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Constitutional Court Ruling on Forestry Act of No Retroactive Effect

There has been some confusion in the plantation, forestry and natural resources industries following the recent decision of the Constitutional Court in Case No. 45/PUU-IX/2011, in which the court ruled that part of Article 1(3) of the Forestry Act (No. 41 of 1999) is unconstitutional.
Article 1(3) forms part of the "Definitions Section" of the Forestry Act, and defines what a "forest area" actually is. Thus, it goes to the very heart of the legislation, and has implications for practically every governmental action in the forestry sector. As such, it has been argued by a number of environmental organizations that the Constitutional Court's ruling automatically avoids all legal instruments issued pursuant to the legislation since its enactment in 1999 as they were formulated based on a faulty definition of "forest area."

Were this true, the economic consequences for Indonesia would be profound and urgent corrective action would need to be taken by the government in the form of a Government Regulation in Lieu of Law. (See end note [1]) However, it is our conclusion that this view is misconceived.

The Decision

The challenge to Article 1(3) was brought by five regents and a businessman from timber-rich areas of Central Kalimantan. The impugned article reads as follows: "A forest area is an area that is indicated and/or designated by the government for retention as permanent forest" (emphasis ours). In essence, the petitioners argued that the use of "indicated and/or" resulted in a lack of legal certainty as it was imprecise and conflicted with other provisions of the legislation. The court agreed and ordered that the offending phrase be excised from the article. As the court did not find the entire article unconstitutional, it still stands and now reads as follows: "A forest area is an area that is designated by the government for retention as permanent forest."
Essentially, most of the confusion that has arisen centers on whether the decision is of retroactive effect, meaning that every legal instrument that has been issued since 1999 and which is related to the offending article would also be null and void.

Retroactivity

As regards the question of whether the ruling applies retroactively, that is to say, to decisions made prior to the court's ruling, we are of the opinion that this is not the case. This is because Article 58 of the Constitutional Court Act (No. 24 of 2003) and Article 38 of Constitutional Court Regulation No.06/PMK/2005 expressly provide that legislation reviewed by the court remains in force until such time as a judgment is entered declaring that the legislation (or a part thereof) is repugnant to the Constitution. Furthermore, Article 47 of the Constitutional Court Act and Article 39 of Regulation

No.06/PMK/2005 also expressly provide that the court's decisions only enter into effect on the date of their pronouncement in open court. On that basis, it seems clear that decisions of the court are not retroactive in cases involving challenges to the constitutionality of statutes or statutory regulations. Furthermore, in Indonesian legal theory and practice, should legislation be repealed or be declared unconstitutional, all actions or policies that have been taken based on such legislation remains in effect.

The non-retroactivity of the Constitutional Court's decisions on constitutional matters has been expressly affirmed by the court in a number of high-profile precedents, such as the Antasari case in November 2009:

> *Mr. Antasari had been removed from office as head of the Corruption Eradication Commission (KPK) under a provision of the KPK Act (No. 30 of 2002), which stipulated that a KPK commissioner would automatically be removed from office upon being prosecuted for a criminal offense. The court had earlier ruled that this provision was unconstitutional in a case involving two KPK commissioners, Mr. Bibit and Mr. Chandra, who had been similarly removed from office. Mr. Antasari argued that as the offending provision of the KPK Act had been struck down, he should now be restored to his former position. The court, however, refused to hear Mr. Antasari's petition as he had been removed from office prior to Messrs. Bibit and Chandra and the ruling in that case could not be applied retroactively.*

This view was reiterated by the Constitutional Court in 2010 in the Hendarman Supandji case:

> *The legitimacy of Hendarman Supandji's appointment as Attorney General was challenged in the Constitutional Court by a former justice minister, Mr. Yusril Ihza Mahendra, who argued on a technicality that the Attorney General's term of office had expired and that therefore decisions made by him were of no legal effect. While agreeing with Yusril that Supandji no longer held office as the Attorney General, the court stressed that all decisions made by him prior to the date of the judgment remained valid and binding.*

However, as always in the law, there are exceptions. In a good example of judge-made law in Indonesia, the Constitutional Court has held on a number of occasions that a decision in a constitutional review case may apply retroactively, despite Articles 47 and 58 of the Constitutional Court Act, provided that this is necessary for the sake of legal expediency and certainty. However, in such cases the court will always make it clear that its decision is to be of retrospective effect.
No such pronouncement was made by the court in this case, and therefore it is clear that the Forestry Act decision is of prospective rather than retrospective effect. Accordingly, the decision only became applicable on 9 February 2012, the date on which it was handed down. Thus, every legal instrument issued pursuant to the Forestry Act prior to the handing down of the court's decision continues to stand and is of valid legal effect. (See end note [2])

Conclusion

Overall, the Ministry of Forestry appears to be taking the matter lightly and has yet to issue a formal statement on the judgment. However, it is clear that it will need to amend the wording of many of the legal instruments it issues in the forestry sector, including decisions conferring rights over forestland, so as to take account of the Constitutional Court's ruling.

On a more general note, as with many of the controversies and polemics that arise in Indonesian law from time to time, much confusion could have been avoided in this case through tighter legislative drafting. The use of "and/or" is a continuing source of confusion in the law, and appears on many occasions to be little more than a habit, without any thought being given to the actual linguistic implications and consequences on the ground.

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[1] A "Government Regulation in Lieu of Law" or "Emergency Government Regulation" is a regulation issued by the government that temporarily has the power of law. It must be submitted to the House of Representatives (DPR) for ratification as law within a period of two years. Should the DPR approve it, then it will be enacted as a statute. Otherwise, it will automatically stand revoked. Such emergency regulations are normally issued to fill a legal vacuum or in particularly pressing circumstances.

[2] See the Constitutional Court's decisions in Case Number 110-111-112-113/PUU-VII/2009 and Number 5/PUU-IX/2011.

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Menara Rajawali 16th Floor
Jalan Mega Kuningan Lot #5.1
Kawasan Mega Kuningan
Jakarta 12950 – INDONESIA

Telephone	:	(62-21) 25557800
Fax	:	(62-21) 25557899
E-mail	:	info@ahp.co.id
Web Site	:	www.ahp.co.id