

CHAPTER TWO

LITERATURE REVIEW

A. The Decision of Constitutional Court

The Constitutional Court has the authority to hear at the first and last level where the decision is final. The final meaning of the decision of this Constitutional Court is that there can be no legal action or legal action. The finalisation of the Constitutional Court decision here means that the Constitutional Court decision was binding as a legal norm since it was pronounced in court. This final decision is directly binding which also means that all parties, people, legal entities, or state institutions shall comply with and implement the decision which has been decided. If there are no legal remedies that can be used, it means that the decision has a permanent legal force (*in kracht van gewijsde*) and has a binding force.

The decision is an act of a judge as a state official who is authorized and pronounced in open trial to the public and made in writing to end the case in that the parties confront him. Maruarar Siahaan argued that the judge's decision is an act of the state whose authority is delegated to the judge based on the law.¹ Judges' decision is often referred to as court decisions, which are something that the litigants are most likely want or wait to settle the case between the two parties in the best possible way.

¹ Maruarar Siahaan, 2006, *Hukum Acara Mahkamah Konstitusi Republik Indonesia*, Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI, Jakarta, p. 235

Every decision imposed by the Constitutional Court is *orga omnes* which means that the decision of the constitutional court does not only bind litigant parties who have impaired their constitutional rights (the applicant's party) but are publicly binding. The decision of the constitutional court is legally binding and must be obeyed by every citizen in Indonesia.

According to Jimly Asshiddiqie, in connection with the constitutional court's position, the constitutional court is a body which in accordance with the provisions of the 24C 1945 Constitution, as explained below:

1. The Constitutional Court has the authority to hear at the first and final level decision of which is final to examine the law against the constitution, to decide upon the dispute over the authority of the state institutions whose authorities are granted by the constitution, to decide upon the dissolution of political parties, and to decide upon disputes concerning the results general election;
2. The Constitutional Court must provide a decision on the opinion of the House of Representatives regarding alleged violations by the president and/or vice president in accordance with the 1945 Constitution;
3. The Constitutional Court has nine members of the constitutional judges appointed by the president, each of which is nominated by three persons 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 are elected by constitutional judges

5. Constitutional judges must have integrity and personality that is not blameworthy and fair, and does not act concurrently as state officials;
6. The appointment and dismissal of constitutional judges, procedural law and other provisions concerning constitutional court shall be regulated by the Law.

B. Water and Water Resources

Water is all water contained in and/or derived from water sources, both above and below the soil surface, not included in this sense of water in the sea.² The water source is a place or container of natural water and/or artificial contained on, above, or below the soil surface.³ Water power is the potential contained in water and or water sources that can provide benefits or harm to human life and the environment.⁴

Water resources are water, water sources, and water resources contained therein.⁵ The issue of water availability and its distribution has always been a common problem. The availability of water in the dry season becomes very limited while in the rainy season floods occur in everywhere.⁶ The provision of water resources itself is an effort to meet the needs of water and water power to fulfill various needs with the quality and quantity accordingly.

² Article 1 Paragraph 3 Law No. 11 of 1974 on Irrigation

³ Article 1 Paragraph 4 Law No. 11 of 1974 on Irrigation

⁴ Article 1 Paragraph 6 Law No 7 of 2004 on Water Resources

⁵ Article 1 Paragraph 1 Law No 7 of 2004 on Water Resources

⁶ I Gusti Agung Putu Eryani, 2014, Potensi Air dan Metode Pengelolaan Sumber Daya Air di Daerah Aliran Sungai Sowan Perancak Kabupaten Jembrana, Vol. 3 No. 1, *Journal Paduraksa*, ISSN: 2303-2693, Fakultas Teknik Universitas Warmadewa, p. 35

According to the Law No. 11 of 1974 on Irrigation, water is all water contained in and/or derived from water sources, both above and below the soil surface, not included in this sense of water in the sea.⁷ Article 33 paragraph (3) of the 1945 Constitution stated that the earth, water, and natural resources contained therein are administered and controlled by the state and used as much as possible for the welfare of the people.⁸

Water resources are one of the important resources for human life in conducting activities, including development activities. The Increasing population and development activities resulted in an increase in water resource requirements. On the other hand, the availability of water resources is increasingly limited. Even in some places it can be said to be in a state of crisis. This is caused by various factors such as pollution, deforestation, agricultural activities that ignore environmental sustainability and changes in water catchment function.⁹

There are two understandings that can be used as the basis for the elaboration of water resources. The first is a physical elaboration, or it can be called based on the physical view of the water and the second is based on the arrangement of water. At the general level, as the protection that has been given for the management of these natural resources, the use of water is useful in the fields of industry, agriculture, household, and environmental activities. It is the aspect that requires a regulation as a legal foundation. Therefore, water utilization

⁷ Article 1 paragraph 3 Law No 11 of 1974 on Irrigation

⁸ Article 33 Paragraph 3 of the 1945 Constitution

⁹ Asep Hariyanto, K. Herry Iskandar, "Kajian Identifikasi Potensi dan Permasalahan Sumber Daya Air (Studi Kasus: Kabupaten Belitung)", *Jurnal Perencanaan Wilayah dan Kota*, Vol 11 No. 2, p.3

remains based on a just legal dimension and provides maximum benefit to human life.¹⁰

In the management of water resources basically, there are three aspects including utilization, conservation, and control.

a. Aspect of Utilization

Utilization of potential water resources is for the benefit of human such as for the purposes of irrigation, agriculture, drinking water, manufacturing, and tourism industry, cross-water, and so forth. All of the functions are run with the general purpose of meeting the needs of human beings and to create the welfare of the people.

b. Conservation Aspect

In order to the utilization to be sustainable, the water needs to be preserved both in terms of the quantity and quality.

c. Control aspects

One of the components of the management of water resources is an effort to control the damage power caused by water. The river used to be one of the landfill disposals, both in the form of household and industrial waste that resulted in disruption of living things. Therefore, in the management of water resources which should not be forgotten is the control of damaged power in the form of floods or pollution.¹¹ In the management of water resources, these three aspects must be one unity and cannot be separated

¹⁰ Samsul Wahidin, *Op.Cit*, p. 4

¹¹ Jacobus Samidjo, Maret 2014, *Pengelolaan Sumber Daya Air*, <http://download.portalgaruda.org/article.php?article=251790&val=6766&title=Pengelolaan>, *Majalah Ilmiah Pawiyatan*, Vol. XXI, No. 1, p. 45, accessed on Nov 1st, 2014 at 15.11 p.m

from each other. If one aspect is forgotten, it will result in the unsustainable use of water and will even bring bad consequences. If we are not correct and meticulous in managing water resources, then not only us who will bear the consequences, but the future generations will also bear the consequences.

C. The Role of Government in Regulating Water Resources

As explained in Article 33 paragraph 3 of the 1945 Constitution above, the management of water resources is controlled by the state or government.¹² The meaning of “controlled by the state” is to organize, to supervise, especially to improve the services so that water resources can be used fairly and sustainably.¹³ To ensure the implementation of water resources management that provides the maximum benefit for the interest of the community in all areas of life, it is necessary to arrange the pattern of water resources management in each river area with the principle of integration between surface water and groundwater.¹⁴

The Government Regulation Number 82 of 2001 on Management of Water Quality and Control of Water Pollution authorizes the government (central), provincial and regency governments to manage water resources especially in water quality management. Governments, the provincial government, and regency governments are authorized to determine the pollution load capacity, inventory and identification of pollution sources, establish the requirements for disposal of wastewater into water or water sources, monitor water quality and monitor other factors leading to changes in water quality.¹⁵

¹² Article 33 Paragraph 3 of the 1945 Constitution

¹³ See: Constitutional Court’s Decision Number 85/PUU-XI/2013, p.66

¹⁴ *Ibid*, p.88

¹⁵ Takdir Rahmadi, 2015, *Hukum Lingkungan*, Jakarta, PT Rajagrafindo Persada, p. 127

The role of government is very important in managing water resources for the needs of the community. The regulation or act, in particular, shall have an eternal significance for the life of the people if the meaning and law has been able to provide essential justice, create protection for all the people, create peace and public order, and can nourish the economic growth and welfare of the people.¹⁶

Water is a very important necessity of life that includes humans, plants, and animals. Therefore, it needs to be arranged in order to provide benefits for the people. In the water distribution process, a coordinated system is needed between the actors as well as the policymakers in the water sector, and the guarantee of sufficient water acquisition. This is based on the purpose of organizing the state, among others, to organize public welfare, provide protection to all the people, and hold public order. Therefore, the state is obliged to protect all the interests of the people and create justice.¹⁷

The Law No. 32 of 2009 on Protection and Management of the Environment requires the government to implement the principles of good environmental governance in every building policy so that the responsibility of the state is to preserve the function of the environment and the welfare of the people. Indonesia is an archipelagic country characterized by the archipelago having conditions that are highly vulnerable to natural disasters. The condition of water, soil, and air below, beside and above Indonesia is in such way that if there is a change in the natural balance in the world, it can give consequences to Indonesia. Indonesia is a

¹⁶ Samsul Wahidin, 2016, *Op.Cit*, p. 71

¹⁷ Masrudi Muchtar, Abdul Khair, 2016, *Hukum Kesehatan Lingkungan (Kajian Teoritis dan Perkembangan Pemikiran)*, Yogyakarta, PT Pustaka Baru, p. 125

country with the most potent areas to suffer in the event of pollution, ecological damage, and disruption of natural balance in the world.¹⁸

To ensure the absence of pollution, especially water in Indonesia, the management of water resources need to provide the maximum benefit to the community in all areas of life-based on the principle of a balance between regulation and efforts to provide water resources especially clean water. With regard to the role of the government in relation to water resources management, article 3 of Law No. 11 of 1974 on irrigation states that water and its resources are contained therein as referred to in article 1 number 3, 4, and 5. This law is controlled by the state. The right of control by the state authorizes the government to:¹⁹

- 1) Manage and develop the benefits of water and/or water sources;
- 2) Prepare, validate, and/or grant licenses based on technical planning of water and irrigation management arrangements;
- 3) Arrange, authorize and/or grant land use permits, use, provision of water, and/or sources;
- 4) Arrange, authorize and/or authorize water entrepreneurs, and/or water sources;
- 5) Determine and regulate legal acts and legal relations between persons and/or legal entities in water issues and/or water sources;

Furthermore, Article 4 of Law No. 11 of 1974 on Irrigation states also that the government authority as mentioned in article 3 of this law may be delegated to

¹⁸ Syaiful Bahri Ruray, 2012, *Tanggung Jawab Hukum Pemerintah Daerah dalam Pengelolaan dan Pelestarian Fungsi Lingkungan Hidup*, Bandung, PT. Alumni, p. 61

¹⁹ Article 3 paragraph 2 Law No. 11 of 1974 on Irrigation

government agencies, either central or regional and/or certain legal bodies with terms and the ways are governed by government regulations.²⁰

The reactivation of the Law No. 11 of 1974 on Irrigation explains that water resources management is still centralized, where the central government has full authority to regulate and manage water resources, while local governments can only assist the implementation of the delegated central government authority (Co-Administration). Based on the decision of the Constitutional Court number 85/PUU-XI/2013, the reactivation of Law Number 11 of 1974 on irrigation is the best way to realize water management in accordance with the constitutional mandate in order to realize the fulfillment of the right to get clean water for all Indonesian people protection and preservation of water resources.

As we know that the function of the state which are as a guarantor, as a regulator, as an economic agent and as a supervisor represented by the regional government according to regional autonomy here must be able to guarantee water availability for the community and does not just pursue of the PAD (Original Local Government Revenue). Water resources and fresh water are public goods as public goods should be used for the prosperity of the people as mandated by the constitution.²¹

²⁰ Article 4 paragraph 2 Law No. 11 of 1974 on Irrigation

²¹ Tim Kruha, *et al*, 2005, *Kemelut SDA Menggugat Privatisasi Air di Indonesia*, Yogyakarta, LAPERA Pustaka Utama, p. 68