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Analysis of the Decision of the Constitutional Court of the Judicial Review of Law Number 7, 2004 on Water Resources (Review Juridical Constitutional)

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Abstract
The purpose of this study was to determine and assess the applicant's rationale for asking for judicial review of Law No. 7 of 2004 on Water Resources, meaning contained in Article 33 of the 1945 Constitution as the basis of the decision of the Constitutional Court for a judicial review of Law No. 7 of 2004 on Water Resources, and the juridical implications of the Constitutional Court decision on judicial review of Law No. 7 of 2004 on Water Resources. This writing method Juridical Normative, the method of approach where the process of reviewing and discussing the object of investigation by focusing on aspects-juridical aspects. Descriptive data were analyzed qualitative, the data obtained are presented according Descriptive and Qualitative analyzed (content analysis). The results of this study stated that: (1) The basic consideration for the applicant to apply for judicial review of Law No. 7 of 2004 on Water Resources, Among others: (a) Act - legislation that can be petitioned for is law - enacted after the 1945 changes; (b) An application in this case are Whose reviews those rights and / or authority has been impaired by the enactment of laws-laws; Clearly the applicant must describe the petition of rights and / or constitutional competence, (2) Definition of control by the state under Article 33 in 1945 implies a higher or wider than ownership in the civil law conception. The concept of control by the state is a concept of public law relating to the principle of sovereignty of the people in 1945, both in politics (political democracy) and economic (economic democracy). Thus the explicit meaning of Article 33 of the 1945 Constitution is mandated by the government for the country, will provide guarantees and protection for individuals to have equal rights on matters concerning the lives of many people, and (3) the Juridical implications of the Court's decision to Constitution on the judicial review of Law Act No. 7 of 2004 on Water Resources are as follows: (a) Article therefore testing the material submitted by the applicant does not stand alone but linked between one another; (b) one to study the petition, the Court concludes that the Applicant did not pay enough attention to what the Water Resources Act Referred to as “Patterns of Water Resources Management”; (c) That the Petitioners argued in Natural Resources Law there are chapters - chapters that encourage privatization; and (d) That the water resources is not only-the eye used to meet basic needs-day directly.
Keywords: constitutional court, judicial review, act no. 7 of 2004 on water resources

1. Introduction

The reform movement that toppled the New Order regime has created an enormous change for Indonesia. It was widely recognized that 1945 has been the basic reference of statehood must be revised thoroughly to support and strengthen the consolidation of democracy. The dynamics of traveling the nation Indonesia has shown that the constitutional reform process underway so closely, it is not without reason because the trip constitutional reform today is starting to show significant growth in line with the constitutional amendment process (UUD 1945) starting from the first amendment in 1999 until the amendment fourth in 2002 ago. Amendments to the 1945 Constitution has indeed brought a significant impact also on the constitutional structure of Indonesia.

The existence of 1945 (before the amendment) does not provide a mechanism check and balances so that paralyzes judicial control of the exercise of power, resulting in the implementation of the centralized and authoritarian rule. Check and balances mechanism itself in a construction of the modern State is a natural thing, even indispensable. Why? The answer is, to avoid the abuse of power or by an institution. Because, with such a mechanism, the institution of the other institutions will each control or supervise, even co-exist.[1]

Moh. Mahfud MD, concluded that the 1945 Constitution before the amendment had many fundamental flaws, among others:[2]

a. 1945 to build a political system that is too big and gives excessive power to the executive (executive heavy) constitution does not give the limits of power firmly and do not have judicial as well as the mechanism of checks and balances so that power be centralized to one person, namely the president.
b. 1945 too gave authority to the Legislature to regulate crucial issues without clear boundaries and the condition is exacerbated by the dominant role of the executive (the government's political vision) to color

[1] Affan Gaffar, *Politics Indonesia: Transition to Democracy,* Pustaka Pelajar, Yogyakarta, 2002, p. 89.
[2] Moh. Mahfud MD, *Towards Constitutional Amendment Constitutional Reform.* UII Press, Yogyakarta, 1999, p. 44-46.

every decision in the field of legislation.

c. The 1945 Constitution contains provisions that are multiple interpretations so that power holders to freely conduct meateri interpretation of the constitution for the sake of power.
d. 1945 too excessive reliance on operator of the state (government) so it felt to be the most powerful and free to do anything in accordance with the wishes and interests of power.

Elucidation of Article 26 of Law No. 14 of 1970 states in part as follows:

NKRI right to examine the laws and the Regulation on the Implementation of the Constitution as a basic function is absent in the Supreme Court. Therefore, 1945 is not set, it is not by itself the right to test laws against the Constitution by the Supreme Court can be put in this legislation. Rights if the test is to be given to the Supreme Court should be a constitutional provision.[1]

The vacuum test settings (judicial) of the statute has indirect benefit of power, because the product its laws no one will ever be inviolable. Such conditions in the New Order is considered very favorable power (executive) because the majority of members of the House of Representatives (DPR) is derived from the ruling group (Golkar) and the rest is political parties PPP and PDI.

All sorts of bills stemming from the government (executive) will almost certainly always be approved by Parliament. Parliament's performance during the New Order was very weak, his presence only to provide justification for the actions of government (executive). The rights of Parliament are not implemented optimally. Function monitoring should be part of the duties and authorities are not running optimally. The opposite happened, members of the House are very 'fear' against the government even they feel controlled by the Government, so that if there are members of Parliament were deemed too daring criticize government policy, then the risk of recalling already waiting for him.

As is known, the position of the constitution in a country is a basic rule in the state administration. Rules lesser must not conflict with the higher rules to ensure law and order and law in the country, so that every operator must adhere to state that principle. Besides that, it also meant not to arise arbitrariness by the authorities or anarchy by the people. This has been one of the pillars and state laws that we have adopted.[2]

To fill the void of authority to test the settings of the law, the MPR Annual Session of the MPR 7 to 1 August 2000 has resulted in a number of MPR Decree, one of them in the form of MPR Decree No. III/MPR/2000 on Law Resources and Sequence Laws Invitation. MPR Decree regulates among others: First, the national basic legal source on Pancasila and the sort order for the legislation of the Republic of Indonesia; Second, the authority of the Assembly a law against the 1945 Constitution and MPR Decree as well as the authority of the Supreme Court examine the laws and regulations under the law; Third, Revocation Statement are no longer effective and MPRS No. XX/MPRS/1996 on the need for improvement set forth in Article 3 paragraph (1) MPR Decree No. V/MPR/1973. If carried out a study of MPR Decree No. III/MPR/2000 at least there will be some problems, among others: on the granting of authority to the Assembly for a law against the Constitution of 1945 and Legislative Act. The Supreme Court (MA) authorized to examine the legislation under law. Testing by the MA are active and can be executed without trial appeal. Supreme Court decisions regarding the examination referred to above are binding (Article 5).

Granting authority to the Assembly to examine legislation through Decree No. III/MPR/2000 based on the judgment; First, there needs to be an institution that is authorized to test laws against the Constitution and MPR Decree; Secondly, the Assembly that establishes the Constitution and MPR Decree issued a legal product, so that this institution is deemed better understand and grasp the meaning and nature of the material contained in the Constitution and MPR Decree than other institutions that do not specify it.

However, the granting of authority to the Assembly for a law is deemed not appropriate and it will cause problems Juridical. First, the MPR is a Political Institution actualized political aspirations of the people within the framework of oversight of government power. Secondly, in terms of its membership, seven hundred members of the Assembly there were five hundred (500) members of the MPR automatically (regulated by Law No. 4 of 1999) become members of the Assembly. While the law is made by the Government and Parliament. If the tested material law by the Assembly, would not the draft has been discussed and approved in the House of Representatives to become law postscript they are also members of the Assembly. Third substantive examination of the law leads to more testing rather than testing the political jurisdiction. Politically Act has been tested by the House of Representatives. Fourth, if a rule lower conflict with higher regulations means there is a dispute between the two laws. Essentially it is a legal dispute. Therefore, the court competent to solve them. Based on the above, it can be concluded that the MPR is deemed improper conduct testing of the laws. Although as the highest state institution, the Assembly can do in such a manner, but a wide range of prevalence for a country should also be considered whether it is right or not.[3]

[1] Elucidation of Article 26 of Law No. 14 of 1970 on the Principles of Judicial Power.
[2] Ni'matul Huda, *Indonesian constitutional politics,* UII Press, Yogyakarta, 2004, p. 203-207.
[3] *Ibid,* p. 208-211.

In 2001 the Assembly has made the Third Amendment to the Constitution of 1945. The results of the Third Amendment to the 1945 Constitution, among others, relating to the judicial authorities in which mention of the Institute of the Constitutional Court. Article 24 paragraph (1) of the 1945 Constitution states that "The judicial power is an independent power to organize another trial that was underneath it in the general courts, religious courts, military courts, administrative courts, and by a Constitutional Court".

The further the authority of the Constitutional Court itself set more clearly in Article 24 C of the 1945 Constitution which states:[1]

(1) The Constitutional Court authority to hear at the first and last decision is final for a law against the Constitution, rule on the dispute the authority of state institutions whose authorities are granted by the Constitution, dissolution of political parties, and to decide disputes concerning election results.
(2) The Constitutional Court shall give a decision on the opinion of the House of Representatives regarding the alleged violations by the President and / or Vice President by the Constitution.
(3) The Constitutional Court has nine members of the constitutional judges set by the President, who presented each of the three people by the Supreme Court, three by the House of Representatives, and three by the President.
(4) The Chairman and Vice-Chairman of the Constitutional Court judges elected from and by the Constitution.
(5) The Constitutional Court must have integrity and a personality that is not dishonorable, unjust, statesman who controlled the constitution and the constitution, and not concurrently as state officials.
(6) The appointment and dismissal of judges constitutional, procedural law and other provisions on the Constitutional Court shall be regulated by law.

Regarding judicial review of laws against the Constitution in Indonesia theoretically and in practice is known for two kinds of test rights, namely the right to a formal test (*formele toetsingsrecht*) and the right of judicial review (*materiele toetsingsrecht*). Formal testing is authorized to assess and test whether a product is made in accordance with the legislative procedure or not. While testing the material is authorized to investigate and assess whether the legislation is contrary or not to the higher laws (*lex superiori derograt legi inferiori*).

On July 28, 2004 as many as 870 people, mostly farmers and largely dependent on water resources, represented by legal counsel has applied for judicial review of Law No. 7 of 2004 on Water Resources to the Constitutional Court of the Republic of Indonesia (MKRI). Earlier on July 1 as much as 16 Institutions from various sectors and regions also filed a similar lawsuit to the Constitutional Court to undertake judicial review of Law No. Act 7 of 2004 to 1945. The submission of the lawsuit legal standing or on behalf of the agency proposed among others by: Indonesian Forum for the Environment (WALHI), the Indonesian Farmers Federation (FSPI) Alliance of Indigenous Peoples of the Archipelago (AMAN) and some NGOs and Foundations in various regions. The judicial review was filed because in Law No. 7 In 2004 the charge it is considered contrary to the 1945 Constitution, particularly Article 33 of the 1945 Constitution, which states that:

(1) The economy is structured as a joint venture on family principles.
(2) The branches of production that are important for the state and dominate the life of people controlled by the state.
(3) Land and water and natural resources contained therein shall be controlled by the state and used for the greatest prosperity of the people.

The article should charge state is entitled to retain water and natural resources. But the Law on Water Resources provides a large space for individuals and the private sector to be able to take on water resources. This is for example contained in Article 7, 8, 9, 10.

Article 7

(1) (Right to water as referred to in Article 6 paragraph (4) in the form of water utilization and water exploitation rights
(2) The right to water as referred to in paragraph (1) cannot be leased or assigned, in part or entirely.

Article 8

(1) The right to use water obtained without permission to meet daily basic needs for individuals and for the people who are farming in irrigation systems.
(2) The right to use water as referred to in paragraph (1) requires a permit if:
(3) Permission referred to in subsection (2) is given by the Government or Local Government in accordance with the authority.
(4) The right to life referred to in subsection (1) includes the right to drain water from the ground through the ground or to another person who is bordered by land.

Article 9

(1) Water exploitation rights may be granted to an individual or entity with the permission of the Government or the regional government in accordance with its authority.

[1] Article 24C of the Constitution of the Republic of Indonesia Year 1945.

(2) The holder of the right to cultivate the water can drain water on the land of others based on the consent of the holders of land rights are concerned.
(3) Approval as referred to in paragraph (2) may be in the form of damages or compensation agreements.
Article 10
Provisions concerning water rights as referred to in Article 7, Article 8 and Article 9 shall be regulated further by government regulation. July 19, 2005, the Constitutional Court (MK) decided to reject the application for judicial review of Law No. 7 of 2004 on Water Resources of the Constitution of 1945. With this rejection, the Law on Water. A resource which is detrimental to the people will continue to apply. The law will also allow the privatization of Water Resources and marginalize the public interest on the water.[1]

2. Problem Formulation and Objectives

Based on the description of the background of the above problems, the problems in this research are:
a) How does the consideration the applicant to apply for judicial review of Law No. 7 of 2004 on Water Resources?
b) What is the meaning contained in Article 33 of the 1945 Constitution as the basis of the decision of the Constitutional Court for a judicial review of Law No. 7 of 2004 on Water Resources?
c) How does the juridical implications of the decision of the Constitutional Court for a judicial review of Law No. 7 of 2004 on Water Resources?

While the purpose of this research is:
a) To identify and assess the rationale applicant to file a judicial review of Law No. 7 of 2004 on Water Resources
b) To identify and assess the meaning contained in Article 33 of the 1945 Constitution as the basis of the decision of the Constitutional Court for a judicial review of Law No. 7 of 2004 on Water Resources
c) To identify and assess the juridical implications of the Constitutional Court decision on judicial review of Law No. 7 of 2004 on Water Resources.

3. Research Methods

This writing method Normative juridical, the method of approach where the process of reviewing and discussing the investigation of objects by focusing on aspects of juridical, then adjusted to a Constitutional Court decision on judicial review of Law No. 7 of 2004 on Water Resources.
Descriptive data were analyzed qualitative, i.e. the data obtained are presented in a descriptive and qualitative analyzed (content analysis) with the following steps:
a) The research data are classified according to research problems.
b) The results of further data classification systematized.
c) Data which has been systematized and analyzed to be used as a basis for conclusions

4. Results and Discussion

4.1 Basic Considerations Applicant to File Judicial Review of Law No. 7 of 2004 on Water Resources

Based on the authority and position as described in previous chapters, the functions that should be performed by the Constitutional Court is:[2]
a. The Constitutional Court serves to implement the judicial power in the constitutional system;
b. The Constitutional Court serves as the Guardian of Constitution; and
c. The Constitutional Court functions as a constitutional interpretation.

While the role that should be done by the Constitutional Court is:[3]
a. The Constitutional Court as one of the perpetrators of the judicial authorities, acting pushing mechanism of check and balances in the organization of the state;
b. The Constitutional Court's role is to keep the constitutionality of the execution of state power;
c. The Constitutional Court plays a role in realizing the Indonesian state welfare law.

The existence of the Constitutional Court is basically a logical consequence of the desire to ensure the upholding of the principles of modern constitutional state and the desire to strengthen a modern democratic system. As a new institution newly formed in 2003, the Constitutional Court has shown its existence. Some things have been done by the Constitutional Court in starting a work from an entirely new institution.

The Constitutional Court is a new institution that was given the function as the guardian of the constitution. Said as a guard constitution because the Constitutional Court is authorized to test laws against the Constitution of 1945. Each of the above contention made a law against the Constitution of 1945 filed by citizens

[1] http://www.yahoo.com/berita/accessed on July 23, 2005
[2] www.mahkamahkonstitusi.go.id.
[3] *Ibid.*

who violated his constitutional rights must be addressed carefully by The Constitutional Court in order to keep the soul constitutionality of the 1945 Constitution itself.

An explanation of Public Law Number 24 Year 2003 regarding the Constitutional Court confirmed as a few grains of landing affairs functions of the Constitutional Court as the guardian of the constitution, which among other things:

a. That the constitution be implemented in a responsible manner in accordance with the will of the people and the ideals of democracy;
b. Keeping a stable implementation of state government;
b. A correction of constitutional life experiences in the past were associated management by the double interpretation of the constitution.

After a few years of traveling the Constitutional Court has since formed many incoming requests to request a test of the Constitution of 1945. The lapse of time has also generated a lot of decisions. As a new institution, the community had high hopes that the Constitutional Court it is realized with success makes progressive decisions, argumentative, and cultural. The success of the Constitutional Court in making decisions that progressive meaning that the resulting decisions are creative, logical and populist.

In general, the mechanism of testing examination by the Constitutional Court based on Law Number 24 of 2003 on the Constitutional Court is as follows:

a. Testing of the 1945 Act made after the application submitted in writing in Indonesian to the Constitutional Court.[1]
    1) The law that can be petitioned for is legislation enacted after the 1945 changes.[2]
    2) The application in this case is the party that considers the rights and/or authorities have been impaired by the enactment of legislation, namely:[3]
        a) Individual citizens of Indonesia;
        b) The unity of indigenous communities along the still alive and in accordance with the development of society and the principles of the Unitary Republic of Indonesia as regulated in law;
        c) Public or private legal entity; or
        d) State.
    3) The applicant must clearly describe in their petition rights and/or authority that:[4]
        a) Establishment of legislation does not comply with the provisions under the 1945 Constitution; and/or
        b) The content of the paragraph, chapter, and/or parts of legislation considered contrary to the 1945 Constitution
b. No entries are then checked by the Registrar of the Constitutional Court to determine the administrative requirements of the application.
    1) If it turns out is not complete, the applicant will be asked to complete its shortcomings later than seven (7) working days after notification of the deficiencies are received applicant.
    2) As for the applicant who has met the administrative requirements it will be noted in Constitutional Case Register.
c. In a period of at least seven (7) working days after the request is recorded in Constitutional Case Register, the Constitutional Court will deliver the petition to the Parliament and the President to be known. In the same period the Supreme Court on the petition against a law.
d. No later than 14 (fourteen) working days after the application is recorded in the Case Register, the Constitutional Court will set the first hearing. Determination of the trial was announced to the parties and the public.
e. Before starting the principal case, the Constitutional Court held that examination, the Constitutional Court is obliged to give advice to the applicant to complete and / or correct the petition within a period of at least 14 (fourteen) days.[5]
f. In the trial, the judges of the Constitutional Court examine the petition along with the evidence presented. The Constitutional Court may request information from / or minutes of meetings relating to the application being checked by the People's Consultative Assembly, the House of Representatives, Regional Representatives Council, and / or the President.
g. Amar ruling will declare that the request can not be accepted if the Constitutional Court found the Applicant and / or the application is eligible filing. Instead the ruling will be granted if the Constitutional Court found

[1] Article 29 paragraph (1) of Law No. 24 Year 2003 regarding the Constitutional Court
[2] Article 50 of Law No. 24 Year 2003 regarding the Constitutional Court
[3] Article 51 paragraph (1) of Law No. 24 Year 2003 regarding the Constitutional Court
[4] Article 40 paragraph (3) of Act No. 24 Year 2003 regarding the Constitutional Court
[5] Article 39 paragraph (2) of Law No. 24 Year 2003 regarding the Constitutional Court

the request reasonable.[1] In terms of making laws based on the 1945 Constitution, the ruling states the petition is granted. And vice versa if the law is either the establishment or the material does not conflict with the 1945 Constitution, the ruling states the petition is rejected.[2]

h. In the petition is granted, the Constitutional Court stated unequivocally substance of paragraphs, chapters, and/or parts of laws that are contrary to the 1945 Constitution and automatically the substance of the paragraph, chapter, and / or parts of laws that contradict the would not have binding legal force.[3] As for the Constitutional Court decision stating that the establishment of a law is not in accordance with the provisions of the 1945 Constitution, the law automatically has no binding force.
i. Constitutional Court decision has permanent legal force since completed pronounced in plenary session open to the public. The Constitutional Court is obliged to send copies to the parties no later than seven (7) working days after the decision is made and shall include the decision in the Official Gazette within a period not later than 30 (thirty) days after the verdict is pronounced. The verdict was delivered also to Parliament, Parliament, the President, and the Supreme Court.

Constitutional Court open to the public, except for the deliberation of judges.[4] And the need to note also that the testing of the legislation under legislation that is being carried out by the Supreme Court shall be terminated if the legislation that became the basis of testing these regulations are in the process of the testing grounds such regulations are in the process of testing Court Constitution until there is a decision of the Constitutional Court.

Legislation being reviewed by the Constitutional Court remain valid as long as no decision stating that the legislation is contrary to the 1945 Constitution.[5] Against the substance paragraph, chapter, and / or parts of laws that have been tested can not be filed back.

4.2 Contained in the meaning of Article 33 UUD 1945 which cite the Basic Constitutional Court decision on judicial review of Law No. 7 of 2004 on Water Resources

In Article 33 paragraph (3) of the 1945 Constitution states that the earth and water and natural resources contained therein shall be controlled by the State and used for the welfare of the people. The conception of "controlled by the state" as contained in Article 33 paragraph (3) of the 1945 Constitution, can be defined by state control is something higher than ownership. Understanding controlled by the state under Article 33 UUD 1945 implies a higher or wider than the concept of ownership in civil law. The concept of control by the state is a conception of public law relating to the principle of people's sovereignty adopted in 1945, both in politics (political democracy) and economic (economic democracy).[6]

In the people's sovereignty principle, it is the people who are recognized as the source, owner and holder of the highest authority in the life of the state, according to the doctrine "of the people, by the people and for the people". In this sense, covers the definition of public ownership by the people collectively. "The people collectively are constructed by the 1945 Constitution mandates the State to establish policies (*a regulation*) and maintenance actions (*bestuursdaad*), setting (*regelendaad*), management (*beheersdaad*) and supervision (*toezichthoudensdaad*) for the purpose of the prosperity of the people.

Definition of "controlled by the state" as stated in Article 33 of the 1945 Constitution Supomo, in one of his books gave definition of "controlled" as follows:[7]

"..... Including the definition of regulating and / or organized primarily to repair and expensive production .....".

Furthermore, Mohammad Hatta, said:

"...Government builds from the top, carries the big ones such as developing electric power, drinking water supply, ... manufacturing various products that dominate the life of many people. What is called in English "public utilities" should be run by the Government. Belonging to large companies must be in the hands of the Government...".[8]

Article 33 the state mandates by the Government to organize, provide and provide guarantees and protection for individuals to have equal rights over matters concerning the lives of many people. That water is the livelihood of many people is a basic right for every individual. Availability of water for each individual is one thing that is absolute and must be guaranteed by the State without any differences in social and economic status. In the operation of the water as the lives of individuals prosecuted role of the state to guarantee and

[1] Article 56 paragraph (1) of Law No. 24 Year 2003 regarding the Constitutional Court
[2] Article 56 paragraph (2) of Law No. 24 Year 2003 regarding the Constitutional Court
[3] Article 56 paragraph (3) of Act No. 24 Year 2003 regarding the Constitutional Court
[4] Article 40 paragraph (1) of Law No. 24 Year 2003 regarding the Constitutional Court
[5] Article 47 of Law Number 24 Year 2003 regarding the Constitutional Court
[6] Decision of the Court Case Number 058-059-060-063 / PUU-II / 2004
[7] Decision of the Court Case Number 058-059-060-063 / PUU-II / 2004
[8] Decision of the Court Case Number 058-059-060-063 / PUU-II / 2004

protect the interests of groups who cannot afford, including the poor.

Basically Article 33 paragraph (1), (2) and (3) of the 1945 Constitution is the foundation of economic democracy or later known as Economic Democracy as a system is an economic system that promotes increased participation of all members of society in the process of the economy. Accordingly, in the System of Economic Democracy, every member of the community is not only required as an object. Every citizen is a subject of the economy of Indonesia, which has the right to participate directly in the implementation of the Indonesian economy, as well as in overseeing the process of organizing the economy.

The interpretation of that article cannot be separated from the nature of the state law chosen by our founding fathers when forming the unitary state of Indonesia which was proclaimed on August 17, 1945. State law chosen Indonesia is a state of law in the sense *rechtstaats* requiring state interference in people's lives, including one familiar setting for the purpose of economic welfare of its people.

In the context of the interpretation of Article 33 UUD 1945 cannot be separated from its historical review. In general, Article 33 illustrates the economic system to be implemented by the Indonesian people by the founders of our country, in the formulation of Article 33 is an understanding that anti against liberalism, capitalism, and imperialism practiced colonialism Netherlands and Japan did not bring the Indonesian nation to independence, equality and brotherhood but on the contrary the practice of liberalism made by the colonial Dutch and Japanese only bore the seeds of capitalist imperialism which oppress people of Indonesia pit, poverty and misery.

4.3 Juridical implications of the Constitutional Court Decision on Judicial Review of Law Number 7 of 2004 on Water Resources

In consideration of the substantive Court delivered the premises used in the test articles of Law Water Resources. Among the premises used by the Constitutional Court in this test is:

a. State, People, and Water

The Constitutional Court found the function of water is necessary for human life and can be regarded as such an important requirement as living beings need for oxygen (air). Access to clean water supply has been recognized as a human right derived from:

1) Charter the establishment of the World Health Organization in 1946.
2) Article 25 of Universal Declaration of Human Rights.
3) Article 12 International Covenant on Economic, Social and Cultural Rights.
4) Article 24 (1) Convention on the Rights of the Child (1989).

The Constitutional Court found the recognition of access to water as a human right to identify two things; on the one hand is the recognition of the fact that water is a necessity that is so important for human life, on the other hand the need for protection for every person on access to water. Dipositifkan necessary for the protection of the right to water rights are the highest in the field of law, namely human rights. The problem that arises then is how the country's position in relation to water as a public body or human social objects. As the human rights of other country's position in relation to the obligations posed by human rights, the state must respect, protect, and fulfill it.

Panel of Judges of the Constitutional Court also found the water is a resource that is present in nature as well as other natural resources, whose availability for human needs is strongly influenced by local natural conditions in which a person resides. From the point of the hydrological cycle, water will not deteriorate, but the problem is how people can make efforts so that in the middle of the cycle man enough to get the water supply in contrast to the natural resources of air relatively freely can be obtained anywhere. A natural condition led to the availability of water is not always distributed in line with the spread of humans who need water for life. In the case, the human need for water for life does not depend on where he lives. That is, the presence or absence of water in one place will not reduce the human need for water. Human intervention to influence the hydrological cycle with the aim to provide water for human needs has long been pursued either by utilizing technology that is very simple to highly advanced technology. For example, water storage and regulation of water flow to be utilized in various purposes of good drinking water, fisheries, and agriculture, and also for power generation.

That by basing the two things, namely: first, the state's obligation to respect, protect and fulfill the human rights of access to water, and second, the character / nature special water, then it becomes a necessity for the state to intervene in order to make arrangements whose purpose so that human rights can be respected, protected and fulfilled.

Panel of Judges of the Constitutional Court found if respect for human rights to water is interpreted as not being allowed to interfere in the state affairs at all the water from the citizen or community, then certainly there will be a lot of conflict because it will happen scramble to get water. That is because the water is only found in certain places and natural conditions, while in a different place natural conditions, no source of water. In the case, where the people still need water. This differs from the air though it is also a social object *(res commune)*, but the distribution is widespread in nature so that people can easily get it.

In addition, the Assembly also of the view that the protection of basic rights to water is not only about the protection of the rights that had been enjoyed by someone of infringement by others, but also ensure certainty as rights that should really be enjoyed. Thus, the protection of rights in this aspect cannot be separated with the fulfillment of the rights recognized.

In the view of the judges of the Constitutional Court that the three aspects of human rights that should be guaranteed by the state, namely the respect, protection and fulfillment, not only the current needs but also guaranteed continuity for the future because it directly involves human existence. Therefore, countries also need to be actively involved in the planning of water resources management for the community. The planning involves many aspects of which is the conservation of water resources, which is a human interference in the hydrological cycle, so that enough water is available at the time the water needed by humans.

With the basics in mind, regarding the regulation of water resources for secondary purposes is a necessity as well. Therefore, regulation of water resources is not enough simply involves regulation of water as a basic human need that as human rights, but also necessary to regulate the use of water resources for secondary purposes is no less important for humans to be able to live decently. The presence of legislation governing both of these very relevant.

b. Water Rights in the Law on Water Resources

Court deems it necessary to assess whether the Law on Water Resources has set the state's obligation to respect, protect and fulfill the human right to water. Considering that since the articles of the Law of Water Resources interrelated, the Court needs to conduct a comprehensive assessment of the Law of Water Resources as a basis for taking a decision.

Court argued that Article 5 of the Law of Water Resources, which reads: “The State guarantees the right of every person to obtain water for basic needs minimal daily to meet the life of a healthy, clean and productive”, is the formulation of the law adequate to describe the rights on water as a human right guaranteed by the 1945 Constitution.

Although the state guarantees in Article 5 of the Law of Water Resources is not reaffirmed the responsibility of the Government and provincial governments, as defined in the article should be based on respect, protection and fulfillment of human rights to water. The provisions of Article 16 letter h Law on Water Resources determines that the District / Municipal Government has a responsibility to meet basic needs minimal day-to-day on the water for the people in the region should not be interpreted as an exclusive responsibility that only the District / City alone have the obligation to meet the basic needs of daily minimum on the water. Government and provincial governments through its programs are also obliged to ensure that rights to water can be met. This must be reflected in the regulations implementing the Law on Water Resources.

Regarding the Right to Use Water as defined in Article 1 paragraph 14 of Law of Water Resources, the Constitutional Court found Right to Use Water that is more respect for and protection of human rights on the water, because the right to use the Elucidation of Article 8 of the Act Water Resources only enjoyed by those who take away from water sources instead of distribution channels.

Court argued that the Government's obligation to fulfill the right to water on the outside of the right to life is reflected in:

1) 1) The responsibility of the Government, Provincial Government, and District/City Government specified in Articles 14, 15 and 16 Law on Water Resources, which is the responsibility to manage, use, and control of water resources in the basin. The Government must prioritize the raw water to meet the daily interests for everyone through the utilization of water resources management.
2) 2) The provisions of Article 29 paragraph (3) of the Law of Water Resources, which reads, “The provision of water to meet the basic needs of daily and irrigation for agriculture of the people in the system of the existing irrigation is a major priority provision of water resources above all needs “.

On this basis, the Court found this provision to be significantly implemented in the rules of implementation of the Law on Water Resources, so that the management of the Regional Water Company (PDAM) as the exploitation of water resources actually cultivated by the local government to be based on the provisions of Article 26 (7) Law on Water Resources. Community participation is the implementation of democratic principles in the management of the water should be paramount in the management of taps, for good or bad performance of taps in service to the public water supply directly reflects both the poor countries in performing its obligation to fulfill the human right to water.

While the meaning of the principle of “water users pay the cost of water resource management services” is to put the water not as an object that is subject to economic price, this corresponds to the status of water as “res commune”. With this principle should water users pay less than if the water were assessed in prices in the economy, because the price of water economically, beneficiaries would have to pay in addition to the price of water is also the production costs and the benefits of water utilization. Taps must realize the country's obligations as set out in Article 5 of the Law of Water Resources, and not as a profit-oriented company economically. Despite the provision of Article 80 paragraph (1) of the Law of Water Resources stated that users

of water resources to meet the basic needs of daily and for the agricultural community is not burdened with the cost of services of water resource management, this provision is applicable throughout the fulfillment of basic needs daily and for the agricultural community is obtained directly from the water source. That is, if the water for daily needs and the agricultural community was drawn from the distribution channel then applies the principle of "pay for the use of the water resources management service water" meant. However, this should not be used as a basis for the imposition of an expensive cost for residents who rely on the fulfillment of basic needs daily to the taps through the distribution channel. The costs of water resources management for the taps should be transparent and involve the community element in its calculations.

c. Water Mastery by State

On these considerations the Constitutional Court stated that the water is *res communes*, and therefore should be subject to the provisions of Article 33 paragraph (3) of the 1945 Constitution, thus setting on the water should get into the legal system public against him can not be made the object of ownership in terms of civil law , Therefore, the only concept of rights in accordance with the nature of such arrangements is the right to water as a human right as stipulated in the constitution. Court argued the concept of Right to Use Water as defined in the Law on Water Resources should be interpreted as a derivative (derivative) of the right to life guaranteed by the 1945 Constitution.

Therefore, beyond the right to use any of the water company should be subject to the right of control by the state. Utilization of outside water use rights must be through the use permit application to the Government and to meet the specified requirements, the Government may issue permits better utilization of water as raw materials and utilization of water resources. For that, the water has the properties or characteristics of its own compared to other natural resources as eg oil or goods other mines, and because of the water effect two provisions of the law, namely human rights derived from Article 28 H and Article 33 paragraph (3) the Constitution in 1945, the regulation of the water has specificity.

Although the Law on Water Resources Water is known leasehold as stated in Article 7 (1), but the definition of such rights must be distinguished from the right in a general sense. Article 1 paragraph 15 states that leasehold Water is a right to acquire and commercialize water. With this formula, the leasehold Water is not intended to give the right of control over water resources, rivers, lakes, or swamps. General Explanation number 2 states that the Right to Water is not an ownership right on the water, but only limited to the right to obtain and use or exploit a number (quota) of water in accordance with the allocation set by the Government to the water users. Right to Water in such a concept is consistent with the concept that water is *res communes* that do not become the object of prices in the economy.

Right to Water has two properties. First, the right to use such rights is rights *in persona*. It is due to a right to life is a reflection of human rights, therefore the rights inherent to human subjects that are inseparable. Second, the leasehold Water is a right that exists solely on the permissions granted by the Government or Local Government, and as permission then bound by the rules of licensing, including provisions on licensing requirements and the reasons that led to permission can be revoked by the licensor. Disputes over land use permits Water may not arise between the Government or Local Government with the license holder.

The licensor has the right to supervise the permission granted. Right to Water business is instrumental in the licensing system used by the Government to limit the number or volume of water that can be obtained or attempted by eligible. With the leasehold Air will clearly be able to determine how much volume of water can be cultivated by the licensee. The Constitutional Court found both characteristics contained on Right to Water has been fulfilled with the provisions set forth in Article 7 (2) of the Law of Water Resources stating that the Right to Water cannot be leased or assigned, in part or entirely to party third.

5. Conclusions and Recommendations

5.1 Conclusions

Based on the results of research and analysis as described above, the authors draw the following conclusion:

a. Basic consideration of the applicant to apply for judicial review of Law No. 7 of 2004 on Water Resources, among others:
   1) The law that can be petitioned for is legislation enacted after the 1945 changes.
   2) The application in this case is the party that considers the rights and / or authorities have been impaired by the enactment of legislation, namely:
      a) Individual citizens of Indonesia;
      b) The unity of indigenous communities along the still alive and in accordance with the development of society and the principles of the Unitary Republic of Indonesia as regulated in law;
      c) Public or private legal entity; or
      d) State.
   3) The applicant must clearly describe in their petition rights and / or authority that:
      a) Establishment of legislation does not comply with the provisions under the 1945 Constitution; and / or

b) The content of the paragraph, chapter, and / or parts of legislation considered contrary to the 1945 Constitution

b. Understanding controlled by the state under Article 33 UUD 1945 implies a higher or wider than ownership in the civil law conception. The concept of control by the state is a conception of public law relating to the principle of people's sovereignty adopted in 1945, both in politics (political democracy) and economic (economic democracy). Thus the explicit meaning of Article 33 UUD 1945 is mandated by the government for the country, will provide guarantees and protection for individuals to have equal rights over matters concerning the lives of many people.

c. Juridical implications of the Constitutional Court decision on judicial review of Law No. 7 of 2004 on Water Resources are as follows:
   1) That because the articles proposed by the Applicant substantive testing does not stand alone but related between one another, the Court needs to look at the links between the articles of the Law on Water Resources to consider the petition.
   2) That one studied the petition, the Court concludes that the Petitioners did not pay enough attention to what the Act Water Resources referred to as "Pattern Water Resources Management", causing the perception or interpretation misunderstood Act Water Resources comprehensively.
   3) Whereas the Petitioners argued in Law Water Resources there are clauses that encourage privatization, Article 9, Article 10, Article 26, Article 45, Article 46 and Article 80 of Law Water Resources, so the clauses are contrary to Article 33 paragraph (3) of the 1945 Act Water Resources Court found regulate matters central to the management of water resources, and although the Act Water Resources opportunities to get the private sector's role leasehold Water and permit exploitation of water resources, but it will not lead to mastery water will fall into private hands.
   4) That the water resources are not solely be used to meet the basic needs of daily directly, but the function of secondary water resources are needed in industrial activities, both industrial small, medium and large where they are carried by non-Government. Right to Water and exploitation permit businesses a licensing system that publication should be based on the pattern of water resource management in which the preparation of such patterns has involved community participation widest. Performance management of water resources will be supervised directly by the parties' concerned (stakeholders). With the licensing system is actually utilization of water resources will be controlled by the Government. Applications for permission either to obtain the right to cultivate and exploitation permit shall be refused if granting such permission does not fit the pattern of water resource management that have been prepared.

5.2 Recommendations

a. a. The Government needs to devise comprehensive measures and sided with the people within the framework of the privatization of water to the people's needs always met and sustainability of water ecosystems is always awake. In addition, strict rules need to be made regarding the procedure or procedures for private sector involvement in the management of water resources to avoid monopolistic practices that it is very detrimental to the people.

b. b. Judge of the Constitutional Court should only decide the future application submitted to him, except in the case of the need for legal reform progressive and rely on the principles of justice and expediency. This is done to prevent the potential for in constitutional feared conditionally can refract upholding the principles of constitutionalism.

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