

CONSTITUTIONAL COURT DECLARES THE WATER RESOURCES LAW NULL AND VOID

On 18 February 2015, the Constitutional Court handed down its ruling No. 85/PUU-XI/2013, declaring Law No. 7 of 2004 on Water Resources ("**Water Resources Law**") null and void. The panel of judges declared that implementing regulations derived from the Water Resources Law contravened the Constitution, under which access to water is a basic right and the state must control and regulate water resources. The ruling also reinstated the previous 1974 Water Law until a new law is enacted.

Actually, this is not the first time the Water Resources Law has been reviewed by the Constitutional Court. Ten years ago, shortly after the entry into force of the Water Resources Law, five petitioners (individuals and non-governmental organizations) filed a suit challenging the constitutionality of the Water Resources Law on various procedural and substantive grounds. On all counts, the petitioners' claims were ultimately rejected, but the Constitutional Court declared the Water Resources Law only "conditionally constitutional". The Constitutional Court explained that the term "conditional" meant that the Water Resources Law must be applied in accordance with the Constitution, so it will not be subject to any more challenges in the future. In other words, the Water Resources Law could be invalidated sometime in the future if the implementing regulation contradicted the Constitution.

In its ruling, the Constitutional Court first confirmed that state control over water is the essence of the Water Resources Law and must meet the following criteria:

1. No measure on the use of water may waive or neglect the people's rights over water, as the resource is to be used for the greater good of the people;
2. The state must respect the people's right over water;
3. The use of water must take into account the preservation of the environment;
4. The state must have the authority to oversee and control water;
5. The state must prioritize the use of water by state and region owned enterprises; and
6. If all the criteria in 1. to 5. above are met and water is still available, private entities may be granted the right to use water, but with strict requirements.

According to the Constitutional Court, the implementing regulations for the Water Resources Law do not meet the above criteria as required under the Constitution. For example, Article 40 (2) of the Water Resources Law states that central and regional governments are responsible for organizing the Drinking Water Supply System (SPAM). However, Government Regulation No. 16 of 2005 on The Development of Drinking Water Supply Systems expressly states that the organizing authorities for SPAM are state/region owned enterprises, cooperatives, private entities, and social groups. Given the above considerations, the Constitutional Court declared the Water Resources Law, as the source of the implementing regulations, null and void.

The reinstatement of the previous 1974 Water Law changes the basic concept of state control over water. The Water Resources Law draws a distinction between the right to use water for daily basic needs and for irrigation by agricultural smallholders, on the one hand, and the right to use water for commercial purposes on the other. The right to use water for commercial purposes (*hak guna usaha air*) requires a permit from the Central Government (through the Ministry of Public Works) or regional (i.e., provincial or local) government under the Water Resources Law. In contrast, the 1974 Water Law does not divide state control over water resources into any derivative rights. In fact, the authority to exercise control over water can only be delegated to central and regional governments, or other specific incorporated entities.

This ruling has created confusion among bottling and water management companies. Although it is uncertain that bottled water companies are now operating illegally, the ruling will change how such firms operate. However, The Investment Coordinating Board (BKPM) has vowed to protect water-related companies and allow them to continue operations, despite the Constitutional Court ruling. It is expected that the Government will soon issue follow-up rules to ensure the continuity of investment in the water resources sector.