



DECISION

Number 58/PUU-VI/2008

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Examining, hearing and deciding upon constitutional cases at the first and final level, has passed a decision in the case of petition for the Judicial Review of Law Number 19 Year 2003 concerning State-Owned Enterprises against the 1945 Constitution of the State of the Republic of Indonesia filed by:

- [1.2] 1. Name : **Mohamad Yusuf Hasibuan**
Address : Cisalak, Jalan Swadaya RT. 02 RW. 03
Number 41, Kota Depok
2. Name : **Reiza Aribowo**
Address : Komplek POLRI Menteng Dalam RT. 04 RW.
014 Number 15, South Jakarta

Hereinafter referred to as ----- **Petitioners;**

[1.3] Reading the Petitioners' petition;

Hearing the Petitioners' statements;

Examining the Petitioners' evidence;

3. LEGAL CONSIDERATIONS

[3.1] Considering whereas the principal legal issue of the Petitioners' petition is concerned with substantive review of Article 1 sub-articles 11 and 12, Article 72 paragraphs (1), (2), and (3), Article 73, Article 74 paragraph (1) and (2), Article 75, Article 76 paragraphs (1) and (2), Article 77, Article 78, Article 79 paragraphs (1), (2), and (3), Article 80 paragraphs (1), (2), and (3), Articles 81, 82, 83, 84, 85 paragraphs (1) and (2), and Article 86 paragraphs (1) and (2) of Law Number 19 Year 2003 concerning State-Owned Enterprises (State Gazette of the Republic of Indonesia Year 2003 Number 70, Supplement to the State Gazette of the Republic of Indonesia Number 4297, (hereinafter referred to as Law No. 19/2003), against the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution);

[3.2] Considering whereas prior to entering the Principal Issue of the Petition, the Constitutional Court (hereinafter referred to as the Court) shall first consider:

1. The Court's authority to examine, hear, and decide upon the *a quo* petition;
2. The Petitioners' legal standing to file the *a quo* petition.

With respect to the intended two matters, the Court presents the following considerations:

The Court's Authorities

[3.3] Considering whereas based on Article 24C paragraph (1) of the 1945 Constitution, one of the Court's authorities is to hear at the first and final levels whose decision shall be final to review laws against the Constitution;

[3.4] Considering whereas the *a quo* petition is concerned with judicial review of a law against the Constitution, *in casu* Law No. 19/2003 against the 1945 Constitution, and accordingly the Court has the authority to examine, hear, and decide upon the *a quo* petition;

The Petitioners' legal standing

[3.5] Considering whereas based on Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court along with its Elucidation (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to the State Gazette of the Republic of Indonesia Number 4316, hereinafter referred to as the Constitutional Court Law), the parties who may file a petition for judicial review of a law against the 1945 Constitution shall be the parties who deem that their rights and/or authorities granted by the 1945 Constitution have been impaired by the coming into effect of a law, namely:

- a. individual Indonesian citizens (including groups of people having a common interest);
- b. units of customary law communities to the extent that they still exist and in accordance with the development of the community and the principle of the Unitary State of the Republic of Indonesia as regulated in laws;
- c. public or private legal entities; or
- d. state institutions;

[3.6] Considering whereas to be accepted as Petitioner(s) in a case of judicial review of law against the 1945 Constitution, according to the provision of Article 51 paragraph (1) of the Constitutional Court Law, the intended party(parties) shall explain:

- a. the position as the Petitioner(s) as intended in Article 51 paragraph (1) of the Constitutional Court Law;
- b. whether or not the constitutional rights and/or authorities granted by the 1945 Constitution have been impaired by the coming into effect of the law petitioned for judicial review;

[3.7] Considering following Decision Number 006/PUU-III/2005 dated May 31, 2005 and Decision Number 11/PUU-V/2007 dated September 20, 2007 the Court has had a stand that the impairment of constitutional rights and/or

authorities as intended in Article 51 paragraph (1) of the Constitutional Court Law shall meet five requirements, namely:

- a. The Petitioners have constitutional rights and/or authorities granted by the 1945 Constitution;
- b. The Petitioners deem such constitutional rights and/or authorities to have been impaired by the coming into effect of the law petitioned for the review;
- c. such constitutional impairment shall be specific and actual or at least potential in nature which, according to logical reasoning, will take place for sure;
- d. there shall be a causal relationship (*causal verband*) between the intended impairment and the coming into effect of the law petitioned for review;
- e. If the petition is granted, it is expected that, the constitutional impairment as argued will not occur or no longer occur;

[3.8] Considering whereas the Petitioners in the *a quo* petition as mentioned in paragraph [3.5] above are include in the qualification of Petitioners of individual Indonesian citizens in accordance with Article 51 paragraph (1) subparagraph a of the Constitutional Court Law;

[3.9] Considering whereas according to the Petitioners the constitutional rights and/or authorities are regulated in the 1945 Constitution (Exhibit P-1), namely:

- a. Article 33 paragraph (2): *"Production branches which are important for the state and which effect the livelihood of the public shall be controlled by the state"*.
- b. Article 33 paragraph (3): *"Land and water and the natural resources contained therein shall be controlled by the state and shall be used for the greatest prosperity of the people"*;

[3.10] Considering whereas even though the Petitioners meet the qualification as the Petitioners in the judicial review of Law No. 19/2003 against the 1945 Constitution and have constitutional rights granted by Article 33 paragraphs (2) and (3) of the 1945 Constitution, it still must be proved whether or not the intended constitutional rights are impaired, either in an actual or potential manner by Article 1 sub-articles 11 and 12, Article 72 paragraphs (1), (2), and (3), Article 73, Article 74 paragraphs (1) and (2), Article 75, Article 76 paragraphs (1) and (2), Article 77, Article 78, Article 79 paragraphs (1), (2), and (3), Article 80 paragraphs (1), (2), and (3), Article 81, Article 82, Article 83, Article 84, Article 85 paragraphs (1) and (2), and Article 86 paragraphs (1) and (2) of Law No. 19/2003, as argued by the Petitioners;

[3.11] Considering whereas Article 1 sub-articles 11 and 12, Article 72 paragraphs (1), (2), and paragraph (3), Article 73, Article 74 paragraphs (1) and (2), Article 75, Article 76 paragraphs (1) and (2), Article 77, Article 78, Article 79 paragraphs (1), (2), and (3), Article 80 paragraphs (1), (2), and (3), Article 81, Article 82, Article 83, Article 84, Article 85 paragraphs (1), and (2), and Article 86 paragraphs (1) and (2) of Law No. 19/2003 state as follows:

1. Article 1 sub-article 11: *"Restructuring shall be the efforts put in the context of State-Owned Enterprises reorganization which constitutes a strategic step to improve the internal condition of enterprises in order to enhance the performance and promote the value of such enterprises";*
2. Article 1 sub-article 12: *"Privatization shall be the sale of the Companies' shares, either partly or wholly, to other parties in the context of improving the companies' performance and values, enlarging the benefit for the state and the people, as well as extending share ownership by the people";*
3. Article 72

Paragraph (1): *"Restructuring shall be conducted for the purpose of reorganizing State-Owned Enterprises in order to be able to operate in an efficient, transparent, and professional manner";*

Paragraph (2): *"The objective of restructuring shall be: a. To improve the companies' performance and values, b. To provide benefits in the forms of dividend and tax for the state, c. To provide produce products and service with competitive prices for the consumers; and d. To facilitate privatization implementation";*

Paragraph (3): *"The restructuring implementation as intended in paragraph (1) shall consistently observe the principle of cost and benefit obtained";*

4. Article 73: *"Restructuring shall include:*
- a. *sectoral restructuring whose implementation shall be adjusted to the sectoral policies and/or the laws and regulations;*
 - b. *corporate restructuring including:*
 - 1. *the improvement of business competition intensity, especially in sectors where there is*

monopoly, either regulated monopoly or natural monopoly;

2. *the management of functional relationship between Government as the regulator and State-Owned Enterprises as business entities, including the application of good corporate governance principles and to determine the orientation in the context of performing public service obligation;*
3. *internal restructuring including finance, organization/management, operation, system and procedures;*

5. Article 74

Paragraph (1): *"Privatization shall be conducted for the purpose of:*

- a. *extending public ownership of companies;*
- b. *improving companies' efficiency and productivity;*
- c. *creating good/strong financial structure and management;*
- d. *creating a sound and competitive industrial structure;*

- e. *creating competitive and globally-oriented companies;*
- f. *growing business climate, macroeconomy, and market capacity”;*

Paragraph (2): *”Privatization shall be conducted for the purpose of improving the companies’ performance and added value as well as public participation in the companies’ share ownership”;*

6. Article 75: *”Privatization shall be conducted with due observance of the principles of transparency, independence, accountability, responsibility and reasonableness”;*

7. Article 76

Paragraph (1): *”Companies which can be privatized must at least meet the following criteria:*

- a. *having competitive industries/business sectors;*
or
- b. *having industries/business sectors with rapidly changing technological elements”;*

Paragraph (2): *”A part of the Companies’ assets or activities implementing public service obligation and/or whose*

business activities, based on the law, shall be conducted by State-Owned Enterprises, may be separated to be made as equity participation in the companies' establishment to be further privatized when necessary;"

8. Article 77: *"The Companies that may not be privatized shall be:*
 - a. *Companies whose lines of business based on the laws and regulations may only be managed by State-Owned Enterprises*
 - b. *Companies engaging business sectors related to state defense and security;*
 - c. *Companies which engaging in certain sectors which are specially assigned by the government to conduct certain activities related to public interests;*
 - d. *Companies engaging in natural resources business which, explicitly based on the laws and regulations, are prohibited from being privatized";*

9. Article 78: *"Privatization shall be conducted by ways of:*
 - a. *sale of shares based on the terms of the capital market;*

- b. *direct sale of shares to investors;*
- a. *Sale of shares sale to the management and/or employees concerned”;*

10. Article 79

Paragraph (1): *”To discuss and decide upon the policy concerning privatization in relation to intersectoral activities, the Government shall establish. a privatization committee as the coordination forum”;*

Paragraph (2): *”The privatization committee shall be chaired by the Coordinating Minister for the economy with members namely, the Minister, the Minister of Finance, and Technical Minister where the companies conduct their activities”;*

Paragraph (3): *”The membership of the privatization committee as intended in paragraph (2) shall be stipulated with a Presidential Decree”;*

11. Article 80

Paragraph (1): *”The Privatization committee shall have the following duties:*

- a. *formulating and stipulating general policies and requirements for privatization implementation;*
- b. *determining necessary measures to facilitate privatization process;*
- c. *discussing and finding solutions for strategic problems arising in the privatization process, including the problems related to Government policies”;*

Paragraph (2): *”In carrying out its duties as intended in paragraph (1), the privatization committee may invite, request for inputs and/or assistance from government agencies or other parties when necessary”;*

Paragraph (3): *”The Chairman of the Privatization Committee shall periodically report the progress of his/her duty implementation to the President”;*

12. Article 81: *”In conducting privatization, the Minister shall have the following duties:*

- a. *preparing the annual privatization program;*

- b. *submitting the annual privatization program to the privatization committee to obtain directives”;*
- c. *implementing privatization;*

13. Article 82

Paragraph (1): *”Privatization shall be preceded by selection of companies and based on the criteria stipulated in government regulations”;*

Paragraph (2): *”Companies which have been selected and met the stipulated criteria, after obtaining the recommendation from the Minister of Finance, shall be further publicly disseminated as well as consulted with the People’s Legislative Assembly”;*

14. Article 83: *”Further provisions concerning Privatization procedures shall be regulated by a government regulation”;*

15. Article 84: *”Any person and/or business entity with potential conflict of interest shall be prohibited from engaging in the privatization process”;*

16. Article 85

Paragraph (1): *"The parties related to the privatization program and process shall be obliged to keep the confidentiality of information obtained to the extent that the information has not been disclosed";*

Paragraph (2): *"Violations against the provision as intended in paragraph (1) shall be imposed with sanctions in accordance with the laws and regulations";*

17. Article 86

Paragraph (1): *"The proceeds of privatization by way of state-owned enterprises' sale of shares shall be directly paid to the state treasury";*

Paragraph (2): *"Further provisions concerning the terms of payment of Privatization proceeds shall be regulated by a government regulation";*

[3.12] Considering whereas after thoroughly examining the Petitioners' arguments concerning the impairment of their constitutional rights in relation to the provisions of the *a quo* law, including the evidence attached to support the Petitioners' arguments', it has been evidenced that:

- The Petitioners' constitutional rights as included in Article 33 paragraphs (2) and (3) of the 1945 Constitution made as the basis for filing the petition

- are not at all impaired by the coming into effect of Article 1 sub-articles 11 and 12, Article 72 paragraphs (1), (2), and (3), Article 73, Article 74 paragraphs (1) and (2), Article 75, Article 76 paragraphs (1) and (2), Article 77, Article 78, Article 79 paragraphs (1), (2), and (3), Article 80 paragraphs (1), (2), and (3), Article 81, Article 82, Article 83, Article 84, Article 85 paragraphs (1) and (2), as well as Article 86 paragraphs (1) and (2) of Law No. 19/2003, either in an actual or potential manner;
- On the contrary, the coming into effect of the *a qua* Articles petitioned for judicial review in fact protects and guarantees the Petitioners' constitutional rights. According to the Court, the provisions of Article 33 of the 1945 Constitution do not refuse privatization, provided that the privatization shall not eliminate the state's control *c.q.* the Government shall become the main determiner of business policies in the production branches which are important for the state and/or which control the livelihood of the public. Furthermore, Article 33 of the 1945 does not refuse the idea of competition among business actors, provided that such competition shall not eliminate the State's control which includes the authority the regulation (*regelendaad*), administration (*bestuursdaad*), management (*beheersdaad*), and control (*toezichthoudensdaad*) of production branches which are important for the state and/or which control the livelihood of the public for the greatest prosperity of the people (*vide* Court's Decision, Case Number 002/PUU-I/2003). Moreover, "*Privatization shall be the sale of companies' shares in the context of improving the*

companies' performance and values, enlarging the benefit for the state and the people, as well as extending share ownership by the people"
(Article 1 sub-article 12 of the Law No. 19/2003);

[3.13] Considering whereas, in accordance with the provision of Article 39 paragraph (2) of the Constitutional Court Law *juncto* Article 11 paragraph (2) of the Constitutional Court Regulation Number 06/PMK/2005 concerning the Guidelines on the Proceedings in the Cases of Judicial Review (hereinafter referred to as PMK No. 06/2005), in the hearing on December 22, 2008 the Petitioner was advised to revise their petition for the *a quo* petition to meet the requirements as intended in Article 51 paragraph (1) of the Constitutional Court Law or the requirements of constitutional impairment as this has become the Court's jurisprudence. However, the Petitioners failed to meet such requirements. Therefore, in accordance with the provision of Article 28 paragraph (4) of the Constitutional Court Law *juncto* Article 11 paragraph (5) of PMK No. 06/2005, in the hearing on January 15, 2009 the Panel of Justices informed the Petitioners that the result of examination of the *a quo* petition would be reported to the Plenary Consultative Meeting of Justices (hereinafter referred to as RPH) for further process (*vide* Hearing Minutes dated January 15, 2009);

[3.14] Considering whereas the requirement as specified in paragraph [3.13] above was not fulfilled by the Petitioners, and accordingly the RPH has decided that it is not necessary to hear the statements of the People's Legislative Assembly and the President (Government);

[3.15] Considering whereas because the Petitioners and their petition do not meet the impairment requirements as intended in Article 51 paragraphs (1) and (2) of the Constitutional Court Law, the Petitioners do not have legal standing. Therefore, the Court does not need to further examine and consider the Principal Issue of the Petition;

4. **CONCLUSION**

Based on the whole consideration of facts and laws as described above, the Court has come to the following conclusions:

[4.1] The Petitioners' constitutional rights as individual Indonesian citizens are not impaired by the coming into effect of Article 1 sub-articles 11 and 12, Article 72 paragraphs (1), (2), and paragraph (3), Article 73, Article 74 paragraphs (1) and (2), Article 75, Article 76 paragraphs (1) and (2), Article 77, Article 78, Article 79 paragraphs (1), (2), and (3), Article 80 paragraphs (1), (2), and (3), Article 81, Article 82, Article 83, Article 84, Article 85 paragraphs (1) and (2), as well as Article 86 paragraphs (1) and (2) of Law Number 19 Year 2003 concerning State-Owned Enterprises;

[4.2] The Petitioners do not meet the legal standing requirements as intended in Article 51 paragraphs (1) and (2) of Law Number 24 Year 2003 concerning the Constitutional Court;

5. DECISION

In view of the Constitution of the State of the Republic of Indonesia Year 1945 and Article 56 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia Number 98, Supplement to the State Gazette of the Republic of Indonesia Number 4316);

Passing the Decision

To declare that the Petitioners' petition cannot be accepted.

Hence this decision was decided in the Consultative Meeting of Constitutional Court Justices attended by eight Constitutional Court Justices on Tuesday, August the twentieth, year two thousand and nine, namely Moh. Mahfud MD, Abdul Mukthie Fadjar, M. Akil Mochtar, M. Arsyad Sanusi, Muhammad Alim, Maruarar Siahaan, Maria Farida Indrati, and Achmad Sodiki, and was pronounced in the Plenary Hearing of the Constitutional Court open for the public on Friday, dated January the thirtieth, year two thousand and nine by us, seven Constitutional Court Justices, namely Abdul Mukthie Fadjar, as the Chairperson of the Hearing and concurrent Member, M. Akil Mochtar, M. Arsyad Sanusi, Muhammad Alim, Maruarar Siahaan, Maria Farida Indrati, and Achmad Sodiki, respectively as Members assisted by Alfius Ngatrin as Substitute Registrar, in the presence of the Petitioners, Government and/or its representative, the People's Legislative Assembly and/or its representative.

CHAIRPERSON,

Sgd.

Abdul Mukthie Fadjar

JUSTICES,

Sgd.

M. Akil Mochtar

Sgd.

Muhammad Alim

Sgd.

Maria Farida Indrati

Sgd.

M. Arsyad Sanusi

Sgd.

Maruarar Siahaan

Sgd.

Achmad Sodiki

SUBSTITUTE REGISTRAR,

Sgd.

Alfius Ngatrin