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3rd ImCoSS

THE THIRD INTERNATIONAL MULTIDISCIPLINARY
CONFERENCE ON SOCIAL SCIENCES

5 - 7 JUNE 2015

BANDAR LAMPUNG UNIVERSITY
INDONESIA

PROCEEDINGS

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- Faculty of Teacher Training and Education
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3rd IMCoSS 2015

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

5, 6 June 2015
Bandar Lampung University (UBL)
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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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FROM STATE SOVEREIGNTY TO PEOPLE SOVEREIGNTY: THE DEVELOPMENT OF STATE CONTROL DOCTRINE IN INDONESIA CONSTITUTIONAL COURT DECISION

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ABSTRACT - *State Control Doctrine in Indonesia has no restriction criteria. The high of rights granted by the constitution to make the state the power to the state's enormous power in respect of Article 33 of the Constitution of 1945. The absence of this restriction criteria led to the state capable of acting arbitrarily, it is at the reflection of the enactment of state sovereignty. Democracy continues to grow until delivery of the Constitutional Court. Through the decisions of the Constitutional Court this is slowly becoming a limiting criterion State Control Doctrine in Indonesia. Former power in the hands of the state slowly began to shift into the hands of the public. By analyzing the decision of the Constitutional Court will be able to describe the shift towards state sovereignty to people sovereignty.*

keywords: State Control Doctrine, Sovereignty, Constitutional Court Decision

1. INTRODUCTION

The Earth and water and natural resources contained therein shall be controlled by the state and used for the greatest prosperity of the people.[1] Act of 1945, Section 33 which is the legal basis of state control in Indonesia. The state has the constitutional State Control Doctrine the branches are vital for the people of Indonesia, i.e. 1) the Earth (land), 2) water, and 3) other natural resources (crude oil) in use for the maximum benefit of the people. State control over the branches has become a vital issue for Indonesia considering that to date there has been no clear criteria that describe the constraints that are owned by the State of Article 33 of the 1945 Constitution.

Matters relating to the rights of control of a very important state and occupy a central position, as the position of property rights in the civil law system, is not regulated by law . As a result the boundaries, content and scope of the State Control Doctrine becomes less clear. Is the State Control Doctrine implementation beyond the boundary or is not clear.[2]

The role of the state is so strong on the people will lead to two things that the source of the error, i.e.: [3]

1. The assumption that the state is an institution that has a legitimate powers to impose their will on the citizens or society groups. If necessary the state may use physical violence in an attempt to demand physical propriety in demanding compliance effort on policies issued.
2. The assumption that the state is the institutionalization of public interest. Thus, the state can impose its will against the interests of individuals or groups in society that are smaller in number.

The potential for corruption in the two ideas above are enormous. The state will put itself as a highly sacred and untouched by the obligation to be responsible before the law and the people. In addition, the variety of potential criticism very easily seen as part of the resistance of oppressed groups who generally are few.[4]

The State Control Doctrine (HMN) is the Right that the highest levels of the organization controlled by the state as a whole power of the people. Mastery of countries that do not have restrictions or criteria raises a presumption that such power will be concentrated in the hands of the state, which creates an enormous power which is owned by the state that would lead to the state sovereignty.

Muhammad Yamin, the state control in the production branches which are important for the state and who dominate the life of the people. According to him, the meaning of the word controlled, included into the definition of regulating and / or in organizing primarily to repair and enhance production with emphasis on cooperative building. It is also in accordance with the principle that the production is done by all under the leadership or ownership of society members.[5]

That view is disputed by Mohammad Hatta, Hatta said State does not have to directly participate in managing and organizing branches of production, but it can be left to the cooperatives and private enterprises.

The State Control Doctrine that belongs to the state as an organization of power from Indonesia to the highest level:

1. Arranging and conducting, use, supply, and maintenance.
2. Determine and set up the rights to possess over (part of) the earth, water and air space was.
3. Determine and regulate legal relations between the people and the legal acts concerning the earth, water and space.

Implementation of State Control Doctrine can be controlled by the autonomous regions and communities customary law, merely required and not contrary to the national interest under the terms of government regulations State Control Doctrine the state under Article 33 of the Constitution of 1945 is divided into three parts, namely:

1. Earth (Land): Consists of the field of Land and Natural Ingredients that is in the earth.
2. Water, and

3. Other natural assets

The State Control Doctrine as a form of perlimpahan right of the people will never be clear during the State of the Republic of Indonesia unity is still exist as an independent and sovereign state.[6]

2. MATERIALS AND METHOD

This paper will use the methods of data analysis in the form of a decision of the Constitutional Court will be able to describe the shift of state sovereignty to people Sovereignty. The Approach to the problem which is used to address the problem is to use the approach of case study is reviewing the decision of the Court with regard to the State's rights. Decision have been obtained will be analyzed by using a legal interpretation and construction. [7] By doing legal interpretation, legal interpretation will be done through legal discovery (rechtsvinding). Then, the construction of the law through legal arguments a *contrario*[8] will answer legal issues. Thus, the method of the invention of the law has generated legal argument that can address issues of law through legal reasoning logically and systematically. And at the end of this article will be able to show that Indonesia has experienced a shift of state sovereignty to people sovereignty in the field of State Control Doctrine.

3. RESULTS/DISCUSSION

3.1. THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA. [9]

The success of the 1945 amendment by the Assembly provides a logical consequence of the formation of new government institutions as well as regulate in detail the relationship limits of authority and power of government institutions such as the constitutional mandate. The formation of the new government institutions to ensure the sustainability of democracy in a constitutional government, one of which is the Constitutional Court (MK). [10]

"This idea is the development of the principles of democracy where people's political rights and human rights is a basic theme in the thinking of politics. The basic rights are constitutionally guaranteed in a constitutional rights of citizens and institutionally realized through the state agency that protects the constitutional rights of every citizen".

The Constitutional Court as part of the judicial control, base its judgment on the principles and values contained in the Constitution, as the basic norm (*grundnorm*) at the top of the hierarchy. It has an important role in the efforts to uphold the Constitution and the Supremacy of law in accordance with its competence and jurisdiction. Its main function in to adjudicate constitutional cases in the framework of guarding the Constitution. So that it will be implemented responsibly according to the will of the people and ideals of democracy. Its existence is also expected to be able to safeguard a stable administration of government in the state.

Pursuant to Article 24C of the 1945 Constitution, the Constitutional Court has four authorities, namely:

1. Conduct judicial review to ensure that laws are in compliance with the Constitution;
2. Make decisions in disputes related to the authority of state agencies the authority of which bestowed by the Constitution;
3. Make decisions on the dissolution of political parties; and
4. Resolve disputes related to the results of general elections.

Under the constitutional context, the Constitutional Court construed as a guardian of the constitution and interpreter of the Constitution. [11] As the guardian of the constitution, the Constitutional Court justice constitutional function in public life. Constitutional court tasked to encourage and ensure that the constitution is respected and implemented by all components of the state consistently and responsibly. [12] In addition, the Court also serves as the official interpreter of the constitution 1945 that spirit is always alive and coloring sustainability of the state and society. [13]

The Constitutional Court aims to maintain the existence of constitutionality of state administration. In other words, is the constitutionality of the suitability of all aspects of the organization of the state based on the basic rules that become the substance of the constitution. The basic rule that became the substance of 1945 constitution is implemented in the form of legislation as the basis and framework of state administration.

So that, with the enactment of provisions in the 1945 Constitution, the Constitutional Court has some authority as namely, [14] 1). Conduct judicial review to ensure that laws are in compliance with the Constitution; 2) Make decisions in disputes related to the authority of state agencies the authority of which bestowed by the Constitution; 3) Make decisions on the dissolution of political parties; and 4) Resolve disputes related to the results of general elections.

Aside from the authority of the Constitutional Court mentioned above, the Constitutional Court also carry out other functions which the Court also serves as a the protector of human rights and the protector of citizen's constitutional rights. [15]

3.2. CONSTITUTIONAL COURT DECISION

The main function of the establishment of the Constitutional Court is judicial review (Conduct judicial review to ensure that laws are in compliance with the Constitution). Some of the Constitutional Court decisions related to the testing of several acts 1945 related to the power of the State Control Doctrine, including: the Forestry Law, Electricity, and minerals, and others.

1. The Constitutional Court Decision No. 32 / PUU-VIII / 2010 on Law No. 4 of 2009 on Mineral and Coal of the Act of 1945 constitution

The Petition for Judicial Review of Law No. 4 of 2009 on Mineral and Coal Mining of the Act of 1945 filed by the Indonesian Forum for Environment (WALHI), Association of Legal Aid and Human Rights of Indonesia (PBHI), Foundation for Agrarian Reform Consortium (KPA), Coalition for Fishery Justice

(KIARA), and others are recorded in the book Constitutional Case Registration on Wednesday, May 12, 2010 with the Number 32 / PUU-VIII / 2010. Judicial review \ the Article 6 paragraph (1) letter e *juncto* Pasal 9 paragraph (2) in conjunction with Article 10 paragraph b, Article 162 *juncto* Pasal 136 paragraph (2) of Law No. 4 of 2009 on Mineral and Coal Mining (State Gazette of the Republic of Indonesia Year 2009 Number 4, additional of State Gazette of the Republic of Indonesia Number 4959).

The ruling of the Constitutional court to such a request is granted the petition for the most part. The Constitutional Court only accepts a petition for Article 10, paragraph b. The phrase in Article 10 letter b "... considering the views of ... society ..." Act No. 4 of 2009 on Mineral and Coal Mining (State Gazette of the Republic of Indonesia Year 2009 Number 4, additional of State Gazette of the Republic of Indonesia Number 4959) conditionally contrary to Law Constitution of the Republic of Indonesia Year 1945 and stating that Article 10 letter b does not have binding legal force. Throughout not be interpreted, **"shall protect, respect and fulfill the interests of the society and its land area will be incorporated into the mining regions and communities that will be affected"**

Based on the Constitutional Court Decision No. 32 /PUU-VII / 2010 on Law No. 4 of 2009 on Mineral and Coal Mining of the Act of 1945 that provides for the obligation of the state to protect, respect and fulfill the interests of the society and its land area will be incorporated into the mining regions and communities that will be affected. The ruling illustrates the shift in the State's sovereignty previously only states "... the opinions ... society ..." in accordance with Article 10, paragraph b of Law No. 4 of 2009 through this decision the state has an obligation to protect, respect and fulfill the interests of the society as well as the land area hers will be incorporated into the mining regions and communities that will be affected.

2. Constitutional Court Decision No. 35 / PUU-X / 2012 On Law Number 41 Year 1999 On Forestry Of The Act Of 1945 Constitution

The petition of judicial review the Law Number 41 Year 1999 On Forestry of the Act of 1945 were filed by the Alliance Of Indigenous People Of The Archipelago (AMAN), The Unity Of An Indigenous People At Kenegerian Kuntu, The Unity Of An Indigenous People At Kasepuhan Csitu, which is recorded on the book of constitutional case register on april 2, 2012 with no. 35 / PUU-X / 2012. The points that were requested for the judicial review article 1 paragraph 6, of article 4 paragraph (3), article 5 and article 67 of the forestry law State Gazette of the Republic of Indonesia Year 1999 Number 167, additional of State Gazette of the Republic of Indonesia Number 3888).

The ruling of the Constitutional court to such a request is granted of the petition for the half of part . The Constitutional Court only accepts a request of the petition for article 1 paragraph 6 of article 4 paragraph (3), and article 5.

The first, the word *state* in article 1 point 6 the Law Number 41 Year 1999 On Forestry (State Gazette of the Republic of Indonesia Year 1999 Number 167, additional of State Gazette of the Republic of Indonesia Number 3888). Contradictory with Constitution Of Republic Of Indonesia in the and does not have of the binding force, so that article 1, item 6 the number of the law. 41 of 1999 about forestry it means that to be "an indigenous **“forest is a forest that is in the area of an indigenous communities”**

The second, Article 4 Paragraph (3) contrary with Constitution Of Republic Of Indonesia in the and does not have of the legal binding force to the extent without the meaning **"by the state forest tenure taking into account the rights of an indigenous people, all of the still alive and in accordance with the development of society and the principles of Unitary Republic Of Indonesia as regulated in law.**

The third, article 5 (1) contrary With Constitution Republic Of Indonesia and does not have of the legal binding force to the extent without the meaning **"the state's forest that referred in paragraph (1) letter a, not including an indigenous forests"**.

Article 5 (2) and (3) contrary with constitution of Republic Of Indonesia Constitution and does not have of the legal binding force.

The Constitutional Court decision the number of. 35/PUU-X / 2012 on the law of the number 41 in year 1999 on forestry of the act of 1945 has been a shift reinforces state sovereignty to people sovereignty in the field of State Control Doctrine. Based on this ruling, the word *state* in an Article 1 Of Law No. 41 Of 1999 On Forestry that was cleaned to be **"an indigenous forest is a forest that is in the area of an indigenous people.** And an article 4 paragraph (3) "the authority of the forest by the constant of the state to pay attention of the rights of an indigenous people, all of the still alive and in accordance with the development of society and the principles of The Unitary Republic Of Indonesia as regulated in law. Before, there was this decision, the forest was purposed without the recognition of indigenous forest. Only, after the verdict gives strength that an indigenous forests apart from the state's forest as a form of people sovereignty.

3. The constitutional court decision no. 85 / puu-xi / 2013 on judicial review the number. 7 of 2004 on Water Resources of the act of 1945

The petition of judicial review the No. 7 of 2004 on Water Resources were filed by the Muhammadiyah, Jami'yatul Washliyah, Solidarity Spokesman Parking, Vanaprastha Association and others are recorded on the book of constitutional case register on october 16th 2013 for requested judicial review of the number. 7 of 2004 on Water Resources (State Gazette of the Republic of Indonesia Year 2004 Number 32, additional of State Gazette of the Republic of Indonesia Number 4377).

The ruling of the Constitutional court to the mentioned of request is granted of the petition for its entirety act no. 7 of 2004 on Water Resources (State Gazette of the Republic of Indonesia Year 2004 Number 32, additional of State Gazette of the Republic of Indonesia

Number 4377) contradictory to the Constitution Of The Republic Of Indonesia of 1945 and does not have of the legal binding.

The law of the number . 11 of 1974 about irrigation (State Gazette of the Republic of Indonesia Year 1974 Number 65, additional of State Gazette of the Republic of Indonesia Number 3046) reenact replaces the law of the number 7 in of 2004 on Water Resources.

The Water Resources law in practice has been interpreted differently from consideration in the decision no. 058-059-060-06 /PUU-II/2004 and no. 008/PUU-III/2005. Court needs to affirm that in Indonesia meaning that earth and water and natural resources contained therein shall be controlled by the state and used for the greatest prosperity of the people mandated that in the view of the founders of the nation, particularly the framers of the 1945 constitution, water is one very important element and fundamental in life and human life or dominate the life of the people. As one of an important element in human life that dominate the lives of many people, the water should be controlled by the state of article 33 paragraph (2) and (3) of the 1945 constitution.

Based on these considerations, the utilization of water there must be very strict restrictions in an effort to preserve and sustainability.

As there are restrictions on the power of the state water resources, including:

The first is that every concession on the 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. *The second* is that the state must meet the people's right to water. As considered above, access to water is one of the human rights of its own then the article 28 paragraph (4) determine, "protection, promotion, enforcement and fulfillment of human rights is the responsibility of the state, especially the government." *the third*, it must be given the environmental sustainability life, because as one of human rights, article 28h paragraph (1) of the 1945 constitution determines, "everyone has the right to live physical and spiritual prosperity, reside, and get a good environment and healthy and receive medical care." *the fourth*, that as an important branch of production and dominate the life of a lot to be controlled by the state of article 33 paragraph (2) of the 1945 constitution and the water which according to article 33 paragraph (3) of the 1945 constitution should be controlled by the state and used for the greatest prosperity of the people then supervision and control by the state over its water absolute. *The fifth*, a continuation rights of control by the state, and because water is something very dominate the life of a lot of the top priority given to water exploitation is the state owned enterprises or regional-owned enterprises.

The constitutional court decision No. 85/PUU-XI/2013 on judicial review no. 7 of 2004 on Water Resources of the constitution of 1945 stated act no. 7 of 2004 on Water Resources contrary to the constitution of 1945.

To fill the legal vacuum in the field of the law no. 11 of 1974 about Irrigation reinstated.

The Act no. 7 of 2004 on Water Resources by the decision gives enormous power to the private sector manage water resources Indonesia. This is considered contrary to the constitution of 1945.

4. CONCLUSION

The constitutional court decision is used as a fortress of limiting the application of State Control Doctrine in accordance with an article 33 of the constitution of 1945 in Indonesia. Through these decisions have described the shift in state sovereignty to people sovereignty. The powers that previously were in the lap state has been switched to the hands of the public as a form of people sovereignty.

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