DECISION

Case Number 058-059-060-063/PUU-II/2004

Case Number 008/PUU-III/2005

FOR THE SAKE OF JUSTICE OF THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

Examining, hearing, and deciding upon constitutional cases at the first and final level, has passed a decision on a case of petition for Judicial Review of the Law of the Republic of Indonesia Number 7 Year 2004 regarding Water Resources (Law Number 7 Year 2004) against the 1945 Constitution of the State of the Republic of Indonesia (the 1945 Constitution), filed by:

I. Petitioners in Case Number 058/PUU-II/2004:

Munarman, S.H., the Chairperson of the Indonesian Legal Aid Institute Foundation (YLBHI), having his address at Jalan Diponegoro Number. 74, Jakarta, *cs*, 53 persons; the last **Ahmad Frantagore**, entrepreneur, having his address Air Dingin Village, Rimbo Pengadang District, Rejang Lebong Regency, Bengkulu, **as Petitioners I;**

In this matter granting the power of attorney to: **A. Patramijaya, S.H., LL.M., A.H. Semendawai, S.H., LL.M., Asfinawati, S.H., Daniel Panjaitan, S.H., LL.M., Dede Nurdin Sadat, S.H., Edisius Riyadi, S.H., Erna Ratnaningsih, S.H., Fatmawati Djugo, S.H., Gatot, S.H.,**

Hermawanto, S.H., Horas Siringoringo, S.H., Hotma Timbul Hutapea, S.H., Ida Zahrotu Saidah, S.H., Ines Thioren Situmorang, S.H., Muhammad Ichsan, S.H., Munarman, S.H., Reno Iskandarsyah, S.H., Rino Subagyo, S.H., Supriyadi W. Eddyono, S.H., Syamsul Bahri, S.H., Uli Parulian Sihombing, S.H. and Vincent Edwin Hasjim, S.H., M.H., all of whom are from the **Indonesian Legal Aid Institute Foundation (YLBHI), Legal Aid Institute (LBH) Jakarta, Indonesian Centre for Environmental Law (ICEL), Institute for Policy Research and Advocacy (ELSAM), Indonesian Association of Legal and Human Rights Consultants (APHI)**, choosing their legal domicile at Jalan Pangeran Diponegoro Number 74 Central Jakarta, respectively by the virtue of a special power of attorney valid for that purpose as attached in the petition.

II. Petitioners in case number 059/PUU-II/2004:

Longgena Ginting, the Chairperson of the Indonesian Forum for the Environment (WALHI), having his address in Jalan Teal Paring Ray Tara Number 14 Jakarta 12790, *cs*, 16 persons; the last is **Henry Saragih,** the Secretary General of the Federation of Farmers' Union, having his address in Jalan SMA Number 15A RT. 04/04 Dewi Sartika, East Jakarta 13640 **as Petitioners II;**

In this matter granting the power of attorney to: **Johnson Panjaitan, S.H., R. Dwiyanto Prihartono, S.H., Hotma Timbul Hutapea, S.H.,**

Muhammad Arfiandi Fauzan, S.H., Ecoline Situmorang, S.H., Uli Parulian, S.H., Deddy Prihambudi, S.H., Rhino Subagyo, S.H., Reinhard Parapat, S.H., Basir Bahuga, S.H., Lamria Siagian, S.H., Dorma Sinaga, S.H., Lambok Gultom, S.H., Dede Nurdin Sadat, S.H., Susilaningtyas, S.H., Muji Kartika Rahayu, S.H., Isna Hertati, S.H., Agus Yunianto, S.H., Heppy Sebayang, S.H., Fredi K. Simanungkalit, S.H, David Oliver Sitorus, S.H., Leonard Sitompul, S.H., Arianus Maruli, S.H., Derwin Anifah, S.H., Ibrahim Sumantri, S.H., Irfan Fahmi, S.H., Janses E. Sihaloho, S.H., Maria, S.H., Rido Triawan, S.H., Tumaber Manulang, S.H., Burhanuddin, S.H., Anthony Leroi Ratag, S.H., Ali Akbar, S.H., Feri Febrian, S.H., Asfinawati, S.H. and Hermawanto, S.H., all of whom are Advocates/General Defense Lawyers of **APHI** (Indonesian Association of Legal and Human Rights Consultants)**, ICEL** (Indonesian Center for Environmental Law), LBH Jakarta (Legal Aid Institute Jakarta), **LBH East Java** (Legal Aid Institute of East Java), **PBHI** (Indonesian Legal Aid and Human Rights Association), **WALHI** (Indonesian Forum for the Environment); choosing their domicile in Jakarta, WALHI, at Jalan Tegal Parang Utara Number 14 Mampang Perapatan, South Jakarta 12790, based on a special power of attorney valid for that purpose as attached in the petition.

III. Petitioners in case number 060/PUU-II/2004:

Zumrotun, farmer, having his address in Tandomulyo RT.08/RW.04, Tondomulyo Sub-District, Jakenan District, Pati Regency, *cs*, 868 persons; the last is **Minister Serdy R. Pratastik**, Christian Minister, having his address Citra Indah Block A.7 Number 36, Sukamaju Jonggol **as Petitioners III;**

In this matter granting the power of attorney to: **Johnson Panjaitan, S.H., R. Dwiyanto Prihartono, S.H., Hotma Timbul Hutapea, S.H., Muhammad Arfiandi Fauzan, S.H., Ecoline Situmorang, S.H., Uli Parulian, S.H., Deddy Prihambudi, S.H., Rhino Subagyo, S.H., Reinhard Parapat, S.H., Basir Bahuga, S.H., Lamria Siagian, S.H., Dorma Sinaga, S.H., Lambok Gultom, S.H., Dede Nurdin Sadat, S.H., Susilaningtyas, S.H., Muji Kartika Rahayu, S.H., Isna Hertati, S.H., Agus Yunianto, S.H., Heppy Sebayang, S.H., Fredi K. Simanungkalit, S.H., David Oliver Sitorus, S.H., Leonard Sitompul, S.H., Arianus Maruli, S.H., Derwin Anifah, S.H., Ibrahim Sumantri, S.H., Irfan Fahmi, S.H., Janses E. Sihaloho, S.H., Maria, S.H., Rido Triawan, S.H., Tumaber Manulang, S.H., Burhanuddin, S.H., Anthony Leroi Ratag, S.H., Ali Akbar, S.H., Feri Febrian, S.H., Asfinawati, S.H. and Hermawanto, S.H.,** all of whom are Advocates/General Defense Lawyers of **APHI** (Indonesian Association of Legal and Human Rights Consultants), **ICEL** (Indonesian Center for Environmental Law), **LBH Jakarta** (Legal Aid Institute of Jakarta), **LBH East Java** (Legal Aid Institute of East Java), **PBHI** (Indonesian Legal Aid and Human Rights Association), **WALHI**

(Indonesian Forum for the Environment), choosing their legal domicile at Jalan North Tegal Parang Number 14 Mampang Prapatan, South Jakarta 12790, based on a special power of attorney valid for that purpose as attached in the petition.

IV. Petitioner in case number 063/PUU-II/2004:

Suta Widhya, Private person, having his address in Jalan Mangga Number 16A Rt.4/5 East Jakarta, **as Petitioner IV;**

In this matter granting the power of attorney to: **JJ. Amstrong Sembiring, S.H.**, from the office of the Legal Aid Team for Jakarta Drinking Water Costumers Community (KOMPARTA), domiciled at Jalan Dr. Saharjo Number 11, South Jakarta, based on a special power of attorney valid for that purpose as attached in the petition.

V. Petitioner in case number 008/PUU-III/2005:

Suyanto, having his address in Dusun Krayokan, Meyosi Village, Talun District, Pekalongan Regency, Central Java Province, *cs*, 2063 persons, the last is **P.Siburian**, having his address in Serdang Village, Beringin Deli District, Serdang, North Sumatera **as Petitioners V;**

In this matter granting the power of attorney to: **Bambang Widjojanto, S.H., LL.M., Iskandar Sonhaji, S.H., A. Fickar Hadjar, S.H., M.H., M. Soleh Amin, S.H., Poltak Ike Wibowo, S.H., Kurniawan Adi Nugroho, S.H., Boedhi Wijardjo, S.H., Adhi Prasetyo, S.H. and Ivan Valentina**

Ageung, S.H., choosing their legal domicile in Manggala Wanabakti Building Block IV 7th Floor Suite 721C, Jalan Jend. Gatot Subroto, Senayan, Jakarta 10270, based on a special power of attorney valid for that purpose as attached in the petition.

Having read the petition of the Petitioners;

Having heard the statement of the Petitioners;

Having heard the statement of the Government and the People's Legislative Assembly of the Republic of Indonesia;

Having read the written statement of the Government and the People's Legislative Assembly of the Republic of Indonesia;

Having heard the statements of the Witnesses;

Having heard the statements of the Experts;

Having examined the written evidence or writings and documents;

Having read the Conclusion of the Petitioners in Case Number 058, 059, 060/ PUU-II/2004.

LEGAL CONSIDERATIONS

Considering whereas the objective and the purpose of the Petitioners are as described above;

Considering whereas prior to going into the principal issue of the petition, the Court needs to first consider the following matters:

1. The authority of the Court to examine, hear, and decide upon the petition of the Petitioners;

2. The legal standing of Petitioners to file the *a quo* petition;

Considering whereas with respect to the foregoing two issues, the Court is of the following opinion:

1. Authority of the Court

Considering whereas based on the Provision of Article 24C Paragraph 1 of the 1945 Constitution of State of the Republic of Indonesia (hereinafter referred as the 1945 Constitution) *juncto* Article 10 Paragraph 1 Sub-Paragraph a and Article 51 Paragraph 3 of the Law of the Republic of Indonesia Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to State Gazette of the Republic of Indonesia Number 4316, hereinafter referred as Constitutional Court Law), one of the authorities of the Court is to review a law against the 1945 Constitution, both in its process of legislation (formal review) and the its substance (substantive review).

Considering whereas the *a quo* petition pertains to the formal and substantive review of the Law of the Republic of Indonesia Number 7 Year 2004 regarding Water Resources (State Gazette of the Republic of Indonesia Year 2004 Number 32, Supplement to the State Gazette of the Republic of Indonesia Number 4437, hereinafter referred as the Water Resources Law), against the 1945 Constitution, therefore the Court has the authority to examine, hear, and decide upon the *a quo* petition.

2. Legal Standing of the Petitioners

Considering whereas in accordance with the Provision of Article 51 Paragraph 1 of the Constitutional Court Law, the Petitioners in the judicial review against the 1945 Constitution shall be the parties who consider that their constitutional rights and/or constitutional authorities 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 insofar as they are still in existence in accordance with the development of the community and the principle of the Unitary State of the Republic of Indonesia); c) public or private legal entities; or d) state institutions;

Considering whereas the Court in the Decision for Case Number 006/PUU-III/2005 and Case Number 010/PUU-III/2005 is of the opinion of that the existence of impairment of constitutional rights due to the coming

effect of a law in accordance with Article 51 Paragraph 1 of the Constitutional Court Law must fulfill the 5 (five) criteria, namely:

a. the Petitioners must have constitutional rights granted by the 1945 Constitution;

b. the Petitioners deem that their constitutional rights have been impaired by the coming into effect of the law being petitioned;

c. Such impairment of the constitutional rights is of specific and actual nature or at least potential in nature which, based on logical reasoning, will surely occur;

d. There is a causal relationship *(causal verband)* between the Petitioners' impaired constitutional rights and the coming into effect of the law being petitioned for review;

e. If the petition is granted, it is expected that that such impairment of constitutional rights argued will not or does not occur any longer;

Considering whereas the Petitioners in the petition for judicial review of the Water Resources Law against the 1945 Constitution consist of 5 (five) groups of Petitioners in accordance with the case number, as follows:

1. The Petitioners in Case Number 058/PUU-II/2004 are the Team of Advocacy of People's Coalition for the Right to Water which consist of

several Non-Governmental Organizations and individuals in the number of 53 persons;

2. The Petitioners in Case Number 059/PUU-II/2004 are 16 organizations which call themselves *Rakyat Menggugat* [People Accuses], among others are the Indonesian Forum for the Environment, Indonesian Legal Aid and Human Rights Association, UPC, and *Somasi* of West Nusa Tenggara;

3. The Petitioners in Case Number 060/PUU-II/2004 are 868 individual of Indonesian citizens;

4. The Petitioner of the Case Number 063/PUU-II/2004, Suta Widya, individual of Indonesian citizen;

5. The Petitioners of Case Number 008/PUU-III/2005 are 2063 persons of Indonesian citizens who granted the power of attorney to Bambang Widjojanto, S.H., LLM., *cs*, from “The Team of Advocacy for Justice of Natural Resources”.

Therefore, the Petitioners can be categorized individual Indonesian citizens and/or private legal entities for Non Government Association which are in the form of Foundation which consider that their constitutional rights have been impaired by the coming into effect of the Water Resources Law. Water is absolutely vital for human life, to such an extent that the United Nation refers to the right to water as one of the Human

Rights (HAM), hence basically, every person has his or her interest in the existence of legal provisions which are able to guarantee and protect the human rights to water. Thus, every Indonesian citizen, as a human being also has, *mutatis mutandis,* the legal standing to question the constitutionality of the Water Resources Law deemed to have harmed him/her. Therefore, the Petitioners in the aforementioned 5 cases have the legal standing to file the petition for Judicial Review of the Water Resources Law against the 1945 Constitution.

Considering whereas the Court has the authority to examine, hear, and decide upon the *a quo* petition and the Petitioners have the legal standing, and therefore the Court will further consider the principal issue of the petition;

3. Principal Issue of the Petition

Considering whereas in the principal case, the Petitioners have presented their arguments as the grounds for filing the petition for formal and substantive review of the Water Resources Law against the 1945 Constitution;

Considering whereas after hearing and reading the statement of the Government, the statement of the People's Legislative Assembly, the statement of the Experts, and the statement of the Witnesses, the Court

shall give its legal considerations on the Petition of the Petitioners as described below.

I. Formal Review

Considering whereas the Petitioners argue that the legislation procedures of Law Number 7 Year 2004 regarding Water Resources are contradictory to Article 20 Paragraph 1 of the 1945 Constitution, Article 33 Paragraph 2 Sub-Paragraph a and Article 5 of Law Number 4 Year 1999 regarding the Organizational Structure and Status of the People's Consultative Assembly (MPR), the People's Legislative Assembly the People's Legislative Assembly (DPR), and the Regional People's Legislative Assembly (DPRD), and the DPR Decree Number 03A/DPR RI/2001-2002 regarding DPR Rules of Procedure, thus the Law Number 7 Year 2004 legally flawed.

Article 20 of the 1945 Constitution:

Paragraph 1: "*Every law shall require the approval of the People's Legislative Assembly*."

Article 33 of Law Number 4 Year 1999

Paragraph 2 Sub-Paragraph a: "The People's Legislative Assembly has the duties and authorities together with the President to formulate Laws",

Paragraph 5: "The implementation as referred to in Paragraphs 2, 3, and 4 shall be regulated in the DPR Rules of Procedures".

Article 192 of DPR Rules of Procedure: "The Decision based on consensus is if taken in a meeting attended by the members and the faction elements, as referred to in Article 189 Paragraph 1 and approved by all who are present."

Article 193 of DPR Rules of Procedure: "The Decision based on the majority votes shall be taken in the event the decision based on consensus had not reached.

Considering whereas based on the Minutes of the Plenary Meeting of People's Legislative Assembly of the Republic of Indonesia (DPR RI) held on February 19, 2004, attended by 282 persons out of 494 members of the DPR RI from all factions. Hence, the Plenary Meeting had fulfilled the quorum as provided for in Article 189 Paragraph 1 of DPR Rules of Procedure which reads as follows:

"Every DPR meeting can pass a decision if attended by more then a half of total members of the meeting consisting of more than half of faction elements".

Whereas of DPR members present consist of:

Functional Group Party-Faction	: 55 out of 119 persons
Indonesian Democratic Party-Struggle Faction	: 82 out of 149 persons
Indonesian National Armed Forces/Police of the State of the Republic of Indonesia-Faction	: 36 out of 38 persons
United Development Party-Faction	: 32 out of 58 persons
National Awakening Party-Faction	: 30 out of 55 persons
Reform-Faction	: 25 out of 41 persons
Crescent Star Party-Faction	: 8 out of 12 persons
KKI-Faction	: 7 out of 11 persons
PDU-Faction	: 6 out of 10 persons
Non-Faction	: 1 person

Considering the Petitioners also argue that in the decision making for the approval of the Draft Law on Water Resources (hereinafter referred as Water Resources Draft Law) should have been conducted by voting and not deliberations to reach a consensus, because there were several members present (7 persons) who objected to and rejected the Draft Law on Water Resources, thus the decision making process through deliberations to reach a consensus is invalid;

Considering whereas Article 192 of DPR RI Rules of Procedure states as follows:

"The Decision based on consensus is if taken in a meeting attended by the members and the faction elements, as referred to in Article 189 Paragraph 1 and approved by all who are present."

In addition, the Article 193 of the DPR RI Rules of Procedure states as follows:

"The Decision based on the majority votes shall be taken in the event the decision based on consensus had not reached."

Considering whereas based on the facts in the hearing, the statement of witnesses, the written statement of DPR and the Minutes of Meeting of DPR, the chronology of the formulation of the Water Resources Law is follows:

1. Whereas since 2001, DPR RI had a program related to Water Resources. The Legislation Board had prepared a Draft Law which was named the Draft Law on Water Management;

2. On October 8, 2002, DPR received the Mandate of the President Number R12 PU/10/2002 having the same substances with the subject matter prepared by the Legislation Board, namely regarding the Draft Law on Water Resources;

3. On October 28, 2002, in the Plenary Meeting of DPR the incoming letter from the President regarding the aforementioned Mandate of the President was read. Subsequently, in the meeting of Consultative Board dated November 5, 2002, which assigned the Commission IV of DPR RI

with the task of discussing the aforementioned Draft Law with the Government which was represented by the Minister of Settlement and Regional Infrastructure Development. This discussion is referred to as the First Level Discussion;

Furthermore, in Commission IV, the Factions compiled the inventory list of issues totaling 436 issues in the List (DIM). Based on the existing record, Commission IV had listened to a variety of parties, either through Work Meeting, the Hearing Meeting, and the Public Hearing Meeting. These were conducted by DPR RI in order to find input and to accommodate people's aspiration.

4. On January 23, 2003, Commission IV held a consultative meeting with the team of Experts from the Department of Settlement and Regional Infrastructure Development, and subsequently on February 3, 2003, Commission IV invited the Communication Forum for Quality Management of Drinking Water, which at that time had the following members:

- Water Drinking Company Association;
- Indonesian Association of Restoration Engineering;
- Indonesian Association of Environmental Health Experts
- Center for Water and Environment Engineering Studies of the University of Indonesia;

- The Indonesian Drinking Water Community and Indonesian Water Preservation Community.

5. On February 5, 2003, Commission IV consulted with the State Minister for the Environment;

6. On May 22, Commission IV also held a general hearing with the Water Service Public Company I (*Perum Jasa Tirta I*) and Water Service Public Company II (*Perum Jasa Tirta II*);

7. On May 23, 2003, Commission IV held a general hearing with the experts in the fieldof water resources from several universities, namely University of North Sumatra, Gajah Mada University, Surabaya November 10 Institute of Technology, University of Indonesia, University of Hassanudin, and Bandung Institute of Technology;

8. In the discussion stage in Commission IV, on the first level talks, Commission IV held the meetings, on the fourth period of hearing 2002-2003, from May to September organized the working meeting for the first time concerning the aforementioned 436 issues on the Inventory List. Furthermore, from the working meeting, a working committee was established on September 1, 2003 by discussing items not agreed upon in the working meeting;

9. On December 5 to December 15, the formulating team was established to discuss the issues which had not been agreed upon by the working committee;

10. On December 9, 2003, due to a lot of responses of community, among others from the Headquarter of Indonesia National Police, the Minister of Energy and Mineral Resources, Minister of Home Affairs, Water User Association, Care for Water Community, et cetera, Commission IV and the Government, on December 15, 2003, agreed to continue the discussion in the meeting of Working Committee to act upon the responses and input,;

11. On December 17, 2003, the working meeting was held to make a conclusion concerning the need of socialization, both to the Government and to the public, with the expectation that the result of discussion of the aforementioned Draft Law would be more comprehensive so that prolonged polemic and resistance in the community would not occur;

12. On December 17, 2003, the Second Level of Discussion was supposedly held, namely the meeting for the legalization the Water Resource Draft Law in the commission. Due to the continuation of much input for socialization, Commission IV delayed the mentioned working meeting for legalization on February 12, 2004. The re-socialization lasted for almost 2 months and upon the input from the public, it was then discussed in the working meeting;

13. On February 12, 2004, all Factions in Commission IV of DPR RI had stated their approval that the Water Resource Draft Law should be passed on to the Second Level Discussion to obtain the joint approval in the Plenary Meeting of DPR RI which would be held on February 19, 2004;

14. Furthermore, on February 19, 2003, the Plenary Meeting of the Second Level Discussion was held namely, the Decision Making on the Water Resource Draft Law. In the aforementioned Plenary Meeting, most of the Factions, namely: Functional Group Party - Faction, United Development Party-Faction, National Awakening Party-Faction, Reform-Faction, Indonesian National Army/Police of the State of the Republic of Indonesia-Faction, Crescent Star Party-Faction, KKI-Faction, PDU-Faction, Indonesian Democratic Party-Struggle-Faction through their Final Opinion stated to have approved the Water Resource Draft Law to be enacted as Law.

Based on the Final Opinion of the abovementioned parties, at first there are only 7 (seven) Faction approved the Water Resource Draft Law to be enacted as Law. One Faction (Reform-Faction) asked for the delay of enactment and the need for prior socialization, while the National Awakening Party-Faction proposed the need for a conscientious judgment to enact the Draft Law as Law since it was still impeded by political factors.

Whereas because in the final decision-making, there was one faction that asked for the delay and one faction which was still unclear whether to approve or

to delay, thus the lobby among factions was held. This process is often and commonly conducted if the decision-making by way of consensus reached a deadlock. However, if the lobbying process also reached the deadlock, only then the decision-making by way of voting was conducted. In this lobbying an agreement with the result being the approval of all factions of the enactment of the Water Resource Draft Law as Law could be reached. Even though there were interruptions from several members of DPR-RI, namely:

- Prof. Dr. Astrid S. Susanto who submitted a minor note *(minderheidsnota)*;

- Mutammimul Ulla, S.H. and Cecep Rukmana and Dra. Hj. Nurdiatmi Akma still preferred for prior socialization, recorded also as *minderheidsnota* ;

- TB. Soenmandjaja SD and Ir. Husni Amri Siregar proposed a voting;

- Ismawan DS gave *minderheidsnota* not to approve the present stipulation of the Draft Law.

- Drs. Zulkifli Halim, M.Si. criticized the absence of a balanced discussion at the First and Second Level of Rules of Procedure, if there is no point of agreement, don't be afraid of voting;

- Panda Nababan (Indonesian Democratic Party-Struggle-Faction) requested the Chairpersons of Factions to keep their members under control by explaining that lobby and discussion stages had been in accordance with the Rules of Procedure of DPR-RI.

Finally, the Chairperson of the Plenary Meeting asked the Plenary Meeting of DPR RI, whether the Draft Law of Water Resource could jointly be approved for its enactment as Law. The participants of the meeting of DPR RI reached a joint agreement, thus the Chairperson then pronounced the decision that the Plenary Meeting of DPR RI had approved the Draft Law of Water Resource to be enacted as Law. Afterwards, the Minister of Settlement and Regional Infrastructure Development read the Government's Response to the Approval of DPR RI of the Water Resource Draft Law.

Considering whereas therefore, the process of formulation of Law Number 7 Year 2004 has been in accordance with the procedures of Law formulation, and the Court did not find any element which is contradictory to the 1945 Constitution.

Considering whereas the Petitioners argue that the Water Resource Law, the Water Resource Law is contradictory to the 1945 Constitution because it has not included the entire Article 33 of the 1945 Constitution in the "in view of" part of the considerations of. The Court is of opinion although only a part of Article 33 of the 1945 Constitution is included in the "view of" part of the considerations of the Water Resources Law, namely Paragraph 3 and Paragraph 4 and not the whole Article 33 of the 1945 Constitution, the aforementioned matter does not formally cause the Water Resources Law to be contradictory to the 1945 Constitution.

With the absence of constitutional foundation which formally established that the Water Resource Law is contradictory to the 1945 Constitution (in its formulation), therefore, the petition for formal review does not have sufficient grounds and shall be rejected accordingly.

II. Substantive Review

Considering whereas the Petitioners had requested the Court to conduct substantive review of 19 articles of the Water Resources Law and in addition, there are some of the Petitioners that petition the underlying philosophy which forms the basis of the Water Resources Law for review.

Considering whereas prior to conducting the review of the articles of the Water Resources Law as petitioned by the Petitioners, the Court will convey the considerations as the basis in conducting the review of articles of the Water Resources Law.

A. The State, the People, and Water

Considering whereas the water is indeed absolutely necessary for human life and can be said to be as absolutely necessary as important as the need of living beings for oxygen (air). The access to clean water supply has been recognized as the human right which is described in:

(a) The Formation Charter of the *World Health Organization* of 1946 which states that *the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being;*

(b) *Article 25 Universal Declaration of Human Rights* which states: *"Everyone has the right to standard of living adequate for the health and well- being of himself and of his family";*

(c) *Article 12 International Covenant on Economic, Social and Cultural Rights* which states:

1. *The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*

(d) *Article 24(1) Convention on the Rights of Child (1989)* which states*:*

1. *States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.*

In 2000, the United Nation Committee for Economic, Social, and Cultural Rights accepted the General Comment regarding the right for health which

formulated the normative interpretation as indicated in Article ***12 (1) ICESCR*** which reads as follows: "*The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*". The aforementioned General Statement interprets the right for health as the inclusive right which consists of not only continuous and appropriate medical services but also the determining factors for good health, including therein, among others, the access to safe drinking water. Furthermore, in 2002, the Committee recognized the access to water as a separate human right.

Considering whereas the recognition of the access to water as human rights indicates two aspects; on the one hand, it is a recognition of the fact that water is such an important need for human life, on the other hand, every person's access to water needs to be protected. For the sake of the aforementioned protection, the right to water shall be affirmed as the highest right in law, namely the human rights. The further issues that arises is concerning the position of the state in relation to water as public goods or social goods which had been even recognized as part of the human rights. As to the position of the state in relation to the obligation arising from the human rights, the state has to respect, protect, and fulfill them like other human rights.

Considering whereas water resources exists in nature like other natural resources, availability of which for human need is very much influenced by the condition of natural surroundings where people live. From the point of view of

hydrological cycle, the quantity of water will not decrease, but the problem is how people can make every effort so that in the middle of the aforementioned cycle, people can obtain sufficient water supply when needed for their life. The nature of water is different form the nature air resource which relatively can be obtained freely everywhere. Due to the condition of nature, water supply is not always distributed in accordance with the distribution of human beings who need water for their life. In fact, the human need for water is not dependent on their domicile, which means that the presence or absence of water supply in one location does not reduce the human need for water. Men have been working worked for a long time to intervene in the hydrological cycle for the purpose of making water available for their needs by utilizing the simplest to the very advanced technology. For example, water reservoir and water flow management have been utilized to fulfill a variety of needs, for drinking water, fish farm, or agriculture, and also for the power plant.

Considering whereas based on the abovementioned two matters namely: firstly, the obligation of the state to respect, protect, and fulfill the human right of access to water, and secondly, the special characteristic/nature of water, it is certain that the state must therefore be involved in its management in order to respect, protect, and fulfill the aforementioned human rights.

Considering whereas the founding fathers have appropriately laid a visionary foundation for water management in the provisions of the 1945 Constitution namely, Article 33 Paragraph 3, which reads as follows: “Land and

water and natural resources contained therein shall be controlled and shall be used for the greatest prosperity for the people." Hence, the constitutional foundation of water management is Article 33 Paragraph 3 of the 1945 Constitution and Article 28H of the 1945 Constitution which lays the foundation for the recognition of the right to water as part of the right to live a physically and mentally prosperous life which means that they become the substance of the human rights;

Considering whereas if the respect for the human right to water is interpreted as the strict prohibition of state's involvement in water affairs, many conflicts will surely occur due to the competition to obtain water. This is due to the fact that water exists only in certain locations and natural condition, while in other locations with different natural condition, water resource is not found. Meanwhile, in the aforementioned locations human still need water. This is different from the air, being also *res commune*, but with natural distribution which makes it easily obtained by human being;

Considering whereas the protection of the right to water is concerned not only with the protection of rights enjoyed by a person against any violation by another person, but also with the guarantee that as a human right, it can truly be enjoyed. Thus, the protection of right in this aspect is inseparable from the fulfillment of the right which has been recognized;

Considering whereas the fulfillment of the right to water becomes the responsibility of state, it means the state is obligated to guarantee that every

individual's need of water can be fulfilled. The three aspects of human rights which shall be fulfilled by the state, namely the respect, the protection, and the fulfillment, are concerned not only with the present need but also the guarantee of continuation in the future, as it is directly related to the human existence. Thus, the state shall also need to be actively involved in the planning of water resources management, for the purpose of guaranteeing the availability of water for the community. Such planning concerns many matters namely, among others, the effort for water resources conservation, which is basically the involvement of men in the hydrological cycle, in order to make water sufficiently available when needed.

Considering whereas water is needed not only to fulfill the immediate necessities of life. Water resource is also needed to fulfill other necessities, such as irrigation for agriculture, power plant, and for industrial needs. The utilization of the aforementioned water resources also plays an important part in the development of human being, and also becomes a significant factor for human being to live a decent life. One of the means to fulfill the availability of food, the necessities of energy/electricity is through the utilization of water resources. With such consideration, the management of water resources for the secondary needs is also a must. Therefore, the management of water resources is concerned not only with the management of water as the basic need of human beings, namely, the human rights, but also with the management of water resources utilization to secondary needs which are no way less important for human being to live a

decent life. The existence of a Law regulating the abovementioned two matters is greatly relevant;

B. Human Rights to Water in the Water Resources Law

Considering whereas the Court needs to examine whether in the Water Resources Law, the obligation of the state to respect, protect, and fulfill the right of water has been regulated.

Considering whereas since the articles of the Water Resources Law are interrelated, the Court needs to comprehensively study the Water Resources Law as the basis in decision-making. The Court is of the opinion that Article 5 of the Water Resources Law which reads as follows: "The State shall guarantee the right of every person to obtain water for minimum daily basic needs to have a healthy, hygienic, and productive life," is the sufficient legal formulation to describe the right to water as the right guaranteed by the Constitution. Although the **guarantee** by state in the aforementioned Article 5 of the Water Resources Law has not been re-formulated in the form of **responsibilities of the Government** and the **Provincial Government** as referred to in Articles 14, Article 15 of the Water Resources Law, the responsibilities of Government and Provincial Government as described in both articles shall therefore be based on the respect, protection, and fulfillment of the right to water. Article 16 Sub-Article H of the Water Resources Law which provides that the Second Level Regional/City Government have the responsibilities to fulfill the

minimal daily basic needs for water for the community of their regions shall not be interpreted as the exclusive responsibilities that only the Second Level Regional/City Governments are obligated to fulfill the minimal daily basic needs for water. The Government and the Provincial Governments through their programs are also obligated to guarantee the fulfillment of the right to water. Thus, it has to be reflected in the implementing regulations of the Water Resources Law.

Considering whereas the Water Use Right as formulated in Article 1 Sub-Article 14 of the Water Resources Law which reads as follows, “Water use right shall be the right to obtain and use water” which pursuant to the Article 8 is acquired without permission to fulfill the daily basic needs for individuals and for people’s smallholdings in the irrigation system as formulated in the Water Resources Law constitute the rights derived from the human right to water. The volume of daily basic needs should be established based on the universally applied standard regarding the minimum water needs to fulfill the daily basic needs. An individual cannot use the right to water as the basis to obtain water without limit because it will violate the right of other individuals. The nature of water use rights formulated in the Water Resources Law is concerned more with the respect and protection of the right to water because the use rights in accordance with the Elucidation of Article 8 of the Water Resources Law can only be enjoyed by those who have obtained from the water sources and not from the distribution channel of water.

Considering whereas water supply to fulfill daily basic needs is no longer sufficient to be directly obtained from the water sources managed by the community, but depends on the distribution channels. With the existence of Article 5 of the Water Resources Law, the state is obligated to guarantee the right of every individual to obtain water for the purpose of fulfilling the minimal daily basic needs, including the need of community depending on distribution channels. The Court is of opinion that the Government is obligated to fulfill the right to water other than the use-rights as reflected in:

(1) The responsibilities of the Government, Provincial Governments, and Second Level Regional/City Governments described in Articles 14, 15, and 16 of the Water Resources Law, namely the responsibilities to regulate, stipulate, and to grant permit for the supply, allocation, utilization, and exploitation of the water resources in the river areas. The Government is obligated to prioritize untreated water to fulfill the daily needs for every individual through water resources utilization management.

(1) The provision of Article 29 Paragraph 3 of the Water Resources Law which states as follows, “Water provision to fulfill daily basic needs and for the irrigation of people’s smallholdings in the existing irrigation system shall be the main priority of water resources provision above all needs”;

(2) The provision of Article 26 (7) which reads as follows, “The utilization of water resources shall be conducted by giving priority to social function to realize justice by taking into account the principle of payment by water users for water resources management service charges and by involving communities.“ The Court is of opinion that this provision shall be implemented actually in the implementing regulations of the Water Resources Law, therefore the management by Drinking Water Regional Company (PDAM) as the exploitation of water resources will be truly implemented by the Regional Government on the basis of Article 26 (7) of the Water Resources Law. The participation of community which constitutes the implementation of the principle of democracy in water management shall be prioritized in the management of PDAM, because the good or poor performance of the PDAM in water supply service for the community directly reflect the good or poor performance of the state in carrying out its obligation to fulfill the right to water.

The principle of “water users shall pay the service charges for water resources management” treats water not as the object attached with prices in economic respect, this is in accordance with the status of water as “*res commune*”. With this principle, water consumers should pay less price than the price if the water is valued in price in the economic respect, because if the later occurs,

the users have to pay not only the price of water but also the production cost along with the profit of the water management. PDAM has to position itself as the state's operational unit to realize the state's obligation as stipulated in Article 5 of the Water Resources Law, and not as the company which is economically profit-oriented. Although the existence of Article 80 Paragraph 1 of the Water Resources Law which states that in order to meet their daily basic needs and for people's smallholdings, water resource users shall be exempted from the service charge for water resources management, this provision is applicable insofar as to fulfill the daily basic needs and the people's smallholdings are obtained directly from water resources. It means that if the water for daily basic needs and the people's smallholdings is obtained from distribution channels, the aforementioned principle of "water users shall pay the service charges for water resources management" is applicable. However, this matter cannot be used as the basis to apply expensive costs for citizens whose fulfillment of their daily basic needs depend on PDAM through the distribution channel. The amount of water resources management service charges has to be transparent and must involve the element of community in its calculation. Due to the fact that water is very vital and directly related to human rights, the implementing regulations of the Water Resources Law must contain the obligation of the Regional

Government to allocate the budget for the financing the water resources management in its Regional Revenues and Expenditures Budget (APBD);

(4) Article 40 Paragraph 1 states that the need for untreated water for household drinking water as intended in Article 34 Paragraph (1) shall be fulfilled through the development of drinking water provision system., while Paragraph 2 states that the Government and regional governments shall be responsible for the development of drinking water provision system as intended in Paragraph (1). The development of water drinking provision system shall be administrated integrated with the development of infrastructure and facility sanitation, as stated in the Paragraph 6, Article 40 of the Water Resources Law. The Court is of opinion that the responsibilities of the Government and Regional Governments provided for in this Paragraph 40 of the Water Resources Law have to be the priority of the programs of Government and Regional Governments, because with sufficient development of drinking water provision system, the quality of the right to water fulfillment will increase, because an individual could obtain water in a quite short period of time and distance. The responsibilities in implementing the development of drinking water provision system are basically the responsibilities of the Government and Regional Governments. The participation of cooperatives, private legal entities, and the community are limited only to the matter where the

Government cannot performed the task by itself and the Government is still capable of exercising its authority in the management, implementation, and supervision in the overall management of water resources;

Considering whereas Article 33 of the Water Resources Law grants the authority to the Government and Regional Governments, in the event of exigencies, the Government and/or regional governments shall arrange and stipulate the use of water resources for the purpose of conservation, preparation of construction, and the fulfillment of water resources use priority. The Court is of that opinion that in exercising such authority, the Government shall prioritize the fulfillment of the right to water over other interests, since the right to water is the main right.

Considering whereas with the existence of the abovementioned provisions, the Court is of opinion that the Water Resources Law has sufficiently obligated the Government to respect, protect, and fulfill the right to water, which in the implementing regulations thereof, the Government must take into account the opinion of the Court which has been expressed in the legal considerations which becomes the basis or ground for the decision. Hence , if in its implementation the *a quo* Law is interpreted to be different from that which is the intended in the above considerations of the Court

then another petition for review of the *a quo* Law is not impossible (*conditionally constitutional*);

C. Control of Water by the State

Considering whereas water is *res commune*, and therefore that has to be subject to the provision of Article 33 Paragraph 3 of the 1945 Constitution, so that the management of water has to be included in the public legal system which cannot be made as the object of ownership in the concept of civil law. Thus, the only concept which is in accordance with the fact that the management is the right to water as a human right as stipulated in the Constitution. The Court is of opinion that the concept of water use rights as formulated in the Water Resources Law has to be interpreted as being derived from the right to life guaranteed by the 1945 Constitution;

Considering whereas therefore, except for water use rights, every exploitation of water must be subject to state's right to control. The utilization of water outside of water use right has to obtain a permit requested for to the Government and must fulfill the stipulated requirements, The Government can issue the permit for water utilization either as untreated water or as the utilization of water resources;

Considering whereas due to the particular nature or characteristic of water compared to the other resources such as oil or other mined

goods, and due to the implementation of two legal provisions on water, namely Article 28H and Article 33 Paragraph 3 of the 1945 Constitution, the management of water has a special feature;

Considering whereas although the Water Resources Law recognizes the right of commercial use of water as stated in Article 7 Paragraph 1, but the definition of the aforementioned right has to be distinguished from the definition of right in general. Article 1 Paragraph 15 states that whereas the right of commercial use of water shall be the right to obtain and exert water commercially. With this formulation, the right of commercial use of water is therefore not intended to grant the exploitation right for water resources, rivers, lakes, or swamps. General Elucidation item 2 states that the Right of Commercial Use of Water does not constitute ownership of water but is limited to the right to obtain and use or exert a quota of water in accordance with the allocation stipulated by the Government for water users. Such concept of the Right of Commercial Use of Water is in accordance with the concept that water is *res commune* which shall not become an object of economic price. The Right of Commercial Use of Water has two characteristics; First, the Right of Use has the nature of *in persona* right. The reason is that Water Use Right is the reflection of human rights; hence such rights are attached to and inseparable from the human subject. Second, the Right of Commercial Use of Water is created solely based on the permit issued by the Government or Regional Governments, and therefore, as a permit, it is

bound by the rules of the permit, including the provisions regarding the requirements and the reasons of termination by the grantor of the permit. It is impossible for a dispute on the Right of Commercial Use of Water to occur between the Government or Regional Governments and the holder of permit. The grantor of permit has the supervisory right on the permits granted. The Right of Commercial Use of Water is the instrument in the permit system which can be used made use of by the Government to limit the quota or the volume of water obtained or exerted by those entitled. With the existence of the Right of Commercial Use of Water, the volume of water which may be exploited by the holder of the Right of Commercial Use of Water can be clearly determined. The Court is of the opinion that the two characteristics in the aforementioned Right of Commercial Use of Water have been fulfilled with the existence of the provisions in Article 7 Paragraph 2 of the Water Resources Law which states that Water Use Right intended in Paragraph (1) shall not be leased or transferred, either partly or entirely.

Considering whereas although the state has the right to control water, due to the existence of human rights aspect with respect to water, the management of water shall be conducted in a transparent manner, namely by including the participation of community, and still respecting the right to water of customary law community, so as to develop democratization in the water resources system management. The Court is of the opinion that the provision of Article 11 Paragraph 3 which states

whereas; “Water resources management pattern as intended in paragraph (2) shall be prepared by extensively involving the participation of communities and business community” is sufficiently reflecting the transparency in the water resources management pattern. The existence of “extensively” shall not be interpreted as giving a major role only to the business community but also to the community. The involvement of the community and the business community is intended to provide inputs to the planning of water resources management implementation and to give responses to the pattern which will be implemented in the water resources management. The role of the state controlling water implemented by the Government or Regional Governments; pursuant to the instruction of the Article 33 Paragraph 3 of the 1945 Constitution, shall remain them and shall not be transferred to business community or private sector. The aforementioned matters are reflected in the provisions of Article 14, Article 15, and Article 16 of the Water Resources Law;

Considering whereas on the basis of the abovementioned opinion of the Court, the legal considerations of the Court for substantive review are as follows:

- Whereas since the articles petitioned by the Petitioners for substantive review do not stand alone but are interrelated, the Court needs to examine the interrelationship among the Articles of the Water Resources Law to consider the petition of the Petitioners;

- Whereas following the analysis of the Petitioners' petition, the Court concludes that the Petitioners did not pay adequate attention to what is referred by the Water Resources Law as "Water Resources Management Pattern," so as to create misperception or misinterpretation in the comprehensive understanding of the Water Resources Law;

- Whereas the Petitioners argue the Water Resources Law contains articles encouraging privatization namely, Article 9, Article 10, Article 26, Article 45, Article 46, and Article 80 of the Water Resources Law, which are therefore contradictory to Article 33 (3) of the 1945 Constitution. The Court is of the opinion that the Water Resources Law regulates the principal matters in the water resources management, and although the Water Resources Law opens the opportunities for private participation to obtain the Right on Commercial Use of Water and the permit of exploitation of water resources, the aforementioned matters will not cause the control if water exploitation to fall into the hands of private parties. The state, in the exercising the right of water exploitation, conducts the following activities: (1) to formulate policies (*beleid*), (2) to conduct acts of administration (*bestuursdaad*), (3) to regulate (*regelendaad*), (4) to manage (*beheersdaad*), (5) to supervise (*toezichthoudendaad*);

- Whereas the water resources shall be utilized merely to fulfill the daily basic needs directly, but also in its secondary function in which water resources are very much needed in industrial activities, either small-scale industries, medium or large-scale industries, conducted by non-government parties. As the units of economic activities, small, medium and large-scale industries are important in the effort to develop the standard of living of the community. Therefore, failure to fulfill the need for water resources by the aforementioned units of the economy will cause the operation of such industries to stop which will have direct impacts on the economy of the community. The Right of Commercial Use of Water and the exploitation permits constitute the system of permits issued based on the water resources management pattern which has extensively involved the participation of the community. The performance of water resources management will be under direct supervision by the interested party (stakeholders). The existence of this permit system will allow the Government to control the exploitation of water resources. The application to obtain such permits both for the Right on Commercial Use of Water and the exploitation right shall be rejected if the granting of such permits is not in accordance with regulated water resources management pattern.

Considering whereas based on the abovementioned considerations, the arguments of the Petitioners stating that Article 9, Article 10, Article 26, Article 45, Article 46, and Article 80 of the Water

Resources Law are contradictory to the Article 33 (3) of the 1945 Constitution are groundless;

Considering whereas the Petitioners argue the Water Resources Law has caused the commercialization of water due to the adoption of the principle of “water users shall pay the service charges for water resources management” according to the service used. The Court is of the opinion that this principle in fact puts the position of water not as the object to be attached with price in economic respect, because of that there is no price of water being considered as a component in calculating the amounts to be paid water users. Thus, this principle is not commercial in nature;

Considering whereas the problem arising in practices is the value or amount which has to be paid by water users, in relation to the capability of the community to pay such amount. The amount or quantity which has to be paid by water users based on this principle is extremely variable or relatively dependent upon the calculation of components used to finance the management costs. Based on this standard, the amount will be less expensive if compared to the amount which has to be paid if the water is charge with economic price. Article 77 of the Water Resources Law states that the financing of water resources management shall be stipulated based on the actual need for water resources management, fictive calculation or mark up is prohibited in the calculation of the management cost. The types of water resources management financing include: (a) The

information system cost, (b) planning cost, (c) construction implementation cost, (d) operational, maintenance costs, and (e) observation, evaluation, and people's empowerment costs. Meanwhile the fund for every type of financing is in the form of: (a) Government budget, (b) private budget, and/or (c) revenues from water resources management service charge. The inclusion of private budget will surely depend on whether the private sector has participated in the water resources management; if the private participation is excluded; this type of financing will surely not become a component in the calculation. The Government supposedly provides the budget in the form subsidy or routine budget for water resources management in every budget year, which is not calculated as the capital and thus shall not be calculated in the stipulation of amount of water resources management costs. The aforementioned matter definitely shall be regulated in the formulation of State Revenues and Expenditures Budget (*APBN*) and not in the Water Resources Law. The bigger the amount of subsidy and the routine budget which can be provided by the Government in the water resources management, the fewer the obligations shall be paid by water users. The principle "users shall pay the service charges for water resources management" is performed in a flexible manner by not applying similar calculation without considering the type of water resources utilization. The implementation of this principle is not applied to water users for daily basic needs fulfillment, or to social interest and public safety. Water-user farmers, water users for the

people's smallholdings are exempted from the obligation to finance the water resources management service charge. The utilization of water resources to support the small-scale economy of the community shall have different regulation from the regulation for water resources utilization for large-scale industries. Therefore, the implementation of this principle has considered the value of justice. If this principle is not implemented, meaning that there is no obligation to support the water resources management service charge at all by water users, it will clearly benefit those who utilize considerable quantity of water, namely large-scale private industries, which will definitely lead to injustice. Such regulation shall be included in the implementing regulations of the Water Resources Law. The purpose of this principal is the continuous implementation of water resources management, and not to generate profits. Based on the foregoing considerations, the Court is of the opinion that the implementation of the principle "water users shall pay the service charges for water resources management", with several special exceptions in its implementation, is not contradictory to Article 33 Paragraph 3 of the 1945 Constitution;

Considering whereas the Petitioners argue that Articles 90, 91, and 92 of the Water Resources Law is discriminatory, because it restricts the parties who can file a lawsuit if there are losses caused by water resources management. The Court is of the opinion that the application of Articles 90, 91, and 92 of the Water Resources Law does not abolish the

right to file a lawsuit of the citizens/members of the community. Every person shall be entitled to file a lawsuit, if there is civil damage as well as losses caused by the state administrative decision. Articles 90, 91, and 92 of the Water Resources Law regulates lawsuits filed by the community members and organizations. Article 90 allows a person to file his/her lawsuit through the representative, namely by representing other members of community that also suffer losses. Article 91 of the Water Resources Law basically constitutes a responsibility of the Government to be actively involved in protecting the community's interest so that greater losses suffered by the community can be avoided at an early stage. Therefore, the Court is of the opinion that there is no reason to declare that Articles 90, 91, and 92 of the Water Resources Law are contradictory to the 1945 Constitution;

Considering whereas the Petitioners argue that Article 39 paragraph (2) of the Water Resources Law will harm traditional farmers producing salt because by the application of the aforementioned provision traditional farmers producing salt must obtain permits on Commercial Use of Water Resources from the Government/or Regional Government. Therefore, the Petitioners request that Article 39 Paragraph (2) of the Water Resources Law be declared contradictory to the 1945 Constitution. As stated in General Elucidation item 11 that utilization of seawater on land for the purpose of business, either through technical engineering or by through natural process due to the tides, needs to observe the

environmental function and must obtain the permit from the Government or Regional Government. If the provisions set forth in Article 39 Paragraph (2) of the Water Resources Law is declared contradictory to the constitutional rights of the farmers producing salt, the legal norm created as a result of the abolition of this provision is that “utilization of seawater on land for the purpose of business shall be conducted without any permit from the Government”. This is applicable for any type of any commercial use of seawater on land without considering its destructive force, including large scale fish-pond business. Protection of salt farmers and traditional fish-pond farmers is excluded from the provision of Article 39 paragraph (2) of the Water Resources Law in the Government Regulation mandated by Article 39 Paragraph (3) of the Water Resources Law. In addition, the Court does not find the grounds that Article 39 Paragraph (2) is contradictory to the 1945 Constitution, so that petition of the Petitioner is groundless;

Considering whereas the Petitioners argue that the existence of the provision of Article 6 Paragraph (3) of Water Resources Law stating that the communal rights of customary law communities to water resources as intended in Paragraph (2) shall be recognized insofar as such rights do exist and have been confirmed in the relevant regional regulation, has undermined the position of the existing customary law communities because they need to be confirmed in the regional regulation, so that it impairs the constitutional rights of the customary law communities. In

addition, the Petitioners are also concerned that the possession of water resources by private sector will harm the customary law communities. The right of customary law communities is guaranteed by the 1945 Constitution, namely by article 18B Paragraph (2) of the 1945 Constitution. The Court is of the opinion that Article 6 Paragraph (2) of the Water Resources Law is formulated to protect the right of the customary law communities concerned to water resources. The existence of customary law communities which still have communal right to water resources must become the substance in the formulation pattern of water resources management by the regency/municipality Government, provincial Government, as well as central Government. The confirmation in the regional regulation shall not be interpreted as having constitutory nature but is only declaratory in nature with respect to the customary law community units insofar as they are still existent and in conformity with the development of the community and the principle of the Unitary State of the Republic of Indonesia, as regulated in law. Water resources controlled by the customary law communities will not be taken over by private sector because commercial use of water resources will be conducted by private sector through permit mechanism in obtaining either the Right of Commercial Use of Water or water exploitation permit. Permits issued by either the Government or the Regional Government must always be based on water resources management pattern formulated by either the Central Government or Regional Government. Private sectors cannot control

water springs or water resources, but can only conduct exploitation in the specified amount or allocation in accordance with the allocation stipulated by the relevant permits. Based on the above considerations, the Court is of the opinion that the petition to declare Article 6 Paragraph (3) of the Water Resources Law contradictory to the 1945 Constitution is not sufficiently grounded;

Considering whereas the Petitioners argue that Article 38 Paragraph (2) of the Water Resources Law giving opportunity to the business entities and individuals to utilize clouds using weather modification technology will create conflicts among the communities as well as will harm the community. The Court is of the opinion that because in conducting weather modification technology utilization, permit from the Government is required, therefore the Government can apply specific requirements so that the community will not be harmed and if the community suffer losses, an obligation to pay compensation can be applied. Therefore, the Court is of the opinion that Article 38 Paragraph (2) of the Water Resources Law is not contradictory to the provisions set forth in the 1945 Constitution. Therefore, the petition of the Petitioners to declare Article 38 Paragraph (2) of Water Resources Law contradictory to the 1945 Constitution is groundless;

Considering whereas the Petitioners argue that Article 48 Paragraph (1) of the Water Resources Law will create conflicts of interest

and according to the Petitioners such matter is caused by the difference between river area and administrative area, as well as the priority of the interest of the villagers the distribution channels of which have been constructed. The Court is not of the same opinion with the Petitioners, because the management of water resources in a river area where the river concerned is located in more than one regency, shall be done by provincial government and if the river area concerned is located in several provinces, the management shall be conducted by the central Government, so that for one river area there will be integrated management. Meanwhile, the prioritizing of the villagers' interests in a river area the distribution channels of which have been constructed is based on technical consideration in accordance with the allocation of the aforementioned distribution channels construction. However, if there is water volume excess, it is possible to distribute it to other river areas if needed, in accordance with respective river area management patterns. The Court is of the opinion that Article 48 Paragraph (1) of the Water Resources Law is not contradictory to the provisions set forth in the 1945 Constitution, therefore, the petition of the Petitioner is not sufficiently grounded;

Considering whereas the Petitioners argue that Article 29 Paragraph (5) of the Water Resources Law will burden either the Government or the Regional Government because they have to provide compensation, if the determination of water resources provision priority is

harmful to water resources users. The Court is of the opinion that the obligation to regulate the compensation as intended in the *a quo* provisions is not meant to give obligation to the Government or the Regional Government to make payments. In regulating compensation, the Government or Regional Government can charge the users of water resources, and such charge must not be borne by the Government or Regional Government. The definition of regulating compensation is not same as paying compensation. The Court is of the opinion that Article 29 Paragraph (5) of the Water Resources Law is not contradictory to the provisions set forth in the 1945 Constitution, so that petition of the Petitioners to declare that Article 29 Paragraph (5) is contradictory to the 1945 Constitution is groundless;

Considering whereas the Petitioners argue that Article 49 Paragraph (4) of the Water Resources Law is contradictory to Article 33 paragraph (3) of the 1945 Constitution. As described in Article 49 Paragraph (1), principally water exploitation for other countries is prohibited. The Court is of the opinion that the Water Resources Law has stipulated sufficient requirements for water exploitation for other countries provided by the central Government based on the recommendation of the Regional Government. The Government can only provide water exploitation permit for other countries if the provision of water for various necessities has been fulfilled. The needs are, among other things, basic needs, needs for environmental sanitation, needs in the field of

agriculture, employment, industry, mining, transportation, forestry and biological diversity, sports, recreation and tourism, ecosystem, aesthetics, and other purposes. It means that there is real water excess in a river area, and if such excess is not utilized it will be a waste of resources. The Court is of the opinion that water exploitation for other countries is only possible if there is real water excess in a river area, and the principle of "benefit receivers shall pay the management fee" must also be applied, and the benefit receivers shall be obligated to pay the charge for the aforementioned water. State revenues originating from water exploitation for other countries must be allocated for the greatest prosperity of the people; Therefore the Court is of the opinion that Article 49 Paragraph (4) of the Water Resources Law is not contradictory to the 1945 Constitution.

Considering based on the foregoing considerations the Court is of the opinion that the petition for judicial review of Law Number 7 Year 2004 regarding Water Resources both in formal and substantive aspects cannot be granted;

In view of Article 56 Paragraph (5) of Law Number 24 Year 2003 regarding the Constitutional Court;

PASSING THE DECISION

To reject the petition of the Petitioners;

Dissenting Opinion:

Considering, whereas in respect of the abovementined decision of the Court, Constitutional Court Justice A. Mukthie Fadjar and Maruarar Siahaan, have dissenting opinion as follows:

Constitutional Court Justice A. Mukthie Fadjar:

We create human being from water (Q.S. 25: 54)

We create all animals from water (Q.S. 24: 45)

We create all living creatures from water (Q.S. 21: 30)

In general, the quotations of the Koran above indicate that water is a source of life, without water there is no life. Water which previously did not belong to anyone (*res nullius*), then became publicly owned by the entire people (*res commune*), even became publicly owned by all the creatures created by God, no one may monopolize it. Water that becomes rare needs to be regulated by the state. However, at the paradigmatic level, water resources controlled by the state, must only relates to the control of the water resources management, so that water can be used for the greatest prosperity of the people in the context of respecting, protecting, and fulfilling the right to water which has been universally acknowledged as a fundamental right. The control shall not be in the form of the grant of specified water right to individuals and/or private business entities, as adopted by Law No. 7 Year 2004 regarding Water Resources, which may lead to disguised privatization of water resources, so that it distorts the provisions of Article 33 of the 1945 Constitution. Therefore the Water Resources Law

receiving great resistance from the people, should be revised first in order to meet accurate paradigm, namely the paradigm giving more focus on social and environmental dimension instead of economic dimension, otherwise, the Water Resources Law will be unconstitutional, because its paradigm is not in line with the paradigm of the 1945 Constitution, particularly Article 33 Paragraph (3) which reads "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.

In particular, the Petition of the Petitioners for judicial review of the Water Resources Law against the 1945 Constitution, should have been granted partly. Several articles, paragraphs, or part of the Water Resources Law the judicial review of which could be granted along with the arguments of its granting is as follows:

1. Article 6 Paragraph (3) which reads "*The communal rights of customary law communities on water resources as intended in paragraph (2) shall be acknowledged insofar as such rights do exist and have been confirmed in the relevant regional regulation*". The grounds for granting the petition is that the confirmation of the customary law community units in the regional regulation is unconstitutional, because based on the provisions of Article 18B Paragraph (2) of the 1945 Constitution, the customary law community units along with their traditional rights "insofar as they are still in existence and are in conformity with the development of society and the principle of the Unitary State of the Republic of Indonesia, as regulated in law". Whereas, up to now

there has been no Law which contains the description of the provisions of Article 18B Paragraph (2) of the 1945 Constitution concerned. The lack of uniform national standards will produce various Regional Regulations that may make the foundation of the Unitary State of the Republic of Indonesia unstable.

2. Article 7 Paragraph (1) which states “Water utilization right as intended in Article 6 paragraph (4) shall be in the form of water use right and right of commercial use of water” and the next articles, such as Articles 8 and 9.

   The grounds for granting the petition is that the use of terminology “Water Utilization Right” derived from “right of the state to control water” and further described as “Water Use Right” and “Right on Commercial Use of Water” is not only paradigmatically inaccurate, since it puts more focus on “water right” instead of “the right to water”, but can also create misinterpretation as if the water is no longer controlled by the state as the provided for in Article 33 of the 1945 Constitution. Therefore, the terminology of Water Utilization Right, Water Use Right, and Right of Commercial Use of Water is preferable to be changed with the terminologies as follows: permit to use water, permit to utilize water, and permit to exploit water in which the state’s role seems to be more dominant.

3. Article 9 paragraph (1) which reads “Right of commercial use of water can be granted to individuals or legal entities with permits from the Government or regional governments in accordance with their authorities”.

   The grounds for granting the petition is that the aforementioned provisions are disguised policy on water resources privatization which is contradictory to Article 33 of the 1945 Constitution. The Right of Commercial Use of Water more exactly water business license should have been only to the State-Owned Enterprise and the Regional Government-Owned Enterprise.

4. Article 11 Paragraph (3) which reads “Water resources management pattern as intended in paragraph (2) shall be prepared by extensively involving the participation of communities and business community”.

   The grounds for granting the petition are *mutatis mutandis* similar to the grounds for granting the petition on Article 9 Paragraph (1), except if the intended business entities are State-Owned Enterprise and the Regional Government-Owned Enterprise.

5. Article 26 Paragraph (7) which reads “The utilization of water resources shall be conducted by giving priority to social function to realize justice by taking into account the principle of payment by water users for water resources management service charges and by involving communities”. Its elucidation reads “Referred to as the principle where users shall pay management service fee shall be the principle where users shall jointly

bear, directly or indirectly, water resources management fee. This provision shall not be applicable to those using water to fulfill their basic daily necessities and people's smallholdings as intended in Article 80". Elucidation on Article 80 paragraph (1), stipulates that the provisions on exemption from water resources management service fee shall only be if the water resources users take water from water resources which are not distribution channels. The ground for granting the petition is that the granting of Right on Commercial Use of Water to private sector will cause more extensive/larger water control through distribution channels leading to decreasing non-distribution water, so that the majority of water users must pay for the water for their daily needs and smallholding agriculture. Therefore, the argument of the Petitioners stating that if there is only distribution channels, the water users for daily needs and smallholding agriculture must also pay which constitutes a form disguised commercialization of water resources, is sufficiently grounded.

6. Article 29 Paragraph (3) which reads "Water provision to fulfill daily basic needs and for the irrigation of smallholding agriculture in the existing irrigation system shall be the main priority of water resources provision above all needs".

The ground for granting the petition is that the argument of the Petitioners which substantially states that the aforementioned provision discriminated water users or smallholding agriculture located in the existing or outside the existing irrigation system is contradictory to the articles on Human

Rights set forth in the 1945 Constitution, is sufficiently grounded. Because it is possible that the smallholding agriculture outside of the existing irrigation system is larger than that located in the existing irrigation system. The state should have given equal opportunity for water provision for all smallholding agriculture.

7. Article 38 Paragraph (2) which reads “Business entities and individuals may utilize clouds using weather modification technology after obtaining permit from the Government”.

The grounds for granting the petition is that weather modification for making artificial rain should be conducted by the state/Government, instead of by private business entities or individuals, and should be made after thorough survey and test, as well as by developing capacity in order to prevent its negative impacts on human life and environment. Therefore, the argument of the Petitioners which principally states that the aforementioned provision is contradictory to Article 28 Paragraph (1) of the 1945 Constitution is sufficiently grounded, because the making of artificial rain using weather modification technology will endanger human life and environment if it is not conducted carefully, moreover practice which has been doing has not indicated significant result, and the granting of permit to individuals or private business entities will create conflict among the community.

8. Article 39 which principally contains the provision that the development of the functions and uses of seawater on land shall be conducted by taking into account environmental functions, the business activities can be done by business entities and individuals after obtaining permit from the Government/Regional Government, and shall be set forth further in a government regulation. With respect to this article, it is noted that although the permit is necessary in order to maintain the environmental conservation, however the Government must still provide protection to traditional salt farmers in respect of permit priority.

9. Article 40 Paragraph (4) which reads “Cooperatives, private business entities, and communities may participate in the administration of the development of drinking water provision system”. Its elucidation reads “In the event that in a region there is no drinking water supply by state-owned and/or regional government-owned enterprise, drinking water in such region shall be supplied by cooperatives, private enterprises and the community”.

   The ground for granting the petition is that the argument of the Petitioners stating that the provision of Article 40 Paragraph (4) is contradictory to Article 33 of the 1945 Constitution, because it has expanded water resources commercialization and privatization, particularly in the drinking water supply system by giving an opportunity to private parties to take part in it. It is evident by the issuance of Government Regulation No. 16 Year 2005 regarding the Development of Drinking Water Provision System

Article 1 point 9 of which states that “The Administrator of the development of Drinking Water Provision System, hereinafter referred to Administrator, shall be State-Owned Enterprises/Regional Government-Owned Enterprises, cooperatives, private business entities, and/or community group organizing the development of drinking water system development”. Whereas Article 40 Paragraph (2) of the Water Resources Law states that the Government/Regional Governments shall be responsible for the development of drinking water provision system, therefore Article 40 Paragraph (3) of the Water Resources Law states that State-owned enterprises and/or regional government-owned companies shall be the administrators of the development of drinking water provision system. The role of cooperatives, private business entities and community in the development of Drinking Water Provision System is not to take over the responsibility of the Government/Regional Government through the State-Owned Enterprises/Regional Government-Owned Enterprises as stated in Elucidation of Article 40 paragraph (4). Therefore, Article 40 Paragraph (4) constitutes a disguised privatization as indicated in Government Regulation No. 16 Year 2005 which is the implementation of Article 40 of the Water Resources Law.

10. Article 41 Paragraph (5) which principally relates to the water provision for agricultural untreated water needs which may include the community, the elucidation of such article strengthens the indication of granting the role to the private sector in managing irrigation system in Indonesia. The

provisions of Article 45 paragraph (3) and paragraph (4) *juncto* Article 46 of the Water Resources Law principally gives an opportunity for granting permits to the private/individuals party to exploit the surface water resources.

Constitutional Justice Maruarar Siahaan:

In evaluating the petition of the Petitioners, arguments regarding the meaning of water for the human life must be first tested and viewed. It is undeniable that water constitutes the fundamental need in supporting human life. Even it can be said that human being cannot live without water, so that it can be accepted that water constitutes a part of life, and even the life itself. The fundamental need of water in human life is an absolute fact. Human being can live without oil or electricity power, but cannot live without water. Therefore, regulations in respect of water is different from the other resources and natural resources, because it needs deep instilling concerning such fact. Because the right of every person to live and to defend his/her life and living constitutes the human rights protected by the constitution, in which it cannot be done without sufficient minimum water quantity, both for private and agricultural irrigation system purposes, therefore in accordance with the interpretation which has been internationally accepted in the UN document of General Comment No. 15 Year 2000 stating water as the human rights which is acknowledged, such interpretation is in compliance with the 1945 Constitution, particularly Article 28A and Article 28I Paragraph (I), becoming the fundamental norms in the Indonesian

laws and regulations hierarchy system regulating water. Therefore, based on the fact that people's access to water in defending their physically and mentally prosperous living, one fundamental norm can be withdrawn that the aforementioned people's access also constitutes a fundamental right.

The Government of the State of the Republic of Indonesia shall be obligated to protect the entire Indonesian nation and the entire Indonesian motherland, and to improve the prosperity of the people, in addition, the state is also obligated to protect, to respect, and to fulfill the human rights of the people relating to access to water. It has been universally recognized that the state shall be responsible for respecting, protecting, and fulfilling the Human Rights of its people. In order to respect, to protect, and to fulfill people's human rights on water, the Government on behalf of the state has also been mandated by Article 33 Paragraph (3) of the 1945 Constitution to implement the stipulation as follows "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".

The concept of "controlled by the state" as indicated in Article 33 Paragraph (3) of the 1945 Constitution concerned, has been interpreted by the Constitutional Court in case number 01-021-022/PUU-I/2003 regarding judicial review of Law No. 20 year 2002 and 02/PUU-I/2003 concerning judicial review of Law Number 22 Year 2002 regarding Oil and Natural Gas, dated December 1 Year 2004, formulating that the aforementioned state control is something which is higher than ownership. It is stated that:

"…. the control by the state in Article 33 of the 1945 Constitution has a higher or broader definition than ownership in the concept of civil law. The concept of control by the state is a concept of public law in relation to the principle of sovereignty by the people adhered to by the 1945 Constitution, both in the field of politics (political democracy) and in the field of economy (economic democracy). In the sovereignty by the people perspective, it is the people that shall be recognized as the source, owner as well as the holder of the highest authority in living as a nation, in accordance with the *"from the people, by the people, and for the people"* doctrine. The aforementioned definition of highest authority also covers the definition of public ownership by the people collectively.

"The people as a collective is constructed by the 1945 Constitution as giving the mandate to the state to create policies *(beleid)* and acts of administration *(berstuursdaad)*, regulation *(regelendaad)*, management *(behersdaad)*, and supervision *(toezicthoudensdaad)* for the greatest prosperity of the people. The function of administration *(berstuursdaad)* by the state is performed by the Government with its authority to issue and revoke permit *(vergunning)*, license *(licentie)*, and concession *(concessie)* facilities.".

The land and waters and the natural resources contained therein are the fundamentals of the people's prosperity. Therefore, they must be controlled by the state and used for the greatest prosperity of the people. There is a question,

whether we can expressly determine who is the owner of such water based on the interpretation of such ownership concept. The aforementioned concept clearly confirms that people is the owner of the land and waters and the natural resources contained therein, so that the human being as individual having human rights to obtain access to water, who must be protected, respected and fulfilled by the Government as its constitutional obligations, obtain priority based on the priority scale formulated in the laws and regulations regarding water resources. Even legal and state system which does not recognize provision such as Article 33 Paragraph (3) of the 1945 Constitution, also adopts the doctrine that water is *res communes*. Article 33 Paragraph (3) of the 1945 Constitution has consequence that water constitutes public property of the Indonesian people and all authorities as a result of state control in the form of regulation, management, supervision, and administration on water and water resources must prioritize the right of Indonesian people, as a fundamental right, and all regulations made must prioritize the fulfillment of people's needs to defend their life and living, and then the next priority shall be put in the next priority scale.

There is no denying that the aforementioned water resources is dynamic, and highly depends on absorptive power and capacity of the land to reserve water, so that its supply and availability is not always constant. There is also a possibility that water in a certain resources cannot be utilized wholly and can be wasted. With respect to its functions, as described in Law Number 7 Year 2004 regarding Water Resources, it is also recognized that water has social, environmental, and economic functions. However, considering the characteristic

of people's fundamental right to water, which must be respected, protected, and fulfilled, and people as the owner of water, there is a question whether based on the priority scale has been described, the arrangement of Water Use Right at the same level with Right on Commercial Use of Water will support its constitutional description and interpretation that water belongs to the people who have the fundamental right to water as a priority can be considered as the description of water resources arrangement in accordance with the Constitution.

Is it appropriate to regulate the fundamental right to water and its economic, environmental, and social functions with the Water Utilization Right system? Or is it more appropriate to regulate the social, environmental, and economic functions concerned by permits system as a part of water resources management? Is people's fundamental right to water can be fulfilled properly by transferring the management and exploitation of water resources to individual or private business entities?

Water Resources Management based on Right System or Permit System.

If Water Utilization Right set forth in Article 7 Paragraph (1) of Law Number 7 Year 2004 classified into Water Use Right and Right of Commercial Use of Water, therefore the Water Use Right to fulfill the daily basic needs for individuals and smallholding agriculture located in irrigation system shall be obtained without any permit as stipulated by Article 8 paragraph (1). However, if its use changes the natural condition of water resources, to fulfill the needs of a group requiring a great amount of water and used for smallholding agriculture

outside the existing irrigation system, it shall require a permit. On the other hand, Article 9 stipulates that Right of Commercial Use of Water can be granted to individuals or legal entities with permits, hence the interpretation of Article 9 concerned in respect of Government Regulation Number 16 Year 2005, has indicated that the right of commercial use of water granted can be in the form of drinking water provision by private sector. This matter creates question whether such description is consistent with the 1945 Constitution.

Although we cannot deny that there is an economic aspect of water relating to its efficient and effective use, such economic function of water must not become a commodity that is beneficial merely for a certain group of people, because water belongs to the people and should be used to defend their life and living, as the main and first issue. Therefore, the regulation on people's fundamental right concerning access to water may not be put at the same level as right on commercial use of water, which can be granted to individuals, private business entities and cooperatives, because a right on commercial use as a right concept under the right of ownership known in the context of western civil law, which is also transferred based on the right concept regulated in the Indonesian land law, has an exclusive characteristic against other people, the exclusivity of which can be defended against anyone whosoever. Although there is an argument that the intended right of commercial use of water in the *a quo* Law, is different from the right of cultivation in the agrarian law, namely it is not based on territory but volume, therefore such exclusive right still has an advantage that may ignore people's fundamental right concerning access to water, because the

access of the holder of Right of commercial Use of Water granted to him/her on water resources in a specified location, will not allow every person to exercise conduct effective control.

“Man obtains right on something through two ways, namely: (a) Based on its nature; and (b) based on its function. The first one is a right which belongs to man beyond his/her authority. Man obtains this right based on ”God order”. The second one is right owned by man based on logic and intent, in the meaning that man has right on something because he/she is able to use it. Community (in this case the state) as a source of positive right determines the division of goods and services for its people, and it is valid only if made based on ”natural right”, namely more fundamental right owned by all men”. (E. Sumaryono, Legal Ethics, 2002, page 260). Therefore, it is not appropriate to regulate access to water resources in two equal rights, namely Water Use Right having fundamental characteristic and Right on Commercial Use of Water, originating from positive law based on state sovereignty, which basically may consider the Right on Commercial Use of Water as more important than Water Use Right that has fundamental characteristic, although it is stated that the regulation made is not intended as such. There is a prominent question, namely why other Laws relating to other natural resources, namely law regarding oil and natural gas, which the economic aspects of oil and natural gas concerned is much more dominant at least currently, and people are still able to live properly without oil and natural gas, the exploitation and utilization of its economic aspects as a commodity are not regulated by providing right on commercial use of oil.

The management and utilization of water resources, as an economic commodity and on the other hand as a commodity becoming basic and fundamental needs of people, without which people cannot live, require regulation that must consider and motivate the state to exercise its obligation to protect, respect and fulfill it. Although there is always an issue regarding current condition which disallows the State to perform its obligation to fulfill fundamental needs of the people to the water concerned requiring capital and power mobilization, therefore it is possible that such regulation can be made through permits system (*vergunning*). Such regulation system will put the State as the party granting permits, having sovereign position, putting the state in a better position in the context of performing its obligation to “respect, protect, and fulfill” people’s fundamental right to water in better and more effective way, because every offense against permits granted will automatically authorize the government to revoke it, with early anticipation on its impact and legal consequence which has been predicted. It will be different if the state provides right on commercial use, which will impede the procedure of revocation in case protection and fulfillment of citizens’ fundamental right when it is necessary. State’s position will become more difficult in the context of providing protection and fulfillment of citizens’ fundamental right concerning access to water power, because Right on Commercial Use of Water has been granted shall also be entitled to receive equal legal protection from the state, although it is still acknowledged that even right of ownership can be revoked for public interest *(onteigening)*.

Opportunity for Privatization in Water Resources Law

Although it is stated that Law Number 7 Year 2004 regarding Water Resources does not regulate privatization, it opens a wide opportunity for privatization, as stipulated in Article 9 Paragraph (1) and Article 40 Paragraph (4), which are further described in Article 1 Sub-Article 9, and Article 64 of the Government Regulation Number 16 Year 2005. Although it only states about Drinking Water Development System in the regions, areas, or territories that have not covered by the services of Regional Government-Owned Enterprise/State-Owned Enterprise, but the Right of Commercial use of Water which can be granted to private sectors and individuals creates opportunity for privatization concerned. Although Article 7 Paragraph (2) states that Water Utilization Right cannot be leased or transferred either partly or entirely, however business capitalization through the stock exchange, opens wide opportunity for capital mobilization, without transferring the right of commercial use of water obtained by a legal entity. This kind of opportunity cannot be disregarded just because it does not explicitly state privatization.

Private sector managing drinking water will always be in the form of profit-oriented organizations, because it is the characteristic of business entity to prioritize optimum profit for the shareholders. It is not oriented towards public service, even it is contradictory to its basic characteristic, so that we cannot expect that private business entities will dedicate itself to social public service.

Based on empirical experiences and surveys as have been presented by witnesses and experts in the court hearing it is evident that drinking water management by private sector does not improve the quality of drinking water, and the price becomes more expensive instead of cheaper. The reason that the Government does not have capital and capability to manage drinking water provision is inappropriate as an argument to transfer its management to private sector, because similar to the government, private sector does not have capital in conducting such management but utilizing capital sources provided by the banking industry either, in addition, state-owned enterprises can also employ experts under the management contract. If the Government shall be obligated to protect, guarantee, and fulfill the needs of its people for public utilities such as water as a part of fundamental rights, therefore stipulation of Article 28A and Article 33 Paragraph (3) of the 1945 Constitution cannot be ignored as an alternative to test the constitutionality of the Water Resources Law concerned, which shall become constitutional responsibility of the state, due to the fact that the Republic of Indonesia is a welfare state.

Constitutionality of Article 98 of the Transitional Provision of Law Number 7 Year 2004

Although expressly the Petitioner does not refer to Article 98 as one of articles petitioned for review, however it is the obligation of the Court to conduct judicial review of the aforementioned transitional provision, because Petitioners of the case Number 059/PUU-III/2005 state in general in his *petitum* to declare

Law Number 7 Year 2004 regarding water resources contradictory to the 1945 Constitution, and therefore to declare that it has no binding legal effect in its entirety.

Article 98 of the *a quo* Law stipulates that “Permits related to water resources management issued prior to the stipulation of this law shall remain applicable up to the expiry of its term”. This provision has legalized all permits issued prior to Law Number 7 Year 2004, regardless of whether the aforementioned permits issued are contradictory to this new Law, so that this transitional provision is formulated without order to make adjustment with new provision, which is greatly harmful and deemed unconstitutional. especially if the permit that have been issued has a validity for 25 (twenty-five years). Although the provisions set forth in Law Number 10 Year 2004 regarding the Formulation of Laws and Regulations came into effect on November 1, 2004 which formally does not bind Law Number 7 Year 2004 regarding the Water Resources, enacted on March 18, 2004, the practice in laws and regulations formulation has deemed it as a law, whereas when a law is declared as coming into effect, all existing legal relations or legal actions before, at, or after the application of new Laws and Regulations, shall be subject to the new Laws and Regulations.

The transitional provision set forth in Article 98 of the *a quo* Law which does not regulate the adjustment to provisions of new Law, can be used as a justification for permits which had been granted prior to the application of Law Number 7 Year 2004, although it is highly contradictory to the new paradigm concerning the right to water as Human Rights, in which the state shall be obligated to respect,

to protect and to fulfill it. In order to fulfill the intended obligation, Article 33 Paragraph (3) of the 1945 Constitution requires that the state's control on water resources shall apply without waiting the termination of the aforementioned permits. This is based on the logic that if the right to live, with respect to which water constitutes the requirement that cannot be delayed or decreased for any reason whatsoever, therefore Article 98 of the *a quo* Law without adjustment with new Law is clearly contradictory to the 1945 Constitution.

With respect to the aforementioned considerations, without describing other parts of the *petitum* of the Petitioners, with their basis to establish unconstitutionality not being sufficiently grounded, the Court should have granted the petition of the Petitioners partly, namely be declaring Article 7, Article 9, Article 40 Paragraph (4), Article 45 Paragraph (3), as well as Article 98 of Law Number 7 Year 2004 regarding Water Resources, contradictory to the 1945 Constitution and declaring the aforementioned articles as having no binding legal effect.

Whereas however the articles explicitly described above as regulations deemed to be unconstitutional are regulations/provisions constituting a paradigm becoming the spirit or basis of Law Number 7 Year 2004 regarding water resources, and if it is declared to be contradictory to the 1945 Constitution and as having no binding legal effect, it will be difficult for Law Number 7 Year 2004 concerned to be implemented based on a completely different paradigm.

Therefore based on the ground that the implementation of Law Number 7 Year 2004 without Article 7, Article 9, Article 40 Paragraph (4), Article 45 Paragraph (3), as well as Article 98, becomes difficult, hence Law Number 7 Year 2004 regarding Water Resources should have been also declared as having no binding legal effect its entirety.

Hence the decision was made in the Consultative Meeting of the Constitutional Court Justices on: Wednesday, July 13, 2005 attended by 9 (nine) Constitutional Court Justices and was pronounced in a Plenary Session of the Constitutional Court open for the public on Tuesday, July 19, 2005 by us: Prof. Dr. Jimly Asshiddiqie, S.H. as the Chairperson and concurrent Member, accompanied by Prof. Dr. H. M. Laica Marzuki, S.H., Prof. H. A.S. Natabaya, S.H., LL.M., Prof. H. A. Mukthie Fadjar, S.H.,MS., Dr. Harjono, S.H., MCL., H. Achmad Roestandi, S.H., I Dewa Gede Palguna, S.H., M.H., Maruarar Siahaan, S.H. and Soedarsono, S.H., respectively as Members, accompanied by Jara Lumbanraja, S.H., M.H., Ina Zuchriyah, S.H. and Eddy Purwanto, S.H., as Substitute Registrar, and attended by Petitioners/their Attorneys-In-Fact, the Government, the People's Legislative Assembly/its Attorneys-In-Fact.

CHIEF JUSTICE,

Prof. Dr. Jimly Asshiddiqie, S.H.

JUSTICES,

Prof. Dr. H. M. Laica Marzuki, S.H. **Prof. H. A.S. Natabaya, S.H, LL.M.**

Prof. H. A. Mukthie Fadjar, S.H., MS. **H. Achmad Roestandi, S.H.**

Dr. Harjono, S.H., MCL. **I Dewa Gede Palguna, S.H., M.H.**

Maruarar Siahaan, S.H. **Soedarsono, S.H.**

SUBSTITUTE REGISTRAR,

Jara Lumbanraja, S.H.,M.H.

Ina Zuchriyah,S.H.

Eddy Purwanto, S.H.