

3rd IMCoSS 2015

**THE THIRD INTERNATIONAL MULTIDISCIPLINARY
CONFERENCE ON SOCIAL SCIENCES**

5, 6 June 2015
Bandar Lampung University (UBL)
Lampung, Indonesia

PROCEEDINGS

Organized by:



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PREFACE

The Activities of the International Conference are in line and very appropriate with the vision and mission of Bandar Lampung University (UBL) to promote training and education as well as research in these areas.

On behalf of the **The Third International Multidisciplinary Conference on Social Sciences (The 3rd IMCoSS) 2015** organizing committee, we are very pleased with the very good response especially from the keynote speaker and from the participants. It is noteworthy to point out that about 112 technical papers were received for this conference.

I would like to express my deepest gratitude to the International Advisory Board members, sponsor and also to all keynote speakers and all participants. I am also grateful to all organizing committee and all of the reviewers who contribute to the high standard of the conference. Also I would like to express my deepest gratitude to the Rector of Bandar Lampung University (UBL) who give us endless support to these activities, so that the conference can be administrated on time

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DILEMMA OF STATE SOVEREIGNTY PROTECTING THE HOMELAND (STUDIES OF AGRARIAN CONSTITUTION)

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ABSTRACT: *State of law has the sovereign authority to determine and regulate their own affairs for free. State of law teaches that all government action must be based on legislation drafted by the competent institution. Practice anomaly state in Indonesia, on the one hand have a sovereign law-making but on the other hand welcomed the intervention of other parties. The Conditions of legislators who still easily bought and intervention is one of the reasons. Impact the state is ineffective to protect the native land of Indonesia from foreign exploitation. Whereas the agrarian constitution of Indonesia sincerely as developing states have been prepared in line with the International Covenant on Economic, Social and Cultural Rights to set access restrictions by foreign agrarian resources. Legislation that opens wide agrarian access to foreign resources is a infringement of Human Rights, which should be corrected (judicial), hence it does not make pretending law states. Ostensibly to protect the homeland of Indonesia, although sold to foreigners. Institutions authorized to make corrections to the laws that are discrepant with the constitution of agrarian is the Constitutional Court. This research subject points is to analyze legislation in the field of agrarian resources that have been corrected and the legal considerations. The study was conducted using the document approach. Such legal materials through library and internet access. Legal materials were examined using a prescriptive-analytical method. Until the beginning of 2015 there were nine legislation related to the field of agrarian resources that have been successfully corrected, and otherwise contrary to the constitution. So the Court's performance should be held up and requires awareness together in finding the national identity, became sovereign over agrarian resources and no intervention from other parties.*

Keywords: sovereignty, homeland, agrarian constitution, exploitation.

1. INTRODUCTION

Nawa Cita Jokowi want to bring the country in raising the dignity of the people. The state as the main actor to facilitate and protect the various businesses in order to raise the dignity of the people. People who are poor and underdeveloped brought to the prosperous people. According to the constitution, the state is obliged to make the prosperous people. The problem is, the state or the government has limited capability. For the sake of people's welfare, since the beginning of the New Order government has invited private participation in building public infrastructure, such as toll roads, airports, ports, water supply, health services, education, electricity, and telecom-munications [1].

Since 2005, the government made a policy of increasing the role of private sector in infrastructure development through Presidential Decree No. 67 Year 2005 jo. Presidential Decree No. 13 Year 2010 jo. Presidential Decree No. 56 Year 2011 jo. Presidential Decree No. 66 Year 2013 on Public Private Partnership in Infrastructure Provision [2,3]. This policy was taken with the consideration that the funds for infrastructure development and could not be fulfilled by state funds. Moreover, to gain the support of foreign funds, the government has accommodated the wishes of foreign funders, such as the World Bank and IMF. The Government of Indonesia of which should reduce subsidies or public service budget, easing the tax by the private sector, privatization of state enterprises, facilitate regulatory entry of foreign investors, supporting the patent rights, and free trade. The impact, based on the study of the State Intelligence Agency in 2006, there were 72 laws (old and new) to be adapted to

the demands of foreign financiers (foreign orders) [4], and some legislation made were very detrimental to the people [5].

The entry of foreign capital into Indonesia in large quantities can be affect the risk of increasing foreign exploitation. Indonesia's abundant natural wealth to attract foreign investors in the field of natural resource-based enterprises [6]. Indonesian government was powerless to face pressure / foreign intervention, so powerless anyway defend national sovereignty of the law. Until the beginning of 2015, there were nine laws in the field of agrarian resources that are contrary to the Constitution, which successfully corrected through the Constitutional Court [5]. The law opens opportunities to foreigners for exploiting Indonesian agrarian resources, and harm the constitutional rights of Indonesian citizens. Impact, the state is unable to protect the homeland of Indonesia from foreign exploitation.

The legal consequences of the conflict between legislation with the norms of the Constitution, then there are opportunities to do judicial review [7] or constitutional review [8] to the Constitutional Court. Under the provisions of Article 24C The 1945 Constitution of the State of the Republic of Indonesia (Constitution) and Article 10 (1) letter a of Law No. 24 Year 2003 regarding the Constitutional Court, the Constitutional Court has the authority to hear at the first and last decision is final to test laws against Constitution [9].

Constitutional review is an instrument to ensure that the contents of the law in accordance with the politics of law in Constitution, if the Constitution is understood as the supreme law of politics. This is in line with the opinion of Moh. Mahfud MD that, if the politics of law

is defined as the direction or directions of legal policy should be used as guidelines to establish or enforce a legal system that is desired, then the judicial review can be seen as one of the instruments to ensure the accuracy of the direction it is or as a guardian of the accuracy of the content in lawmaking [10,11].

2. PROBLEMS

Based on the description above, the problems in this study is:

- a. What kind of the legislation in the field of agrarian resources that has been carried out constitutional review until early 2015, and was declared contrary to the Constitution?
- b. What is the basis of legal considerations in deciding the case the Constitutional Court for constitutional review of the Law No. 7 Year 2004?

3. METHODS

This study was included in the doctrinal legal research [12,13,14], that used document approach, because studied is legal doctrines, principles of law, the decision of the Constitutional Court and the rule of positive law in Indonesia. Positive legal regulations in question are legislation that regulate agrarian resources, specifically the Law No. 7 Year 2004 on Water Resources. Search legal materials through library and internet access. The analytical method used is prescriptive-analytical [15,16].

4. RESULTS AND DISCUSSION

a. Constitutional Review of the Agricultural Law Resource Sector Until Early 2015

According to Sudikno Mertokusumo, the function of law is for protection of human interests. The law should be implemented to protect human interests. Law enforcement can take place as normal, peaceful, but can occur as well as violations of the law [17]. Violation of the law occurs when certain legal subjects do not perform the duties that should be executed or for violating the rights of other legal subjects. Rights of legal subjects that have been violated should get legal protection [18].

Legal subject, whether human, legal entity or position (*ambt*) as bearers of rights and obligations can perform legal actions based on ability (*bekwaam*) or authority (*bevoegdheid*) has. Law was created as an instrument to regulate the rights and obligations of legal subjects, so that each legal subject can carry out its obligations properly and get their rights appropriately. In addition, the law also serves as an instrument for the protection of legal subjects [18].

Given the state of Indonesia is a law state, to protect all the people and the homeland of Indonesia (agrarian resources) using legal instruments in the form of legislation. When the interests of legal subjects stipulated in the legislation considered contrary to the constitution or constitutional rights, legal protection instruments have been provided to him. Legal protection due to the issuance of laws through constitutional review to the Constitutional Court.

Based on the search and analysis of legal materials collected during the period until the beginning of 2015, the Constitutional Court has made a correction or constitutional review of the nine laws in the field of agrarian resources, which declared contrary to the Constitution. Nine of the law, are:

- 1) Law No. 41 Year 1999 on Forestry. Through the Constitutional Court No. 45/ PUU-IX/2011 concerning the constitutionality of the definition of forest area, No. 34/PUU-IX/2011 on the restriction of state control over forest land to protect the right to land in forestry regime, and No. 35/PUU-X/2012 concerning the constitutionality of indigenous forests as part of the state forest.
- 2) Law No. 22 Year 2001 on Oil and Gas. Through the Constitutional Court No. 002/PUU-I/2003 concerning the unconstitutionality of raising fuel prices based on market prices, No. 36/PUU-X/2012 concerning the constitutionality of the Management Board for Upstream Oil and Gas (BP Migas).
- 3) Law No. 20 Year 2002 on Electricity. Through the Constitutional Court No. 001-21-22/PUU-I/2003 concerning the unconstitutionality of the system of separation (unbundling), the law was declared not have binding legal force.
- 4) Law No. 7 Year 2004 on Water Resources. Through the Constitutional Court No. 85 / PUU-XI/2013 concerning the constitutionality of the privatization of water, the law was declared not have binding legal force and the application Law No. 11 of 1974 on Water.
- 5) Law No. 18 Year 2004 on Plantations. Through the Constitutional Court No. 55/ PUU-VIII/2010 regarding the criminalization of the conflict plantations.
- 6) Law No. 25 Year 2007 on Investment. Through the Constitutional Court No.21-22/PUU-V/2007 concerning the extension of land rights in advance.
- 7) Law No. 27 Year 2007 on the Management of Coastal Areas and Small Islands. Through the Constitutional Court No. 3/PUU-VIII/2010 on the Right to Water and Coastal Management, indigenous people and their rights benchmarks state control.
- 8) Law No. 4 Year 2009 on Mineral and Coal. Through the Constitutional Court No. 25/PUU-VIII/2010 on the restriction of the people's mining region, No. 30/PUU-VIII/2010 regarding the interests of the mining entrepreneur, No.32/PUU-VIII/2010 regarding the involvement of the community in determining the mining area, No.10/PUU-X/2012 concerning the determination of Mining Area, Business Area Mines and limit total area Mining License.
- 9) Law No. 19 Year 2013 on the Protection and Empowerment of Farmers. Through the Constitutional Court No. 87/PUU-XI/2013 regarding the unconstitutionality of the land lease rights by the Government.

b. Case Law on Water Resources No. 85/ PUU-XI/2013, Regarding Water Privatization

Article 33 (3) Constitution determining the "earth and water and natural resources contained therein shall be

controlled by the state and used for the greatest prosperity of the people". The Constitutional Court has given an explanation of meaning "controlled by the state" and benchmarks "used for the greatest prosperity of the people", the Constitutional Court's decision No. 001-21-22/PUU-I/2003 on the constitutional review of Law No. 20 Year 2001 on Electricity.

The Constitutional Court sharper reinterprets the meaning of "controlled by the state" in the Constitutional Court's decision No. 36/PUU-X/2012, regarding judicial review of Law No. 22 Year 2001 on Oil and Gas, that:

"Ranked first form of state control and the most important is the state directly manages over natural resources, in this case oil and gas, so that the state benefit that is greater than natural resource management. State control in the second rank is state policy making and handling, and function in a third country is a function of regulation and supervision. Throughout the country has a good ability of capital, technology, and management in managing natural resources, the country should choose to do the direct management of natural resources. With direct management, ensured all the results and benefits will go into a state benefit that will indirectly bring more benefit to the people. Direct management is referred to here, either in the form of direct management by the state (state organs) through the State-Owned Enterprises. On the other hand, if the state handed over the management of natural resources to be managed by private companies or other legal entities outside the state, an advantage for the country will be divided so that the benefits for the people will also be reduced. Direct management is the primary purpose of Article 33 Constitution as revealed by Muhammad Hatta, one of the founding leaders of Indonesia argues, "... ideals that are embedded in Article 33 Constitution is the production of the big ones as far as possible carried out by the government with the help of loan capital from outside. If these tactics do not work, should also be given an opportunity to foreign entrepreneurs to invest their capital in Indonesia with the requirements identified by the Government ... If national power and national capital is not sufficient, we borrow foreign workers and foreign capital to accelerate production. If foreign nations are not willing to lend his capital, then given them the opportunity to invest their capital in our country with the conditions determined by the Government of Indonesia itself. The terms of which are determined primarily ensure that our natural resources, such as our forests and soil fertility, must be maintained. That in the development of state and society part of workers and national capital increasingly large, aid workers and foreign capital, following up on one level increasingly less "... (Mohammad Hatta, 2002, *Bung Hatta Menjawab*, PT. Toko Gunung Agung Tbk. Jakarta, p. 202-203. In the opinion of Muhammad Hatta is implied that the provision of opportunity for foreigners because of the condition of state/ government has not been

able to and it is only temporary. Ideally, a country that fully manage natural resources." [19]

Based on the description above, the order of the meaning of "controlled by the state" for the greater prosperity of the people has changed from before, namely: 1) the state take over management, 2) the state makes policy, 3) maintenance, 4) setting, and 5) oversight. While the previous decision, namely the decision of the Constitutional Court No. 001-21-22/PUU-I/2003, the Court describes the meaning of "dominated by the state" as a mandate from the people, that the state must hold: 1) policy (*beleid*), 2) maintenance actions (*bestuursdaad*), 3) settings (*regelendaad*), 4) management (*beheersdaad*), and 5) control (*toezichhoudensdaad*).

The maintenance function (*bestuursdaad*) by the state carried out by the government with the authority to issue and revoke permissions facilities (*vergunning*), licenses (*licentie*), and concession (*concessie*). Functions of state regulation (*regelendaad*) done through legislative authority by the Parliament and the Government, and regulation by the government (executive). Management functions (*beheersdaad*) is done through the mechanism of share ownership (shareholding) and/or through direct involvement in the management of State-Owned Enterprises or Regional-Owned Law Firm as an institutional instrument through which the state cq Government to leverage its control over the sources of wealth were to be used for the greatest prosperity of the people. Similarly, the function of oversight by the state (*toezichhoudensdaad*) carried by the state cq Government in order to supervise and control for the implementation of control by the state over production branch which is important and/or that dominate the life of the people in question, really performed for the overall prosperity of all people [20].

In the above description is not found explanations policy function (*beleid*) undertaken by the government, while Yance Arisona explain the policy functions related to natural resources that governments formulate and establish policies on acquisition, provision, use of land and other natural resources. Policies can also be done by the government with plannings in running the administration of land and other natural resources [5].

In addition to the five forms of rights of state control over natural resources in the above, the Constitutional Court has established four benchmarks, to judge a provision in a law, in accordance with the purpose of state control that is used for the greatest prosperity of the people, in Article 33 (3) Constitution, namely [5]:

- 1) Benefits of natural resources for the people,
- 2) The level of equalization benefits of natural resources for the people,
- 3) The level of popular participation in determining the benefits of natural resources,
- 4) Respect for the rights of the people for generations to exploit natural resources.

Noting the legal considerations in taking a decision in the constitutional review of the law on water resources, the Constitutional Court ruled that the six basic principles of water resources management restrictions. Given that water as one important element in human

life that dominate the life of the people, then the water should be controlled by the state (Article 33 (2) and (3) Constitution). Six basic principles are:

- a) Every concession to water should not interfere, override, let alone negate the people's right to water as earth and water and natural resources contained therein other than to be controlled by the state, as well as the designation is for the greater prosperity of the people.
- b) The state must meet the people's right to water. Access to water is one of the human rights of its own, then the Article 28 (4) Constitution set the "protection, promotion, enforcement and fulfillment of human rights is the responsibility of the state, especially the government."
- c) Should be given the preservation of the environment, as one of human rights. Article 28H (1) Constitution determines, "everyone has the right to live physical and spiritual prosperity, reside, and get a good environment and healthy and receive medical care."
- d) As an important branch of production and dominate the life of a lot to be controlled by the state (Article 33 (2) Constitution), and the water which according to Article 33 (3) Constitution must be controlled by the state and used for the greatest prosperity of the people, the supervision and control by the state over its water absolute.
- e) As a continuation of rights of control by the state, and because water is something very dominate the life of many, the top priority given concession on the water is a state or local government.
- f) After five of these principles are met and that there is still water availability, the Government is still possible to grant permission to private businesses to perform over the water concession with certain conditions and tight.

Interesting what the basic consideration of the Constitutional Court, in assessing the Water Resources of Law has met the six basic principles of water resources management restrictions, namely the implementation of the rules carefully examine the law of water resources. Given law of water resources to know the actual purpose can be known through the rules of procedure. This means that the requirements of constitutionality the law of water resources hung on compliance regulations implementing law of water resources in implementing the Court's interpretation.

As the implementing regulations of Law, government regulation is evidence to suggest that the real intent of the Act being tested its constitutionality before the Constitutional Court. If the intention is apparently contrary to the interpretation given by the Court, it was pointed out that the law in question is contrary to the Constitution. The law of water resources proved that the decree does not reflect a set of six basic principles of the Constitutional Court, the overall the law of water resources otherwise not have binding legal force. Vacancy arrangements regarding water resources, reintroduced Law No. 11 Year 1974 on Water, pending the establishment of a new law that takes into account the Court's decision by the legislators.

Noting the above description, that law of water resources indeed been appropriately categorized as a law contrary to the Constitution, in addition to not meet the six basic principles of water resources management restrictions, the law of water resources also seemed not reflect the four benchmarks used for the greatest prosperity of the people, and also does not implement forms of state control over water resources that should be managed by the government, but is given freedom to the private sector to manage it.

The Court deserves appreciation for its decisions. Constitutional Court's decision should have control in the implementation of the establishment of law, order the establishment of laws attention to the decision of the Constitutional Court, and that the content of the law is not contrary to the purposes and objectives, as well as legal norms contained in Constitution. Control over the implementation of the decision of the Court needs to be done to anticipate the tactics of the government, parliament and law enforcer, to avoid the decision of the Court [5,21,22]. Thus the original purpose of the establishment of the Constitutional Court to keep upholding the implementation of the Constitution can be realized, especially in the "protect all the people of Indonesia and all the land and its territorial integrity that has been struggled for, and to improve public welfare...."

5. CONCLUSIONS

- a. Nine legislation in the field of agrarian resources successfully corrected (constitutional review) by the Constitutional Court (2003-2015), which was declared contrary to the Constitution. This suggests there is a fundamental problem in the legislation in Indonesia. There are several laws that more than once made constitutional review. The legislation did constitutional review, there are some who favor the foreigners, and threatened state sovereignty over agrarian resources.
- b. Basic legal considerations and the opinion of the Constitutional Court in its decision is also experiencing growth. The development was not alone in examining the constitutionality of the provisions in the legislation, but rather provide interpretation of existing provisions in the constitution itself. This interpretation, then used as the test based of law.

6. REKOMENDATIONS

- a. The Constitutional Court through the rulings have played an important role as a pillar in realizing the establishment of the constitution, as well as an institution can be a balancing in the state system, between the authority of the Government and Parliament
- b. The Constitutional Court must be guarded/ watched until the implementation phase of legislation, even if necessary to the implementation stage of the norms that have been decided the Constitutional Court.

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- [7] Definition of judicial review is the notion judicial rights in general by the judicial body (court) on legislation to other legislations that are hierarchical higher.
- [8] Constitutional review is a test of suitability substance of the law against the Constitution made by the Constitutional Court, as mandated by Article 24C The 1945 Constitution of the State of the Republic of Indonesia and Article 10 (1) letter a of Law No. 24 Year 2003 regarding the Constitutional Court.
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- [12] Wignjosoebroto, Soetandyo, sorting two types of legal studies based on five concepts of law. Doctrinal legal research is the study of law conceived as: (1) the principle of fairness in the system obey moral doctrine of the flow of natural law; (2) the law as a rule of law follow the doctrine of the flow of positivism in jurisprudence; and (3) the law as a judge's ruling in concreto follow the doctrine of functionalism realists in the science of law. Meanwhile, non-doctrinal legal research is the study of law conceived as (4) patterns of human behavior in society or as an objective social institutions (macro approach to structural-functional theory); and (5) the law as a symbolic meaning that is revealed in human interactive behavior.
- [13] Wignyosoebroto, Soetandyo, *Hukum Paradigma, Metode dan Dinamika Masalahnya*, Lembaga Studi dan Advokasi Masyarakat (ELSAM), Jakarta. p. 160-169 (2002).
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- [19] Constitutional Court Decision No. 36/PUU-X/2012, p. 101-102.
- [20] Constitutional Court Decision No. 001-21-22/PUU-I/2003, p. 334.
- [21] At the practical level, it is evident that the decision of the Constitutional Court by the government and parliament responded by giving birth to a new terminology which give a different impression, although in essence the same as what has been canceled by the Constitutional Court, or things that never canceled by the Constitutional Court, raised again in the material charge other legislation. For example unblinding system in the Electricity Law, the definition of forest area in the Prevention and Eradication of forest destruction, and permits Honorary Council in Law Notary.
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