 36/PUU-X/2012) and Law on Hospital (Decision No 38/PUU-XI/2013).
to say that the right to a healthy environment appears to have been underutilised by applicants, and the Court itself, to date. Indeed, in its earlier years, the Court rejected many claims based on environmental rights, including the Mining in Protected Forest Case and the WRL Case No 1. As discussed in Chapter V, the applicants were not altogether unsuccessful in the latter case, but the Court was hesitant to invalidate the WRL and use conditional constitutionality for the first time. Only later, in 2010, did it start to issue decisions that upheld environment-related rights. There are several possible explanations for this.

The first explanation is politics. As discussed in Chapter II, the Court was established in 2003 in a political environment that had never experienced effective judicial review. Therefore, it had to work incrementally towards building recognition and legitimacy without drawing a reaction against it that might threaten its institutional existence. For this reason, it appeared that the Court wanted to avoid irritating the government by issuing zero-sum decisions. Apart from the Electricity Law decision, the Court was initially wary of invalidating statutory provisions, developing ‘conditional’ decisions and making non-binding ‘suggestions’ for law reform. This might explain why the Court rejected the Mining in Protected Forest Case while simultaneously providing guidance to the government on how to implement the Court’s order by establishing several conditions on how mining operations should be conducted. It appears that the Court expected the government to follow its order. The question is whether the government considered itself bound by the Court’s suggestions. This issue is considered in Chapter VII.

The second possible explanation is institutional. While judges may claim expertise in legal interpretation, they do not necessarily have adequate knowledge of the scientific, sociological and economic aspects of the environmental problems in which their decision must be rooted. Only a handful of Constitutional Court judges have environment-related backgrounds. By my estimation, only three can claim particular knowledge of environment and natural resources management issues. The first is former Judge Achmad Sodiki (2003–2008), who was professor of Agrarian Law and Legal Philosophy at Brawijaya University and has expertise regarding agrarian problems, which, in the Indonesian context, are closely connected to customary rights and the environmental movement. The others are former Judges Maruarar Siahaan (2003–2009) and Gede Palguna (2003–2005, 2015–2019), who are often said to understand environmental issues because of their connections with civil society groups, including environmental organisations and activists. Former Judge Maruarar is also known for his inclination towards ‘substantive justice’, which is believed to make him open to progressive

60 Butt (n 21) 251–256.
constitutional and statutory interpretations, including in environment-related cases.\textsuperscript{62} This can be observed in his dissenting opinion on WRL Case 1 (discussed above), in which he maintained that the Court should have sided with the applicants because the right to water is a basic human right and, therefore, the right to use water and the right to use water for commercial purposes should not be treated as equal.\textsuperscript{63} The citizens’ rights to use water, primarily for basic daily needs, should be prioritised over the right to use water for commercial purposes.

The third possible reason for the lack of decisions applying the right to a healthy environment is that it appears to require the Court to apply a proportionality test — that is, the Court often needs to balance the right to a healthy environment against another constitutional right, such as the right to a livelihood. The Court rarely explains how it balances competing constitutional rights, and even whether it consciously engages in a proportionality analysis of constitutional rights and the statutes it reviews.\textsuperscript{64} However, determining whether one constitutional right should prevail over another usually requires judges to make policy choices — for example, in the Mining in Protected Forest Case, the choice was between protecting the environment by prohibiting mining operations (which may also help satisfy the human right to a healthy environment for some people) and preserving the right to work, which will be lost by citizens if mining companies are prohibited from operating. However, whether judges should engage in the balancing of socioeconomic rights has long been a vexed issue in the literature.\textsuperscript{65} Likewise, allowing private companies to manage water resources may limit people’s access to water, but it also provides jobs for others, which may increase their children’s access to education. This example involves not only judicial capability to implement proportionality tests, but also broader political interests that might push judges away from upholding environmental rights.

The dearth of cases in the Constitutional Court involving the right to a healthy environment can be at least partially attributed to the applicants and lawyers who bring these environment-related cases before the Court. There appears to be a general lack of familiarity


\textsuperscript{63} Decision on Water Resource Law 1 (n 50) 513–522.


with this right. As observed from the cases in this chapter, applicants commonly argue that their right to a healthy environment has been violated, but they provide no further reasons or facts to substantiate their claim. Instead, they refer to the violation of other rights, such as the right to life or the right to legal certainty.

During interviews, lawyers involved in several of these cases told me that they did not refer to this right for several reasons. The reasons included difficulties in constructing arguments based on the right to a good and healthy environment because of its newness and vagueness; a widely held assumption that if customary rights were recognised, environmental protection would follow, and pessimism borne from frequent failed attempts to use the statutory right to a healthy environment in the general and administrative courts. Accordingly, the lawyers missed the opportunity to use the right to a healthy environment, as well as the possibility of the Court providing clarity and guidance in relation to how to interpret and implement this right.

This is rather puzzling given that the right to a healthy environment is specifically articulated in the Constitution and there is no limit on how many provisions can be cited in an argument. Indeed, many applicants before the Constitutional Court appear to use a ‘scattergun’ approach by producing long applications that refer to many constitutional provisions and involve quite tenuous arguments. Another possible explanation is that the lawyers felt more confident using constitutional provisions that the Court upheld in the past, and for which it had developed a body of jurisprudence, such as art 33 and the right to legal certainty, discussed in Chapters V and VI respectively. Therefore, these lawyers might view these commonly used traditions as ‘safer bets’ — that is, they might be able to better predict how the Court might respond to arguments based on them, going from previous cases.

Finally, it can be difficult for applicants to demonstrate causation — that is, proving both that a violation of a constitutional right has occurred and that the statute was the cause of that violation. A degraded environment may affect people’s lives and their access to water. However, at what point can one say that it has violated their right to a healthy environment? Does this occur when the water is polluted, or does it only occur if the people lose access to water altogether? How does one prove that the impugned statute caused pollution or prevented access to water? Tied up in this uncertainty is the principle, discussed in Chapter II, that the Court will refuse to examine the implementation of a statute. In these cases, there

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66 Interview with Yance Arizona, Director of Law and Indigenous People (HuMA) and one of the lawyers for the Adat Forest Case (14 August 2017) and Dede Nurdin Sadat, one of the lawyers for the Mining in Protected Forest and Water Resource Law 1 cases (17 July 2017).
67 Interview with Sadat (n 66).
68 Interview with Arizona (n 66).
69 Interview with Andi Muttaqien, Deputy Director for Advocacy of the Institute for Policy Research and Advocacy (ELSAM) and one of the lawyers for the Plantation Law Case (26 July 2017).
70 Interview with Arizona (n 66) and Sadat (n 66).
always appears to be tension between the cause of environmental damage being the words or norms of the statutes themselves, or rather their implementation.

Further, while there is an inherent lack of clarity in the threshold of a ‘good and healthy’ environment as stipulated in art 28H(1) of the Constitution, what satisfies the constitutional requirement of ‘good and healthy’? I argue that this difficulty is amplified by the formulation of the right to a healthy environment provision. As mentioned earlier, the Constitution drafters combined the right to a healthy environment with other rights. One might interpret such a formulation as cumulative, to which every aspect in that provision needs to be proved, as one interviewee suggested. However, the Court does not adopt this view. As seen in the five cases involving the right to a healthy environment, the formulation of the provision in which that right is contained has not stopped the Court from isolating it.

The next chapter considers the Constitutional Court’s interpretation of procedural environmental rights. As we will see, like the Court’s use of substantive environmental rights, the Court and applicants have rarely resorted to procedural environmental rights, even though, *prima facie*, those rights appeared to be applicable in several cases.

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71 Interview with Sadat (n 66).
Procedural rights are generally taken to consist of access to information, access to participation and access to justice. As discussed in Chapter I, many scholars have argued that constitutionalising procedural environmental rights can greatly strengthen the ability of advocates to use the law to protect substantive environmental rights (that is, the right to a healthy environment). The existence of these rights gives concerned citizens a set of tools to address environmental problems through the judiciary.

This chapter outlines how procedural environmental rights provisions in the Indonesian Constitution discussed in Chapter II — mainly the right to legal certainty (art 28D(1)), the right to express an opinion (28E(3)) and the right to information (art 28F) — have been used by applicants in Constitutional Court cases, and how the Court has handled arguments based on these provisions in its decisions. This chapter focuses on five cases that involve access to justice (WRL Cases 1 and 2), right to participation (Minerba Law Case and Pesisir Case) and right to information (Horticulture System Case). As it will show, in these cases, the procedural constitutional rights appear to be underutilised, primarily by the applicants, but also by the Court. The chapter will then offer possible explanations for this underutilisation of constitutional procedural rights.

A Access to Justice: Water Resource Law (WRL) Cases 1 and 2

The first judicial review case involving procedural environmental rights in the Constitutional Court was WRL Case 1. Here, the applicants argued that they had been denied access to justice because the WRL did not grant them standing to bring claims on behalf of the environment. As discussed in Chapter III, five different applications were lodged on 18 March 2004, but because of the similarities in the applications, the Court decided the cases together. The Court granted standing to the applicants but rejected the applications.

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4 Law No 7 of 2004 on Water Resource.
5 The Court held that the WRL did not violate the Constitution. However, two judges issued dissenting opinions, stating that the application should be upheld because some provisions in the Law violated the Constitution.
The applications and the decision emphasise violation of the right to water. However, an application brought by the Indonesian Legal Aid Foundation argued that the WRL violated the procedural access to justice right. The applicant argued that WRL provisions relating to the right to file a class action (art 90), the government’s duty to take legal action on behalf of affected communities (art 91) and NGO standing (art 92) were unconstitutional.

The Legal Aid Foundation’s arguments for the unconstitutionality of arts 90 and 91 could not be clearly discerned from a reading of the court documents, thereby precluding a discussion of those arguments here. However, their arguments concerning art 92 were clear. Article 92 states that

(1) Organisations working on water resource sector [issues] are entitled to file lawsuits against individuals or corporations which carry out activities that cause damage to water resources and/or its infrastructure, in the interests of water resource function sustainability;

(2) Lawsuits, as referred to in paragraph (1), are limited to seeking orders to carry out certain activities relevant to the sustainability of water resource functions and/or claims to pay for actual expenses;

(3) Organisations entitled to file lawsuits as referred to in paragraph (1) shall meet the following requirements:
   a. a non-government organisation which is a legal entity and works in the water resource sector;
   b. the objective of the organisation is to achieve the sustainability of water resources functions and this objective is in the articles of association of the organisation;
   c. (the organisation) has carried out activities pursuant to its articles.

Thus, art 92 clearly limited the standing of various NGOs to bring water resource–related cases to court. In particular, the Legal Aid Foundation was precluded from doing so because achieving the sustainability of water resources was not specified in its articles of association.

A significant stumbling block for the applicants was that access to justice is not an express constitutional right. Therefore, the applicants needed to make inventive legal arguments. To this end, the applicants pointed to art 28I(5) of the Constitution, which stipulates: ‘to uphold

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6 Some analysts argued that some of the more controversial provisions of the WRL had been included at the behest of the International Monetary Fund in return for a loan to help bail out the Indonesian economy after the Asian Financial Crisis. Further, in parliament, the Chairperson pushed the House to pass the draft law, even though the meeting did not meet quorum requirements and some MPs refused to approve the draft. See ‘Menggugat Praktek Privatisasi Air Di Indonesia’, Kruha (online, 15 March 2011) <http://www.kruha.org/page/id/dinamic_detil/11/110/Privatisasi_Air/Menggugat_Praktek_Privatisasi_Air_di_Indonesia.html>; ‘10 Pembahasan RUU Paling Kontroversial Sepanjang 2004’, Hukum Online (online, 1 January 2005) <https://www.hukumonline.com/berita/baca/hol11923/10-pembahasan-ruu-paling-kontroversial-sepanjang-2004>.


8 Ibid 36.
and to protect human rights pursuant to the principles of the democratic constitutional state, the implementation of human rights is guaranteed, regulated, and established in legislation.

Based on this article, the applicants referred to existing legislation — namely, the Human Rights Act — that clearly expressed the right to access to justice. Article 7 of that Law states that

(1) Every person shall have the right to use all national legal means and international forums against all human rights violation guaranteed under Indonesian laws, and under international laws pertaining to human rights which have been ratified by Indonesia.

On this basis, the Legal Aid Foundation argued that NGOs — either on their own account or representing the environment or affected persons — should be granted standing to pursue the protection of the environment and human rights guaranteed under Indonesian laws, including the right to water.

The Court rejected these arguments, holding that arts 90–92 of the WRL were not against the Constitution because none of those articles removed the right of any citizen to file a lawsuit if their right to water was violated. However, this holding failed to respond to the precise arguments and requests of the applicants. The applicants sought clarity regarding the criteria for an NGO to have standing in water-related cases and requested the Court to broadly interpret the standing criteria so that they applied not only to organisations working on water issues, but also to organisations working on broader related issues, such as the environment. Instead, the judges focused on the right of the government to bring legal action on behalf of the community (art 91) and the right of citizens to act on behalf of communities using class actions (art 90). The Court overlooked the important access to justice issues raised in art 92 — that is, NGOs standing to petition the Court on behalf of the environment and seeking environmental restoration rather than compensation.

As discussed in Chapter III, eight years after the Constitutional Court handed down its decision in the Water Resource Case 1, the Court was asked to review the WRL again. The applicants’ arguments mostly focused on water resource privatisation violating the right to water and the state’s duty to control natural resources for the people. However, the applicants also claimed that art 92 of the WRL violated their procedural rights. They asked the Court to invalidate art 92, putting forward similar arguments to the previous WRL Case 1, but this time also using art 28(2) of the Constitution, which pertains to the right to non-discrimination, as the main constitutional basis for their argument.

As discussed in Chapter III, the Court ultimately struck down the entire WRL. The Court’s decision to invalidate the entire law appeared to be based entirely on its rejection of water privatisation and the constitutional right to water. However, the Court ignored the applicants’

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11 Decision on Water Resource Law 2 (n 3) 33–34.
arguments on the violation of procedural rights, failing to address those arguments. Again, this case appears to provide an example of the Constitutional Court overlooking procedural environmental rights in judicial review cases.

B Access to Participation: the Pesisir and Minerba Law Cases

Applicants have argued a violation of access to participation rights before the Constitutional Court in two cases. This section will discuss those cases.

1 Pesisir Case

The right to participation was used as the basis of an argument in a Constitutional Court review for the first time in the Pesisir Case. This case is discussed in detail in Chapter V and is briefly discussed here. The applicants in this case did not seek to heavily rely on art 28E(3) (right to express an opinion). Instead, they substantiated their arguments by referring to the violation of their rights to life (art 28A), just law and legal certainty (art 28D(1)), and non-discrimination (art 28I(2)).

The application in this case was lodged by nine NGOs and 26 fishermen on 13 January 2010. While their main arguments focused on the constitutionality of provisions in the Pesisir Law, which granted rights to the private sector to use coastal water for commercial use, they also questioned the constitutionality of the absence of a public participation requirement in relation to coastal management planning. Here, they referred to art 14(1) of the Pesisir Law, which stipulates that ‘Proposals to develop Coastal and Small Island Strategic Plans, Coastal and Small Island Zonation Plans, Coastal and Small Island Management Plans, and Coastal and Small Island Action Plans shall be carried out by the Government and business community’. The applicants maintained that this provision excluded local and customary communities from participation in the management of coastal and small islands.

The Court upheld some of the applicants’ claims, but it rejected the arguments based on the right to participation. It was surprising that the Court did not invalidate or limit the application of art 14(1) of the Pesisir Law because it appeared to agree with the applicants’ arguments regarding the violation of the right to participation, as indicated in the following passage:

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13 Coalition for Fishery Justice (Koalisi untuk Keadilan Perikanan — KIARA), Indonesian Human Rights Committee for Social Justice — IHCS, Centre for Maritime Development and Maritime Civilization (Pusat Kajian Pembangunan Kelautan dan Peradaban Maritim — PK2PM), Consortium for Agrarian Reform Foundation (Yayasan Konsorsium Pemberuan Agraria — KPA), Indonesian Farmers Union (Serikat Petani Indonesia — SPI), Bina Desa Foundation, Forum for the Environment (Wahana Lingkungan Hidup — WALHI) and Indonesian Farmers Alliance (Aliansi Petani Indonesia — API).
14 Law No 27 of 2007 on the Management of Coastal Area and Small Islands.
15 Notably, in regard to provisions of the Law pertaining to the right to utilise coastal water for commercial use. This right is discussed in Chapter V.
The norm (of Article 14 (1)) ... reduced public access to participation, particularly for local and traditional communities. Although they were involved in ‘socialisation’ and public hearings, their position was weak as compared to the Government and business community. Article 14 (1) of this Law will create problems. First, it will keep the community silent and prevent it from voicing their opinions, so that they do not have a choice whether to accept or to reject a plan proposal; Second, a non-participatory policy will increase the potential of violation of communities’ right in the future. ... According to the Court, developing proposals with the involvement of only the Government and the business community is unequal treatment for the community and ignores the community’s right to self-development, as well as breaches their right to collectively build the nation and state as stipulated in Article 27, Article 28C (2) and Article 28D (3) of the 1945 Constitution.

Why the Court made this statement but rejected the participation right argument is not clear. Given the strong statements rejecting weak public participation in coastal management, it can be speculated that the judges simply neglected to address community participation in coastal management planning in its ruling. That is, it might have been an oversight or simply the result of an editing or drafting error in the decision. However, if true, this suggests that the Court faces serious problems, including a lack of institutional capacity to make careful and rigorous decisions, as discussed in Chapter III, and a preference for upholding substantive rights over procedural rights. Although procedural and substantive issues can hardly be separated in environmental matters, the Court’s decision on this procedural right appears to have affected the government’s response to the decision, as discussed in Chapter VII.

2 Minerba Law Case

In the same year, on 21 April 2010, another application for a constitutional review of the 2009 Mineral and Coal Mining Law (Minerba Law) was lodged by five environmental NGOs and 16 individual citizens who were affected by mining operations in various cities across Indonesia. They were represented by a team of lawyers who called themselves the ‘Advocacy Team for Environmental Rights’.

This case is particularly notable because, at the time of writing, it is the only judicial review case to be heard by the Constitutional Court in which the applicants have claimed a violation of art 28E of the Constitution regarding the right to participation. Nevertheless, although art 28E appeared to be central to the application, the applicants substantiated their arguments by referring primarily to the right to a healthy environment and other social and economic constitutional rights.

18 Law No 4 of 2009 on Mineral and Coal Mining.
19 WALHI, Perhimpunan Bantuan Hukum dan Hak Asasi Manusia Indonesia (PBHI), KPA, KIARA and Solidaritas Perempuan.
The applicants’ first argument was that provisions in the Minerba Law authorising the government to designate mining zones without genuine public participation violated the substantive constitutional right to live in a good and healthy environment as stipulated in art 28H(1) of the Constitution. The impugned provisions were arts 6(1e), 9(2) and 10b of the Minerba Law.

Article 6(1e) states:

The authorities of the government in the management of mineral and coal mining, among others, are:

e. designating (menetapkan) mining zones in coordination with the local government and in consultation with the Parliament of the Republic of Indonesia.

Article 9(2) stipulates that ‘Mining zones as referred to in Article (1) are designated by the Government after coordinating with local government and consulting with the Parliament’.

Article 10b stipulates:

The designation (penetapan) of mining zones as referred to in Article 9 (2) shall be conducted in an integrated manner (secara terpadu) by considering opinions of relevant government agencies and communities, and by considering ecological, economic, social, and cultural aspects, and shall be environmentally friendly.

While it was not clearly expressed in their application, it appears that the applicants wanted to contend that public participation meant that the community could effectively reject the designation. As they stated, ‘to obtain the right to a healthy environment, the communities shall have the right to refuse the designation of mining zones which will potentially affect their lives, which eventually will derogate their right to live prosperously’. 20

Second, the applicants maintained that by limiting public participation, the impugned provisions also violated the right to legal certainty contained in art 28D(1) and the right to express an opinion in 28E of the Constitution. They argued that there would be no legal certainty for landowners because ‘every person might feel threatened by mining. All land might be designated as mining zone without the land owner’s consent’. 21

The applicants also argued that arts 162 and 136(2) of the Minerba Law violated the right to participation (art 28E(3) of the Constitution). Article 162 states that

Every person who obstructs or disrupts mining activities that hold a mining business license (Izin Usaha Pertambangan) and a specific mining business license (Izin Usaha Pertambangan Khusus) that meet the requirements as referred to in Article 136 (2) faces criminal punishment of a maximum of one year’s imprisonment or a maximum fine of Rp 100,000,000.00 (one hundred million rupiah).

20 Decision on Minerba Law (n 17) 22.
21 Ibid 24.
Article 136 stipulates that

(1) The holder of a mining business license or a specific mining business license is obliged to settle [the status of] land rights with the right bearer prior to its operation pursuant to legal regulations;

(2) Land right settlements as referred to in sub-article (1) may be conducted gradually in accordance with the needs of the holder of a mining business license or a specific mining business license.

The applicants supported this claim with the following arguments. The Minerba Law, as reflected in the two articles above, failed to protect human rights in Indonesia. The Constitution clearly guarantees the right to associate, to assemble and to express an opinion, but the Minerba Law limited these rights.22 This was observed in the government’s reaction to protests by potentially affected communities that tried to defend their land from appropriation by mining companies. They were ‘criminalised’ and discriminated against not only for defending their land, but also for raising concerns over the environmental impact of the mining operations. The applicants put forward several examples, including the detention of a community leader in East Kutai, East Kalimantan, for protesting against the operation of Kaltim Prima Coal Inc. and the use of violence in dealing with 2,500 people who resisted eviction by the Nusa Halmahera Mineral/Newcrest mining operation in North Maluku Province.23 One of the protesters was shot and killed by a special police force unit during the crackdown, and three people were arrested.24

The applicants also argued that the articles could be used to criminalise human rights activists and their organisations when they advocated or defended communities affected by mining operations.25 Therefore, those criminal provisions posed a serious threat to communities and human rights defenders who are critical of or reject mining operations — even those approved by the government. After all, they pointed out, protesting and demonstrating are not in themselves criminal activities; therefore, they should not be categorised as criminal offences in this Law.26

The Court handed down its decision on 15 May 2012. It granted standing to the applicants but rejected all of the above arguments except for the one based on art 10b of the Minerba Law. The Court declared this provision conditionally unconstitutional, which meant that the phrase ‘considering communities’ opinion’ in the article remained valid to the extent that it was given the meaning that the government ‘is obliged to protect, to respect and to fulfil the

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23 Ibid 31–32.
25 Decision on Minerba Law (n 17) 33.
26 Ibid 34.
need of the communities whose land will be designated as a mining zone and the communities who will be affected'.

While the Court appeared to recognise that this case concerned the right to participation in decision-making processes in the mining sector, it paid relatively little attention to the violation of procedural rights. Instead, it viewed this case as largely concerning the government’s duty to manage natural resources as public trust (art 33(3)), discussed in Chapter V, and the violation of substantive rights (art 28H(1) of the Constitution). This can be observed in the following statement:

based on the above mentioned explanation, therefore, the constitutional problem which the Court has to address is whether state control over land and water and natural resources for the greatest prosperity of the citizens, as reflected in the government’s authority to designate mining zone by coordinating with local government and consulting with the parliament, are against the constitutional rights of the citizen to obtain guarantees, protections, and legal certainty to live, to own property, and to have a good and healthy environment.

The Court provided relatively extensive reasoning on the public trust principle, referring to several of its previous decisions, but it did not explain the correlation between public trust principles and the right to participation. Accordingly, its comments about this issue did not respond to the applicants’ concerns.

However, in another part of its reasoning, the Court held that it

emphasized the implementation of the duty to include communities’ inputs but not in the form of written consent. ... because the Court believes that providing input as a form of communities’ involvement in designating a mining zone is a concrete form of the implementation of Article 28H (1) and (4) ...

This statement makes it clear that the Court views public participation as instrumental to the protection of substantive rights. However, critically, the Court decided that the mechanism for public participation was a matter over which the government had authority. The Court gave the government discretion to choose the manner and form of public participation and who should be involved, but it required the government to refer to the existing laws and regulations, as well as two of its prior decisions on Minerba Law, for guidance when

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27 Ibid 143.
28 Ibid 136.
30 Decision on Minerba Law (n 17) 140.
developing public participation regulations. However, the Court did not provide further guidance regarding which part of the decisions the government was required to consult.

C Access to Information, Participation and Justice: The Horticulture System Law (HSL) Case

On 10 September 2012, 10 associations (including several NGOs) and two farmers sought a constitutional review of the HSL. At the time of writing, this was the only application brought on the basis of the right to access to information, access to participation and access to justice arguments. The applicants argued that the HSL supported big companies monopolising seeds and germination, thereby sidelining local farmers, including two farmers who were applicants in the case. The Law required these farmers to use and plant seeds from the companies and, when they did not, they were imprisoned. One of the applicants, Kunoto, was sentenced to 10 months’ imprisonment and Rp 1 million in fines.

In relation to the constitutional argument, first, the applicants pointed to arts 5(1), 6(1) and 6(2) of the HSL and argued that they breached their right to participation. Article 5(1) states that to achieve the objectives of the horticulture system, the government must:

a) develop a horticulture system plan pursuant to the national development plan;
b) designate cultivation areas;
c) regulate the production of certain crops based on the national interest;
d) create conditions that encourage public participation.

Articles 6(1) and (2) state that

(1) Farmers have freedom to choose the type of plants;
(2) In applying such freedom as mentioned in the sub-article (1) farmers are obliged to participate to achieve the horticulture plan mentioned in Article 5(1).

However, instead of using the right to express an opinion (art 28E(3)) to strengthen this argument, the applicants substantiated their arguments with the right to life (art 28A). For

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32 Decision on Minerba Law (n 17) 140.
34 They are the IHCS, Farmer Initiatives for Ecological Livelihoods and Democracy, API, Yaysan Bina Desa, Koalisi Rakyat Untuk Kedaulatan Pangan, Ikatan Petani Pengendali Hama Terpadu Indonesia, Serikat Petani Kelapa Sawit, Perkumpulan Sawit Watch, SPI, Aliansi Gerakan Reforma Agraria and two individual farmers who were being criminalised for conducting plant breeding.
example, they argued that art 5(1) did not support farmers’ rights to participate in the national development plan because they were never involved in the process of planning, production regulation and zoning designation. Instead, they were forced to follow the government’s plan and use seeds provided by the government or big companies. They argued that this was more likely to cause environmental damage and disrupt ecological balance because the government’s planting system and seeds were less resistant to plant pests and diseases and required more water and pesticides. Thus, this infringed on their right to life.

Second, the applicants made arguments based on the violation of the right to information (art 28F). They said that because plant breeding and farming were the main sources of the farmers’ livelihoods, providing them with insufficient information about the planning process, let alone involving them in it, had adversely affected them. In particular, this lack of information made them dependent on these companies and resulted in them losing personal autonomy. At the same time, using non-local seeds caused them to be unable to use their current knowledge about planting seasons and how to deal with plant diseases. This was because every plant was better suited to particular seasons and required different amounts of water. For example, imported garlic and corn seeds required more water than local varieties; thus, farmers had to plant them during the rainy season. In contrast, local varieties could be planted during either the dry or wet seasons. Moreover, non-local seeds were prone to different types of diseases and needed different treatments to recover from those diseases, about which farmers had no knowledge. As a result of the adverse effects of the government’s planning program, one of the applicants and 14 other farmers had refused to follow it and had bred and distributed their own seeds. For this, they were jailed under the criminal provisions in the HSL.

Finally, the applicants alleged that arts 6(1) and (2) of the HSL contradicted each other. While art 6(1) guarantees freedoms for farmers, art 6(2) limits those freedoms and requires them to be exercised pursuant to the government’s horticulture plan. Indeed, this limit makes the guarantee in sub-article (1) meaningless because it provides no room for farmers to choose plants based on their own needs or to choose those that might be more appropriate for the particular growing conditions, unless those needs and conditions are coincidentally consistent with the plan. Article 6 did not provide farmers with a complaint mechanism in relation to the

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37 Decision on Horticulture Law (n 33) 23–24.  
38 Ibid 23–24.  
40 Art 60–63 Law on Horticulture System (n 35). These articles stipulate that whoever intentionally, or as a result of negligence, conducts illegal activities, such as collecting and distributing germs, is subject to criminal sanctions (imprisonment and fine).
planning processes. While it appears that the argument concerned access to justice (more specifically, access to a complaint mechanism), the applicants substantiated their argument using the right to life.\textsuperscript{41}

The Court rejected these arguments\textsuperscript{42} and appeared to underappreciate the importance of these procedural rights. In its judgment, the Court did not consider the applicants’ argument that art 5(1) of the HSL violates the right of farmers to participate in the planning processes. Instead, the judges simply reiterated the provision, stating that the government has a constitutional obligation to develop horticulture planning in line with the national development plan, to designate cultivation areas and to regulate the production of crops. On these grounds, art 5(1) of the HSL did not breach the Constitution.\textsuperscript{43}

Although the Court addressed the applicants’ argument concerning art 6, it appeared to ignore the possibility that farmers’ participation was a constitutional right. Instead, the Court viewed art 6 as primarily imposing an obligation on farmers, emphasising that, ‘as citizens, farmers are obliged to participate in realising the horticulture plan’, and that freedom to choose the type of plants and cultivation system was not absolute. That freedom, the Court decided, could be restricted in the context of recognising and respecting other peoples’ rights under art 28J(2) of the Constitution. Further, the Court ignored the applicants’ arguments concerning access to information and access to a complaint mechanism. In this way, farmers might be prohibited to develop their environmentally friendly seeds and crops and instead, they could be forced to plant seeds and crops that were obliged by the Government. This decision was certainly not friendly toward traditional farmers. In the long run, such decision might also have a detrimental effect to the environment, because the seeds that was obliged to plant might not environmentally suitable with the local area.

\textbf{D Concluding Analysis: Underutilisation of Procedural Environmental Rights in the Constitutional Court}

As discussed in Chapter I, many commentators argue that procedural environmental rights are easier for courts to enforce than substantive environmental rights. This is for a variety of reasons, including that substantive environmental rights can have wide applicability, be

\textsuperscript{41} \textit{Decision on Horticulture Law} (n 33) 26–27.

\textsuperscript{42} However, the Court granted the applicants’ other requests. The applicants had also complained about the HSL, in art 9 (3), imposing a requirement that farmers hold a permit to carry out breeding activities. The Court held that requiring individual farmers to require a permit for these activities was unconstitutional. The applicants also complained about the HSL’s prohibition, contained in arts 12 (1) and (2), on the distribution of seeds before being released by the Government. Again, the Court held that this prohibition was unconstitutional, at least when applied to individual farmers. Finally, the Court invalidated the criminal provisions prohibiting individual farmers from carrying out breeding and distribution (art 60(1) and (2)).

\textsuperscript{43} \textit{Decision on Horticulture Law} (n 33) 123.
difficult to interpret and require the courts to balance competing rights. However, violations of procedural rights are much easier to assess because the court only needs to identify the procedure and determine whether it has been followed.

While it is arguable that violations of procedural rights have been effectively pursued in some general court cases — particularly the right to access information related to the environment — similar observations cannot yet be made about the handling of procedural rights by Indonesia’s Constitutional Court. As demonstrated in this chapter, applicants have used procedural rights arguments in only five cases. They won in only three of these cases, and even then, not always on the grounds that their procedural rights had been violated. Many different factors were at play in each case, including that the claimed violation of procedural rights accompanied alleged violations of several different substantive rights. Nevertheless, the number of cases employing procedural rights in party arguments and court decisions is relatively small compared with those in which substantive rights have been employed. As discussed in Chapters V and VI, these substantive rights have included the right to life and the right to legal certainty. The government’s duty or obligation to control natural resources has also been used, as discussed in Chapter V.

One possible explanation for this is that, as discussed in Chapter II, in judicial review cases, the Indonesian Constitutional Court limits itself to assessing the constitutionality of the text of the legislation, or an article or part of the article of that legislation, against the Constitution, and not the practical application of those articles. Taking environment-related examples, the Court does not need to assess how a norm has, in practice, prevented someone accessing information concerning an environmental impact assessment or how an increase in the level of air pollution made people sick. If the norm itself is constitutional, the Court will not interfere with it if loss occurs because that norm has been ignored or misapplied. In contrast, the general courts can and do assess whether legal norms have, in practice, been applied or complied with. Therefore, they are accustomed to the task that assessing compliance with procedural norms encompasses, even if they do not always do so satisfactorily, as discussed in Chapter II.

The limited number of procedural rights cases in the Constitutional Court can also be attributed to the absence of clear procedural environmental rights provisions in the Constitution. As discussed in Chapter II, Indonesia’s Constitution does not have explicit procedural environmental rights, but it does contain generic procedural rights. This leads to

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44 Supreme Court of the Republic of Indonesia, ‘Direktori Putusan — Pengadilan > MAHKAMAH AGUNG > Tun’ (putusan.mahkamahagung.go.id) <https://putusan.mahkamahagung.go.id/pengadilan/mahkamah-agung/direktori/tun>. Based on data on the Supreme Court’s website, the Supreme Court has handed down 12 decisions on access to environment-related information and public participation between 2016 and 2017. The number of similar cases that went to lower courts might be higher than this.

the following consequences. First, in the absence of clear provisions on procedural environmental rights in the Constitution, citizens may not be aware that specific environment-related rights are part of their broader fundamental rights that are constitutionally guaranteed and can, therefore, be used to challenge environment-related legislation. For example, the right to access information (art 28F of the Constitution) should encompass the right to access environmental information, and the right to express an opinion (art 28E(3)) should encompass the right to express opposition to development that potentially harms the environment. For this reason, even when legislation potentially violates these rights, people might not immediately or instinctively consider filing a judicial review case with the Court.

Second, even in cases involving these rights that have made it to court, lawyers and judges appear to have found it difficult to identify the violation of rights and then to build a legal argument based on it. For example, in the Horticulture System Case, even though the applicants were able to identify a potential violation of the right to participation in the HSL, they had difficulty building their arguments based on it. Accordingly, they had to be creative by relying on other rights and pointing to the implementation of norms to develop their arguments. Given this emphasis, the judges appear to have been distracted from the applicants’ argument about the violation of the right to participation. In contrast, in Minerba Law Case, the applicants relied on art 28E(3) in developing their argument regarding the violation of the right to participation, but the judges did not consider it. Instead, they referred to the violation of other substantive rights and the duty of the government to manage resources as a public trust to decide whether the right to participation had been violated. The judges’ point of view might not practically affect the fulfilment of citizens’ right to a healthy environment, but the Court’s failure to recognise procedural environmental rights as something distinct from substantive environmental rights might affect environmental democracy — that is, the ability for people to access environment-related information, to engage meaningfully in environmental decision-making processes and to seek environmental law enforcement or compensation for damages. This raises the possibility that the government will prefer to respond to the Court’s decisions by fixing laws or regulations pertaining to substantive rights, such as setting stricter pollution standards, instead of improving mechanisms for public participation in environmental decision-making processes.

In the Water Resource Law 1, the absence of clear constitutional provisions pertaining to access to justice forced the applicants to engage in legal acrobatics by combining provisions in the Constitution and the Human Right Law. Although the applicants’ arguments appeared to be sound, the judges denied their claim, despite emphasising that ‘open standing is a key aspect of access to justice’ and granting standing to the applicants. The Court also pointed

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47 Decision on Water Resource Law 1 (n 3) 478.
out that it could only assess the constitutionality of a statute against the Constitution, but not against other statutes, such as the HRL. As discussed in Chapter II, the Court placed this limitation on itself but has, in other cases, appeared to ignore the rule, apparently in the interest of upholding legal certainty in the face of inconsistent statutes.

Another possible explanation is that the judges think it is more suitable for procedural mechanisms to be established by lower regulations than through constitutional rights. As mentioned earlier, the Court in Minerba Law Case suggested that public participation mechanisms were best left to the government for regulation. In fact, various laws and regulations guarantee procedural rights, such as the Environmental Protection and Management Law, the Public Information Disclosure Law and their enabling regulations. They can be used to address violations of procedural environmental rights, but they cannot be used to address gaps or rectify weaknesses in legislation. To do so, a procedural mechanism needs to be entrenched in the Constitution so that people can use judicial review mechanisms in the Constitutional Court to address legislative gaps.

The next two chapters discuss cases involving constitutional rights that might not at first appear to be related to the environment. However, in these cases, the Court has applied those rights in ways, or for purposes, that appear to be environmentally beneficial. The following chapter discusses how the Court has applied art 33(3) of the Constitution in cases in which applicants have pursued environment-related ends.

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48 Law No 24 of 2003 on Constitutional Court (Undang-Undang No 24 Tahun 2003 tentang Mahkamah Konstitusi) s 10 (1a).
49 Constitutional Court Decision 78/PUU-X/2012 on Criminal Procedural on In-Public Verdict Reading (2012). However, it has ignored the rule inconsistently. In recent years, the Court appears to have readily broken this rule by reviewing inconsistencies between and within statutes without providing justification for why it has done so: Simon Butt, Judicial Review in Indonesia: Between Civil Law and Accountability? A Study of Constitutional Court Decisions 2003–2005 (University of Melbourne, 2006).
Indonesia’s Constitutional Court has heard many environment and natural resource–related cases that involve art 33 of the Constitution. Article 33 states that

“(1) The economy shall be organised as a common endeavor based upon the family principle;

(2) Sectors of production which are important to the state and that affect the lives of citizens are to be controlled by the state;

(3) The lands, the waters, and the natural resources within are controlled by the state and are to be utilised for the greatest prosperity of citizens;

(4) The organisation of the national economy shall be conducted on the basis of economic democracy upholding the principles of togetherness, efficiency with justice, sustainability, environmental perspective, self-sufficiency, and maintaining a balance between advancement and national economic unity.”

Of these sub-articles, art 33(3) has been the most important in environment-related cases. These cases include judicial reviews of the Oil and Gas Law,1 WRL,2 Forestry Law,3 Coastal and Small Islands Management Law (Pesisir),4 Coal and Mineral Mining Law (Minerba)5 and Plantation Law.6 The applicants in most of these cases objected to government attempts to privatise natural resource exploitation or to allow greater private sector involvement in them.7 The applicants asked the Constitutional Court to invalidate statutes that resulted in the state losing control of natural resources so that those resources were not used for the ‘greatest prosperity’ of Indonesia’s citizens.

The Court’s earliest and most important decision on the meaning of ‘state control’ was its judicial review of the Electricity Law.8 Although this case was primarily about art 33(2), both arts 33(2) and 33(3) mention ‘state control’, and the Court appears to have interpreted the

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1 Constitutional Court Decision No 36/PUU-X/2012 reviewing Law No 22 of 2001 on Oil and Gas.
3 Constitutional Court Decision No 98/PUU-XIII/2015 reviewing Law No 41 of 1999 on Forestry (Inanta Timber Case); Constitutional Court Decision No 35/PUU-X/2012 reviewing Law No 41 of 1999 on Forestry (Adat Forest Case).
8 Constitutional Court Decision No 001-002/PUU-I/2003 reviewing Law No 15 of 1985 on Electricity.
phrase in the same way for both sub-articles. Here, the Court broadly interpreted the requirement of ‘state control’ to be derived from the Indonesian people’s sovereignty over the land, water and natural resources, which the people owned collectively. However, the Court maintained that ownership was not necessarily a guarantee of people’s welfare and was therefore insufficient to constitute control. According to the Court, under the Constitution, the people, as owners of the national natural resources, gave the state control over those resources, including to devise policy and regulate the natural resources (whether by legislation or government regulation). The state also needed to manage the resources — for example, by having sufficient shares to control the decision-making of any corporate entity authorised to exploit those resources, as well as administrative control to issue and revoke licences or concessions to any person to manage those natural resources. The state also had overarching supervisory and monitoring obligations to ensure that the natural resources were used for the greatest prosperity of the people.

The Court endorsed the above interpretation of art 33(3) in subsequent cases, but also refined and added to the interpretation. For example, in its decision on Oil and Gas Law, the Court emphasised that the phrase ‘state control’ and ‘for the greatest prosperity of the people’ must be read together and interpreted jointly. In this way, the Court held that state control needs to be exercised for the greatest prosperity of the Indonesian people. As such, the state’s actions to devise policy and to regulate, administer, manage and supervise the management of natural resources should be interpreted as one single action.

However, in the same decision, the Court also provided an interpretation that appeared to contradict its own stance. According to the Court, if these five state actions are not interpreted as a single action, they should be ranked in importance based on effectiveness to achieve the objective ‘for the greatest prosperity of the people’. This implies that control does not necessarily comprise all five elements. According to the Court, the first-ranked element of state control was direct management over natural resources by the state. Second, if the state could not manage the resources directly, the state should devise policies and regulations to ensure that the natural resources were managed for the greatest prosperity of the people. The Court ranked the state’s supervisory and monitoring function third. If the state has the capital, technology and capacity to manage the

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10 Decision on Electricity Law (n 8) 332–333.
11 Ibid 333.
12 Ibid 334.
13 Ibid.
14 Ibid.
15 Decision on Oil and Gas Law Case (n 1).
16 Ibid 100.
17 Ibid 101.
natural resources, the state should perform direct management, either through state agencies or state-owned enterprises. However, the Court also emphasised that it did not reject privatisation as long as the privatisation did not eliminate the state’s control as interpreted by the Court. Yet even in this decision, the Court held that the state had not exercised sufficient control over the oil and gas sector, but it did not clearly assess whether the state had the requisite capital, technology and capacity to manage that sector. The inconsistencies in its explanations regarding these elements, as well as their relative importance, makes the Court’s decisions on art 33 unclear. One ramification of this lack of clarity, discussed in Chapter VII, is that complying with decisions becomes difficult, if not impossible, as does drafting legislation that complies with the Court’s interpretation of those decisions.

As discussed in Chapter II, art 33 contains the basic principles of the Indonesian economy and was not intended to protect environmental rights per se. Article 33(3) has been used to pursue environmental rights in Indonesia’s Constitutional Court, including the right to water and the rights of indigenous communities and local people to access natural resources. The applicants in these cases have rarely asked the Constitutional Court to review the impugned legislation by reference to art 33(3). Rather, the Constitutional Court itself refers to it in these cases largely unprompted, apparently considering art 33(3) — and sometimes together with art 33(4) — a normative provision that imposes an obligation on the state to control the natural resources in Indonesia and, to a lesser extent, to protect environmental rights. The Constitutional Court appears to have taken this view even though the provision lacks explicit normative wording such as would be conveyed by the use of the word ‘must’ or even ‘should’. Nevertheless, through this article, the Court has arguably increased the scope for the constitutional protection of natural resources for public use, and it has also buttressed protection for other constitutional rights, including the right to water, the right to a healthy environment and even broad socio-economic rights, as will be discussed below.

According to one view, art 33(3) resembles the ‘public trust doctrine’ because both the provision and the doctrine appear to position the state as the trustee of natural resources and must manage those resources for the benefit and enjoyment of the public. As discussed in Chapter I, this concept has been employed by courts around the world to protect the environment and natural resources, even though their constitutions do not expressly refer to the doctrine.

19 See, eg, Decision on Adat Forest Case (n 3); Constitutional Court Decision 45/PUU-IX/2011 reviewing Law No41 of 1999 on Forestry (Forest Zoning Case). See Chapter VI for case studies on the right of indigenous communities to access natural resources.
20 Sarah Waddell, Property Rights for Natural Resources Management in Indonesia: Have They Been Ruled Unconstitutional? (University of Indonesia, 2012).
I will now discuss and critique Constitutional Court cases involving art 33(3), with a focus on cases involving art 33(3) that feature environmental rights as defined in this thesis; that is, where the Court derived from art 33(3) the right to a healthy environment, the right to water and the right of marginalised people to natural resources.

**A Article 33(3): The Right to Water**

The right to water is not explicitly guaranteed in the Indonesian Constitution. However, the Constitutional Court has made two important decisions that have derived the right to water from art 33(3). The first decision — WRL Case 1 — was handed down on 15 July 2005, and the second — WRL Case 2 — was handed down on 18 February 2014. As discussed in Chapter III, both applications were brought by civil society organisations that argued that the Law was unconstitutional because it promoted water privatisation and therefore violated the state’s duty to control water for the greatest prosperity of citizens.

In WRL Case 1 (2005), the applicants called particular attention to art 7 of the WRL, which stipulates that ‘(1) The right to utilise water (hak guna air) as referred to in Article 6 paragraph (4) consists of the right to utilise water for non-commercial purposes (hak guna pakai air) and the right to utilise water for commercial purposes (hak guna usaha air)’. They also pointed to art 9(1), which states that ‘(1) The right to utilise water for commercial purposes (hak guna usaha air) may be provided to an individual or business entities with permission from the (National) Government or Local Government pursuant to their authorities’.

According to the applicants, these articles and several others allowed individuals and private enterprises to benefit from utilising and commercialising water, which was a public resource, and at the same time limited the state’s role to that of a mere regulator. They also argued that water privatisation might threaten their right to life (art 28A), right to wellbeing and right to health (art 28H(1)) by limiting free access to water.

As discussed in Chapter III, in the WRL Case 2 (2014), a group of applicants challenged the WRL again, pointing out that the government had not fully implemented the Court’s decision in the WRL Case 1, with the result that the Law still allowed private sector participation in the management of water resources. The petitioners’ applications in the WRL Case 2 employed a similar structure to the applications in the WRL Case 1. Their primary constitutional argument was that the WRL promoted water privatisation and ignored the constitutional

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21 *Decision on Water Resource Law 1* (n 2).
22 *Decision on Water Resource Law 2* (n 2).
24 In this case, the Constitutional Court conducted a joint trial for five different judicial review applications on the WRL and made one joint decision.
25 Including arts 7, 8, 10, 26, 45, 46 and 80 of the 2004 WRL.
26 *Decision on Water Resource Law 2* (n 2).
27 Ibid 15–16.
obligation of the state to control water resources. They pointed to Government Regulation (GR) No 16 of 2005 on the Development of a Drinking Water Supply System that the government had issued pursuant to the WRL. While the Law stipulated that a drinking water system should be developed by the government, and the Constitutional Court in WRL Case 1 reaffirmed this mandate, the GR itself made it possible for private corporations to manage water resources if state-owned enterprises were ‘unable to improve the quality and quantity’ of drinking water by themselves. The applicants argued that this policy demonstrated that the government wanted to escape from its obligation to provide drinking water, and it treated water as an economic commodity rather than a public good. The result was that only the affluent could access water resources.

The applicants also argued that art 48 of the WRL could trigger conflict between regional governments. The WRL stipulated that water resources within a river zone (wilayah sungai) — up to 2,000 km² — could only be used for another river zone if those water resources were sufficient to meet the needs of the community in the existing river zone. According to the applicants, this provision could engender conflict between communities and between regional governments in different river zones, particularly where the rivers crossed administrative zones and were controlled by different regional governments. The applicants expressed concern that regional governments would prioritise the commercialisation of water for the benefit of their own region rather than ensuring the availability of water for public consumption across different river zones.

The Constitutional Court’s response to these arguments was very different in these two cases. In the WRL Case 1, the Court rejected the application and held that the Law did not promote water privatisation. However, in the WRL Case 2, the Court upheld the application and struck down the entire statute. To avoid a legal vacuum, the Court declared that the WRL’s predecessor — the 1974 Law on Water Management (Undang-undang No 1 Tahun 1974 tentang Pengairan) — would spring back into effect. This decision was controversial, primarily because the Court’s decision went far beyond what the applicants had requested. The decision has nevertheless been followed: water resources in Indonesia are now managed under the 1974 statute, much to the frustration of government officials and private sector operators working in the water sector. Until new water legislation can be enacted, the sector will be governed by an outdated statute that does not regulate the key water resource management issues that face Indonesia today.

29 Decision on Water Resource Law 2 (n 2) 42–43.
30 Ibid 43.
31 I have translated ‘pengairan’ as water management. The literal translation of the term is ‘irrigation’, but it is clear from the definition of ‘pengairan’ contained in art 1 of the Law that it is much broader than irrigation and refers to the pembinaan (‘development’ or ‘administration’) of a variety of water issues.
However, the Court was consistent regarding one issue in both cases — namely, its interpretation of art 33(3) to provide a constitutional foundation for the existence of the constitutional right to water in Indonesia. The Court also held that the right to water was a derivative of the right to life and that water should be treated as a public good (res communes). I now turn to discuss the Court’s reasoning in these decisions in more detail.

In the WRL Case 1, the Court disagreed with the applicants that the WRL promoted water privatisation. According to the Court, although the WRL allowed individuals and business entities to use water for commercial purposes, the Law also clearly stated that ‘the State guarantees the right of every citizen to access water for their daily needs, to obtain a healthy, clean and productive life’. For the Court, this implied that the government had a duty to respect, protect and fulfil the right to water, as mentioned in subsequent provisions of the WRL. Further, the Court declared that the WRL required the national and local governments to prioritise the fulfilment of the right to water over other matters, particularly in emergency situations. It also held that the right to utilise water for commercial purposes could only be exercised through government permits, over which the government had full authority to oversee and could revoke if necessary. For these reasons, the Court denied the applicants’ claim but made a conditionally constitutional note that, ‘if in its application, the Law is interpreted in a different way from the above-mentioned Court’s consideration, there remains the possibility to re-apply for another review.’

Although the applicants lost in the WRL Case 1, the Court acknowledged the right to water as a fundamental human right and, for that reason, the state has an obligation to respect, protect and fulfil the right to water, not only for the current generation, but also for future generations. Indeed, the Court went so far as to say that Indonesia has a constitutional foundation for water regulation, with arts 33(3) and 28H(1) serving ‘as foundation for the acknowledgement of right to water as part of the right to a life of well-being, which is the substance of human rights.’ The Court also held that the right to utilise water for non-commercial purposes (hak guna pakai air), provided in the Water Law, must be interpreted as a derivative of the right to life, which is constitutionally guaranteed in art 28A.

The Constitutional Court Law prohibits the lodgement of an application for the judicial review of a statutory provision on constitutional grounds that the Court has reviewed in an earlier case. Strictly interpreted, this probably would have precluded the bringing of the WRL Case

33 Law No. 7 of 2004 on Water Resource art 5.
34 Decision on Water Resource Law 2 (n 2) 490–491.
35 Particularly art 33 of the Water Resource Law. See ibid 494.
36 Ibid 496–497.
37 Ibid 495.
38 Decision on Water Resource Law 1 (n 2) 486–489.
39 Ibid 488.
40 Ibid 495.
41 Art 60 of Law No 8 of 2011 on Amendment of Law No 24 of 2003 on Constitutional Court.
2. However, the Court appeared to make an exception, referring to its pledge, contained in its decision in the WRL Case 1, that the Court would consider reviewing the WRL again if the government interpreted the Law differently from the way the Court had interpreted it. Based on this, in the WRL Case 2, the Court not only reviewed the WRL, but also six GRs issued by the government after the Court’s decision, which were inconsistent with the Court’s rulings.\(^{42}\)

To justify this, the Court stated that the only way available for the Court to answer this question is by carefully examining the enabling regulations of the Water Resource Law, in this case the Government Regulations. By doing so, the Court does not intend to review regulations under Law, but only to assess the constitutionality of the Law under review (c.q. the WRL) by assessing the consistency of its enabling regulations with the Court’s interpretation. ... [Those] Government Regulations are evidence that clarify the objectives of the Law under review, thus, if the enabling regulations are inconsistent with the Court’s interpretation, it would mean that the Law under review is inconsistent with the Constitution.\(^{43}\)

The Court then emphasised that water was a basic and important element to support human life and the livelihoods of many people (menguasai hajat hidup orang banyak). Thus, it needed to be controlled by the state, which, according to the Court, was required to impose rigorous restrictions (pembatasan yang ketat) for the utilisation of water resources for commercial purposes (hak pengusahaan air) to ensure the sustainability of the water supply in the long run. The Court then set out an exhaustive list of restrictions as follows:

1. Water utilisation for commercial purposes must not disturb, disregard and eliminate people’s right to water;
2. The State must fulfil citizens’ right to water because it is a basic human right;
3. The State’s control over water must consider environmental sustainability and the right to well-being, the right to dwell, the right to a good and healthy environment, and the right to health;
4. The State must provide oversight and control over water resources because it is a vital branch of production, which should be utilised for the greatest prosperity of the people;
5. The State should give priority to state-owned-enterprises and local government-owned enterprises to manage water resource for commercial purposes;
6. The State may permit private businesses to utilise water for commercial purposes to the extent that the above-mentioned requirements have been met.\(^{44}\)

In addition, the Court held that the WRL would be constitutional only if it provided six guarantees.\(^{45}\) First, that the state fulfil the daily need of the people to water and, accordingly, that the national and regional governments develop a safe drinking water system. Second,

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\(^{42}\) GR No 16 of 2005 on the Development of Drinking Water System; GR No 20 of 2006 on Irrigation; GR No 42 of 2008 on Water Resource Management; GR No 43 of 2008 on Groundwater; GR No 38 of 2011 on River; GR No 73 of 2013 on Swamp.

\(^{43}\) Decision on Water Resource Law 2 (n 2) 143.

\(^{44}\) Ibid 138–139.

\(^{45}\) Ibid 141–143.
the concept of the right to utilise water must be in line with the res communes concept, which is also known as the public trust doctrine; therefore, water must not be treated merely as an economic commodity. Third, the right to water was a derivative of the right to life. Therefore, the right to utilise water for commercial purposes should not be treated as equal to the right to utilise water resources such as water springs (sumber mata air), rivers, lakes and marshlands. The right to utilise water for commercial purposes must be controlled by the government based on a permit system through which the government can limit the allocation and utilisation of water. Fourth, water should not be treated as an economic commodity; therefore, water usage for agriculture must be free. Fifth, the right of indigenous communities to utilise water must be acknowledged. Finally, the utilisation of water to supply other countries was prohibited. The government can only give water concessions to supply other countries’ needs if domestic needs for water have been fulfilled, including basic needs for sanitation, agriculture and industry, as well as to maintain ecosystems and biodiversity.

B Article 33(3): Indigenous Rights to Natural Resources

Indonesia has more coastline than most countries. It has around 99,093 km of coast across its 16,056 or so islands. However, unlike other natural resource sectors, such as forestry and mining, Indonesia has traditionally paid little attention to coastal and island management. In 2007, after more than seven years of consultation, drafting and deliberation, Law No 27 of that year on the Management of Coastal Area and Small Islands Area, commonly called the Pesisir Law, was enacted. This Law has three main objectives. First, it aims to provide a legal basis for integrated coastal management, which covers planning, utilisation, rights of communities, conflict management, conservation, rehabilitation and disaster mitigation of coastal area and small islands. Second, the Law seeks to strengthen the institutional arrangements for the management of coastal area and small islands. In particular, it aims to ‘synergise national and regional government institutions’. Third, the Law purports to provide legal protection for the community in the coastal and small islands area and to increase their welfare.

Although the objectives of this Law appear to be sound, several NGOs pointed out that it contains several provisions — pertaining to the right to use coastal water for commercial purposes (Hak Pengusahaan Perairan Pesisir, HP3) and to public participation in coastal

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47 These objectives are listed in the General Elucidation of 2007 Pesisir Law.

48 Ibid Section point 2b.
management planning — that were inconsistent with these objectives. According to the NGOs, not only did these provisions establish unequal access and entitlements to coastal resources, but they also violated community rights to be involved in the management of coastal areas. Hence, they claimed that the Law did not support community sustainability in the sense that it facilitated people connecting with each other and their environment in a productive way. They said that one result would be further deterioration of coastal and small island areas.

On 13 January 2010, these NGOs, along with 26 fishermen from various indigenous communities, sought constitutional review of provisions of the Pesisir Law (Pesisir Case). The public participation aspect of the case is discussed in Chapter IV; here, I confine my discussion to the right to use coastal water for commercial purposes (HP3).

Article 1(18) of the Pesisir Law defined HP3 as follows:

Hak Pengusahaan Perairan Pesisir, hereinafter called HP3, is the right to utilise a certain area of coastal water for marine related commercial activities (usaha kelautan) and fisheries, as well as other commercial purposes related to the utilisation of coastal and small island resources in certain areas, including the water surface, water columns and seabeds.

According to the Pesisir Law, HP3 can be obtained by individuals, legal entities and indigenous communities for 20 years and can be twice extended for another 20 years. The HP3 gives the right holder the right to use coastal and marine resources along a maximum of 12 miles of coastline, or in waters connecting the coast and islands, estuaries, bays, shallow water, marshes and lagoons, but not in conservation zones, fish sanctuaries, sea transport lanes, harbours and beaches. Evidence of the existence of an HP3 right is a certificate that is transferable and can be used as debt security. The HP3 certificate is issued by the Ministry of Marine and Fisheries, a governor or regent, depending on the location of the resource.

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51 KIARA, IHCS, PK2PM, KPA, SPI, WALHI and API.
52 Decision on Coastal Area and Small Islands Law (n 4).
53 Art 18 (a), (b), (c) of Law No 27 of 2007 on the Management of Coastal Area and Small Islands.
54 Ibid art 19(1), (2) and (3).
55 Ibid art 1(7).
56 Ibid art 22.
57 Ibid art 20(1), (2).
58 Ibid art 50(1), (2) and (3)
Issuance of an HP3 certificate and the right it provides requires satisfaction of various technical, administrative and operational conditions specified in the Law. Technical conditions include compliance with zoning and management plans. Public consultations must also be held and the results considered, and the potential damage of the proposed activities must be assessed. Administrative conditions include the development of a plan for the utilisation of resources appropriate for the ecosystem’s carrying capacity, as well as the development of oversight and reporting mechanisms. Operational conditions include community empowerment, respecting the rights of traditional and local communities, allowing community access to beaches and estuaries, and rehabilitating damaged resources in the area where the HP3 is given.

In their application for judicial review, the applicants mainly argued that the provisions pertaining to HP3 violated the Constitution, particularly the duty of the state to control natural resources for the greatest prosperity of citizens (art 33(3)) and the right to life (art 28A). Accordingly, they asked the Court to invalidate these provisions. The applicants argued that, given the size of Indonesia’s coastal area, the management of coastal and small island areas was an important and strategic sector that the state must control. They pointed to previous Constitutional Court decisions, discussed earlier in the Chapter, in which the Court defined ‘controlled by state’ to include five activities: policy-making, regulating, administering, managing and supervising. Based on this, the applicants maintained that the management of coastal and small island areas should be performed by an authoritative institution acting for and on behalf of the state. The applicants also contended that the HP3 should not be granted in the form of a property right (hak kebendaan) because this might lead to the commercialisation of the coastal area and privatisation, thereby leaving the state unable to effectively control coastal common resources. To avoid this, the applicants argued that the government should issue permits instead of granting property rights.

The preference for permits over property rights was justified by the applicants as follows. In the Indonesian context, there are four criteria to determine whether a legal relationship (suatu hubungan hukum) confers a right or a permit (or authority): the nature of the legal relationship (hubungan hukum) between the person (right/permit holder) and the object; authority (kewenangan) over the object; level of attachment to the object (daya lekat hubungan hukum dengan objeknya) and possibility of coexistence with other rights (pembebanan dengan hak lain). Property rights generally give the rightholder unlimited...
authority to use, obtain a benefit from or undertake any legal action in regard to the object, because the holder has ownership over the object. This right attaches to the rightholder regardless of whoever may ‘hold’ the object at any given time, and it can be granted along with other rights, such as the right to utilise for commercial purposes (*hak guna usaha*) or collateral rights (*hak jaminan pelunasan hutang*).

However, the HP3 in the Pesisir Law did not meet these criteria. Instead, it resembled private rights (*hak perorangan*), which do not give the rightholder ownership over the object. Hence, it only gave limited ‘rights’ to the holder to use or obtain a benefit from the object, and only for as long as that object was under their control. This type of right cannot co-exist with other rights and therefore cannot be used, for example, as collateral. In the past, this rights-based system was commonly used in natural resource management (for example, in the 1967 Forestry Law). However, the 1999 Forestry Law adopted a permit-based system that established permits to utilise forest zones, permits for environmental services and permits to collect timber and non-timber products. Thus, according to the applicants, the HP3 provisions that appear to treat HP3 as rights should really be permit- or authorisation-based.

The applicants also argued that the HP3 provisions violated indigenous communities’ right to life as stipulated in art 28A of the Constitution. While the Law states that an HP3 can be granted to indigenous communities, the conditions and procedures to obtain it are particularly complicated and costly. Consequently, indigenous communities will find it difficult to obtain an HP3, if they can obtain one at all. This will eventually preclude them from accessing coastal resources, particularly if someone else obtained an HP3 over the area they occupied or otherwise relied upon, which would inevitably affect the sustainability of their existence.67 Equally important, the HP3 might overlap with existing entitlements granted in other sectors, such as in forestry, sand mining and tourism. This overlap would likely cause legal uncertainty (art 28D(1) of the Constitution).

The Court agreed with some of the applicants’ arguments and decided to invalidate 14 provisions pertaining to HP3s in the Pesisir Law.68 As discussed in Chapter IV, the Court ignored the applicants’ request to invalidate provisions that limited public participation in coastal management planning; however, it employed art 33. The Court began by stating that the duty of the state to control land, water and natural resources under arts 33(2) and (3) of the Constitution derives from the conception of the sovereignty of the people, which can be achieved if the land, water and natural resources are used for the citizens’ greatest prosperity. Therefore, these provisions eschew the unbridled private exploitation of these resources: they cannot be owned by private interests or used for private purposes without regard for the public interest. Instead, the Court emphasised once more that art 33 obliges the state to devise policy (*mengadakan kebijakan*) and regulate (*melakukan pengaturan*), administer...

67 Ibid 50–53.
68 These include art 1(18), art 16–22, art 23(4) and (5), art 50 – 60(1), art 71 and art 75 of the 2007 Pesisir Law.
(melakukan pengurusan), manage (melakukan pengelolaan) and provide supervision (melakukan pengawasan) following its previous decision in the Electricity Law Case.\textsuperscript{69} The Court stated that the administering function included the authority to issue licences and concessions.\textsuperscript{70}

Critically, in exercising authority to control land, water and natural resources, the Court observed that the state must consider other constitutional rights, including indigenous and environmental rights. In the Court’s words:

> In addition, the state’s control over land, water and the natural resources must also take into account (memperhatikan) existing rights, both individual and collective, possessed by indigenous communities (hak ulayat), the rights of indigenous peoples, and other constitutional rights held by the public and guaranteed by the Constitution, such as the right to pass through (melintas), the right to a healthy environment and so on.\textsuperscript{71}

To assess whether state control was exercised for the greatest prosperity of citizens, the Court used four criteria;\textsuperscript{72} whether natural resources are used for the benefit of the community; whether the benefits from the natural resources are distributed fairly; whether communities are involved in natural resources management; and, whether communities’ right to natural resources is respected. The Court did not provide a further explanation about why and how it came up with those four criteria. However, based on these criteria, the Court concluded that the formulation of provisions on HP3 in the Pesisir Law was unconstitutional.\textsuperscript{73} Here, the Court mainly focused on the requirements to obtain an HP3, which included meeting various technical, administrative and operational conditions. In the view of the Court, these conditions could only be met by entities with access to significant capital and technology; therefore, this would likely exclude local and indigenous communities from obtaining an HP3 and being involved in coastal and small island management. Further, it would probably result in the concentration of benefits from the exploitation of these resources among very few corporations. This would lead to indirect discrimination against local communities, including indigenous communities. It would not only exclude these communities from accessing coastal resources, but also prevent them from determining how these resources can be shared or distributed. Finally, the Court held that a HP3, which can only be given for a certain period (20 years, extendable twice), violated indigenous rights (hak ulayat), which are inherent and inherited rights whose validity is not affected by time. The Court agreed with the applicants’ view that entitlement to manage coastal and small island areas should not take the form of HP3s.\textsuperscript{74} Thus, instead of providing property rights in the form of HP3s, the Court held that the government should only involve the private sector and communities in coastal management

\textsuperscript{69} Decision on Electricity Law (n 8).
\textsuperscript{70} Decision on Pesisir Law (n 4) 157.
\textsuperscript{71} Ibid 157–158.
\textsuperscript{72} Ibid 161
\textsuperscript{73} Ibid 161–163.
\textsuperscript{74} Ibid.
by issuing licences. According to the Court, unlike HP3s, which transfer the state’s control over natural resources to private entities for a certain period, giving a licence did not reduce the state’s authority to control natural resources for the greatest prosperity of the people. Choosing this method instead of awarding HP3s would allow the government to achieve the objectives of the Pesisir Law by performing integrated coastal management, avoiding natural resources conflicts and providing legal certainty.

However, there is a potential flaw in the Court’s reasoning in this case. Despite the technical–legal distinctions between a ‘right’ and a ‘licence’ or ‘permit’ raised by the applicants and accepted by the Court — particularly the apparently greater entitlements associated with rights — both can equally be made subject to conditions at the time they are granted. Critically, there appears to be no legal reason why the state cannot revoke either type of entitlement in the event of a breach of those or other conditions. Certainly, the Court did not clearly identify why the state’s ability to revoke could not constitute ‘control’ within the meaning of art 33(3) and (4) of the Constitution.

C Article 33(3): The Right to a Healthy Environment

As will be discussed in Chapter VI, the 1999 Forestry Law is the natural resource statute that has been most frequently challenged in the Constitutional Court. In many instances, the constitutional challenges have been brought by NGOs or indigenous communities. However, in one case, the challenge was brought by a timber company, Inanta Timber & Trading Coy Ltd (Inanta Timber). The company was accused of cutting down trees beyond its annual allocation, and the company, represented by its director, had been charged with criminal offences for committing forest destruction.

Although the criminal process had been suspended by the police, the applicant still claimed to feel threatened by the existence of criminal provisions in the Forestry Law. He particularly called attention to the definition of ‘activities causing damage to the forest’ in art 50(2), which states that ‘Every person who is granted a business permit to utilise a forest zone, a permit to utilise timber or non-timber products, and a permit to collect timber or non-timber products is prohibited from carrying out activities causing damage to the forest’. He argued that this definition was unclear; therefore, he and his company should not be susceptible to being charged for forest destruction under art 78(1) of the Forestry Law, which imposes imprisonment and fines for violating art 50(2). Thus, he argued that art 50(2) violated his constitutional right to legal certainty (art 28D(1)) and the principle of the rule of law (art 1(3) of the Constitution).

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75 Ibid 164–165.
76 Decision on Forestry Law (Inanta Timber Case) (n 3).
77 The annual allocation is based on geographical limits and is measured in hectares.
78 Arts 50(2) and 78(1) of the Law No 41 of 1999 on Forestry.
79 Decision on Forestry Law (Inanta Timber Case) (n 3) 15–19.
The Court denied the applicant’s request. However, to justify its decision, the Constitutional Court did not refer to legal certainty or the rule of law. Instead, it referred to the duty of the state to control natural resources based on sustainability and environmental protection principles, pointing to arts 33(3) and (4) of the Constitution. The Court found that this duty needed to be exercised to protect the right to a good and healthy environment (art 28H(1) of the Constitution).

According to the Court, the Forestry Law provisions pertaining to the permit system for forest management, including art 50(2), provided an acceptable form of state control over natural resources, as mandated by art 33(3) of the Constitution.\(^80\) To justify this argument, the Court referred to its previous decision in the Electricity Law Case,\(^81\) in which it had described issuing permits as a means for the state to exercise control within the meaning of art 33(3). For the Court, the permits referred to in art 50(2) of the Forestry Law enabled the government to ensure that permit holders would not conduct activity that might cause damage to the forest.\(^82\) In this way, forest management would not be merely directed towards fulfilling economic interests, but could also achieve social and environmental ends.\(^83\) For this reason, the Court said that it could not grant the applicant’s request to invalidate art 50(2) because if it did, the consequence would be to remove the provision that prohibits forest destruction, which would be inconsistent with the ‘spirit of forest protection’,\(^84\) which the Court appears to view as a constitutional priority.

The Court also held that the duty of the state to control natural resources — in this case, forests — should be performed with environmental protection in mind to guarantee people’s right to a healthy environment. The Court stated that

> it is the duty of the Government, business entities and communities to protect forests. As such, every endeavor to achieve forest sustainability, including maintenance, prevention, and mitigation of forest destruction, must be increased, so that national development may increase citizens’ welfare ... in the framework of sustainability and environmental protection, because every person has the right to a good and healthy environment as stipulated in Article 28H (1) of the Constitution.\(^85\)

\textbf{D Concluding Analysis: Article 33(3) and Environmental Rights}

The cases discussed in this chapter appear to indicate that the Indonesian Constitutional Court has not, in environment-related cases, applied only provisions that confer rights that are clearly expressed as relating to the environment. It has not limited itself to the substantive

\(^{80}\) The Court has established guidance on the meaning of ‘state’s control’ as stipulated in art 33(3) of the Constitution in Decision No 001-021-022/PUU-I/2003 on Electricity Law. Such guidance has been frequently referred to by the Court in its subsequent decisions.

\(^{81}\) \textit{Decision on Electricity Law} (n 8).

\(^{82}\) \textit{Inanta Timber case} (n 3) 29.

\(^{83}\) Ibid 30.

\(^{84}\) Ibid 29–30.

\(^{85}\) Ibid 30.
and procedural environmental rights contained in the Constitution, as discussed in Chapters III and IV. It has also relied on the public trust doctrine from art 33(3) and (4) of the Constitution. In fact, it has drawn on these quite heavily, and even on its own initiative, rather than exclusively in response to party arguments. Compared with the Court’s apparent reluctance to employ the right to a healthy environment, as well as the various procedural rights, the Court appears to be quite comfortable using art 33 in environmental cases. It has applied art 33 in many cases and has progressed its jurisprudence concerning the provision over the past 15 years.

Importantly, using art 33(3), the Court has established that the right to water is a basic human right, even though it is not clearly expressed in the Constitution, and the state has a duty to protect and fulfil that right. In exercising this duty, the state must keep environmental sustainability in mind to give current and future generations the right to enjoy a healthy environment (WRL Cases 1 and 2). The Court reemphasised that this state duty to exercise control must be exercised with a concern to provide the right to a healthy environment for the citizens in the Inanta Timber Case. Equally important, the Court held that state control in art 33(3) constitutes the right of marginalised peoples, including indigenous communities, to have access to natural resources.

These developments are highly significant given that, as mentioned, art 33 is applicable to circumscribe the required levels of state control over the exploitation of all natural resources. Of course, it is in this exploitation that environmental interests are most at risk. Requiring state control over natural resources, and imposing the additional requirement that this control must be exercised while considering environmental protection, equitable access and sustainability, provides a potentially powerful basis for environmental constitutionalism.

Nevertheless, although the Court’s interpretation of art 33(3) and (4) of the Constitution is progressive and has great potential to further advance environmental rights protection, aspects of these decisions are also problematic. Some of these problems were raised in Chapter II, which discussed the Court’s general approach to decision-making. For example, the Court’s decision in WRL 2 is problematic because the Court seemed to review the constitutionality of government regulations rather than statutes. As discussed, the Court’s jurisdiction, as outlined in the Constitution itself, is limited to the review of statutes for compliance with the Constitution. In response to anticipated criticism for doing this, the Court denied reviewing regulations for constitutionality, stating that these regulations could be used as proxies for the constitutionality of the statute those regulations purported to implement. However, even in this context, the decision is problematic. The Court has long maintained the position that it cannot review the implementation of norms, but only the
The main problem with the Court’s art 33 jurisprudence is its vagueness, and this problem is particularly evident in the cases discussed in this chapter. Thus, for example, despite its restatements of the five elements of state control and its subsequent ranking of them in order of importance, the Court has not explained why state control comprises these five activities or where it derived this interpretation of state control. Further, the Court has not explained how it ranked the five activities. As Butt and Siregar argue, ‘Surely tight regulation, matched by strict supervision and enforcement, can constitute “control” and result in specified profits being returned for the people’. As discussed in Chapter VIII, this vagueness makes it difficult to comply with these decisions.

Critically, it is not clear how the Court derived its conclusion that art 33(3) incorporates the state obligation to guarantee the right to a healthy environment. In the Inanta Timber Case, the Court simply asserted this in its reasoning but did not explain how the state authority to issue a permit or concession (which is the base argument of the judicial review application) could include this obligation, which citizens could vindicate in the Constitutional Court. Likewise, in the WRL Case 1, the Court did not explain how arts 33(3) and 28H(1) could serve as a constitutional foundation for the right to water as part of the right to wellbeing. Given that the applicants lost these two cases, it is even more unclear whether this decision really provides the protection of the right to water and the right to a healthy environment. As demonstrated in Chapters VII and VIII, the legislature and the government are highly unlikely to comply with such bald statements in the Court’s reasoning if the Court ultimately rejects the application.

The next chapter discusses the last category of environmental rights applied by the Constitutional Court — namely, indigenous rights. As will be shown, in most cases in which the Court has identified a violation of indigenous constitutional rights, it has also found a violation of the associated right to legal certainty of indigenous individuals and groups.

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86 In some cases, the Constitutional Court has reviewed the implementation of statutes, such as in Constitutional Court Decision No 5/PUU-IX/2011 reviewing Law No 30 of 2002 on KPK and Constitutional Court Decision No 110-111-112-113/PUU-VII/2009 reviewing Law Number 10 of 2008 concerning General Election of Board Members People’s Representative, Regional Representative Council and Regional Representative Council. See Simon Butt, The Constitutional Court and Democracy in Indonesia (Brill Nijhoff, 2015) 100–103.

87 However, for a convincing attempt to identify the source of these activities, see Mohamad Mova Al’Afghani, ‘Anti-Privatisation Debates, Opaque Rules and “Privatised” Water Services Provision: Some Lessons from Indonesia’ (2012) 43 IDS Bulletin 21.

VI INDIGENOUS RIGHTS AND ENVIRONMENTAL PROTECTION

The focus of this chapter is the Constitutional Court’s use of art 18B(2) of the Constitution in environment-related cases. Like the procedural rights and art 33 in the Constitution, discussed in Chapters IV and V respectively, art 18B(2) does not expressly mention the environment. Rather, it guarantees recognition of the laws of indigenous communities, provided that various preconditions are met. However, also like art 33, the Court has found that art 18B(2) can be used to pursue environmental ends. Also relevant in these cases has been art 1(3) and art 28D(1) of the Constitution — specifically, the rule of law principle and the right to ‘legal certainty’ that it contains, respectively. In the cases discussed in this chapter in which the Court has found a statutory provision to violate art 18B(2), it has found a simultaneous violation of the more general right to legal certainty. In other cases, also discussed in this chapter, the Court has focused on the violation of the legal certainty right, but has also tied it to environmental concerns. The lack of recognition and the legal uncertainty has, in turn, been found to violate the concept of the negara hukum, or the ‘rule of law’, contained in art 1(3) of the Constitution.

Before discussing these cases, it bears noting that the character of environmental rights activism in Indonesia has historically been closely linked to indigenous and agrarian movements. This appears to have affected how these activists and their lawyers have approached environment and natural resource–related cases in the Court. They have not based their applications primarily on substantive and procedural environmental rights, as might be expected; rather, they have also used other express constitutional rights, such as indigenous rights, legal certainty rights and the rule of law, in art 1(3) of the Constitution. Since its establishment, the Court has received many judicial review cases brought by indigenous communities and local dwellers who have employed these constitutional grounds to challenge statutes that they say do not recognise their indigenous entitlements.

As discussed in this chapter, these applicants usually point out that the impugned statute has the effect of excluding them from access to the natural resources upon which they have long relied, leading to insecurity in relation to those indigenous entitlements. In many instances, the Court has appeared to favour the applicants’ requests, agreeing that indigenous rights should be recognised and protected, and that legal certainty is an important element in

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2 In Indonesia, the terms masyarakat adat (customary community), penduduk asli (indigenous people) and penduduk lokal (local people) have been loosely used to refer to indigenous people and are commonly used in international discourse. See Tania Murray Li, ‘Articulating Indigenous Identity in Indonesia: Resource Politics and the Tribal Slot’ (2000) 42 Comparative Studies in Society and History 149.
3 The character of environmental rights activism in Indonesia has historically been closely linked to the indigenous movement and the agrarian movement, and this has affected how these activists approach environment and natural resources–related cases in the Court. See Lee Peluso, Afiff and Rachman (n 1) 377.
fulfilling indigenous rights. However, the Court’s rulings are often unclear and inconsistent, which has left space for interpretation by the implementing agencies — particularly the national parliament and the government. The way in which these agencies have sought to implement these decisions, if at all, is discussed later in Chapters VII and VIII.

This chapter will now consider the cases in which applicants have appealed to their constitutional rights to indigenous recognition and legal certainty as part of their efforts to secure indigenous lands, access forest resources and preserve their traditional practices, many of which emphasise environmental sustainability.

A Recognition of Indigenous Rights to Lands and Forest Resources: The Adat Forest Case

Contestation between communities and the state for control of forest resources in Indonesia has occurred for centuries. It can be traced back to colonial times, when the Dutch established a territorialisation policy under which any unowned land, including forests, on Java Island was state domain (domein verklaring). The main principles of this policy included state ownership and control over forests, so that colonial bureaucracies could exploit forest resources by restricting the access of peasants to those resources. Upon achieving independence, the government maintained the Dutch territorialisation policy and applied it across the whole of Indonesia by enacting the 1967 Forestry Law. At that point, forest management shifted from state ownership characterised by direct extraction of natural resources by the government to a state control model centred on the state’s right to control forests (hak menguasai negara), which emphasised the corporate management of public goods by the state in collaboration with private enterprises.

The state’s control over forests was strengthened further under the 1999 Forestry Law, which stipulated that the state controls the forest resources for the greatest prosperity of the people (art 4(1)). It conferred a mandate upon the government to allocate forest zones (kawasan hutan), affirm the designation of permanent forests (hutan tetap) (art 1(3)), regulate and manage forest zones and forest products, and regulate the legal relationships between people and forests (art 4(2)). The Law defines forests as state forests (hutan negara), which include adat forests and titled forests (hutan hak) (art 5). Both are located in the state forest zone (kawasan hutan), over which the state has full control.

Nevertheless, the 1999 Forestry Law also requires the government to recognise indigenous rights in forest management (art 4(3)). However, the Law does not recognise indigenous rights

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4 Constitutional Court Decision 35/PUU-X/2012 reviewing Law No 41 of 1999 on Forestry (Adat Forest Case).
6 Ibid.
(entitlements) over forest land and resources. In practice, the state acts as the owner and controller of these forests and has disproportionately favoured the interests of large corporations at the expense of indigenous and local communities’ access to forest resources. The Environment and Forestry Minister recently revealed that almost 96% of the 42.2 million hectares of forest zone had been allocated to private companies, most of which are oil palm and pulpwood plantations, while the community has been allocated only 4.14%.

The way the state was exercising its control over forest resources spurred the Aliansi Masyarakat Adat Nusantara (AMAN) or National Alliance of Indigenous Communities and two indigenous communities, the Kuntu community from Kampar District and Kasepuhan from Lebak District, to seek a judicial review before the Constitutional Court. They demanded that the Court invalidate several provisions pertaining to adat forests in the 1999 Forestry Law. While the request focused on securing indigenous rights to forest land and resources, it was also a struggle to protect the environment. As the applicants said,

more than a decade after its enactment, the Forestry Law has been used by the State to take over communities’ rights over adat forest, and declare it as state forest, and give licenses to companies to exploit forest and deny communities’ rights and their wisdom [emphasis added].

According to the applicants, this wisdom is contained in indigenous, law-based models of forest management that the applicants and their ancestors have practiced for hundreds of years. These models contain rules pertaining to procedures to open the forest for farming, cattle herding, hunting and other activities to cultivate forest products. They also allocate a portion of the forest to be protected (Hutan Titipan or entrusted forest), which is treated as sacred, and another portion for the public interest (Hutan Tutupan or covered forest), where utilisation is limited — for example, to extract honey or plants for medical purposes and to maintain water springs. Thus, the application was not solely aimed at obtaining entitlements over forest land and resources, but also protecting them.

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13 Decision on Adat Forest Case (n 4) 4.
The applicants structured their arguments around two themes: first, the status and recognition of adat forests; and second, the procedure of recognition for indigenous communities. In regard to the first argument, the applicants called attention to the following provisions of the Forestry Law. Article 1(6) of the Forestry Law stipulates that ‘Adat forest means state forest situated in the indigenous community’s area’ (emphasis added). Articles 5(1) and (2) states that:

(1) Forests, based on their status, consists of:
   (a) State forest (hutan negara), and
   (b) Forest over which rights may be granted (hutan hak)
(2) State forest as referred to in Article 5(1a) can be in the form of adat forest

The applicants argued that the definition of adat forest as stipulated in art 1(6), and the categorisation of forests as stipulated in art 5(1) and (2), were against the rule of law as stipulated in art 1(3) of the Constitution. They argued that these articles do not contain rules which are clear and easy to understand and are difficult to implement fairly. Those provisions contain discrimination against indigenous communities, and against a higher law (the Constitution 1945) and, therefore, contravene the concept of the rule of law, which requires a legal system in which rules are clear, well understood, and fairly enforced.15

According to the applicants, the definition meant that the adat forest was similar to or part of the state forest and, as a result, all land and natural resources in the forest zone must be controlled by the state. This policy had allowed the state to award enterprises rights over indigenous communities’ land without any prior consultation or consent from them, and without needing to pay adequate compensation to them, if any.16 The applicants said that the word ‘State’ (Negara) in Article 1 (6) and Articles 5 (1) and (2) in the Law violate the principle of equality before the law, which is one of the elements of the rule of law, because it — the word ‘State’ — violates the principles of legality, predictability, and transparency, ... which are important elements to uphold the Law State (Negara Hukum) as declared in Article 1 (3) of the Constitution.17

The applicants further argued that this definition resulted in indigenous communities being unable to exercise their rights to forest lands and to access the resources therein. Thus, the articles also prevented them from exercising their right to develop themselves to fulfil basic needs. Their exclusion from forests also inhibited their rights to health, employment and education.18

15 Ibid 31.
16 Ibid.
17 Ibid 32.
18 Ibid 35.
Concerning the second argument, which regarded procedures for the recognition of indigenous communities, the applicants argued that several provisions in the Forestry Law\textsuperscript{19} that require indigenous communities to obtain recognition from the local government to be involved in forest management breached the rule of law as stated in art 1(3) of the Constitution. They also breached the duty of the state to acknowledge and respect traditional rights, as well as the rights to legal certainty and to be treated equally before the law as stated in arts 18B(2) and 28D(1) respectively.\textsuperscript{20} According to the applicants, the procedure for the recognition of indigenous communities should be stipulated in a specific law concerning indigenous communities, and not in the 1999 Forestry Law, because it is clear that the indigenous communities need certainty for their special rights (exclusive; not overlapping with other rights), where they can preserve, utilise (including cultivate) and market forest product within their traditional territories, and (to ensure that) their rights are non-transferable to third parties outside their communities, because their cultural identity and rights have gained strong recognition and protection in the 1945 Constitution.

Therefore,

it can be concluded that ... those provisions in the Forestry Law have prevented the applicants from enjoying rights to just legal recognition, guarantees, protection and certainty as well as equality before the law and, therefore, those provisions in the Forestry Law violate Article 28D (1) of the Constitution 1945.

For these reasons, the applicants asked the Constitutional Court to invalidate the word ‘state’ in art 1(6) so that the provision would read: ‘Adat forest means forest situated in the indigenous community’s area’.

They also requested the Constitutional Court to impose a condition on the constitutionality of art 5(2) so it would be interpreted as: ‘Forests, based on their status, consists of: (a) State forests, (b) Forests over which rights may be granted and (c) Adat forests’. They also asked the Court to invalidate the conditions for recognising indigenous communities in several related provisions in the Forestry Law, as stipulated in arts 4(3), 5(3) and (4), and 67(1), (2) and (3) of the Forestry Law.

On 16 May 2013, the Court handed down its decision. It granted the applicants’ first request concerning the adat forest. It declared that the adat forest was not part of the state forest; instead, it fell under the same category as forests over which rights can be granted (\textit{hutan hak}). Therefore, according to the Court’s interpretation, only two broad forest categories existed: state forest and forests over which rights can be granted. The latter could then be further categorised into adat forest and individual/legal entities’ forest.\textsuperscript{21}

\textsuperscript{19} Arts 4(3), 5(3), and 57(1), (2), (3) of the Law No 41 of 1999 on Forestry.

\textsuperscript{20} Decision on Adat Forest Case (n 4) 39.

\textsuperscript{21} Ibid 173.
To support its argument, the Court referred to art 18B(2) of the Constitution, which states that ‘The State recognises and respects adat communities along with their traditional rights that are still alive to the extent that they are in accordance with the principle of the unitary state and existing regulations’.

According to the Court, the implication of this provision was that adat communities were constitutionally recognised and respected as legal subjects and should be treated equally to other legal subjects such as individuals, enterprises and the state. As a result, indigenous communities must be treated equally before the law, particularly in the allocation of natural resources by the state.\(^\text{22}\) The judges also recalled one of the Court’s previous decisions in the Pesisir Case,\(^\text{23}\) in which it derived recognition of indigenous communities’ rights from art 33(3).\(^\text{24}\)

Many observers viewed the Adat Forest Case as a landmark decision for Indonesian agrarian and forest affairs because it provided new political and legal clout to indigenous claims over forests.\(^\text{25}\) Classifying adat forests as forests over which rights may be granted means that indigenous communities as right bearers have legal authority to exercise rights and perform duties in relation to relevant forest areas, and they have the capacity to continue their possession and utilisation of their adat forest, and to apply adat rules in their territories.\(^\text{26}\)

However, the Court declined the applicants’ second request. It declared that the existence of adat forest and the rights of indigenous communities over forests depended on recognition being given by the government. Therefore, while adat forests no longer comprise part of state forests, this does not necessarily mean that indigenous communities have the right to manage the adat forest without any conditions. To have such rights, they need to obtain recognition of their existence from their local government and prove that they continue to physically manage the relevant adat forest.\(^\text{27}\)

Here, the Court appeared concerned to ensure that recognising adat forests and the rights of indigenous communities to manage forests would not inspire separatist movements. For the Court, the right to manage adat forests could be exercised in accordance with the unitary principle of the State of Indonesia and in accordance with applicable regulations.\(^\text{28}\) This confirmed the Court’s view that adat communities required government recognition to enjoy

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\(^\text{22}\) Ibid 168.
\(^\text{24}\) Ibid 171. Here, the Court said that the ‘duty of the State to control natural resources must consider existing rights, including individual rights and collective rights of customary communities, and other constitutional rights, including the right to cross (coastal areas), the right to a healthy environment, and other rights’.
\(^\text{25}\) Myers et al (n 7).
\(^\text{26}\) Rachman and Siscawati (n 8).
\(^\text{27}\) Decision on Pesisir Case (n 23) 166–167.
\(^\text{28}\) Decision on Adat Forest Case (n 4) 178.
their rights over forests. The Court suggested that a specific statute concerning indigenous communities was necessary but, in its absence, existing government regulations and local regulations could be employed to provide legal certainty.29

B Recognition of Indigenous Rights to Participation: Maskur Anang Case30 and Forest Zoning Case31

Before the Adat Forest Case, the Court had already been asked to review the constitutionality of the 1999 Forestry Law. In two of these cases, the Court found for the applicants and established that ‘state control’ and ‘adherence to rule of law’ encompassed indigenous communities’ rights to participation, wellbeing, a dwelling, a healthy environment and to own property.

The first time the Court recognised indigenous communities’ right to participation was in the Maskur Anang Case. The applicant, Maskur Anang bin Muhamad Kemas, was a landowner and small-scale oil palm farmer from Jambi city, who had lost his entitlements to manage his own land. This occurred because the MoF, without prior consultation with him, had changed the status of the area where his farm was located to be an Industrial Plantation Forest (Hutan Tanaman Industri). The Minister then issued a permit to logging company PT Wira Karya Sakti to carry out logging activities in that area. Anang continued to run his palm oil farm on this land. He was then arrested for illegal activity in the state forest and imprisoned for seven months.32

Aggrieved by his imprisonment, Anang asked the Constitutional Court to examine provisions in the Forestry Law that gave the Minister authority to determine and to change forest status, arguing that these provisions violated his right to life (art 28A) and to legal certainty and legal protection (art 28D(1)). He pointed to art 4(2b) of the Forestry Law, which declares that

State control over forests as referred to in sub-paragraph (1) gives the Government authority to ...

b. designate status of certain area to be a forest zone or a forest zone to be non-forest zone.

29 Ibid 184.
30 Constitutional Court Decision 34/PUU-IX/2011 reviewing Law No 41 of 1999 on Forestry (Maskur Anang Case).
31 Constitutional Court Decision 45/PUU-IX/2011 reviewing Law No 41 of 1999 on Forestry (Forest Zoning Case).
32 Decision of Sengeti District Court No 169/Pid.B/2010/PN.Sgt. This decision was appealed to the Jambi High Court, which imposed a higher sanction on the defendant of eight months and 10 days’ imprisonment (Decision of Jambi High Court No 13/PEN/PID/2011/PT.JBI); Redaksi Dinamika Jambi, ‘Sempat 2 Kali Mendekam Di Penjara, Anang Masih Gigih Mencari Keadilan’, Dinamika Jambi (online, 23 May 2017) <http://dinamikajambi.com/2017/05/23/sempat-2-kali-mendekam-di-penjara-anang-masih-gigih-mencari-keadilan/>.
He also challenged art 4(3) of the Forestry Law, which stipulates that ‘State control must take the rights of indigenous communities into consideration, provided they remain in existence and are legally recognised, and are not contrary to the national interest’.

Anang asked the Court to invalidate art 4(2) of the Forestry Law and to declare art 4(3) conditionally constitutional.

In response, the Court recalled its previous decisions in the Electricity Law Case, the Forest Zoning Case and the Minerba Case, emphasising that, in exercising state control — in this case, by regulating forest designation — the government must take into account the community’s right to participation and to justice.\(^{33}\) However, the Court denied the applicant’s first request. This was a strange outcome considering the emphasis the Court had placed on the importance of rights to participation and justice. The Court also provided no reason for rejecting the claim. Rather, it simply asserted that the government’s authority to regulate forest designation as stipulated in art 4(2b) of the Forestry Law was consistent with the Constitution. Nevertheless, the Court emphasised that in exercising this authority, the government must ‘refer to laws and regulations and take into account communities’ rights … and the government is obliged to make settlement with those right holders in advance’.\(^{34}\)

The Court granted the applicant’s second request and held that when exercising its control, it was important for the government to take into consideration not only indigenous communities’ rights, but also local community rights.\(^{35}\) The Court also emphasised the importance of community involvement in designating forest zones:

> In accordance with Court’s decision in the Minerba Case … the word ‘take into consideration’ (memperhatikan) in Article 4 (3) of Forestry Law must be given an imperative meaning — that the Government, prior to designating forest zone, must take into account public opinion as a form of control of the Government, to ensure the fulfilment of citizens’ constitutional rights to well-being, to dwelling, to a healthy environment, and to own property, which cannot be arbitrarily taken by anyone [vide Article 28H (1) and (4) of the Constitution] \(^{36}\)

Accordingly, the Court declared art 4(3) of the Forestry Law to be conditionally unconstitutional unless given the following meaning: ‘In carrying out its obligation to control forests, the State must protect, respect, and fulfil the rights of indigenous communities, provided they remain in existence and are legally recognized, and the right of communities which are guaranteed by law, provided they are not contrary to the national interest’.\(^{37}\)

The Court also established an interpretive basis for indigenous communities’ participation rights in the Forest Zoning Case, this time deriving it from the rule of law principle (art 1(3) of the Constitution). This case was filed on 14 July 2011 by five district heads in Central

\(^{33}\) Decision on Maskur Anang Case (n 30) 40–43.

\(^{34}\) Ibid 43.

\(^{35}\) Ibid 44.

\(^{36}\) Ibid.

\(^{37}\) Ibid 46.
Kalimantan Province (Kapuas District, Gunung Mas District, Katingan District, Barito Timur District and Sukamara District) and an individual who argued that the Forestry Law, which, *inter alia*, regulates the forest gazettal process, impeded their right to manage their territory, thereby violating the constitutional provisions on regional autonomy.

As part of this argument, the applicants challenged the constitutionality of the definition of ‘forest zone’ in the 1999 Forestry Law. Their main argument was that the definition of a forest zone in art 1(3) of the Forestry Law was unclear because it was inconsistent with the forest designation procedure in art 15(1) of the same Law.

Article 1(3) of the Forestry Law states that a ‘Forest zone is any particular area that is allocated and/or designated by the Government to be permanent forest’ (my emphasis). Article 15(1) of the Forestry Law stipulates that a ‘Forest designation (to identify a particular area as forest zone) includes the following steps: forest allocation, forest delineation, forest mapping, and forest gazettal’.

The applicants pointed to the phrase ‘allocated and/or’ in art 1(3) of the Forestry Law, which appears to give a choice to the government to either allocate or designate a certain area as forest. In contrast, art 15 of the Forestry Law clearly indicated that appointment was only part of the broader forest designation process. The applicants argued that arts 1(3) and 15 contradicted each other and therefore breached the rule of law and caused them legal uncertainty.

This inconsistency, combined with national policies to allocate large portions of rural land as national forest zones without a proper gazettement process, impeded the applicants from issuing permits to use the land for development purposes. For example, the Regent of Kapuas District argued that he was uncertain of how to implement regional regulations on spatial planning because almost the entire area of his district had been designated, by simple allocation, as forest by the MoF. Consequently, he could be imprisoned for violating the Forestry Law if he issued licences in the area that had been designated as forest. The individual applicant argued that his rights to property had been rendered uncertain because his land was located in an area that had been appointed as forest, without the fuller designation process. Accordingly, his ownership right over land could be revoked by the government at any time.

The Court granted the applicants’ request and clarified the definition of a forest zone in the 1999 Forestry Law. It subscribed to the applicants’ argument that the definition of a forest zone in the Forestry Law was unclear because it was inconsistent with the art 15 procedures for forest designation. For the Court, art 15 was consistent with the rule of law, while art 1(3) was not. It stated that ‘the procedure of forest designation established in art 15(1) of the

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38 *Decision on Forest Zoning Case (n 31).*
39 Ibid 70–75.
Forestry Law is consistent with the principle of the rule of law, which, among other things, requires the Government and state officials to comply with existing laws and regulations.\(^{40}\)

Moreover, art 15(1) was consistent with the rule of law because it took into account individual and indigenous rights in the forest designation process. To justify this, the Court said that art 15(1) should be read together with art 15(2), which states that forest designation must take into account spatial planning. In this way, the government must take into account individual and indigenous communities’ rights and avoid causing harm to the communities in forest delineation and forest mapping, which are steps the government must go through in forest designation.\(^{41}\) The Court also recognised that adherence to the rule of law was to include public participation. It said that

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\text{In a state that is based on rule of law, government officials must act in accordance with laws and regulations ... Allocating an area to be a forest zone without going through processes or stages that involve various stakeholders in forest management is an act of authoritarian government ... [Thus] it is improper to determine an area to be a forest zone merely based on allocation process [as stated in Article 1 (3)].}^{42}
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After all, the government would have been complying with ‘existing laws and regulations’ if it followed the art 1(3) definition of forest. Nevertheless, the Court confirmed that areas could only be zoned as forests under the full gazettal process, as required by art 15. In theory, this Court decision resolved the longstanding confusion about the legality of forest designations. For the Court, all forest stakeholders — particularly individuals and indigenous communities — must be involved in the forest designation process.

\[C \text{ ‘Musyawarah’ to Resolve Land Conflict with Indigenous Communities: Plantation Law Case}^{43}\]

In addition to recognising indigenous communities’ rights to lands and forest resources and to participate in forest management, the Constitutional Court has also emphasised that ‘musyawarah’ (dialogue to achieve agreement), not criminal sanctions, should be the primary means to resolve land conflicts with indigenous communities, as observed in the Plantation Law Case.

This case was filed on 20 August 2010 by four farmers from three provinces in Indonesia who had been imprisoned, or at least charged with criminal offences, under the 2004 Plantation Law.\(^{44}\) Two of the applicants, Japin and Vitalis Andi, were members of the indigenous community of Silat Hulu from Ketapang, West Kalimantan. They were sentenced by Ketapang District Court to one year of imprisonment and fined Rp 2 million for damaging a plantation

\[^{40}\text{Ibid 158.}\]
\[^{41}\text{Ibid 158–159.}\]
\[^{42}\text{Ibid 158.}\]
\[^{43}\text{Constitutional Court Decision No 55/PUU-VIII/2010 reviewing Law No 18 of 2004 on Plantation.}\]
\[^{44}\text{Law No 18 of 2004 on Plantation. This Law has been replaced by Law No 39 of 2014 on Plantation.}\]
area held by Bina Nusantara Mandiri Inc., a subsidiary of Sinar Mas Inc., which is a large Indonesian plantation company. Another applicant, Ngatimin alias Keling, together with 10 other farmers from Serdang, North Sumatera, were sentenced to one year of imprisonment and fined Rp 500,000 for using a plantation area held by Lonsum Inc. without a permit, despite having registered his land since 1955 and paid land taxes since then; accordingly, he was granted a right to use that land.

For these reasons, those farmers, represented by several public interest lawyers from Public Interest Lawyers–Network (PIL–Net), requested the Court to invalidate two provisions of the Plantation Law that had been used against them: arts 21 and 47.

Article 21 stipulates that ‘Every person is prohibited from taking actions which result in damage to plantations and/or other assets, using plantation land without permits and / or other actions resulting in disruption of plantation businesses.’

According to art 47:

1. Any person who deliberately violates the prohibitions [in Article 21] face imprisonment of a maximum of 5 (five) years and a fine of not more than Rp. 5,000,000,000.00 (five billion rupiah).

2. Any person who due to his/her negligence, takes action that results in damage to a plantation and /or other assets, uses plantation land without permits and / or performs other actions resulting in disruption of plantation businesses as referred to in Article 21 faces imprisonment for a maximum of 2 (two) years and 6 (six) months and a fine of not more than Rp. 2,500,000,000,00 (two billion five hundred million rupiah).

Under these provisions, the four applicants were accused of destroying and disrupting plantations or using plantation land without a permit, when in fact they were merely seeking to attempt to reclaim their own land, which they said was illegally occupied by plantation companies. The applicants argued that these criminal provisions were unclear, subject to multiple interpretations and unfair. In particular, they claimed that the provisions had induced conflicts and violated the rule of law principle (art 1(3)), their right to legal certainty and equality before the law (art 28D(1)), as well as their right to self-development (art 28C(1) and freedom from fear (art 28G(1) of the Constitution).

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47 Ibid.
The Court largely adopted the applicants’ argument that art 21 of the 2004 Plantation Law was too broad and unclear, which made implementation difficult, particularly to identify the scope of ‘actions which result in damage to plantation and/or other assets’. For the Court, it was not clear whether this prohibition also applied to the plantation owner, if, for example, he or she damaged the plantation during the fertilisation process.\textsuperscript{49}

The Court also agreed that the phrase ‘the use of plantation land without permits’ in art 21, along with its elucidation, which stated that, ‘what is meant by the unauthorised use of plantation land is the occupation of land without the owner’s permission in accordance with the laws and regulations’, was unclear. According to the Court, land conflicts resulting from unclear land entitlements have occurred since Dutch and Japanese colonisation. The government had issued various laws and regulations to deal with this problem and emphasised the use of ‘musyawarah’ (negotiation to achieve agreement) in resolving land conflict.\textsuperscript{50} The Court said that those laws and regulations should be used to resolve land conflicts rather than the criminal sanctions as stipulated in art 47 of the 2005 Plantation Law, which were inappropriate to apply to indigenous communities, including the applicants, who had inherited an entitlement to indigenous land.\textsuperscript{51} Based on those reasons, the Court invalidated art 21 and its elucidation, as well as art 47 of the 2004 Plantation Law for violating the rule of law (art 1(3)), traditional rights (art 18B(2)) and the right to legal certainty (art 28D(1)).

D Analysis: ‘The Rule of Law’ and ‘Legal Certainty’ to Uphold Indigenous and Environmental Rights

As mentioned in Chapter III, for several years after its establishment, the Constitutional Court issued decisions in environment-related cases that were relatively conservative. This was probably because the Court wanted to secure its legitimacy before issuing decisions that significantly changed Indonesia’s legal landscape or required a parliamentary response. In the ensuing years, despite various problems, including corruption scandals, the Court has arguably solidified its position within the Indonesian political and legal landscape. Therefore, it has been able to issue more ambitious decisions, including some that uphold indigenous rights.

As discussed in Chapter I, as a result of indigenous communities’ close relationship to the land and natural resources, many believe that upholding indigenous rights also helps to strengthen environmental protection. This is certainly the view of many NGOs working in the fields of environment and indigenous rights.\textsuperscript{52} As the four cases discussed above demonstrate, the

\textsuperscript{49} Decision on Plantation Law (n 43) 104.
\textsuperscript{50} Ibid 101–102. For example, Law No 51 of 1960 on the Prohibition of Using Land without Permit from the Land Right Holder and Regulation of Agrarian Minister No 11 of 1962, which allow communities to use land that is not used by the government or rightholders.
\textsuperscript{51} Ibid 103.
\textsuperscript{52} See, eg, Peluso, Afiff and Rachman (n 1).
Constitutional Court has invoked several constitutional provisions to recognise indigenous rights, primarily rights to land and access to forest resources. In its decision in the Adat Forest Case, the Court emphasised not only that individual members of the indigenous community were the subjects of the rights, but also that these applied to the community as a group. The Court also established that state control (in the Maskur Anang Case) and the rule of law (in the Forest Zoning Case) require the state to give effect to various indigenous community rights, including to participation, wellbeing and a healthy environment. As mentioned, the Court has also emphasised that criminal sanctions are not an appropriate means for resolving conflicts with indigenous communities. Instead, in the Plantation Law Case, the Court suggested deliberation to reach consensus. Overall, the Constitutional Court decisions appear to be directed towards protecting indigenous rights, at least in theory.

However, in practice, it is unlikely that the Court’s decisions will lead to increased recognition of the environment-related rights of indigenous communities, let alone guarantee legal certainty, at least in the short term. There are several reasons for this. First, as discussed in Chapter II, the Court cannot formally review the constitutionality of laws falling below the level of a statute on the hierarchy of Indonesian laws — it can only review statutes against the Constitution. The indigenous rights cases in this chapter were challenges to statutes that conferred authority upon the state to issue concessions, which were usually exercised by way of subordinate regulations, most commonly ministerial decrees and local regulations. According to the *erga omnes* principle, those regulations are automatically null and void. However, in practice, the government may not know about the Court’s decision, or it might simply ignore the decision and continue to issue concessions that exclude the indigenous community from forest land and resources.

Even if the government complies with the Court’s decisions — a matter that is addressed in Chapters VII — it is worth noting that the Court has continually declared that its decisions operate prospectively, which means that if the Court decides that a statute breaches the Constitution and declares it invalid, it will only be invalid from the moment the Court finishes reading its decision.53 When applied to the case discussed in this chapter, this means that the Court’s decisions merely invalidate the statutory basis upon which concessions might be awarded in the future, and they have no effect on the status of the concessions that have already been given to companies. These concessions might remain valid for decades, considering that concessions to log natural forest (*Hutan Alam*) and industrial forest (*Hutan Tanaman Industri*) can last for 55 or 35 years respectively, and can be extended.54 Therefore, indigenous communities will likely remain excluded from forest land and resources until these concessions expire.

Second, the Court’s decisions are unlikely to help indigenous community rights because the Court’s decisions do not define exactly which communities are considered indigenous. In the abovementioned cases, the Court often simply reiterated the conditions in art 18B of the Constitution — that is, that the indigenous communities may claim their rights if they meet three requirements: first, that they still exist; second, that they accord with social developments; and, three, that their existence is consistent with the principle of the Unitary State of the Republic of Indonesia. The Court has often reemphasised the condition imposed by the statutes it reviews: that for the indigenous community to exist, it must gain recognition from the government. However, the Court has not defined ‘social developments’ and ‘the unitary state’.\(^5\) Thus, the existence of indigenous communities and the conditions they must meet to claim their rights remain the exclusive domain of the government. Given that there are many laws and regulations on indigenous community and the government’s sectoral approach to natural resources management,\(^6\) the government will probably continue to refer to those laws and regulations. The community cannot simply refer to the Court’s decisions to claim their rights.

Third, the Court’s decisions discussed in this chapter do not appear to extend to all types of forest users, thereby potentially excluding some specific groups of community forest users.\(^7\) As mentioned in the Adat Forest Case, the Court decided that the adat forest is no longer part of the state forest, but it is categorised as a titled forest. As a result, indigenous communities can have entitlement over forest land and resources (adat forest). However, this decision applies only to indigenous communities within forest zones. In contrast, in the Forest Zoning Case, the Court decided that an area is defined as a forest zone if it has been formally gazetted. This applies to all forest users. While these decisions will assist indigenous communities living in area that has been formally gazetted by the government, they do not apply to areas that have not been gazetted.

With these problematical limitations in mind, this thesis now considers how the government has responded to the various Court decisions covered in Part II. The next chapter examines how the national legislature has reacted — in particular, the extent to which it has complied by amending statutes or passing new legislation as the Court’s decisions seem to require. Chapter VIII then considers the response of the national executive to the Court’s decisions.

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\(^7\) Myers and Muhajir (n 9). Myers et al identified five groups of customary and non-customary forest users who will not stand to benefit from the Court’s decisions. They include the customary community that claims land outside forest zones, forest users who claim gazetted conservation forest zones, customary claims over land that has been converted to non-forest land (Area Penggunaan Lain — APL), forest users with statutory management rights and transmigrant or forced migrant communities with claims over forest land.
Together, Chapters VII and VIII comprise Part III of this thesis, which, as mentioned in the Introduction, contains the first scholarly attempt to rigorously examine government compliance with Indonesian Constitutional Court decisions in any area of law.
PART III: LEGISLATIVE AND REGULATORY COMPLIANCE
VII LEGISLATIVE COMPLIANCE

As discussed, this chapter’s focus is legislation — that is, the process by which it is drafted and enacted, and its ultimate content — as a direct response to, or at least inspired by, the Constitutional Court decisions discussed in Part II of this thesis. As mentioned, executive compliance through issuing regulations and other lower-level legal instruments is discussed in Chapter VIII. As this chapter will demonstrate, legislative compliance with the Court’s decisions has been very low. As part of this discussion, I will draw on my field research to uncover why compliance occurred (or did not occur) to the extent that it did.

Before discussing these case studies, I briefly examine two preliminary issues. The first is government compliance with judicial decisions. What constitutes compliance and, more particularly, under what circumstances can we say that a government has complied with a judicial decision? Further, what factors have scholars identified that explain compliance and non-compliance? The second is Indonesia’s legislative process, through which government and legislative responses to Constitutional Court decisions have been made.

A Theories of Compliance

Government compliance with judicial decisions has been conceptualised differently by various scholars writing in different contexts, but most of them appear to agree that, fundamentally, compliance involves behavioural change in line with the expectations of a court, as outlined in a judicial decision.¹ The literature suggests that government compliance with judicial decisions can be examined using normative and instrumental approaches. The normative approach assumes compliance to be the default — that is, people voluntarily act in accordance with norms because those norms have legal force.² The instrumental approach suggests that actors obey laws or adhere to judicial decisions because they believe that doing

² Geoffrey Brennan et al, Explaining Norms (Oxford Scholarship Online, 2013) Chapter 9, 1–36; Kapiszewski and Taylor (n 1) 822.
so will advance their own interests, implying a rational calculation of the costs and benefits of compliance.\(^3\)

However, the normative and instrumental approaches do not appear to comprehensively capture an actor’s reasons for compliance with a judicial decision. For example, the normative approach may be unable to explain why those who may be inclined to comply will not necessarily prioritise legal correctness over their material interest when the two conflict. For example, the government might comply quickly, but using a questionable legal instrument, which might therefore be easily avoidable.\(^4\) Equally, compliance cannot be explained solely by instrumental calculation. Compliance occurs even when the cost of compliance exceeds the cost of non-compliance, because actors are compelled to comply with what they perceive to be legitimate law.

To bridge the gap between normative and instrumental approaches, Beach introduces an integrative compliance approach.\(^5\) According to this approach, compliance with judicial decisions is not solely based on an actor’s instrumental calculation, but also involves normative concerns such as the social costs of being seen to be breaking the law. The relationship between normative and instrumental logics of action is viewed as a continuum where compliance is often based on both instrumental and normative motivations. In some cases, compliance can only be explained based on instrumental factors, whereas in other situations, normative motivations are also at play, but it will never fully determine an actor’s action. This research uses this integrative compliance approach to answer why government institutions — namely, the national parliament and national executive — complied with Constitutional Court decisions to the extent that they did or did not.

### B Measuring Compliance

Measuring compliance can be elusive because identifying the factors that motivate legal change can be difficult. The responses of actors targeted in a judicial decision are rarely dichotomous. That is, compliance is rarely, if ever, ‘fully’ complete or non-existent. Rather, the response usually sits somewhere along a continuum.\(^6\) Further, as Spriggs points out, a

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\(^3\) Geoffrey Brennan et al (n 2) Chapter 10, 1–24. Stover and Brown propose a similar approach, which they call utility theory: ‘a person with the capacity to either comply or not comply with a given law will not comply when the utility of noncompliance is greater than the utility of compliance’: Robert V Stover and Don W Brown, ‘Understanding Compliance and Noncompliance with Law: The Contribution of Utility Theory’ (1975) 56 Social Science Quarterly 363, 370–371.

\(^4\) As discussed in chapter VIII, for example, the Indonesian government was willing to promptly comply with one of the Constitutional Court’s decisions on forestry, but instead of issuing legally recognised laws and regulations, it issued a circular, the legal status of which is questionable.

\(^5\) Derek Beach, ‘Why Governments Comply: An Integrative Compliance Model That Bridges the Gap between Instrumental and Normative Models of Compliance’ (2005) 12 Journal of European Public Policy 113. Beach’s model is based on Anthony Giddens’ structuration theory, which argues that both instrumental and normative concerns motivate governmental actors in their compliance calculation.

\(^6\) Kapiszewski and Taylor (n 1) 807.
government response can be prompted by a complex mix of motives and expectations, which often makes it difficult to identify a specific judicial decision as the sole trigger for a bureaucratic or government action.7 Similarly, Kapiszewski and Taylor emphasise the importance of accurately assessing the extent to which subsequent government action corresponds to the requirements set out in the judicial decision and the need to determine whether government compliance is a response to the judicial decision or some other factor or factors.8 Conformity may not be the same as compliance.9

The extent of government compliance can, of course, be affected by the complex interplay of institutional factors, including the attributes of the court, the government ‘complier’ and even third parties.10 Factors attributable to the court include, for example: the set of consequences for non-compliance included in the judicial decision itself; the clarity, or lack thereof, with which the decision is expressed; and the degree of division between justices voting on the case.11 Those that are attributable to the government include: the interest of the government, the capacity of the government, the availability of funds to comply, the extent of the response required by the judicial decision and the frequency of court–government interactions.12 It is worth noting that ‘responders’ or ‘compliers’ might be ordinary officials who act without prompting or even knowledge of the leadership of their institution.13 While those that are attributable to third party, for example: the ability of litigants and availability of resources to monitor compliance.14 The more resourceful the litigants, the more likely they can pursue the government to comply with a court decision

Therefore, Spriggs captures some of the nuances that appear to be at play, particularly in highly political settings, where the government may be able to escape non-compliance without any legal consequences and where a variety of factors not related to the court decision itself might also be at play in the government’s response. As this chapter will show, many of these factors help explain compliance, or non-compliance, with Indonesian Constitutional Court decisions. However, I uncover further factors that indicate that Spriggs’

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7 Spriggs (n 1) 570.
8 Kapiszewski and Taylor (n 1) 823–825.
9 Ibid 816.
10 Spriggs (n 1) 570–574.
11 Spriggs (n 1); Kapiszewski and Taylor (n 1); Simon Butt, Judicial Review in Indonesia: Between Civil Law and Accountability? A Study of Constitutional Court Decisions 2003–2005 (University of Melbourne, 2006) 265–272.
12 Spriggs (n 1); Kapiszewski and Taylor (n 1); David B Hausman, ‘When and Why the South African Government Disobeys Constitutional Court Orders’ (2012) 48 Stanford Journal of International Law 437.
13 My experience working with officials on legislative-drafting suggests that ordinary officials might sometimes play a significant role. Although they did not have the authority to make the final decision, they were the ones who did the real drafting and might (deliberately or obliviously) ‘manipulate’ the drafting process, which went unnoticed by the leaders.
14 Spriggs (n 1) 573–574.
list of factors might not be complete, at least in the Indonesian context. These include the existence of an interest group to monitor compliance, media attention and the existence of societal or political powerbrokers to encourage implementation.

C Legislative Process

The Indonesian Constitution confers power to make statutes (Undang-undang) upon the parliament (Dewan Perwakilan Rakyat or DPR).\textsuperscript{15} The president\textsuperscript{16} and the Regional Representative Council (Dewan Perwakilan Daerah or DPD)\textsuperscript{17} may also propose bills to the parliament for deliberation and enactment. However, unlike the president, who can propose a bill on any subject matter,\textsuperscript{18} the DPD can only propose bills concerning regional autonomy, the relationship between the national and regional governments, regional development and integration, natural resources management and other economic resources, and fiscal balance between national and regional governments.\textsuperscript{19} In practice, the DPD’s role in lawmaking is even more limited, which leaves the process as the exclusive domain of the DPR and the government.\textsuperscript{20}

Every bill must be discussed between the parliament and the president, and both institutions must reach an agreement for a bill to become a law.\textsuperscript{21} The president may issue an interim emergency law (Peraturan Pemerintah Pengganti Undang-undang), which is equal in legal status to a statute in a pressing situation.\textsuperscript{22} This type of law will only become a formal law if it is approved by the parliament in the nearest legislative drafting session.\textsuperscript{23} However, in some cases, the DPR has not taken any action to approve an interim emergency law in its legislative drafting session, and it is unclear whether the interim emergency law remains in force or simply lapses in this circumstance.\textsuperscript{24}

Law No 12 of 2011 on Law on Law-making establishes five stages for passing a law: planning (perencanaan), drafting (penyusunan), discussion (pembahasan), adoption (pengesahan atau

\textsuperscript{15} Art 20(1) of the 1945 Constitution.
\textsuperscript{16} Ibid art 5(1).
\textsuperscript{17} Ibid art 22D(1).
\textsuperscript{18} Ibid art 5(1).
\textsuperscript{19} Ibid art 22D(1).
\textsuperscript{20} Law No 12 of 2011 on Law-making and Law No 27 of 2009 on People’s Consultative Assembly, House of Representatives, Regional Representative Council, and Regional House of Representatives have removed the DPD’s authority to propose bills for inclusion in the National Legislative Program (Prolegnas). The latter also seeks to reduce the role of the DOD to that of an institution equivalent to a member of parliament of a commission in the DPR. Thus, for the most part, the DPD has no role to play in the law-making process.
\textsuperscript{21} 1945 Constitution art 20(2).
\textsuperscript{22} Ibid art 22(1).
\textsuperscript{23} Ibid art 22(2).
\textsuperscript{24} Simon Butt and Tim Lindsey, \textit{Indonesian Law} (Oxford University Press, 2018) 47.
penetapan) and enactment (pengundangan). In the planning stage, the parliament — represented by a legislation task force (Badan Legislasi or Baleg) — and the government determine the draft laws that they plan to pass in the next five years and list them in a National Legislation Program (Program Legislasi Nasional or Prolegnas). Every year, the parliament and the government establish a list containing the legislation they will prioritise in that year (Prolegnas Tahunan). The list of bills in the Prolegnas and Prolegnas Tahunan is not necessarily fixed. The government and the parliament can add draft legislation to the list that they consider necessary to anticipate social and legal developments, including to accommodate changing norms as a result of Constitutional Court rulings. Hence, draft laws in the Prolegnas list can be classified into three categories: the priority list, the carried over list and the open list. The priority list features draft laws that are prioritised by the parliament and the government annually. The carried over list includes draft laws that appeared on the priority list from the previous year but were not discussed in the parliament in that year. The open list includes ratification of international agreements, statutory responses to Constitutional Court rulings, state budgetary issues, establishment of new provinces or districts, and enactment of interim emergency laws.

The official drafting procedures differ according to the institution initiating the bill. A bill that is initiated by the parliament can be prepared by a member of parliament, the parliamentary commission, a joint commission, a unit in the parliament that is responsible for legislation, or the DPD. This unit is also responsible for harmonising the content of the bill with existing laws and ‘firming up’ the content of the bill. In contrast, a bill that is introduced by the government is drafted by a minister or head of an executive agency. The responsible minister or head of agency then establishes an inter-ministerial joint committee to refine the draft. The Minister of Law and Human Rights is responsible for coordinating the final draft.

All bills must be accompanied by an academic document (naskah akademis) that explains the substance of the bill and provides a detailed breakdown of all proposed clauses. The bill and the academic document are then handed over to parliament leaders, who take the bill to plenary parliamentary meetings, at which it is decided whether to accept the proposal, accept the proposal with revisions or reject it. If the bill is accepted, the leaders pass to a steering committee (Badan Musyawarah or Bamus), which will nominate a commission or joint commission to be responsible for the passage of the bill.

25 Law on Law-making (n 20) art 1(1).
26 Ibid art 23(1).
27 Ibid.
28 Ibid art 46(1).
29 Ibid art 46(2).
30 Ibid art 47.
31 Ibid art 43(1).
The legislative process to discuss bills has two stages.\textsuperscript{32} The first stage (pembahasan tingkat I) takes the form of a discussion between the relevant commission(s) of parliament and the president, who is usually represented by the minister whose portfolio touches on the subject matter of the statute. The minister must attend the first meeting if the bill is initiated by the government and can then be represented by a ministry official in subsequent meetings. At the first meeting, the bill is presented by the proposing institution (either parliament or the government) and responded to by the other.\textsuperscript{33} In subsequent meetings, which usually take place in a working committee (panitia kerja or Panja), both parties discuss the bill based on a list of issues (daftar interverisasi masalah or DIM).\textsuperscript{34} This DIM is determined by the party — either the parliament or the government — that did not submit the bill. If proposed by the DPR, the DIM is produced by the responsible minister in response to that bill. If the bill is proposed by the government, the DPR will make the DIM.\textsuperscript{35} The DIM sets out any perceived shortcomings or problems of various clauses and subclauses relating to their substance or drafting, which then form the basis for negotiations about the draft between the parliament and the government. Agreement on the final draft of the bill is reached when all issues in the DIM have been resolved. The bill is then sent back to the responsible commission(s), which will arrange the schedule for the second stage.

The second stage of the legislative process (pembahasan tingkat II) involves formal acceptance or rejection and, if acceptance, the passage of the bill through the plenary session.\textsuperscript{36} In this stage, the decision to accept or reject the bill is made through deliberation. In the event agreement is not achieved, the decision is made through voting.\textsuperscript{37} The bill is then passed to the president to be signed. If the president does not sign in 30 days, the bill is deemed accepted by the executive and automatically becomes law.\textsuperscript{38} The new statute is then published in the state gazette.\textsuperscript{39}

The Law on Law-making and its enabling regulations, such as the Parliamentary Regulation on the Procedures of Developing National Legislation Program\textsuperscript{40} and the Presidential Regulation on the Implementation Guidelines for Law No 12 of 2011 on Law on Law-making,\textsuperscript{41} suggest that the parliament and the government must respond to the Constitutional Court either by introducing a new law or amending an existing one. Article 10 of the Law on Law-making

\begin{itemize}
\item \textsuperscript{32} Ibid art 66.
\item \textsuperscript{33} Ibid art 68(2).
\item \textsuperscript{34} Ibid art 68(3).
\item \textsuperscript{35} Ibid.
\item \textsuperscript{36} Ibid art 69.
\item \textsuperscript{37} Ibid art 69(2).
\item \textsuperscript{38} Ibid art 73(2).
\item \textsuperscript{39} Ibid art 81(1).
\item \textsuperscript{40} Parliamentary Regulation No 2 of 2016 on the Procedures for the Development on National Legislation Program.
\item \textsuperscript{41} Presidential Regulation No 87 of 2014 on the Implementation Guidelines for Law No 12 of 2011 on Law on Law-making.
\end{itemize}
states that ‘The Substance of a law includes: ... (d) follow up of the Constitutional Court decision.’

The same Law and its enabling regulations also emphasise that Constitutional Court decisions should be listed in the open list of Prolegnas.\textsuperscript{42} However, in practice, this does not always happen.

\textit{D Legislative Compliance with Constitutional Court Decisions in Indonesia}

In Part II, 12 judicial review decisions affecting eight statutes were discussed. All of the statutes with which the Constitutional Court found fault in these cases have been included on the Prolegnas. This at least constitutes recognition by the DPR and the government that they should at least appear to be willing to comply with Constitutional Court decisions.

However, to date, actual compliance has been low. Of the eight statutes reviewed by the Constitutional Court in these 12 judicial reviews, only two have resulted in legislative change: the 2014 Pesisir Law and the 2015 Plantation Law. The remainder of the challenged legislation — the Environmental Management Law, Forestry Law, Minerba (Mineral and Coal Mining) Law, Horticulture System Law, P3H Law and Water Resource Law — have not been amended in response to the Constitutional Court’s decisions, despite the Court invalidating some provisions — even an entire statute in the case of the Water Resource Law — and declaring others conditionally unconstitutional. This is illustrated in Table 7.1.

\footnotesize{\textsuperscript{42} Law on Law-Making (n 20) art 23 (1); Parliamentary Regulation on the Procedures for the Development on National Legislation Program (n 40) art 27 (2); Ibid, art 22(1).}
Table 7.1: Legislative compliance with Constitutional Court decisions discussed in Part II

<table>
<thead>
<tr>
<th>No</th>
<th>Decision, Year</th>
<th>Initiative (formal)</th>
<th>Current position</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Pesisir Law, 2010</td>
<td>Bill on Pesisir — Government initiative, 2013</td>
<td>Enacted 2014</td>
<td>Amendment (&gt; 3 years)</td>
</tr>
<tr>
<td>3</td>
<td>Water Resources Law 2005; 2013</td>
<td>Bill on WR — DPR initiative, 2018</td>
<td>In the deliberation process in DPR</td>
<td>Amendment (&gt; 5 years)</td>
</tr>
<tr>
<td>4</td>
<td>Minerba Law, 2010</td>
<td>Bill on Minerba — DPR initiative, 2018</td>
<td>In the deliberation process in DPR</td>
<td>Amendment (&gt; 6 years)</td>
</tr>
<tr>
<td>5</td>
<td>Forestry Law, 2011; 2012, 2014</td>
<td>Bill on Forestry — DPR initiative 2017</td>
<td>Officially announced as DPR initiative, no deliberation yet</td>
<td>Amendment (&gt; 7 years)</td>
</tr>
<tr>
<td>6</td>
<td>Horticulture System Law, 2012</td>
<td>Bill on HSL, 2017 — DPR initiative</td>
<td>In the deliberation process in DPR</td>
<td>Replacement (&gt; 5 years)</td>
</tr>
<tr>
<td>7</td>
<td>P3H Law, 2014</td>
<td>—</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>8</td>
<td>Environmental Management Law, 2014</td>
<td>Bill — DPD initiative, 2016</td>
<td>Unclear, not listed in the Prolegnas 2017 and 2018</td>
<td>Amendment (&gt; 2 years)</td>
</tr>
</tbody>
</table>

I will now discuss the legislative compliance case studies: the DPR’s response to the Constitutional Court’s decisions in the form of the Pesisir Law (2014) and the Plantation Law (2015). I will also discuss a draft Forestry Law to which the national parliament has given significant attention, and the P3H Law. While the P3H Law was not a direct response to a Constitutional Court decision, it is a Law about forestry and appears to have ignored a highly relevant and important decision.

**E 2014 Pesisir Law**

The Constitutional Court handed down its decision in the Pesisir Case on 9 June 2011. As mentioned in Chapter V, the Court invalidated 14 provisions pertaining to the right to manage coastal areas (HP3) in the 2007 Pesisir Law. However, the Court did not respond to the applicants’ call to invalidate provisions that did not require community participation in coastal development plans.

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43 Law No 27 of 2007 on the Management of Coastal Area and Small Islands (Pesisir Law) art 1 point 18, 16, 17, 18, 19, 20, 21, 22, 23(4) and (5), 50, 51, 60(1), 71 and 75.
44 Ibid art 14(1).
The government, represented by the Ministry of Maritime and Fisheries Affairs (MMFA) — whose responsibility includes coastal and small island affairs — began to revise the Pesisir Law in 2013 as a government initiative.\(^{45}\) The Director General for Marine, Coastal, and Small Islands (DG KP3K) of the MMFA said that the ministry would follow the Court’s decision and proposed focusing on revising the provisions of the HP3 in the 2007 Pesisir Law to change the management of coastal resources from rights-based to permit-based.\(^{46}\) This can also be observed in the ‘naskah akademik or (NA)’ of the Pesisir Law that the government submitted to the parliament. The NA suggests that the Constitutional Court’s decision on the Pesisir Case was the main reason for the amendment.\(^{47}\) As the NA states, ‘it is urgent to initiate the revision of Pesisir Law in accordance with Constitutional Court Decision No 3/PUU-VIII/2010’.\(^{48}\)

The drafters of the NA (whose names are not specified) appeared to be aware of the substance of the Court’s decision and tried to consider almost every aspect of the Court’s ruling and reasoning in the drafting process. For example, the drafters carefully considered the Court’s comments about the need to shift coastal and small island management from rights-based to permit-based, and they devised recommendations based on existing legal and social circumstances. The drafters also considered the importance of local and traditional community participation in coastal and small island management, which the Court discussed in its reasoning but did not incorporate in its rulings. Later, in the first meeting with the DPR, the MMFA emphasised this, stating that, ‘Generally, the Bill on the Amendment of the Management of Coastal and Small Island Law focuses on the provisions that were invalidated by the Constitutional Court and also provisions on public participation’.\(^{49}\)

The parliament formally accepted the draft law for deliberation and the government’s NA on 9 July 2013 and began discussing it in Commission IV, which was chaired by Firman Subagyo from Golkar.\(^{50}\) In the plenary session to close the first stage of discussion, Subagyo said the reason for amending the 2007 Pesisir Law was to revise some provisions that were invalidated by the Constitutional Court.\(^{51}\) The main points of the parliamentary discussions, which are based on the draft law and NA from the government, appeared to respond to the Court’s decision in its entirety — that is, not only to the Court’s holding (amarn putusan) but also to its

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47 ‘Academic Draft of Management of Coastal Area and Small Islands Bill (Government Version)’ (Ministry of Maritime and Fisheries Affairs). Document obtained from the Parliament’s Information Unit (PPID) on 3 May 2016.
48 Ibid 119.
51 Ibid.
reasoning. This is significant because it demonstrates that the government has gone beyond what strict compliance requires, at least on one view, as discussed above. The main points of discussions were: replacing HP3s with a permit system, establishing the rights of local communities and customary communities to manage coastal and small islands area, and communities’ right to participate in the coastal management development plan.

At the time of the amendment, the drafters inserted two other provisions that the Pesisir Law Case did not require: art 26A, which opens coastal management to foreign investment; and art 78A, which gives authority to the minister to change the status of coastal zones (perubahan peruntukan) from conservation to exploitation. In short, it appears that lawmakers, perhaps initially well intentioned, have used the opportunity presented by the Constitutional Court decision to pursue their own financial interests by adding provisions that appear to be clearly unconstitutional.

I will now discuss the substance of the revisions and assess whether they strengthen environmental rights and, more broadly, indicate that the government can be said to have complied with the Court’s decision, which, as discussed in Chapter 1, appears to be a prerequisite to the effective constitutionalisation of environmental rights.

1 Procedural Environmental Rights (PERs): Beyond Compliance?

As discussed, the applicants had requested the Court to invalidate art 14(1) of the 2007 Pesisir Law because it excluded communities from participating in coastal and small island management development plans (commonly called RSWP-3-K, RZWP-3-K, RPWP-3-K and RAPWP-3-K). As mentioned, although the Court appeared to agree with the applicant’s arguments in its reasoning, it refused to invalidate this provision in its ruling and provided no reason for doing so.

Nevertheless, when discussing the Pesisir Law amendments, lawmakers ultimately appeared to side with the Court’s views about the need for community participation in development plans, even though these views were not reflected in the holding itself. These views were also not reflected in the government’s initial draft, although they were expressed in the government’s NA. In practice, inconsistency between NAs and the draft laws they are developed to support occurs for various reasons, including that the NA drafting team was different from the legal drafting team, and that the NA drafting was outsourced to a university or think tank that expresses views that parliamentarians do not ultimately endorse.

52 Ibid.
The initiative to revise this provision arose during a statement made in the parliament by Rahman Amin, a representative from the Prosperous Justice Party.\(^{54}\) He reasoned that community participation was important in every decision-making process to avoid problems that might occur in the future, although he did not specify precisely what those problems were. This proposal was endorsed by government representatives and the other drafters. Accordingly, even though the Court did not invalidate art 14(1) on coastal development plans in its *amar putusan*, lawmakers decided to revise this provision to include community participation in coastal management development plans. This article now states: ‘(1) The proposed formulation RSWP-3-K, RZWP-3-K, RPWP-3-K, and RAPWP-3-K are carried out by local governments, communities, and businesses’.

Lawmakers also inserted several provisions that strengthen communities’ rights in the management of coastal and small islands — for example, art 60(1) includes the right to propose traditional fishing and customary community zones during zonation development planning,\(^{55}\) and to obtain legal aid when legal problems emerge in coastal and small islands management.\(^{56}\) In this way, lawmakers have gone further than the Constitutional Court decision required, and the result is strengthened environmental rights, including indigenous rights, at least on paper. Although it is impossible to say with certainty that this change would not have occurred if not for the Constitutional Court’s decision in the Pesisir Case, it is reasonable to assume that, given the legislature’s well-known slow pace and reactive rather than proactive approach to law reform,\(^{57}\) it would likely not have seen this as enough of a priority to include it on the Prolegnas but for the Court’s decision.

2 From Right-Based to Permit-Based Approach: Between Compliance and Evasion?

As discussed in Chapter V, the applicants also asked the Court to invalidate provisions concerning HP3 because they provided entitlements in the management of coastal and small islands to the private sector. They argued that this violated art 33(3) of the Constitution and the right to life (art 28A) of indigenous communities. The Court agreed with the applicants and invalidated 14 provisions relevant to HP3 in the 2007 Pesisir Law.\(^{58}\)

The government complied with the Court’s decision in relation to HP3. The NA accepted that 14 provisions in the 2007 Pesisir Law concerning HP3 were inconsistent with the Constitution

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\(^{55}\) ‘Academic Draft of Management of Coastal Area and Small Islands Bill (Government Version)’ (n 47) art 60 (1b) and (1c).

\(^{56}\) Ibid art 60(1).


\(^{58}\) 2007 Pesisir Law (n 43).
and therefore required amendment.\textsuperscript{59} In a chapter outlining the scope of the proposed revision, the NA states that

the Constitutional Court’s decision declared the HP3 invalid. However, the Constitutional Court leaves open the possibility of utilising coastal resources using a permit-based system. Consequently, there should be changes in the name and definition, nature and characteristics, limitation of objects that can be utilised, subjects given authority, requirements for granting [a permit], authority and obligations of the subject, period of utilisation and expiration.\textsuperscript{60}

The NA concludes that ‘it is urgent to initiate the revision of Pesisir Law in accordance with Constitutional Court decision No 3/PUU-VIII/2010.’\textsuperscript{61} The draft law that the government submitted to parliament followed the NA and removed all provisions invalidated by the Court concerning the HP3.

In the discussion at the commission level in parliament, most of the party representatives agreed with the draft from the government, except in relation to several matters, such as the definition and type of permit. For example, the government proposed that management of coastal areas should require two types of permits: a location permit (izin lokasi) and a utilisation permit (izin pemanfaatan)\textsuperscript{62} but the Golkar Party proposed changing the name of the latter to management permit (izin pengelolaan).\textsuperscript{63} However, in essence, there was no substantial difference between the two.\textsuperscript{64} The government and the parliament finally agreed to use the term ‘management permit’; that is, a permit to use (memanfaatkan) coastal and small island resources\textsuperscript{65} — simply because the Constitutional Court also used this term in its decision.\textsuperscript{66} These types of permits are common and are similar to permit systems used in other sectors, such as forestry and mining, to which the lawmakers also referred when drafting the bill. Lawmakers appeared to follow the Court’s decision here by reconfiguring some provisions about coastal and small island management from being rights-based to permit-based. In the final plenary meeting of the second stage before agreement was formally reached, the Chair of Commission IV, Romahurmuziy, again emphasised:

Based on the invalidation of some provisions [by the Constitutional Court], the rights to manage coastal resources lose their legal basis. On the other hand, there is a pressing need to

\textsuperscript{59} ‘Academic Draft of Management of Coastal Area and Small Islands Bill (Government Version)’ (n 47) 52–65.
\textsuperscript{60} Ibid 6.
\textsuperscript{61} Ibid 109.
\textsuperscript{62} Working Committee (n 49) 8.
\textsuperscript{63} ‘List of issues (DIM), Management of Coastal Area and Small Islands Bill’ (n 54) 13.
\textsuperscript{64} This was confirmed by Professor Maria Soemardjono, one of the experts invited by the DPR during the public consultation process (Public Consultation Meeting with Expert, Parliamentary Notes, 18 September 2013, 8–12).
\textsuperscript{65} As seen in art 1 point 18A of Law No 1 of 2014 on the Management of Coastal Area and Small Islands (2014 Pesisir Law).
increase the welfare of coastal communities and the state is obliged to fulfill it. Therefore, the Pesisir Law needs to be revised.  

However, the new provisions do not radically change the procedural details for obtaining access to manage coastal and small island resources. The amended Pesisir Law establishes the permit system as follows. Managing coastal and small islands requires location and management permits. Location permits provide the permit holder with a legal basis to obtain a management permit, while management permits give the permit holder authority to carry out activities such as salt production, marine bio pharmacology, marine biotechnology and tourism. These permits are available for 20 years for individual citizens, corporations that are established by Indonesian law and cooperatives that are established by communities, and they can be twice extended for another 20 years. To obtain those permits, they must fulfil technical, administrative and operational requirements. The permits are issued by the ministry, a governor or regent depending on the location of the resource. In addition, the right of customary communities to manage their territories is recognised, and they are exempted from the obligation to obtain a permit to manage those territories.

Some background discussion is required to explain how permits are seen to accord more control to the state, at least compared with rights. In Indonesia, natural resources management entitlements can generally be classified into four forms: ‘rights’ to utilise natural resources, ‘permits’ to utilise natural resources, ‘contracts’ with natural resources as their object and ‘kuasa usaha’ (authority to carry out activities on behalf of a certain legal subject) in natural resources. According to Hadjon, in the Indonesian context, a permit is essentially government approval to allow activities that are otherwise considered illegal by laws and regulations. A permit has three characteristics: individual, concrete and final. Individual means that the authority (kewenangan) to carry out an action on a particular object is attached to permit holders (individuals or legal entities). Consequently, the authority listed in the permit may not be transferred to other legal subjects and will expire if the given period passes, if the individual dies or if the legal entity dissolves. Concrete means that the authority relates to a particular action, namely using (menggunakan), utilising (memanfaatkan) or

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68 2014 Pesisir Law (n 65) art 1 point 18 and 18A.
69 Ibid art 16.
70 Ibid art 19, which adds that permissible activities will be defined in implementing regulations.
71 Ibid art 22A.
72 Ibid art 22B.
73 Ibid art 50.
74 Ibid art 21.
75 Ibid art 22(1).
76 ‘Academic Draft of Management of Coastal Area and Small Islands Bill (Government Version)’ (n 47) 61–72.
77 Philipus M Hadjon, Pengantar Hukum Perizinan (Yuridika, 1993) 2–3.
78 Ibid 7.
managing (mengusahakan) an object. While all of these terms are classified as ‘activities’, they are still quite vaguely expressed. For example, ‘use’ could mean a number of things for various purposes. The authority granted by the permit does not include ownership (hubungan kepemilikan) of that object by the legal subject, or only the designation of a particular location as the place where the activity can be conducted. Final means that the authority takes place only after the permit is granted, and it can only be used for the time specified in it. In this way, the permit-based system treats the government as the only legal entity with authority to issue a permit if the application meets the technical, administrative and operational requirements, or to reject the application if it does not meet the requirements. The government can also revoke a permit if the permit holders do not comply with laws and regulations and the requirements listed in the permit. In contrast, the permit holders’ entitlements are limited to those listed in the permit. Unlike ‘rights’, they cannot be transferred to other parties, and they do not constitute ownership, which can lead to privatisation.

Critically, lawmakers appeared to neglect the part of the Constitutional Court decision that clearly states that when the state is exercising control over natural resources, it must also consider environmental rights. Lawmakers removed environmental safeguards contained in art 21(5) of the old Pesisir Law, which had required the authorities to reject an HP3 application if the proposed activities: posed a serious threat to the sustainability of coastal areas; were supported by no scientific evidence; and would potentially cause irreversible damage to the environment. The new Pesisir Law does not have these preventive measures. Instead, it confers a mandate on the government to establish permit requirements by GR. Unfortunately, at the time of writing, the regulation has not been issued, although the minister produced a draft version in 2015. Therefore, in terms of environmental protection, the Court’s decision appears to have prompted a rather deleterious result, at least in theory.

Nevertheless, it is worth noting that the new Pesisir Law does not entirely remove environmental considerations from the permit process. The minister can revoke a permit if the activities performed under it have a significant, wide and strategic impact. The Law defines this impact to include changes affecting the biophysical environment, such as climate change, as well as the social and economic circumstances of the current and future generations. These provisions are obviously important, but they suggest that the damage — whether environmental, social or economic — must have already occurred for the minister to be able to revoke the permit. This is important because it means that environmental damage cannot be prevented using this system.

Worse, during the revision process, lawmakers changed arts 20 and 30, which limit local and traditional communities’ access to natural resources and allow the minister to rezone core

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79 Decision on Pesisir Case (n 53) 157–158.
81 2014 Pesisir Law art 51.
82 Ibid art 1 point 27A.
conservation zones (zona inti konservasi) into exploitation zones without requiring any environmental safeguards to be met. Article 20 of the 2014 Pesisir Law states that

1. National and Regional Governments must facilitate the granting of Location Permits and Management Permits to local communities and traditional communities;
2. Permits as referred to in paragraph (1) are provided to local communities and traditional communities who utilize (melakukan pemanfaatan) coastal and small island spaces and resources to fulfill their daily needs.”

Article 30 of the 2014 Pesisir Law stipulates that the minister may change the status of utilisation (melakukan perubahan peruntukan) of a core conservation zone (zona inti Kawasan konservasi) to that of an exploitation zone. The minister can make this change if it is recommended by a joint or integrated research team (tim penelitian terpadu) that consists of ministerial officers, community leaders, academics, and marine and fisheries practitioners. A change of status of utilisation that has a significant, wide and strategic impact must be approved by parliament, and the procedure to change this status must be regulated further by an MR.

The government appears to have been motivated by good intentions to include these two provisions. According to the government, requiring local and traditional communities to obtain a permit would protect them because, by holding a permit, they would have legal proof of their entitlements. Thus, if they were ever in conflict — for example, with a corporation — they would hold a strong legal position. Likewise, conferring a mandate exclusively on the minister to change a core conservation zone into an exploitation zone would prevent local governments from doing so. However, these two provisions undermine important aspects of the Court’s decision. Article 20 of the new Pesisir Law, which prohibits local and traditional communities from utilising coastal and small island resources for daily needs without a permit, is inconsistent with the spirit of the Court’s decision, which requires that natural resources be used for the greatest prosperity of citizens. As mentioned, the Court held that a rights-based system in coastal management (HP3), under which the private sector could obtain entitlements, violated coastal communities’ rights to life (art 28A) and had relinquished the necessary level of state control over natural resources under art 33(3) and (4). According to the Court, under the rights-based system,

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83 Ibid art 30(1).
84 Ibid art 30(2).
85 Ibid art 30(3).
86 Ibid art 30(4).
87 The Drafting Team, Parliamentary Notes 6 December 2013 (Indonesian Parliament, 2013) 63.
88 2007 Pesisir Law art 30. The 2007 Pesisir Law allowed the local government to change the core conservation zone.
89 Decision on Pesisir Case (n 53) 161–165.
the largest portion of coastal area will be controlled by individuals or private companies with big capital and high technology. This will result in the loss of access and freedom and loss of work for most Indonesian people who work as fishermen to make a living in coastal waters.\textsuperscript{90}

Thus, despite the Court’s prompting to replace the rights-based system with a permit-based system, local and indigenous communities will still need to apply to use coastal resources even for their daily needs. Requiring them to obtain a permit appears to go against the grain of the Court’s decision. Arguably, if these provisions are reviewed by the Court at a later date, they might be invalidated, largely for impeding access of indigenous communities to natural resources. Similarly, art 30, which allows the minister to change conservation zones into exploitation zones without requiring the imposition of strict environmental protections on permit holders, is inconsistent with parts of the Court’s decision that require the state to consider environmental rights when exercising its control over natural resources. Although art 30 confers a mandate upon the government to further regulate this matter in an MR, the government was very late in responding to the mandate. Only in 2018 did the MMFA issue MR No 3 of that year on the Procedures to Change the Allocation and Function of the Core of Conservation Zones in Coastal and Small Island Area. As the title suggests, this regulation mainly covers the procedural steps or stages that the minister must follow to obtain approval from the parliament to change the utilisation of a conservation zone. It does not give guidance about, for example, requirements or preventive measures to ensure that the change of utilisation will not cause environmental damage.

3 Amendment as a Momentum to (Re)gain Power and Authority

While compliance with the Pesisir Case was initially the main reason for amending the old Pesisir Law, during the deliberation process, both parliament and the government agreed to use the momentum of the amendment to address additional issues.\textsuperscript{91} The reason for this is not clear, but the MMFA ultimately proposed the inclusion of two additional provisions. The first relates to foreign investment in coastal and small island management and the second to authority over conservation zones.

For foreign investment, art 26A of the amended Pesisir Law states that:

(1) Utilisation of small islands and surrounding waters using foreign investment requires a permit from the Minister;
(2) Foreign investment as referred to in sub-article (1) must prioritise the national interest;
(3) Permits as referred to in sub-article (1) can be awarded based on a recommendation from the Head of District/Municipality;
(4) Permits as mentioned in sub-article (1) must meet the following requirements:
   a. Legal entity in the form of limited company (Perseroan Terbatas);

\textsuperscript{90} Ibid 161.
\textsuperscript{91} Commission IV, \textit{Parliamentary Notes 28 August 2013} (Indonesian Parliament, 2013). First consultation meeting with Directorate General for Marine, Coastal and Small Islands (DG KP3K) of the MMFA.
b. Guarantee public access;

c. Uninhabited;

d. Not yet exploited by local community;

e. In partnership with Indonesian participant (peserta Indonesia);

f. Performing gradual transfer of shares to Indonesian participants;

g. Performing transfer of technology;

h. Considering ecological, social and economic aspect of the area;

(5) Further provisions about shares and land transfers as referred to in sub-article 4 shall be regulated by Presidential Decree.

Article 78A now states that ‘Conservation zones in coastal and small islands areas which have been determined by laws and regulations prior to the enactment of this Law fall under the authority of the Minister [of Maritime and Fishery Affairs]’.

Foreign investment appears to have been of great importance to both the government and the national parliament because they dedicated considerable time to discussing it in a closed meeting (rapat tertutup) on 6–7 December 2013. For the parliament, foreign investment in coastal and small island resource management was needed because the sector was highly strategic and required high levels of investment capital. However, it was important to ensure that foreign investment would not be detrimental to the national interest. To this end, parliament’s main concern during the discussion was the permit system and the requirement to eventually transfer shares and technology from foreign investors to the government. The motive here appeared to be purely normative — that is, to comply with arts 33(2) and (3) of the Constitution, which required that strategic sectors be managed by the government for the greatest benefit of the citizens. However, it is also possible that the business interests of individual members of parliament played a part in this discussion. During a consultative meeting with NGOs, an MP from the Indonesian Democratic Party of Struggle, Sudin, said, ‘We invited you to give inputs, article by article, in the interests of citizens and the national interest, because often in a law-making process like this, some people will try to include provisions ordered by businesspersons or politicians.’ However, there is no evidence that any influence peddling or corruption occurred during the discussion of the 2014 Pesisir Law.

The MMFA, representing the government, generally agreed with the parliament regarding the inclusion of art 26A. However, it appears that the MMFA’s motivations were different to those of the parliament. It saw this provision as an opportunity to take authority over permits for foreign investment in small island management from local governments. During

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92 See particularly The Drafting Team (n 87); The Drafting Team, Parliamentary Notes 7 December 2013 (The Indonesian Parliament).

93 Working Committee, Parliamentary Notes 16 September 2013, Consultative Meeting with NGOs (Indonesian Parliament, 2013) 25.

94 In 1999, the Indonesian Government began applying the decentralisation policy (Law No 22 of 1999 on Local Governance). In 2004, the national government decentralised most of its authority to local government except for seven matters: foreign policy, defence, security, judiciary, religion, fiscal and
discussions, the MMFA argued that giving this authority exclusively to the Minister of the MFA was important to stop local governments from issuing permits arbitrarily to foreigners, often in circumstances that contradicted the national interest. One example that the government mentioned was the issuance of mining permits to a foreign company on Bangka Island by the North Minahasa local government. This local government allowed the company to operate without an environmental permit (izin lingkungan) and infringe on spatial planning regulations. The MMFA’s interest corresponded with the general policy of the national government at the time to curb the adverse impacts of regional autonomy on natural resources and the environment by pulling back the authority of local governments to manage natural resources.

The MMFA used similar arguments to justify the transfer of authority over marine conservation zone management to the MMFA. However, this time, the MMFA sought to take authority from the MoEF. During discussions in a closed meeting between the government and the DPR, MMFA representative Sudirman Saad said:

As mandated by the Minister for Maritime and Fishery Affairs, it is better if there is an additional provision, either put in the provisions on conservation, or in the transitional provisions, that stipulates that the management of all water conservation areas and those that relate to coastal and marine ecosystems must be given (diserahkan) to the Ministry that is responsible for Maritime and Fisheries.

Conflicts regarding government authority over conservation zones has been a feature in successive Indonesian administrations. Although almost two-thirds of its territory consists of seawater, the Indonesian Government only established a ministry to deal with marine affairs in 1999. Related laws, such as the Law on Marine (Undang-undang Kelautan) and the Law on monetary policy (Law No 32 of 2004 on Local Governance). However, as a result of the adverse effect of decentralisation on natural resources and the environment, the national government attempted to pull its authority back and amended the 2004 Local Governance Law with Law No 23 of 2014 on the Amendment of Law No 32 of 2004 on Local Governance.


Ibid 45.


Law No 23 of 2014 on the Amendment of Law No 32 of 2004 on Local Governance mostly gives authority to provincial governments, as the representatives of the national government, to manage natural resources (see particularly arts 14, 27, 28 and 29).


Law No 32 of 2014 on Marine.
on the Management of Coastal and Small Island Area,\textsuperscript{101} were only passed in recent years. Nevertheless, the Law on Conservation of Biotic Natural Resources and Its Ecosystem (Conservation Law)\textsuperscript{102} has been in effect since 1990. Although this Law does not confer a mandate upon a specific ministry to be responsible for conservation matters, the MoF (before it merged with the MoE in 2015) appears to have assumed this responsibility. This was then confirmed by the 1999 Forestry Law, which stipulates that ‘this Law aims to broadly cover forest and forestry, including matters related to conservation of biotic natural resources and ecosystems’.\textsuperscript{103} This precluded the MMFA from claiming authority over marine conservation areas, even though it appeared to have been established for the very purpose of conservation, including in marine and coastal areas.

Since the establishment of the MMFA, the MMFA and the MoF have negotiated to resolve this conflict, with the minister of the MMFA wanting to take over marine and coastal conservation areas from the MoF. However, in 2009, 10 years after the MMFA’s establishment, Forestry Minister Ms Kaban reached an agreement with the minister of the MMFA, Freddy Numberi, to hand over eight marine conservation areas to the MMFA,\textsuperscript{104} while seven of them\textsuperscript{105} (the largest areas) remained under the MoF.\textsuperscript{106} In 2011, under the new Minister Fadel Muhammad, the MMFA tried to persuade the MoF to hand over the remaining conservation zones, but Forestry Minister Zulkifli Hasan refused on the grounds that this would conflict with the Conservation Law.\textsuperscript{107} The MMFA tried again in 2013, but the response from the MoF was a proposal to revise the Conservation Law so that both ministries could clarify their respective authority.

During the discussion in the parliament regarding the Pesisir Law, this history of jurisdictional conflict was mentioned by the representative from the MMFA. The parliament did not object to authority being transferred to the MMFA. The chairperson of the meeting (who was also the chairperson of Commission IV, which had discussed the bill before it was put to a plenary session of the DPR), Firman Subagyo from Golkar, supported this idea, stating that:

\begin{quote}
Maybe I should stress it again, this must be immediately included in the provisions of this legislation because to this day marine conservation areas are still under the authority of the Ministry of Forestry. Now we have the Ministry of Maritime and Fisheries Affairs, I think we
\end{quote}

\begin{thebibliography}{9}
\bibitem{101} 2007 Pesisir Law, which has been amended by Law No 1 of 2014 on the Amendment of the Law on the Management of Coastal and Small Island Area.
\bibitem{102} Law No 5 of 1990 on the Conservation of Biotic Natural Resources and Its Ecosystem.
\bibitem{103} Law No 41 of 1999 on Forestry, General Elucidation.
\bibitem{104} These include Marine Touristic Park Gili Ayer, Gili Meno, Gili Trawangan, Pulau Padaido, Kepulauan Kapoposang and Pulau Pieh and Perairan, as well as Marine Conservation Park Kepulauan Panjang, Taman Laut Banda and Kepulauan Aru.
\bibitem{105} These include Marine National Park Kepulauan Seribu, Kepulauan Karimun Jawa, Bunaken, Wakatobi, Taka Bonerate, Teluk Cendrawasih and Kepulauan Togean.
\bibitem{106} ‘Membonceng Revisi, Merebut Kewenangan’, \textit{Agro Indonesia} (online, 25 March 2014) \texttt{<http://agroindonesia.co.id/2014/03/membonaseng-revisi-merebut-kewenangan/>}.
\bibitem{107} Ibid.
\end{thebibliography}
should start to give authority to ministries that have competence. ... I think we must be courageous so that there are clear assignments and legal bases to regulate this ...

Although this additional provision reduced the MoEF’s authority, the MoEF was not consulted about it. In a subsequent meeting on 9 December 2013, Subagyo even rejected a suggestion from a member of parliament, Tetty Kadi, that the MoEF be consulted to avoid the possibility of the MoEF filing a judicial review application with the Constitutional Court over the amended Pesisir Law. He said ‘It is the problem of the government, isn’t it? So don’t involve the parliament, our task is to make law, everything else that comes next is the task of government, which should be discussed at the level of ... The President’.

Unsurprisingly, the MoEF was upset with the new Law, and it sought to retain its authority over the seven largest conservation areas. It did not choose to file a judicial review with the Constitutional Court, but instead asked President Jokowi for a declaration that they retain authority over the zones in question. As a result, the President made the declaration, and the authority over marine conservation zones remains with the MoEF at the time of writing. It is not clear why the President made the declaration, or its precise legal status; however, it is clear that there are now conflicting laws that regulate marine conservation areas — the 1990 Conservation Law and the 2014 Pesisir Law — and the Constitutional Court decision perpetuates institutional rivalries between the MoEF and the MMFA.

The response of the government and the legislature to the Pesisir Case demonstrates a willingness to comply with Constitutional Court decisions by amending the provisions invalidated by the Court. The government was even willing to go beyond what the Court’s decision required and use the opportunity the Court presented to amend the relevant statute to enact even greater environmental protections. However, at the same time, lawmakers appear to have made some amendments that contravene the spirit of the Court’s decision and undermine statutory environmental protections, perhaps to pursue personal interests or gain advantages in institutional rivalries.

**F 2014 Plantation Law**

In 2011, the Constitutional Court invalidated arts 21 and 47 of the 2004 Plantation Law. As discussed in Chapter VI, in its decision in the Plantation Law Case, the Court agreed with the applicants’ arguments that these two provisions, which establish criminal sanctions for any activities that result in damaging plantations or disrupting plantation businesses, are

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unclear, unfair, subject to multiple interpretations and often used by plantation companies and law enforcement agencies to ‘criminalise’ small farmers and customary communities, including the applicants. Hence, the provisions violated the rule of law, legal certainty and equality before the law.

In October 2013, the DPD initiated a bill to replace the Plantation Law and produced an NA and Plantation Bill (herein, ‘the DPD version’). The NA accompanying the DPD bill suggested that compliance with the Constitutional Court decision was not the only reason for replacing the Law, but it was clearly a factor. The NA referred to the ‘current development in Indonesia’s plantation sector, including the result of the judicial review in the Constitutional Court’, which makes it ‘urgent to revise the Plantation Law’. It also referred to the need to speed up the process to provide a stronger legal basis for the plantation sector because of the increasing number of conflicts between communities and plantation companies. In fact, the DPD bill appeared to have been developed with the interests of those companies in mind, because it maintained two provisions similar to those invalidated by the Constitutional Court. The provisions prohibited anyone from taking action that would result in damage to a plantation, using plantation land without permission and undertaking other actions resulting in the disruption of a plantation business. Criminal sanctions were imposed for breach. Thus, the DPD version clearly failed to comply with the Constitutional Court’s decision, both in substance and in spirit.

Nevertheless, the DPD version was fortunately never tabled in parliament. No formal reason was given for this but, as mentioned above, the DPD is a weak institution when it comes to lawmaking. It has no formal legislation-initiating powers and relies on the DPR to adopt its bills and put them before parliament. The DPR is notorious for rejecting DPD initiatives and for denying the DPD a meaningful role in the legislative drafting process. Consistent with this practice, the DPR ignored the DPD’s version and instead drafted its own Plantation Bill in the following year (2014).

The DPR and the government rushed the deliberation of the Plantation Bill. They discussed the bill in less than one month and enacted it in October 2014. Like the DPD version, it appears

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114 Ibid.


that the DPR’s main reason for drafting the bill was not complying with the Constitutional Court’s decision. However, it appears that the Constitutional Court’s decision was one reason; it was mentioned in the consideration section of the bill and in the parliamentary commissions where the bill was discussed. In the first meeting between the DPR and the government, the Chair of Commission IV said:

The Constitutional Court’s decision, the changing paradigm of plantation management, and the development of community legal needs have prompted Commission IV to revise Law No. 18 of 2004 on Plantations ... in the hope of providing legal certainty and to anticipate future challenges in the plantation sector.¹¹⁸

Some commentators argue that lawmakers were pushing a hidden agenda — that is, to open more access for the liberalisation and expansion of plantations.¹¹⁹ Both the DPR and the government are said to have been ‘captured’ in the lawmaking process to advance the interests of plantation owners and companies, as well as their own.¹²⁰ The Law was criticised for being pro-business, furthering injustice and threatening the environment.¹²¹ As a result, the new Plantation Law was brought to the Constitutional Court for review twice within a year of its enactment.¹²²

I will now discuss the lawmakers’ level of compliance with the Constitutional Court’s decision when drafting the 2014 Plantation Law. It is not known whether the DPR produced an NA to support the drafting process of the 2014 Plantation Law. Despite making many formal and informal requests to the DPR, as well as questioning many interviewees and conducting an extensive search, I have been unable to find an NA, although I discovered a letter from the DPR speaker suggesting that they sent an NA along with the bill to the government.¹²³ However, the NA was never mentioned or referred to in the deliberation processes. Thus, my assessment of the compliance of the Law with Constitutional Court decisions is based on the DIM and the parliamentary notes that I obtained during my fieldwork.¹²⁴

¹²⁰ Ibid.
¹²³ Letter of the Speaker of the DPR to the President regarding the submission of the Plantation Bill, 16 July 2014.
¹²⁴ Plantation Bill — DPR Version, List of issues (DIM) dated on 15 September 2014, Parliamentary Notes of Working Committee 15 September 2014, Parliamentary Notes of Drafting Committee 24
In the first meeting between the DPR and the government, the Vice Chair of Commission IV gave three reasons for wanting to replace the 2004 Plantation Law: to respond to the Constitutional Court’s decision, to change the paradigm of plantation management and to address current legal developments in society. Based on those general reasons, the DPR identified eight areas of improvements for discussion: farmers’ welfare, business opportunities for domestic business entities and farmers, conflict resolution (particularly for customary communities), permit mechanisms and procedures, sanctions for authorities, limitations on foreign investment, public participation, and environmentally sound plantation management.

Although complying with the Constitutional Court’s decision was mentioned as one of the reasons for the Plantation Law’s replacement, the true influence of the decision is highly questionable. The timing of the deliberation process and the enactment of the Law suggests that complying with the Constitutional Court’s decision was not the main reason for replacing the Law. Indeed, the parliament included provisions equivalent to those the Constitutional Court had invalidated in the old Law. Thus, it is likely that local and indigenous communities will still have to deal with legal uncertainty when accessing natural resources.

The next section will discuss aspects of the process by which the Plantation Law was revised by lawmakers, which appear to indicate that they were acting in their own economic interests when revising the Law. It will begin by discussing the planning stage of lawmaking and then considering the parliamentary deliberation process. As will be shown, the lawmakers were ill-prepared to revise the law, and they were able to ignore legal constraints to pursue their personal interests.

1 Poor Planning of Lawmaking Processes

As discussed above, the Law on Law-making requires that the proposed bill be listed in the Prolegnas and that lawmakers produce a priority list of bills to be discussed each year. The main exception is for bills that might be needed in emergency circumstances, such as conflicts or natural disasters, which can be drafted, deliberated and enacted in an ad hoc fashion as required. The Plantation Bill was in fact listed as a DPR initiative in the 2010-2014 Prolegnas issued in 2010, before the application for judicial review of the Plantation Law was brought...
before the Constitutional Court on 20 August 2010. However, the bill was never scheduled in the annual Prolegnas of 2012–2014 or in the List of Open Cumulative Bills, which allows bills not included on the list to be discussed in response to Constitutional Court decisions.

Despite its absence in the annual Prolegnas, the bill was tabled and discussed by lawmakers anyway. The DPR announced its plans to revise the Plantation Law, and it invited the government to start the deliberation process on 14 July 2014. However, the President took some time to respond to the DPR’s invitation. His formal response letter, sent on 3 September 2014, assigned the minister of agriculture to lead the government’s team in the deliberation process. Deliberations took place during the last sitting of the DPR in 2009–2014, whose term ended on 30 September 2014. As a result, lawmakers had less than a month to discuss the bill. Further, the DPR and the government spent only four days meeting and discussing the bill. During that short period, they discussed 96 articles, about which 545 issues were raised, and they considered eight areas for improvement. The DPR and the government eventually agreed to pass the bill on 29 September 2014, a day before the parliamentary term ended. President Susilo Bambang Yudhoyono then signed the Law on 17 October 2014, three days before his term ended.

This extremely tight schedule had various consequences. First, the government did not have adequate time to gather comments and inputs from relevant ministries, such as the MoEF, Ministry of Industry and Ministry of Law and Human Rights. As the government’s representative mentioned in the first meeting between the DPR and the government, ‘given the limited time we have, the DIM (which we submitted) was a result of internal discussions in the Ministry of Agriculture, and did not involve other relevant ministries’. This is a major shortcoming, because plantation issues are intersectoral. Lack of coordination and discussion between all ministries whose portfolios touch on issues relating to plantation likely resulted in a failure to identify all relevant issues and to obtain ‘buy in’ — that is, a genuine

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130 Letter of the Speaker of the DPR to the President regarding the submission of the Plantation Bill, 16 July 2014.
131 Letter of the President of the Republic of Indonesia to the DPR, 3 September 2014.
133 Commission IV, Parliamentary Notes 15 September 2014 (n 132)
135 Commission IV, Explanation of Commission IV DPR on the Plantation Bill (n 118) 3.
136 Decree of the DPR RI No 24/DPR RI/I/2014 on the Agreement of the DPR RI on the Plantation Bill.
commitment from the ministries to follow the law once enacted. For the purposes of this chapter, most critical was the exclusion of the Ministry of Law and Human Rights, whose general function in lawmaking is to ensure that bills are consistent with existing laws and regulations and the Constitutional Court’s decisions before they are enacted.\(^\text{139}\) This is, of course, a substantial and significant task, yet it appears that because this ministry was not involved, very little attention was paid to consistency and compliance.

Second, because the bill was not listed in the annual Prolegnas,\(^\text{140}\) the public and civil society were not aware of the deliberation processes.\(^\text{141}\) As a result, they were not able to provide inputs to lawmakers and scrutinise the deliberation processes as they do for most other statutes.\(^\text{142}\) For example, there was no consultative meeting (\textit{rapat dengar pendapat umum, RDPU}) in which civil society usually participates in the lawmaking process.\(^\text{143}\) Moreover, the deliberation process took place during a presidential campaign, so there was almost no space in the mainstream media for a discussion of any issues other than election-related matters.\(^\text{144}\) This lack of public participation and media attention arguably resulted in many weaknesses of the bill not being identified, much less discussed and addressed.\(^\text{145}\) It is arguable that these circumstances made it possible for the reappearance of provisions in the new Law that were equivalent to the two provisions that the Constitutional Court invalidated in the Plantation Law Case.

2 \textit{Reappearing Criminal Provisions: Legal Uncertainty Continues}

Generally, the 2014 Plantation Law provides stronger protection for indigenous communities than its predecessor. It requires plantation owners (companies) to obtain consent from indigenous communities and to give compensation whenever they want to operate on customary lands.\(^\text{146}\) Violation of this provision can lead to the imposition of criminal sanctions stated in art 107(b): up to four years’ imprisonment or a fine of 4 billion rupiah (approximately USD282,500). Moreover, authorities are prohibited from issuing permits for plantations on customary lands without indigenous communities’ consent.\(^\text{147}\) Any official who violates this

\(^{139}\) Law on Law-Making (n 20) art 49(3).
\(^{140}\) Prolegnas is a public document that is usually placed on the DPR’s websites and can be easily accessed.
\(^{141}\) Interview with Andi Muttaqien, Deputy Director for Advocacy of the Institute for Policy Research and Advocacy (ELSAM) and one of the Lawyers for the Plantation Law Case, Jakarta (26 July 2017) and Gunawan, Senior Advisor for IHCS, Jakarta (24 August 2017).
\(^{142}\) Muttaqien (n 141).
\(^{143}\) In this type of meeting, the DPR usually invites several relevant NGOs and academics to give their opinion on the bill. Alternatively, NGOs and academics can propose to be involved in the meeting by sending a formal letter to the DPR/relevant commission.
\(^{144}\) Khatarina (n 119) 11.
\(^{145}\) Khatarina (n 119).
\(^{146}\) Law No 39 of 2014 on Plantation art 12.
\(^{147}\) Ibid art 17.
provision faces five years of imprisonment or up to 4 billion rupiah in fines.\textsuperscript{148} However, at the same time, the Law imposes very demanding requirements for the formal recognition of customary communities,\textsuperscript{149} which many of these communities are unlikely to be able to meet.

Perhaps most important is that the new law revives various provisions that the Constitutional Court removed from the 2014 Plantation Law. Article 55 of the 2014 Plantation Law states that

\begin{itemize}
\item everyone is prohibited from illegally:
\begin{itemize}
\item working on (mengerjakan), using (menggunakan), occupying (menduduki), and/or controlling (menguasai) plantation land;
\item working on, using, occupying, and/or controlling communities’ land or customary communities’ land with intent to operate a plantation business;
\item cutting down plants in a plantation area; or
\item harvesting and/or collecting plantation products.
\end{itemize}
\end{itemize}

Meanwhile, art 107 stipulates that

\begin{itemize}
\item every person who:
\begin{itemize}
\item works on, uses, occupies, and/or controls plantation land;
\item works on, uses, occupies, and/or controls community lands or customary communities’ land with intent to operate a plantation business;
\item cuts down plants in a plantation area; or
\item harvests and/or collects plantation products;
\end{itemize}
\end{itemize}

as referred to in Article 55, shall be subject to a maximum term of imprisonment of 4 (four) years or a maximum fine of Rp.4,000,000,000.00 (four billion rupiah).

Lawmakers added several norms to art 55(b) and 107(b) to provide more protection to customary communities against illegal land grabbing, but other sub-articles provide no guarantee against the criminalisation of local and indigenous communities for continuing to use their traditional lands if the government has already granted entitlements to a plantation company to use that land. Thus, the formulation of these provisions suggests that lawmakers have defied the Constitutional Court’s decision by inserting provisions of similar import to those invalidated by the Court.

Lawmakers were also unable to formulate a clear provision regarding permits for plantations, which may make criminalisation using arts 55 and 107 even more likely. The 2014 Plantation Law allows three types of business activity in the plantation sector: cultivation of plantation crops, processing of plantation products and plantation services businesses.\textsuperscript{150} Article 42 of

\begin{itemize}
\item \textsuperscript{148} Ibid art 103.
\item \textsuperscript{149} Ibid art 1(6) and art 13.
\item \textsuperscript{150} Ibid art 41.
\end{itemize}
the new Law requires business owners to obtain permit(s) for the first and second types of businesses:

Business activities for cultivating plantation crops and/or plantation product businesses as referred to in Article 41 (1) can only be carried out by a plantation company if it has obtained land rights (hak atas tanah/HGU) and/or a plantation business permit (izin usaha perkebunan).

However, the formulation of this article is unclear and subject to multi-interpretation. Does a plantation need to obtain both land rights and cultivating rights to operate legally, or either one of them? It appears that either would be sufficient, but ‘and/or’ in art 42 raises some doubt. This provision also contradicts the Basic Agrarian Law, which requires that any land-based activity can only take place legally after land rights have been formally obtained.\(^{151}\) However, in practice, many large plantation companies operate without land rights (HGU).\(^ {152}\) They have been able to ignore the pre-existing de facto land rights of local and indigenous communities, which has often led to conflicts, and sometimes violence,\(^ {153}\) and local and indigenous communities have been reported to the police for continuing to occupy their ancestral lands. Although resolving tenurial problems in Indonesia is beyond the scope of the Plantation Law, the lack of clarity of this provision and the reappearance of unclear criminal sanction provisions will potentially prolong conflicts between indigenous communities and plantation companies.

As mentioned above, the bill was rushed through at the end of the DPR’s term without consultation with relevant ministries, including the Ministry of Law and Human Rights. The tight timeframe also precluded lawmakers from discussing the entirety of the bill. Instead, they focused on the parts of the bill dealing with business expansion and investment in the plantations section, but not the provisions that imposed criminal sanctions on traditional communities.\(^ {154}\)

For example, the government did not raise any objection to the DPR’s proposal to include equivalent provisions to those that had been invalidated by the Constitutional Court, and it even proposed higher sanctions of up to five years’ imprisonment or an Rp 5 billion fine for working on plantation land, cutting down plants in a plantation area or harvesting plantation products illegally.\(^ {155}\) A representative of the Democratic Party appeared to interpret the Court’s decision as being directed at ensuring certainty for business actors instead of indigenous communities. He said that,

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\(^{151}\) Law No 5 of 1960 on Agrarian Affairs art 4(2).


\(^{153}\) Ahmad Dhiaulhaq, John F McCarthy and Yurdi Yasmi, ‘Resolving Industrial Plantation Conflicts in Indonesia: Can Mediation Deliver?’ (2018) 91 Forest Policy and Economics 64, 64.


\(^{155}\) Commission IV, List of Issues (n 134) 511–515.
after the Constitutional Court invalidated Article 21 and 47 of the old Plantation Law, it is important to have a more detailed and specific provision to define damaging action (tindakan yang merusak) which should be prohibited, to protect legal certainty for business actors and to make law enforcement easier.\textsuperscript{156}

A representative of the Prosperous Justice Party, Hermanto, also mentioned the need to revise the old Plantation Law to avoid multiple interpretations in implementing the Constitutional Court’s decision. However, he then suggested several issues to be discussed — none of which were touched upon in the Court’s decision.\textsuperscript{157}

Other than these comments by the Democratic Party and the Prosperous Justice Party representatives, the parliamentary records do not indicate that any other representatives discussed the Court’s decision. No substantive discussion of criminal sanctions or plantation permits took place. Instead, it appears that the lawmakers wanted to push forward their personal interests. In a rushed last meeting between the DPR and the government, a representative of the Golkar Party, Siswono Yudo Husodo, criticised art 42 of the bill, which requires plantation owners to obtain both a HGU and a plantation permit. Husodo is an oil palm plantation owner who served as a powerful minister during Soeharto’s New Order era.\textsuperscript{158} He said that

\begin{quote}
It is very dangerous [to require both]. If [we] have to wait to obtain an HGU, this is my daughter’s best friend, a plantation owner, she has to wait for 15 years. So I am inclined to change \textbf{and} to \textbf{or}, so [it becomes] ‘can only be carried out by a plantation company if it has obtained land rights (hak atas tanah/HGU) or a plantation business permit (izin usaha perkebunan) …’ (emphasis added).
\end{quote}

The chairman of the meeting, Ibnu Multazam of the National Awakening Party, appeared to steer the forum towards a quick decision, suggesting that ‘in principle, we need to expedite investment, I think we have to support [it] and HGU is not under the Ministry of Agriculture’s authority anyway, so I think we use \textbf{or} to be more flexible, or \textbf{and/or} maybe?’ (emphasis added).\textsuperscript{159}

Without any further substantial discussion, the government and the DPR finally agreed with ‘and/or’ and passed the draft on to the plenary session to be formally adopted in the Plantation Law.

Soon after the 2014 Plantation Law was enacted, a group of NGOs and a group of farmers filed two separate judicial challenges to it with the Constitutional Court. Both requested the

\begin{footnotes}
\item[157] Ibid, Prosperous and Justice Party Fraction (FPKS).
\item[159] Commission IV, \textit{Parliamentary Notes 26 September 2014} (n 132) 72.
\item[160] Ibid 72–74.
\end{footnotes}
Court to strike down the criminal provisions that reappeared in the amendments after the Constitutional Court had invalidated them and an additional provision concerning HGU. The Court upheld the NGOs’ application but rejected that of the farmers on the grounds that they lacked legal standing because they had not suffered constitutional loss. For the Court, any loss the farmers suffered was a result of the implementation of those provisions and not the formulation of the norms themselves.

Unlike in the Plantation Law Case, in which the Court struck down entire provisions, in this case, the Court issued a conditional decision — the type of decision discussed in Chapter II — and held that customary communities must be excluded from the definition of ‘every person’ in arts 55 and 107, and from the requirement that land rights (HGU) and plantation business permits must be obtained for a plantation to legally operate. Hence, provided that the indigenous community has obtained formal recognition and can prove their entitlement, they cannot be charged for illegally working on plantation land or harvesting plantation products. Nevertheless, the Court held that obtaining land rights (HGU) is a requirement before a plantation company can obtain a business permit. Thus, the Court frustrated lawmakers who had, as discussed above, used the amendments as an opportunity to allow plantation businesses to obtain only one type of permit to be able to legally operate. This decision diminishes the effect of the criminal sanctions posed by arts 55 and 107 to customary communities, and it clarifies the permit requirement for plantation businesses, at least at the normative level. Neither the DPR nor the government had attempted to comply at the time of writing.

G Forestry Law Cases

NGOs, academics and communities working in the forestry sector have long requested the replacement of, or at least amendments to, the 1999 Forestry Law. They claimed that the Forestry Law and its implementing regulations have caused, or at least contributed to, environmental damage and deforestation, as well as the violation of local and customary rights. However, the government and the DPR refused to amend or replace the Forestry Law to review several other provisions in the 2014 Plantation Law, including art 12 on customary communities’ consent, art 13 on the requirement for the recognition of customary community and art 27(3), 29, 30 (1) on smallholders’ rights. This case will not be discussed here because it is beyond the scope of this study.

161 Decision on Plantation Law 3 (n 122). The applicants also requested the Constitutional Court to review several other provisions in the 2014 Plantation Law, including art 12 on customary communities’ consent, art 13 on the requirement for the recognition of customary community and art 27(3), 29, 30 (1) on smallholders’ rights. This case will not be discussed here because it is beyond the scope of this study.
162 Decision on Plantation Law 2 (n 122) 38–41.
163 Ibid.
164 Decision on Plantation Law 3 (n 123) 294–295.
166 Ibid 282–284.
Law for several years. In response to this perceived need for change and to the government and legislative inaction, NGOs, academics and communities attempted to change the Law by bringing judicial challenges to the constitutionality of the 1999 Forestry Law to the Constitutional Court. Many of these cases were discussed in Chapter VI.

1 2017 Forestry Bill

While initial attempts to convince the government to change the Forestry Law fell on deaf ears, using the Constitutional Court seems to have attracted the DPR’s attention. Within a month of the Constitutional Court handing down the decision on Forest Zoning on 21 February 2012\(^\text{169}\) (discussed in Chapter VI), in which the Court invalidated the definition of the forest zone, DPR Commission IV Chairperson Firman Subagyo urged Minister of Forestry Zulkifli Hasan to begin revising the Law.\(^\text{170}\) However, the minister did not respond to this appeal. Initially, instead of pursuing a statutory response, the government’s preferred method was to issue regulations (as will be discussed in Chapter VIII). Nevertheless, DPR Commission IV — the commission that is responsible for forestry, environment, agriculture and marine issues — eventually met to discuss a forestry bill on 4 April 2018, after having included it on the Prolegnas in 2015, as discussed below. It is clear that the Constitutional Court decisions were factors in the move to revise the Forestry Law, although the decisions themselves were not specified and were not the only reasons listed to justify the revisions. During the meeting, the Commission’s vice chairperson stated that the revision of the Forestry Law was needed to ‘adjust’ (menyesuaikan) the Law to the Constitutional Court’s decisions and to assist with implementation.\(^\text{171}\) Chairperson of the DPR Expert Body (Badan Keahlian)\(^\text{172}\), K Johnson Radjaguguk, stated in his foreword for the NA:

> the drafting of the academic paper and Bill aims to provide adjustments and improvements to the dynamics of forestry management and current legal developments, including the disharmony of the Forestry Law with other relevant laws and the existence of some Constitutional Court Decisions that need to be incorporated into the Forestry Law.\(^\text{173}\)

\(^{169}\) *Constitutional Court Decision 45/PUU-IX/2011 reviewing Law on Forestry (Forest Zoning Case).*


\(^{171}\) ‘UU Kehutanan Sudah Tidak Sesuai, DPR Siapkan Naskah Akademik’, *Dewan Perwakilan Rakyat Republik Indonesia* (online, 4 April 2018) <http://www.dpr.go.id/berita/detail/id/20262>.

\(^{172}\) A unit in the DPR whose tasks are to support the national parliament’s members to perform legislative, supervision and budgetary functions. It consists of five subunits that are responsible for legislative drafting, monitoring of legislation implementation, budgetary research, financial accountability research and general research.

\(^{173}\) *Academic Draft of Forestry Bill* (Indonesian Parliament, 2017) para ii.
Although the DPR sought to revise the Forestry Law, at least in part, to implement Constitutional Court decisions,\textsuperscript{174} the revisions clearly fell outside the DPR’s main legislative priorities. The DPR formally decided to revise the Forestry Law in 2015 and requested the DPR’s Expert Body to prepare the academic draft and the bill. The Forestry Law was included in the 2015–2019 Prolegnas as a DPR/DPD initiative.\textsuperscript{175} However, it took more than two years for the academic draft and the bill to be developed and then submitted to the Chair of Commission IV in April 2018.\textsuperscript{176}

During an event to obtain public input for improving the bill, Commission IV Vice Chair Michael Watimena stated that the DPR wanted to pass the Law before the end of the 2015–2019 DPR term on 30 September 2019.\textsuperscript{177} However, the bill was not listed in the annual Prolegnas of 2015–2019 or in the Open Cumulative Lists in those years.\textsuperscript{178} Upon a strict reading of the lawmaking rules, discussed above, the failure to include the bill on these lists means that, barring an emergency, the DPR should not in fact discuss the bill during the 2015–2019 term. Nevertheless, the DPR has ignored these rules in the past and, at the time of writing in January 2019, it was still possible for the DPR to start the deliberation process before the end of its term, just as it did in 2014, when it decided to replace the Plantation Law. However, this is unlikely unless, as happened with the Plantation Law, the personal interests of DPR members prompt legislative activity. There was nothing to indicate that the national parliament will seek to revise the Law to comply with the Constitutional Court’s decision. Indeed, at the time of writing, the 2019 elections were consuming the attention of the legislature, making deliberation and enactment very unlikely in the foreseeable future.

Although the bill had not been enacted into law at the time of writing, given the centrality of the Forestry Law case study (discussed in Chapter VI) to the protection of constitutional environmental rights in Indonesia, I will now discuss the bill to determine the extent to which it responds to, and complies with, the Constitutional Court’s decisions. However, I acknowledge that the bill may not be enacted in its current form; indeed, it might not be enacted in the foreseeable future, if at all.

\textsuperscript{174} As mentioned in the academic draft, those decisions are Decision No 34/PUU-IX/2011 on Maskur Anang Case, Decision No 45/PUU-IX/2011 on Forest Zoning Case, Decision No 35/PUU-X/2012 on Adat Forest Case, and Decision No 95/PUU-XII/2014 on P3H Case.
\textsuperscript{175} National Legislation Program 2014–2019 (Republic of Indonesia, 2014).
\textsuperscript{176} ‘UU Kehutanan Tak Sesuai, DPR Siapkan Naskah Akademik’, Republika Online (online, 6 April 2018) <http://republika.co.id/2018/04/25/06179182423>.
As mentioned, the NA that was drafted by the DPR’s Expert Body suggests that the Forestry Law needs to be revised for several reasons, only one of which is the Constitutional Court’s decisions. The NA states that the Constitutional Court’s decisions have left a legal vacuum and legal uncertainty, which require legislative redress. As the NA states,

The Constitutional Court's decisions are subject to the principle of Erga Omnes, which [means that they] have the power to legally bind all components of the nation, meaning that all parties must submit and obey the decisions. This means the legal norms contained in Constitutional Court’s decisions can be directly implemented without necessarily waiting for the revision of a statute or its implementing regulations. However, ideally, legislators must immediately follow up on the Constitutional Court’s decisions by adopting them in a legislative amendment to avoid a vacuum and/or legal uncertainty.\(^\text{179}\)

In interviews, similar comments were made by an Expert Body staff member involved in the drafting of the bill. She said:

> We must take into account Constitutional Court’s decision in the drafting process. So, if the Constitutional Court handed down a decision, it does not need to take long time to follow up. It must be finished within one or two months, especially for decisions that only invalidate an article or word.\(^\text{180}\)

The NA also suggests that drafters should consider decisions that were upheld by the Constitutional Court,\(^\text{181}\) but not rejected decisions, even if those rejected decisions contain legal arguments or statements about the law that are relevant to the bill. Thus, the Court’s instructions in the Mining in Protected Forest Case, for example, were not taken into account, which suggests that drafters only considered the Court’s ruling binding. This contrasts with decisions in which the applicant’s claims are upheld, whereby drafters consider that both the holding (amar putusan) and the reasoning of the Court are binding.\(^\text{182}\)

While there have been significant debates regarding whether the reasoning contained within the Court’s decision is also binding,\(^\text{183}\) in my view it should be binding. Lawmakers should expect the Constitutional Court to interpret the Constitution consistently. Thus, treating the Court’s reasoning as binding will help lawmakers to anticipate what types of statutes the Constitutional Court will likely accept or reject in future cases.\(^\text{184}\) In this way, the lawmaking

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\(^{179}\) [Academic Draft of Forestry Bill (n 173) 111.]

\(^{180}\) Interview with Sri Nurhayati Qodriyatun, staff of Research Sub-unit, the Expert Body of the National Parliament (26 July 2017).

\(^{181}\) Maskur Anang Case, Forest Zoning Case, Adat Forest Case and P3H Case.

\(^{182}\) [Academic Draft of Forestry Bill (n 173) 102–111.]

\(^{183}\) Butt, [Judicial Review in Indonesia (n 11) 126.]

\(^{184}\) Ibid 129.
process will be improved because the lawmakers can enact a statute after considering how the Constitutional Court has decided similar issues in past cases.\textsuperscript{185}

The authors of the NA cited the Court’s reasoning in the Maskur Kemas Case,\textsuperscript{186} the Forest Zoning Case,\textsuperscript{187} the Adat Forest Case\textsuperscript{188} and the P3H Case,\textsuperscript{189} and they attempted to interpret those decisions and identify their practical impacts. For example, in relation to the Forest Zoning Case in which the Court changed the definition of the forest zone, the drafters identified the effect of the new definition on existing permits.\textsuperscript{190} According to them, permits that were granted before the Court’s decision remain valid, and issuing new permits or permit extensions in areas not yet designated as forest zones is illegal. Similarly, when discussing the Adat Forest Case, the NA authors identified the need to regulate customary communities and customary forest to ensure legal certainty without overriding state control.\textsuperscript{191} In doing so, the drafters suggested that

the utilisation of adat forests in the form of collection of timber products, non-timber forest products, and environmental services in accordance with the functions of adat forest areas granted to customary communities, insofar as in reality these customary communities still exist and are recognised for their existence ... must be carried out in accordance with their [stipulated] function. If the utilisation of customary forest is not in accordance with its function, the customary forest will be returned to the government.\textsuperscript{192}

Thus, the NA drafters were willing to draw implications from the decision based on the Court’s reasoning, even though the Court did not specifically draw the same implications.

However, critically, the NA’s views regarding the Constitutional Court’s decisions were not carried over into the bill I have obtained.\textsuperscript{193} In the most recent version available at the time of writing, the drafters of the bill appeared to ignore important parts of the NA — particularly the suggestions motivated by a desire to restore legal certainty. In particular, they only responded to the Court’s decisions that invalidated the provisions of the Forestry Law, and they did so by removing those provisions in the bill. For example, legislators took this approach by simply removing the provisions invalidated in the Forest Zone Case and the Adat Forest Case and requiring the government to complete the process of forest gazettal and adat

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{185} Ibid.
\item\textsuperscript{186} Constitutional Court Decision 34/PUU-IX/2011 reviewing Law No 41 of 1999 on Forestry (Maskur Anang Case).
\item\textsuperscript{187} Decision on Forest Zoning Case (n 169).
\item\textsuperscript{188} Constitutional Court Decision 35/PUU-X/2012 reviewing Law No 41 of 1999 on Forestry (Adat Forest Case).
\item\textsuperscript{189} Constitutional Court Decision 95/PUU-XII/2014 reviewing Law No 41 of 1999 on Forestry (P3H Law Case)
\item\textsuperscript{190} ‘Academic Draft of Forestry Bill’ (n 173) 105–106.
\item\textsuperscript{191} Ibid 107–108.
\item\textsuperscript{192} Ibid 187.
\item\textsuperscript{193} Secretariat General and Expert Body, The Bill on the Second Amendment of Law No 41 of 1999 on Forestry (Indonesian Parliament, 2017).
\end{itemize}
\end{footnotesize}
forest recognition within five years of the bill being enacted. However, they do not prescribe processes for this gazettal process and adat forest recognition. Instead, they simply require the government to further regulate these issues in a GR (Peraturan Pemerintah). As discussed in Chapter VI, such statutory delegations of power to the government are very common in Indonesia and are the cause of much regulatory uncertainty and complexity. Experience suggests that the government often ignores this kind of requirement or takes many years to issue the regulation.\footnote{Simon Butt and Tim Lindsey, Indian Law (Oxford University Press, 2018) 56.} For example, the government has not produced a GR on the recognition of customary communities as required by art 67(3) of the 1999 Forestry Law, which was enacted almost 20 years ago. This suggests that although the Court’s intervention might have strengthened the Forestry Law, in reality, its implementation very much depends on the follow-up regulations issued by the executive.

The drafters’ response to the Court’s conditionally (un)constitutional decisions has been less consistent. For some provisions, drafters have attempted to interpret the Court’s rulings, but for others, they have simply ignored the Court’s conditions. One of the drafters interviewed explained that this was a result of the Constitutional Court’s decisions being difficult to understand, which required them to seek further clarification from the Court.\footnote{Interview with Sri Nurhayati Qodriyatun, staff of Research Sub-unit, the Expert Body of the National Parliament (26 July 2017).} However, in drafting the Forestry Bill, the Constitutional Court refused the drafters’ request to meet to seek clarification.\footnote{Ibid.} Thus, drafters faced a quandary: although the decision is not clear enough to them to apply, there is no way to obtain an explanation regarding the decision. In these circumstances, ignoring the Court’s decisions might not be entirely unreasonable. The bases for these observations appear in Table 7.2.

<table>
<thead>
<tr>
<th>No</th>
<th>Decisions</th>
<th>Court’s rulings</th>
<th>Proposed changes (Forestry Bill)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Decision No 34/PUU-IX/2011 (Maskur Kemas case)</td>
<td>Conditionally unconstitutional — Art. 4(3) states that State control over forest means that the state must protect, respect, and fulfill the rights of customary communities, provided they continue to exist and are legally recognised, and in accordance with national interest</td>
<td>Ignored, no proposed change for this provision.</td>
</tr>
</tbody>
</table>

This is unconstitutional unless it is given the meaning that

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194 Simon Butt and Tim Lindsey, Indonesian Law (Oxford University Press, 2018) 56.
195 Interview with Sri Nurhayati Qodriyatun, staff of Research Sub-unit, the Expert Body of the National Parliament (26 July 2017).
196 Ibid.
State control over forest means that the state must protect, respect, and fulfil the rights of customary communities, provided they continue to exist and are legally recognised, the communities’ rights are guaranteed by laws, and in accordance with national interest [emphasis added].

<table>
<thead>
<tr>
<th>Decision No 45/PUU-IX/2011 (Forest Zoning Case)</th>
<th>Invalidating the words ‘appointed and/or’ in Art. 1 (3): Forest zone is any particular area that is allocated and/or designated by the Government to be permanent forest [emphasis added].</th>
<th>Adopted</th>
<th>Art. 1 (3) Forest zone is any particular area that is designated by the Government to be permanent forest.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Decision No 35/PUU-X/2012 (Adat Forest Case)</td>
<td>Invalidated the word ‘state’ in Art 1 (6): Adat forest means state forest situated in the customary legal community’s area [emphasis added].</td>
<td>Adopted</td>
<td>Art 1 (6) Adat forest means forest situated in the customary legal community’s area.</td>
</tr>
<tr>
<td>Conditionally unconstitutional — Art. 5 (1): Forests, based on their status, consists of: (a) State forest (hutan negara), and (b) Forest over which rights may be granted (hutan hak)</td>
<td>This is unconstitutional unless it is given the meaning that State forest as referred to in sub paragraph (1) does not include adat forest.</td>
<td>Adopted as Art. 5 (1): Forests, based on their status, consists of: (a) State forest (hutan negara), (b) Forest over which rights may be granted (hutan hak), and (c) Adat forest.</td>
<td></td>
</tr>
<tr>
<td>Invalidating Art. 5 (2): State forest as referred to in sub paragraph (1a) can be in the form of adat forest.</td>
<td>Adopted (deleted)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Invalidating the word ‘and sub-paragraph (2)’ in Art 5 (3). The Government designates forest status as referred to in sub paragraph (1) and adat forests provided the</td>
<td>Interpreting the decision by referring to the Court’s reasons and adding several provisions as follows:</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
customary communities still exist and is legally recognised.

(3) The Government designates forest status as referred to in sub-article (1);
(3a) The Government designates adat forest provided that the customary communities still exist and is legally recognised;
(3b) Customary community may carry out activities collecting timber forest product, non-timber forest product, and environmental services pursuant to its function in the adat forest as referred to in sub paragraph (1);
(3c) Every person is prohibited from buying and selling and/or transferring adat forest that has been designated by the Government as referred to in Article (3);
(3d) Every person is prohibited from changing the status of adat forest that has been designated by the Government as referred to in Article (3).

| 4. | Decision No 95/PUU-XII/2014 (P3H Case) | Conditionally unconstitutional — Art. 50 (3e) and (3i) state that:

*Every person is prohibited from:*

- (e) cutting down trees or harvesting or collecting any forest product without any right or permit from the authority;
- (i) herding cattle in the forest zone that is not designated by the authority for such purpose.

This is unconstitutional unless it is given the meaning that *communities who have been living for generations in the forest and using forest product for non-commercial purpose are exempted from this provision.* | Ignored, no proposed change. |
Drafters told me that the Secretary General of the Constitutional Court had, on rare occasions, met with them to clarify the Court’s decision on WRL2. This, too, is problematic because it is the judgment of the Constitutional Court that binds the government, not the explanation of that decision, even from the Secretary General, who may have different views to those of the judges.

Although the 2017 bill had been officially accepted by Commission IV of the DPR, at the time of writing, the DPR and the government had not begun discussing the bill. While one might expect that the more frequently the Constitutional Court reviews a statute, the more likely it is that lawmakers will amend that statute, this is not borne out in practice. As demonstrated here, the DPR and the government have not moved to revise the Forestry Law, even though the Court has reviewed the Law 10 times and has invalidated provisions in four cases. This does not necessarily mean that a judicial review in the Constitutional Court cannot prompt legal reform. As discussed in Chapter VIII, the government has preferred to comply with these forestry decisions by issuing regulations instead of pursuing statutory reforms.

The 2017 Forestry Bill also demonstrates that lawmakers are only willing to respond to Constitutional Court decisions in which applicants are successful. More specifically, lawmakers have only changed provisions that have been explicitly invalidated by the Court in one of its rulings. In this context, it appears that lawmakers have strictly applied the elucidation to Article 10.d. of the Law on Law-making, which states that only articles, subarticles and/or parts of statutes that have been clearly (secara tegas) declared invalid in the Court’s decision must be followed up by revising a statute.

Of course, it is possible that legislators might accommodate aspects of the Court’s reasoning or its conditional decisions as the deliberation process continues. However, if legislators maintain their refusal to comply unless the Court has invalidated part of a statute, the legislation they produce will be legally problematic. For example, from one perspective, revising a statute in response to a conditional decision is necessary to provide legal certainty because it reduces the potential for multi-interpretation. Further, it is important for lawmakers to take into account the Court’s reasoning, even in cases whereby the Court rejects the application and refuses to invalidate. As mentioned, the Court’s reasoning in this type of decision should be binding and complied with because lawmakers should expect the Constitutional Court to interpret the Constitution consistently. Thus, treating the Court’s reasoning as binding will assist lawmakers to anticipate what types of statutes the Constitutional Court will be likely to accept or reject in future cases. In this way, the

197 Interview with with Nurfaqih Irfani, Directorate for Harmonisation of Laws and Regulations, Ministry of Law and Human Rights (18 August 2017).
lawmaking process will be improved because the lawmakers can enact a statute after considering how the Constitutional Court has decided similar issues in past cases.\textsuperscript{200}

3 \textit{The P3H Law: Ignoring the Court’s Decision on Forestry Law}

Also of great significance is the DPR’s failure to pay heed to the Constitutional Court’s decisions regarding the Forestry Law when it enacted the Law on the Prevention and Eradication of Forest Destruction (\textit{Undang-undang Pencegahan dan Pemberantasan Perusakan Hutan} or P3H Law).\textsuperscript{201} As discussed in Chapter II, deforestation is a major environmental problem in Indonesia, and most of it is illegal. While illegal logging was criminalised under the 1999 Forestry Law, the provisions are relatively weak because they target perpetrators in the field (\textit{pelaku tindak pidana di lapangan}) such as lumberjacks and truck drivers, but not the ‘masterminds’ of these crimes.\textsuperscript{202}

Under pressure to act against escalating illegal logging, President Susilo Bambang Yudhoyono wanted to issue an interim emergency law (\textit{Perpu}) to combat illegal logging in 2003. However, the \textit{Perpu} was never issued by the president, although the draft was circulated publicly.\textsuperscript{203} One of the reasons why it was not issued was because the Draft \textit{Perpu} conferred authority on the Ministry of Forestry to lead illegal logging law enforcement, but this idea was rejected by the police department and the Attorney General’s Office.\textsuperscript{204} The two agencies wanted to retain the existing practice whereby they could engage in forestry law enforcement, but not necessarily under the coordination of the MoF. In the event, President Yudhoyono instead issued a Presidential Instruction on Combating Illegal Logging in 2005\textsuperscript{205} to supplement the 1999 Forestry Law. This Presidential Instruction gave a mandate to the Coordinating Minister for Politics, Social, and Security to coordinate law enforcement agencies and relevant ministries to combat illegal logging. Each law enforcement agency (MoEF, police department and Attorney General’s Office) continues to perform the law enforcement tasks that fall within their respective authorities.

\textsuperscript{200} Ibid.
\textsuperscript{201} Law No 18 of 2013 on the Prevention and Elimination of Forest Crimes.
\textsuperscript{202} Law on Forestry (n 103) art 50 and 78.
\textsuperscript{204} Interview with Rino Subagyo, The Asia Foundation (8 May 2019).
\textsuperscript{205} Presidential Instruction No 4 of 2005 on Combating Illegal Logging in Forest Zone and Its Distribution Across the Republic of Indonesia.
However, this did little to stop illegal logging. The DPR and the government eventually agreed that a specific law to deal with illegal logging problems was necessary, and deliberations began in 2011. Many NGOs and academics vehemently objected to this idea, pointing out that ineffectiveness partly resulted from inconsistencies between existing laws and regulations, and emphasising that issuing a new statute would not resolve these inconsistencies. However, the DPR and the government ignored these objections. Over the course of the deliberation process, lawmakers agreed to expand the forest crimes covered in the law beyond illegal logging and enacted the Law on 6 August 2013.

As the P3H Law was being deliberated between 7 February 2011 and 9 July 2013, the Constitutional Court handed down its decisions in the Forest Zoning Case on 9 February 2011 and in the Adat Forest Case on 26 March 2013, which invalidated the provisions in the 1999 Forestry Law.

However, critically, these decisions were ignored in the drafting process of the P3H Law. For example, the definition of forest destruction (art 1(3) of the P3H Law) adopts the definition of a forest zone in the Forestry Law that had been invalidated in the Forest Zoning Case (Decision No 45/PUU-IX/2011).

Article 1(3) of the P3H Law stipulates:

> Forest destruction is a process, method, or activity that destroys forest through illegal logging, utilisation of forest without a license, or with a license but against the objectives stated in the license, in a forest zone that has been gazetted, allocated or in the process of gazetted (emphasis added).

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209 Law No 18 of 2013 on the Prevention and Eradication of Forest Destruction.

210 Decision on Forest Zoning Case (n 169).

211 Decision on Adat Forest Case (n 188) 2

212 For a description of the P3H and Forest Zoning Cases, see Chapters III and VI respectively.

213 According to the elucidation of art 15(1) of the Forestry Law, ‘appointment’ is a preparatory activity of forest gazetted that includes producing a map of the forest’s outer boundaries, constructing a border pile or canal and announcing the forest border plan in a certain area that will be nominated as a forest zone.
The formulation of this provision suggests that activities carried out in a forest zone that has not received gazettal status can constitute forest destruction. Therefore, this definition is inconsistent with the Constitutional Court’s decision in the Forest Zoning Case that held that an area can only be defined as a forest zone if it has undergone appointment, delineation, mapping and gazettal procedures. Consequently, someone can be charged with illegal logging and other illegal activities as defined in this provision, even in an area that has not been properly gazetted.\(^\text{214}\) For this reason, they can be imprisoned for up to 10 years or required to pay a fine of up to Rp 15 billion, depending on the activities.\(^\text{215}\)

The failure of lawmakers to adopt the Court’s forestry-related decisions has ultimately perpetuated legal uncertainty, particularly for local and customary communities to access forest resources. This prompted several NGOs to challenge the P3H Law soon after it was enacted on the grounds that the new Law was inconsistent with the Constitutional Court’s decision on the Forest Zoning Case. Unfortunately, as discussed in Chapter III, the Court rejected this application without addressing this inconsistency, but instead, on the grounds that the definition section of a statute — including the definitions, acronyms and general descriptions contained therein — is not a regulatory norm, and hence is not subject to review by the Court.\(^\text{216}\) This demonstrates that the Court has missed an opportunity to stamp its authority over the DPR for failing to take its previous decision into account, even though the law was different.

**H Concluding Analysis**

This chapter has demonstrated that legislative compliance with Constitutional Court decisions that sought to give effect to environment-related constitutional rights has been very limited. Out of eight statutes that, in my view, required revision, even on the narrow view of compliance under the Law on Law-making, the government has only revised the old Pesisir Law. Meanwhile, in the amendment to the 2015 Plantation Law, lawmakers stated that compliance with the Constitutional Court’s decision was one of the reasons for revising the Law. However, in light of the lawmaking process described above, this appears to be mere window dressing — rhetorical conformity rather than compliance. As for the remainder of the Court’s decisions, the government and the DPR had, at the time of writing, exhibited a willingness to comply, as observed from the Forestry Law NA and bill, or outright avoidance, as demonstrated by the lack of follow up in the P3H Law and the Environmental Management Law.

As mentioned, the literature suggests that compliance with a court decision usually sits somewhere along a continuum between full compliance and complete avoidance. Applied to the 2014 Pesisir Law example, lawmakers were willing to change from a rights-based system to a permit-based system as required by the Constitutional Court’s decision, but at the same

\(^{214}\) P3H Law (n 201) art 12 and 17.

\(^{215}\) Ibid arts 82–94.

\(^{216}\) Decision on P3H Law (n 189).
time ignored the Court’s order to consider environmental protection. This also applies in the 2015 Plantation Law, where the lawmakers reinserted criminal provisions that the Constitutional Court had invalidated.

This chapter also demonstrated that the normative motivations of the government and DPR also affected the level of compliance. As observed in the 2014 Pesisir Law example, lawmakers went beyond compliance by adding provisions on the right to participation in coastal and small island management. Similarly, the DPR appeared to be influenced by normative concerns to uphold public trust principles when it attempted to ensure that foreign investment in coastal management must be in the national interest. At the same time, instrumental motivations were also at play. As observed in the 2015 Plantation Law Case study, parliamentarians did not hesitate to advance their personal commercial interests by loosening permit requirements for plantation businesses to operate.

Also relevant here are the institutional interests of the government. As observed in the Pesisir Law Case study, the MMFA has used the opportunity to revise the old Pesisir Law to (re)gain power and authority from local governments and the MoEF by adding provisions on authority to issue permits and on conservation respectively. However, this institutional interest is not necessarily bad for the environment. It may be well intentioned to minimise the adverse impact of decentralisation of natural resources management, as discussed above.

Equally important is the influence of external influences and actors — in this case, public pressure and media attention. As seen in the 2015 Plantation Law Case, the lack of civil society involvement and media attention in the drafting process might cause the reappearance of criminal provisions that have been invalidated by the Constitutional Court.

The next chapter will discuss the responses of the executive to the Constitutional Court’s decisions examined in Part II. These responses have primarily been ‘regulatory’ — that is, ministers or executive officials have issued regulations to comply with the Court’s decisions. This form of compliance is legally debatable because, by law, compliance should be by statute — that is, a law passed by the national legislature. The government has also issued other quasi-legislation or policy documents, such as circulars, that seek to provide guidance regarding what the Constitutional Court’s decisions require the government to do (or refrain from doing). While some of these appear to be genuine attempts to comply with the Court’s decisions, the legal status of these regulations and policies is suspect, which raises questions about their effectiveness.
The 2011 Law on Lawmaking and its enabling regulations, such as the 2016 Parliamentary Regulation on the Procedures of Developing National Legislation Program\textsuperscript{1} and the 2014 Presidential Regulation on the Implementation Guidelines for Law No 12 of 2011 on Law on Law-making,\textsuperscript{2} suggest that the only appropriate legal instrument for responding to a Constitutional Court decision is a national statute. The Law on Law-making states that ‘content materials that must be stipulated in a statute includes decision of the Constitutional Court’\textsuperscript{3} and that it must be performed by the DPR and the government.\textsuperscript{4} However, the government appears to be willing to ignore this restriction in an effort to comply with the Constitutional Court’s decisions. In doing so, the government has issued several circulars and regulations, the status of which are below a statute in the hierarchy of law in Indonesia. To my knowledge, this issue has not been given much attention in Indonesian legal circles, much less used to challenge the validity of these circulars and regulations.

The government may have many reasons to issue a regulation, of which compliance with a Constitutional Court decision may be only one. Thus, to avoid vagueness in assessing compliance, I limit my consideration here to regulations that are issued to implement Constitutional Court decisions, as is evident from an express reference to a decision either in the consideration part, in the list of objectives or in the elucidation of those regulations. For reasons of space, I also confine my discussion to the implementation of Constitutional Court decisions relating to forestry and water resources. These cases are central to the discussion of effective constitutionalisation of environmental rights in Indonesia because, in them, the Constitutional Court has recognised indigenous rights in environment-related matters and the right to water.

A Government’s Immediate Response to Constitutional Court Decisions: Issuing Circulars

By early 2019, the 1999 Forestry Law had been challenged in the Constitutional Court 10 times. In four cases, the applicants were successful on the grounds that the impugned provisions of the Forestry Law violated legal certainty and the rule of law as discussed in Chapter VI.\textsuperscript{5} The applicants were unsuccessful in the remaining two cases — the Mining in

\begin{itemize}
\item \textsuperscript{1} Parliamentary Regulation No 2 of 2016 on the Procedures for the Development on National Legislation Program.
\item \textsuperscript{2} Presidential Regulation No 87 of 2014 on the Implementation Guidelines for Law No 12 of 2011 on Law on Law-making.
\item \textsuperscript{3} Law No 12 of 2011 on Law-Making art 10(1d).
\item \textsuperscript{4} Ibid art 10(2).
\item \textsuperscript{5} Constitutional Court Decision 34/PUU-IX/2011 reviewing Law No 41 of 1999 on Forestry (Maskur Anang Case); Constitutional Court Decision 45/PUU-IX/2011 reviewing Law No 41 of 1999 on Forestry (Forest Zoning Case); Constitutional Court Decision 35/PUU-XII/2012 reviewing Law No 41 of 1999 on Forestry (Adat Forest Case); Constitutional Court Decision 55/PUU-XII/2014 reviewing Law No 41 of 1999 on Forestry (P3H Law Case)
\end{itemize}
Protected Forest Case\(^6\) discussed in Chapter III, which involved substantive environmental rights, and the Inanta Timber Case\(^7\) discussed in Chapter V on art 33 of the Constitution. Although the Court turned down these applications, it provided ‘instructions’ (arahan) to the government about how to implement the decision (see Chapters III and V).

The Court took a similar approach in the WRL Case 1.\(^8\) As discussed in Chapters III, IV and V, the Court rejected the application but still issued instructions to the government. However, in the second judicial review of the same Law (WRL Case 2),\(^9\) the Court handed down a more radical decision, invalidating the entire statute and holding that water management was to be regulated under the 1974 Water Management Law (which the 2004 WRL had itself invalidated).

The government has been very slow in responding to the Constitutional Court’s decisions on forestry and water resources through legislative amendments. As discussed in Chapter VII, the government appeared to be reluctant to revise the Forestry Law,\(^10\) having placed it near the bottom of a long list of priorities in the Prolegnas. In the event, the DPR took the initiative to draft the bill in 2015, but only formally adopted it as a DPR initiative in April 2018. Similarly, the DPR only put amendment of WRL in the Prolegnas in 2017 and commenced formal discussions in July 2018. Thus, it took more than three years for the government and the parliament to start the legislative process to respond to the latest Constitutional Court decisions on forestry and water resources. At the time of writing, a discussion of the two bills was pending, and there were no indications that deliberations would commence any time soon.

However, this does not necessarily mean that the government did not see a need to comply with the Constitutional Court’s decisions. Instead, the government preferred to issue circulars to implement the Court’s decisions rather than initiate the legislation before parliament. The MoEF and the Minister of Home Affairs (MoHA) have done this to respond to the Constitutional Court’s decision in the Adat Forest Case. The MoPWH and the Ministry of Energy and Mining (MoEM) have done this to respond to the Court’s decision in WRL Case 2. On one view, issuing circulars to give effect to decisions of the Constitutional Court might be the most rational choice for the government because it is much faster and easier than any

\(^6\) Constitutional Court Decision 003/PUU-III/2005 reviewing Law No 41 of 1999 on Forestry (Mining in Protected Forest Case).

\(^7\) Constitutional Court Decision 98/PUU-XIII/2015 reviewing Law No 41 of 1999 on Forestry (Inanta Timber Case).


\(^10\) Interview with Sri Nurhayati Qodriyatun, Legislative Research Unit, Expert Body of the National Parliament (26 July 2017).
regulatory alternative and appears to be acceptable in governmental practice in Indonesia.\textsuperscript{11} However, the legal status of circulars is not recognised in the hierarchy of laws in the 2011 Law on Law-making, which raises serious questions about whether the government’s choice of regulatory instrument to respond to the decision was legally correct.

1 Circulars to Respond to the Adat Forest Case

The government’s first written policy response to the Constitutional Court’s decision on forestry was MoF Circular on Constitutional Court Decision No 35/PUU-X/2012.\textsuperscript{12} This circular was issued on 16 May 2013, two months after the decision was handed down, but before the Constitutional Court had handed down the Maskur Anang Case\textsuperscript{13} and the Forest Zoning Case.\textsuperscript{14} This circular is addressed to governors, regents and heads of provincial and district institutions responsible for forest management. In the circular, the Forestry Minister informs those local authorities that several provisions in the Forestry Law have been invalidated by the Constitutional Court and outlines the consequences for forest management.\textsuperscript{15} This includes that the MoF has authority to determine adat forest if the existence of the relevant indigenous community has been recognised by the local government through a local regulation,\textsuperscript{16} and if the indigenous community no longer exists, the adat forest will be returned to the state forest.\textsuperscript{17}

Six months later, in December 2013, the MoHA issued a Circular on Social Mapping of Indigenous Communities.\textsuperscript{18} In this circular, the minister ordered governors, regents and mayors throughout Indonesia to map indigenous communities that remain in existence, as well as their geographical distribution and social problems. This mapping was to assist in the implementation of both the Constitutional Court’s decision on adat forest, which declared that adat forest was no longer part of the state forest, and several government policies related to community empowerment and forest management.

2 Circulars to Respond to the WRL Case 2

The government responded promptly to the Court’s decision in WRL Case 2, handed down on 18 February 2015. On 19 March 2015, the MoPWH issued a Circular on Permits to Use Water Resource and Contracts between the Government and Private Companies for the Piped

\textsuperscript{11} See Jimly Asshiddiqie, Perihal Undang-Undang (Rajawali Pers, 2010).
\textsuperscript{12} MoF Circular No 1 of 2013 on Constitutional Court Decision No 35/PUU-X/2012.
\textsuperscript{13} Decision on Maskur Anang Case (n 5).
\textsuperscript{14} Decision on Forest Zoning Case (n 5).
\textsuperscript{15} MoF Circular (n 12) Point II.1 (a-f) and 2.
\textsuperscript{16} Ibid Point II.1.f.
\textsuperscript{17} Ibid Point II.2.
\textsuperscript{18} MoHA Circular No 522/8900/Sj of 2013 on Social Mapping of Indigenous Communities.
Drinking Water Supply System. In this circular, the minister declared that all permits to use surface water (air permukaan) that had been issued before the Court’s decision remained valid. It also requested the government officials responsible for issuing permits to use surface water, including Echelon I officials in the MoPWH, governors (heads of provincial governments) and regents (heads of district government), to perform evaluations in line with the six principles of water management set out by the Constitutional Court. Permits being applied for or extended needed to be examined based on those six principles. Likewise, the minister requested the responsible agencies to evaluate and renegotiate existing contracts between the government and the private sector to ensure that the six principles of water management were followed.

A month later, on 17 April 2015, the MoEM issued a circular on Groundwater Management Services to all governors, in which the minister declared that the management of groundwater services must accord with the Constitutional Court’s six water management principles. He also stipulated that any permit for groundwater use issued before the Constitutional Court’s decision in the WRL Case 2 would remain valid. New permits or extensions applied for before and after the Constitutional Court’s decision must follow the 1974 Law on Water Management and the 2014 Law on Local Government. According to the circular, the issuance of permits to use groundwater must be based on technical guidelines from the minister and governor pursuant to the circular.

B Issuing Circulars: Compliance or Evasion in Disguise?

All of the circulars mention that they were made to implement the relevant Constitutional Court decisions. In particular, in the two circulars to implement the WRL Case 2, the minister mentioned, as a reason for issuing these circulars, providing legal certainty to permit holders and contracting parties after the Court’s invalidation of the WRL.

Using a circular to comply with the Constitutional Court’s decisions appears to be a well-intentioned and rational choice. Unlike statutes, issuing circulars is relatively fast and easy because they do not require approval from other government institutions or the parliament.

20 Ibid Point D.2.a.
21 Ibid Point D.2.b.
22 Ibid Point D.3.a. and b.
24 Ibid Point 1.
25 Ibid Point 2.
26 Ibid Point 3 and 4.
27 Ibid Point 6.
This type of policy document is also acceptable in governmental practice in Indonesia.\textsuperscript{28} Circulars are commonly used by the government to perform its administrative function based on its discretionary power,\textsuperscript{29} and they are binding upon the subject(s) to whom they are addressed.\textsuperscript{30}

However, the minister’s choice to use a circular to respond to the Court’s decision is legally problematic, primarily because the Law on Law-making does not list circulars in the hierarchy of laws, discussed in Chapter VII.\textsuperscript{31} Minister of Home Affairs Regulation No 10 of 2010 on the Management of Official Documents in the Ministry of Home Affairs (MoHA) stipulates that circulars are not formal ‘legal products’, but rather for official announcements or clarifications, or to provide guidance on important issues.\textsuperscript{32} There is some doubt regarding whether this regulation is itself formally valid because, on one reading, it contradicts the Law-making Law. Article 8(1) of the Law-making Law allows ministers to issue regulations that are not on the hierarchy, including ‘by authority’ — that is, under the authority that attaches to their position. A circular \textit{prima facie} fits within this category, in which case it should be binding. If the regulation and the Law-making Law contradict each other, then the Law-making Law must prevail to the extent of any inconsistency, because statutes are higher on the hierarchy than regulations.

Presuming that the circulars are valid — or at least that they are followed in practice — then circulars are not ‘legal products’ and therefore lack legal binding force. As a result, there will be no legal consequences if the legal subjects to whom the circular is addressed do not comply with it. Indeed, most circulars do not contain sanctions. Less clear is the status of a circular that purports to implement a Constitutional Court decision but in fact deviates from that decision. This appears to be relevant to the Circular of the Minister of Forestry No 1 of 2013, which contains indications of non-compliance. The circular indicates that the minister appears to accept the Court’s ruling that adat forest is no longer part of the state forest. It recognises that forests can be categorised into three types: state forest, adat forest and forest over which rights may be granted. However, the circular makes stipulation of adat forest very difficult, if not impossible. As discussed, in Constitutional Court Decision No 35/PUU-X/2012, the Court held that art 5(3) of the Forestry Law should be read to mean: ‘The Government stipulates the status of forest as referred to in sub-paragraph (1), and adat forest is stipulated provided that the [relevant] indigenous community remains in existence and its existence is recognised’.

\textsuperscript{31} Law on Law-Making (n 3) arts 7 and 8.
\textsuperscript{32} MoHA Regulation No 10 of 2010 on the Management of Official Documents in the Ministry of Home Affairs arts 1(43), 9, and 11.
In this regard, the circular states that ‘the Minister of Forestry may stipulate adat forest to the extent that the indigenous community has been recognised by a Local Regulation (Perda) based on the research result of the Team as mentioned in art 67 of the Forestry Law and its elucidation.’

Although the circular might appear to be supportive of stipulation at first glance, on closer inspection, it is not. While art 62(2) of the Forestry Law also mentions that recognition of indigenous communities must be stipulated in a Local Regulation (Perda), art 67(3) authorises the government to produce a GR to establish mechanisms to regulate indigenous communities. However, this GR has not been produced in the 20 years since the Forestry Law was enacted. Thus, even though this circular recognises adat forest as no longer being part of the state forest, it does not provide any guidance regarding the processes for achieving recognition. Instead, it refers directly to the Forestry Law, which requires an enabling regulation that does not exist. Thus, it is difficult, if not impossible, to implement this circular, even if the addressees are willing to do so, simply because this regulation does not exist. To this end, the minister appears to have hidden behind its discretionary power to avoid implementing the Court’s decision. Instead, it has diverted responsibility to local governments to recognise customary communities without necessarily providing a legal basis as required by the Forestry Law and the Law on Law-making.

The Forestry Minister may well have been motivated to issue the circular by another imperative: maintaining a claim of authority to determine adat forest. This can be observed from the minister’s interpretation of the word ‘Government’ in art 5(3) of the Forestry Law, which was declared conditionally unconstitutional in the Adat Forest Case. (In Indonesia, ‘Government’ with a capital ‘G’ is taken to refer to the national government, whereas ‘government’ with a lower-case ‘g’ refers to the regional government.) However, the Court’s ruling did not clarify which ministry was responsible for determining adat forest. Thus, through this circular, the MoEF may have wanted to clarify and establish that the Court’s reference to the ‘Government’ was to the national government generally and to the MoEF in particular. In short, the MoEF wanted to stake its claim of authority over determining adat forest to the exclusion of other government agencies that have overlapping jurisdiction, such as the National Land Agency. The MoEF appears to have learned from previous experience in which it has used regulatory measures to assume authority or control over natural resources. (See, for example, the discussion on compliance in the Pesisir Law Case in Chapter VII, where the MoEF claimed authority over conservation areas.)

Regardless of the minister’s intention and the problem mentioned above, it appears that the addressees of this circular — namely, the heads of provincial and district governments and the local forestry unit — expressed no objection to the circular. However, it is also unclear whether this circular has in fact been followed by the addressees by prompting them to recognise adat communities.
After issuing circulars, various MRs were issued to respond to the Constitutional Court’s forestry decisions. However, many of these regulations were inconsistent with each other, which suggests that these government agencies have not coordinated to implement the decisions. Unfortunately, the result is perpetuating legal uncertainty, which some of the Constitutional Court’s decisions were made to remove. These regulations have also diminished the effect of the Constitutional Court’s decisions to protect forest and customary rights.

As seen in the table below, seven regulations have been issued by the government that directly respond to the Constitutional Court’s decisions. The table presents these regulations in chronological order, indicates which of the Court’s decisions they were intended to address and specifies how long the regulation was issued after the decisions. Some of them seek to comply with one Constitutional Court decision, and some target all four of them.
Table 8.1: Regulations in response to the Constitutional Court’s decisions on forestry

<table>
<thead>
<tr>
<th>Year</th>
<th>Ministerial Regulation</th>
<th>Constitutional Court Decisions</th>
<th>Time</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013</td>
<td>Regulation of MoEF No 62 of 2013 on the Amendment of Regulation of the Minister of Forestry No 44 of 2012 on Forest Zone Gazettal</td>
<td>√</td>
<td></td>
</tr>
<tr>
<td>2014</td>
<td>Regulation of MoEF No 25 of 2014 on the Commission for Forest Zone Delineation</td>
<td></td>
<td>√</td>
</tr>
<tr>
<td>2014</td>
<td>Joint Regulation between MoHA, MoEF, MoPWH, &amp; NLA No 79 of 2014 on the Procedures for the Resolution of Land Entitlement Disputes in Forest Zone</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>2015</td>
<td>Regulation of MoEF No 32 of 2015 on Titled Forest (Hutan Hak) cum Regulation of Director General for Social Forestry and Environmental Partnership No 1 of 2016 on the Procedure of Verification for Titled Forest</td>
<td></td>
<td>√</td>
</tr>
<tr>
<td>2015</td>
<td>Regulation of MoEF No 84 of 2015 on Tenurial Conflict in Forest Zones Handling Mechanisms</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2016</td>
<td>Regulation of MoEF No 83 of 2016 on Social Forestry</td>
<td>Art. 2 (1): the objective of this regulation is to provide guidance for the granting of ... adat forest under the social forestry scheme.</td>
<td></td>
</tr>
<tr>
<td>2017</td>
<td>Presidential Regulation No 88 of 2017 on the Resolution of Land Entitlement Disputes in Forest Zone</td>
<td>√</td>
<td>√</td>
</tr>
</tbody>
</table>

The government appears to have been more receptive to the Court’s decision on the adat forest than other decisions. This appears to be because the case attracted widespread public and media attention and because of pressure from civil society to respond to this decision.  
Civil society organisations (CSOs) and customary communities that have been struggling for decades to be recognised and to have access to forest resources viewed the Court’s decision on the adat forest as an opportunity to reignite their calls for government action; therefore,  

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they placed pressure on the government to implement this decision.34 To support their efforts, they conducted community mapping of adat forest and submitted the results to the MoEF.35 As of 2015, for example, the National Alliance for Customary Community (AMAN) had identified 4.8 million hectares of customary land, of which 2.2 million hectares were located in forest zones, and it requested the MoEF to include this in the forestry map issued by the MoEF.36 Civil society also collaborated with subnational governments to draft local regulations to recognise indigenous communities and adat forest. Up to 2016, 69 local legal instruments had been issued by local governments, either at the provincial or district level, to recognise indigenous communities or adat forest.37 However, this significant progress was not only due to the Constitutional Court’s decision itself. Although the decision was the main impetus for mapping and recognition, also critical was the enactment of several statutes, such as the Law on Regional Government38 and the Law on Village Government,39 as well as several regulations that were issued by the government to implement the Court’s decision on forestry cases as discussed in Chapter VI. Moreover, in 2015, several CSOs facilitated meetings between CSOs, communities and the government, resulting in the signing of the Mataram Declaration to accelerate the recognition of customary zones.40 The Declaration was signed by the Minister of Environment and Forestry and the representative of the MoHA, as well as several heads of provincial and district governments. In the Declaration, they committed to, among other things, implementing the Constitutional Court’s decisions by accelerating the enactment of laws and regulations required to recognise traditional territories and indigenous community rights to manage their territories.41

Two state institutions — the President’s Delivery Unit for Development Monitoring and Oversight (UKP4) and the Anti-Corruption Commission (KPK) — also played a significant role in compelling the MoEF to implement the Constitutional Court’s decisions on Forest Zoning

36 Ibid 63.
38 Law No 23 of 2014 on Regional Government.
39 Law No 6 of 2014 on Village Government.
41 Document of Mataram Declaration, 18 April 2015 (on file with author).
and the Adat Forest.\textsuperscript{42} These two institutions, which were highly respected by the ministries because of their important functions and leadership, coordinated 12 ministries\textsuperscript{43} to sign a memorandum of understanding (MoU) to accelerate the forest gazettal process. This MoU was signed on 13 March 2013, only several months before the MoEF amended the forest gazettal procedures through the MR on Forest Zone Gazettal.\textsuperscript{44} This suggests that involvement (or coordination) from other state institution(s), which are reputable and whose work affects relevant ministries, can influence the level of compliance of the ministries with Constitutional Court decisions.

Generally speaking, the government’s response, in the form of MRs, to the four Court decisions relates to forest gazettal mechanisms (pengukuhan kawasan hutan) and land entitlement resolution. These two issues are critical if the government is to guarantee legal certainty for communities living in forest zones: tenurial conflicts in forest zones can be settled and reduced significantly if the government can ensure that the gazettal of forest zones is legal and legitimate, and if the community can obtain their tenurial rights, including in relation to the adat forest.

1 Setting Procedures for Forest Gazettal

The MoEF issued two MRs on forest gazettal to respond to the Constitutional Court’s decisions. First, it issued MR on Forest Zone Gazettal\textsuperscript{45} to respond to Decision No 35/PUU-X/2012 on Adat Forest. This regulation was issued less than eight months after the Court handed down the decision.\textsuperscript{46} Following this, the MoEF issued MR on the Commission for Forest Zone Delineation\textsuperscript{47} to respond to Decision No 45/PUU-IX/2011 on Forest Zoning.

Although these regulations were intended to respond to two different Constitutional Court decisions, both were designed to accelerate the forest gazettal process and have met with some success. The MR on the Commission for Forest Zone Delineation provided a legal basis for the Director General for Planology of MoEF to establish a Committee on Forest Delineation in each district. This committee’s main tasks are to assess and determine boundary route

\textsuperscript{42} The Memorandum of Understanding to Accelerate Forest Gazettal Process in Indonesia between 12 Ministries/Agencies 2013 Appendix 1. It stated that the Constitutional Court’s decision on Forest Zoning has proved that regulations concerning forest gazettal need to be harmonised.
\textsuperscript{44} MoF Regulation No 62 of 2013 on the Amendment of Forestry Minister Regulation No 44 of 2012 on Forest Zone Gazettal.
\textsuperscript{45} Ibid.
\textsuperscript{46} The Court’s decision was handed down on 26 March 2013 and the MR was issued on 15 November 2013.
\textsuperscript{47} MoF Regulation No 25 of 2014 on the Commission for Forest Zone Delineation.
plans and delineation maps, and to identify and make an inventory list of third-party rights. Based on the committee’s assessment, the directorate general approves the delineation documents (mengesahkan dokumen tata batas).

The issuance of this regulation has pushed forward the forest gazettal process. The committee was able to gazette almost 86% of 122 million hectares of forest by 2017. This represents significant progress compared with 2013, when only 12% of forest zones had been gazetted. This suggests that the government has followed the Court’s ruling on Forest Zoning, which held that forest zoning must be conducted through four steps of forest gazettal. Nonetheless, it is worth noting that the Court’s decision itself might not have prompted compliance. Indeed, the Court did not require the government to gazette more quickly, and in fact, the decision makes gazettal more complex. Rather, the Court’s decision should be considered an initiating variable: by bringing attention to the issue and clarifying the process, the Court pushed the government to act. There are some other factors that were as important to this progress as the Court’s decision, such as intervention from the President’s Office and the Anti-Corruption Commission, as well as assistance from CSOs, as previously mentioned.

The MR on Forest Zone Gazettal also relaxed the requirement for communities to claim their rights, including land rights, right to cultivate (HGU), right to use (hak pakai) and right to manage (hak pengelolaan) by recognising written and unwritten evidence of entitlement. Included as unwritten evidence is the existence of dwellings and public and social facilities in the area that are used by the community, which existed before and after the forest zone appointment. This recognition of unwritten evidence of entitlement is important because, in many instances, indigenous communities do not have written evidence of entitlement, precisely because their existence has not been recognised by law.

However, the MR on Forest Zone Gazettal establishes additional requirements for communities that have lived in forest zones after forest appointment. It states that the community will receive rights, and their area will be released from a forest zone (dikeluarkan dari kawasan hutan) only if they meet the following requirements: their area contains fewer than 10 houses; they are not located in a province with forest areas comprising less than 30% of its total area; and they are recognised by the local government and listed in the village or subdistrict (kecamatan) statistics. These requirements are much more restrictive than the Constitutional Court decision requires. The Court held that the adat forest can be recognised if the indigenous communities claiming forest rights meet the following requirements of art 18B of the Constitution: they still exist, they can adapt to development (hidup sesuai dengan...
The policy choice embodied in the MR on Forest Zone Gazettal to release the communities’ land from the state forest zone is also problematic. This deviates from the Court’s decisions on the Adat Forest Case and the Forest Zoning Case, is impractical and will potentially endanger forest sustainability. As discussed in Chapter VI, the Court’s ruling on the Adat Forest Case held that the adat forest is not part of the state forest and that state control over forests must be exercised by considering the rights of indigenous communities, provided that they still exist and live in accordance with the principles of the unitary state of Indonesia. In the Forest Zoning Case, the Court held that certain areas can be designated (gazetted) as forest zones if they have gone through four gazettal stages: appointment, delineation, mapping and gazettal. Thus, appointment does not constitute forest gazettal, and a certain area that has only been appointed by the government cannot be treated as a forest zone. Nowhere in either of these two decisions did the Court declare that the adat forest must not be in a forest zone. Why then did the government — in this case, the MoEF — release the adat forest from the forest zones?

It appears that the MoEF considers forest zones necessarily part of state forests, although forest zones and state forests have different definitions according to the Forestry Law and the Court’s decisions. The Forestry Law stipulates that a forest zone is a ‘certain area that is designated (gazetted) by the Government to maintain its existence as a permanent forest’, while a state forest is ‘any forest that is located on untitled land’. By treating these two terms as equivalent, the MoEF can maximise its control over forest zones, which comprise almost 63% of Indonesia’s land area, or 120.6 million hectares. Treating these two terms as equivalent will give the MoEF immense political power. Put simply, this is because the Forestry Law and its enabling regulations allow forest zones to be used for activities other

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54 Decision on Adat Forest Case (n 5) 182–184.
55 Ibid 184.
56 Law No 41 of 1999 on Forestry art 1c.
57 Ibid art 1d.
than forestry, including for mining\textsuperscript{59} and plantations.\textsuperscript{60} This Law and its regulations also stipulate that mining companies must obtain a borrow-to-use permit (\textit{izin pinjam pakai}), and plantation companies must obtain a release permit (\textit{izin pelepasan}) from the MoEF before they can legally operate in a forest zone. With the authorities conferred by the Forestry Law and regulations, the MoEF gains immense political power over the other two other ministries — the Mining Ministry and the Plantation Ministry — because the latter two can only issue an operating permit after the companies obtain relevant permits from the MoEF. That is, they depend largely on the MoEF to be able to perform their functions.

\textit{2 Resolution of Land Entitlement Disputes}

Following the MRs on forest gazettal procedures, the government issued two MRs on procedures for the resolution of land entitlement disputes in forest zones. The first was in 2014, when the government issued a joint regulation (\textit{peraturan bersama}, or \textit{Perber}) between four ministers on the procedures for land entitlement resolution (\textit{penyelesaian pengusahaan tanah}) in forest zones\textsuperscript{61} to implement three Constitutional Court decisions: Maskur Kemas,\textsuperscript{62} Forest Zoning\textsuperscript{63} and Adat Forest.\textsuperscript{64} This \textit{Perber} grants a mandate to heads of districts/municipalities (\textit{Bupati/Walikota}) to establish teams to inventarise entitlements, ownership and utilisation of any piece of land in the forest zones in their respective jurisdictions.\textsuperscript{65} Any person who can prove that they have possessed (\textit{menguasai}) and managed a piece of land for 20 years can apply to the MoEF to obtain land rights.\textsuperscript{66} While this \textit{Perber} does not explicitly mention the recognition of the adat forest, there is no reason why the adat forest should be excluded from its ambit. If a customary community can prove that it has managed forest land for 20 years, it can apply to obtain the right to manage that forest land, which can be in the form of the adat forest. Moreover, in the absence of an integrated mechanism between ministries to settle land conflicts, this \textit{Perber} provides a means to help settle land conflicts between customary communities and the government in forest zones.\textsuperscript{67} Unfortunately, the implementation of this \textit{Perber} has been ineffective because of the institutional restructure of all ministries by the newly elected President Joko Widodo in 2015,

\footnotesize
\begin{itemize}
\item[\textsuperscript{59}] Law on Forestry (n 56) art 38.
\item[\textsuperscript{60}] GR No 62 of 2012 on the Amendment of GR No 10 of 2010 on Procedure for Forest Function Change 2012; GR No 104 of 2014 on the Amendment on GR No 62 of 2012 on Tata Cara Perubahan Peruntukan dan Fungsii Kawasan Hutan.
\item[\textsuperscript{62}] Decision on Maskur Anang Case (n 5).
\item[\textsuperscript{63}] Decision on Forest Zoning Case (n 5).
\item[\textsuperscript{64}] Decision on Adat Forest Case (n 5).
\item[\textsuperscript{65}] Joint MR of Four Ministries (n 61) art 2-7.
\item[\textsuperscript{66}] Ibid arts 8–11.
\item[\textsuperscript{67}] Epistema Institute, ‘Amicus Brief 01/2005, Realizing Justice in the Indonesia’s Forest Zones’ (2015).
\end{itemize}

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which resulted in unclear responsibilities and coordination problems among ministries.\(^{68}\) As a result of this ineffectiveness, a Presidential Regulation (*Perpres*) was issued almost three years later, which touched upon recognition and dispute resolution. This *Perpres* is discussed below.

Despite the ineffectiveness of the *Perber*, the MoEF continued implementing the Constitutional Court’s decision on the Adat Forest by issuing an MR on Forest Tenure Conflict-handling.\(^{69}\) This regulation aims to increase public participation in forest management by involving indigenous communities. To do so, it confers a mandate upon the director general of the MoEF, who is responsible for social forestry and environmental partnerships, to establish a team to settle tenurial conflict in forest zones while prioritising human rights. Any person, including a legal entity or an indigenous community, may file an application for tenurial conflict resolution with the MoEF, either online or in person.\(^{70}\) Based on this application, the director general will establish an Independent Team for Forest Tenure Conflict-handling (commonly called ‘Team IPKTKH’),\(^{71}\) which consists of three experts on anthropology, law and/or social community, to assess preliminary data on the relevant conflict.\(^{72}\) Based on the result of Team IPKTKH’s assessment, the director general will establish another team to conduct a field assessment,\(^{73}\) and the Team will then further assess the result.\(^{74}\) Team IPKTKH offers three choices of resolution procedures: mediation, formal law enforcement and involvement in a social forestry program.\(^{75}\) If the latter is chosen, the documents that have been used for conflict resolution can be used as a legal document to grant the right to manage the adat forest and village forest, or to grant a permit for community forestry or a forest partnership.\(^{76}\)

Since the issuance of this regulation, the MoEF has received 222 applications to resolve tenurial conflicts, and it has resolved 77 of them.\(^{77}\) While relatively small compared with the number of tenurial conflicts throughout Indonesia, which the Agrarian Reform Consortium


\(^{69}\) MoEF Regulation No 84 of 2015 on Forest Tenure Conflict-handling.

\(^{70}\) Ibid art 1.

\(^{71}\) *Tim Independen Penanganan Konflik Tenurial Kawasan Hutan*.

\(^{72}\) MoEF Regulation on Forest Tenure Conflict-handling (n 69) art 8.

\(^{73}\) Ibid art 9.

\(^{74}\) Ibid art 12(1).

\(^{75}\) Ibid art 12(3).

\(^{76}\) Ibid art 13(2).

\(^{77}\) MoF (n 58) 44.
estimates to have reached 1,769 cases in 2015–2018,\textsuperscript{78} this figure suggests that the government has made progress in implementing the Constitutional Court’s decision.

3 Conditional Recognition of Adat Forest: An Inconsistent and Uncoordinated Approach

After issuing a circular letter (the legal status of which is questionable) and a \textit{Perber} (which does not explicitly recognise the adat forest), the MoEF finally issued two MRs that explicitly recognise the adat forest: MR on Titled Forest (\textit{Hutan Hak})\textsuperscript{79} and MR on Social Forestry.\textsuperscript{80} These regulations complement each other. The MR on Titled Forest reinforces the Constitutional Court’s decision that the adat forest is not part of the state forest, but rather is a type of titled forest.\textsuperscript{81} The regulation states that its objectives are to provide legal certainty and justice for the indigenous community to achieve social welfare and sustainable forest use.\textsuperscript{82} In doing so, this MR stipulates that a customary community — itself, as part of a group or as a legal entity — may propose to the Minister of Environment and Forestry that a certain piece of forest be classified as an adat forest. Based on this proposal, the minister must conduct verification and validation, and if the proposal meets the requirements as stipulated in the director general’s guidelines,\textsuperscript{83} the minister must classify the forest land as titled forest and specify the purposes for which it can be used within 14 days after the results of the verification and validation are obtained.\textsuperscript{84} The MR even requires the minister to proactively identify the adat forest without necessarily being proposed by the community.\textsuperscript{85}

Meanwhile, the MR on Social Forestry provides guidelines for the granting of rights to manage forests, as well as permits and partnerships under the social forestry scheme.\textsuperscript{86} Further, it aims to settle tenurial conflicts and to ‘deliver justice’ — without providing further explanation of its meaning — for local and indigenous communities that live in the forest zones so that social welfare and sustainable forest use can be achieved.\textsuperscript{87} To these ends, the MoEF recognises five types of forest under the social forestry program: village forest (\textit{hutan desa}), community forest (\textit{hutan kemasyarakatan}), community timber plantation (\textit{hutan

\begin{footnotesize}
\begin{itemize}
\item[78] KPA, ‘The 2018 End of Year Report’ (Konsorsium Pembaruan Agraria, 2018). This number includes conflicts in several sectors, such as forestry, mining and plantation, which mostly occurred in forest zones.
\item[79] MoEF Regulation No 32 of 2015 on Entitled Forest.
\item[80] MoEF Regulation No 83 of 2015 on Social Forestry.
\item[81] MoEF Regulation on Entitled Forest (n 79) art 3.
\item[82] MoEF Regulation on Social Forestry (n 80) art 21.
\item[83] Director General of Social Forestry and Forest Partnership Regulation No 1 of 2016 on the Procedures of Verification and Validation of Titled Forest. The requirements are, among others: evidence of identity (for customary community includes local regulation on its recognition) and data on the proposed titled forest, such as location, boundary, evidence of entitlement and map with scale as in the guideline.
\item[84] MoEF Regulation on Entitled Forest (n 79) art 4(1–5).
\item[85] Ibid art 4(6).
\item[86] MoEF Regulation on Social Forestry (n 80) art 2.
\item[87] Ibid.
\end{itemize}
\end{footnotesize}
This regulation mentions that any regulation regarding the adat forest must refer to the MR on Titled Forest. These two regulations comply with the Constitutional Court’s decision on the Adat Forest in the sense that they recognise that the adat forest no longer comprises part of the state forest.

The MoEF’s regulation also contains the same limitation on the adat forest recognition imposed by the Court: the recognition of the indigenous community claiming the entitlement. As mentioned in Chapter VI, the Court declined the applicants’ request to invalidate provisions in the Forestry Law that require indigenous communities to obtain recognition from the local government to have access to forest and forest resources. For the Court, recognition of indigenous communities was necessary to ensure that they lived in accordance with social development and the principles of the unitary state of Indonesia, as stated in art 18B(2) of the Constitution. While the Court specified that recognition should occur by statute, the Court asserted that existing government regulations (Peraturan Pemerintah) and local regulations (Peraturan Daerah) were acceptable legal bases that could be used in the absence of that statute. The government conceded to the Court’s stance. In the MR on Titled Forest, the MoEF established three requirements for the indigenous community to obtain adat forest entitlements. First, the indigenous community must be recognised by a local government in a ‘produk hukum daerah’ (legal product of local government). Second, the traditional territory must include or wholly comprise forest. Third, the indigenous community must provide a statement indicating that it wants its territory determined as an adat forest.

As mentioned in Chapter VI, the conditions that the Court established for the recognition of an indigenous community were thought to be likely to hinder the implementation of the Court’s decision on the Adat Forest because of the numerous laws and regulations governing this matter. This regulatory ‘mess’ has become more complicated with the issuance of the MR on Titled Forest. One of the main problems is that the regulation does not clarify what ‘produk hukum daerah’ means. The Law on Law-making does not use this term; however, it does recognize local regulations (Perda) in the hierarchy of law. Reading the regulation together with the Law on Law-making, it can then be surmised that ‘produk hukum daerah’ here means Perda. If this is correct, then the customary community must be recognised by the local government in a specific local regulation (Perda). This interpretation is also consistent with the Forestry Law, which requires the indigenous community to be recognised in a Perda and the MoEF Regulation on Forest Gazettal. While internally consistent, this is also inconsistent with the policies of other ministries: the MoHA and the Ministry of Agrarian and Spatial Planning (MoASP). Through Regulation No 52 of 2014 on the Guidelines for the Recognition

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88 Ibid art 1(1) and art 4.
89 Ibid art 6.
90 Law on Law-Making (n 3).
91 Law on Forestry (n 56) art 67(2).
92 MoF Regulation on Forest Zone Gazettal (n 44).
and Protection of Indigenous Communities, the MoHA stipulates that recognition of indigenous communities should be by the decision of the head of the local government (Keputusan Kepala Daerah), which is another type of legal instrument altogether.\textsuperscript{93} Further, in Regulation No 20 of 2016 on the Procedure for the Recognition of Indigenous Community Land Rights in a Specific Zone,\textsuperscript{94} the MoASP specifies neither conditions for the recognition of indigenous communities nor specific types of regulations for recognition.

This inconsistency appears to demonstrate a lack of coordination in producing regulations between the ministries. However, another possibility is that the MoEF has deliberately chosen to use the term produk hukum daerah in the MR on Titled Forest by referring to MoHA Regulation No 1 of 2014 on the Creation of ‘Produk Hukum Daerah’ in an effort to accommodate the existing inconsistent regulations and current legal developments. According to this MoHA regulation, ‘produk hukum daerah’ includes, among others, local regulations (Perda) and decisions of the heads of local government (Keputusan Kepala Daerah). Therefore, based on this definition, adat forest can be recognised by Perda (as regulated by the MoEF) or Keputusan (as regulated by the MoHA). Several local governments have, in the absence of consistent regulations, recognised indigenous communities through various produk hukum daerah. As of 2014, 29 produk hukum daerah have been issued to recognise indigenous communities.\textsuperscript{95} With this development, the MoEF appears to have accommodated the local initiative to recognise indigenous communities. Viewed in this way, the problem concerning the form of regulation for recognising indigenous communities appears to have been resolved. However, this interpretation is problematic if compliance with the Constitutional Court’s decision on the Adat Forest is to be achieved. For the Court, in the absence of a specific statute on the recognition of indigenous communities, recognition of indigenous communities is to take place by GR or Local Regulation (Perda).\textsuperscript{96} The Court’s decision does not appear to accommodate a decision of the head of a local government as a legally acceptable instrument to recognise indigenous communities.

Despite this legal problem, the issuance of MRs on Titled Forest and on Social Forestry have increased the size of the forest allocated to the community. Therefore, it can be confidently claimed that the Constitutional Court’s decision has prompted legal change. The net effect has been positive, even though the government’s regulations do not necessarily correspond to the Court’s decisions, despite imperfect compliance. Of 12.7 million hectares of state forest that the government allocated for social forestry programs since 2015,\textsuperscript{97} 1.7 million hectares

\textsuperscript{93} MoHA Regulation No 52 of 2014 on the Guidelines for the Recognition and Protection of Indigenous Communities art 6(2).
\textsuperscript{94} Included in the definition of specific zone is forest and plantation zones.
\textsuperscript{96} Decision on Adat Forest Case (n 5) 184.
\textsuperscript{97} MoEF, \textit{Strategic Plan 2015–2019} (MoEF, 2015).
have been reallocated for communities.\textsuperscript{98} Unfortunately, inconsistent regulations and demanding requirements for the recognition of indigenous communities has slowed the progress of reallocation for the adat forest.\textsuperscript{99} As of 2018, the MoEF had only issued 21 ministerial decrees and two reserved ministerial decrees\textsuperscript{100} on the adat forest,\textsuperscript{101} which purport to allocate only 24,000 hectares out of 1.7 million hectares that have been earmarked for community reallocation (0.01%).\textsuperscript{102} This figure is very small compared with those that have been reallocated — for example, for village forests (8.2 million hectares)\textsuperscript{103} — or earmarked to be allocated to industry (56 million hectares).\textsuperscript{104}

It is not easy for indigenous communities to obtain recognition from their local governments. While the number of local regulations that recognise indigenous communities has continued to increase since the Constitutional Court handed down its decision on the Adat Forest,\textsuperscript{105} at the time of writing, there were only 70 produk hukum daerah to recognise indigenous communities.\textsuperscript{106} None of these were purely government or indigenous community initiatives, but rather were facilitated by CSOs and donor agencies.\textsuperscript{107} Based on experience, it requires approximately Rp 500 million to introduce, deliberate and ultimately pass a Perda or a Decree to recognise a indigenous community.\textsuperscript{108} An interviewee mentioned an even higher amount — up to Rp 700 million — mostly spent to conduct geographical mapping and social studies, including to identify potential conflicts.\textsuperscript{109} In many instances, this process is supported by donor agencies, NGOs and local governments. After obtaining a Perda or Decree of recognition, communities still need to obtain a ministerial decree for the adat forest, the costs of which are also significant.\textsuperscript{110} Moreover, issuing a Perda or Decree for recognition takes time. For example, it took more than two years for the customary community of Amatoa

\textsuperscript{98} MoF (n 58) 37.

\textsuperscript{99} R Yando Zakaria et al, Perhutanan Sosial: Dari Slogan Menjadi Program (Sekretariat Reforma Agraria dan Perhutanan Sosial, 2018) 47.

\textsuperscript{100} Reserved ministerial decree means a decree that was issued by the minister on the condition that the applicants met the requirements to obtain full recognition of the Adat forest.

\textsuperscript{101} Yando Zakaria, ‘Setelah Lima Tahun Putusan MK’, Kompas (22 June 2018).

\textsuperscript{102} MoF (n 58) 85.

\textsuperscript{103} Ibid.

\textsuperscript{104} MoF, The 2017 Indonesian Forest Statistic (MoF, 2017). These figures include production forest (HP) and limited production forest (HPT).

\textsuperscript{105} Arizona, Malik and Ishimora (n 95).

\textsuperscript{106} Zakaria (n 101).

\textsuperscript{107} Ibid.

\textsuperscript{108} Ibid.

\textsuperscript{109} Interview with Erasmus Cahyadi, Deputy for Law and Politics, National Alliance for Indigenous People (AMAN), Jakarta (16 August 2017).

Kajang, South Sulawesi, to obtain recognition from their local government. Another problem is that most customary communities lack access to local lawmaking processes, let alone access to apply for a ministerial decree in the capital city of their country or district. Thus, they rely heavily on CSOs and donor agencies to obtain their rights.

4 Recognising Adat Forest and Protecting the Rights of Indigenous Communities by Presidential Regulation

The most recent government response at the time of writing was Presidential Regulation No 88 of 2017 on the Resolution of Land Entitlements in Forest Zones (Perpres Penyelesaian Penguasaan Tanah dalam Kawasan Hutan) on 11 September 2017. The consideration part of the Perpres mentions that this regulation is intended to implement four Constitutional Court decisions on forestry (Decision No 34/PUU-IX/2011, Decision No 45/PUU-IX/2011, Decision No 35/PUU-X/2012 and Decision No 95/PUU-XII/2014) to give legal protection to communities that possess a piece of land in the forest zone. This Perpres is the result of the perceived failure of the four-minister Joint Regulation on Procedures for the Resolution of Land Ownership in Forest Areas (Perber), as discussed above. The government had deemed this joint regulation to be ineffective as a result of leadership and coordination issues. For this reason, the MoF proposed upgrading the status of the Perber to become a Perpres, which is higher on the hierarchy of laws than an MR. The thinking behind this was that, with the change of legal instrument, the leadership and coordination problems that had existed under the Perber would be removed, at least in theory, because the implementation of a Perpres is supervised by the president. However, the substance of this Perpres is very similar to that of the Perber. The difference is that the Perpres provides more detailed procedures for, and more types of, land entitlement resolution. It also establishes a new team to accelerate the process of land entitlement resolution and give a mandate to the Coordinating Minister for Economic Affairs to lead the team.

Unfortunately, this Perpres is problematic because even though it says that it seeks to provide legal protection, it appears to make it easier for customary communities to be expelled from their territory under the pretext of resolving forest tenure disputes; therefore, it diminishes

112 Presidential Regulation No 88 of 2017 on the Resolution of Land Entitlements in Forest Zones, Consideration part.
114 Maria SW Sumardjono, ‘Sekali Lagi Tentang Hak Komunal’ Kompas (16 July 2016) 6.
the effect of the Constitutional Court’s decisions. As will be explained later, the *Pepres* requires any person who lives in the conservation zones and protected forest to be relocated from the area without certainty as to where and how the relocation will be conducted.

**Type and Procedures of Land Entitlement Resolution**

The *Pepres* authorises the government to engage in land entitlement conflict resolution in zones\(^{116}\) that have been nominated *(ditunjuk)* as forest zones, but that have not undergone full gazettal phases.\(^{117}\) The types of resolution depend on the location of the land parcels in the forest zone. For land parcels owned, managed and/or granted rights **before** the land parcel is nominated *(ditunjuk)* as a forest zone, the parcel is released *(dikeluarkan)* from the forest zone through changes in forest zone boundaries.\(^{118}\) For land parcels owned, managed and/or granted rights **after** the land parcel is nominated *(ditunjuk)* as a forest zone, the parcel is released *(dikeluarkan)* from the forest zone through changes in forest zone boundaries, land-swapping *(tukar menukar kawasan hutan)*, providing access to manage forests through social forestry programs, and resettlement.\(^{119}\) Resolutions must maintain 30\% of the forest zone and sustain basic forest functions.\(^{120}\)

The types of resolution in the second category depend on various factors, including the size of forest zones in the relevant province, the utilisation of the land parcels and the function of the forest where the land parcels are located. The *Pepres* stipulates that the only resolution available for people who live in forest zones with conservation functions, regardless of the location and the utilisation, is relocating them to non-forest zones (resettlement).\(^{121}\) The same applies to those who live in a protected and production forest and who are using the area for housing and for social and public facilities.\(^{122}\) However, if the protected forest is no longer meeting the criteria as a protected forest, the *Pepres* provides two alternatives. First, if the forest is located in a province with \(\leq 30\%\) forest zone, the government will swap this land with a land parcel elsewhere in a non-forest zone.\(^{123}\) Second, if the forest is located in a province with more than 30\% forest zone, the area will be released, and its status will be changed to a non-forest zone.\(^{124}\) This means that the land will no longer be under the MoEF’s authority, but that of the MoASP.

A different resolution applies for those who live in a protected forest but use it to generate income: they will be involved in a social forestry program (in a province with 30\% or less forest

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\(^{116}\) Presidential Regulation on the Resolution of Land Entitlements in Forest Zones (n 112) art 2.

\(^{117}\) Ibid art 3(1).

\(^{118}\) Ibid art 7.

\(^{119}\) Ibid art 8(1).

\(^{120}\) Ibid art 8(2).

\(^{121}\) Ibid art 9.

\(^{122}\) Ibid arts 10.a., 11.a. and 12.a.

\(^{123}\) Ibid art 10.b.

\(^{124}\) Ibid art 11.b.
zone), \textsuperscript{125} or the area will be released if they have lived in that location for more than 20 years (in a province with more than 30\% forest zone).\textsuperscript{126} For people who live in a production forest and use it for housing and social and public facilities, the resolution can be a land swap or release of the land to become a non-forest zone.\textsuperscript{127}

Unfortunately, while one of the objectives of this \textit{Perpres} is to implement the Constitutional Court’s decisions on forestry, the \textit{Perpres} is silent about the resolution for the adat forest. It is not clear what resolution is available if the adat forest is located in a protected zone (whether or not the criteria are met) or in a production zone.

\begin{table}[ht]
\centering
\caption{Type of land entitlement resolution in appointed forest zones}\textsuperscript{128}
\begin{tabular}{|c|c|c|c|c|c|c|c|}
\hline
\textbf{Size of forest zone*} & \multicolumn{2}{c|}{\leq 30\%} & \multicolumn{2}{c|}{> 30\%} & \\
\hline
\textbf{Utilisation} & Housing & Social & \\
& & \& public & Adat \\
& & & facilities & forest & Housing & Social & Adat \\
& & & Production & & & \& forest & \\
\hline
\textbf{Forest function} & & & & & & & \\
- Conservation & Resettlement (RS) & & & & & & \\
\hline
- Protected & RS & RS & SF & NA & RS & RS & > 20 yr: R & \textless 20 yr: SF & NA \\
\hline
- Protected but not & LS & LS & — & NA & R & R & — & NA & \\
meet the criteria & & & & & & & & & \\
\hline
- Production & LS/R & LS/R & SF & NA & R & R & > 20 yr: R & \textless 20 yr: SF & NA \\
\hline
\end{tabular}
\footnotesize{
\textsuperscript{*} Size of forest zone in a watershed, a province and/or an island \\
RS = Resettlement \\
LS = Land swap \\
R = Released \\
SF = Social forestry \\
NA = No answer}
\end{table}

The procedures for land entitlement resolution comprise five stages, as follows.\textsuperscript{129} inventory of land entitlements in the forest zone, verification of land entitlements and recommendations, determining the type of resolution and utilisation of land in the forest zone, issuing a decision on the type of resolution and utilisation of land in the forest zone, and issuance of land entitlement certificate.

\textsuperscript{125} Ibid art 10.c. \\
\textsuperscript{126} Ibid art 11.c. \\
\textsuperscript{127} Ibid arts 12.b. and 13(1) a., b. and c. \\
\textsuperscript{128} Ibid art 9-13. \\
\textsuperscript{129} Ibid art 20.
To speed up the resolution process, the *Perpres* establishes a team called the Accelerating Team for Land Entitlement Resolution in the Forest Zone (*Tim Percepatan — PPTKH*) and empowers the Coordinating Minister for Economic Affairs to lead the team. The members of the team are the Minister of Environment and Forestry, Minister of Agrarian and Spatial Planning *cum* Head of National Land Agency, MoHA, Secretary of the Cabinet and Head of the Presidential Office. The main tasks of this team are to coordinate the implementation of the land entitlement resolution, develop required policies, determine the maximum size of the land for this program, determine the mechanism for resettlement, conduct supervision and oversight, and provide the budget. The team is directly accountable to the president. The high-level composition of the team and the importance of its tasks suggest that the government is serious about this process. However, it might also indicate that the government can easily block resolutions that do not correspond with their interests.

To support the tasks of the Accelerating Team, this *Perpres* authorises the governor (head of the provincial government) to form a team to conduct inventorisation and verification (*Team Inver PPTKH*). The team is responsible for receiving applications to obtain land entitlements, conduct data collection, analyse the physical and legal status of the land as well as the environmental impact, and provide recommendations to the governor. The governor will then submit this report to the Head of the Accelerating Team. Any person unsatisfied with the decision of the team can file a complaint to the Minister of Environment and Forestry through the relevant Head of District/Municipality within 30 days of the announcement of the decision. If the complaint is accepted, the minister will ask the governor to perform reverification.

5 *Problematic and Diminishing the Effect of the Constitutional Court’s Decisions*

This *Perpres* is problematic in several ways. The first problem relates to the location in which the resolution may occur. As mentioned, the *Perpres* authorises the government to conduct land entitlement resolution in forest zones. However, the definition of forest zones in this *Perpres* is similar to the definition in the Forestry Law, parts of which the Constitutional Court invalidated in Decision No 45/PUU-IX/2011. Article 3(1) of the *Perpres* states that the ‘Forest Zone as referred to in art 2 is forest zone that is in the phase of nomination (penunjukan) as forest zone’.

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130 Ibid art 14(1).
131 Ibid art 14(3).
132 Ibid art 14(3).
133 Ibid art 14(2).
134 Ibid art 17.
135 Ibid art 18.
136 Ibid art 19(1).
137 Ibid art 24.
138 Ibid art 27(2), (3) and (4).
139 Ibid art 27(6).
In subsequent provisions regarding the types of resolution (art 7-13), this Perpres stipulates that the type of resolution available depends on the location of the land parcels and whether the land is located in an area that has been nominated as a forest zone.

Article 7 of the Perpres stipulates that ‘The type of resolution for the land parcel that is owned, managed and/or granted rights before the land parcel is nominated (ditunjuk) as a forest zone is ... releasing it (mengeluarkan) from the forest zone through changes in forest zone boundaries’ (emphasis added).

Article 8(1) of the Perpres states that

The types of resolution for the land parcel that is owned, managed and/or granted rights after the land parcel is nominated (ditunjuk) as a forest zone are:

a. releasing the land from (mengeluarkan) the forest zone through changes in forest zone boundaries,

b. land-swaps (tukar menukar kawasan hutan),

c. giving access to manage forest through social forestry programs, or

d. resettlement.

In my view, the definition of the forest zone in art 3(1) is inconsistent with arts 7 and 8(1). While art 3(1) mentions that the resolution can be conducted for land parcels that are in areas in the process of nomination as a forest zone, arts 7 and 8(1) implicitly suggest that the resolution can be conducted in an area that either has or has not been nominated as a forest zone. This inconsistency raises questions about the type of land to which the Perpres’ resolution program applies. Going by art 3(1), the resolution can only take place in relation to land that is in the process of being nominated as a forest zone. This means that it applies to less than 33 million hectares (27.5%) of the total size of the nominated forest zone (of 120 million hectares that have been appointed as forest zones, more than 87 million hectares (72.5%) have been gazetted). However, from arts 7 and 8(1), it can be argued that the resolution applies to a wider area of forest zones, including those that have been gazetted.

Given that forest tenure conflicts may occur in forest zones regardless of whether they have been nominated, it is important to cover both areas as implicitly stipulated by art 7-13 of the Perpres.

The second problem is that resettlement is difficult to implement and may worsen the problem of communities being pursued for criminal offences if they refuse to be resettled. Yet under the Perpres, resettlement is the only option for communities living in conservation zones and some protected zones. Approximately 25,000 villages are located in these zones,

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140 Directorate General of Planology (n 50) 44–45.

141 According to arts 1 (3) and 15 of the 1999 Forestry Law, an area is a forest zone if it is designated through four stages: appointment, delineation, mapping and gazettal. Thus, a gazetted forest zone means it has been appointed.

142 Mongabay, ‘Presiden Teken Perpres Penyelesaian Penguasaan Tanah Di Kawasan Hutan’ (n 113).
and 1.62 million hectares are customary territories; therefore, it is difficult to relocate people who live in this area. For the government, it requires a large budget, replacement land and human resources to relocate these people. Further, these communities may find resettlement difficult, particularly if they are forest-dependent. They may also have lived in these areas before the nomination or gazettal of the forest zone commenced, but do not have legal documents to prove their entitlements. Experience shows that without proof of entitlement, these communities are susceptible to criminalisation. The AMAN reports that, as of 2018, 261 people from various indigenous communities have been charged with criminal offences, most of which relate to conflict over land entitlements in forest zones.

The third problem is that it is questionable whether the Perpres supersedes the Perber or whether both regulations remain valid. Given its historical background, the Perpres appears to be intended to give the government a legal basis stronger than that of the Perber to conduct land entitlement resolutions. Indeed, the Perpres provides a stronger legal basis for leadership and coordination tasks, at least on paper, because, as mentioned, it provides for direct leadership from the president, who is the head of the executive. While there is generally little inconsistency between the Perpres and the Perber, there is one important exception: the Perpres authorises the governor (ie, the head of a provincial government) to establish and lead a team to inventorise and verify land entitlements, while the Perber gives these tasks to the regent (ie, head of the district government). This change is consistent with the current trend in natural resources management, in which the national government wants to redirect power to manage natural resources from district-level administration to provincial-level governments to make it easier for the national government to coordinate and supervise the sector. However, the Perpres does not clearly mention whether it revokes or replaces the Perber, and both remain ‘on the books’. Problematically, the Perpres is silent about its purported effect on the Perber, but it seems clear that the Perpres should override the Perber to the extent of any inconsistency because of its higher position in the hierarchy of laws than the Perber. Moreover, based on the principle of lex posteriori derogate lex apriori (a later statute automatically repeals an earlier one), the Perpres should override the Perber because it contains similar subject matter but was enacted after the Perber. Nevertheless, the Supreme Court, which is responsible for invalidating ‘lower’ regulations that are inconsistent with ‘higher’ laws in most types of cases, has not yet been called upon to determine the relative status of the Perpres and the Perber.

Finally, the Perpres is inconsistent with other MRs. For example, it is inconsistent with the MR on Social Forestry and the Ministerial Decree (Kepmen) on the Indicative Map of Social

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143 Agung Wibawa, ‘Dari Reformasi Kembali Ke Orde Baru’.
145 Law on Law-Making (n 3).
146 MoEF Regulation on Social Forestry (n 80).
Forestry Areas (Peta Indikatif dan Areal Perhutanan Sosial – PIAPS). As mentioned, one type of resolution that is recognised by the Perpres involves giving local communities access to forest resources through the Social Forestry program. This includes village forest (hutan desa), community forest (hutan kemasyarakatan), community timber plantation (hutan tanaman rakyat), forest partnerships (kemitraan kehutanan) and the adat forest (hutan adat). According to the Kepmen on PIAPS, communities can manage the adat forest in protected zones and conservation zones to the extent that doing so does not disturb forest functions. In contrast, the Perpres stipulates that the only choice is resettlement for people who own land in conservation zones and some parts of protected forests. The question is: If an indigenous community lives in an adat forest (that is legally granted) in a conservation or protected zone, which regulation should apply? Does the Perpres automatically prevail because it has a higher position on the hierarchy of law? Similar inconsistencies arise with the MR on Titled Forest, which seeks to implement Constitutional Court Decision No 35/PUU-X/2012 on Adat Forest. This Permen stipulates that the adat forest may function as a conservation and protected forest. Given that the Perpres mentions that resettlement is the only resolution option for utilisation in conservation zones, it closes the opportunity for indigenous communities to have an adat forest in conservation or protected zones.

In light of these problems, it is doubtful that this Perpres will be able to effectively implement the Constitutional Court’s decisions on forestry. Even the Ministry of Law and Human Rights in a recent evaluation report suggested that the Perpres should be revoked and that its substance be included in the revision to the Forestry Law for the following reasons: first, according to the Law on Law-making, the implementation of the Constitutional Court’s decision must be established in a statute. This issue was discussed above and, if taken to its logical conclusion, brings into question the validity of all of the legal instruments discussed in this chapter. However, the report did not identify the problems discussed above. It appears that the ministry’s view is focused on legal formalities that relate only to the form of the law rather than the substance.

6 Strong Environmental Protection, Lack of Legal Certainty for Indigenous Communities

As this section has demonstrated, the regulations issued by the government to respond to the Constitutional Court’s decisions on forestry generally contain strong environmental protection provisions. For example, under the MR on Titled Forest, a forest zone can be designated as titled forest provided it is used in accordance with forest functions that have been determined by the government based on ecological considerations. If the rightholders

147 MoEF Decree No 22 of 2017 on the Indicative Map of Social Forestry Area.
148 Ibid art 8.
149 MoEF Regulation on Entitled Forest (n 79).
150 Ibid art 3(4).
are not satisfied, the minister must provide compensation.\textsuperscript{152} So, for example, compensation is available to the community if the designation of the forest as a protected forest limits forest access.\textsuperscript{153} Further, the MR states that rightholders must maintain, restore and increase forest function, apply principles of sustainable forest management and protect their land from forest fires.\textsuperscript{154} The \textit{Perpres} on the Resolution for Land Entitlement in the Forest Zone requires communities that live in conservation forest to resettle in the interests of sustainability.\textsuperscript{155} It also stipulates that any resolution must result in the retention of at least 30\% of the land of each province as a forest zone. Equally important is that the \textit{Perpres} states that any change in forest function and utilisation must be integrated within regional spatial plans.\textsuperscript{156}

The regulations also guarantee communities’ procedural rights. For example, the \textit{Perpres 88/2017} on the Resolution of Land Entitlement in the Forest Zone stipulates that affected communities may file complaints to the Minister of Environment and Forestry through their heads of local government within 30 days of the announcement of the resolution, and the minister must conduct reverification if complaints are received.\textsuperscript{157} Similarly, an MR on the Handling of Tenure Conflict in Forest Zones provides guarantees for conflict settlement. Thus, it can be said that the Constitutional Court’s decisions have had an overall positive effect on environmental protections, not necessarily because of their own content, but because they have prompted legal change that will make the environment better off, even if compliance has not been perfect and has resulted in an inconsistent legal framework.

However, despite increased environmental protection, at least in theory, the MRs do little to provide legal certainty for local and customary communities, as discussed above. A report from the Agrarian Reform Consortium (\textit{Konsorsium Pembaruan Agraria — KPA}) revealed that in 2018, there were 49 land conflict cases resulting from the unilateral nomination of forest zones and 11 cases resulting from the unilateral nomination of conservation zones.\textsuperscript{158} Recently, a community in Guntung Punak in Riau Island Province sued the MoEF for unilaterally determining hundreds of hectares of land to be protected forest based on this \textit{Perpres}.\textsuperscript{159} At the time of writing, this trial was ongoing. On another occasion, a community in Way Pisang, Lampung Province filed a complaint to the president because more than 3,000 hectares of its territory had been classified as being production forest, even though they had

\begin{footnotesize}
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\item[152] MoEF Regulation on Entitled Forest (n 79) art 7(1) and (2).
\item[153] Ibid art 13.
\item[154] Ibid art 10(2).
\item[155] Presidential Regulation on the Resolution of Land Entitlements in Forest Zones (n 112) art 9(1).
\item[156] Ibid 14–17.
\item[157] Ibid art 27(2), (3) and (4).
\item[158] KPA (n 78) 21.
\end{footnotes}
\end{footnotesize}
met all requirements to be granted rights to manage the land.\textsuperscript{160} This suggests that, despite the net positive benefit for the environment, these Constitutional Court decisions have not had a similar desired effect to improve legal certainty for indigenous communities because of the low level of the government’s compliance as demonstrated by those regulations.

**D Government’s Regulatory Compliance with Water Resource Law 2**

As discussed in Chapter V, the invalidation of the WRL by the Constitutional Court was driven by the Court’s concerns that privatisation of the right to use water for commercial purposes would result in the monopolisation of the drinking water sector by the private sector. In its decision, the Court held that the right to water is a basic human right and that because water is ‘public trust’, it must be controlled by the state. For this reason, the state must establish rigorous restrictions on the use of water for commercial purposes.

As mentioned, at the time of writing, a bill to replace the WRL was being discussed in the national parliament. In the meantime, in addition to the circulars discussed above, the government issued at least three GRs,\textsuperscript{161} 18 MRs and various policies, including Economic Policy Package (\textit{Paket Kebijakan Ekonomi}) VI, in an attempt to deregulate the sector.\textsuperscript{162} The government has continually asserted that this was necessary to avoid a legal vacuum.\textsuperscript{163} Here, I focus on two GRs that are relevant to water privatisation and commercialisation: the GR on the Use of Water Resources for Commercial Purposes (\textit{PP Pengusahaan Sumber Daya Air})\textsuperscript{164} and the GR on the Drinking Water Service System (\textit{PP Sistem Penyedian Air Minum}).\textsuperscript{165} Both were issued on the same date (28 December 2015), 10 months after the Constitutional Court handed down the WRL Case 2.

The general elucidation to these regulations clearly states that the reason for their issuance is to implement the Constitutional Court’s decision.\textsuperscript{166} More specifically, they seek to regulate commercial water use permits, including for drinking water. Generally, the principles of water


\textsuperscript{161} Among others, MoPWH Regulation No 09/PRT/2015 on The Utilization of Water Resource; MoPWH Regulation No 25/PRT/M/2016 on Drinking Water Service for Business Entity; MoPWH Regulation No 27/PRT/M/ 2016 on the Management of Drinking Water System.


\textsuperscript{164} GR No 121 of 2015 on the Use of Water Resource for Commercial Purpose.

\textsuperscript{165} GR No 122 of 2015 on Drinking Water Service System.

\textsuperscript{166} Ibid; GR on the Use of Water Resource for Commercial Purpose (n 164).
management that have been set out in the Constitutional Court’s decision are adopted in the GR on the Use of Water Resource for Commercial Purposes, including that: water management must not disturb, disregard and eliminate people’s right to water; citizens’ rights to water and environmental sustainability are basic human rights; the government must oversee and control water resources; state-owned-enterprises and local government-owned enterprises should be prioritised in water resource management; and permits to manage water resources, including to use surface and ground water, can be given to private enterprises, provided the preceding principles have been met. It also adopts the Court’s reasoning held on the WRL Case 2 — namely, that water is public trust and can therefore be used for commercial purposes only if the daily needs of the community have been met. Such use must take into account the social and environmental functions of water. Given that surface and groundwater are the sources of drinking water, the principles set out in the GR on the Use of Water Resource for Commercial Purposes must surely also apply to the GR on Drinking Water Service System, even though these principles are not expressly included in that GR.

In light of these principles, the two regulations emphasise that the government is responsible for managing surface and groundwater, including for drinking water. At the same time, the regulations also allow private entities (swasta) to be involved in managing this sector. While this does not necessarily contradict the Court’s decision, because the Court allowed ‘private involvement’ with some conditions, this is likely to cause problems in implementation that could perpetuate water privatisation. This problem derives from the Court’s failure to define what it meant by ‘private involvement’ in its decision. Unfortunately, the two regulations, which aim to implement the court’s decision, did not clarify the meaning of the concept either. There appear to be at least two possible reasons for this. One reason is that this seems to be because drafters did not understand what the Court meant by ‘private involvement’. In an interview, one of the drafters of the GR on the Use of Water Resource for Commercial Purposes from the Ministry of Law and Human Rights said that during the drafting process, they sought advice about this from the Constitutional Court. To this end, they were able to meet several times with the Secretary General of the Constitutional Court, not the judges, but unfortunately the Secretary General could not provide clearer guidance either.

This lack of understanding regarding the permissible level of ‘private involvement’ appears to be shared by drafters of the national statute on Water Resources, with one interviewee

167 GR on the Use of Water Resource for Commercial Purpose (n 164) art 2.
168 Ibid art 4(3).
169 Ibid art 4(4).
170 GR No 122 of 2015 on Drinking Water Service System (n 165) art 1.1.
171 Ibid General Elucidation.
172 Ibid art 121; GR on the Use of Water Resource for Commercial Purpose (n 164) art 2.
stating that there was widespread confusion among drafters about the term.\textsuperscript{174} Is involvement here limited to shareholding (\textit{kepemilikan saham}) or physical involvement, such as to develop infrastructure for drinking water? If it is limited to shareholding, what percentage can private entities hold before their involvement becomes excessive?

Another reason why the government did not seek to articulate the concept of ‘private involvement’ might have been a deliberate attempt to accommodate the business interests and political agendas of officials. The water privatisation case in Jakarta lends some credence to this explanation. In 1995, then President Soeharto, on the World Bank’s advice, agreed to allow two foreign companies — British Thames Water and Lyonnaise des Eaux — to handle water service delivery in Indonesia.\textsuperscript{175} The Jakarta water privatisation began in 1997, when PAM Jaya, a company owned by the city, signed a 25-year contract with two companies — Aetra Air Jakarta (Aetra), founded by British Thames Water and Soeharto’s son Sigit Harjoyudanto, and PAM Lyonnes Jaya (Palyja), founded by Lyonnaise des Eaux and Soeharto’s close ally, Lim Sioe Liong.\textsuperscript{176} Under this contract, PAM Jaya agreed to hand over the management of Jakarta’s water to these two companies: Aetra for the eastern part and Palyja for the western part of the city.

In November 2012, before the second judicial review of the WRL in the Constitutional Court, a group of Jakarta residents, called the Coalition of Residents Opposing Water Privatisation in Jakarta (\textit{Koalisi Masyarakat Menolak Swastanisasi Air Jakarta} — KMMSAJ) filed a citizens’ lawsuit with the Central Jakarta District Court, asking the Court to annul the water privatisation contract.\textsuperscript{177} They argued that water privatisation had failed to guarantee an adequate supply of clean, potable water in the city. After almost 20 years of operations, the two private companies had failed to reach the targets agreed in the 1997 contract: having 98\% service coverage and decreasing non-revenue water to 20\% by the twentieth year.\textsuperscript{178} In 2015, the water coverage provided by both private operators was only 59\%, with a leakage rate of 44\%. The applicants also complained that the city’s poor residents could not afford the

\begin{footnotesize}
\begin{enumerate}
\item[174] Interview with Khopiatuziadah, Legislative Drafting Unit, Expert Body of the National Parliament (26 July 2017).
\item[177] In this case, the litigants were a group of Jakarta residents called the Coalition of Residents Opposing Water Privatization in Jakarta (\textit{Koalisi Masyarakat Menolak Swastanisasi Air Jakarta} — KMMSAJ), and the defendants were Aetra Air Jakarta Inc., PAM Lyonnes Jaya — Palyja Inc, the President of the Republic of Indonesia, the Minister of Public Work and the Minister of Finance.
\item[178] Heriyanto (n 176).
\end{enumerate}
\end{footnotesize}
water tariff of Rp 7,800 per cubic metre, which was the highest among countries in South Asia.\footnote{Lusia Arumingtyas, ‘Privatisasi Air Jakarta: Swasta Untung, Warga Ketiban Pulung’, Mongabay Environmental News (online, 13 June 2016) <https://www.mongabay.co.id/2016/06/13/privatisasi-air-jakarta-swasta-untung-warga-ketiban-pulung/>}

The Central Jakarta District Court agreed with the applicants and declared that the water privatisation contract must be annulled, deciding that water privatisation contradicted the human right to water.\footnote{Decision of the District Court of Central Jakarta No 527/Pdt.G/2012/PN JKT.PST.} In 2015, the Appellate Court of Jakarta overturned the district court’s decision.\footnote{Decision of the Hight Court of Jakarta No 588/PDT/2015/PT DKI.} Unsatisfied, the Jakarta residents appealed to the Supreme Court, adding the argument that the Constitutional Court had, by this time, invalidated the WRL on the grounds of water privatisation. The Supreme Court granted this application, delivering its decision in 2017. It overturned the Appellate Court’s decision, holding that the Appellate Court had wrongfully applied the law for allowing water privatisation in Jakarta. Accordingly, the Supreme Court ordered the defendants to terminate water privatisation and revert to a water management system that complied with both Indonesian law and the right to water as set out in the International Covenant on Economic, Social and Cultural Rights.\footnote{Decision of the Supreme Court of Republic of Indonesia No 31/Pdt/2017, p. 160.}


He formed a Team for the Evaluation of Drinking Water Management (\textit{Tim Evaluasi Tata Kelola Air Minum}) to support him to make a decision on this matter.\footnote{‘Anies Bentuk Tim Evaluasi Tata Kelola Air Minum’, \textit{CNN Indonesia} (online, 15 August 2018) <https://www.cnnindonesia.com/nasional/20180815190001-20-322595/anies-bentuk-tim-evaluasi-tata-kelola-air-minum>}. By contrast, the national government appeared to be reluctant to comply. The Director for Water and Sanitation of the Committee for the Accelerated Provision of Priority Infrastructure (\textit{Komite Percepatan Penyediaan Infrastruktur Prioritas — KPPiP}),\footnote{The Committee consists of the Coordinating Minister for Economic Affairs, Coordinating Minister for Maritime Affairs, Minister of Finance, Minister for National Development Plan, Minister for Agrarian and Spatial Planning and MoEF.} Henry BL Toruan, said that the Supreme Court’s decision would not stop the government involving the private sector in government projects on water and sanitation because this involvement was permitted by the Constitutional Court and the two GRs.\footnote{‘Siaran Pers: Putusan MA tidak Mengganggu Investasi Infrastruktur Air Minum’, Committee for Acceleration of Priority Infrastructure Delivery (KPPiP) (online, 23 October 2017) <https://kppip.go.id/siaran-pers/putusan-ma-tidak-mengganggu-investasi-infrastruktur-air-minum/>} There appeared to be no other choice: under the Jokowi presidency, the government has committed to push for infrastructure development,
including in the water sector, and it needs private sector ‘involvement’, particularly investment and expertise. In the 2015–2019 National Development Plan, the government introduced a program called ‘100-0-100’, which aimed to provide 100% safe drinking water, 0% slum areas and 100% access to sanitation by 2019. The government requires up to Rp 274.8 trillion to finance this program, of which it can afford only 33%. Thus, the government needs private sector funds to finance the remaining 67% of the budget for the project.

In March 2018, the Minister for Finance, Sri Mulyani, filed a petition to the Supreme Court and requested the Supreme Court to invalidate its cassation decision using its own review mechanism (Peninjauan Kembali — PK). While it appears that the main reason for filing this petition was to ensure that the government’s infrastructure projects could continue with private involvement, the minister’s arguments centred on the legality of the citizens’ lawsuit brought by Jakarta residents. The Supreme Court granted this petition in February 2019 and overturned its own decision, allowing private involvement in water management to continue. Despite this, the Jakarta governor remains committed to taking over the water management from the two private companies. He has proposed three options to take over Jakarta’s water management from the private sector: buy 100% of the companies’ shares; unilaterally terminate the contract, or take over the water treatment installation from the companies. Each option carries serious potential ramifications, including the provision of trillions of rupiahs in compensation to the companies, and perhaps even the prospect of litigation or international arbitration. Nevertheless, the governor appears undeterred, pointing to the Constitutional Court’s decision on Water Resources as the legal justification for the courses of actions open to him. However, at the time of writing, none of these options had been taken or implemented.

Another problem with the regulation relates to the question: Who can use surface and groundwater for commercial purposes, including for drinking water? The GR on the Use of

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189 Ibid.  
190 Decision of the Supreme Court of Republic of Indonesia No 841 PK/PDT/2018.  
Water Resource for Commercial Purpose states that a permit to use water for commercial purposes can be given to state, regional and village-owned enterprises, as well as private entities, cooperatives, individuals and cooperating business entities.\textsuperscript{193} In contrast, the GR on Drinking Water Service Systems states that permits to operationalise drinking water systems can be given to state- and regional-owned enterprises, technical service units \textit{(unit pelayanan teknis)}, community groups and/or business entities.\textsuperscript{194} This regulation allows all of them to collaborate with private entities;\textsuperscript{195} however, groups of communities are only allowed to run \textit{(menyelenggarakan)} drinking water systems for their daily needs.\textsuperscript{196} In practice, thousands of community-based drinking water systems have been established throughout Indonesia, but they are not the types of entity mentioned in the GR. Many are community-based foundations or associations\textsuperscript{197} that use water not only for their daily needs, but also for commercial purposes, in the sense that they sell water to communities and generate profits. Thus, these regulations preclude communities that run community-based drinking water systems from obtaining permits, with the result that they must stop their operations. In my view, this clearly contradicts the spirit of the Constitutional Court’s decision, which held that water is a public trust and that its utilisation must therefore be for the greatest benefit of citizens.

\textit{E Concluding Analysis}

Overall, the government’s regulatory compliance with Constitutional Court decisions has been mixed. The government appears to be willing to immediately implement the Court’s decisions by issuing circulars. Despite questions regarding its legal status, circulars appear to be acceptable in governmental practice in Indonesia and are easy to issue without coordinating with other governmental institutions or state branches. However, this leads to another problem: the government can easily use circulars to pursue its own interests, which might contradict the Court’s decision, as appears to have occurred in the case of the circular on the Adat Forest. However, no other parties appear to have picked this up, let alone questioned the validity of the circular. As this chapter has demonstrated, using circulars also potentially perpetuates regulatory overlaps and institutional rivalries between state institutions.

Many MRs and government regulations have been issued after these circulars. These are also relatively easy to make because they do not involve parliament, particularly the deliberation that is associated with the passage of most bills. Like circulars, one problem with regulations

\textsuperscript{193} GR on the Use of Water Resource for Commercial Purpose (n 164) art 13.
\textsuperscript{194} GR No 122 of 2015 on Drinking Water Service System (n 165) art 42(1).
\textsuperscript{195} Ibid art 42(2).
\textsuperscript{196} Ibid art 49(2).
\textsuperscript{197} See Mohamad Mova Al’Afghani et al, \textit{The Role of Regulatory Frameworks in Ensuring the Sustainability of Community Based Water and Sanitation} (Center for Regulation, Policy and Governance, 2015).
is that they sometimes overlap with each other, which impedes even the most genuine attempts at compliance.
CONCLUSION

This thesis has considered whether ‘environmental constitutionalism’ — that is, the inclusion of environment-related rights in national constitutions for vindication by constitutional courts — has been effective in Indonesia in the sense that it has led to improved environmental protection.¹ This is an important question in the context of the almost continual decline of environmental quality in Indonesia and the largely unsuccessful statutory and regulatory framework for environmental protection outlined in Chapter II. As discussed in Chapter I, many countries have recently adopted environmental rights in their constitutions — notably the right to a healthy environment. As discussed in Chapter II, Indonesia has followed this global trend by including the right to a healthy environment in its Constitution. Indonesia’s Constitution also contains other substantive rights that can be used to pursue environmental ends, such as the right to life, the right to health and the rights of indigenous communities. Also important are various procedural rights, through which environmental rights can be vindicated, and art 33(3), which requires the state to exercise control over natural resources for the greatest benefit of the people.

As mentioned in Introduction, this thesis has argued that the constitutionalisation of environmental rights in Indonesia has had mixed results. At the outset, I extrapolated four prerequisites for the effective constitutionalisation of environmental rights, drawing on the work of Harding et al and Stone-Sweet:² first, a constitutional review mechanism performed by a Court; second, the exercise of that mechanism to produce quality jurisprudence and provide legally acceptable reasons for its decisions; third, compliance with the decisions of that Court by the legislative and executive; and fourth, implementation by the ordinary courts with those decisions, and with statutes and other forms of law more generally.

As discussed in Chapter II, Indonesia formally meets the first prerequisite, having both constitutional environmental rights and a Constitutional Court. However, the jurisdiction of that court is limited to reviewing statutes for compliance with those constitutional rights. This is a serious limitation because it excludes executive regulations and government actions, both of which have either violated, or have significant potential to violate, those rights. As explained in Chapter II, other Indonesian courts have the power to review executive regulations and government actions, but not for compliance with the Constitution. In relation to the fourth prerequisite, Indonesia’s ordinary and administrative courts have long been criticised for failing to enforce environmental laws, particularly in the face of significant commercial interests of politically powerful figures. Despite some notable victories, discussed

¹ See James R May and Erin Daly, Global Environmental Constitutionalism (Cambridge University Press, 2015).
² Andrew Harding, Peter Leyland and Tania Groppi, ‘Constitutional Courts: Forms, Functions and Practice in Comparative Perspective’ in Andrew Harding and Peter Leyland (eds), Constitutional Court: A Comparative Study (Wildy, Summonds & Hill Publishing, 2009); Alec Stone-Sweet, ‘Constitutional Courts’ in Michel Rosenfeld and Andras Sajo (eds), The Oxford Handbook of Comparative Constitutional Law (Oxford University Press, 2012).
in Chapter II, it appears that they cannot always be relied upon to objectively enforce environmental laws and standards. This below-par track record of environmental law enforcement is critical and is likely to preclude the constitutionalisation of environmental rights from being effective. Even if the Constitutional Court produces quality decisions and the legislative and executive comply with those decisions, environmental law enforcement largely still falls to these ordinary and administrative courts.

This thesis focused on the second and third prerequisites, in Parts II and III respectively, where it made its primary contributions to the literature on environmental constitutionalism. Part II considered how the Constitutional Court exercised its constitutional review jurisdiction in environmental-related cases, with a focus on the quality of its jurisprudence. Part III considered the extent to which the legislature and the executive have complied with the Constitutional Court’s decisions on environment-related cases. In particular, I sought to examine why the legislature and the executive complied to the level that they did. The next section will highlight the key contributions this thesis has made, particularly to the literature on the constitutionalisation of environmental rights.

A Adjudication of Constitutional Environment-related Rights in the Indonesian Constitutional Court

Part II examined the extent to which the express right to a healthy environment provision and other constitutional provisions have been used by the litigants and the Court to pursue environmental ends. Despite the growing number of national constitutions that recognise substantive environmental rights (the right to a healthy environment) and procedural environmental rights (the rights to information, participation and justice) worldwide, the utilisation of these rights in the judiciary remains limited. Generally, the same situation applies in Indonesia, where Indonesia’s Constitutional Court has underutilised the right to a healthy environment and other procedural rights in its decision-making, as have litigants appearing before it, despite ample opportunities. Nevertheless, the Court has issued many decisions that have urged or required the legislature to pay more attention to environmental sustainability, employing the constitutional rights of customary communities and art 33 of the Constitution to provide environment-related protections.

As discussed in Chapter III, from the establishment of the Constitutional Court in 2003 until early 2019, the violation of the right to a healthy environment (art 28H(1)) was mentioned in arguments in only five cases: Mining in Protected Forest Case, Chevron Bioremediation Case, WRL Cases 1 and 2, and P3H Case. Only in the first two cases did the applicants employ this right to ground their central argument; in the others, the right was used as a subsidiary argument to support the main arguments based on other constitutional rights. Even so, only in the Chevron Bioremediation Case did the Court apply the right and produce a relatively sound decision. The Constitutional Court also upheld the claims of the applicants in the WRL
Case 2, but it used art 33(3) as the basis of its decision and ignored the applicants’ arguments on the right to a healthy environment.³

As Chapter IV demonstrated, the utilisation of procedural environmental rights in judicial review cases in Indonesia has also been limited. Applicants have only employed these in arguments in several cases: in the HSL Case (access to information, participation and justice in horticulture system planning); in Minerba and the Pesisir Cases (the right to participation in decision-making concerning mining activities and in coastal management, respectively); and two cases concerning access to justice (WRL Cases 1 and 2). The Constitutional Court granted standing to the applicants in all of these cases and found in favour of the applicants in three of them. However, in none of these cases did the Court use the violation of the applicants’ procedural rights as the basis for its decision. Rather, it referred to other constitutional provisions, such as art 33(3), which requires the state to exercise control over natural resources. In these cases, the Constitutional Court simply ignored the procedural environmental rights arguments.

When viewed in isolation, these decisions may appear to indicate that the Court is reluctant to allow the use of its processes for environmental ends. However, this thesis has demonstrated that the Court is not reluctant to do this. Instead, as discussed in Chapter V, the Constitutional Court has pursued environmental ends indirectly using art 33(3). As Chapter V showed, the Constitutional Court has often done this of its own accord, even in cases where the applicants have not developed arguments based on art 33(3) in their applications. In the WRL 1 and 2 Cases, the Constitutional Court interpreted art 33(3) to provide a constitutional foundation for the right to water, which is not recognised in the Constitution. The Constitutional Court also established an interpretive basis for state control to include indigenous rights to participation in coastal management (Pesisir Case). More importantly, in the Inanta Timber Case, the Court established that the duty of the state to control natural resources must be exercised in the framework of sustainability and environmental protection to ensure the right of every citizen to a healthy environment.

The Court has also preferred to rely on other provisions, such as those providing indigenous rights (art 18B), the right to legal certainty (art 28D(1)) and even the rule of law (art 1(3)) as discussed in Chapter VI. For example, in the Adat Forest Case, both the litigants and the Court used these rights to seek protection for indigenous rights to lands and forest resources to ensure sustainable use of those natural resources using traditional rules. In the Maskur Anang Case, the Court interpreted adherence to the rule of law (art 1(3)) to require inclusions of indigenous rights to participation, which would in turn help to ensure their rights to wellbeing and a healthy environment. In the Plantation Law Case, the Court ordered the prioritisation of ‘musyawarah’ (dialogue to achieve agreement) to resolve land conflicts that involve customary communities. This suggests that the Court is committed to protecting indigenous

³ As discussed in Chapter III, the Court rejected the arguments of the applicants in the other three cases (Mining in Protected Forest Case, WRL Case 1 and P3H Case).
rights and traditional law, at least on paper, so that natural resources can be enjoyed by current and future generations. Yet, in all of these cases, the Court also emphasised that these rights are conditional: the existence of the relevant indigenous community must be recognised under existing laws and regulations. As discussed in Chapter VI, this condition has greatly undermined the effectiveness of the Constitutional Court’s decisions on indigenous rights, primarily because the laws that establish procedures for recognition are inconsistent, and recognition is insurmountably costly and complicated for many indigenous communities. Thus, it is unlikely that these decisions can be effectively enforced.

**B Explaining the Underutilisation of Environmental Rights in the Indonesian Constitutional Court**

May and Daly⁴ and Bruch⁵ suggest several explanations for the relative dearth of constitutional cases based on environmental rights in courts worldwide, including the novelty of the right, the difficulty in proving causation, the lack of judicial familiarity and competence to deal with the right, and the lack of public interest in environmental litigation and its capacity to bring cases to court.

These factors are also undoubtedly at play in Indonesia. However, this thesis has uncovered three additional explanations or factors that apply in the Indonesian context. These relate to the formulation of the rights in the Constitution itself, the attributes of the Court and its judges, and the skills of the lawyers. These three factors are discussed below.

**1 The Constitution Itself**

As discussed in Chapter III, the formulation of the right to a healthy environment is broad and vague. It contains several rights in a single provision: the right to wellbeing, the right to a place to dwell, the right to a healthy environment, and the right to health. One might interpret this as cumulative; one single human right with four aspects, which makes the applicant need to prove all four aspects to pursue violation of any single right. Further, there is an inherent lack of clarity in the threshold of a ‘good and healthy’ environment as stipulated in art 28H(1) of the Constitution. What satisfies the constitutional requirement of ‘good and healthy’?

Likewise, as discussed in Chapter IV, Indonesia’s Constitution does not have explicit procedural environmental rights, but it contains generic procedural rights. As a result, citizens may not be aware that specific environment-related rights are part of broader fundamental rights that are constitutionally guaranteed and can therefore be used to challenge environment-related legislation. For example, the right to access information (art 28F of the Constitution) should encompass the right to access environmental information. For this

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⁴ See May and Daly (n 1).
reason, even when legislation potentially violates this right, people might not consider filing a judicial review case with the Court.

The absence of clear constitutional provisions pertaining to procedural rights has also forced applicants to either substantiate their arguments with rights that are not obviously environment-related, or to engage in legal acrobatics by combining statutory provisions with constitutional rights to establish their claims. For example, in the HSL Case discussed in Chapter IV, the litigants had to substantiate arguments based on the violation of the right to participation with the right to life. The Constitutional Court rejected their main arguments and refused to invalidate the provision. This might not have occurred if the applicants simply argued about the right to participation. Similarly, in WRL 1, the applicants had to resort to statutory rights provided under the HRL, rather than the Constitution, to argue that their right to standing to act ‘on behalf of the environment’ had been violated. Although the applicants’ arguments appeared to be sound, the judges denied the claim, despite emphasising that ‘open standing is a key aspect of access to justice’ and granting them standing. The Court pointed out that it could only assess the constitutionality of a statute against the Constitution, but not against other statutes such as the Human Rights Law.

Second, the Constitution limits the Constitutional Court’s judicial review power to assessing whether statutes are consistent with the Constitution. This power is very limited and raises difficult issues of causation: for example, how can an applicant demonstrate that a violation of the right to a healthy environment was caused by a particular statute? For example, in the WRL 1, the applicants found it difficult to prove that a lack of access to water (because of provisions of the impugned statute) caused a deterioration in human health. Even if health deterioration could be proved, it is difficult to demonstrate that the violation was caused by a statute. Tied up in this problem is that, as discussed in Chapter II, the Court refuses to review the constitutionality of the implementation of a statute. In the case studies in Chapter III, there always appears to arise from whether the cause of the environmental damage is the words or norms of the statutes themselves, or rather their implementation.

2 The Attributes of the Court

Underutilisation also appears to be attributable to the Constitutional Court itself. While judges may claim expertise in legal interpretation, they do not necessarily have sufficient technical or legal expertise to fully appreciate the complexity of the issues raised in the environment-related cases discussed in Part II of this thesis. As discussed in Chapter III, only a handful judges of the 26 who have served on the Court have environment-related backgrounds. This could partly explain why the Court appears to ignore arguments based on substantive and procedural environment-related rights. This explanation seems particularly feasible to explain cases involving balancing competing rights. As discussed in Chapter III, it is particularly difficult for judges to weigh environment-related rights against other types of rights, such as the right to work or to a livelihood, if they do not fully understand the environment-related rights. On a more general level, the quality of the Court’s decision-
making has long been identified as problematic and, as discussed in Chapter II, its reasoning is often vague and unclear. This has undoubtedly hampered genuine legislative and executive attempts to comply with these decisions.

Also relevant to the issue of familiarity is the newness of the Constitutional Court and the constitutional review function it performs. As discussed in Chapter II, the Constitutional Court was established in 2003 in a political environment that had never experienced an effective judicial review. In this environment, it seems likely that the Court was careful to issue decisions that did not attract the ire of the government, preferring to avoid the direct confrontation that invalidation of statutory norms may have provoked, at least where possible. As discussed in Chapter III, these concerns may have underlaid the Court’s decision to refuse to invalidate the impugned provisions in the Mining in Protected Forest Case, but to instead issue guidance to the government. Critically, this thesis has demonstrated that this strategy does not always work. As was seen in the discussion of the the bill on Forestry Law and WRL Case 2 in Chapter VII and VIII respectively, the legislature and the government have tended to ignore Constitutional Court decisions that provide guidance to the government if the Court’s overall decision is to reject the application.

3 The Applicants

As discussed in Chapter III, applicants and their lawyers also appear to have contributed to the underutilisation of constitutional environment-related rights. Many lawyers interviewed for this research admitted to being unfamiliar with these rights — particularly the right to a healthy environment — and how to prove their violation. Their resulting wariness of using those rights was only exacerbated by their newness and vagueness, and by the past failed efforts to employ them in general and administrative court cases. In contrast, lawyers appear to be far more willing to employ provisions that the Court has favourably interpreted in the past, such as art 33(3) and the right to legal certainty, discussed in Chapters V and VI respectively.

C Legislative and Regulatory Compliance with Environment-Related Constitutional Court Decisions

Part III examined the laws and amendments made by the legislature and executive in response to the Constitutional Court decisions analysed in Part II. Where relevant, it also considered the parliamentary debates that preceded enactment, which provided clues about the extent to which the Constitutional Court’s decisions figured in the statutory reforms produced.

As discussed in Chapter VII, theorists — particularly Spriggs, Kapizewski, Taylor and Beach — explain that government compliance with judicial decisions is rarely, if ever, fully complete or non-existent, but rather will usually sit somewhere along a continuum. Particularly in a highly political setting, the extent of the government’s compliance might be affected by the complex interplay of institutional factors, including the attributes of the court (for example,
consequences for non-compliance and whether the decision is expressed with sufficient clarity), the capacity and interests of the government (for example, normative concerns to comply with binding court decisions) and even third parties (for example, the ability of litigants to monitor compliance and hence expose non-compliance).

This thesis has found that compliance by the legislature and executive with the decisions of the Indonesian Constitutional Court has been mixed. In some cases, the Court’s decisions have been fully complied with; in others, compliance has been partial at best. However, the government has completely ignored some decisions and has even used the opportunity presented by the Court’s decision to pursue legal change based on personal, political and commercial interests.

1 Legislative Compliance

Notably, as discussed in Chapter VII, very few of the Constitutional Court’s decisions requiring a legislative response have in fact elicited one. Out of eight statutes that, in my view, required revision because of a Constitutional Court decision discussed in Part II, the government has complied with that decision only once — by revising the Pesisir Law. To be sure, the government also amended the 2015 Plantation Law, and lawmakers gave compliance with the Constitutional Court’s decision as one of the reasons for that amendment. However, as discussed in Chapter VII, this was mere window dressing shrouding a statute that contradicted the decision it purported to comply with. Regarding the remainder of the Court’s decisions, the legislature and the executive had, at the time of writing, exhibited a willingness to comply with some decisions, as can be observed in the Forestry Law bill and its supporting academic paper. However, the legislature appears to have chosen to avoid responding to the Court’s decisions concerning the P3H Law and the Environmental Management Law.

These findings support the view in the literature that compliance with the Court’s decision usually sits somewhere along a continuum between full compliance and complete avoidance. For example, applied to the 2014 Pesisir Law, the legislature and the executive were willing to go beyond compliance by strengthening the provision on public participation and engaging in full compliance to change from a rights-based system to a permit-based system as required by the Constitutional Court’s decision. However, at the same time, they ignored the Court’s order to consider environmental protection in coastal management. Avoidance also appears in the 2015 Plantation Law, where criminal provisions invalidated by the Constitutional Court were reinserted. Thus, the protection of indigenous rights provided in the Court’s decision was thwarted by the legislature and the executive.

Also relevant were the institutional interests of the government. As the 2014 Pesisir Law Case study presented in Chapter VII showed, the MMFA used the opportunity to revise the old Pesisir Law to regain legal power and authority from local governments and the MoEF. It achieved this by adding provisions on authority to issue permits and on conservation respectively. However, this institutional interest was not necessarily ‘bad’ for the
environment. The MMFA might genuinely be concerned with halting the adverse environmental consequences of local government mismanagement. More sinister were the attempts of legislators to advance their commercial interests when the 2015 Plantation Law was replaced. They did this by loosening permit requirements for plantation businesses to operate, which will likely prolong land conflicts with marginalised and indigenous communities. Allegedly captured by business interests, the legislature also failed to include the Plantation Bill in the national legislative program (Prolegnas) and to involve the Minister of Law and Human Rights in the drafting process. As discussed in Chapter VII, the civil society and media were thereby ambushed and not given an opportunity to evaluate the Plantation Bill before its enactment, including its reinsertion of criminal provisions that the Constitutional Court had invalidated.

A particularly significant finding of this thesis is that a legislative response is more likely if the Constitutional Court’s decision is a straight invalidation rather than a conditional one. The legislative drafters were willing to change all of the provisions of the HP3 Law that were invalidated by the Constitutional Court. Likewise, in the draft Forestry Bill amendments, the legislative drafters made changes to the provisions that the Constitutional Court invalidated, but not to those that the Court declared conditionally unconstitutional. The reasons for this are not clear and could be the subject of future research.

Another finding of this thesis was that the number of times the Constitutional Court has been asked to review a statute does not necessarily affect legislative compliance. For example, the Constitutional Court has reviewed the 1999 Forestry Law 10 times, with applicants winning in four cases. However, as of the beginning of 2019, the government and the legislature had not even started the deliberation process to revise the 1999 Forestry Law. The reasons for the inaction are unclear, but they could be related to fears held by the MoEF that its authority might be reduced in any amendment.

As mentioned in Chapter VII, the current formal legal position in Indonesia is that the only appropriate legal instrument for responding to a Constitutional Court decision is a national statute. This means that compliance must be performed by the legislature and the executive because both arms must cooperate to deliberate and ultimately enact any new statutes or statutory amendments. However, the executive is often unwilling to be confined by the formal legal requirement of a statutory response in an effort to comply with Constitutional Court decisions. It has issued various regulations — the legal status of which are sometimes questionable, and which often contain substantive provisions that overlap with, or even contradict, those in other legal instruments. Nevertheless, despite their questionable legal validity, these regulations tend to remain on the books and are generally followed in practice, as discussed in Chapter VIII. The next section will provide a concluding discussion regarding these regulations.
2 Regulatory Compliance

As discussed in Chapter VIII, some parts of the executive have been willing to implement the Court’s decisions quite quickly. For example, relevant ministries responded to the Forestry Law and WRL cases by issuing circulars. At least two circulars were issued almost immediately, which ordered governors and regents to implement the Court’s decision on the Adat Forest in the way the national government interpreted it.6 Similarly, the government immediately issued two circulars when the Court invalidated the entire WRL Case 2.7

As discussed in Chapter VIII, the main problem with this response is that the legal status of a circular is questionable and so is its binding force, primarily because it is not listed in the hierarchy of laws stated in the Law on Law-making. As a result, there will be no legal consequences if the legal subjects to whom the circular is addressed do not comply with it. Indeed, the circulars themselves contain no sanctions for non-compliance. Nevertheless, circulars appear to be acceptable in governmental practice in Indonesia and, in practice, are followed by those to whom they are addressed. They also have the advantage of being relatively easy to issue, primarily because they do not require coordination with other governmental institutions or state branches. However, this leads to another problem: the government — particularly ministries — can easily use circulars to pursue its own interests, which might contradict the Court’s decision. This appears to have occurred in the case of the circular on Adat Forest. Here, the Forestry Minister’s circular appears to have been used to divert responsibility to local governments to recognise customary communities and at the same time maintain the ministry’s authority to determine the adat forest. Perversely, precisely because the legal status of circulars is unclear, it is very rare for their validity to be judicially challenged. This, along with the fact that circulars are routinely followed, gives them significant normative force.

In addition to these circulars, government ministers have issued many regulations in response to Constitutional Court decisions. For example, as discussed in Chapter VIII, the Forestry Ministry has generated at least seven regulations to implement four of the Constitutional Court’s decisions relating to the Forestry Law. These regulations can be categorised into those that set procedures for forest gazettal and those that resolve land entitlement disputes. These two issues are critical if the government wants to guarantee legal certainty for communities living in forest zones. Tenurial conflicts in forest zones can be settled and reduced significantly if the government can ensure that the gazettal of forest zones is legal and legitimate, and if the community can obtain its tenurial rights, including in relation to the adat forest.

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6 MoF Circular No 1 of 2013 on Constitutional Court Decision No 35/PUU-X/2012; MoHA Circular No 522/8900/Sj of 2013 on Social Mapping of Customary Communities.
Like circulars, these regulations are relatively easy to make because they do not involve parliament, particularly the ‘open for public deliberation’ that is associated with the passage of most bills. Despite this lack of transparency, the issuance of these regulations on forest gazettal has pushed forward the forest gazettal process and forced the government to make progress on land conflict resolutions. Moreover, these regulations generally contain strong environmental protection provisions. Several regulations, such as the MR on Titled Forest and the Presidential Regulation on the Resolution of Land Entitlement in the Forest Zone, provide stronger guarantees for procedural environmental rights, primarily access to justice — that is, mechanisms to resolve conflicts and obtain compensation.

One problem with these regulations is that they are often developed in a legal vacuum — that is, without regard to other applicable regulations with a similar subject matter. This causes significant regulatory overlaps and inconsistencies. For example, this can be seen in the inconsistencies between MRSs issued by the Minister of Forestry, the MoHA, and the Minister of Agrarian and Spatial Planning, which regulate the ‘legal product’ that should be used to recognise customary communities. The Minister of Environment and Forestry regulations require customary community recognition through Local Regulation (Perda), the MoHA requires it in the form of the Head of Local Government Decree (Keputusan Kepala Daerah), while the Minister of Agrarian and Spatial Planning specifies neither conditions for recognition nor types of regulations for recognition. These inconsistencies have resulted in perpetuating the legal uncertainty that some of the Constitutional Court’s decisions were made to remove, and they have impeded even the most genuine attempts at compliance.

Similarly, in water resource management, the government has issued many regulations to implement the Constitutional Court’s decision in the WRL Case 2. Among these, at least two regulations appear to be designed to maintain the water privatisation that the Constitutional Court’s decisions were made to remove by allowing greater private involvement to support infrastructure development. Moreover, as discussed in Chapter VIII, these regulations have precluded thousands of community-based organisations from obtaining permits to use water for commercial purposes. This also defies the spirit of the Court’s decision, which held, *inter alia*, that water is a public trust and must, therefore, be used for the greatest benefit of citizens.

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8 MoEF Regulation No 32 of 2015 on Entitled Forest.
9 Presidential Regulation No 88 of 2017 on the Resolution of Land Entitlements in Forest Zones.
10 MoF Regulation No 62 of 2013 on the Amendment of Forestry Minister Regulation No 44 of 2012 on Forest Zone Gazettal.
11 MoHA Regulation No 52 of 2014 on the Guidelines for the Recognition and Protection of Customary Communities.
12 MoASP Regulation No 20 of 2016 on the Procedure for the Recognition of Customary Community Land Rights in a Specific Zone.
13 GR No 121 of 2015 on the Use of Water Resource for Commercial Purpose; GR No 122 of 2015 on Drinking Water Service System 122.
Towards Effective Constitutionalisation of Environmental Rights

With the myriad environmental problems that Indonesia faces today — including water and air pollution, hazardous waste, deforestation and over-exploitation of natural resources — the continual decline of environmental quality appears to be unavoidable, at least in the short to medium term. Strong statutory and regulatory guarantees of environmental rights have been unable to address these problems without meaningful enforcement by ordinary or administrative courts, including the compliance of losing parties, such as individuals, corporations and government officials. In contrast, the constitutionalisation of environment-related rights relies for its effectiveness upon judicial willingness to genuinely engage with the constitutional arguments put forward by the parties and, if necessary, to enforce the Constitution against the legislative and executive arms of the government.

In this thesis, I have demonstrated that the effectiveness of the constitutionalisation of environmental rights in Indonesia has been mixed. Despite the willingness of the Constitutional Court to engage in judicial reviews of environment-related cases using various constitutional provisions, the express right to a healthy environment and other procedural rights provisions have rarely been used. Moreover, legislative and executive compliance with the Court’s decisions remains limited.

There is a pressing need to improve this to strengthen environmental rights. This could be achieved by, *inter alia*, supporting attempts to improve the quality of the Court’s decisions concerning environment-related rights so that the Court’s reasoning is more comprehensive and easier to understand, and its holdings can be followed more straightforwardly. Civil society can play a role by filing more applications that have clear and strong arguments regarding the violation of environmental rights. In this way, the Court might become more familiar with those rights and more confident in applying them.

Conversely, to increase legislative compliance, a simpler mechanism to amend laws or provision(s) invalidated by the Constitutional Court should be developed. A mechanism similar to international treaty ratification could be adopted — that is, the responsible ministry could be made responsible for proposing the revision for enactment by the legislature. Alternatively, the parliament could establish a unit to monitor every Constitutional Court’s decision and accordingly revise the invalidated law or provision(s) and enact it. In this way, legislative amendments to respond to the Constitutional Court’s decisions will not be perversely used by the legislators to pursue their own interests. Action must be taken soon because Indonesia’s natural resources, and the economy that relies heavily upon them, depend on it.
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