

CHAPTER ONE

INTRODUCTION

A. Background of Research

The Population growth has increased the need for clothing, food, clean water, and energy. This resulted in the excessive exploitation of natural resources, especially water resources which sometimes ignore the aspects of the environment. Excessive exploitation of natural resources will have an impact on the decrease of natural resources sustainability and environmental functions.¹ The management of water resources in Indonesia is controlled by the state. It has been clearly mentioned in Article 33 Paragraph (3) of the 1945 Constitution which states that the earth, water and natural resources contained therein are controlled by the state and used for prosperity people.² Therefore the 1945 Constitution is not only a constitution that regulates the legal and political order but also the economic constitution.

The government has a right to manage water resources to meet the daily needs of the community. The management of water resources is regulated by the state. The state guarantees every people right to get water for their daily minimum needs in order to fulfil their healthy, clean, and productive lives. One of them provides clean water for daily necessities such as washing clothes, bathing, eating, drinking, or in terms of industrial needs such as agriculture and others.

¹ Kartodihardjo, *et al*, 2005, *Di Bawah Satu Payung Pengelolaan Sumber Daya Alam*, Jakarta, Suara Bebas, p. 14

² Article 33 Paragraph (3) of the 1945 Constitution

The water resources in Indonesia are one of the largest natural resources in ASEAN.³ However, the management of water resources in Indonesia has shown some problems. This is indicated by various problems such as floods and droughts that are getting worse from year to year. In addition, the use of water and water resources between intersectoral and inter-regional has increased, despite unclear division of authority and responsibility for the management of water resources. On the other hand, there is a lack of our attention to the arrangements in the management of water resources itself. Therefore, water as the source of life for all living beings is important and so is the regulation on water resources management. The regulation on water resources management itself must be clear and in accordance with current conditions.

Based on the decision of the Constitutional Court Number 85/PUU-XI/2013 which has abolished the Law Number 7 of 2004 on Water Resources and reactivated the Law Number 11 of 1974 on Irrigation, the main reason for the cancellation of the Law No. 7 of 2004 on Water Resources was the involvement of the private sector in its management process. This cannot be separated from the shifting of the meaning of water that previously was public goods that turned into a commodity that is more concerned with economic aspects that ultimately oriented to get a profit.⁴ The issues that mention the commercialization and privatization in water management was contained in Article 40, Article 41, and Article 45 of the Law Number 7 of 2004 on Water Resources, which in the end

³ Aji Sofyan Effendi, 2016, *Transformasi Ekonomi yang Berbasis Sumber Daya Alam (SDA) dalam Rangka Penciptaan Nilai Tambah Ekspor dan Kompetitivnes Indonesia di Negara ASEAN*, Pusat Studi Universitas Mulawarman, Samarinda, Kalimantan Timur, p. 3

⁴ Samsul Wahidin, 2016, *Hukum Sumber Daya Air*, Yogyakarta, Pustaka Pelajar, p. 28

the Constitutional Court had issued a decision number 85/ PUU-XI/2013 which means that the Water Resources Law did not have a binding legal force anymore.

Theoretically, there are many definitions of privatization itself. Commonly, privatization is a process of transferring ownership from public property to private property. Based on Article 1, paragraph 12 of the Law Number 19 of 2003 concerning to the state-owned enterprises, states that the definition of privatization is the sale of company, in a whole or in a part, to other parties in order to improve the performance and value of the company, enlarge benefits for the state and society, and expand public shareholdings.⁵ Privatization includes the transfer of ownership of productive assets from the public sector to the private sector or simply giving space to the private sector to engage in operational activities such as contracting out and internal markets.⁶

The Law Number 7 of 2004 on Water Resources also contradicts the 1945 Constitution precisely in Article 33 paragraph (3) stating that the earth, water and natural resources contained therein are controlled by the state and used for the greatest possible for the welfare of the people. The definition is contained in the constitutional mandate where the state is responsible for the availability and distribution of potential water resources for all Indonesian and thus the utilization of water resources must be planned in such a way as to fulfil the principles of expediency, justice, independence, sustainability, and sustainability.⁷

⁵ Article 1 Paragraph 12 Law No 19 of 2003 on State-Owned Enterprises

⁶ Justacla M. Grace Istla, 2016, "Implikasi Pembatalan Undang-Undang Nomor 7 Tahun 2004 tentang Sumber Daya Air terhadap Perusahaan Pengelolaan Sumber Daya Air (PDAM Kota Surakarta dan PT Tirta Investama Klaten)", *Privat Law*, Vol VI No 2, p. 19

⁷ Upik Hamidah, 2015, "Pengaturan Hukum Pengelolaan Sumber Daya Air di Kota Bandar Lampung", *Jurnal Cita Hukum*, FSH UIN Syarif Hidayatullah Jakarta, p. 314

Previously, in 2005 the Judicial Review of the Law No. 7 of 2004 had resulted in the decision of the Constitutional Court Number 008/PUU-III/2005. The court did not cancel the Law Number 7 of 2004 in the decision of the case; the court rejected the applicant's petition, but stipulates the provisions which petitioned as a conditional constitution. As time passes, matters which have been stipulated in the ruling of the Constitutional Court has been declared conditionally constitution, which in fact in its implementation was not in accordance with the conditions established by the Constitutional Court so that the decision of the Constitutional Court Number 85/PUU-XI/2013 which ruled that Law Number 7 of 2004 on Water Resources was completely cancelled and the decision is final and binding.

Based on the reasons for the privatization in the management of water resources, the Constitutional Court has cancelled all articles in the Law No. 7 of 2004 on Water Resources on February 18th through Decision Number 85/PUU-XI/2013. It was perceived that the policy on this regulation did not to guarantee the limitation of the management of water resources by private parties so that it was considered in contradiction with the 1945 Constitution. In order to avoid the legal vacuum that resulted in legal confusion in the management of water resources, the Constitutional Court reactivated the Law Number 11 of 1974 on Irrigation until the establishment of a new law that regulates water resources in Indonesia. Therefore, the author intends to research “The Legal Implications of the Decision of the Constitutional Court Number 85/PUU-XI/2013 on the Regulation and Clean Water Supply System in Indonesia”.

B. Research problem

Based on the background above, the research problems can be formulated as:

1. What are the legal implications of the Constitutional Court's Decision Number 85/PUU-XI/2013 on regulation and clean water supply system in Indonesia?
2. What are the similarities and differences between Law No 7 of 2004 on Water Resources and Law 11 of 1974 on Irrigation?

C. Objectives of Research

There are two objectives of research as follows:

1. To analyze the legal implication of the Constitutional Court's Decision Number 85/PUU-XI/2013 on regulation of clean water supplying system in Indonesia
2. To analyze the similarities and differences between Law No 7 of 2004 on Water Resources and Law No 11 of 1974 on Irrigation

D. Benefits of Research

1. Theoretical Benefit

This benefit of research is giving an understanding of the provision of clean water supply in Indonesia after the decision of the Constitutional Court Number 85/PUU-XI/2013 stating the Law Number 7 of 2004 on Water Resources abolished as a whole.

2. Practical Benefit

This research provides a better understanding to the government about the legal implications on regulation and cleans water supplying system in Indonesia after the Decision of Constitutional Court Number 85/PUU-XI/2013.