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# PROPERTY RIGHTS FOR NATURAL RESOURCES MANAGEMENT IN INDONESIA: HAVE THEY BEEN RULED UNCONSTITUTIONAL?

Sarah Waddell,<sup>1</sup>

## *Abstract*

A new property right known as the coastal waters commercial use right (Hak Pengusahaan Pengairan Pesisir (HP-3)) introduced by Law No. 27 of 2007 regarding the Management of Coastal and Small Island Areas has been ruled inoperative by the Constitutional Court. The decision raises a question as to whether the door has been closed to market-based instruments that rely on property rights as a policy tool in natural resources management. This concern is relevant as legal developments in natural resources law internationally have moved away from traditional forms of regulation to focus on the creation of new statutory property rights such as fisheries rights, water use rights and rights associated with carbon sequestration. An exploration of the Constitutional Court's decisions suggests that a similar line of reasoning would not, and should not, arise in relation to other forms of property rights that the Government of Indonesia may seek to introduce in the future.

**Keywords:** Property right, natural resources management, Government of Indonesia

## I. INTRODUCTION

*Law No. 27 of 2007 regarding the Management of Coastal and Small Island Areas (Undang-undang No. 27 Tahun 2007 tentang Pengelolaan Wilayah Pesisir dan Pulau-pulau Kecil)* (Law 27/2007) was passed after more than five years of consultation, deliberation and drafting activity. The main purpose and driver for passing Law 27/2007 was to provide a legal basis for extending and adapting the system of spatial planning that takes place on the land to coastal, marine and small island areas under the jurisdiction of regional government. In doing so, guidance was taken from the principles of integrated coastal management also known as integrated coastal zone management (ICZM).<sup>2</sup>

As expressed by the European Commission in their recommendation passed in 2002, the principles of ICZM endorse a broad, long-term perspective to balance environmental, economic, social, cultural and recreational objectives within the limits set by coastal and marine ecosystems (Recommendation of the European Parliament and of the Council 2002; Clark 1992; Klinger 2004). 'Integrated' in ICZM refers to integration of all relevant sectors and policy areas (horizontally) and levels of administration (vertically). In addition to the

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<sup>2</sup> Integrated Coastal Management is mentioned in the Elucidation to Law 27/2007 (1(3): Scope) and is reflected in the planning system introduced by the Law.

integration of management objectives it requires the integration of instruments needed to meet these objectives.

Pursuant to UU27/2007, the integration of instruments is achieved through four new planning processes, namely, the Coastal and Small Islands Strategic Plan, the Coastal and Small Islands Zonation Plan, the Coastal and Small Islands Management Plan and the Coastal and Small Islands Action Plan. Aside from the new planning instruments, Law 27/2007 introduced a new legal instrument called a Coastal Waters Commercial Use Right (*Hak Pengusahaan Pengairan Pesisir* (HP-3)). Whilst this right is sometimes referred to as Coastal Waters Use Right, in this article, it will be referred to as a commercial use right for the reason that in *bahasa Indonesia* commercial purpose is indicated by the word *usaha*, which is the root word for *perusahaan* (business, enterprise, undertaking or concern) and *pengusaha* (industrialist, entrepreneur).

The HP-3 was to provide the vehicle for the introduction of private property rights into the use of marine and fisheries resources in coastal areas. The final version of the HP-3 as drafted in Law 27/2007 was not accepted by a number of non-government organisations such as the People's Coalition for Fisheries Justice (*Koalisi Rakyat untuk Keadilan Perikanan* (KIARA)), Indonesian Human Rights Committee for Social Justice (IHSC) and the Indonesian Legal Aid Bureau (*Yayasan Lembaga Bantuan Hukum Indonesia*) (YLBHI), who challenged the validity of the HP-3 by launching judicial review proceedings in the Constitutional Court of Indonesia.

On 16 June 2011, the Constitutional Court found that the HP-3 was unconstitutional and, accordingly, the relevant provisions were ruled to be inoperative.<sup>3</sup> The HP-3 was characterized as a property right (*hak kebendaan*) that was contrary to Article 33(3), which provides as follows:

“Land and water and the natural resources therein are controlled by the state and utilised for the greatest prosperity of the people (*Bumi, air dan kekayaan alam yang terkandung di dalamnya dikuasai oleh negara dan dipergunakan untuk sebesar-besar kemakmuran rakyat*).”

The decision of the Constitutional Court raises a question as to whether the door has been closed to new forms of property rights for natural resources management in Indonesia. The question is relevant as, in recent times, legal developments in natural resources law internationally have focused on new statutory property rights such as fisheries rights, water use rights and rights associated with carbon sequestration. This article explores the decision of the Constitutional Court and suggests that a similar line of reasoning would not necessarily, and should not, arise in relation to other forms of property rights that the Government of Indonesia may seek to introduce in the future. In Part I, observations are made regarding the presentation of the HP-3 within Law 27/2007. In Part II, aspects of property and property rights are considered. In part III, the reasoning of the Constitutional Court is examined. In Part IV, the trend away from the command-and-control approach of direct regulation towards incorporation of market-based instruments into regulatory policy is considered. Finally, implications for future attempts to introduce property rights to natural resources management are reviewed and conclusions drawn.

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<sup>3</sup> Decision of the Constitutional Court Number 3/PUU•VIII/2010.

## II. OBSERVATIONS ON THE COASTAL WATERS COMMERCIAL USE RIGHT

### A. Features of the HP-3

#### 1. Practical operation

The HP-3 provided a right to use coastal or marine resources in coastal waters, which were defined to include waters stretching up to 12 nautical miles from the coastline, waters connecting the coast and islands, estuaries, bays, shallow water, marshes and lagoons (art 1(7)). It was a right available to support marine enterprises, fisheries and other enterprises for activities on the surface of the water, in the water column and on the sea bed along the coastline and in coastal waters (art 1(18)). It was not available in conservation zones, fish sanctuaries, sea transport lanes, harbors and beaches (art 22). The size of the HP-3 is not mentioned in Law 27/2007.

The HP-3 was stated to be available for individuals, legal entities (*badan hukum*) and *Adat* Communities (art 18(a),(b)&(c)). *Adat* Communities are defined in Law 27/2007 as ‘a coastal community that through generations has lived in a specific geographical area because of a bond of common descent, a strong connection with coastal and small island resources as well as a system of values that determine economic, political, social and legal arrangements’ (art 1(33)).<sup>4</sup> Notably, although Law 27/2007 also defined Local Communities and Traditional Communities, these communities were not expressly granted the ability to apply for a HP-3.

Exactly who was to benefit from the HP-3 becomes more complex when it is considered that whilst legal entities (*badan hukum*) most commonly refer to limited liability companies or corporations (*perseroan terbatas*), they also include cooperatives (*koperasi*) and associations (*yayasan*) (Hukum Online, 2007). Another question is whether ‘individual’ could include a small group of individuals. Indeed, in the author’s understanding, there was a perception by some stakeholders involved in the legislative drafting process that the HP-3 was to provide a vehicle for community-based management of coastal and small island resources and, for this reason, had been initially supported by a number of non-government organisations working for the welfare of coastal communities and sustainable fisheries.

It can be observed that there is a natural cleavage between the entities covered by the HP-3 into two groupings, namely:

- a. individualised commercial interests (individuals, corporations) and
- b. collective or communal interests (e.g.: *Adat* Communities, non-corporate legal bodies, associations, cooperatives or a small group of individual fishermen).

The interests of these two groups could be quite distinct and indeed conflicting, which reveals an underlying weakness in the original conception of the HP-3.<sup>5</sup>

<sup>4</sup> Masyarakat Adat adalah Kelompok Masyarakat Pesisir yang secara turun-temurun bermukim di wilayah geografis tertentu karena adanya ikatan pada asal-usul leluhur, adanya hubungan yang kuat dengan Sumber Daya Pesisir dan Pulau-Pulau Kecil, serta adanya sistem nilai yang menentukan pranata ekonomi, politik, sosial, dan hukum.

<sup>5</sup> A first step in effective policy making and legislative drafting is to define the behaviour that is to be influenced by a new law. Where actors have divergent interests they should be covered by separate legislative provisions. If more than one actor is covered by a provision, they should have interests in common that bind them together: see generally work by Seidman, Seidman and Abeyesekere (2001).

Neither the provisions of the Law or its Elucidation provided specific examples as to activities covered by the HP-3. In material prepared by the Ministry of Marine Affairs and Fisheries, it was stated that it could be given for one particular use or for multiple uses (Djais, Putra, Raharjo and Widianton. d., pp.1-3). The range of activities originally considered covered the following:

- a. fisheries in the 12 nm area
- b. pearl cultivation
- c. sea grass cultivation
- d. red algae cultivation
- e. maritime tourism (*wisata bahari*) and resorts
- f. wave, current and tidal power
- g. metallic modules
- h. traditional uses.

Most of these activities, including fishing are governed by sectoral law. For example, Law No. 31 of 2004 regarding Fisheries (*Undang-undang No. 31 Tahun 2004 tentang Perikanan*) regulates fishing activity. Tourism operations are governed by the Law No. 10 of 2009 regarding Tourism (*Undang-undang No. 10 Tahun 2009 tentang Kepariwisataaan*) and investment in opportunities for new forms of renewable energy along the coast, in wave, current and tidal power would be governed by Law No. 30 of 2007 regarding Energy (*Undang-Undang No. 30 Tahun 2007 tentang Energi*). Some of the plaintiff's witnesses argued that the level of complexity created by co-existing sectoral law would have led to such legal uncertainty that article 28H(1) of the Constitution would have been breached.<sup>6</sup> However, the only article of the Constitution that directly refers to legal certainty is article 28D (1)<sup>7</sup> and the Court did not consider this ground of review in its decision.

## 2. Legal Foundation

The HP-3 was established by a provision that enabled the obtaining of the right; in effect, empowering the grant of the right by government (art 16(1)). When a right is granted, it means that the particular action is authorized. The HP-3 was to be granted for a period of 20 year and could be extended twice (art 19). Evidence of the existence of the right was a certificate (*sertifikat hak*) (art 20(2)). Importantly, for its characterization by the Constitutional Court as a property right, it was transferable in that it could be bought and sold (art 20(1)) and bankable as it could be used as security for a loan (art 20(1)).

In many respects, the HP-3 had the same features as the ownership right to land (*hak milik*) established under the Law No. 5 of 1960 regarding Basic Agrarian Law (*Undang-Undang No. 5 Tahun 1960 tentang Peraturan Dasar Pokok Agraria*) (arts 20(2) and 25). However, as explained by Ferrianto et al, the right established by the HP-3 was intended as a 'use right' and not an absolute right in the sense of land ownership; it was intended to limit commercial use (Djais, Putra, Raharjo and Widianton. d., p.3).

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<sup>6</sup> Nurhasan Ismail; other witnesses referred to the possibility for 'horizontal conflict' between laws. Article 28(H)(1) provides that "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 medical care".

<sup>7</sup> Article 28D(1) provides that 'Each person has the right to recognition, security, protection and certainty under the law that shall be just and treat everybody as equal before the law.'

As expressed in the legislative provisions, there was no obligation to obtain the right and no prohibition against activities without approval of an application for the right. Hence, the role that the right would have played in regulating the use of resources was not made explicit. However, the giving of the right had to fulfill technical, administrative and operational conditions (art 21(1)). Technical conditions included compliance with the relevant zoning plan and/or management plan (art 21(2)(a))<sup>8</sup> and public consultation in accordance with size and volume of the use (art 21(2)(b)). Administrative conditions included a plan for the use of resources appropriate for the carrying capacity of the ecosystem and a system for oversight and reporting to government (art 21(3)(b)-(c)). Operational conditions included obligations to empower the local community, respect the rights of traditional and local communities, give attention to the community to obtain access along beaches and estuaries<sup>9</sup> and to rehabilitate any areas of the environment damaged as a result of activities carried out under the HP-3 (art 21(4)(a)-(d)).

Whilst there were no detailed provisions on oversight and control of activities carried out pursuant to the HP-3, the Elucidation explains that 'control and oversight' includes monitoring the implementation of management plans and sanctions including cancellation of a right. It was clear that the HP-3 could be terminated for breach of conditions and that administrative, criminal and civil sanction could be imposed on a right holder.

## **B. The positioning of the HP-3 within other content of Law 27/2007**

As can be seen from its title, Law 27/2007 concerns the management of the coastline, coastal marine areas and small islands including the natural resources found in in these areas. A preliminary observation that can be made in regard to the HP-3 is that its presentation within Law 27/2007 appeared incongruous with the management objectives of the Law 27/2007. This incongruity arose from the terminology adopted in Law 27/2007, the placement of the provisions on the HP-3 within its overall structure and a lack of detail as to how the HP-3 related to the management objectives of ICRM.

Law 27/2007 defines management broadly to include 'planning, *utilization*, oversight and control of human interaction in the use of coastal and small island resources as well as a sustainable scientific process in lifting the welfare of the community and protecting the unity of the Republic of Indonesia' (art 5) (emphasis added). Certain obligations are imposed in relation to management. It is stated that it must be carried out by integrating the activities between central and regional government; between regional governments; between sectors; between government, business and the community; between land-based ecosystems and marine ecosystems; and between scientific knowledge and management principles (art 6). Hence, the goal of *integrated* coastal management is established.

The first problem with terminology is lack of clarity in the definition of management due to the inclusion of the word 'utilization' (*pemanfaatan*). A common understanding of the root word *manfaat* in *bahasa Indonesia* covers

<sup>8</sup> Zonation Plan consists of four zones. General Use Zone (*Kawasan Perumahan Umum*), Conservation Areas (*Kawasan Konservasi*), Strategic National Areas (*Kawasan Strategis Nasional Tertentu*) and Sea Lanes (*Alur Laut*) – Law 27/2007 art 10. Priority uses for small islands are listed in article 23.

<sup>9</sup> Note that this is not a clear obligation to provide access, only to give attention to providing access.



the meaning of 'use', 'to profit from', 'to benefit from' and 'to obtain an advantage'. The point here is that 'to use' and 'to profit from' are distinct meanings for which different words should be chosen. The lack of clear meaning to the word 'utilization' can be seen in the structure of the chapter on utilization, which covered the topics of the HP-3, utilization of small Islands and their surrounding waters, conservation, rehabilitation, reclamation and prohibitions.

A second problem with terminology was inclusion of commercial use (*pengusahaan*) in the range of activities that counted as utilization. To include commercial use within the chapter on utilization appears at a minimum to have been incongruous as it meant that management includes commercial use whereas it is more customary for it to be understood that management requires *controls over* commercial use. If the intention was that the HP-3 was to be a management tool then this should have been made far more explicit by provisions of Law 27/2007. Furthermore, it should have been made clear how the HP-3 was to assist in achieving integration in coastal management.

### C. The intent of the HP-3

One of the drivers for introducing the HP-3 was to the desire to provide legal certainty for the encouragement of investment in coastal and small island areas in support of development; the long duration of the right and its ability to be used as security for finance would have supported legal certainty for investors. The point was also made that it would not be granted arbitrarily but would accord with the new planning regime and would be the subject of conditions that arise through environmental law such as environmental impact assessment (Djais, Putra, Raharjo and Widiyanto 2008). Interestingly, the role that the HP-3 would have played in encouraging investment was taken up by the plaintiffs as a reason to reject the HP-3. In response, government witnesses rather chose to explain the need for the HP-3 on the basis that a new legal tool was required to overcome problems caused by overuse of 'open access resources' in coastal and marine areas and the resultant problem for Indonesia characterized by 'the tragedy of the commons'.<sup>10</sup> It is notable that the thesis of the now classic work by Garrett Hardin 'The Tragedy of the Commons' was not elaborated to the Court and government witnesses did little to explain exactly how the HP-3 was intended to operate.

In his essay, Hardin addressed the 'tendency to assume that decisions reached individually will, in fact, be the best decisions for an entire society' thereby raising the problem of negative externalities that lead to deterioration in our natural environment (Hardin 1968 p.1244). A negative externality occurs where some of the costs of an activity (e.g. pollution or other forms of environmental damage) are not borne by the decision maker engaging in that activity with the result that the market fails to produce an optimal result.<sup>11</sup> Hardin illustrated the problem by describing a pasture open to a large group of cattle herders as follows:

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<sup>10</sup> Abdon Nababan, an expert witness for the government referred to the 'tragedy of open access.'

<sup>11</sup> Under the set of theoretical assumptions made by neoclassical economics, in a perfectly competitive market an optimal result is achieved when it reaches a point of Pareto efficiency in which a consumer good is produced in the quantity that maximizes overall social welfare.

“As a rational being, each herdsman seeks to maximize his gain. Explicitly or implicitly, more or less consciously, he asks, “What is the utility to me of adding one more animal to my herd?” This utility has one negative and one positive component.

1. The positive component is a function of the increment of one animal. Since the herdsman receives all the proceeds from the sale of the additional animal, the positive utility is nearly + 1.
2. The negative component is a function of the additional overgrazing created by one more animal. Since, however, the effects of overgrazing are shared by all the herdsmen, the negative utility for any particular decision-making herdsman is only a fraction of - 1.

Adding together the component partial utilities, the rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another... But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit -- in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.”

As observed by Sinden, ‘it is a powerful parable, because this particular iteration of the externality problem forms the root of virtually all environmental problems, from the over-exploitation of forests and fisheries to the pollution of air and water’ (Sinden 2007 p.546). Hardin identified two possible solutions to the tragedy. One was ‘mutual coercion, mutually agreed upon’, or as stated by Hardin, ‘coercive laws or taxing devices’. Another was to establish the commons as private property ‘or something formally like it’ (Hardin 1968 pp.1245-1247).<sup>12</sup>

The government’s presentation of the issues in managing the use of coastal and small island resources did not do justice to the level of analysis that has been given by researchers and academics over the decades since Hardin’s article. Nor did government witnesses indicate familiarity with subsequent critiques, such as the empirical research carried out by Elinor Ostrom and others in the 1980s and 1990s that challenge privatization as the preferred way out of the ‘tragedy of the commons’ and promote the concept of common-property resources. Numerous examples have been found where a specific natural resource, such as pasture lands and an irrigation system, has been commonly owned and used by a group of people at sustainable levels due to a set of internally agreed-upon rules. Within this approach, the challenge has been to identify the “design principles” of stable local common pool resource management (Cox 1985; Sinden 2007 p.257; Rose 1986 p.745; Ellickson 1993 pp. 1388-9; Laerhoven and Berge 2011 p.1).

Notably, subsequent critiques of Hardin’s thesis provide support for an alternative to privatization based on community-based management in the use of coastal resources. This approach was thought to be provided by the HP-3 particularly in its explicit application to *Adat* Communities. Indeed, background

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<sup>12</sup> He was most explicit in this regard when referring to deteriorating quality of national parks.



material on the HP-3 prepared by the Ministry of Marine Affairs and Fisheries presented the HP-3 as being beneficial in the support of traditional use rights (*hak ulayat*) citing the examples of *Sasi* in Maluku, *Mane'e* and *Manape* in Talaud, *Awig-awig* in Lombok, *Panglima Laot* in Aceh, *Ninik Mamak* in Sumbang and *Suku Anak Laut* in Kepulauan Riau (Djais, Putra, Raharjo, and Widiyanto 2008).

### III. THE HP-3 AS A PROPERTY RIGHT, ASPECTS OF PROPERTY AND PROPERTY RIGHTS

#### A. The HP-3 as a property right

The Court considered the features of the instrument created by the HP-3 and concluded it to be a property right (*hak kebendaan*). It did so, on the basis of that the HP-3 had the following indicia: [3.15.7]

1. It was to be given within a set time period (20 years and could be extended twice)
2. It applied to a specific space (*luas tertentu*)
3. It could be transferred and be used as collateral for a loan (*dijadikan jaminan utang dengan dibebankan hak tanggungan*)
4. It came with a title (*sertifikat hak*).

The Court concluded that the HP-3 would lead to the parceling (*pengkaplingan*) of coastal areas 'creating areas of private ownership' in the hands of individuals, legal entities and certain communities. Notably, the Court did not consider the issue of compensation to right holders on the revocation of the HP-3 as this was not raised by either party. If there had been a system for claiming compensation by right-holders, it is likely that it would have further confirmed the Court's finding that the HP-3 was a property right.<sup>13</sup>

Property entails a notion of exclusivity so that when someone has a property right – the right belongs to an identifiable person and not to anyone else. The identification of a relationship as a property relationship is generally found to occur when a number of necessary indicia are present. These indicia have been said to include the following criteria: (Fisher 2003 p.140)

- a. definable;
- b. identifiable by third parties;
- c. capable of being assumed by third parties;
- d. a degree of permanence;
- e. a degree of stability;
- f. capable of being transferred;
- g. some kind of quantifiable value; and
- h. capable of assertion and protection.

When deciding whether a statutory instrument creates a proprietary interest, the context and circumstances are likely to determine the weight to be given to each of these criteria. Transferability is important on the basis that it (Hepburn 2010 p.14)

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<sup>13</sup> To have prepared a system for compensation on the extinguishment or variation of the HP-3 assumes that the right holder would be entitled under the Constitution to compensation, which only applies where a property right is acquired. Section 28H(4) of the Constitution provides 'Each person has the right to private property and this right may not be arbitrarily interfered with by anyone at all.'

“connects the entitlement to the orthodox institutional indicia of alienability and definability. A transferable statutory entitlement is more likely to constitute property because both the holder and third parties dealing with the holder understand the nature and scope of the interest and this, in turn, generates certainty and value”.<sup>14</sup>

The approach of the Constitutional Court in identifying the HP-3 as a property right is unremarkable and the HP-3 was a clear case demonstrating the key indicia of a property right. The HP-3 gave the right holder an exclusive right to use although subject to operational conditions such as a condition to ‘give attention to the community to obtain access along beaches and estuaries’. Its application to a specific place meant that it was capable of being defined. The certificate of title meant that it could be identified by third parties and the provision that it could be used as security for a loan meant that it was capable of being assumed by third parties. The 20 year time period with the possibility of two extensions gave the HP-3 a high degree of permanence and stability. The HP-3 was transferable and would have had a quantifiable monetary value. Its form as a right meant that it could be asserted and protected against competing interests through the courts.

## B. The conceptualization of property by the Court

It is widely acknowledged that *property* is a difficult concept, with a range of meanings dependent on the context of its use. Generally speaking, the term ‘property’ is commonly used to refer to a ‘thing’ or to denote ownership of a ‘thing’. However, in a legal sense, property is more accurately described as a legal relationship with a thing and this relationship can be quite complex. It probably means no more than a series of rights or powers that a holder has in relation to the subject matter of these rights (Fisher 2003 p.139).

In referring to the property right established by the HP-3, the Court used the phrase *hak kebendaan*, which, when translated literally, means ‘a right to matter’.<sup>15</sup> This choice of words in *bahasa Indonesia* appears to stress the *thingness* rather than the *relationshipness* of a property right. In contrast, the modern metaphor for property is a ‘bundle of rights’ such as use, alienation, exclusion and possession. As stated by Arnold, the most important contributor to the bundle of rights conception was Wesley Newcomb Hohfeld (Arnold 2002).<sup>16</sup> The central premise is that property is a set of legal relationships amongst people, which ‘is, at its core, anti-thingness’ (Arnold 2002 p. 286).

Arnold gives an account of how, in the Hohfeldian replacement of the ‘property-as-thing-ownership’ concept with the ‘property-as-a-bundle-of-rights’ concept, property as a distinct and coherent concept has been declared

<sup>14</sup> Referring to Epstein, Richard A (1985) *Takings: Private Property and the Power of Eminent Domain*. Cambridge: Cambridge University Press, 304 and Underkuffler, Laura S (1990) ‘On Property: An Essay’, 1000 *Yale Law Journal*, 127: 143.

<sup>15</sup> The root word is *benda* meaning ‘thing, article, inanimate object’ and *kebendaan* conveys the meaning of ‘1. matter; 2. material, physical, substantive; 3. material wealth’: Echols, John M and Shadily, Hassan (1997) *Kamus Indonesia Inggris* (3rd ed) Jakarta: Penerbit PT Gramedia.

<sup>16</sup> Hohfeld’s impact is widely acknowledged: see Hohfeld, Wesley Newcomb (1911) ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’, 23 *Yale Law Journal*, 16 and Hohfeld, Wesley Newcomb (1917) ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ 26 *Yale Law Journal*, 710.

dead. In particular, Grey captured an understanding of property widely shared by scholars, lawyers, and judges that property is a 'malleable, divisible, disaggregable, functional set of rights among people. New property interests can be created in intangibles, as well as tangibles, and in abstract concepts, as well as concrete realities'(Arnold 2002 p. 282).<sup>17</sup>

It can be seen that the choice of wording by the Constitutional Court appears to diverge from common understandings elsewhere, at least in the Anglo-American legal system. Interestingly, Arnold critiques the bundle of rights approach and argues that property law is in search of a reconstituting metaphor. This is because the bundle of rights lacks internal and definitional coherence which becomes particularly important to advance environmental values and take into account our relationship with our environment (Arnold 2002, pp.291-306). He suggests that a 'web of interests' metaphor would help focus attention on the nature and characteristics of the object of property interest (such as land, wildlife or a particular resource), the relationships between interest holders and the object, and the relationships among the interest holders, including society's stake in the object (Arnold 2002, p. 364).

Space does not permit further exploration of such issues related to the conceptualisation of property in Indonesia. However, it appears that this is an area ripe for further research and analysis and that there is a need for discussion on the theory and doctrinal basis for different kinds of property rights and their expression and explanation in *bahasa Indonesia*.

### C. Ownership and community-based property rights

A property right has been said to be 'the authority to undertake particular actions related to a specific domain'(Schlager and Ostrom 1992).Schlager and Ostrom, prepared a helpful conceptual schema that distinguishes between different bundles of rights that may be held by the users of a resource system (Schlager and Ostrom 1992, p.231).Within the schema, the most relevant operational-level property rights are 'access' and 'withdrawal'. Whilst access involves the right to enter a defined physical property, withdrawal involves the right to obtain 'products' or a resource (e.g., catch fish, appropriate water, etc.)In preparing their schema, a distinction can be made between rights at an operational-level and at a collective-choice level. Where an individual has collective-choice rights, they can participate in the definition of future rights regarding management, exclusion and alienation. In this regard, management is the regulation of internal use patterns, exclusion is the determination of access rights and how they may be transferred, and alienation is the right to sell or lease either or both of the management and exclusion right (Schlager and Ostrom 1992, pp.250-1).

The property rights schema ranges from authorized user, to claimant, to proprietor, and to owner as set out below(Schlager and Ostrom 1992, pp.251-4):

*Authorized* users have operational-level rights of access and withdrawal. Their rights are defined by others and they lack the authority to devise harvesting rules or to exclude others from gaining access. Even though

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<sup>17</sup> See also Grey, Thomas C,(1980) 'The Disintegration of Property' in *Property: No Mos XXII*69, Ed. by Pennock J. Roland & ChapmanJohn W., New York: New York University Press. pp. 69-85.

they may be able to transfer or to sell their rights they lack authority to participate in collective action to change operational rules.

*Claimants* have the same rights as authorized users but with rights of management. However, they cannot specify who may or may not have access to resources, nor can they alienate their right of management.

*Proprietors* have collective-choice rights to participate in management and exclusion in addition to rights of access and withdrawal. They authorize who may access resources and how resources may be utilized but they cannot alienate these collective-choice rights.

*Owners*, in addition to rights of management and exclusion, hold the right of alienation in that they can sell or lease their rights.

When this schema is applied to the HP-3, the holders of the HP-3 can be identified as owners. The point made by Schlager and Ostrom is that owners are not the only resource users who make long-term investment in the sustainability or improvement of resources systems and that a level of conceptual sophistication is necessary to understand the range of incentives and disincentives that arise in each property right arrangement. The question that arises after the decision of the Constitutional Court is - which bundles of property rights would be considered to be within the Constitution?

As mentioned above, the HP-3 was to apply to individualized interests and group-held interests. However, in its reasoning, the Court did not discuss these interests separately but simply referred to property rights. This could have been due to the fact that, as mentioned below, the Court found that the HP-3 was not beneficial for *Adat* Communities and so it did not have to consider the question of group-held rights more broadly.

However, for some time, community groups have argued for Community-Based Property Rights (*Hak Kepemilikan Berbasis Masyarakat*) (CBPRs) as an extension of the concept of property rights (CIEL et al. 2002). In the coastal setting, CBPRs can include rights to fish, marine products, wildlife, fresh water, mangrove forest products and so on. They can encompass various kinds of individual rights and kinship rights. CBPRs often specify under what circumstances and to what extent certain resources are available to individuals and communities to inhabit, to harvest, to hunt and gather on, and to inherit.

In setting out the concept behind CBPRs it has been said that (CIEL et al. 2002 p.3):

By contrast with widely used and largely uniform Western concepts, CBPRs within a given local community typically encompass a complex, and often overlapping, bundle of rights that are understood and respected by a self-defined group of local people. Rights in the bundle can be grouped in various ways. One way is to identify six categories that encompass rights of: (1) use, (2) control, (3) indirect economic gain, and (4) transfer, as well as, (5) residual and (6) symbolic rights.

It has been argued that there needs to be a 'rethinking of prevailing theories of property rights in ways that can be constructively applied to benefit local peoples and institutions' (CIEL et al. 2002 p.8). If so, property rights would be seen as falling within a spectrum that provides for public property, private property,

individual rights and group rights. This would allow for private community-based property rights as a form of state-local community arrangement. However, it needs to be clarified that this would not imply exclusive authority for use of a resource. As stated by CIEL et al (CIEL et al 2002 pp.10-11):

Private property rights are subject to state regulation and monitoring of the use of natural resources. The main benefit that local communities would gain from being legally recognized as private property rights holders would be more bargaining leverage with outside interests, including the government, than if their CBPRs were considered to be public property rights. The state, however, could still enact rural zoning laws over private CBPRs as it often does with regard to private individual property rights in urban areas.

The work of Schlager and Ostrom and the views expressed by the Indonesian organisations mentioned above show that whilst the Court may have been correct in finding the existence of a property right in the HP-3, an increasingly sophisticated approach to property rights regimes for natural resources management is likely to be required in the future both by policy makers and lawyers.

#### **IV. THE LEGAL BASIS FOR RULING THE HP-3 UNCONSTITUTIONAL**

The questions raised by the plaintiffs that the Constitutional Court found must be decided were as follows:

1. Did the provisions establishing the HP-3 conflict with article 33(3) of the Constitution?
2. Did the provisions for community participation in the preparation of the Coastal and Small Islands Strategic Plan, Coastal and Small Islands Zonation Plan, Coastal and Small Islands Management Plan and Coastal and Small Islands Action Plan violate constitutional rights?

The Court found in favour of the Plaintiffs in relation to each of these questions. This article will only consider the reasoning of the Constitutional Court in regard to the first question concerning article 33(3) which took the following steps in reasoning, which are considered below:

- a. the state has a constitutional obligation to control the use of the natural resources;
- b. the provisions establishing the HP-3 amounted to an abdication of the state's constitutional obligation to control; and
- c. the arrangements establishing the HP-3 did not support the 'greatest prosperity of the people' as required by the Constitution.

##### **A. The state's constitutional obligation to control the use of land, water and natural resources**

Article 33(3) provides the Constitutional basis for the protection of Indonesia's natural environment. It is preceded by the Preamble to the Constitution which states that the Government of Indonesia 'protects the whole of the Indonesian people and their entire native country'.<sup>18</sup> This was interpreted by Koesnadi as providing a principle under which the government has a responsibility and obligation for the protection of both human and environmental

<sup>18</sup> *Kemudian daripada itu untuk membentuk suatu Pemerintah Negara Indonesia yang melindungi segenap bangsa Indonesia dan seluruh tumpah darah Indonesia.*

resources of Indonesia (Koesnadi1999 p.66). Further provision was made in the second amendment to the Constitution, which included a right to a 'good and healthy environment' (art 28H(1) Amendment No. 2 (18.8.2000)).<sup>19</sup>

It can be observed that, as a power-conferring provision, article 33(3) confers considerable legislative and administrative authority on the state to control land, water and the natural resources of Indonesia. In its wording, there is no explicit normative wording such as would be conveyed by the use of the word 'must' or even 'should';<sup>20</sup> nonetheless, it is open to interpretation as a normative statement and the Constitutional Court has done so.<sup>21</sup> The Court found that article 33(3) to be a normative provision that imposes an obligation on the state to control the use of land, water and natural resources.

The Court stated that the obligation to control expressed in article 33(3) does not carry a private meaning but rather derives from a conception of the sovereignty of the people and the source of Indonesia's wealth as coming from the land, water and all natural resources. It was said to give a mandate to the state to devise policy (*mengadakan kebijakan*), legislate (*melakukan pengaturan*), administer (*melakukan pengurusan*), manage (*melakukan pengelolaan*) and provide oversight (*melakukan pengawasan*). The Court went on to spell out what each of these activities involves. The Court specifically mentioned administration (*fungsi pengurusan*), which it said enables the government to issue licences and concessions (*perijinan, lisensi, dankonsesi*). [3.15.3]

## B. The HP-3 as an abdication of the state's constitutional obligation

In previous judicial review proceedings, discussion of the meaning of 'control' in Article 33 focused on whether it requires the state to engage in direct management, that is, to do *more than* regulate the branches of production and use of natural resources. When legislation supporting efforts by the government to break down government monopolies and attract private investment have been challenged the Constitutional Court has opted for a 'direct management' interpretation of article 33 (Butt & Lindsey 2008).<sup>22</sup>

<sup>19</sup> Interestingly, none of these provisions explicitly refer to ecosystems or the biological diversity found in the flora and fauna of Indonesia. They appear to conceive of the natural environment as containing resources to be utilized rather than as also something that exists independently of its use to human beings and which may require protection for its own sake. It can also be observed that the right to a 'good and healthy' environment suffers from vagueness: the words 'good' and 'healthy' are evaluative and require interpretation before they can be applied.

<sup>20</sup> Rather than a rule imposing an obligation, article 33(3) could be interpreted as a principle to the effect that the state *should* control and utilise land, water, and natural resources for the greatest prosperity of the people and use its best endeavours to do so. There has been a strong tendency in Indonesian legislative drafting to omit explicit normative vocabulary: Waddell (2006).

<sup>21</sup> In regard to this aspect of the claim, the Court stated that it gained authority from decision number 001, 021, 022/PUU-1/2003 dated 15 December 2004, the Electricity Law case.

<sup>22</sup> Butt and Lindsey considered four decisions:

1. The *Oil and Natural Gas (Migas) Law case* (MK Decision 002/2003) where applicants sought a review of Law 22/2001 on Oil and Natural Gas.
2. The *Forestry Law case* (MK Decision 003/2005), where a group of many applicants unsuccessfully disputed the constitutionality of Law 19/2004 on the Stipulation of Interim Law 1/2004 on Amendments to Law 41/1999 on Forestry
3. The *Water Resources (SDA) Law case* (MK Decision 058-059-060-063/2004 and 008/2005), where almost 3,000 individuals and several NGOs requested the MK to review Law 7/2004 on Water Resources; and
4. *Electricity Law case* (MK Decision 001-021-022/PUU-I/2003), three applicants requested the MK to review the constitutional validity of Law 20/2002 on Electricity.



In this case, the Court concluded that if the HP-3 were to come into existence the state would no longer control the use of marine and coastal resources as the HP-3 amounted to an action that was *less than* regulation. The Court concluded that the HP-3 would inevitably lead to privatization of the management and use of coastal and small island areas and make it difficult for the state to effectively control the use of such areas. It said that an even more difficult issue is oversight of activities given variation in capacity between different regions. It also noted that Law 27/2007 did not clarify how much space was potentially available for allocation of HP-3s along the coastline and in small island areas and concluded that there was a strong possibility that vast areas would be closed off to the public at large as HP-3 areas (*kawasan HP-3*). [3.15.7]

The strength of the Court's conclusion can be at least partly attributed to weaknesses in the presentation of government's case. Notably, government witnesses did not detail the working mechanisms of the HP-3. The argument that the creation of private property rights was the correct path to avoid the 'tragedy of the commons' in Indonesia's coastal and small island areas was presented in a sketchy fashion and not accepted by the Court. Witnesses for the government did not contextualize the operation of the HP-3 as a policy tool that would assist the government in the control of coastal and marine coastal resources. For example, there was no detailed explanation of the technical, administrative and operational conditions that would be imposed in the grant of a HP-3. The function of environmental impact assessment in the grant of a HP-3 was not explained and neither was the ongoing oversight by government in monitoring environmental conditions and implementation of commitments or the role of sanctions.

### **C. The failure of the HP-3 to support the 'greatest prosperity of the people'**

The Court also focused on the obligation that the land and water and the natural resources therein are to be utilised for the greatest prosperity of the people (*untuk sebesar-besar kemakmuran rakyat*). According to the Court, this part of article 33(3) is the primary standard (*ukuran utama*) for government. [3.15.4] However, on the face of the wording of article 33(3) its meaning is far from clear. One interpretation could be that it requires that the benefits received by the population as whole are to be maximized, in the utilitarian tradition of the principle of 'the greatest happiness for the greatest number'. Alternatively, it could mean that the interest of the majority is to take priority over the minority.

The Court endorsed a rights-based approach and then assessed *how far* the HP-3 could be said to support the *greatest prosperity of the people*. In essence, the Court said that the government must consider existing rights, both individual and collective rights of traditional law communities (*hak ulayat*), traditional community rights (*hak masyarakat adat*) and other constitutional rights of the community, for example, access rights, rights to a healthy environment and so on. In doing so, it identified and applied four benchmarks as follows: [3.15.8]

#### **1. Use of natural resources by the people**

The Court was concerned with communities living in coastal areas rather than the population at large. It said that a new law should not limit access to

natural resourced by the majority of the coastal community in Indonesia who work as fisherman for the basic necessities of life. It should not benefit those with capital and technology to the detriment of fishermen who, on average, have limited education and access to capital. A new instrument should not be more available to one sector of society at the expense of another less capable sector of society.

2. Balance in the spread of use

The spread of utilization (*pemerataan manfaat*) of natural resources should be balanced between the private sector and local communities. A new law should not concentrate benefits in the private sector or involve indirect discrimination against local communities. Even if on the face of it a new law appears neutral, if it will lead to losses by certain sections of the community, in this case fishermen, then it will indirectly discriminate against such community groups.

3. Community participation in determining natural resources use

The level of participation by the community in determining natural resources use must be adequate to guarantee, protect and fulfill the rights of local communities.

4. Respect for traditional use rights

Existing traditional rights in the use of natural resources must be respected.

As mentioned above, the HP-3 was intended as an instrument that would be available to traditional communities living under *Adat* law. However, there was very little by way of explanation in Law 27/2007 to clarify how *Adat* Communities were to access the right or the benefits that would accrue to them. It can be observed that the interests of corporations are quite distinct in that corporations are likely to have interests oriented towards commercial exploitation for resources whereas *Adat* Communities are more likely to desire to protect traditional use rights from interference by outside interests and to preserve traditional practices that sustain them culturally and materially. A point that was accepted by the Constitutional Court was that in the event of competition for a HP-3 between organised commercial interests and *Adat* Communities it could be expected that the interests of organised commercial interests with more capital, technology and expertise would prevail. [3.15.7]

Despite being made available to *Adat* Communities, the Court accepted the argument that, in practice, the HP-3 would be a threat to the existence of traditional rights and local knowledge in the use of coastal and small island resources. The Court accepted that *Adat* Communities only had two alternatives: either obtain a HP-3 or allow traditional areas and/or use rights to be handed over to private interests and negotiate compensation based on deliberations between the parties (*musyawarah*). Obtaining a HP-3 would fundamentally alter traditional rights inherited from generation to generation by limiting them to a finite timeframe. Compensation would also result in the loss of rights as it could only be enjoyed by those who receive the compensation at the moment of

receipt. The Court found this to also conflict with articles 18B<sup>23</sup> and 28A<sup>24</sup> in the Constitution.

## V. IMPLICATIONS FOR FUTURE ATTEMPTS TO INTRODUCE NEW FORMS OF PROPERTY RIGHTS IN NATURAL RESOURCES MANAGEMENT IN INDONESIA

The Court's decision can be interpreted as saying that the creation of new forms of private property rights will conflict with the state's constitutional obligation to exercise control over the use of Indonesia's natural resources. However, the reasoning of the Court bears detailed analysis in relation to which forms of property rights may be considered to be outside the bounds of the Constitution. It is apparent there are two requirements for any new instrument to survive a constitutional challenge:

- a. the government must not renege from its obligation to control the use of land, water and the natural resources and
- b. the new instrument must be justifiable as not being against the greatest prosperity of the people.

In regard to the second requirement, the government must be ready to argue that a new law goes *sufficiently* far in meeting the benchmarks set by the Constitutional Court. At a minimum it will need to be established that any new instrument

1. does not limit access by local communities to resources or work opportunities;
2. does not benefit those with access to capital and technology to the detriment of those who on average have limited education and access to capital;
3. will not lead to a concentration of resources in the hands of the private sector;
4. will not discriminate against local communities (directly or indirectly); and
5. does not reduce the level of participation by the community in determining natural resources use.

In addition, it will need to be established that there are adequate provisions to guarantee, protect and fulfill existing rights of local communities and there are mechanisms to ensure that traditional rights in the use of natural resources are respected.

### A. The trend away from direct regulation to economic instruments

In regard to the first requirement, the Court referred specifically to the state's administrative role (*fungsi pemerintahan*) in issuing licences (*perijinan, lisensi*) and concessions (*konsesi*). The meaning of *lisensi* and *konsesi* has been explained by Pudyatmoko, where he states that *lisensi* is a specifically Indonesian term that is a permission to do something commercial for profit such as running a cinema or conducting an import/export business which, in reality, it is hard to

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<sup>23</sup> Article 18B(2): The state recognises and respects traditional communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law.

<sup>24</sup> Article 28A: Every person shall have the right to live and to defend his/her life and existence.

distinguish from a licence (*ijin/izin*). A concession is an administrative decision by the state where a licence is related to large-scale activity that concerns the public interest (Pudyatmoko 2009 pp.9-10).

A licence (*izin*) provides permission by the government to do something that would otherwise be prohibited by legislation. In quoting Atmosudirdjo (Atmosudirdjo 1983, 94), Pudyatmoko concludes that a licence is a dispensation from a prohibition that would otherwise be imposed by legislation. Accordingly, the prohibition is followed by detailed conditions and criteria that must be fulfilled by the applicant for the licence as well as a procedure that must be followed by the government authority tasked with considering application (Pudyatmoko 2009 p.7). Pudyatmoko also provides a comprehensive list of licences issued by central and regional government in Indonesia and the range of conditions that are required.

The approach of the Constitutional Court falls squarely within the paradigm of direct regulation, the so-called 'command and control' (CAC) approach, which is the traditional response of a legal system to congestion and overuse of natural resources, pollution, environmental damage and all the other problems that are associated with negative externalities. This approach is based on the establishment of prohibitions (commands) against certain activities that need to be enforced by the state through sanctions (control). Failure to obtain a licence will provide the basis for criminal enforcement. The licence can be used as an instrument to ensure compliance in that breach of its conditions provide the basis for administrative enforcement and/or criminal enforcement depending on the severity of the offence. In this way, licensing plays a fundamental role in traditional environmental regulation.<sup>25</sup>

This arrangement is set up with a view to compliance and enforcement. However, it requires ongoing monitoring and surveillance by the state and enforcement action through the courts is expensive and potentially unreliable. The comparison is often made between CAC and market-based instruments (MBIs) that incorporate the cost of externalities into the cost of production or consumption thereby encouraging polluters to reduce or eliminate their negative externalities. One alternative is through removal of perverse incentives or by imposing taxes or charges on processes or products. Another is by creating property rights and facilitating the establishment of a proxy market for the use of environmental services.

As Stavins pointed out, MBIs have not replaced, nor have they come anywhere close to replacing the conventional, CAC approach (Stavins 2003, pp.355-435). However, in comparison with MBIs, the CAC approach has been associated with a number of shortcomings, which is relevant for policy-makers in Indonesia.<sup>26</sup> It is now widely acknowledged that traditional direct regulation is

<sup>25</sup>The most common example is pollution of water, which is prohibited except with a licence. This may be a blanket prohibition against all pollution or a prohibition against emissions beyond a set standard - i.e. the maximum level of permissible pollution. There are two types of standards - *ambient standards and emissions standards*.

<sup>26</sup>Reasons for the move away from the 'command and control' approach include difficulty in determining an 'optimum' standard; lack of incentives to reduce pollution beyond the standard; low penalties for violating standards and weak enforcement. To be effective, standards need to be revised frequently but in practice legislation tends not to keep up with the change; standards tend to be less cost-effective than MBIs; the financial costs of standards may be high; and there could also be political costs if the standards are stringent and businesses are adversely affected (Economic and Social Commission for Asia and the Pacific (ESCAP) 2003; Whitten, Carter and Stoneham 2004).

not fully effective and that more sophisticated and refined instruments of control are more likely to produce desired effects. Regulatory design is now focused on selecting the most effective combination of instruments rather than adhering to the old CAC approach and this may involve considering a range of instruments from self-regulation and co-regulation, utilising commercial interests and market-based instruments, providing a role for NGOs, and direct government intervention. It has also been found that some combinations of instruments will be inherently complimentary and others inherently counterproductive.<sup>27</sup>

## **B. Property rights in natural resources management**

More specifically in relation to natural resources management, CAC approaches have been linked to a loss of resilience in ecosystems and have been found to be counterproductive to ecosystem-based management. There has been a call for innovative approaches based on incentives that will lead to more flexible action by government agencies, more self-reliant industries and a more knowledgeable local population (Holling & Meffe 1996). Past perceptions that ownership rights and the power to regulate are necessarily in conflict no longer apply although there is ongoing discussion between those who have an optimistic as opposed to a skeptical response to the expanding role of property rights (Levmore 2003 pp.182-184).

In a number of countries, property rights have been established as a tool to manage the use of resources such as fisheries, water, minerals and even some biological processes such as carbon sequestration. For example, in every state in Australia, legislation has been introduced validating forestry carbon sequestration rights as property (Hepburn 2009). In fisheries, it is now widely accepted internationally that property rights have an important role to play (Shotton 2000). There has been a dramatic growth in aquaculture, which is premised on property rights in the stock being grown and the area used to grow it such as the water bottom or water column (Wyman 2008 p.513). In regard to capture fisheries, private property-like rights for commercial fisheries have been introduced in many countries through the establishment of individual transferable quotas ('ITQs') (Wyman 2008 p.512).<sup>28</sup> An ITQ covers a single fishing ground that can be very large. The regulator sets a species-specific total allowable catch (TAC), typically by weight and for a given time period.<sup>29</sup> A dedicated portion of the TAC, called quota shares, is allocated to individuals. ITQs can be resold to those who want to increase their presence in the fishery. If ITQs are sold at auction to the highest bidder, at least in theory, it is thought that the fisherman who is most efficient at catching fish will be able to secure the ITQ.

In some countries inshore fisheries are the subject of territorial use rights ('TURFs'), which give fishers ownership of the stock of fish in designated areas (Fisheries and Aquaculture Department FAO Corporate Document, n.d.). Fish covered by TURFs generally are sedentary species, with oyster beds being a famous example (Agnello & Donnelley, cited in Wyman 2008 p.517). In locations

<sup>27</sup> The point was made in the early 1990s that it is wrong to depict the choice between CACs and MBIs as a simple dichotomy (Swaney 1992; Gunningham & Grabosky (1998); Gunningham & Sinclair n.d.).

<sup>28</sup> ITQs are used in New Zealand, Iceland, Canada, Australia, Chile, Namibia, and the United States (Hentrich & Salomon 2006 p.715); also in Norway (Hannesson 2013).

<sup>29</sup> It is only practical where there is adequate data to make a realistic estimate of the TAC. At present, in Indonesia that data is not sufficient.

where there have been long-established communally-run fisheries, the concept of the TURF overlaps with the goal of community-based management and the idea that community norms can substitute for state regulation. The most commonly cited example are fishing cooperatives in Japan that have TURF rights to fish in specific territories that originally derived from feudal fishing rights (Anderson & Leal 2001 p.116).<sup>30</sup> Another example is in Taiwan, where it has been argued that whilst progress in the right direction has been made, greater attention needs to be given to increasing participation of fisherman, improving fishermen's association's technical skills and financial resources, and the division of management responsibility (Chen 2012). Other examples include community-based management in Chile (Aburto et al 2013), and the Philippines (Agbayani et al 2000).

Rather than questioning the role of property rights in fisheries, the challenge is now being cast in terms of the need to design property rights that create the greatest net benefits. As stated by Wyman (Wyman 2008 p.515):

“Our experience combining different types of property rights on land suggests that that arrangement likely will be a mix of individual and communal property rights and state-governed protected areas where extractive uses are prohibited—neither only marine reserves nor private property rights. Furthermore, the elements of the optimal mix of property rights arrangements likely will differ across fisheries depending on many context specific factors, including the level of the demand for the resource, externalities caused by fishing, prospects for economies of scale, and administrative costs.”

In the field of water resources management, tradable water rights separate from land title have been the subject of much attention by researchers and policy-makers (Easter, Rosegrant & Ariel 1998; Rosegrant 1994). Space does not permit an account of developments in this area of policy making but practical examples can be found in Australia where statutory water entitlements have been introduced most states (Hepburn 2010 pp.12-15)<sup>31</sup> and in New Zealand where trade in water permits is available under the *Resource Management Act 1991* (Nyce 2008). The creation of property rights in water has been considered a necessary precondition to water trading; however, there has been a tension between the creation of property rights and the flexibility required for adaptive management of water resources. As such, a question has remained as to whether legislation has created something less than property rights even where they are commonly referred to as property rights, which shows the elusive nature of the concept of property (McKenzie 2009).

The question posed here is whether the approach of the Constitutional Court allows for the sort of innovations that have been introduced in other

<sup>30</sup> An update on the pros and cons of ITQ and TURF in Japan is available (Yagi, Clark, Anderson, Arnason and Metzner 2012).

<sup>31</sup> As described by Hepburn, the holder has access and use of specified rivers and/or lakes for a prescribed period of time in accordance with defined terms and conditions. Usually the entitlement is described as a permissive licence and is accompanied by a specific water allocation grant. The right is transferable with the aim of encouraging trade in entitlements. A transfer usually requires ministerial approval. The entitlement can be varied or modified. Administrative agencies conferring a licence retain the capacity to cancel or vary entitlements at any time without compensation. In practice most water licences are renewed on a regular basis.



countries? According to Sinden, such instruments are often mischaracterized as privatization (Sinden 2007 pp.537-9).<sup>32</sup> A key aspect is that the government is not passive and, in this regard, a distinction needs to be made between the use of economic instruments and outright privatization. When related back to the 'tragedy of the commons', the establishment of property rights can be seen as a way of preventing the over-exploitation of a particular natural resource where the state sets limits directly through, for example, a cap and trade system (e.g. a limit established by the total allowable catch or a cap on carbon emissions below which trading takes place) or a management plan under which tradable allocations are made. Hence, the state is not simply leaving it to the market to answer the 'how much' question. What is at issue here is whether legislation that gives a role to government to answer the 'how much' question but sets up property rights to determine *allocative* efficiency would be ruled unconstitutional.

An approach that presents greater difficulty for questions of constitutionality at the policy design stage is where incentives and disincentives for users to set their own limits are set up within the framework of the legislation. As stated by Fisher (Fisher 2003 p.131):

"The fundamental idea is for government to create commercial or financial advantages or disadvantages for environmentally acceptable or unacceptable conduct respectively. Whilst there is no direct government direction, government seeks to influence the conduct of the private sector so as to bring about outcomes that it desires."

Essentially, the goal in this approach is that the regulatory instrument is designed so that perceptions of self-interest and environmental responsibility converge (Thompson 2000 pp. 267-69). The rationale is that if policies are designed effectively, then the private sector will respond by doing what is expected to achieve the anticipated outcome.

To be fully effective, however, all externalities will need to be eliminated, that is all the costs and benefits of the owner's activities will have to accrue to the owner. This can be done, for example, by setting the period of tenure for resource use right longer than the time it will take for the resource to be replenished. Hence, there will be an incentive to use the resource sustainably rather than forgo ongoing use of the resource over the full period of the tenure. To work effectively, there needs a proper scoping of the all the externalities that will be caused by activities related to a property right and a matching of the extent of the private property with the extent of the externality (Sinden 2007 pp.556-8). For example, externalities in the form of environmental damage caused by fertilizer runoff to an adjoining waterway or marine pollution from aquaculture need to be accommodated, which can be difficult without taking additional measures beyond the creation of the property right.

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<sup>32</sup> Sinden considers the range of types of government regulation across a continuum starting from government (public) ownership to definition and enforcement of private property rights and points out that the government still answers the 'how much' question when they introduce environmental trading markets and taxes or subsidies and therefore it is incorrect to characterize such policies as privatization: see table at p. 553.

## VI. CONCLUSION

The experience of the government in formulating the coastal waters commercial use right (HP-3) and the subsequent constitutional challenge leading to its invalidity has been unfortunate. The conflicting interests covered by the HP-3 meant that it was not well conceived in terms of underlying policy and neither was it drafted with sufficient clarity to indicate how it would apply in practice, particularly for *Adat* Communities. In the judicial review proceedings before the Constitutional Court, government witnesses did not effectively justify the need for this new instrument. Perhaps the fatal flaw in the HP-3 was its capacity to extinguish the very *Adat* rights that it was said to support.

A narrow interpretation of the Court's decision is that a system that parcels up territory in coastal and small island areas into segments of individual private ownership with no indication of ongoing management and control by government in such a way that discriminates against local and *Adat* Communities will be unconstitutional. A broad interpretation is that all new forms of private property rights will be viewed as an abdication by the government of its obligation to control the use of Indonesia's natural resources. It is being suggested here that although the decision of the Constitutional Court appears to be a setback for the introduction of property rights in natural resources management in Indonesia, on closer examination, the views expressed by the Court may not be applicable to many of the new forms of property rights that could be considered for adoption as part of ongoing policy making in the future.

The Court's decision can be at least partly attributed to weaknesses in the presentation of the government's case. In particular, the Court took exception to what they envisaged as a future where vast tracts of Indonesia's coastline and small island areas would be handed over to private business interests. If it had been more effectively explained how the zonation plan and the management plan would set limits on the grant of HP-3s to private entities, the Court may have taken a different approach. There was also no explanation by government witnesses as to the role of technical, administrative and operational conditions that would have applied in the grant of the HP-3 or evidence regarding the compliance regime or enforcement activity.

The government's intentions in regard to subjecting applications for HP-3 by corporate interests to environmental impact assessment could have allayed some of the Court's fears. The reasons for the long tenure for the grant of the HP-3 could have been explained in terms of the incentive that it created for the right-holder to introduce sustainable management practices. It could also have been explained how the HP-3 was to be integrated with existing environmental controls contained in environmental legislation and sectoral laws.

It is suggested that property rights established in the following ways would not, and should not, be ruled outside the bounds of Indonesia's Constitution:

### 1. Property rights introduced through the vehicle of a regulatory licence

The Constitutional Court specifically endorsed licensing as a means whereby the state exercises control in accordance with its obligations under article 33(3). It is implicit that the fact that the HP-3 was not set up within a system of licensing but amounted to a simple grant of a right was a reason for it being ruled unconstitutional. As mentioned above, the provisions on the HP-3

were simple enabling provisions; there was no prohibition against carrying out certain activities without obtaining a HP-3.

However, legislation that sets up a system for licensing can be the vehicle for property rights by including licence conditions that are indicia of property such as transferability and bankability. Furthermore, a licence that provides a property right can be set up within a management scheme that controls the use of a particular resource such as a water body or a specific fishing ground. An example would be where a total allowable catch is set for a fish stock, limits are set on total water withdrawals for a catchment management area, or a cap is imposed on total net carbon emissions. In this way, the ability to trade in allowances provides the opportunity for efficiency gains in the *allocation* of use whilst the government maintains a key role in determining *limits* on use. This form of property right should fall outside the reasoning of the Constitutional Court.

Alternatively, the inherent defeasibility in the grant of rights under a licence which is part of a regulatory scheme could be argued to contradict the requirement of stability that underpins a property right. The strength of such an argument would depend on the details of such the arrangement in question and, in particular, the scope available for change or modification of rights. In some circumstances, a new right could be said to be a lesser form of statutory right rather than a property right. This has been accepted as a ground for denying the proprietary status of statutory bore water licences in the State of New South Wales, in Australia.<sup>33</sup> However, the approach taken by Australia's High Court has been strongly criticised for producing a situation where core property indicia such as transferability and the expectation of renewal (holder reliance) have been overshadowed by legislative defeasibility leading to a conflation of propertisation with constitutional guarantees (Hepburn 2010).

## 2. Community-based property rights

The Court adopted the view that the HP-3 was ineffective as a tool to support *Adat* Community interests. Therefore, the Court was not required to consider whether an instrument providing a private group-based proprietary interest that met the particular needs of *Adat* Communities was within the Constitution. In a similar way, the Court's decision also does not impact upon the broader proposition that management of coastal resources would benefit from the grant of private property rights to local community organisations such as villages and fisherman groups for the use and management of particular resources.

## 3. Property rights at a level lower than ownership

Whilst the HP-3 was said to be a use right, its features closely resembled ownership. If the Schlager and Ostrom schema is applied, it can be seen that holders of the HP-3 held alienable rights that covered rights to access and withdraw, along with alienable rights to manage and exclude. Hence, the decision of the Court can be seen to be directly relevant to ownership rights. However, the Court's decision did not address the other bundles of property rights that could be brought into existence by legislation. Examples include the following:

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<sup>33</sup> High Court decision of *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140; 261 ALR 653; [2009] HCA 51.

- a. a transferable property right held by an unauthorized user to access and withdraw and participate in management without any ability to participate in setting up rules of management or harvesting or to exclude access by other users;
- b. a transferable property right held by an authorized user to access and withdraw that also allows for participation in management participation in setting up the rules of management but does not include the right to exclude others from using the resource;
- c. a transferable property right held by an authorized user to access and withdraw that allows for participation in management and setting up the rules of management where the proprietor has the right to exclude but who is not able to alienate the right and responsibility to manage.

It is harder to argue that property rights that rely solely on incentives and disincentives within the grant of the right to achieve policy goals will not fall outside the Constitutional obligation to control as currently propounded by the Court. However, it is foreseeable that in a future case, where the evidence clearly explains the policy rationale, the Court could take a sophisticated approach and consider the role that the institution of market-based incentives and disincentives play in the exercise by the state of its control over the use of Indonesia's natural resources.

In any event, as a result of the Constitutional Court's decision, it is evident that any future attempt to introduce a new form of property right to further the goal of improved natural resources management will need heightened sophistication and awareness of potential legal pitfalls. This awareness is needed at the policy formulation stage requiring government officials to be well-versed in the rationale and practical application of any proposed policy instrument and fully prepared to justify its validity before the Constitutional Court. It will be necessary to clearly distinguish between outright privatization through the grant of individual rights of ownership and economic instruments that provide specific bundles of lesser forms of property rights. Detailed consideration will also need to be given to distinguishing the goals of a property right granted to individuals including corporations from the very different goals of communal or group rights that may be granted for the strengthening of *Adat* communities and other community groups through the grant of property rights to use and manage local resources. It is clearly necessary to be able to elaborate upon the various forms of property rights, the meaning and practical application of such rights in relation to regulatory goals and the role of incentives and disincentives within the government's range of options in exercising control of the use of Indonesia's natural resources.

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