Authorized Indonesian-English Translation

**DECISION**
**Number 85/PUU-XI/2013**

**FOR THE SAKE OF JUSTICE BASED ON**
**THE BELIEF IN THE ONE AND ONLY GOD**
**THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA**

[1.1] Adjudicating the constitutional case at the first and final instance, handed its decision in the petition for the review of the Law Number 7 of 2004 regarding Water Resources against the Constitution of the State of the Republic of Indonesia of 1945, petitioned by:

[1.2]
1. **The Central Leadership of Muhammadiyah,** domiciled in Jalan Cik Di Tiro Number 23 Yogyakarta and Jalan Menteng Raya Number 62 Jakarta Pusat (Central Jakarta), represented by the General Chairperson of the Central Leadership (*Pengurus Pusat*, PP) of Muhammadiyah namely **Prof. Dr. H.M. Din Syamsuddin, M.A.**, being **the Petitioner I;**
2. **Al Jami'yatul Washliyah,** as represented by the Chairperson of Al Jami'yatul Washliyah named **Drs. HA. Aris Banadji**, being **the Petitioner II;**
3. **Solidaritas Juru Parkir, Pedagang Kaki Lima, Pengusaha, dan Karyawan** (Solidarity of Parkers, Street Vendors, Entrepreneurs, and Employees, **SOJUPEK**), domiciled in Jalan Gadjah Mada Number 16B Jakarta Pusat (Central Jakarta), represented by the Coordinator of SOJUPEK named **Lieus Sungkharisma**, being **the Petitioner III;**
4. **Perkumpulan Vanaprastha** (the Vanaprastha Association)**,** domiciled in Jalan Setiabudi II Number 54, Setiabudi, Jakarta Pusat (Central Jakarta), represented by the General Chairperson of the Perkumpulan Vanaprastha named **Gembong Tawangalun**, being **the Petitioner IV**;
5. Name : **Drs. H. Amidhan**;
   Citizenship : Indonesia;
   Address : Komplek Departemen Agama Number 26 Kedaung, Kali Angke, Cengkareng, Jakarta Barat (West Jakarta);
   being **the Petitioner V**;
6. Name : **Marwan Batubara**;
   Citizenship : Indonesia;
   Occupation : Entrepreneur;
   Address : Jalan Depsos I Number 21, RT 001, Bintaro, Pesanggrahan, Jakarta Selatan (South Jakarta);
   being **the Petitioner VI**;
7. Name : **Adhyaksa Dault**;
   Citizenship : Indonesia;

Occupation : Attorney of Law;
Address : Pengadegan Selatan Number 10, RT 002/005, Pancoran, Jakarta Selatan (South Jakarta);
being **the Petitioner VII**;

8. Name : **Laode Ida**;
Citizenship : Indonesia;
Occupation : Member of the Regional Representative Council (*Dewan Perwakilan Daerah*, DPD) of the Republic of Indonesia;
Address : Jalan Batas Barat III Number 58, RT 006/RW 003, Kalisari, Pasar Rebo, Jakarta Timur (East Jakarta);
being **the Petitioner VIII**;
9. Name : **M. Hatta Taliwang**;
Citizenship : Indonesia;
Occupation : Retired;
Residence : Jalan Boko III Number 38 RT 003/RW 008, Metong, Cimahi Selatan (South Cimahi);
being **the Petitioner IX**;
10. Name : **Rachmawati Soekarnoputri**;
Citizenship : Indonesia;
Occupation : Housewife;
Address : Jalan Cilandak Number 5/10, RT/RW 002/003, Cilandak Barat, Cilandak;
being **the Petitioner X**;
11. Name : **Drs. Fahmi Idris, M.H.**;
Citizenship : Indonesia;
Address : Jalan Mampang Prapatan IV Number 20, RT 015/RW 002 Tegal Parang, Mampang Prapatan, Jakarta Selatan (South Jakarta);
being **the Petitioner XI**;

In this matter based on a Special Power of Attorney dated 19 September 2013 granted a power of attorney with the right of substitution to **i) Dr. Syaiful Bakhri, S.H., M.H.; ii) Noor Ansyari, S.H.; iii) Ibnu Sina Chandranegara, S.H., M.H.; iv) Bachtiar, S.H.; and v) Andy Wiyanto, S.H., namely** advocates and public defenders joined in the Team of the Tribunal of Law and Human Rights (*Tim Majelis Hukum dan Hak Asasi Manusia*) of the Central Leadership of Muhammadiyah, domiciled in Jalan Menteng Raya Number 62, Jakarta Pusat (Central Jakarta), either severally or jointly acting for and on behalf of the grantor of the power of attorney;

Hereinafter the names of the aforementioned grantee of power of attorney based on a Substitute Power of Attorney dated 28 October 2013 granted a power of attorney to **i) Dr. Trisno Rahardjo, S.H., M.Hum.; ii) Muhammad Najih, S.H., M.Hum.; iii) Umar Husin, S.H., M.H.; iv) Saptono Hariadi, S.H.; and v) Jamil Burhan, S.H.**, namely advocates joined in the Team of the Tribunal of Law and Human Rights of the Central Leadership of Muhammadiyah, domiciled in Jalan Menteng Raya Number 62A, Jakarta Pusat (Central Jakarta), either severally or jointly acting for and on behalf of the grantor of the power of attorney;

Hereinafter referred to as **the Petitioners**;

[1.3] Having read the petition of the Petitioners;
Having heard the testimony of the Petitioners;
Having heard and read the testimony of the President;

Having heard and read the testimony of the People's Representative Council (*Dewan Perwakilan Rakyat*);

Having heard and read the testimony of the National Council of Water Resources (*Dewan Sumber Daya Air Nasional*);

Having heard the testimony of the experts of the Petitioners and the President as well as the witness of the President;

Having examined the evidences of the Petitioners and the President;

Having read the conclusion of the Petitioners and the President;

## 2. STATE OF THE CASE

[2.1] Considering whereas the Petitioners have filed a petition dated 23 September 2013 received at the Office of the Clerk of the Constitutional Court (*Kepaniteraan Mahkamah Konstitusi*, hereinafter referred to as the Office of the Clerk of the Court) on the date of 23 September 2013 based on the Deed of Receipt of Dossier of the Case Number 478/PAN.MK/2013 and which has been registered in the Book of Registry of Constitutional Cases under Number 85/PUU-XI/2013 on the date of 16 October 2013, which has been corrected by the petition dated 11 November 2013 received at the Office of the Clerk of the Court on the date of 12 November 2013, substantially describing the following matters:

### I. Authority of the Court

1. Whereas Indonesia has made a new history by shaping a modern state system, one whereof is the Constitutional Court. Being one actor of the judicial power, the Constitutional Court is expected to be able to uphold the constitution and the principle of a State based on law in accordance with the authority granted. The Constitutional Court hall also be able to render checks and balances among state institutions and settle constitutional disputes, to make sure that the basic law inherent in the Constitution of 1945 remain safeguarded;

2. Whereas in accordance with its tasks and authorities as set out in Article 24C section (1) and section (2) of the Constitution of 1945, the Constitutional Court has 4 (four) authorities, and 1 (one) obligation namely:
   1. to review a Law against the Constitution;
   2. to decide on dispute of authorities of state institutions whose authorities are granted by the Constitution;
   3. to decide on the dissolution of a political party and
   4. to decide on disputes regarding the result of a general election.
   5. is obliged to render decision on the opinion of the People's Representative Council regarding an alleged violation committed by the President and/or the Vice President according to the Constitution.
3. Whereas the authority granted to the Constitutional Court became subsequently strengthened by Article 10 section (1) of the Law Number 24 of 2003 regarding the Constitutional Court (hereinafter referred to as the Law on the Constitutional Court) that reads: "the Constitutional Court has the authority to adjudicate at the first and final instance, the decision of which is final:
   a. to review a Law against the Constitution of the State of the Republic of Indonesia of 1945;
   b. to decide on disputes of authorities of State institutions whose authorities are granted by the Constitution of the State of the Republic of Indonesia of 1945;
   c. to decide on the dissolution of a political party; and
   d. to decide on disputes regarding the result of a general election.
   e. is obliged to render decision on the opinion of the People's Representative Council regarding an alleged violation committed by the President and/or the Vice President according to the Constitution.

4. Whereas the Petitioners in this matter have petitioned for the constitutional review of the Correction of the Petition for the Review of Article 6, Article 7, Article 8, Article 9, Article 10, Article 26, Article 29 section (2) and section (5), Article 45, Article 46, Article 48 section (1), Article 49 section (1), Article 80, Article 91, and Article 92 section (1), section (2) and section (3) of the Law Number 7 of 2004 regarding Water Resources against the Constitution of the State of the Republic of Indonesia of 1945 before the Constitutional Court, based on its authorities as stipulated in Article 24C of the Constitution of 1945 in conjunction with Article 10 section (1) of the Law Number 24 of 2003 in conjunction with the Law Number 8 of 2011 in conjunction with the Government Regulation in Lieu of a Law (*Perpu*) Number 1 of 2013;
5. Whereas the authority of the Constitutional Court to adjudicate on the petition for the review of a Law against the Constitution of 1945 is in accordance with prevailing provisions, then the Petitioner petitioned to the Tribunal of the Constitutional Court to stipulate the authorities of the Constitutional Court to adjudicate on the petition of the Petitioner;

## II. Legal Standing of the Petitioner

1. Whereas the Petitioner I up to IV are Petitioners qualified as Private Legal Entities as referred to in Article 51 section (1) letter c of the Law Number 24 of 2003 regarding the Constitutional Court. Moreover, the Petitioner V, the Petitioner VI, the Petitioner VII, the Petitioner VIII, the Petitioner IX, the Petitioner X, and the Petitioner XI Petitioners qualified as private persons as referred to in Article 51 section (1) letter c of the Law Number 24 of 2003;
2. Whereas the Petitioner I is the *Persyarikatan Muhammadiyah* (Muhammadiyah Association) established in Yogyakarta on the date of 8 Dzulhijjah 1330 Hijriyah coinciding with the date of 18 November 1912 Miladiyah, having the Identity of Islamic Movement (*Identitas Gerakan Islam*) and *Da'wah Amar Ma'ruf Nahi munkar*, based on the principles of Islam, and having its source in *Al-Qur'an* and *As-Sunnah*, with the aim of upholding and to revere the Religion of Islam so as to actualize the true Islam society, so that with the base of being a Legal Entity, the Identity and the Aim of the *Persyarikatan Muhammadiyah* have subsequently established various charity endeavors in the field of education, economy, social, health, being the embodiment of the Legal Entity, the Identity and the Aim of the aforesaid *Persyarikatan Muhammadiyah*;
3. Whereas the *Persyarikatan Muhammadiyah* being a Legal Entity having the form of an association and/or *Persyarikatan* which has obtained its first recognition from the Government of the Netherlands India as it appeared in the *Gouvernement Besluit* (Government Decree) Number 81 dated 22 August 1914 in conjunction with the *Gouvernement Besluit* Number 40 dated 16 August 1920 in conjunction with the *Gouvernement Besluit* Number 36 dated 2 September 192, subsequently stipulated as a *Rechtspersoonlijkheid van Verenigingen* (Legal Personality of Associations, K.B.van 28 Maart Stb.70-64 ars : 5a (Ingev stb. 33-80);
4. Whereas being a legal entity having the form of an association and/or *persyarikatan*, Muhammadiyah has activities in various fields of social life recognized and stipulated by the Indonesian Government like:
   a. The Religious Field as stated in a statement letter of the Minister of Religious Affairs Number 1 of 1971, dated 9 September 1971;
   b. The Field of Education and Teaching as stated in a Statement Letter of the Minister of Education and Culture Number 23628/MPK/74, dated 24 July 1974;
   c. The Field of Health including activities in the field of Hospitals, Polyclinics and others as stated in a statement letter of the Minister Health Number 155/Yan.Med/Um/1998, dated 22 February 1988;

5. Whereas being a private legal entity having gained the recognition from the Government as above mentioned, the Association and/or the *Persyarikatan Muhammadiyah* conducting activities in the field of religious affairs/propagating (*dakwah*) and social affairs, education and teaching as well as health, an Amendment

to its Articles of Association has been made, which Amendment has obtained the Approval of the Ministry of Law and Human Rights Number AHU-88.AH.01.07. of 2010 dated 23 June 2010 regarding the Amendment to the Articles of Association of the *Persyarikatan Muhammadiyah*;

6. Whereas based on the above description, the petition of the Petitioners being Private Legal Entities has complied with the requirement of the provisions in Article 51 section (1) of the Law on the Constitutional Court, that reads: "the Petitioner is a Party deeming its constitutional rights and/or authorities harmed by the validity of a Law namely:
   a. Indonesian individual citizens;
   b. unities of the *adat* law societies to the extent that they are still alive and are in accordance with the development of the public and the principle of the Unitary State of the Republic of Indonesia as is regulated in Laws;
   c. public or private legal entities; or
   d. state institutions."
7. Whereas other than the provision of Article 51 section (1) of the Law on the Constitutional Court Article 3 of the Decree of the Constitutional Court Number 06/PMK/2005 regarding the Guidelines of Proceedings in the Review of Laws regarding the Position of the Law also requires as follows, "the Petitioner in a review of a Law against the Constitution of 1945 shall be:
   a) Indonesian individual citizens or groups of people sharing the same interests;
   b) unities of the *adat* law societies to the extent that they are still alive and are in accordance with the development of the public and the principle of the Unitary State of the Republic of Indonesia as is regulated in Laws;
   c) public or private legal entity;
   d) state institutions.
8. Whereas therefore the requirement for the petition of the Petitioners has complied with in this petition, while for the constitutional rights according to the Elucidation to Article 51 section (1) shall be rights granted by the Constitution of 1945, the Jurisprudence of the Constitutional Court in its Decision Number 006/PUU-III/2005 and its further Decisions, rendered an interpretation against Article 51 section (1) of the Law on the Constitutional Court related to the constitutional right. The Jurisprudence elucidated as follows:
   a. there shall be constitutional rights and/or authorities of the Petitioners granted by the Constitution of 1945;
   b. the Petitioners deem the aforesaid constitutional rights and/or authorities to have been harmed by the validity a Law;
   c. the aforesaid loss of constitutional rights and/or authorities is of specific and actual nature, or at least is of potential nature which according to common sense can be ascertained that it will happen;
   d. there is a causal relationship (*causal verband*) between the loss of constitutional rights and/or authorities with the Laws petitioned for review;
   e. there is the possibility that by the granting of the petition, the loss of the aforementioned constitutional rights and/or authorities will not or does no longer occur.
9. Whereas based on the review of Laws related to the case Number 36/PUU-X/2012, the Court has rendered legal standing to the Petitioners in petitioning for a review of the constitutionality of a Law, either on the direct and/or indirect interest of the Petitioners.
10. Whereas based on the description as above mentioned, it becomes clear that the Petitioners possess the quality and constitutional interest in the review of the Law as such (as such (*a quo*)).
11. Whereas the Petitioners are private persons granted by the Constitution of 1945 with Constitutional Rights among others but not limited to:
    a. Article 28D section (1) of the Constitution of 1945: *"Every person shall be entitled to recognition, guaranty, protection, and equitable legal certainty as well as equal treatment before the law*";

b. Article 28C section (2) of the Constitution of 1945: "*Every person shall be entitled for self-advancement in the struggle of his/her rights collectively in order to develop the society, the nation, and his/her country.*"

12. Whereas other than the above mentioned Article 28D section (1), the Petitioners possess also other Constitutional Rights as referred to in:
    a. Article 18B section (2) of the Constitution of 1945: "*The State shall recognize and respect entities of the adat law societies along with their traditional right to the extent they still exist and are in accordance with the development of the public and the principle of the Unitary State of the Republic of Indonesia.*"
    b. Article 28H section (1) of the Constitution of 1945:"*Every person is entitled to live prosperous physically and spiritually, to have a place to reside, and to acquire a good and healthy living environment as well as be entitled to obtain health care.*"
    c. Article 28I section (4) of the Constitution of 1945:"*The protection, advancement, enforcement and fulfillment of human rights shall be the responsibility of the state, particularly the government.*"
    d. Article 33 section (2) and section (3) of the Constitution of 1945, "*(2) Production sectors important for the state and vital for the livelihood of the people at large shall be controlled by the state; (3) of the land and waters and the natural wealth contained in it shall be controlled by the state and be utilized for the optimal welfare of the people.*"
13. Whereas the Constitutional rights of the Petitioners have been harmed due to the validity of:
    *a.* Article 6 of the Law as such (*a quo*)
    Section (1) *"Water resources shall be controlled by the state and be utilized for the optimal welfare of the people."*
    Section (2) *"The domination over water resources as referred to in section (1) shall be conducted by the Government and/or the regional governments by retaining recognition of the ulayat rights of the local adat law community and the rights resembling thereto, to the extent not contrary to national interests and the laws and regulations."*

    Section (3) *"The ulayat right of the* adat *law community over water resources as referred to in section (2) remain recognized to the extent they still exist and have been confirmed by virtue of the local regional regulations."*
    Section (4) *"The determination of utility right of water shall be based on the domination of the state as referred to in section (1)."*
    b. Article 7 of the Law as such (as such (*a quo*))
    Section (1) "The utility right of water as referred to in Article 6 section (4) shall comprise the right to use water and the utility right to exploit water."
    Section (2) "The utility right of water as referred to in section (1) cannot be leased out or be transferred, in part or the whole of it."

    c. Article 8 of the Law as such (*a quo*)
    Section (1) "The utility right to use water is obtained without permit to fulfill daily basic needs for individuals and for people's agriculture situated in an irrigation system."
    Section (2) "The utility right to use water as referred to in section (1) requires a permit if:
    a) the mode of its use is conducted by changing the natural condition of the water source;
    b) aimed at the need of groups requiring water in large numbers; or
    c) be used for people's agriculture outside of the existing irrigation system."

Section (3) "The permit as referred to in section (2) is granted by the Government or a regional government in accordance with their respective authorities."

Section (4) "The utility right to use water as referred to in section (1) comprises the right to flow water from or to owned lands through the land of others bordering with the owned land."

d. Article 9 of the Law as such as such (*a quo*)

Section (1) "The utility right to exploit water can be granted to individuals or enterprises subject to a permit from the Government or a regional government in accordance with their respective authorities."

Section (2) "The holder of a utility right to exploit water may flow water on the land of others based on the consent of the holder of rights over the respective land."

Section (3) "The consent as referred to in section (2) can be in the form of consensus to indemnify or to compensate."

e. Article 10 of the Law as such (*a quo*) "The provision regarding the utility right of water as referred to in Article 7, Article 8, and Article 9 shall be further regulated by government regulation."

f. Article 26 of the Law as such (*a quo*)

Section (1) "The utilization of water resources is conducted through the activity of the administration of use, provision, utilization, development, and exploitation of water resources by referring to the management pattern of water resources stipulated on each river zone."

Section (2) "The utilization of water resources is aimed at exploiting water resources sustainably by prioritizing the fulfillment of basic needs for the life of the public equitably."

Section (3) "The utilization of water resources as referred to in section (1) is exempted on natural reserve areas and natural conservation areas."

Section (4) "The utilization of water resources shall be organized cohesively and equitably, either inter-sectoral, inter-regionally or inter-group of the public with encouraging the pattern of cooperation."

Section (5) "The utilization of water resources shall be based on linkage between rain water, surface water, and ground water by prioritizing the utilization of surface water."

Section (6) "Each individual shall be obliged to use water as economically as possible."

Section (7) "The utilization of water resources is conducted by prioritizing its social function to actualize justice by paying regard to the principle of the beneficiary of water to pay for the water resource management service cost and by involving public participation."

g. Article 29 section (2) and section (5) of the Law as such (*a quo*)

Section (2) "The provision of water resources in each river zone shall be executed in accordance with the administration of water resources stipulated for the fulfillment of basic needs, environment sanitation, agriculture, energy, industry, mining, transportation, forestry and bio-diversity, sports, recreation and tourism, ecosystem, esthetics, as well as other needs as stipulated in accordance with the laws and regulations."

Section (5) "If the stipulation of the sequence of priority provision of water resources as referred to in section (4) gives rise to loss of the user of water resources, the Government or the regional governments is/are obliged to regulate the compensation to its user."

h. Article 45 of the Law as such (*a quo*)

Section (1) "The exploitation of water resources is organized by paying regard to its social function and the preservation of the environment."

Section (2) "The exploitation of surface water resources comprising one river zone can only be executed by state owned enterprises or regionally owned enterprises in the field of water management resources or cooperation between state owned enterprises with regionally owned enterprises."

Section (3) "The exploitation of water resources other than as referred to in section (2) can be conducted by individuals, enterprises, or cooperation among enterprises based on an exploitation permit from the Government or a regional government in accordance with their respective authorities."

Section (4) "The exploitation as referred to in section (3) may be in the form of:

a) the utilization water on a certain location according to the requirement as determined in a permit;
b) the exploitation of water basins on a certain location according to the requirement as determined in a permit; and/or
c) the exploitation of water potentials on a certain location according to the requirement as determined in a permit.

i. Article 46 of the Law as such (as such (*a quo*))

Section (1) "The Government or the regional governments in accordance with their respective authorities, regulate and stipulate the water allocation at the water source for exploitation of water resources by enterprises or individuals as referred to in Article 45 section (3)."

Section (2) "Water allocation for the exploitation of water resources as referred to in section (1) shall be based on the water allocation plan stipulated in the management plan of the water resource on the respective river zone."

Section (3) Water allocation for exploitation as referred to in section (1) is stipulated in a permit for the exploitation of water resources from the Government or the regional governments.

Section (4) In the event the water resource management plan has not been stipulated yet, the exploitation permit of water resources on a river zone is stipulated based on a temporary water allocation.

j. Article 48 section (1) of the Law as such (*a quo*), "The exploitation of water resources in a river zone conducted by means of developing and/or utilizing distribution channels can only be utilized for other river zones if there is still water availability surpassing the need of the inhabitants on the respective river zone."

k. Article 49 section (1) of the Law as such (*a quo*), "The exploitation of water for other countries is not permitted, save if the water provision for various needs as referred to in Article 29 section (2) can already be fulfilled.

l. Article 80 of the Law as such (*a quo*)

Section 1: "The utilizer of water resources fulfilling the daily basic needs and for people's agriculture shall not be charged for water resource management service cost."

Section 2: "The utilizer of water resources other than as referred to in section (1) shall bear the water resource management service cost.

Section 3: "The determination of the amount of water resource management service cost as referred to in section (2) shall be based on an accountable rational economic calculation.

Section 4: "The determination of unit value of water resource management service cost for each kind of water resource utilization shall be based on the

consideration of the economic capability of the utilizer group and the utilization volume of water resources.

Section 5: "The determination of unit value of the water resource management service cost for the kind of non-business utilization is exempted from rational economic calculation as referred to in section (3).

Section 6: "A manager of water resources is entitled to the yield of revenue levied from the utilizers of the water resources management service as referred to in section (2).

Section 7: "The funds levied from the utilizers of water resources as referred to in section (6) shall be utilized to support the organization of the continuance of the water resources management on the respective river zone."

m. Article 91 of the Law as such (*a quo*), "The government agency overseeing water resources acts in the interest of the public if there is an indication of the public suffering from contamination of water and/or damage to water source affecting public life."

n. Article 92 section (1), section (2) and section (3) of the Law as such (*a quo*)

Section (1) "An organization conducting activities in the field of water resources is entitled to file a claim against an individual or an enterprise conducting an activity that gives rise to damage to a water resource and/or its infrastructure, in the interest of sustainable function of water resources."

Section (2) "The claim as referred to in section (1) is limited to claim for the conduct of a certain act related to sustainable function of a water resource and/or claim to pay the cost of real expenses."

Section (3) "An organization entitled to file a claim as referred to in section (1) shall comply with the following requirements:

i. it shall have the form of a social organization having the status of a legal entity and conducts activity in the field of water resources
ii. it shall set out the objective of its establishment in its articles of association in the interest related to the sustainable function of water resources; and
iii. has conducted activities in accordance with its articles of association."

## III. The Reason and Subject of the Petition

### 1. The Reason to Review Again the Law Number 7 of 2004 regarding Water Resources

1. Whereas water is a vital need for the life of all living creatures and therefore a just regulation is needed in its allocation and utilization so that we may expect that the exploitation of water can be conducted optimally for all living creatures existing on earth.

2. Whereas the teaching of Islam affirms the importance of water being a source of life. Al-Qur'an mentioned lots of verses related to water, either being basics of knowledge regarding hydrology as well as being a natural phenomenon and being a legal object. All in all, there are lots of verses mentioning the word water in al-Qur'an namely as much as 63 verses as well as other wordings having a very direct relationship with water, among others: rain as much as 44 verses, river as much as 54 verses, oceans as much as 28 verses, water source as much as 23 verses, clouds and cloudy, as much as 21 verses, the wind as much as 33 verses, as well as ice as much as one verse.

3. Whereas water in the perspective of Al-Qur'an is the most important essence for the sustainability of life of all creatures on earth and the earth *per se* at once pursuant to the word of Allah SWT:

وَاللّهُ أَنزَلَ مِنَ السَّمَاءِ مَاءً فَأَحْيَا بِهِ الأَرْضَ بَعْدَ مَوْتِهَا إِنَّ فِي ذَلِكَ لآيَةً لِّقَوْمٍ يَسْمَعُونَ ( النحل: ٦٥)

*And Allah lowered water (rain) from the sky and with that water Allah enlivened the earth after its demise. Lo on such there are really signs (of the magnificence of God) for those who listen (to the teaching).*

A resembling word ("by that water Allah enlivened the earth after its demise") is also contained in the Sure of Al-Baqarah: 164, Al-Ankabut: 63, and Ar-Ruum: 24. Even as Al-Qur'an tells the story regarding the beginning of the creation of the earth and universe, Allah SWT clearly mentioned that from water all creatures are created indeed.

4. Whereas despite the Court has rendered a decision against the Law as such (*a quo*) through its Decision Number 058-059-060-063/PUU-II/2004 and Number 008/PUU-III/2005 and declared it conditionally constitutional, yet the elaboration of the aforesaid Constitutional Court decision has not been fully implemented, this matter is clearly caused by the inseparable leniency of the substance of the Laws granted to foreign capital in the conduct of the water management resources.
5. Whereas such a situation is inseparable from the historical fact which drove the formation of the Law as such (*a quo*) namely commencing from the need of the Government of donor institutions in the disbursement of assisting funds to cope with the crises confronted by the Indonesian nation, whereby one of the requirements for the borrowing consensus between the Government and the International Monetary Fund (IMF) was structural adjustment. Therefore when the memorandum of understanding between the Republic of Indonesia and the IMF was signed, there had been some requirements linked with Water Resources and the environment, among others directly linked with the conglomeration and trade regulation. Besides, the World Bank also submitted requirements for a loan that was directly linked with the management of forestry and other natural resources.
6. Whereas the aforesaid matter was evidenced by the study report of the World Bank regarding water resources in Indonesia in the year 1997, concluding that Indonesia needed to immediately conduct change in approach, perception and implementation of water resources management. Some of the change regarded the water provision for agriculture, to a more even water allocation for the other sectors; from the focus of supply approach to the approach of demand management and balanced supply approach. Furthermore it was also advised that the World Bank did not render further assistance for the sector of water resource and irrigation provided that there were efforts to conduct reform in this sector.

7. Whereas the aforesaid Recommendation was set out in the restructuring program of the water resources policy, or WATSAL (Water Resources Sector Adjustment Loan). This program is linked with structural borrowing adjustment having the nature of quick disbursement to cope with Indonesia's balance of payment caused by the monetary crisis in the year 1997.
8. Some problems aroused in the Law Number 7 of 2004 regarding Water Resources linked with the involvement of the private sector in the proses of its management. This matter is inseparable from the shift of the meaning of water which previously was public good changed into commodity which rendered more importance of the economic aspect which eventually became profit oriented. This shift of meaning is apparent in the regulation regarding the utility right to exploit water which can be granted to the private sector as apparent in Article 9 section (1), Article 11 section (3) and Article 14 of the Law as such (*a quo*).
9. Whereas through the review of the Law as such (*a quo*) and decided by the Court under Number 058-059-060-063/PUU-II/2004 and Number 008/PUU-III/2005 the Court has confirmed and opined that:

*"The obligation of the Government for the fulfillment of rights of water outside of the utility right to use is reflected in:*

1) *The obligation of the Government, the provincial Governments, and the Government of the regencies/municipalities as specified in Article 14, 15, and 16 of the Law on Water Resources, namely the existence of responsibility to regulate, to stipulate, and to grant permit for the provision, allocation, utilization, and exploitation of water resources on the river zone. The Government is obliged to prioritize standard water for the fulfillment of the daily interest for each individual through the management of the utilization of water resources;*
2) *The provision Article 29 section (3) of the Law on Water Resources that reads, "The provision of water to fulfill the daily basic needs and irrigation for people's agriculture in an existing irrigation system is the main priority of water resource provision above all needs";*

3) *The provision Article 26 (7) that reads, "The utilization of water resources is conducted by prioritizing its social function to actualize justice by paying regard to the principle of the water beneficiary to pay for the water resource management service cost and by involving public participation." The Court opined that this provision should be really executed in implementing regulations of the Law on Water Resources, so that the management of Regional Potable Water Companies (Perusahaan Daerah Air Minum, PDAM) being the exploitation of water resources is really exploited by a Regional Government by basing on the provision of Article 26 (7) of the Law on Water Resources. The public participation being the execution of the democratization principle in the water management shall be prioritized in the PDAMs management, as the better or worse performance of the PDAMs in the service of water provision to the public reflects directly the better or worse of the state in the conduct of its obligation for the fulfillment of basic rights of water. The principle of "the water beneficiary to pay for the water resource management service cost" is to place water not as an object subjected to a price economic wise, this being in accordance with the status of water being "res commune." With this principle the water beneficiary should pay less if compared to if water is valued in a price which is economic wise, because in the economic wise price of water, the beneficiary shall also pay for the production cost as well as profit from the water exploitation besides the price of water. The PDAMs shall be positioned as an operational unit of the state in actualizing the obligation of the state as is determined in Article 5 the Law on Water Resources, and not as company which is profit oriented economic wise. Although there is the provision of Article 80 section (1) of the Law on Water Resources stating that the utilizer of water resources to fulfill daily basic needs and for people's agriculture shall not be charged for water resource management service cost, this provision applies to the extent of the fulfillment of daily basic needs and for people's agriculture herein above is obtained directly from the water source. That said, if water for the daily need and people's agriculture is taken from a distribution channel, then the afore* mentioned *principle of "the water beneficiary to pay for the water resource management service cost" applies. Nevertheless, this matter shall not be made a base for the imposition of expensive cost for residents relying the fulfillment of their daily basic needs on the PDAMs through the distribution channel. The amount of cost of the water resources management of the PDAMs shall be transparent and involve the public element in its calculation. As water is vital as well as directly linked with the basic rights, the obligation of a Regional Government to allocate a source for the financing of water resources management in its Regional Budget of Revenue Expenditures*

*(Anggaran Pendapatan dan Belanja Daerah, APBD) shall be expressly set out in the implementing regulation of the Law of Water;*

4) *Article 40 section (1) stated that the fulfillment of the need of standard water for the household potable water as referred to in Article 34 section (1) is conducted by the development of potable water provision system, while section (2) stated that the development of potable water provision system as referred to in section (1) shall be the obligation of the Government and the Regional Governments. The development of potable water provision system is cohesively organized with the development of infra-structure and sanitation facility. Such is stated in section (6) Article 40 of the Law on Water Resources. The Court opined that the obligation of the Government and the Regional Governments stated by this Article 40 of the Law on Water Resources shall become the priority program of the Government and the Regional Governments, because with the development of an adequate potable water provision system, the quality fulfillment of right of water would increase, as anyone may obtain water in a not too long time and in a not too long distance. The obligation of the organization of the development of potable water provision system in principle is the obligation of the Government and the Regional Governments. The role of cooperatives, private enterprises, and the public is only of limited nature in the event the Government is not able yet to organize it on its own, and the Government will remain to carry out its authorities in the regulation, the execution, and the supervision in the water resources management as a whole;*

*Considering whereas Article 33 of the Law on Water Resources grants authorities to the Government and the Regional Governments, in emergency situations, to regulate and stipulate the utilization of water resources in the interest of conservation, preparing the execution of construction, and priority fulfillment of water resources utilization. The Court opined that in applying the aforesaid authorities the Government should prioritize the fulfillment of the basic right of water rather than the other interests, as the basic right of water is the main right;* (Decision of the Constitutional Court Number 058-059-060-063/PUU-II/2004 and Number 008/PUU-III/2005 page 492-495).

10. Whereas with the existence of the aforesaid standard regarding the interpretation determined by the Court, the Court has determined that:
*"Considering whereas with the existence of the provision aforesaid herein above the Court opined, the Law on Water Resources has sufficiently laid down the obligation to the Government to respect, to protect and to fulfill the right of water, which in its implementing regulation the Government should pay regard to the opinion of the Court as has been conveyed in its legal consideration being made the base or reason of the decision. Therefore, if a Law as such (a quo) is interpreted otherwise in its execution other than the intention as contained in the above mentioned consideration of the Court, then the Law as such (a quo) may again become subject to the possibility for another review (conditionally constitutional)" (Decision of the Constitutional Court Number 058-059-060-063/PUU-II/2004 and Number 008/PUU-III/2005 page 495)*

11. Therefore, the Petitioners petitioned to review the Law as such (*a quo*) again, as the scope of interpretation as has been determined regarding the Law as such (*a quo)* has been manipulated normatively, which will also have its effect in its technicalities and its execution. The fact is evidenced by the issuance of the Government Regulation (*Peraturan Pemerintah*, PP) Number 16 of 2005 regarding the Development of potable water provision system (*Pengembangan Sistem Penyediaan Air Minum*, the SPAM) which in Article 1 Point 9 stated: ”The organizer of the development of the SPAM shall be a State Owned Enterprise/Regionally Owned Enterprise (*Badan Usaha Milik Negara/Badan Usaha Milik Daerah*, the BUMN/BUMD), cooperatives, private enterprises, or

public groups." Even though in Article 40 section (2) of the Law on Water Resources is already stated: Whereas the development of the SPAM is the obligation of the central government/the regional governments, Article 40 section (3) of the Law on Water Resources stated: "the organizer of the SPAM shall be a the BUMN and/or BUMD."

12. Whereas the development of the SPAM as contained in the PP Number 16 of 2005 which is an implementation of Article 40 of the Law as such (*a quo*) is a covered privatization and denial of the constitutional interpretation of the Court against the Law as such (*a quo*). Such a condition has perfectly given rise to a mindset of water managers who are always profit-oriented and will endeavor to gain maximum profit for their shareholders so that public service is outside of its dedication as it is not its principal orientation nor basic character. This situation is clearly against Article 33 of the Constitution of 1945 which has mandated its domination for the optimal welfare of the people.

13. Whereas the Court has again interpreted more sharply the meaning of control by the state for the optimal welfare of the people in its Decision Number 36/PUU-X/2012 regarding the review of the Law Number 22 of 2001 regarding Oil and Earth Gas, whereas:
*"According to the Court, the form of domination by the state is of the first rank and most important is that the state conducts direct management over natural resources, in this matter Oil and Gas, so that the state gains bigger profit from the management of natural resources. The state domination of the second rank is that the state makes the policy and management, and the function of the state of the third rank is the function of regulation and supervision. To the extent the state possesses the capability either capital, technology, and management in the management of natural resources then the state shall opt for the conduct of direct management over natural resources. With direct management, it is assured that all the gains and profit obtained will become the profit of the state which indirectly will bring about greater benefit for the people. The direct management as understood here, either in the form of direct management by the state (state organ) through BUMN. On the other hand, if the state submits the management of natural resources is conducted by a company of the private sector or other legal entity outside the state, the profit for the state will be divided as such that the benefit for the people will also decrease. This direct management is indeed the intention of Article 33 of the Constitution of 1945 as revealed by Muhammad Hatta being one of founding leaders of Indonesia stating, "... The aspiration embedded in Article 33 of the Constitution of 1945 is that large productions should be best executed by the Government by capital support from outside. If this strategy does not work, opportunity should be given to foreign entrepreneurs to invest their capital in Indonesia subject to the requirement as determined by the Government... should the national power and national capital not be sufficient, then we borrow foreign power and foreign capital to smoothen production. If foreign people are not willing to lend their capital, then opportunity should be given to them to invest their capital in our native land subject to requirements as determined by the Indonesian Government on its own. The requirements determined as such shall particularly assure that our natural richness, like our forests and soil fertility, shall remain maintained. Whereas in the development of the state and the society the part of manpower and national capital become increasingly larger, foreign power and capital assistance, would at a certain stage more and more decrease"... (Mohammad Hatta, Bung Hatta Menjawab (Comrade Hatta Answers), page 202 up to 203, PT. Toko Gunung Agung Tbk. Jakarta 2002). The aforesaid opinion of Muhammad Hatta implies that the granting of opportunity to foreigners is due to*

*the yet incapacitated condition of the state/government and the aforesaid matter is of temporary nature. The ideal state is, that the state fully manages the natural resources;"* (its Decision Number 36/PUU-X/2012, page 101-102).

14. Whereas with the existence of the new paradigm in the constitutional interpretation of Article 33 of the Constitution of 1945, it becomes increasingly apparent that the Law as such (*a quo*) has wandered far from the achievement of the optimal welfare of the people. The classic reason stating that the state does not possess the cost to manage water resources is simply a lie, whereas water resources management is not that complicated as the management of oil and gas which has indeed a nature of being high cost, high tech, and high risk.
15. Whereas the entrance space of the private sector in the water management is very large as of the issuance of the PP Number 16 of 2005 which indicates the original intent of the Law as such (*a quo*). This is among others apparent in Article 37 section (3) of the PP Number 16 of 2005, namely "in the event that no *State Owned Enterprise* (*Badan Usaha Milik Negara*, the BUMN) or *Regionally Owned Enterprise* (*Badan Usaha Milik* Daerah, BUMD as referred to in section (2) can increase the quantity and the quality of the SPAM service in the area of its service, the BUMN or BUMD subject to the consent of the board of supervisors/commissioners may involve cooperatives, enterprises of the private sector and or public in the organization in the area of its service." Moreover, this Article 64 section (1) of the PP Number 16 of 2005 regarding the SPAM also stated that enterprises of the private sector and cooperatives may play a role as well as in organizing the development of potable water provision system (SPAM) in the regions, areas or zones which are yet to be covered by the service of the BUMN/BUMD. Hereinafter in section (3) the same article mentioned that the involvement of cooperatives and enterprises of the private sector are also mentioned to be conducted based on the principle of fair competition through tender processes.
16. Whereas the spirit of privatization with the involvement of the private sector in the management of potable water in this PP as existing in Article 37 section (3), Article 64 section (1), section (3) and section (4) is gravely contrary to the provision existing in Article 37 section (1) of this PP Number 16 of 2005 regarding the SPAM, whereby it is stated that "the development of the SPAM is the obligation of the Government or the regional governments in assuring the right of each individual to obtain potable water at least for the daily basic needs to fulfill a life that is healthy, clean and productive in accordance with the laws and regulations."
17. Whereas several provisions in the PP herein above show that the Government wishes to escape from its absolute responsibility from providing potable water for its people by providing large space to the private sector in the management of potable water by developing partnership with the private sector and in the development of potable water provision. This would once again change the meaning of water which was previously public good the fulfillment of which is the obligation of the Government to become water being an economic commodity whereby only certain people would gain access thereto.

18. Whereas the Constitution of 1945 basically does not close participation of the private sector in the organization of production branches which are vital for the livelihood of the people at large, including in the organization of potable water. Nevertheless, the aforesaid participation of the private sector shall not eliminate the meaning of domination by the state. The participation of the private sector can be conducted in the frame of cooperation and at the stage of implementation which does not hamper the state in the aforesaid organization of (potable) water. This restriction has not been explained in the Law as such (*a quo*), so that it gives

room for the privatization of water. If such occurs, then the aforesaid matter is gravely contrary to the mandate of the Constitution of 1945, particularly Article 33 section (2) of the Constitution of 1945 which affirmed that production branches important for the state and vital for the livelihood of the people at large shall be controlled by the state.

19. Whereas therefore, in critical legal perspective, legal politics has changed the Law Number 11 of 1974 regarding Waters becoming the Law as such (*a quo*), indicating the existence of pressures from global actors in legalizing privatization in Indonesia. As a consequence, the right of water in the context of Human Rights referred to as a fundamental right, becomes unprotected and difficult to fulfill. In order to respond to a capitalistic water resources law, as it is contrary to Human Rights and justice, intelligence and creativity are needed, namely by leaving behind the positivistic pattern of thought and replacing it with the substantive pattern of thought, as well as to refer to the philosophy and values taking side with the interest of the own nation.
20. As such it becomes clearer that the birth of the Law as such (*a quo*) has been strongly influenced by donor institutions being global powers for the passing of the process of privatization in Indonesia. This is inseparable from the increasingly limited amount of water from day to day which eventually would place water as a very profitable commodity to be traded.

**2. The Law as such (*a quo*) contains a domination and monopoly content of water resources contrary to the principle of control by the state and shall be utilized for the optimal welfare of the people.**

21. Whereas Article 6 section (2) and section (3) required the process of formality to prove the existence of *adat* communities and their right to exploit water sources. Article 6 section (2) stated: *"The domination over water resources as referred to in section (1) shall be conducted by the Government and/or a Regional Government by retaining recognition of the ulayat rights of the local adat law community and rights resembling therewith, to the extent it is not contrary to national interests and the laws and regulations."* Article 6 section (3), stated: *"The ulayat right of the adat law community over water resources as referred to in section (2) remains recognized to the extent it is really still existing and has been confirmed by the local regional regulations."*
22. Whereas Article 9 of the Law as such (*a quo*) mentioned the exploitation of water sources by the private sector is conducted through the granting of the Utility Right to Exploit from the Government and a Regional Government. Article 9 stated:
    *(1) The Utility Right to Exploit Water can be granted to individuals or an enterprise subject to a permit from the Government or a Regional Government in accordance with their respective authorities.*
    (2) *The holder of a Utility Right to Exploit Water may flow water on the land of others based on the consent of the holder of the right of the respective land. The consent as referred to in section (2) can be in the form of consensus to indemnify or to compensate.*
23. Whereas Article 26 and Article 80 of the Law as such (*a quo*) mentioned that the private sector being a manager of a water source is entitled to levy the aforesaid water sources management service cost to the utilizer thereof. Article 26 section (7) stated: "*The utilization of water resources is conducted by prioritizing its social function to actualize justice by paying regard to* the *principle of the water beneficiary to pay for the water resource management service cost and by involving public participation."* Article 80 stated:
    1. *The utilizer of water resources to fulfill daily basic needs and for people's agriculture shall not be charged for water resource management service cost.*

2. *The utilizer of water resources other than as referred to in section (1) shall bear the water resource management service cost.*
3. *The determination of the amount of water resource management service cost as referred to in section (2) shall be based on an accountable rational economic calculation.*
4. *The determination of the unit value of water resource management service cost for each kind of water resource utilization shall be based on the consideration of the economic capability of the utilizer group and the utilization volume of water resources.*
5. *The determination of the unit value of water resource management service cost for the kind of non-business utilization is exempted from rational economic calculation as referred to in section (3).*
6. *A manager of water resources is entitled to the yield of revenue levied on the utilizers of the water resources management service as referred to in section (2).*

7. *The funds levied on the utilizers of water resources as referred to in section (6) shall be utilized to support the organization of the continuance of the water resources management of the respective river zone.*

24. Whereas the elucidation to Article 26 section (7) and the Elucidation to Article 80 section (1) and section (3) mentioned the utilizing parties subjected to water provision service cost and cost calculation basis. The aforesaid Elucidation to Article 80 section (3) means that the utilizers of water for the daily basic needs and agriculture obtained from a distribution channel provided by the private sector remain subject to payment. In the event there is no other water sources, the option is limited to a distribution system provided by the private sector. The Elucidation to Article 26 section (7), stated: "*What is meant by the principle of beneficiary to pay for the management service cost is that the beneficiary shall share to bear the cost of the water resources management either directly or indirectly. This provision is not applied to the utilizers of water for fulfillment daily basic needs and people's agriculture as referred to under Article 80.*" The Elucidation to Article 80 section (1) and section (3), stated: *section (1) The utilizers of water resources to fulfill daily basic needs who shall not be charged for the management service cost of water source potentials are utilizers of water resources utilizing water on or taking water for their own need from a water source which is not a distribution channel. And section (3) an accountable rational economic calculation is a calculation which pays regard to elements of a. investment depreciation costs, b. amortization and investment interest, c. operation and maintenance, and d. for the development of water resources*.
25. Whereas Article 45 and Article 46 the Law as such (*a quo*) grant right of exploitation to individuals, enterprises, or cooperation among enterprises in the form of exploitation of water resources. Article 45 section (2) stated: *"the exploitation of water resources other than as referred to in section (2) can be conducted by individuals, enterprises, or cooperation among enterprises based on an exploitation permit from the Government or a Regional Government in accordance with their respective authorities."* Whereas Article 46 section (1) stated: *"the Government or a Regional Government in accordance with their respective authorities regulate and stipulate water allocation of water source for the exploitation of water resources by enterprises or individuals as referred to in Article 45 section (3)."*

26. Whereas based on the aforesaid description as above mentioned, we may know that the Law as such (*a quo*) has given the widest room to the private sector (enterprises and individuals) to control water resources. The granting of right to the private sector to control water resources is elaborated by this Law through a permit of right of exploitation. The Utility Right to Exploit becomes a new

instrument which determines the right of exploitation of available water sources. With the aforesaid nature, an instrument of the Utility Right to Exploit reconstructs the domination over water sources, including water source which has been exploited for the joint interest of the public.

27. Whereas water sources jointly owned by the public and is freely obtained can be taken over by the private sector (individuals and enterprises) with the existence of the permit of the Utility Right to Exploit. This is a permit formality discrimination and creates domination monopoly of water sources by the private sector and groups able to obtain a permit of Utility Right of Water against public groups who to date jointly utilize water classified as not capable public. With the aforesaid water source, the private sector manages and distributes it for various interest and levies a cost. As such water sources are utilized for commercial interest.

28. Whereas despite the state guarantees the right of each individual to obtain water for the daily basic needs as mentioned in Article 5 as is elaborated in Article 80 which mentioned the water utilization for the daily need and people's agriculture shall not be subjected to cost, yet the elucidation to Article 80 section (1) stated that the water utilization for the daily need from a distribution channel provided by the private sector remains subject to pay service cost. As such, actually each individual who remains willing to obtain water shall remain to pay. The state does not guarantee the right of each individual to obtain water for the daily need and people's agriculture as stated by Article 80 not to be subjected to cost.

29. Whereas if a water source is jointly owned by the public has been exploited by the private sector, then the utilizers of water have no other choice save to obtain it from a distribution channel of the aforesaid private sector. The utilizers of water fully pay the aforesaid exploitation cost, which means that other than subjected to bear treatment and distribution cost, the utilizers of water shall also bear long term profit for the company.

30. Whereas by the inclusion of the sentence *"to the extent it is really still existing and has been confirmed by local regional regulations"* then water resources which to date are jointly controlled by *adat* law communities are required to be first confirmed of its existence by local regional regulations. As a matter of fact, there are a lot of *adat* law communities in Indonesia who are yet to be confirmed by regional regulations. This formal precondition which requires a rather long time bears the potential to ease the taking over of the aforesaid water resources jointly owned by the public by the private sector which has obtained a right to exploit. As such this formal requirement may kill the existence of the *adat* communities and among others to take the benefit from jointly owned water resources being the source of public life.

31. Whereas based on the aforesaid description as above mentioned, we conclude that Article 6, Article 9, Article 26, Article 45, Article 46 and Article 80 in the Law Number 7 of 2004 which contained the content of control and monopoly of water sources by the private sector are contrary to Article 33 section (2) and section (3) of the Constitution of 1945.

**3. The Law as such (*a quo*) which contains a content positioning that the water utilization tend to be in the commercial interest.**

32. Whereas Article 6, Article 7, Article 8, Article 9 and Article 10 of the Law as such (*a quo*) divided the water utilization into two kinds, namely in the form of the Utility Right to Use and the Utility Right to Exploit. Article 6 section (4) stated: "*Based on the domination of the state as referred to in section (1), a Utility Right of Water is determined."* Article 7, stated: a. the utility right of water as referred to in Article 6 section (4) in the form of the Utility Right to Use Water and the Utility

Right to Exploit Water. b. The utility right of water as referred to in Article 6 section (1) cannot be leased out or be transferred, in part or the whole of it. Article 8, stated:

a. the Utility Right to Use Water is obtained without permit to fulfill daily basic needs for individuals and for people's agriculture situated in an irrigation system.

b. the Utility Right to Use Water as aforesaid in section (1) requires a permit if:
   a. the mode of its use is conducted by changing the natural condition of the water source;
   b. aimed at the need of groups who need water in large numbers; or utilized for people's agriculture outside of the existing irrigation system.
   c. the permit as referred to in section (2), is granted by the Government or Regional Government in accordance with their respective authorities.

   d. the Utility Right to Use Water as referred to in section (1) comprises the right to flow water from or to owned lands through the land of others bordering with the owned land.

33. Article 9 stated: (1) the Utility Right to Exploit Water can be granted to individuals or enterprises subject to a permit from the Government or a Regional Government in accordance with their respective authorities. (2) The holder of a Utility Right to Exploit Water may flow water on the land of others based on the consent of the holder of the right of the respective land. (3) The consent as referred to in section (2) can be in the form of consensus to indemnify or to compensate. Article 10: The provision regarding the utility right of water as referred to in Article 7, Article 8 and Article 9 shall be further regulated by Government regulation.
34. Whereas the elucidation to Article 8 the Law Number 7 of 2004 in essence rendered a restriction over daily basic needs and people's agriculture for water. The Elucidation to Article 8 section (1) stated: "What is meant by daily basic needs is water for the fulfillment of need for daily life utilized in or is taken from a water source (not from a distribution channel) for own needs to attain a life that is healthy, clean and productive, for instance for the need worship, drinking, cooking, shower, washing, and flushing. What is meant by people's agriculture is agricultural cultivation comprising various commodities namely the agriculture crops, fishery, husbandry, plantation, and forestry managed by people with a surface area which need of water is not more than 2 liter per second for each head of household."
35. Whereas based on the aforesaid matter, we may draw the conclusion that the existence of the utility right in the Law Number 7 of 2004 fundamentally reconstructs the water value from being a common good becoming a commercial good which may be controlled by a group of individuals and enterprises. By means of possessing a right to exploit over sources, the private sector of water managers gains profit;
36. Whereas the Utility Right which is a basic instrument in this Law Number 7 of 2004 adopts an instrument of "water rights" in the sector of water policy of the World Bank. The Utility Right which equals the principle and the regulation of a water right instrument, becomes a base for the enforcement of water commercialization;
37. Whereas the instrument of the utility right to use stipulates a restriction to the water utilization for the daily basic needs and for people's agriculture. The Law as such (*a quo*) and the Government Regulation to follow will render a restriction for the aforesaid both non-business utilization of water. Although the water utilization for both non-business water utilization is mentioned, by these restrictions the form and number of activities of the water utilization by the public becomes narrower compared with prior to the existence of the Law as such (*a quo*);

38. Whereas the activity by the public outside the aforesaid restriction and the exploitation by the private sector are categorized as commercial activities and required to obtain a permit of utility right to exploit. The utilization of water in the category of a utility right to exploit is subject to cost. The narrower the form and number of the water utilization by the public in the non-business category, the greater the availability (allocation) of water for commercial business utilization. The narrow form and volume of water restriction in this Law leads to greater water allocation for commercial interest. As such water sources will be concentrated in a group of capital owners with a commercial aim. The public endeavor to increase welfare and its quality of life is hampered by the existence of the aforesaid restriction.
39. Whereas based on the aforesaid description as above mentioned, the Petitioners concluded that Article 6, Article 7, Article 8, Article 9 and Article 10 of the Law Number 7 of 2004 which contained a content of water utilization for commercial interest which contains water being a commercial commodity are contrary to Article 33 section (2) and section (3) of the Constitution of 1945.

**4. The Law as such (*a quo*) contains a content that triggers horizontal conflict**

40. Whereas further Article 29 section (2), Article 48 section (1), Article 49 section (1) of the Law Number 7 of 2004 are contrary to the soul and the spirit of the Preamble of the Constitution of 1945 because they trigger and bear the potential to raise conflict between Government and the public. Article 48 section (1) of the Law Number 7 of 2004 stated: *"the exploitation of water resources in a river zone which is conducted by building and/or utilizing distribution channel can only be utilized for other river zones if there is still water availability surpassing the need of the inhabitants on the respective river zone."* Moreover Article 49 section (1) of the Law Number 7 of 2004 stated: *"the exploitation of water for other countries is not permitted, save if the provision for various needs as referred to in Article 29 section (2) could have been fulfilled."*

41. Whereas the aforesaid articles can trigger conflict among river zones particularly among river zones being identical with administrative areas. River areas identical with certain administrative areas would surely be able to give an argumentation underlining the importance of exploiting water for a certain business activity, such as mineral water company, bottled drinks company, water power generator, as contained in the Elucidation to the Law Number 7 of 2004 Part I General point 10, or even for export as is made possible by the rule of Article 49 of the Law Number 7 of 2004. Consequently, exploitation interest and water export would well be prioritized rather than distribute water to the inhabitants of another river zone who needs it particularly for their basic needs. This is clearly against Article 28I of the Constitution of 1945.

**5. The Law as such (*a quo*) eliminates the obligation of the state to fulfill the water need**

42. Whereas Article 9 section (1) of the Law Number 7 of 2004 stated: "the Utility Right to Exploit Water can be granted to individuals or enterprises....." Whereas Article 40 section (4) stated: "Cooperatives, private enterprises, and the public may participate in the organization of the development of the potable water provision system." Moreover Article 40 section (7) stated: "to achieve the objective of the regulation for the development of the potable water provision system..... the Government may establish an agency placed beneath and be accountable to the Minister overseeing water resources."
43. Whereas Article 45 section (3): "The exploitation of water resources other than as referred to in section (2) can be conducted by individuals, enterprises ......" Moreover in the Elucidation to Article 45 section (3) it is stated: "...... The

exploitation permit contains among others the substance of water allocation and/or track (part) of the water source to be exploited." Meanwhile Article 45 section (4) stated: "The exploitation as referred to in section (3) may be in the form of: (a) the water utilization on a certain location.....; (b) the exploitation of water basins on a certain location.....; (c) the exploitation of water potentials on a certain location......." Whereas Article 46 section (2) stated: "the water allocation for exploitation..... is stipulated in the exploitation permit of water resources from a Government or a Regional Government."

44. Whereas further Article 29 section (5) of the Law Number 7 of 2004 stated: if the stipulation of the sequence of priority of water provision resources as referred to in section (4) gives rise to loss of the user of water resources, the Government or the regional governments is obliged to regulate the compensation to its user."
45. Whereas the aforesaid formulation of Article 29 section (5) of the Law Number 7 of 2004 has the implication if once the sequence of priority is changed and this matter also effects on private persons and/or legal entities having been given a right to exploit water, the Government is obliged to compensate. While the compensation from the Government stems from the State/Regional Budget of Revenues and Expenditures (*Anggaran Pendapatan dan Belanja Negara/Daerah*, APBN/D) the source of its revenue among others stems from public monies.
46. Whereas the aforesaid articles in the Law Number 7 of 2004 indicated that production branches important for the state controlling the people at large cannot be controlled by the state. Therefore the aforesaid articles of the Law Number 7 of 2004 are contrary to Article 33 section (2) of the Constitution of 1945. Moreover, the aforesaid articles in the Law Number 7 of 2004 give rise to water being the asset of the state and national asset shall be utilized not for the optimal welfare of the people but for the optimal welfare of private persons and/or private legal entities/the private sector even foreign private persons and/or private legal entities/private sector. Therefore the aforesaid Article 9 section (1), Article 29 section (5), Article 40 section (4) and section (7), Article 45 section (3) and section (4), Article 46 section (2) of the Law Number 7 of 2004 are contrary to Article 33 section (3) of the Constitution of 1945.

### 6. The Law as such (*a quo*) is a discriminative Law

47. Whereas Article 91 of the Law Number 7 of 2004 stated: "The Government agency overseeing water resources acts for the public interest if there is an indication of public suffering from contamination of water and/or damage of the water source affecting public life."

48. Whereas Article 92 section (1) of the Law Number 7 of 2004 stated: "the organization conducting activities in the field of water resources is entitled to file a claim against an individual or an enterprise conducting an activity giving cause to damage to a water resource and/or its infrastructure, in the interest of sustainable function of water resources." Furthermore Article 92 section (2) stated: "the claim... is limited to a claim for the conduct of a certain act related to the sustainable function of a water resource and/or claim to pay cost of real expenses." Moreover Article 91 section (3) stated: "the organization entitled to file a claim ... shall comply with the requirement: (a) it is a social organization having the status of legal entity and conducts activity in the field of water resources, (b) set out the objective of the establishment of the organization in its articles of association for interests related to sustainable function of water resources...", and (c) has conducted activities in accordance with its articles of association."

49. Whereas the aforesaid Article 91 of the Law Number 7 of 2004 has derogated and limited the right of each individual to defend his/her life and living, it is contrary to the provision of the Constitution of 1945 which guarantees each individual and collectively to defend their human rights, contrary to the guarantee of the liberty of

thought and conscience of each citizen, as well as contrary to the guarantee of the right of each individual to communicate and to convey information by means of utilizing all kinds of available channels, including the judiciary channel, by filing a claim.

50. Whereas the setting out of the word "an organization conducting activities in the field of water resources" as stated in the aforesaid Article 92 of the Law Number 7 of 2004 has violated the most substantial principle in the upholding of the law namely recognition and guaranty, protection and an equitable legal certainty as well as equal treatment before the law as stated in the Constitution of 1945 *inter alia* the provision of the of Article 92 section (1) of the Law Number 7 of 2004 is a discriminative article. Therefore Article 92 section (1) of the Law Number 7 of 2004 is contrary to Article 28I section (2) of the Constitution of 1945.

## IV. Petitum

Based on the aforesaid reasons as above mentioned, the Petitioners petitioned to the Tribunal of Judges of the Constitutional Court to examine, to adjudicate and to decide on the petition as such (*a quo*) with the verdict that reads as follows:

1. To receive and to grant the Petition of a Petitioners for the whole of it;
2. To declare the Law Number 7 of 2004 regarding Water Resources as a whole contrary to Constitution of 1945;
3. To declare the Law Number 7 of 2004 regarding Water Resources having no binding legal force as a whole;
4. To order the placing of this decision in the Official Gazette of the Republic of Indonesia according to the provisions of the prevailing laws.

Or to hand down an alternative decision, namely:

1. To receive and to grant the petition of the Petitioners for the whole of it;
2. To declare Article 6, Article 7, Article 8, Article 9, Article 10, Article 26, Article 29 section (2) and section (5), Article 45, Article 46, Article 48 section (1), Article 49 section (1), Article 80, Article 91, and Article 92 section (1), section (2) and section (3) of the Law Number 7 of 2004 regarding Water Resources as contrary to the Constitution of 1945;
3. To declare Article 6, Article 7, Article 8, Article 9, Article 10, Article 26, Article 29 section (2) and section (5), Article 45, Article 46, Article 48 section (1), Article 49 section (1), Article 80, Article 91, and Article 92 section (1), section (2) and section (3) of the Law Number 7 of 2004 regarding Water Resources having no binding legal force ;
5. To order the placing of this decision in the Official Gazette of the Republic of Indonesia according to the provisions of the prevailing laws.

Or should the Tribunal of Judges at the Constitutional the Court have another decision, to petition a decision *ex aequo et bono*.

[2.2] Considering whereas to prove their postulates, the Petitioners have filed instruments of evidence in the form of letters/writings marked as evidence P-1 up to evidence P-15, as follow:

1. Evidence P-1: Photocopy of the Law Number 7 of 2004 regarding Water Resources;
2. Evidence P-2: Photocopy of the Identity Card (*Kartu Tanda Penduduk*, KTP ) of the Petitioner on behalf of M. Sirajuddin Syamsuddin;
3. Evidence P-3: Photocopy of the KTP of the Petitioner on behalf of H.A. Aris Banadji;
4. Evidence P-4: Photocopy of the KTP of the Petitioner on behalf of Lieus Sungkharisma;
5. Evidence P-5: Photocopy of the KTP of the Petitioner on behalf of Gembong Tawangalun;
6. Evidence P-6: Photocopy of the KTP of the Petitioner on behalf of H. Amidhan;
7. Evidence P-7: Photocopy of the KTP of the Petitioner on behalf of Adhyaksa Dault;
8. Evidence P-8: Photocopy of the KTP of the Petitioner on behalf of Marwan Batubara;

9. Evidence P-9: Photocopy of the KTP of the Petitioner on behalf of Laode Ida;
10. Evidence P-10: Photocopy of the KTP of the Petitioner on behalf of M. Hatta Taliwang;
11. Evidence P-11: Photocopy of the KTP of the Petitioner on behalf of Rachmawati Soekarno Putri;
12. Evidence P-12: Photocopy of the Decree of the Minister of Law and Human Rights Number AHU-88.AH.01.07 of 2010 regarding the Amendment to the Articles of Association of the *Persyarikatan Muhammadiyah*;
13. Evidence P-13: Photocopy of the Articles of Association/Bylaws (*Anggaran Dasar/Anggaran Rumah Tangga*, AD/ART) of Al Jami'yatul Washliyah;
14. Evidence P-14: Photocopy of the Deed of the Notary Arman Lany Number 4 dated 11 June 2013 regarding the establishment of the association of Vanaprastha.
15. Evidence P-15: Photocopy of the Government Regulation Number 16 of 2005 regarding the Development of the Potable Water Provision System.

Moreover, the Petitioners also presented 7 (seven) experts whose testimonies have been heard on the date of 18 December 2013, 15 January 2014, and 29 January 2014, substantially rendering testimonies as follows:

1. **Prof. Dr. Suteki, S.H., M.H.**
   - In the field of the management of Water Resources, Pancasila may become the base of legal politics of the right of the state to control Water Resources for the sake of directing that the management of Water Resources would not oppress those who are poor socially and economically (the poor inhabitants).
   - Water is a luxury and scarce good for poor inhabitants particularly those living in the cities. More than one thirds of the revenue of the poor inhabitants is allocated for the fulfillment of the need of water due to the non-existence of clean water channels at the place where they live.
   - The availability of water remains while the need of water increases in terms of quantity and quality, which leads to scarcity. At the stage of water scarcity, the principle of justice becomes important in the management of water.
   - Justice to obtain water being a human right cannot be submitted to each individual based on market mechanism, but there should be government intervention to assure the fulfillment of the right of water.
   - The Government shall shape a social economic structure for water provision so that it will not fall into the hand of private persons or liberal market mechanism.
   - Water privatization is contrary to the principle of the management of Water Resources based on social justice value.
   - In its Decision Number 058-059-060-063/PUU-II/2004 and Number 008/PUU-III/2005 the Constitutional Court opined that the Law on Water Resources has rendered the obligation to the Government to respect, to protect, and to fulfill the right of water, so that in its implementing regulation the Government shall pay regard to the aforesaid legal consideration of the decision.
   - The Constitutional Court opined that the Law on Water Resources regulates the substantial subject in the management of Water Resources. Although the Law on Water Resources opens the opportunity for the role of the private sector to obtain the utility right to exploit water and the permit to exploit water energy, but the aforesaid matter shall not result in the exploitation of water to fall into the hands of the private sector.
   - The PP Number 16 of 2005 regarding the Development of potable water provision system (SPAM) has opened the opportunity for the existence of the organization for potable water by the private sector without restriction on the whole stage of the

activity. Even though the Decision of the Constitutional Court in its review of the Law on Water Resources stated that the state has the responsibility to fulfill the basic need of the public of water.

- The Constitutional Court also opined that the obligation to provide potable water shall be conducted by the Government through the BUMDs, the BUMNs, and not by the private sector. The participation of cooperatives, private enterprises, and public is of limited nature in the event that the Government is not able yet to organize on its own, and the Government will probably remain to carry out its authorities in the regulation, the execution, as well as the arrangement of the management of Water Resources as a whole.
- The Constitutional Court affirmed that the PDAMs shall truly be operated by the regional governments being the manager of Water Resources. The better or worse of the performance of the PDAMs to provide potable water for the public reflects the better or worse of the state to fulfill the basic the right of water.
- The PP of the Development of Potable Water Management System is contrary to the legal consideration of the Decision of the Constitutional Court.
- Article 64 section (1) of the PP Number 16 of 2005 regarding the Development of the SPAM mentioned the involvement of the private sector in the organization of potable water in the area not being serviced yet by BUMDs and the BUMNs, can be conducted on all stages of the organization. As such the obligation of the state as mandated by the Constitution of 1945 can be replaced by a profit oriented entity of the private sector.
- The involvement of the private sector can also be conducted in regions which already possess potable water organizing BUMNs or BUMDs, in the event that the aforesaid BUMNs or BUMDs cannot increase the service quality and quantity in regions of its service. Such is a form of privatization.
- The PP of the Development of the SPAM does not restrict the capital ownership of the private sector, let alone foreign.
- The Presidential Regulation (*Peraturan Presiden*, Perpres) Number 77/2007 regarding the Lists of Business Fields that are Closed to Investment as amended by the Perpres Number 111/2007 and the Perpres Number 36/2010, in which attachments of both Perpres is mentioned, “The specification of business fields open for foreign investment with a capital ownership variation from 25% to 95%.” One of the aforesaid business field is the exploitation of potable water which capital ownership can be 95% controlled by a foreign investor.
- What is the base to benchmark 95% if the production branch of potable water is important for the state and vital for the livelihood of the people at large?
- The domination over capital amounting 95% indicates the existence of a privatization agenda of potable water in this Perpres and in the Law on Water Resources.
- Based on the aforesaid matter, the PP on the Development of the SPAM, the Regulation of the Minister of Home Affairs (*Peraturan Menteri Dalam Negeri*, Permendagri) Number 23/2006, and the Perpres Number 77/2007 as amended by the Perpres Number 111/2007 and the Perpres Number 36/2010, will become subject to conditionally constitutional warning from the Constitutional Court.
- Privatization is always followed by tariff increase but is not necessarily followed by increase of service quality and quantity.
- It has been predicted that there will be a global water famine in 2025 which can trigger water war.
- The privatization era is no longer a trend of the 21st century. The current era is better suit to jack-up economic growth.

- During the early decade of 1980 through 1990 the role of the state was limited and castrated by privatization and deregulation on programs, but the aforesaid promises of liberalization is never evidenced to have brought mankind to welfare of life.
- The Elucidation to Article 33 of the Constitution of 1945 prior to amendment stated that the economy is based on democratic economy, welfare for all the people. Therefore, production branches important for the state and vital for the livelihood of the people at large shall be controlled by the state. If production control falls into the hands of an individual in power, then the people at large will be oppressed. Only a company which is not vital for the livelihood of the people at large may be in the hands of an individual. The land and waters and the natural wealth contained in it are subjects for the welfare of the people. Therefore, it shall be controlled by the state and be utilized for the optimal welfare of the people.
- Bung Hatta interpreted Article 33 section (2) of the Constitution of 1945 that control by the state is rather emphasized to be on the aspect of the ownership of rights by the state, not by the Government, to control the organization of respective production branches. By the control of production branches important for the state and vital for the livelihood of the people at large by the state means that the state possesses the right to control the organization of the aforesaid production branches. Direct organization can be submitted to executing agencies of the BUMNs and the sector of private companies accountable to the Government and whose work is controlled by the state.

- The Jakarta Potable Company (*Perusahaan Air Minum Jaya*, PAM Jaya) possesses a very high profit interest.
- The areas of the sector of private companies which are profit oriented in nature but having no profit or does not gain profit will not be flown with water. Furthermore the public which has no access to a channel of potable water will pay higher if compared with the public in areas having access to potable water. To the effect that the revenue of the public would for a bigger part be exhausted for buying clean water for the daily need.
- People in the area of Juwiring, Klaten, used to get water flow from Ponggok, but the farmers there precisely irrigate their lands by siphoning ground water with the help of diesel engines. It is ironic that farmers being in the place abundant with water, but precisely siphon ground water utilizing diesel engines.
- The government should indeed organize the exploitation of water with the aim to fulfill public needs, because private sector organizers would certainly be profit oriented.

- The Law on Water Resources requires that 49 Government Regulations be made.
- There are two PPs, namely the PP regarding Irrigation and the PP of the Potable Water Management System.
- This Law has been reviewed by the Court with a conditionally constitutional verdict. Therefore this second review should merely prove as to whether the Government was correct in rendering an interpretation.
- The Government apparently made a different interpretation by issuing the PP 16/2005 and the PP on Irrigation, the Permendagri 23/2006, the Perpres 77/2007, and the Perpres 36/2010.
- Isn't it possible that the Constitutional Court conducts a breaking rule for the review of PPs on the Potable Water Management System (*Sistem Pengadaan Air Minum*, the SPAM) because it is again linked with a review. Without a repeated review, then

the authority to review a Law and regulations beneath the Laws is the authority of the Supreme Court (*Mahkamah Agung*, MA).

- Article 7, Article 8, Article 9, Article 45, Article 46, Article 47, and Article 49 are contrary to the Constitution of 1945 particularly Article 33 of the Constitution of 1945.
- Article 7 and Article 8 the Law on Water Resources introduced the utility right of water comprising the utility right to use water and the utility right to exploit water. The introduction of such rights can be interpreted that at one time in the future water resources can be subjected to certain rights like energy source or goods in general. That is certainly contrary to Article 33 of the Constitution of 1945.

- Article 9 stated that the utility right to exploit water can be granted to individuals or an enterprise subject to a permit from the Government or a regional government in accordance with their respective authorities. This Article has been referred to as an article that opens the door to water commercialization and water privatization, and is therefore contrary to Article 33 of the Constitution of 1945.
- Article 26 section (1) stated that the utilization of water resources is conducted by prioritizing its social function to actualize justice by paying regard to the principle of the exploitation of water by paying for the water resource management service cost by involving public participation. This provision also contains the aspect of water commercialization.
- Article 38 section (2) mentioned that enterprises and individuals can conduct the exploitation of clouds by means of weather modification technology subject to obtaining a permit from the government. If the government has granted a permit, then artificial rain can be conducted by the private sector. If there still occurs a wrong rain, who shall be responsible?
- Water management should be of integrated nature. The problem of water resources should not be only the affairs of the Public Works (*Pekerjaan Umum*, PU).

**2. Prof. Dr. Absori, S.H., M.H.**

- As of the discussion on the Law 7/2004 regarding Water Resources in the People's Representative Council (*Dewan Perwakilan Rakyat*, DPR) when it was still a Bill, it was questioned by many parties. Lots of parties wanted the Government and the DPR to place the discussion on the Bill Natural Resources on the agenda, but which came out was precisely the Law on Water Resources.
- The following are some subject matters offered:
  i) The aspect of carrying capacity of the ecosystem and the protection of natural resources should be considered. ii) There are real policy steps in the frame of manifesting social justice in the access to natural resources.

  ii) Institutional reconstruction and reconsolidation of the management of natural resources should become more solid and integrated.
  iii) The drafting of a five year development program in the field of natural resources to respond the real problems in the society.
- The implication of the mandate of the legal aspiration of Pancasila is the management of natural resources policy which holds on: i) the responsibility of the state being the power holder over natural resources; ii) strengthening the right of the public being the real sovereignty holder of the state.
- The Decree of the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*, MPR) Number IX of 2001 mandated the President to reform the Law on Agrarian Affairs and the Management of Water Resources.

- The Decree of the MPR Number VI of 2002 contains a recommendation to the President to prepare the drafting of laws and regulations regulating natural resources.
- The Decree of the MPR Number V of 2003 recommended several suggestions to settle various problems of natural resources and conflicts related thereto.
- While the Government has failed to conduct reform of the law on natural resources, precisely the Law 7/2004 regarding the Management of Water Resources became promulgated. That leads to questions as to what could be behind.
- Article 6 section (1) of the Law on Water Resources mentioned, "*Water resources are controlled by the state and shall be utilized for the optimal welfare of the people*." Such meaning is based on Article 33 section (3) of the Constitution of 1945, but there are various interpretations arising, rendering it multi-interpretative in nature.
- All acts in the field of Water Resources should enable the achievement of:
  1. The formation of a government that is capable to protect the whole nation and native land Indonesia.
  2. To be able to increase public welfare, increase the living standard and intelligence of the nation, as well as to establish world order by virtue of perpetual peace and social justice.
- The Law on Water Resources is a neglect against the *ulayat* rights of the *adat* law communities. Article 6 section (2) of the Law on Water Resources regulates the *ulayat* rights but it should actually refer to Article 5 of the Law 5/1960 regarding Basic Regulation on Main Subjects of Agrarian Affairs regulating matters of the land, water, and the natural wealth contained in it, even the outer space. The idea is that the *adat* law should become the base or the principle in determining a law related to Water Resources.
- Al Quran mentioned that water is a symbol of justice, symbol of life, and symbol of welfare, which is important to be emphasized in the Law 7/2004.
- Article 6 section (3) of the Law on Water Resources mentioned, "The *ulayat* right of the *adat* law communities over water resources as referred to in section (2) remain recognized to the extent they are really still existing and has been confirmed by the local regional regulations." This indicates an illogic. If the *ulayat* right and the *adat* law be delegated or is determined by regional regulations it would indeed diminish or reduce the meaning of the *adat* law *per se*. Lots of values of the *adat* law as well as the *ulayat* rights cannot be determined by a regional regulation.
- The privatization of water resources management can be seen in Article 9 section (1) regarding the utility right of water which can be given to individuals or enterprises subject to a permit of the Government or the regional governments. This Article is contrary to Article 33 section (2). Actually the Government may strengthen the institutional form of the BUMNs as well as the BUMDs, so that the state retains a dominant role.
- With regard to the potential of horizontal conflicts, Article 48 section (1) regulates the presence of priority or monopoly in the distribution of water prioritizing upstream regions. Such would in its execution give cause to lots of problems. Conflict regarding water resources for instance occur in the regions of Losari, Brebes, and Cirebon, because the development of levees in the area of the Crucut River results in the diminishing water flow to the regions of Losari, Brebes, leading to fishpond farmers in the aforesaid regions to suffer losses.
- Conflicts also occur at the border between East Java and Central Java, namely in Tawangmangu, Karanganyar, where there is the water spring Ondo-Ondo. The aforesaid water is flown to the areas of Magetan because Magetan gives

compensation to the Regional Government (*Pemerintah Daerah*, Pemda) of Central Java and the Pemda of Karanganyar. Consequently the local farmers became harmed and demanded that the water distribution be distributed to those in need of water without priority based on compensation.

- Article 91 section (1) of the Law 7/2004 indicates the role of government dominance in the settlement of disputes. Such is contrary to Article 89 of the Law 32/2009 which in the frame of settlement of environment disputes would not only involve the Government but also the public. Article 92 section (1) also mentioned the right to challenge of organizational institutions overseeing water problems in the settlement of environment disputes. The provision as such is an adoption from the Law 32/2009 which was previously regulated in the Law 23/1997 and the Law 4/1982 regulating environmental problems.
- A party eligible to challenge environment as well as water problems is limited only to organizations conducting activities in the field of water affairs. Also in environmental affairs only organizations conducting activities in the field of environmental problems have the right to challenge. Therefore, various stakeholders as well as institutions with care in the field of water as well as environmental affairs have no right to challenge against environmental practices and damages.
- In the more than twenty years of the Law on Environment, this right to challenge or legal standing cannot go well because it suffers problems in the proceedings.
- As such practices in environmental disputes is of discriminative nature, because it restricts certain individuals conducting activities in the field of water.
- Water resources actually may be utilized but only for public interests or to achieve benefit.
- The basic management principle of natural resources, including water, shall be identic with the base and objective of the struggle of the Indonesian people as defined in the Preamble of the Constitution of 1945. Therefore the Government shall be capable to protect the whole nation and native land Indonesia and may bring public welfare, including to increase standard of living and intelligence in the life of the nation.
- In relation to permits, the Government may grant permits because the Government possesses power. Nevertheless the permits granted shall be selective because according to Article 33 section (2) of the Constitution of 1945, production branches important for the state and vital for the livelihood of the people at large shall be controlled by the state. Intended is that the BUMNs as well as BUMDs shall be dominant. Even if there is delegation in the form of cooperation, the Government shall remain dominant.
- The granting of permit to date, either granted to individual institutions or to enterprises, are rather procedural and formal, while field supervision is poor that leads to uncontrolled exploitation of natural resources.

- Local conflicts such as in the area of the water spring Cokro Tulung, Central Java, is muted by means of recruiting local residents in favor of the company, while residents who are not in favor of the company are given pragmatic offer, so that the conflict would be temporarily muted, yet once it would explode.
- In some recent time a new problem occurred, because companies are only profit oriented, so that the roads passed through by water transportation vehicles suffer heavy damage.
- Water has a natural management, namely that it would during rainy seasons be absorbed by trees and the soil, subsequently during dry seasons it would slowly be released in a sustainable rhythm. This natural management is no longer there, as

river water has exhausted due to collection by personal or private companies as well as by the private sector during rainy seasons or at any certain time, so that during dry seasons they would spend lots/more money because they would siphon underground water.
- Water privatization by institutions of the private sector takes place in the vulgar way with the reason that “the state is not able,” while the state is actually able.
- The emergence of a consumptive public which should not necessarily happen, is inseparable from the design of the state.
- In areas where water is clean and clear prior to industrialization like nowadays, the public has not suffered kidney stone disease and other diseases. Nevertheless, the existence of tremendous water marketing with the pretext of hygiene has made the public no longer willing to consume water that used to be consumed.

**3. Dr. Dea Erwin Ramedhan**
- Packed potable water has given cause to turbulence in the regions like in Pandarincang, Banten, where conflicts have surfaced among the local public, multinational companies, and the state administration. An installation was damaged and burnt out by the local inhabitants because the state administration did not pay regard to the prevailing procedure (consultation with the public) and did not conduct an Analysis on Environmental Effect (*Analisa Dampak Lingkungan*, Amdal) in the development of the water factory.
- Water suction or draining without the supervision by the state administration as well as by other parties. Nobody knows as to how much water would be taken and how much in the sapping of water.
- The regulation is also silent thereon as to whether surface water or artesian water would be taken.
- Such a situation will lead to grave consequences to the environment. The farmers in Klaten now must take/siphon water with the help of diesel engines, while was not the case in the past. In Sukabumi in the past, water can be taken in a depth of 5 to 8 meters, now it must be more than 15 meters.
- Such fact becomes the background of protest of the local public, including farmers who need water for daily life as well as for their own agriculture.
- There is a water company which around the year 2000 took approximately 2.5 billion liter water, subsequently around the year 2010 it took 5.6 billion liter water. However, it is surprising because there is no increase in the earning of the aforesaid company. That gives rise to the question regarding reports on the siphoning of water.
- Water is taken at the price of several rupiah per one liter, but it is sold at Rp. 3,000.- to the inhabitants of Indonesia. The profit of bottled water industry is greater than the profit of any other industry whatsoever.
- Bottled water consumed by the Indonesian public is at least 60% bought from foreign companies, so that it grants unlimited profit to foreign parties and does not grant meaningful profit to Indonesians.

- A question arises in taxation as to why there is only such an amount of tax, the more as it is related to the presence of foreign parties in the water management in Indonesia.
- The siphoning of water in Padarincang, Banten, is estimated at 63 liter per second and would make Rp.16 billion per day. From the aforesaid estimate we may imagine the earning made by one multinational company in Indonesia per annum, while the earning of local farmers per harvest is approximately Rp.12 billion.

- The taking of water as such also means the domination of areas by foreign parties, so that farmers have no access in their own areas which have been cleared in the interest of foreign parties.
- Aqua Danone controls around 50% to 60% of national market. Initially one share of Aqua Golden Mississippi was valued at Rp.1,000.- further in 2010 between Rp.100,000.- to Rp.200,000.- even Rp.250,000.-.

- In 2010 Aqua Golden Mississippi conducted delisting, possibility for two reasons, namely i) it does no longer need public money, or ii) it does not want to conduct transparency. Public companies are subject to report their profit annually.
- In 2001 water production was 2.3 billion liter with a gross profit of Rp.99 billion.
- In 2002 water production was 3 billion liter with a gross profit of Rp.134 billion.
- In 2003 water production was 3.1 billion liter with a gross profit of Rp.107.28 billion.
- In 2004 water production was 3.18 billion liter with a gross profit of Rp.141.95 billion.
- In 2005 water production was 4.28 billion liter but there was no report on gross profit.
- In 2006 water production was 4.9 billion liter with a gross profit of Rp.71 billion.
- In 2007 water production was 5.17 billion liter with a gross profit of Rp.89.7 billion.
- In 2008 water production was almost 6 billion liter with a gross profit of only Rp.95 billion. By the time water production increased tremendously, precisely gross profit decreased. Experts have queried this matter to the Directorate General of Taxation, however, with no response yet.
- The article related to the water resources management is clearly against Article 33 of the Constitution of 1945.

**4. Dr. Aidul Fitriciada Azhary, S.H., M.H.**

- Rendering the Constitution being a base for the review of laws should not be limited only to norms or rules contained in the Constitution, but should also refer to the ideal values and principles contained in the doctrine of constitutionalism, namely the values and principles of power limitation in the organization of state government. The essence is power limitation of government on the one hand and protection of the rights of residents of the state on the other hand.

- The Constitution of 1945 has from the beginning adopted the aforesaid values of constitutionalism, however, it was not liberal values of constitutionalism but values of constitutionalism which are social justice oriented.
- Liberal constitutionalism prioritizes the protection of individual rights and freedom implying the maximum limitation of government power. Liberal constitutionalism is a reflection of economic liberalism aspiring the validity of the free market economic system being parallel with the liberal political system.

- The drafters of the Constitution of 1945 had from the beginning rejected liberal constitutionalism, because as it was evidenced as of its enforcement by the Colonial Government of the Netherlands India based on the Government Regulation (*Regeringsreglement*) of 1840, it gave cause to the siphoning of the wealth and oppression against the Indonesian nation. Based on the aforesaid principle in the Constitution of the Netherlands India, the Government shall be developed for the sake of protecting the capital of the private sector, including also the capital of the foreign private sector.

- Based on the *Regeringsreglement* (Government Regulation) of 1848 such a liberal economic system was run parallel with a parliamentary democratic system which enabled powers of the private capital sector to influence the process of the making of laws so that they would serve their interest.

- The drafters of the Constitution of 1945 rejected the doctrine of liberal constitutionalism, and opted to establish a national political system and national economic system based on social justice.
- Article 33 of the Constitution of 1945 required the existence of a collectively planned economy based on the principle of kinship or social solidarity [section (1)]; the existence of the domination of the state over production branches important for the state and vital for the livelihood of the people at large [section (2)]; and the domination of the state over natural resources [section (3)].
- A political structure capable to actualize the objective of welfare is established based on such an economic structure.
- The importance of the norm of Article 33 of the Constitution of 1945 is apparent from the consensus of the leaders of the nation to defend the provision of Article 33 of the Constitution of 1945 by the time of its amendment to become the Provisional Constitution (*Undang-Undang Dasar Sementara*, UUDS) 1950.
- The consensus to change the Constitution of 1945 into the Provisional Constitution 1950 stated: "the Provisional Constitution of 1950 is adopted by amending the Constitution of the United Republic of Indonesia which contains the essentials of the Constitution of 1945 added by other parts of the Constitution the United Republic of Indonesia." The essentials of the Constitution of 1945 comprises three articles, namely Article 27, Article 29, and Article 33 of the Constitution of 1945.
- On such basis, the review of several provisions in the Law 7/2004 regarding Water Resources shall also be based on Article 27 and Article 33 of the Constitution of 1945 being the essentials of the Constitution of 1945.
- The Decision of the Constitutional Court Number 58-59-60-63/PUU-II/2004 and the Decision of the Constitutional Court Number 08/PUU-III/2005 mentioned at least two basic principles, i) the organization of the development of potable water provision system is in principle the responsibility of the Government and the regional governments; and ii) the Government shall prioritize the fulfillment of the basic right of water if compared with the other interests because the basic right of water is the main right.
- Article 11 and Article 12 of the International Covenant on Economic Social and Cultural Rights (ICESCR) in its paragraph three rendered a general comment on the provision of Article 11 mentioning that a specific recognition of the right of each individual of a decent standard of living, including food, clothing, and housing, shall be interpreted as to include therein the right of water being a right of a decent standard of living, particularly being one of the most basic condition to survive.
- The right of water is also linked with the provision of Article 12 which recognized the right of each individual to enjoy a high standard to be achieved for the sake of health. Based on the aforesaid law, the right of water is basically the right of each individual to obtain water sufficiently, safe, acceptable, and can be accessed physically, as well as affordable for private utilization and household.
- Normatively the right of water connotes on the one hand being "the *right to maintain access to existing water supplies necessary for the right to water and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies",* and on the other hand *"is a right to a system of water supply and the management that provides equality of*

*opportunity for people to enjoy the right to water."* That said, on the one hand each individual shall be able to access water easily, while on the other hand the equal opportunity for each individual to enjoy the right of water shall be granted. In principle, water, the facilities, and service of water shall be accessible for each individual without discrimination.

- Article 11 and Article 12 of the *Ecosoc Covenant* has truly been regulated in Article 27 section (2) of the Constitution of 1945 which determined that each citizen is entitled to work and a decent life for humanity.
- The guaranty for the right of water has been strengthened institutional wise with the right to control of the state as is regulated in Article 33 section (3) of the Constitution of 1945.
- In relation to Article 27 of the Constitution of 1945, water resources cannot be understood merely as an economic commodity, but more basically as one of the basic rights of humans to defend life.
- The right to control of the state over water resources shall be understood also in the context of Article 28I section (4) of the Constitution of 1945, stating that the protection, advancement, enforcement, and fulfillment of basic human rights is the responsibility of the state, particularly the government.
- Conceptional wise, the responsibility of the state to fulfill the right of water is linked with the position of the right of water being a part of the *Ecosoc* rights (economic, social, and cultural rights) rooted in the concept of positive freedoms aspiring for the existence of a wide spectrum and effective for the state to conduct intervention to fulfill the *Ecosoc* rights. That kind of right is different from the character of civil and political rights rooted in the concept of negative freedoms, which precisely does not want the existence of intervention of the state in the fulfillment its rights.
- In relation with the right of water, the responsibility of the state shall be understood as a wide and effective domination over water resources management to ensure that each individual will be able to fulfill the need of water sufficiently, safe, and affordable for private utilization and his/her household.

- The provision of Article 40 section (2) and section (3) of the Law on Water Resources that stated that the development of potable water provision system is the responsibility of the Government and the regional the governments, and the organization of which shall be executed by the BUMNs and/or BUMDs is already in line with Article 27 and Article 33 section (3) of the Constitution of 1945.
- However, Article 40 section (4) of the Law on Water Resources regulating the involvement of cooperatives, enterprises owned by the private sector, or public groups contained norms which are not fully in line with Article 27 and Article 33 section (3) of the Constitution of 1945. The norm which involves corporations or institutions other than the BUMNs and/or BUMDs indicates the paradigm that water resources are merely an economic commodity, the management of which can be transferred to the private sector which is more economic profit oriented. Nonetheless, potable water is the most basic need, it is namely part of a right of water which shall be guaranteed by the state.
- The provision regarding potable water is not just related with the aim of welfare in economic sense, but is related with a basic condition which determines the dignity of humanity, the right to live, and health quality.

- The privatization of the right of water will open the opportunity towards the occurrence of discrimination in the access to water as a need.

- Privatization will encourage a part of people to obtain quality potable water, while the other larger part will have difficulty in their access to and afford water decently.

- Meanwhile the founders of the state drafted Article 33 of the Constitution of 1945 in order to change and eliminate the liberal economic system left by the colonial system of the Netherlands India.
- One of the characters of colonial liberalism of the Netherlands India is the dominant role of the private sector in the management of natural resources, while the state becomes only an instrument to protect the capital of the private sector.
- The execution of the Ecosoc rights precisely wants a larger obligation for the government, the other way around from the civil and political rights.
- Its *General Comments* stated that tremendous authorities or power should be granted to the state for the private and household utilization interest, to ensure not only the fulfillment of economic need, but also the need of human dignity of life.

- The fulfillment of the right of water, in the sense of *personal and domestic use* should in principle be without discrimination.
- The constitutional review does not merely refer to norms or rules, but should refer to the principle of constitutionalism.

- A modern constitution has three meanings, namely i) being the highest rule; ii) the existing system of the Government or the Government system which indeed prevail; and iii) the realization of constitutionalism.
- Lots of states possess a constitution but do not embrace constitutionalism.
- Communist and authoritarian states possess long constitutions but do not embrace constitutionalism.

- England does not possess a written constitution but embraces constitutionalism.
- In the context of the right of water, the first principle is how the state can protect the basic interest to the right of water, namely the public interest to obtain water for the sake of the need of private and domestic or family utilization. The second principle is for the sake of the right to defend life; and the third principle is health.

- Indonesia’s constitutionalism is not a liberal constitutionalism that grants great authorities to the individual, but is a social constitutionalism that emphasizes balance between political and social justice.

**5. Dr. Hamid Chalid, S.H., LL.M.**

- In the previous Decision of the Constitutional Court water is categorized as *public good*, being a typical good which is the source of life, so that access thereto is a human basic right.

- The coming of the Law on Water Resources is a pressure from the World Bank to the state debtor to implement a new water regime of law, which is based on the *Dublin Principles*.

- One of the important principle in the *Dublin Principles* is that water has an economic value for all its utilizers.

- Economic wise water cannot be categorized as *public good* or *pure public good*, but would be more familiar with the term of *common pool resources*, with the reason: i)

it is of *no excludable* nature, namely the water utilization by one cannot hamper others to use it; ii) *rival rules* character, namely that water is not an unlimited good so that the use of water by one would diminish the water availability for other individuals.

- Water is not *public good* but *common pool resources*, yet in the interest of law we should place it as a *public good*, because: i) there are almost no good in this world being pure public good; ii) the character of water economy which is *rival rules*. As such the law can prevent private domination over water resources.
- There are two basic principles of the *Public Trust Doctrine*, namely i) surface water is a public owned good or *res communis*; and ii) the state is a trustee or a mandate holder of a *public trust* object, which in this matter is water.

- In its development, *public trust* eventually comprises also ground water, because i) initially *public trust doctrine* was developed to protect water flow from the domination of private persons to prevent disturbance to the public interest for navigation and fishery; ii) subsequently water being a good became categorized as public good, yet ground water was still regarded differently because of the limited understanding of man regarding the hydrology of ground water; and iii) by the time water was still abundant, people did not imagine that progress of technology and the change of life style would lead to the utilization of ground water in one place can disturb the utilization of ground water in another place; and iv) in line with the development of human knowledge, ground water was given the status of *public good* and therefore a part of the jurisdiction under *common law* included it into the category of the *public trust doctrine*. The position of water being an *economic good* is linked with the fact that water has been, is being, and will become a *scarce good*.
- According to David Ricardo, the limited supply of natural resources for the fulfillment of economic needs can be substituted by means of intensification (intensive wise exploitation of energy source) or by means of extensification (exploiting energy source which has not been exploited).
- According to Ricardo the scarcity of energy source is reflected in two economic indicators, namely the price increase of *output* as well as the extraction cost per *output* unit.
- The increase of *output* price due to the increase of unit cost per *output* will decrease demand for good and service produced by natural resources. On the other hand the price increase of *output* gives incentive to the producer of natural resources to increase supply.

- The limited availability of resources, the combination of price effect and cost will give cause to incentive to seek natural resources substitution and increase recycling, innovation development, search for new deposit, and increase of production efficiency, so that it may diminish pressure/depletion of natural resources.
- Ricardo's opinion cannot be accepted because i) the suggestion of intensification and extensification in the exploitation of water resources is dangerous for the environment and for life; ii) the price increase of *output* is not axiomatic against demand for water, because there are several absolute matters in the water utilization which cannot be bargained only because of the diminishing purchasing power; iii) water is not an energy source that has substitutes.
- Although water being an economic good is an undeniable social reality, yet the position of water being *public good* cannot be ignored, due to these reasons: i) the individual purchases treated water or value added water as an option because the existence of purchasing power; ii) a community which does not possess purchasing

power, treats water as an *economic good* with its market logic, which would hamper humans to obtain access to water for the basic needs of life.

- The reason of access to water for the basic needs of life gives rise to the idea to include the right of water as a basic right of humans, so that human right of water is protected from the violence of economization or commoditization of water.

- American courts have developed the '*Shock the Conscience Theory*', which is taken from the consideration of Justice Frankfurter in the case of Rochin vs California in 1952 in America. The theory as referred to was based on the $14^{th}$ Amendment to the Constitution of America which prohibited the state to confiscate the right of *live, liberty, and property without due process of law*. The rejection or elimination of a right which is such inherent and fundamental would shock the human awareness. If the right of somebody to access water is rejected because certain water resources have become the *property right* of somebody, legal entity, or company, whereas the aforesaid water is very important for the fulfillment of the vital life of the aforesaid somebody, then such rejection would shock human awareness, let alone if such rejection is protected by law.

- With the *Public Trust Doctrine* one may challenge the utilizer of water which is evidenced to have diminished the current of water in a river due to excessive usage, despite the said individual *per se* does utilize the aforesaid water for his/her daily needs, and not as a party who has been directly harmed.
- On the other hand the *Public Trust Doctrine* cannot be made a base to reject the water commercialization or privatization save if it can show that there is a potential of disturbance vis-à-vis the rights of another utilizer of water due to the said water commercialization business.
- In 2002 the basic human right of water was set out in the *General Comment Number 15 on The Rights to Water* or GC 15th.
- In the Netherlands, basic human right of water is not issue in the water law of the Netherlands, yet in reality the right of water is given serious regard and is well governed by law.

- There are three basic points in the making of laws and regulations in the field of water resources in the Netherlands, namely i) the continental European legal tradition; ii) it is adoptive towards the European law; and iii) pragmatic or prioritizing problem solving rather than bound by the standard and rigid provisions.
- The European environment law influencing the water law of the Netherlands is the '*polluters pay principle*' which is the '*precautionary principle*'.
- In 1990 the Netherlands conducted water privatization, yet early in the 2000s it was referred back to the public. In 2004 a new regulation was promulgated which returned the clean water service to the public. Water service for consumers can only be conducted by a legal entity which qualifies certain requirements or qualifications. Such legal entity shall be: i) *publiekrechtelijke rechtspersoon* or *public legal person* which in this Law is the state per se, the provinces, the municipalities or the water council; ii) *naamloze* or *besloten vennootschap*, namely public owned limited companies, the BUMNs, or limited companies which comply with certain requirements.
- In India which applies the *common law system*, surface water is subject to the *Public Trust Doctrine* and applies the riparian system in the allocation of water

resources, namely a system whereby the individuals who live on the river banks possess *preference* rights over individuals living far away from the river banks.

- In India ground water is owned by the landowner, the provision of which was strengthened in the *Indian Easements Act* of 1882.
- Article 33 of the Constitution of 1945 embraced the same principle with that of the *Public Trust Doctrine*.
- The Law on Water Resources came to existence under the pressure of the World Bank through the scheme of the *Water Resources Sector Adjustment Loan* (WATSAL), whereby Indonesia was pressured to apply the WATSAL Law if it wished to obtain a loan.
- The paradigm of the *economic and social function* is an effort to accommodate the idea of *economic value* of water being an *economic good* and basic human right of water being a *public good*.
- The national water policy encouraging the water management by the private sector, the development of a funding system of the water resources management by the principle of *full cost recovery*, namely water cost will be shouldered by the utilizing public. Furthermore the institutional system of the water resources management differentiated between the function of a regulator and the function of an operator.
- The government wants to get rid of the obligation to arrange (*bestuursdaad*) and to manage (*beheersdaad*) being one implementation of the right to control water resources, which is granted to the private sector through the privatization of water resources arrangement and management.
- The policy of *full cost recovery* as regulated in Article 4 which stated the direction of the general water management resources policy developed a funding system for the water resources management which considered the principle of *cost recovery* and the social condition of the public. This policy is also expressly stated in PP 16/2005 which mentioned the existence of profit for the managing party. The aforesaid PP was promulgated ahead of the closing of the session for the review of the Law on Water Resources in the Constitutional Court, so that for the larger part the Justices were not aware of this PP being an integral part of the Law being reviewed. Two Constitutional Justices knowing the existence of the aforesaid PP had subsequently taken the position of a *dissenting opinion*.
- The Law on Water Resources introduced the utility right of water being an implementation of social function and economic function. The social function of water is implemented in the utility right to use water, while the economic function is implemented in the utility right to exploit water.
- The Court interpreted Article 1 number 14 and Article 5 of the Law on Water Resources to indicate the term of the basic human right of water, so that the Utility Right to Use Water (*Hak Guna Pakai Air*, HGPA) was translated as being a right to obtain and to use water minimum for the daily basic needs to fulfill the need of a life that is healthy, clean, and productive.
- The HGPA as such is named as the primary HGPA while the utilization of the HGPA outside the aforesaid need is of secondary nature.
- The primary HGPA being the obligation of the state should actually be obtained by the people for free, and not by letting privatization and commercialization to occur.
- Related to the Utility Right to Exploit, Frederic Bastiat stated that actually an owner of a good is truly he/she who possesses or obtains the benefit from the value of the aforesaid good, while value is different from utility.
- From the perspective of Bastiat, the granting of a right to exploit actually is submission of the benefit of water resources from a state to the private sector, which equals submission of ownership right of water resources to the private sector. That

is dangerous to the public being the actual owner of the water resources, because the right of exploitation is only slightly different from *private ownership without responsibilities*.

- The utility right to exploit water eventually became *property right which* transfers the right to control of the state to it shoulder to use or to misuse it.

6. **Dr. A. Irman Putra Sidin, S.H., M.H.**
   - The opinion that a law is a product of politics should be changed to become a law being a product of the market.
   - The law abides by the rule of the pendulum which is moved by the market because the market needs the law to legalize the mechanism of the market which works massively without limits from day to day.
   - The main enemy of the market is the constitution of a state which necessitates its economic sovereignty.
   - The Constitution of 1945 possesses the concept of domination of the state over the economic sector which is deemed strategic. No state in the world possesses the concept of control of the state as stated in Article 33 of the Constitution of 1945.
   - The constitutional interpretation of Article 33 of the Constitution of 1945 is an antagonistic threat to the market. The constitutional interpretation as such is an interpretation of the Court which deepened the domination of the state according to Article 33 of the Constitution of 1945, namely it is to be understood as that the people are collectively constructed by the constitution as granting the mandate of the state to make policy, arrangement, regulations, management, and supervision for the optimal welfare of the people.
   - The Court also interpreted that Article 33 of the Constitution of 1945 wanted that the domination of the state as such shall effect in the optimal welfare of the people.
   - Following the interpretation of Article 33 as such, then the existence of Laws that contains only a regulation does not truly reflect the concept of domination of the state.

   - The Laws shall not instantly draw the conclusion that in certain economic sectors such as water resources, suffice if the state conducts only regulation and supervision.

   - The norm in the Law on Water Resources should confirm that it is basically and primarily the state which conducts the aforesaid water management resources all the way up to the stage of supervision. The norms of the Laws are not eligible to directly determine the rank of execution of the concept of arrangement by the state, in the sense that the laws only self-determine up to the rank of regulations only, bearing in mind that the state is yet in the capacity to manage it.

   - Although reality wise the state is incapable to manage, norms of the laws shall remain to determine that basically the management thereof is conducted directly by the state, only subsequently at the stage of implementation, the Laws delegate it to the Government or other state institutions.

   - The Laws shall remain capable to expressly write down the five variables of the aforesaid concept of domination by the state being one integral concept of state domination, whereby the state manages directly.

- In the face of imbalance between water availability which tend to decrease and the increasing need of water, water resources shall be managed by paying regard to the social function of water of the environment and economy harmoniously.
- The consideration clause of the Law on Water Resources did not prioritize the concept of domination by the state, but inclined to a management which is horizontal in nature.
- Although Article 6 section (1) of the Law on Water Resources stated that water resources be controlled by the state and shall be utilized for the optimal welfare of the people, the concept of domination in the Law on Water Resources tend to be more in regard of the regulation of the management of the utility right of water, whereby the management of the aforesaid utility right of water shall be in the frame of economic democratization, in other words the existence of market should be welcome with a red carpet by the state.
- The spirit of domination by the state according to the Law on Water Resources is merely that the state has the authority to regulate the pattern of the arrangement mechanism policy all the way to dominate. The aforesaid Laws tend to emphasize the regulation of the management of the utility right of water.
- The aforesaid Laws is the source of more than 30 Government Regulations which increasingly indicate that the paradigm of domination in the aforesaid Laws is merely in the regulation.

**7. Salamuddin (Daeng)**

- According to the data of the World Bank nowadays there are around 2.5 billion inhabitants of the earth who do not have access to sanitation, and there are around 780,000,000 people having no access to clean water resulting in the loss of thousands of life daily and billions of dollar of economic loss annually. Such loss is estimated to reach 7% of the current world gross *domestic* product.

- The World Bank conducts various kinds of efforts which according to them is an effort to cope with this problem by allocating around US$ 8 billion for all or their projects in the whole world approved during the financial year of 2002-2012. Nevertheless, the efforts of the aforesaid international financial institution is suspected by many experts in the world as efforts to conduct water commercialization, including in Indonesia, which changes water scarcity or crisis into the opportunity for the water companies in the conduct of business.
- The main reform agenda funded by the international financial institution is the Amendment to the Constitution of 1945 to be in line with the spirit of neoliberalism. Based on the amended Constitution of 1945 various laws and regulations have been made that opens the road for domination by the foreign private capital to control Indonesia’s natural wealth.
- The signing of the consensus between the Government and the *International Monetary Fund* through the *Letter of Intent* dated 31 October 1997 is the door for the initial basic reform in the system of water management towards liberalization, deregulation, and privatization.
- Article 44 of the aforesaid LOI urged the Government to conduct the restructuring of key energy source price and its utilization cost, particularly for the sectors of forestry and water utilization, so that it would generate big revenue and at the same time to promote environment objectives.

- Article 42 emphasizes that the Government conducts steps to promote competition by accelerating privatization and to extend the role of the private sector in the provision of infrastructure, including water.
- The IMF particularly stated that with regard to water it will be assigned to the World Bank to conduct further activities through project water resources management which was signed in April 1998 to encourage commercialization and water privatization in Indonesia.
- The aforesaid water commercialization and privatization is set out in the Law 7/2004 being a part of the execution of a loan of US$ 150 million from the World Bank being the requirement from a total loan of US$ 300 million for the water restructuring program.
- The ADB being the ally of the IMF and the World Bank conducted further activities by funding 21 water projects in Indonesia in the frame of privatization and commercialization.
- The activity with the most extensive effect is technical assistance project of US$ 600.000 in February 2001, whereby the ADB conducted various kinds of programs linked with water sector and infrastructure in Indonesia.
- In the report of the World Bank of February 2004, prior to the endorsement of the Law 7/2004 on 18 March 2004, bearing the title "*Water Resources Management During Transition and Reform in Indonesia Toward an Integrated Perspective on Agriculture Drainage*" with the sub-topic of "*Water Sector Reform Beyond* 1998" stated several ideas which became the base of the draft "*National Water Resources Policy Action Plan*" of the year 1994 up to 2020, namely a policy to identify the emphasis of an efficient water allocation, exploitation, safe quality of water, economic wise adjustment, and management of capital budget, increasing the role of the private sector, and the participation of the public, as well as the need of an administrative structure consistent with an integrated aim.
- The action plan emphasizes the management approach of the River Watershed (*Daerah Aliran Sungai,* DAS) recommending the formation of the National Water Resources Council (*Dewan Sumber Daya Air Nasional*).
- The report of the World Bank was issued in February 2004, while the National Water Resources Council was endorsed only in 2008, indicating the very significant role of the World Bank in the whole restructuring of the water resources management in Indonesia.
- The water management strategy in the Law 7/2004 obviously aimed at the facilitation of business sector. That is apparent from three keywords which tend to indicate efforts of commercialization and privatization, namely i) the management of water; ii) the involvement of the private and public sector; and iii) beneficial right of water.
- The scope of water business as referred to in the Law 7/2004 is very wide and comprises almost all the potentials of water resources mentioned in Article 2. In the case of water resources management, the Government executed Article 6 and Article 13 of the Law 7/2004.
- By virtue of the utility right of water, the private sector can manage water resources for commercial interests and can sell it at the rate of economic price.
- The existence of the Law 7/2004 is strengthened by the Law 25/2007 regarding Capital Investment which stipulated various kinds of right to dominate land in the form of utility right to exploit, utility right to build, and right to use, equal with the utility right of water.
- The Law on Capital Investment also granted the base for the stipulation of closed and open sectors for foreign capital investment.

- The spirit of the Law 7/2004 is the same with or is strengthened by the Law on Capital Investment, namely the commercialization of Indonesia's natural wealth through capital investment.
- With reference to the Law on Capital Investment, the Government issued a regulation regarding the list of negative investment or the list of business field closed and open for capital investment. In the negative list of investment, namely the Perpres 36/2010, the Government stipulated that the exploitation of potable water can be controlled up to 95% by foreign capital investment, and business in the field of agriculture having a close relationship with water up to 95% can be controlled by foreign capital investment.
- The high stream of urbanization to the cities and the uncontrollable population the development of which correlated inversely with water availability becomes a source of crisis in the cities.
- Indonesia possesses an abundant wealth of water, but only around 25% have been exploited from the standard water provision, water irrigation, as well as household need, cities, and industry. From the 7.2 million hectare irrigation land just around 11% have been serviced.
- The farmers have a low revenue and become increasingly poorer, one of which causes is the high agriculture production cost due to irrigation infrastructure damage, high cost production facility, as well as the amount of agricultural risk due to natural calamities, drought, and climate change.
- The Law 7/2004 does not render a settlement to the crisis of water occurring in Indonesia, but precisely aggravates the crisis level and extends conflicts caused by the scramble of water resources in the midst of the public. It does not rarely lead to open conflict as well between the public the private sector.
- All the water resources should absolutely be in the hands of the state, and the state develops the production branch for the management of water as mandated by the constitution, while the private sector desiring to utilize water for their various economic activities should buy water from the state through the state company.
- The private sector shall not control or possess water resources because it endangers the public interest indeed.
- The spirit of involvement of the public and the water management through the granting of the utility right to exploit is a form of violation of the constitution.

[2.3] Considering whereas with regard to the petition of the Petitioners, the President conveyed his testimony in the hearing dated 4 December 2013 and conveyed his testimony in writing dated 17 December 2013 as received by the Office of the Clerk of the Court dated 23 December 2013, which substantially stated matters as described as follows.

**The Authority of the Constitutional Court**

In essence the Petitioners have postulated that a covered privatization has occurred because the making of the Government Regulation Number 16 of 2005 regarding the Development of potable water provision system is not in accordance with the interpretation of the Decision of the Constitutional the Court Number 058-059-060-063/PUU-II/2004 and Number 008/PUU-III/2005 dated 19 July 2005, so that the Law as such (*a quo*) can be petitioned for review again in the Constitutional Court. Other than the aforesaid matter the Petitioners have utilized Laws in their petition as a testing stone against the Government Regulation Number 15 of 2005 regarding the Development of Potable Water Provision System.

The Government opined on the petition stating that the Petitioners have queried the implementation to the aforesaid matter according to the Government questioned by the

Petitioners is regarding the implementation of the provisions of the Law on Water Resources, while the postulates utilized are the same or is a *copy-paste* from the previous petition, so that the allegation of the Petitioners stating that the Government Regulation Number 16 of 2005 is contrary to the interpretation of the Constitutional the Court is not reasoned.

Based on the aforesaid herein above, the Government opined that the petition of the Petitioners is imprecise and therefore it would be proper if the Constitutional Court would state the petition as such (*a quo*) as not subject to the authorities of the Constitutional Court.

**Regarding Legal Standing**

The description regarding the legal standing of the Petitioners will be explained more elaborate in the complete testimony of the Government which will be conveyed in the next hearing or through the Office of the Clerk of the Constitutional Court. Nevertheless the Government petitioned to the Constitutional Court to consider and to judge whether the Petitioners possess legal standing as determined by Article 51 section (1) of the Law Number 24 of 2003 regarding the Constitutional Court as amended by the Law Number 8 of 2011, as well as based on the previous Decision of the Constitutional Court as of its Decision Number 06/PUU-III/2005 and its Decision Number 11/PUU-V/2007.

**Statement of the Government Regarding the Subject Matter of the Petition Petitioned for Review**

Prior to the Government giving its elucidation on the subject matter petitioned for review by the Petitioners, the followings can be explained:

1. Whereas the whole description of the petition of the Petitioners either its *posita* as well as its *petitum* share the same purpose and objective with the Petition to review as set out in the case Number 058-059-060-063/PUU-II/2004 and Number 008/PUU-III/2005 as has been decided by the Constitutional Court on the date 19 July 2005. Therefore, according to the Government the current petition of the Petitioners in the case Number 85/PUU-XI/2013 appears as if it has a different purpose and objective though they are similar.
2. Whereas because the previous petition of the Petitioners and the petition petitioned now shares the same purpose and objective, the testimony of the Government as conveyed in the previous review shall be of *mutatis mutandis* nature vis-à-vis the testimony of the Government to be conveyed in the Plenary hearing of today dated 4 December 2013.
3. Whereas the testimony of the Government to be conveyed in the hearing today should be deemed being a testimony sharing the same value, perfecting, affirming, or adding in order to complete the previous testimony of the Government.

The following is the elucidation of the Government regarding the petitioned subject matter:

a. Background

The basic concept of the Law on Water Resources can be detailed as follows:

The Preamble of the Constitution of 1945 affirms that the objective of the establishment of the Government of the State of Indonesia is to protect the whole Indonesian nation and the native land Indonesia and to advance the public welfare, to educate the life of the nation, and to participate in the execution of world order which is by virtue of freedom, perpetual peace and social justice. Moreover Article 33 section (3) of the

Constitution of 1945 stated that the land and waters and the natural wealth contained in it shall be controlled by the state and utilized for the optimal welfare of the people.

Therefore, the whole natural wealth either existing in or on the surface of the land, shall be utilized to the optimal welfare and prosperity people including water.

The current availability of water in various regions in Indonesia has become increasingly limited. The need of water continue to rise, so that lots of imbalance has occurred between the availability and need of water. Therefore, water resources shall be managed in order for it to remain exploitable sustainably.

In order for the water resources management to be executed properly to anticipate the problems stated herein above, a firm legal instrument is needed to become the base for water resources management. Moreover there is also a demand growing in public in order:

a. There is more real recognition of basic human right of water related to human rights.
b. There is protection of the interest of people's agriculture and public with a weak economy.
c. More transparent and democratic process of decision making and the policy stipulation.
d. There is a legal frame to anticipate the development of excesses of water economic value that surfaces increasingly.

The development of problems as well as the aforesaid public demand has given cause to a new paradigm in the water resources management which among others are:

a. First is the overall and integrated management.
b. The protection of basic human right of water.
c. The balance between utilization and conservation.
d. The balance between physical and non-physical handling.
e. The involvement of stakeholders in the water resources management in the spirit of democracy and coordinative approach.
f. To adopt the principle of sustainable development based on harmony between the social function of water, the environment, and economy.

In line with the aforesaid matter as above mentioned, the Law on Water Resources has the capability to actualize that the water resources management will comprise efforts to plan, to execute, to monitor, and to evaluate the organization of water resources conservation. The utilization of water resources and control of the destructive force of water shall be executed according to the mandate of the Constitution of 1945. The utilization of water resources and control of the destructive force of water is executed according to the mandate of the Constitution of 1945. This is also already in line with the opinion of the Constitutional Court in its Decision Number 058-059-060-063/PUU-II/2004 and Number 008/PUU-III/2005 dated 19 July 2005, stating that "the position of the state in its relation with its obligation induced by human rights, the state shall respect, protect, and fulfill." In order to actualize the values of respect, the protection, and fulfillment of basic human right of water, the Law on Water Resources has three basic thoughts, which is namely philosophic, sociologic, and juridical in nature as follows.

Philosophically water is a gift of God The One Only which is a source of life and source of livelihood. Therefore, the state is obliged to grant protection and guaranty for the basic rights of each individual to obtain water being the fulfillment of the minimum daily basic needs for the sake of the fulfillment of his/her healthy, clean, and productive livelihood.

Sociologically, the management of water resources shall pay regard to the social function of water, accommodate the spirit of democratization, decentralization, transparency in order of livelihood of the public, the nation, and the state, as well as recognizing the *ulayat* rights of *adat* law communities.

In juridical sense Article 33 section (3) of the Constitution of 1945 stated that the land and waters and the natural wealth contained in it shall be controlled by the state and shall be utilized for the optimal welfare of the people. In line with that provision, the Law on Water Resources stated that: "Water resources shall be controlled by the state and shall be utilized for the optimal welfare of the people." The term"be controlled by the state" includes the understanding to regulate and/or to organize, to cultivate and to supervise, particularly to repair and increase service, so that water resources can be utilized equitably and sustainably.

The organization of the water resources management also needs to pay regard to several basic technical thoughts in accordance with the nature of water, namely:

1. Water is a renewable energy source the availability of which is subject to the natural cycle named as the hydrological cycle. There are certain times when water is abundant and even excessive, and there is also time of drought, so that there is the need for an integration between abundant water and drought.
2. The amount of water naturally remains, but its availability in various places is different in accordance with the natural local condition. There are areas which are naturally rich in water and there are also areas suffering from shortage of water, so that human intervention is needed to bring water from areas abundant with water to places where water is scarce through water resources management.
3. The availability of surface water and ground water mutually influence one another. Therefore, the management of both needs to be harmonized.
4. Water is a dynamically flowing energy source without knowing administrative border areas of government and state. Therefore the base areas of its management shall be vested in hydrological areas by keeping to pay regard to the existence of administrative areas. Therefore the formulation of policy, pattern, and the water resource management plan needs to involve parties in the related administrative areas in order to achieve consensus and integration in its implementation.

Based on the thought aforesaid herein above, then water resources as regulated in the Law on Water Resources needs to be managed according to the following principles:

1. The principle of preservation contains the understanding that the utilization of water resources shall be organized by safeguarding the preservation of the sustainable function of water resources.
2. The principle of balance contains the understanding of always placing the social function of water, function of the environment, and economic functions harmoniously.
3. The principle of public expediency contains the understanding that the water resources management shall be executed to render the optimal benefit to the public interest effectively and efficiently.
4. The principle of integration and harmony contains the understanding that the water resources management shall be conducted cohesively in the actualization of harmony among the various interests and pay regard to the dynamic nature of water.
5. The principle of justice contains the understanding that the water resources management shall be conducted evenly to all the public segments in the area of our land and water, so that each citizen is entitled to obtain the equal opportunity to participate and to really enjoy its result and keep rendering protection to public segments suffering from poor economy.

6. The principle of autonomy contains the understanding that the water resources management shall be conducted by paying regard to the capability and excellence of local energy source.
7. The principle of transparency and accountability contains the understanding that the water resources management shall be conducted transparently and can be accounted for.

With the aforesaid principles, water resources needs to be managed overall, integrated and having an environment insight with the aim of actualizing the sustainable expediency of water resources for the optimal welfare of the people. In other words, the Law on Water Resources is a manifestation of the mandate of the Constitution of 1945 particularly Article 33 section (3) which stated: "The land and waters and the natural wealth contained in it shall be controlled by the state and be utilized for the optimal welfare of the people."

**The Scope Regulated in the Law on Water Resources**

In the actualization of the sustainable expediency of water resources for the optimal welfare of the people and by paying regard to the basic thoughts as well as the principles as described as above mentioned, the Law on Water Resources has been drafted with the regulating substance that comprises among others:

1. The conservation of water resources.
2. The water utilization resources.
3. The control of the destructive power of water
4. The empowerment and enhancement of public participation.
5. The enhancement of the data as well as information and transparency on the availability of water resources; and
6. The management process comprising the planning, the execution of construction, as well as the operation and maintenance.

**Against the assumption of the Petitioners stating that the provision of Article 6, Article 7, Article 8, Article 9, Article 10, Article 26, Article 29 section (2) and section (5), Article 45, Article 46, Article 48 section (1), Article 49 section (1), Article 80, Article 91, Article 92 section (1), section (2) and section (3) of the Law on Water Resources are contrary to the provision of Article 18B section (2), Article 28C section (2), Article 28D section (1), Article 28H section (1), Article 28I section (4) and Article 33 section (2) and section (3) of the Constitution of 1945, the Petitioners assumed:**

1. The Law on Water Resources contains a content of domination and of monopoly water sources contrary to principle that water resources shall be controlled by the state and shall be utilized for the optimal welfare of the people.
2. The Law on Water Resources contains a content positioning that the water utilization tends to be in the interest of commerce and can trigger horizontal conflict.
3. The Law on Water Resources eliminates the obligation of the state to fulfill the need of water.
4. The Law on Water Resources is a discriminative law.

The Government submitted a testimony as follows:

1. Against the assumption of the Petitioners stating that the Law on Water Resources contains a content of domination and monopoly of water resources being contrary to the principles of water resources shall be controlled by the state, the Government submitted an elucidation as follows:
   a. Whereas the exploitation of water resources could be given a permit if:
      1) The water provision for the daily basic needs and irrigation for the people's agriculture in an existing irrigation system, has been fulfilled and there is still

water allocation for the kind of such business [*vide* Article 29 section (3) and Article 46 section (2) of the Law on Water Resources and its elucidation];

2) The process of public consultation has been conducted [*vide* Article 47 section (4) of the Law on Water Resources];
3) The amount and water location for which a permit for its exploitation has been applied for shall be in accordance with the allocation plan stipulated in the water resource management plan on the respective river zone [*vide* Article 45 section (4) letter a and Article 46 section (2) of the Law on Water Resources].

b. Whereas the exploitation of water resources is organized by paying regard to its social function and the environment [*vide* Article 45 section (1) of the Law on Water Resources];
c. Whereas the exploitation of water resources is organized by encouraging the participation of small and medium enterprises [*vide* Article 47 section (5) of the Law on Water Resources];
d. Whereas the exploitation of water resources comprising one river zone as a whole (from the upstream to the downstream) can only be executed by enterprises owned by the state/a region (BUMN/BUMD) being the manager of water resources [*vide* Article 45 section (2) of the Law on Water Resources];
e. Whereas individuals, enterprises, or inter-enterprise cooperation can be given the opportunity to exploit (not to control) water resources by the Government, a Province Government, or Government of a Regency/a Municipality through a licensing mechanism [*vide* Article 45 section (3) of the Law on Water Resources];
f. Whereas with the validity the aforesaid licensing mechanism then the Government keeps holding control over water resource utilization [*vide* Article 45 section (3) of the Law on Water Resources].

As such according to Government, the domination of water by the state as mandated by Article 33 section (3) of the Constitution of 1945 shall remain to be executed by the Government or a regional government in line with consideration/the opinion of the Constitutional Court comprising (1) policy making (*beleid*), (2) to conduct an act of the arrangement of (*bestuursdaad*), (3) to conduct the act of regulation (*regelendaad*), (4) to conduct the act of management (*beheersdaad*), and (5) to conduct the act of supervision (*toezichthoudendaad*).

Furthermore the Constitutional Court has also rendered a consideration which can be quoted again as follows:

"*Whereas despite the Law on Water Resources recognized the Utility Right to Exploit Water as stated in Article 7 section (1), yet the aforesaid term right shall be differentiated from* the *right in a general term. Article 1 number 15 stated that a Utility Right to Exploit Water is a right to obtain and to exploit water. By this formulation the Utility Right to Exploit Water is not intended to grant the right to dominate water resources, rivers, lakes, or swamps. The general elucidation number 2 stated that the Utility Right of Water is not a right to own water but is only limited to the right to obtain and to use or to exploit a quota of water in accordance with the allocation yang stipulated by the Government to the utilizer of water. The concept of the Utility Right of Water as such is in accordance with the concept that water is a res commune which does not become an economic price object. The Utility Right of Water is of two characters. Firstly, the aforesaid utility right to use is of a personal right in nature. The reason therefor is that the utility right to use is a reflection of basic rights, therefore the aforesaid right is attached to the human subject inseparable therefrom. Secondly, the Utility Right to Exploit Water is a right that merely stems from a permit granted by the Government or a Regional Government, and being a permit it is bound by rules of*

*licensing, including therein the provisions regarding the requirement of licensing and the reasons that give cause to permit to be revoked by the licensor."* (*Vide* page 496 the Decision of the Constitutional Court Number 058-059-060-063/PUU-II/2004 and Number 008/PUU-III/2005 dated 19 July 2005).

Based on the aforesaid description as above mentioned, the assumption of the Petitioners which stated that the Law on Water Resources contains a subject matter of domination and monopoly is imprecise and unreasoned.

2. Against the assumption of the Petitioners stating that the Law on Water Resources contains a content positioning that the water utilization tends to be in the commercial interest and can give cause to horizontal conflict. The Government explained that the Law on Water Resources grants protection and guarantees the people's right of water as regulated in the articles as follows:

1) The state guarantees the right of each individual to obtain water at least for the daily basic needs to fulfill healthy, clean, and productive the need yang (Article 5);
2) Water resources be controlled by the state and shall be utilized for the optimal welfare of the people [Article 6 section (1)];
3) The utility right to use is obtained without permit to fulfill the daily basic needs for individuals and for people's agriculture situated in an irrigation system [Article 8 section (1)];
4) The Government of the regencies/municipalities has the authority and has the responsibility to fulfill at least the basic daily needs of water for the public in its area (Article 16 letter h);
5) The provincial Governments have the authority and have the responsibility to assist regencies/municipalities in its area to fulfill the public basic needs of water (Article 15 letter j);
6) The (central) Government has the authority and has the responsibility to render technical assistance in the water resources management to the Province Governments and the Government of regencies/municipalities (Article 14 letter l);
7) The utilization of water resources is aimed at the making use of water resources sustainably by prioritizing the fulfillment of public basic needs of life equitably [Article 26 section (2)];
8) The determination of water allotment of water source in each river zone is conducted among others by paying regard to the exploitation of available water [Article 28 section (1) letter d];
9) The provision of water to fulfill the daily basic needs and irrigation for the people's agriculture in an existing irrigation system is the main priority of the provision of water resources above all needs [Article 29 section (3)];
10) If the determination of the priority of water provision of resources gives rise to the loss of the user who has previously used the water resources, the Government or a Regional Government is obliged to regulate the compensation to its user [Article 29 section (5)];
11) The development of potable water provision system is the obligation of the Government and a Regional Government [Article 40 section (2)];
12) State owned enterprises and/or or regionally enterprises are the organizer of the development of potable water provision system [Article 40 section (3)];

13) The utilizers of water resources for the daily basic needs and for people's agriculture shall not be charged with service cost of the manager of water resources [Article 80 section (1)];
14) The public has the equal opportunity to participate in the process of the planning, the execution, and the supervision of the water resources management of [Article 84 section (1)];
15) The public harmed by various problems of the water resources management is entitled to file a class action with a court (Article 90);

Furthermore the Constitutional Court has also rendered its consideration which can be quoted again as follows:

> "*Whereas* water is not only needed for the direct fulfillment of the need of human life. Energy resources existing in water are also needed for the fulfillment of other needs like irrigation for agriculture, electric power generators, and for industrial needs. The utilization of the aforesaid water resources has also an important share for the advancement of human livelihood, and is also important factor for humans to live a decent life. The utilization of water resources is one among the means to fulfill the availability of foodstuff, need of energy/electricity. With the aforesaid thought bases, the regulation regarding water resources for the secondary need is also a necessity. Therefore, the regulation of water resources does not suffice if only linked with the regulation of water as a human basic need as a basic right, but the utilization of water resources needs also be regulated for the secondary needs which are not less important for humans to live a decent live. Therefore, the existence of the Law on Water Resources is very relevant (*vide* page 489-490 of the Decision of the Constitutional Court Number 058-059-060-063/PUU-II/2004 and the Case Number 008/PUU-III/2005 dated 19 June 2005).

In other words, according to the Government the assumption of the Petitioners is unreasoned, irrelevant, and imprecise.

3. Against the assumption of the Petitioners stating as if the Law on Water Resources eliminates the obligation of the state to fulfill the need of water. According to the Government the aforesaid assumption of the Petitioners is imprecise and unreasoned, because the Law on Water Resources regulates the substantial subject in water resources management, and although the Law on Water Resources opens the opportunity for the role of the private sector to obtain the Utility Right to Exploit Water and the exploitation permit of water resources, the aforesaid matter will not cause the domination of water to fall into the hands of the private sector.

   The Government opined that the aforesaid assumption of the Petitioners is obviously imprecise and unreasoned, because the Law on Water Resources has clearly and firmly regulated matters being the responsibility of the Government in water resources management, namely in Article 5, Article 6 section (1) and section (2), Article 14, Article 15, Article 16, Article 17, Article 18, Article 19, as well as several article other among others namely Article 28 section (2), Article 29 section (4), section (5), and section (6), Article 30 section (2), Article 33, Article 40 section (2), Article 41 section (2), Article 45 section (3), Article 46 section (1) and section (3), Article 47 section (1), as well as Article 60 section (2) and section (3).

   Furthermore the Constitutional Court has rendered the understanding regarding domination by the state in executing its right of domination of water comprising activities of: i) policy making (*beleid*); ii) conducting the act of arrangement of (*bestuursdaad*); iii) conducting the act of regulation on (*regelendaad*); iv) conducting

management (*beheersdaad*); and v) conducting supervision (*toezichthoudendaad*). All of which have been accommodated in the Law on Water Resources.

4. Against the assumption of the Petitioners stating that the Law on Water Resources is a Law discriminative in nature.

According to the Government the aforesaid assumption of the Petitioners is imprecise and not reasoned because Article 91 and Article 92 shall be understood in their entirety with Article 90 being one entity. The aforesaid articles in the Law on Water Resources are intended to render space for the public for file a claim if matters related to water resources management occur, harming their livelihood and having been clearly set out in what are the right of the public (*vide* Article 90), what are the obligation of the Government agencies (*vide* Article 91), and how if a claim is filed through an organization (*vide* Article 92).

The right of the public to file a claim has been extensively assured without discrimination as written down in Article 90 stating that the public harmed due to various problems of water resources management, is entitled to file a class action to a court. With the above description, it is incorrect that there are derogation and limitation of the right of each individual to defend life and his/her livelihood.

Besides, Government agencies overseeing water resources are also mandated to act for the interest of the public if there is an indication of the public suffering from contamination of water and/or damage of water resources which intends to unravel public life as efforts to protect the public. This provision is deemed needed as the culprit of contamination may not be directly linked with the water resources management activity, but the activity he/she conducts may give cause to contamination of water harming the public. What is meant in this matter by acting for the interest of the public in Article 91 is to file a legal claim in the interest of the public against the culprits of water contamination.

In case of a claim is filed by an organization, it needs to be regulated as to what kind of organization is proper and knowledgeable regarding matters related to water resources, in order to the claim to be made is a claim which is relevant to the problem of water resources. Such regulation is needed in order for the public also to gain a correct comprehension and to be able to channel their aspiration proportionally. If it is not regulated as such, obscurity about the problem may occur and it is feared that it would indeed not assist the public.

The aforesaid is in line with the content of Article 28I section (5) of the Constitution of 1945, namely that in order to uphold and to protect basic human rights in accordance with the democratic principles of a state of law, the execution of basic human rights shall be assured, regulated, and be set out in laws and regulations.

The Elucidation of the Government as aforesaid herein above is already in line with the consideration of the Constitutional Court in its Decision Number 058-059-060-063/PUU-II/2004 and Number 008/PUU-III/2005 dated 19 July 2005 (*vide* page 501 up to 502).

Based on the aforesaid description as above mentioned, the Government does not agree with the assumption of the Petitioners stating that the Law on Water Resources is of discriminative nature against the mechanism of filing the right of the citizen to challenge. Because the Law on Water Resources has precisely rendered freedom to the public to file a claim to a court institution, the Law on Water Resources has also rendered clear rules regarding its procedural law (*vide* Article 90, Article 91, and Article 92 of the Law on Water Resources).

**The Follow-up or Implementation of the Law on Water Resources**

1. In the frame of the further execution of the Law on Water Resources (Government evidence-1) several Government regulations have been determined as follow:
   a. The Government Regulation Number 16 of 2005 regarding the Development of potable water provision system (Government evidence-2)
   b. The Government Regulation Number 20 of 2005 regarding Irrigation (Government evidence-3)
   c. The Government Regulation Number 42 of 2008 regarding the Management of Water Resources (Government evidence-4)
   d. The Government Regulation Number 43 of 2008 regarding Ground Water (Government evidence-5)
   e. The Government Regulation Number 37 of 2010 regarding Dams (Government evidence-6)
   f. The Government Regulation Number 38 of 2013 regarding Rivers (Government evidence-7), and
   g. The Government Regulation Number 73 of 2013 regarding Swamps (Government evidence-8).
2. As a follow-up of the regulation product particularly related to the potable water provision system, several of its implementing regulations are as follow:
   a. The Government Regulation Number 16 of 2005 regarding the Development of the Potable Water Provision System;
   b. The Decree of the President Number 29 of 2009 regarding the Granting of Guaranty and Subvention of Interest by the Central Government in the Frame of Acceleration of the Provision of Potable Water;
   c. The Regulation of the Minister of Public Works Number 294/PRT/M/2005 regarding the Support Agency for the Development of the Potable Water Provision System;
   d. The Regulation of the Minister of Public Works Number 20/PRT/M/2006 regarding the National Policy and Strategy for the Development of potable water provision system (*Kebijakan dan Strategi Nasional Pengembangan Sistem Penyediaan Air Minum,* KSNP SPAM);
   e. The Regulation of the Minister of Public Works Number 18/PRT/M/2007 regarding the Organization of the Development of the SPAM;
   f. The Regulation of the Minister of Public Works Number 01/PRT/M/2009 regarding the Organization of the Development of potable water provision system Non-Piping Network;
   g. The Regulation of the Minister of Public Works Number 21/PRT/M/2009 regarding the Technical Guidelines Investment Worthiness in the Development of the SPAM by the PDAM;
   h. The Regulation of the Minister of Public Works Number 12/PRT/M/2010 regarding the Cooperation Guidelines for the exploitation of the Development of the Potable Water Provision System;
   i. The Regulation of the Minister of Public Works Number 18/PRT/M/2012 regarding Cultivation and Supervision of the Organization of the Potable Water Provision System;
   j. The Regulation of the Minister of Public Works Number 7/PRT/M/2013 regarding the Guidelines for the granting of the permit for the Organization of the Development of the SPAM by Enterprises and the Public to Fulfill Own Needs;

k. The Regulation of the Minister of Home Affairs Number 23 of 2006 regarding the Technical Guidelines and Procedure Regulations on the Tariff of Potable Water in Regional Potable Water Companies;
l. The Regulation of the Minister of Home Affairs Number 2 of 2007 regarding the Organ and Personal Affairs of Regional Potable Water Companies;
m. The Regulation of the Minister of Finance Number 229/PMK.01/2009 regarding the Execution Procedure of the Granting of Guaranty and Subvention of Interest by the Central Government in the Frame of Acceleration of the Provision of Potable Water;
n. The Regulation of the Minister of Finance Number 91/PMK.011/2011regarding the Amendment to the Regulation of the Minister of Finance Number 229/PMK.01/2009 regarding the Execution Procedure of the Granting of Guaranty and Subvention of Interest By the Central Government in the Frame of Acceleration of the Provision of Potable Water;
o. The Regulation of the Minister of Finance Number 114/PMK.05/2012 regarding the Settlement of State Accounts Receivable Sourced from the Continuation of Offshore Loans, Account of Investment Funds, and Account of Regional Development in Regional Potable Water Companies.

3. Program and Activities for the Provision of Standard Water and Potable Water for the Public

The execution of the development of infra-structure and facilities for potable water in the frame of fulfillment of the public needs in accordance with the *Millennium Development Goals* (MDGs) program, which has been ratified by the Government to target a scope of service for the year 2015 in the amount of 68.87%. The national scope of service for potable water for the year 2012 has achieved 58.05%. The aforesaid figure increased to 10.34% if compared with year 2011 which was only 47.71%. As such target enhancement of the remaining 10.82% will be achieved at the end of the year 2015 according to the target of the MDGs.

In order to achieve the execution scope of potable water as has been targeted in the MDGs, a very large funding is needed, namely as much as around Rp.65,27 trillion, the funding of which is obtained through the State Budget of Revenues and Expenditures (*Anggaran Pendapatan dan Belanja Negara,* APBN), the Regional Budget of Revenues and Expenditures (*Anggaran Pendapatan dan Belanja Daerah*, APBD), the Regional Potable Water Companies (PDAM), *corporate social responsibility* (CSR), banking, Government Center of Investment (*Pusat Investasi Pemerintah*, PIP), public self-help and the Cooperation between the Government and the Private Sector (*Kerjasama Pemerintah dan Swasta*, KPS).

The funds of the APBN allocated to support the provision of standard water and the development of potable water provision system has the following program structure:

a. The provision of standard water (the years 2011-2012):
   1) The development of the Provision of Standard Water in the frame of supplying the SPAM to the PDAMs of regencies/municipalities has been done in 228 of regencies/municipalities with an outcome of 17.620 liter/second;
   2) The development of Standard Water in the Capital of Sub-Regencies (*Ibukota Kecamatan*, IKK), namely the provision of standard water for the SPAMs in the Capital of Sub-Regencies has achieved standard water IKK in 25 locations with an outcome of 625 liter/second;
   3) The development of standard retention basins/barns (*embung/lumbung*) for standard water located in villages has achieved 45 retention basins with an outcome of 2.595 liter/second;

4) The development of Standard Water for Villages to serve the provision of standard water for public villages which have not been served by the PDAM, has achieved Standard Water for Villages in 228 villages with an outcome of 2.450 liter/second.

b. the SPAM for the years 2010 up to 2013:

1) Facilitated SPAMs in order to support sanitation program for the PDAMs for 164 the PDAMs;
2) The SPAM for Zones of Capital of Sub-Regencies (IKK) to support the service of potable water for locations which have not been afforded with the SPAM service for 827 IKKs;
3) The SPAM for Zones of the Public with Low Earning (*Masyarakat Berpenghasilan Rendah*, MBR) aimed at the fulfillment of service of potable water to public in slums, villages/coastal fishermen, small islands and border zones of the state for 2.135 zones;
4) Regional SPAMs to overcome problems of limited standard water availability in regencies/municipalities and provinces for 6 (six) zones; and
5) Village SPAMs to afford service of potable water in villages not having yet the SPAMs for 8.868 villages.

To fulfill the limited capability of funding by the APBN and the APBD, the Government has facilitated the PDAMs to open access to funding sources other than the APBN and the APBD. One of the mechanisms to mobilize potential sources for financing other than funds from the Government is through the utilization of banking funds. To fulfill the need of sources for the aforesaid bank financing a Decree of the President Number 29 of 2009 regarding the Granting of Guaranty and Subvention of Interest by the Central Government in the Frame of Acceleration of the Provision of Potable Water has been issued.

As determined in Article 1 section (1) of the Decree of the President Number 29 of 2009 which stated that "*In the frame of the acceleration of potable water provision, the Central Government by paying regard to the financial capability of the state may grant:*

*a. guaranty for the repayment of the PDAMs loans to banks, and*

*b. subvention for interest imposed by banks.*"

There are currently 9 (nine) banks, the BUMN as well as BUMD banks which are ready to become sponsoring banks with a total fund of Rp.4,66 trillion. Moreover, the Government has encouraged the development of the participation of the BUMNs as well as the private sector through the company social responsibility for the fulfillment of potable water need for the public particularly the public with low earning through joint consensus and cooperation agreement between the Government, Regional Governments, and CSR granting companies in the fulfillment of the need of potable water.

Besides, the participation of the private sector is also promoted through cooperation programs between the Government and the private sector. In principle, the cooperation between the Government and the Private Sector (*Kerjasama Pemerintah dan Swasta*, KPS) is different from privatization. Based on the Regulation of the Minister of Public Works Number 12 of 2010 regarding the Cooperation Guidelines for the Development of the SPAMs, asset ownership in the aforesaid cooperation being the result of the aforesaid cooperation between the Government and enterprises becomes the asset of the Government. In privatization the asset ownership becomes that of the private sector.

The service target of a KPS is regulated by the government, while in privatization it is regulated by a company. The determination of the service cost in a KPS is regulated by the Government as set out in Article 10 section (2) of the Regulation of the Minister of Home Affairs Number 23 of 2006 regarding the Technical Guidelines and Procedure

Regulations on the Tariff of Potable Water in a Regional Potable Water Company to accommodate the kind of tariffs for groups of customers who pays a lower tariff, for the fulfillment of standard basic needs or minimum need of potable water.

In the execution of the aforesaid the lower tariff allocated among others for customers having low earning and customers for social interest. The value of the aforesaid lower tariff is lower compared to the basic cost, while in privatization processes tariff determination is determined one handedly by the private sector.

The process of the stipulation of potable water tariff by the PDAMs is conducted transparently and involves the public. This shall be based on the provision of Article 4 of the PP of 16/2005 regarding the Development of Potable Water System stating that the regulation on the development of the SPAM has the objective to:

a. the actualization of the management of a quality potable water service at an affordable price;
b. the achievement of a balanced interest between consumers and the procurer of the provision service; and
c. the achievement of the enhancement of efficiency and scope of potable water service.

Furthermore Article 20 and Article 21 of the Regulation of the Minister of Home Affairs Number 23 of 2006 regarding the Technical Guidelines and Procedure Regulations for Potable Water Tariff at the in Regional Potable Water Company regulates:

1) The mechanism of the tariff stipulation is based on the principle of interest proportionality of: a) the public customers, b) the PDAMs as an enterprise and organizer, as well as c) the regional governments being the owner of the PDAMs.
2) The consideration on the interest of the public customers as referred to in section (1) letter a shall assure the interest of the consumers.
3) The proposal concept on the tariff stipulation shall first be consulted with the representatives or forum of customers through various communication media to obtain feedback prior to its submission to the regional head [*vide* Article 21 section (4)].

In consideration of the above mentioned, the Government opined that the policy in the field of the development of potable water has granted protection to prevent the occurrence of privatization practices as well as the commercialization of potable water being basic human right as mandated by Article 33 section (3) of the Constitution of 1945. The other supporting programs in the frame of fulfilling the need of potable water service for the public with low income is the potable water grant program.

This program has the objective of increasing the access for sustainable potable water service for the public with low income in Indonesia in accordance with the MDGs target. This program is a program to support the PDAMs to extend the scope of service by adding new connections. In the execution of the first potable water grant program, namely in the years 2010-2011 as much as 34 regencies/municipalities have been allocated with a total number of home connections of as much as 77,000 connections. At the second stage, in the years 2012-2015, as much as 116 regencies/municipalities have been targeted with a predicted number of home connections as much as 248,498 connections.

From the whole aforesaid description, it is clear that the Government has seriously executed the mandate of the Constitution of 1945, the Law on Water Resources, and the consideration set out in the Decision of the Constitutional Court, particularly that what is related to the management of water resources.

**Conclusion**

Based on the whole description of the aforesaid elucidation of the Government as above mentioned, according to Government:

1. The Law on Water Resources has been in line with the mandate of the Constitution of the State of the Republic of Indonesia of 1945.
2. In the frame of the execution of the Law on Water Resources several laws and regulations have been determined to strengthen the position of the state in water resources management.
3. The Law on Water Resources does not recognize bureaucratization or privatization, commercialization, or monopoly in water resources management, but the water resources management is aimed at the optimal welfare of the people.
4. The *conditionally constitutional* nature as referred to in the Decision of the Constitutional Court Number 058-059-060-063/PUU-II/2004 and Number 008/PUU-III/2005, dated 19 July 2005 against the constitutionality of the validity of the Law on Water Resources has been seriously, cautiously, meticulously and properly executed by the Government, so that it would be just deservedly if the *conditionally constitutional* nature is no longer attached thereto.

**Petitum**

Based on the aforesaid elucidation as above mentioned, the Government petitioned to the Constitutional Court which examines, adjudicates, and decides on the petition for the review of the Law Number 7 of 2004 regarding Water Resources against the Constitution of the State of the Republic of Indonesia of 1945 to render a decision as follows:

1. To declare the Petitioners for not having legal standing.

2. To dismiss the petition for the review of the Petitioners for the whole of it or at least to state the petition of the Petitioners not acceptable.
3. To receive the testimony of the Government as a whole.
4. To declare Article 6, Article 7, Article 8, Article 9, Article 10, Article 26, Article 29 section (2) and section (5), Article 45, Article 46, Article 48 section (1), Article 49 section (1), Article 80, Article 91, Article 92 section (1), section (2), and section (3) of the Law Number 7 of 2004 regarding Water Resources not contrary to the provision of Article 18B section (2), Article 28C section (2), Article 28D section (1), Article 28H section (1), Article 28I section (4), as well as Article 33 section (2) and section (3) of the Constitution of the State of the Republic of Indonesia of 1945.

[2.4] Considering whereas to prove his postulates, the President submitted instruments of letters/writings as evidence marked as Government Evidence-1 up to Government Evidence-23, as follows:

1. Government Evidence-1: Photocopy of the Law Number 7 of 2004 regarding Water Resources;

2. Government Evidence-2: Photocopy of the Government Regulation Number 16 of 2005 regarding the Development of the Potable Water Provision System;
3. Government Evidence-3: Photocopy of the Government Regulation Number 20 of 2006 regarding Irrigation;
4. Government Evidence-4: Photocopy of the Government Regulation Number 42 of 2008 regarding the Management of Water Resources;
5. Government Evidence-5: Photocopy of the Government Regulation Number 43 of 2008 regarding Ground Water;

6. Government Evidence-6: Photocopy of the Government Regulation Number 37 of 2010 regarding Dams;
7. Government Evidence-7: Photocopy of the Government Regulation Number 38 of 2011 regarding Rivers ;
8. Government Evidence-8: Photocopy of the Government Regulation Number 73 of 2013 regarding Swamps;
9. Government Evidence-9: Photocopy of the Government Regulation Number 29 of 2009 regarding the Granting of Guaranty and Subvention of Interest by the Central Government in the Frame of Acceleration of the Provision of Potable Water;
10. Government Evidence-10: Photocopy of the Regulation of the Minister of Public Works Number 294/PRT/M/2005 regarding the Support Agency for the Development of the Potable Water Provision System;
11. Government Evidence-11: Photocopy of the Regulation of the Minister of Public Works Number 20/PRT/M/2006 regarding the National Policy and Strategy for the Development of potable water provision system (*Kebijakan dan Strategi Nasional Pengembangan Sistem Penyediaan Air Minum*, KSNP-SPAM);
12. Government Evidence-12: Photocopy of the Regulation of the Minister of Public Works Number 18/PRT/M/2012 regarding the Guidelines for Cultivation of the Organization of the Development of Potable Water Provision System;
13. Government Evidence-13: Photocopy of the Regulation of the Minister of Public Works Number 01/PRT/M/2009 regarding the Organization of the Development of potable water provision system Non-Piping Network;
14. Government Evidence-14: Photocopy of the Regulation of the Minister of Public Works Number 21/PRT/M/2009 regarding the Technical Guidelines Investment Worthiness in the Development of potable water provision system by Regional Potable Water Companies;
15. Government Evidence-15: Photocopy of the Regulation of the Minister of Public Works Number 12/PRT/M/2010 regarding the Guidelines for the Cooperation in the Exploitation of the Development of Potable Water Provision System;
16. Government Evidence-16: Photocopy of the Regulation of the Minister of Public Works Number 18/PRT/M/2007 regarding the Organization of the Development of Potable Water Provision System;
17. Government Evidence-17: Photocopy of the Regulation of the Minister of Public Works Number 07/PRT/M/2013 regarding the Guidelines for the Granting of Permit for the Organization of the Development of potable water provision system by Enterprises and the Public to Fulfill Own Needs;
18. Government Evidence-18: Photocopy of the Regulation of the Minister of Home Affairs Number 23 of 2006 regarding the Technical Guidelines and Procedure to Regulate Potable Water Tariff in Regional Potable Water Companies;

19. Government Evidence-19: Photocopy of the Regulation of the Minister of Home Affairs Number 2 of 2007 regarding the Organ and Personal Affairs of Regional Potable Water Companies;
20. Government Evidence-20: Photocopy of the Regulation of the Minister of Finance Number 229/PMK.01/2009 regarding the Execution Procedure of the Granting of Guaranty and Subvention of Interest by the Central Government in the Frame of Acceleration of the Provision of Potable Water;
21. Government Evidence-21: Photocopy of the Regulation of the Minister of Finance Number 91/PMK.011/2011 regarding the Amendment to the Regulation of the Minister of Finance Number 229/PMK.01/2009 regarding the Execution Procedure of the Granting of Guaranty and Subvention of Interest by the Central Government in the Frame of Acceleration of the provision of Potable Water;
22. Government Evidence-22: Photocopy of the Regulation of the Minister of Finance Number 114/PMK.05/2012 regarding the Settlement of State Accounts Receivable Sourced from the Continuation of Foreign Loans, the Account of Investment Funds, and the Account of the Regional Development in Regional Potable Water Companies;
23. Government Evidence-23: Photocopy of the Regulation of the Head of the Agency of the Exploitation of Free Trade Zones and the Batam Freeport Number 9 of 2011 regarding the Third Amendment to the Regulation of the Head of the Agency of the Exploitation of Free Trade Zones and the Batam Freeport Number 1 of 2010 regarding the Amendment to the Decision of Chair of the Authority of the Development of the Industrial Zone of the Batam Island Number 106/KPTS/KA/XII/2007 regarding the Amendment of Clean Water Tariff in the Industrial Zone of the Batam Island;

Moreover, the President also submitted five experts and four witnesses to be heard of their testimonies on the date of 12 February 2014, 3 March 2014, and 18 March 2014, who substantially testified as follows:

**PRESIDENTIAL EXPERTS**

1. **Prof. Dr. I Gde Pantja Astawa, S.H., M.H.**
   - The Petitioner has substantially problematized the Law on Water Resources at the platform of norms and at the platform of empiry.
   - At the platform of norms, the Constitutional Court has had decided on the case on the review of the Law 7/2004 regarding Water Resources against the Constitution of 1945 in its Decision Number 058-059-060-063/PUU-II/2004 and Number 008/PUU-III/2005. In the aforesaid case the Court dismissed the petition of the Petitioners. What was the consideration of the Constitutional Court for re-adjudicating and re-examining the same case?
   - The meaning of the right to control of the state over important production branches and vital for the livelihood of the people at large as well as over natural resources does not negate the possibility for individuals or the private sector to participate, provided that the five roles of the state, in this matter the Government, will remain

fulfilled, and to the extent the Government and the regional governments are indeed not yet capable to execute them.

- From the perspective of the state administrative law, particularly licensing (*vergunning*) being a legal instrument of the government, there is an impression from this case as if the role of the state is diminished or lost, even though in the perspective of administrative law whatever is the authority of the state shall be conducted by the Government, either the central or the regional governments.
- The legal instrument of licensing is important because the objective of the aforesaid permit to be a controlling instrument (*sturen*). The concern that the role of the state is lost or exhausted does not need to occur if it is understood that a permit instrument is strategic and important whereby the state will keep playing a controlling role.
- There is an impression that the arrangement of permit has been watered down, even though actually it should not be watered down but neither should it be made difficult. Actually the essence of a permit is the act of permitting a prohibition. This is a misleading practice. A permit issued shall be coupled with control or sufficient supervision.
- From the perspective of constitutional law, namely with regard to institutions and authorities, the institutions as referred to in Article 33 section (3) and section (4) of the Constitution of 1945 shall be the state, which in the context of the right to control of the state should be understood to possess authorities of policy formulation, conduct regulation, arrangement, management, and supervision.
- From the perspective of the state administrative law, the aforesaid state authorities shall be conducted by the Government and/or the regional governments through various legal instruments of the government, among others is the instrument of licensing (*vergunning*) with the function of being a directing, engineering, and designing legal instrument with the aim of controlling (*sturen*) activities in the public.
- Both aforesaid perspectives obtained legitimacy in the Law as such (*a quo*), namely the Law 7/2004 regarding Water Resources with the following basic thoughts and provisions:

1. The state in the context of the right of the state to control water resources (*vide* Article 33 section (3) of the Constitution of 1945) has been accommodated in Article 6 section (1) of the Law as such (*a quo*) which mentioned that water resources shall be controlled by the state and shall be utilized for the optimal welfare of the people.
2. The guaranty for the right of each individual to obtain right of water being a basic human right is mentioned in Article 5 which affirmed that the state guarantees the right of each individual to obtain water at least for the daily basic needs to fulfill a livelihood that is healthy, clean, and productive.
3. The right of the state to control water resources with its five authorities subject to the state administrative law shall be conducted by the Government and/or the regional governments, which recognized the *ulayat* rights of the *adat* law communities of water resources, as are regulated in Article 6 section (2) and section (3) of the Law as such (*a quo*). Article 6 section (2) and section (3) of the Law as such (*a quo*) is a form of recognition and simultaneously protection by the state of the rights of the *adat* law communities of water resources, which is in accordance with Article 18B section (2) of the Constitution of 1945. The recognition of the existence and the rights of *adat* law communities of water resources, in the form of regional regulations is not of constitutive nature but is

declarative vis-à-vis the unities of *adat* law communities to the extent they are really still existing.

4. Through the Law as such (*a quo*) the regulation on the right of water is actualized through the stipulation of the utility right of water in the form of the right to use water and the utility right to exploit water as regulated in Article 6 section (4), Article 7, as well as in the general elucidation to point 2 of the Law as such (*a quo*).
5. The Authority of the state over the arrangement of water resources which is subject to state administrative law shall be conducted by the Government and/or the regional governments looks more real in the Law as such (*a quo*).

- The pattern of the water resources management as regulated in Article 11 of the Law as such (*a quo*) affirmed several principles, namely
  1. The pattern of the water resources management can give the optimal benefit in the interest of the society in all fields of livelihood;
  2. The pattern of the water resources management is arranged based on river zones subject to the principle of integration among water, surface, and ground water.
  3. The arrangement of the pattern of the water resources management is conducted by involving the participation of the public and the business realm as extensive as possible.
  4. The pattern of the water resources management shall be based on the principle of balance between efforts of conservation and the water utilization resources.
  5. Related to the pattern of the water resources management, the Law as such (*a quo*) has attributively granted authorities to units of the central government, the governments of the provinces, and the regencies/municipalities with their respective authorities, among others the authority to issue permits.
- The Authority of the units of the government to issue permits for the utility right to use water and the utility right to exploit water shall be placed in the frame of system of licensing and pattern of water resources management.
- The norm contained in the provisions of the Law as such (*a quo*) petitioned for the aforesaid constitutional review, is in accordance with or is not contrary to the norms existing in the provision of Article 33 or other articles of the Constitution of 1945.
- The Government Regulation Number 16 of 2005 regarding the Development of potable water provision system was promulgated as an order of Article 40 of the Law on Water Resources. Article 40 of the Law on Water Resources is not included in the norms of the article petitioned for review by the Petitioners. As such it is irrelevant and not reasoned that the Petitioners submitted an objection against the PP of 16/2005 as referred to.
- The review of the government regulation is not the domain of the Constitutional Court for reviewing, but is the domain of the Supreme Court.
- The issuance of a permit by an official of the state administration, at the level of the Central Government as well as at the level of the regional governments, can be sued at the state administrative court.
- A civil wise class action can be filed with a court against an individual or an enterprise conducting an activity giving cause to damage of water resources or its infrastructure for the interest of sustainable function of water resources.

**2. Ir. Imam Anshori, M.T.**

- In the hydrological cycle, the quantity and the quality of water on land depends heavily on the management performance in three arenas, namely i) management of the land arena in the regions where rain water is caught (water catchment areas), ii)

management in water sources networks in rivers, lakes, reservoirs, and swamps; as well as iii) management in the places of its utilization, namely in rice fields and potable water distribution networks.

- The dimension of success of a good water resources management shall be able to undertake that the water condition is not too much, not too filthy, and not too little.
- According to the Law as such (*a quo*), water resources that are managed equitably, comprehensive, integrated, and environmentally insightful for public welfare are the obligation of the agency managing the water resources namely the government as the manager of water resources.
- Matters conducted by the aforesaid managing agency shall be based on coordinated consensus in a coordination forum for water resources management, which is related to the execution of three pillars, namely i) conservation, ii) utilization, and iii) control of damaging potential. This shall be supported by the public participation as well as an integrated information network and hedged by seven principles.
- In the Law on Water Resources, the water resources shall be controlled by the state and be utilized for the optimal welfare of the people. The domination of water resources as such shall be conducted by the central government and/or the regional governments by retaining recognition of the *ulayat* rights of the *adat* law communities.
- To assure the organization of the management which gives optimal benefit in the interest of the public in all fields of livelihood, a pattern of water resources management in each river zone subject to the principle of integration between surface water and ground water needs to be arranged.

- Water management resources according to the Law on Water Resources comprises efforts of planning, execution, monitoring, and evaluating of the organization of water resources conservation, the utilization of water resources, and the control of the damaging potential of water.
- In conservation, the utilization and the control of the damaging potential is of a secondary border, while the management is of primary border. The exploitation is the child of the utilization of water, so that it is on the tertiary border of the management side.
- The Indonesian mainland is divided into 131 river zones being a unity of water resources management areas, and each river zone is arranged according to its own pattern respectively. The pattern and the water resource management plan is arranged in each river zone.
- A water management resource comprising one river zone is subject to the authority and the responsibility of the Government, and will never be submitted or submitted for management to the private sector or individuals. That is clearly regulated in Article 14 letter e, Article 15 letter e, and Article 16 letter e of the Law 7/2004 regarding Water Resources.
- Such exploitation shall refer to a pattern and plan, as regulated in Article 1 number 19, Article 26 section (1), and Article 59 section (3) of the Law on Water Resources.
- The exploitation of water resources does not include the control of water source, but is limited to rights for utilizing water in accordance with the quota or allocation as so stipulated. The Government is the party who stipulates it (*vide* the General elucidation of number 10 to the Law on Water Resources).
- Therefore it is not appropriate to interpret exploitation as management and let alone as domination.

- The exploitation of water resources shall pay regard to the principle of utilization, therefore, exploitation being a child of utilization shall be directed to the objective of exploiting water resources sustainably by prioritizing the fulfillment of public basic needs of livelihood equitably.

- The utilization of water resources shall pay regard to the social function of water and the preservation of environment.
- The phrase ”can only” in Article 45 section (2) indicates that the Law on Water Resources barred the possibility of the occurrence of practices of transferring, handover, or devolution of the business of the exploitation of water resources comprising one whole river zone from the government to the private sector or individuals.
- The Central Government and the regional governments have also the function of assuring the right of each individual to obtain potable water and to fulfill the minimum daily basic needs which is healthy, clean, and productive, and not only merely regulating as stated in the PP of 16/2005 regarding Potable Water Provision System (SPAM).
- The development and the management of the irrigation system as well as service in the field of irrigation which comprises five power functions of the state have been stated in detail in Article 16, Article 17, Article 18, Article 19, Article 21, and Article 22 of the PP of 20/2006 regarding Irrigation.
- The regulation of the minimum daily basic needs in the Law as such (*a quo*) implies that it is of principle nature, namely the state guarantees the right of each individual to obtain water at the minimum daily basic needs to fulfill a livelihood that is healthy, clean, and productive, for instance for the need of worship, drinking, cooking, shower, washing, and flushing. Such is stated in the Elucidation to Article 8 section (1) of the Law on Water Resources.
- The limitation of water utilization is important because of at least two reasons, namely i) although fresh water on earth is of renewable nature through hydrological cycle, its annual volume relatively does not change, while humans needing water increase; ii) other than somebody needing water for the daily basic needs which is of principle nature, there are also individuals or households needing additional water outside of which is of principle nature, for instance for soaking, to fill the swimming pool, raising ornamental fish, et cetera.
- Natural water in free nature, like rivers, lakes, swamps, and ground water basins is a public good being common property (*common resources*). Energy resources being common property are goods which are not *excludable* in nature but has a rivalry nature. That said somebody vis-à-vis goods as such may take water in rivers, lakes, swamps, and in free waters, yet by the time the aforesaid individual did it, then the volume or quality of water in that place would diminish so that it bears the potential to diminish or hamper the opportunity for others to do the same. Therefore, limitation for that matter is very reasoned.
- The utilization of natural resources being a common property tend to be excessive, so that if it is limited it will diminish the opportunity for others to utilize it, so that it bears the potential to lower the welfare of life of the others. To anticipate such a problem, the Government needs to intervene by making regulations or limitations with the objective of upholding the welfare of life sustainably for all.

- The concept of the utility right of water as referred to in the Law on Water Resources is already in accordance with the concept that natural water source is a

public good being common property which is not subject to an economic price object price.

- To let these rights which is of basic nature to be unlimited vis-à-vis a consumer good of a limited volume, will be the same with creating a tragedy for the public at large. Therefore the Government needs to anticipate, among others by stipulating a guidance regarding the standard of daily minimum basic needs.
- The Utility Right of Water in the Law on Water Resources has two characters, namely the utility right to use water applicable for the daily basic needs of life, for people's agriculture, and also the need of water for social activities. Whereas the utility right to exploit water is the right to obtain and to exploit water existing in a water source for objectives outside of the basic need which is of personal nature to be exploited, processed, and subsequently to be bottled as a good or service, or as a facility supporting the process of producing certain products and services from which somebody may obtain revenue or earnings.
- In the utility right to exploit water there is indeed a maximum quota provision of water volume which may or can be exploited. This maximum quota shall not be leased out, to be traded, or be transferred. Such a provision is regulated in Article 7 section (2) of the Law on Water Resources.
- Articles related to the priority of water utilization and the utility right of water in the Law as such (*a quo*) should be made a reference of law to straighten deviations from the provisions related to the providing of, utilization, allocation, and domination of water resources, to be made a reference in the settlement of disputes or conflicts due to problems related to the provision and utilization of water, horizontally as well as vertically.

- The Law as such (*a quo*) guarantees legal certainty in the settlement of conflicts related to problems of water resources, particularly problems of water utilization.
- The Law as such (*a quo*) grants significant protection to the daily basic needs of water, particularly in public circles with low earning as well as in the interest of the circle of small farmers.
- The Law as such (*a quo*) provides room to the public to protect and defend their rights in various matters linked with water resources management.

- Deviation from the provisions of Laws should not be made a postulate to state that the respective Law is mistaken.

- The soul and the spirit of the Law on Water Resources is already in line with the Constitution of 1945.

**3. Dr. Jangkung Handoyo Mulyo, M.Ec.**

- The availability of water resources is of *non-substitutable* nature.
- The demand for water globally indicates a significant growth along with the growing number of the population so that the availability of Water Resources is physically relatively limited.
- The result of a study of the FAO indicates that the main utilizer of water is the agricultural sector (93%) and the rest is for the need of industry (4%) and domestic needs (3%).
- In Indonesia, the rice production as much as 84.5% is produced from irrigated rice fields. That means that irrigation water is utilized a lot for the agricultural sector. To produce 1 kg of rice, around 3,000 up to 3,500 liter water is needed.

- In Article 33 section (3) of the Constitution of 1945 there are two important phrases, namely “be controlled by the state” and “for the optimal welfare of the people.” Therefore it can be seen that Water Resources as referred to are a grace of God The One Only. Furthermore Water Resources shall be controlled by the state and be directed for the optimal welfare of the people. That is the philosophy of politics of the management of Water Resources.
- The imbalance between *supply* and *demand* will have an implication that Water Resources would frequently not be available in place and on time. Such imbalance would lead to the need of management of Water Resources.
- There are several perceptions or schools in perceiving Water Resources, namely:
  i) The perspective that water is a private good, where water is not different from the other economic goods, so that water shall be subject to the laws of the economy.

  ii) The perspective that water is a public good, whereby water should not be treated as a private commodity to be purchased, be sold, and be traded for profit. Water should be understood as a common heritage so that it is a common responsibility as well.
  iii) The characteristic lies between the two perspectives.
- Economically the value of Water Resources is determined by utility, which on its turn is determined by preference. The preference of the consumers can be expressed in the form of the willingness of somebody or the consumers to pay for something so that they would be able to consume a good or service (*willingness to pay*). The willingness to pay is related to the factor of quantity, time, space, reliability, and the quality of water.
- The total economic value basically consists of the value of benefit and the value of non-benefit. The value of benefit is the value which is consumed, the recreational value, the value of esthetics, the value of education, and so forth.
- The basic principle in the counting of the cost of water resources, according to Rogers *et al.*, comprises cost of *operation and maintenance* (O&M); capital cost (capital). The summation of both aforesaid costs is the *full supply cost* (cost of water procurement).
- *Full supply cost* when added by the opportunity for *cost* and *economic externalities* will become *full economic cost*.
- *Full economic cost* (total economy cost) when added by *environmental externalities* (environment externality) will produce the number of *full cost* (total cost).
- The cost paid by the consumers for Water Resources in Indonesia is only a part of its *operating and maintenance* cost. All investment and development cost of infrastructure for the provision of Water Resources is borne by the Central Government and is not calculated in the determination of water service cost.
- That would economically or financially lead to loss to the state, yet the Law 7/2004 as well as in Article 33 section (3) of the Constitution of 1945 stated that Water Resources shall be controlled by the state and be utilized for the optimal welfare of the people.
- In the management of Water Resources the state may suffer financial loss, but that loss is for the sake of the optimal welfare of the people.
- It is groundless of the perspective stating that the Law 7/2004 is based on or contains the spirit of commercialization of Water Resources. If Water Resources is commercialized, then its service cost would be very expensive. Furthermore, because the *willingness to pay* of each individual is different, a domination will

occur between a party with a greater *willingness to pay* and those with a lesser *willingness to pay*.

- In the aforesaid condition, the Government/the State shall take side to render protection for the little people (household and agricultural sector). That is a positive discrimination in the exploitation of Water Resources.
- There are at least two kinds of positive discrimination in the Law 7/2004, namely i) the granting of priority of scale to water consumers; ii) the exception of service cost in the management of Water Resources. The aforesaid provisions which are of positive discrimination nature are among others Article 29 section (3) as well as Article 80 section (1) and section (2).
- The expert concluded that, i) the formulation of the substance in the subject material of the Law 7/2004 is in line with the politics of the state in the management of Water Resources as regulated in Article 33 of the Constitution of 1945; ii) the formulation and the spirit of the Law 7/2004 is not based on the spirit of commercialization, but is the taking side in the form of protection, in the form of priority scale, and in the form of exemption of water service cost in the exploitation of Water Resources for the economically less able public.
- The volume of Water Resources utilized for bottled water is very little, in terms of global size as well as in Indonesia.
- One principle of the Pancasila Economy is reflected in Article 33 of the Constitution of 1945 regulating that the land and waters and the natural wealth contained in it shall be controlled by the state. That said, the state shall remain the one who is in control, grants permits, as well as conducts monitoring.

**4. Raymond Valiant Ruritan, S.T., M.T.**

- If compared to the whole water reserve on earth, only 2.5% thereof is fresh water available of earth surface.
- Water is a renewable energy resource with a limited volume. The utilization of water by one the utilizer of would eliminate the opportunity for its utilization by other parties.
- The pattern of water allocation is an effort or means to create justice for all utilizers of water without sacrificing one of the parties. Water allocation is actually an effort to make a balance between the need and the availability of water.

- The Law 7/2004 mentioned that water allocation is one of the forms of operational activities to optimize water through the infrastructure of Water Resources.
- The task of irrigation infrastructure is to regulate that water that falls from the skies can be caught, stored, and distributed on due time, right on target, and right on place. To achieve that, people embrace the principle of developing dams, developing irrigation infrastructure, infrastructure *intake*, infrastructure of moving dams, et cetera.
- A discussion on *supply management*, namely the development of infrastructure to provide water, should also discuss *the management of demand* which is actually a mechanism to control the usage of water.
- Article 8 of the Law 7/2004 mentioned that the means of the Government to control the use of water is by the issuance of permits. By means of permits the volume of water taken can be known and its priority be studied. If it is not controlled by making it subject to a permit and if its priority is not determined: free competition would take place whereby the strong would control water and would only left the remaining water to the poor.

- Article 29 of the Law 7/2004 regulates the priority of water usage, namely the fulfillment of daily basic and irrigation needs for the people's agriculture in the irrigated areas, and only thereafter for the fulfillment of other needs.
- The Regional Governments are enabled to also give input and to regulate in accordance with the limitations and condition of their respective regions, yet they have to keep paying regard to the sequence of priority of the water users (vide Article 17 and Article 18 of the Law 7/2004).
- The water allocation shall pay regard to the limits of the water availability. The availability of water can be recognized by conducting an analysis of water discharge data in a river within a certain frame of time. Only after the river water discharge is recognized can we determine what volume of water discharge that could be distributed.
- In the case study on the Brantas River, the areal of the river zone is 11.800 km², while the available irrigation infrastructure has just managed around 30% of the water that falls from the sky.
- One of the exploitations of the Brantas River water is for electric power generators in the capacity of 280 megawatt which contributes to the energy availability for Java and Bali.
- The other utilization is for the industrial and domestic needs (the PDAMs), which cover a total number of 28 points of water taking for the need of standard water by the PDAMs and 144 points of water taking for industry.
- The Government has stipulated an operator as regulated in the Law 7/2004 to distribute the aforesaid water, namely in the form of BUMNs. It is moreover regulated by the PP of 46/2010 with the task of rendering service to the water exploitation and maintenance.
- There are operators given the task to manage the Water Resources of the Brantas River.
- As of the 1980s a Committee of the Water Arrangement Order which is dominated by the Government for the areas of the Brantas River has been formed.
- Following the promulgation of the Law 7/2004, the Committee of the Water Arrangement Order has been restructured, improved, and perfected to become a management coordination team of Water Resources whose members consist of 50% of the Central Government elements and 50% of non-Government elements.
- In the water allocation plan in the Brantas river zone, the water beneficiaries in Brantas river zone will be in the form of i) electricity in the capacity of 1,2 billion kwh/annum; ii) standard water industry in the volume of 0,158 billion m3/annum; and iii) domestic standard water in the volume of 0,4 billion m3/annum. Whereas for the interest of the public, planned has been for i) the control of floods; ii) irrigation in the volume of 2,7 billion m3/annum; and iii) the river maintenance discharge in the volume of 0,63 billion m3/annum.
- The allocation for the interest of irrigation, flood control, and river maintenance is assured and is borne by the Government. The farmers are not charged anything to obtain water service in the volume of 2.7 billion m3/annum.
- The party to bear a little management cost in accordance with Article 80 of the Law 7/2004 is the beneficiaries like the Water Powered Electricity Generators (*Pembangkit Listrik Tenaga Air*, PLTA), the industry, and the users of standard water for domestic needs.
- The positive discrimination as conducted by the Government is factual, namely that farmers does not pay for the received water subscribed, but the utilizers of water for electricity has the obligation to also bear the cost of the management of Water Resources.

- Related to refill water, the water utilization for refill is far less than for the utilization for irrigation, for industry, and for the domestic standard water.
- In essence, the process of allocation between the need and the availability is arranged by one operator who consults at the Coordinating Team for the Management of Water Resources. Moreover the Management Coordination Team of issues recommendations, to be followed by an approval to recommend the pattern of water allocation. In this process all water utilizers are invited to negotiate, to be considered: and to be provided with water. The aforesaid pattern is subsequently submitted to the Government for stipulation by the Minister of Public Works. Moreover the aforesaid pattern would be lowered back to the aforesaid river zone to be made a base for the operator to distribute, to supervise, and to control the distribution of water jointly with the central Government and the Regional Governments.
- In case of the occurrence of drought, the options to be conducted are: i) reallocation, or ii) the utilization of climate modification technology.
- The climate modification technology is conducted in the event water volume deficiency is regulated in Article 38 of the Law 7/2004.
- Conclusion of the expert:
  i) the Law 7/2004 stipulates that one of the aspects of the water resources management closest to the interest of the public is to provide water service beneficial to and to protect the public from the dangers or the damaging potential of water.
  ii) the utilization of Water Resources is one part of the management of Water Resources in the Law 7/2004 and requires the development of irrigation infrastructure physically in the form of the development of infrastructure of Water Resources and the water benefit service through the activity of water allocation.
  iii) based on the example given in the Brantas river zone it appears that the Law 7/2004 can be implemented in the form of water service through water allocation which pays regard to various criteria, from the aspect of utilization priority, stochastic wise water availability (random variable), the need of the various utilizers, and others.
  iv) in practice the Law 7/2004 has become a reference for the Government in the process of the planning and the execution of water allocation in the service of the beneficiaries equitably, transparent, and not harming one of the beneficiaries, those licensed as well as the agriculture and the daily basic needs.
  v) water is in essence always limited in terms of space and time so that the basic principle which shall always be considered in the management of Water Resources (including its allocation) is the principle of justice, transparency, and accountability. The aforesaid aspects have been assured by the Law 7/2004.
- The Public Company (*Perusahaan Umum*, Perum) Jasa Tirta I has a small business unit exploiting water surplus to be packed as bottled potable water. Its water usage is not more than 2 or 3 liter/second. The aforesaid product only gives an added value to the benefit of water but has not the objective of compelling the individual to utilize bottled water.
- The potable water component in bottling consists of several factors, among others is the cost of the material and cost which is not of material nature. The water component cost *per se* is not too large. It is the bottling that is rather expensive because of utilizing decent material to store foodstuff.
- The price difference of bottled potable water is very relative because it also depends on the cost spent for other matters, for instance advertising cost. It is well possible

that the advertising cost equals the cost for the production of a certain volume of bottled water.

- The operator of the Brantas River area is Perum Jasa Tirta I, namely a BUMN of which its 100% shares is owned by the state.
- The water utilization for the refill potable water or bottled potable water in the Brantas river zone has never exceeded 1% of the aggregate water allocation for industry and domestic use.
- The Law 7/2004 mentioned that the water as referred to is fresh water, either on soil surface, or water flowing in rivers, and others.
- Sea water is subject to desalination for the utilization in the interest of the public because of its salt content, yet the water desalination cost is very high.

**5. Ir. Budiman Arif**

- The expert is a member of the Indonesian Bond of Sanitation Technique and Environment Experts (*Ikatan Ahli Teknik Penyehatan dan Lingkungan Indonesia*).
- There are six points in the Decision of the Constitutional Court Number 058-059-060/PUU-II/2004 and the Decision of the Constitutional Court Number 008/PUU-III/2005 which shall be followed-up by the Government as Regulations to Execute the Law on Water Resources, namely:
  a. the existence of implementing regulations regarding the standard or measurement of the minimum need of potable water for the daily basic needs;
  b. the existence of implementing regulations regarding the PDAMs tariff which should not be expensive (affordable) for the public for their daily basic needs;
  c. the existence of a program integration and enhancement from the Central Government (State Revenue and Expenditure Budget: *Anggaran Pendapatan dan Belanja Negara*, APBN) and the Regional Governments (*Pemerintah Daerah*, Pemda; *Anggaran Pendapatan dan Belanja Daerah*, APBD) for the development of the SPAM.
  d. the existence of implementing regulations regarding the role of cooperatives, private enterprises, and the public.
  e. the existence of implementing regulations for the PDAMs to prioritize the social function of water and the participation of the public as well as efforts in order for the PDAMs to sustainably increase.
  f. the existence of implementing regulations regarding the task of the Central Government and the Provinces which should be clearer and program priorities of the Central Government and the Provincial Governments in the development of the SPAM.
- The Government has made implementing regulations for the six matters requested by the Court as described in the above mentioned points, as follows:
  a. The Ministerial Regulation (*Peraturan Menteri*, Permen) of Public Works Number 14/PRT/M/2010 regarding the Minimum Service Standard of Potable Water (*Standar Pelayanan Minimal Air Minum*, SPM Air Minum);
  b. The Ministerial Regulation of Home Affairs (*Peraturan Menteri* Dalam *Negeri,* Permendagri) Number 23/2006 regarding the Technical Guidelines and Procedure to Regulate Potable Water Tariff in the PDAMs;
  c. The Ministerial Regulation of Public Works Number 20/PRT/M/2006 as amended by the Ministerial Regulation of Public Works Number 13/PRT/M/2013 regarding the National Policy and Strategy for the Development of the SPAM; the Ministerial Regulation of Public Works Number 18/PRT/M/2007 regarding the Organization of the Development of the SPAM;

the Ministerial Regulation of Public Works Number 01/PRT/M/2009 regarding the Organization of the Development of the SPAM Non-Piping Network; the Ministerial Regulation of Health (*Peraturan Menteri Kesehatan*, Permenkes) Number 492/PRT/M/2010 regarding the Quality Requirement of Potable Water; the Ministerial Regulation of Public Works Number 18/PRT/M/2012 regarding the Cultivation of the Organization of the Development of the SPAM.

d. The Ministerial Regulation of Public Works Number 07/PRT/M/2013 regarding the Guidelines for the Granting of Organization Permits of the SPAM by Enterprises and the Public.

e. The Ministerial Regulation of Home Affairs 23/2006 regarding the Technical Guidelines and Procedure to Regulate the Potable Water Tariff in the PDAMs; the Ministerial Regulation of Home Affairs 2/2007 regarding the Organ and Personnel Affairs of the PDAMs; the Ministerial Regulation of Public Works Number 294/PRT/M/2005 regarding the Support Agency for the Development of potable water provision system (*Badan Pendukung Pengembangan Sistem Penyediaan Air Minum*, BPPSPAM); the Ministerial Regulation of Finance (*Peraturan Menteri Keuangan*, Permen Keu) Number 91/PMK 011/2011 regarding the Execution Procedure of the Granting of Guaranty and Subvention of Interest by the Central Government in the Frame of Acceleration of the Provision of Potable Water.

f. The Government Regulation 38/2007 regarding the Division of Governmental Matters among the Government, the Provincial Governments, and the Regional Governments of Regencies/Cities.

- The Government Regulation (*Peraturan Pemerintah*, PP) of 16/2005 regulating: i) the SPAM network as well as non-network; ii) organization of the development of the SPAM; iii) the authority and the responsibility of the Central Government, the Provincial Governments, the Governments of Regencies/Cities, and the Governments of Villages; as well as: iv) the tasks, responsibility, role, rights, and obligations of organizer in the development of the SPAM.
- The PP of 16/2005 regarding the Development of the SPAM is: i) of the first PP which clearly and completely regulates the development of the SPAM comprising the technical aspect (physically) as well as non-technical aspect being efforts of increasing quality potable water service, and ii) a PP which has the clear objective of increasing the quality of service by eliminating the term ”clean water” which was only to fulfill the physical and chemical requirement to become ”potable drinking” which other than fulfilling the physical and chemical requirement also fulfills the bacteriological requirement.
- The expert concluded that the Government has issued implementing regulations and increased programs by paying regard to the opinion of the Constitutional Court in its Decision regarding the Review of the Law on Water Resources of the years 2004-2005 particularly linked with the fulfillment of the daily basic needs of potable water being a basic right guaranteed by the Constitution of 1945.
- Based on the PP of 16/2005, in the event of the water utilization by the PDAMs, the term “clean water” would be eliminated, so that the only term to use shall be “potable water.” The term “clean water” refers to clean water which shall first be boiled prior to its consumption.
- The PDAMs standard is actually the quality potable water, namely water which is ready for consumption.
- There are indeed still several PDAMs who implement zoning of quality water, but in the future all will have the standard of potable water.

- The Law on Water Resources is not contrary to Article 33 of the Constitution of 1945.

**PRESIDENTIAL WITNESS**

1. **Ir. Teguh Suprapto**
   - The witness is a member of the Coordinating Team for the Management of Water Resources in the River Areas of Bengawan Solo (*Tim Koordinasi Pengelolaan Sumber Daya Air Wilayah Sungai Bengawan Solo*).
   - The composition of the membership of the Management Coordination Team of the River Area of Bengawan Solo consists of 50% (32 people) from the Central Government and 50% (32 people) non-Government.
   - Elements of the Government consists of elements of the Provincial Governments of Central Java, East Java, the Governments of regencies/municipalities traversed by the Bengawan Solo, and the Central Government.
   - The non-Government elements consist of various associations, namely water using farmers, water using farmers for the business of fishery, potable water business, industry, and electrical energy, water resources conservation, control of water damaging potential, and the Perum Jasa Tirta.
   - The Coordinating Team for the Management of Water Resources has four tasks, namely:
     i. routinely conducting discussion on the pattern design and the water resource management plan in the River Areas of Bengawan Solo for the formulation of consideration material for the stipulation of the pattern and the management plan of water resources.
     ii. discussion on program design and activity of the water resources management for the formulation of consideration material for the stipulation of the program and activity plan of the management of Water Resources.
     iii. discussion on the proposal of the water allocation plan from each water source for the formulation of consideration material for the stipulation of the water allocation plan.
     iv. to submit consideration to the minister regarding the execution of the water resources management in the River Areas of Bengawan Solo.
   - The function of the Coordinating Team for the Management of Water Resources are:
     i) consultation with parties for the integration of the management of Water Resources on the cross province river zones as well as the achievement of inter-sectoral, inter-area, and inter-stakeholder consensus.
     ii) the integration and harmonization of inter-sectoral, inter-area, and inter-stakeholder interests in the management of Water Resources in the River Areas of Bengawan Solo.
     iii) monitoring and evaluation of the execution of the program and activity plan of the water resources management in the River Areas of Bengawan Solo.
   - The facilitation of the Coordinating Team for the Management of Water Resources in problems of water resources management is conducted through two means, namely a) through the mechanism of sessions, and b) field visit to the points of the occurrence of the problem of water resources management.
   - The witness concluded that i) through the Coordinating Team for the Management of Water Resources in the River Areas of Bengawan Solo, the water allocation is discussed and agreed on by the parties with interest in the management of Water Resources; ii) domination of the Water Resources by parties outside the Government does not occur in the River Areas of Bengawan Solo; iii) the statement

saying that the Law on Water Resources gives rise to horizontal conflict is incorrect, because it is precisely the Law on Water Resources is one of the instruments in conflict resolution of the management of Water Resources.

- Three important matters mandated by the Law on Water Resources are: i) the Law on Water Resources mandated that the existence of water resources conservation is needed; ii) the Law also mandated that the utilization of water shall also be conducted; and iii) is the control of the damaging potential of water.
- The sessions of the Coordinating Team for the Management of Water Resources always discuss matters related to the management of Water Resources, either from the aspect of conservation, its utilization, as well as its damaging potential. The sessions always produced recommendations submitted to: i) the Minister of Public Works and the Ministry of Public Works; ii) the Governor of the Province Central Java and the Governor of the Province East Java; as well as iii) all the regencies/municipalities related to Bengawan Solo.

**2. Ir. H. Agus Sunara**

- The witness is the Executive Director of the Union of Potable Water Companies of all Indonesia (*Persatuan Perusahaan Air Minum Seluruh Indonesia*, Perpamsi).
- The PDAMs was established as mandated by the Law 5/1962 regarding Regional Companies, to exploit the important production branches and vital for the livelihood of the people at large in the regions.
- The Potable Water Provision System (SPAM) is a unity of physical and non-physical system of the potable water facility and infrastructure. The physical system is in the form of i) the taking of standard water; ii) the water treatment installation; iii) the water reservoir; and iv) the distribution network and tank cars facilities. non-physical system in the form of i) management organization; ii) human resources; as well as iii) standard operation and procedure, and others.
- To fulfill the MDG's target of the year 2015 the Government stipulated access to safe potable water in pipelines as well as not in pipelines at 68.87%, of which 61.83% has been complied with up to 2013. Up to 2015 7.04% has yet to be fulfilled.
- To achieve the aforesaid target, the Government investment has been directed to the upstream, while the Government investment in the regions are directed to the downstream.
- For PDAMs who possess customer potential with good economic capability, the respective PDAMs may cooperate with the private sector for the sake of accelerating the scope of service, so that investment of the Central Government and the PDAMs can be directed for the service development for the middle to lower strata public.
- Some cooperation objects between the PDAMs and the private sector are: i) water meter reading service contract and IPA maintenance; ii) management contract; iii) build, operate and transfer of limited ownership contract of water treatment constructions; and iv) full BOT contract in the form of concession.
- The business of the PDAMs is monopoly in nature (in terms of its organization) but in the event of selling price stipulation (tariff) it is regulated by the regional governments. Based thereon the stipulation of potable water shall be based on the principle of affordability, cost recovery, transparency, quality service, utilization efficiency, and standard water protection.
- The expenditure of the lower income or less capable public for the fulfillment of basic need of potable water of as much as 10.000 liter/month/customer shall not

exceed 4% (four percent) from the minimum wage of the respective regencies/municipalities.

- The quality control of potable water according to the standard quality required by the Regulation of the Minister of Health (*Peraturan Menteri Kesehatan*, Permenkes) 492/2010 regarding the Quality Potable Water Requirement shall be conducted by the PDAMs and the regional governments as actualization of consumer protection.
- Bottled water is a derivative product from water with a standard quality referring to the SNI 01-35553-2006 the inspection of which quality is the responsibility of the Agency for the Supervision of Drugs and Foods (*Badan Pengawasan Obat dan Makanan*, BPOM), and its trading rules are regulated by the Ministry of Trade.
- There is actually not much difference of the standard quality of potable water between the PDAMs water and the bottled potable water.
- The water volume produced by the producer of bottled water is only 0.04% of the volume produced by the PDAMs. The quality of water produced by the PDAMs is actually the same with the product of bottled water, the difference is only made by the nitrite content as there is a link with the aim of long time storing.
- Some PDAMs are not in capacity to render service (to construct network) because the water selling price cannot match the operational cost. The PDAMs used to rely on Government funds.
- Not all PDAMs have the same availability potential of Water Resources.
- From a research in Tangerang is discovered that the public starts to trust that the PDAMs water is ready for utilization in cooking, dish washing, and others.
- The witness has worked 20 years in a PDAM.
- There are 176 healthy PDAMs, but almost the half of them have yet to gain *full cost recovery*.
- The PDAMs conditions are assessed by means of various indicators, and not merely from the financial indicator.
- The PDAMs actually do not need to bother about standard water because the PDAMs only need to convey their need of standard water source to the Government.
- When the PDAMs need cost which cannot be fulfilled by the prime cost, then the regional governments should subsidize them, because due to the lack of subsidy most of the PDAMs cannot develop.

**3. Sardi Ahmad Khani, S.H.**

- The witness is the General Chairperson of the Central Board (*Pengurus Pusat*, PP) of the Association of the Management of the Provision Facilities of Potable Water and Sanitation (*Asosiasi Pengelolaan Sarana Penyediaan Air Minum dan Sanitasi,* APSPAMSI) Based on the Public.
- The development of the SPAM is conducted by the Government with two models, namely i) based on institutions (the PDAMs) in the cities; and ii) based on public for the villages and outskirt regions.
- One of the development programs of the SPAM based on the public is the Provision of Potable Water and Sanitation Based on the Public (*Penyediaan Air Minum dan Sanitasi Berbasis Masyarakat*, PAMSIMAS).
- The public being the beneficiary of the aforesaid program is directly involved as of the planning, funding, the potable water system to be built, the post-program management, and conservation of the environment.

- The PAMSIMAS was started in 2008. Up to 2012 SPAMs have been completely developed in 15 provinces, 110 regencies/cities, and 6,800 villages. The program will still be continued in 2013.
- The aim of the PAMSIMAS is to increase the number of poor residents of the villages and outskirts of municipalities (peri-urban) who can access the facilities of decent potable water and sanitation as well as to practice a clean life and healthy behavior.
- The program components of the PAMSIMAS consists of: i) the public empowerment and the development of local institutions; ii) the enhancement of hygienic behavior and sanitation service; iii) the providing of potable water and sanitation facility; iv) incentive for villages and regencies.
- The funding model of the PAMSIMAS consists of three elements, namely i) the Central Government through the APBN; ii) the regional governments through the APBD; and iii) the beneficiary public through *in cash* and *in-kind*.
- The principle and approach of the PAMSIMAS is based on the public, participative, responsive to needs, gender equality, partiality to the poor public, sustainability, transparency and accountability, and value based.

- The condition in the Village (*Kelurahan*) Bangetayu Kulon, Sub-Regency (*Kecamatan*) Genuk, the City of Semarang, is as such whereby the public who suffered drought in the dry season has to fulfill their need of water by utilizing dig up wells (*sumur gali*) for brackish water, stinking and murky. Following the development of a PAMSIMAS (as of September 2009) in the form of: i) one deep well of 132 meter; ii) one *water tower* with a capacity of 18 m3; iii) transmission and distribution pipes of 2’ and 1.5’ to the extent of 5,870 meter; iv) 286 home connections; v) four unit wash basins at the Public Primary School (*Sekolah Dasar Negeri*, SDN) Bangetayu Kulon; vi) one water tower in SDN Bangetayu Kulon; vii) renovation and the development of three toilettes/shower rooms in SDN Bangetayu Kulon; and viii) three billboards for health promotion.

4. **Ir. Endah Angreni, M.T.**
   - The witness is an activist with the Indonesian Bond of Sanitation Technique and Environment Experts (*Ikatan Ahli Teknik Penyehatan and Environment Indonesia*) of the Province of East Java.
   - In East Java there are 2,015 institutions of Association of User of Potable Water Inhabitants (*Himpunan Penduduk Pemakai Air Minum*, HIPPAM) in villages of 37 regencies/cities. In the management of the SPAM, cultivation is conducted by the local Office of Public Works of the regencies/municipalities and the Office of Public Works Cipta Karya of the East Java Province, as well as several among them cooperating with the PDAMs.
   - In relation to the potable water service for the public with low earning (*Masyarakat Berpenghasilan Rendah*, MBR), there are 451,170 individuals of the MBR who obtain potable water service in 2010 up to 2012 in 18 regencies/cities, namely in the Municipality of Surabaya, Tulungagung, Trenggalek, Sidoarjo, Pamekasan, Jombang, Madiun, a Municipality Malang, Lamongan, Bangkalan, Gresik, Malang, Lumajang, Mojokerto, Jember, Magetan, Tuban, and Blitar) through 90,234 units of home connections.
   - The public participation in the organization of the SPAM is apparent from the increase of the number of the HIPPAM institutions in the villages from 1,288 HIPPAMs in 2005 becoming 2,015 HIPPAMs in 2011, with a total scope of service of 2,758,471 individuals being the inhabitants of villages.

- The Government has encouraged cross-regional cooperation in the execution of the SPAM through a Regional Regulation (*Peraturan Daerah*, Perda) regarding the Neighborhood Group (*Rukun Tetangga*, RT; Community Group (*Rukun Warga*, RW) RTRW of the East Java Province regulating space structures in 4 clusters of the regionally integrated SPAM, whereby several regencies/municipalities are committed to jointly exploit water sources for standard water for potable water.
- The Government has executed the responsibility of the state to fulfill the need of water through the allocation of funds in the APBN and the APBD of the provinces for the development of the SPAM in efforts to achieve the MDGs target in the East Java Province.
- The manager of a HIPPAM is a lay person trained to manage potable water on his/her own, including in the determination of tariffs. If there was an operational problem of equipment then the Government would help.

[2.5] Considering the petition of the Petitioners, the People's Representative Council conveyed its testimony in the hearing dated 12 February 2014 and had conveyed its testimony in writing dated 12 February 2014 as accepted at the Office of the Clerk of the Court on the date of 1 April 2014, substantially explaining as follows:

**A. The Provision of the Law on Water Resources Petitioned for Review against the Constitution of 1945**

The Petitioners petitioned in their petition to review over Article 6, Article 7, Article 8, Article 9, Article 10, Article 26, Article 29 section (2) and section (5), Article 45, Article 46, Article 48 section (1), Article 49 section (1), Article 91, Article 92 section (1), section (2) and section (3) of the Law on Water Resources against the Constitution of 1945.

The Petitioners assumed that the provisions of the articles as such (*a quo*) are contrary to Article 18B section (2), Article 28A, Article 28D section (1), Article 28H section (1) and section (2), Article 28I section (2), as well as Article 33 section (3) and section (4) of the Constitution of 1945.

**B. The Constitutional Right and/or the Authority Deemed by the Petitioners to Have Been Harmed by the Validity of the Law on Water Resources**

The Petitioners in their petition as such (*a quo*) expressed that their constitutional rights have been harmed and violated or at least potentially according to normal reasoning can be ascertained would raise loss by the validity of Article 6 section (2), Article 6 section (3), Article 7, Article 8 section (1), Article 9 section (1), Article 11 section (3), Article 29 section (3), Article 40 section (4), and Article 49, the Law Number 7 of 2004 regarding Water Resources substantially as follows:

a. That which has been a scope of interpretation regarding the execution of the Law as such (*a quo*) as set out in the Decision of the Constitutional Court Number 058-059-060-063/PUU-II/2004 and Number 008/PUU-III/2005 dated 19 July 2005, has been normatively manipulated which would also give effect in its technicalities and execution, namely giving rise to a *mindset* of water managers who are always *profit-oriented* and would exploit maximum profit for their shareholders so that *public service* is outside of their dedication and no longer a principal orientation and basic character;
b. The entry space of the private sector in the water management is large as of the issuance of the Government Regulation Number 16 of 2005 indicating the *original intent* of the Law as such (*a quo*);
c. The provision of Article 16 letter h of the Law on Water Resources which determines that the Governments of the regencies/municipalities have the responsibility to fulfill the basic need of at least the daily water for the public in its area shall not be interpreted as an exclusive responsibility that only the Governments of the

regencies/municipalities have obligation for the fulfillment of the basic need of at least daily water;

d. The Utility Right to Use Water as defined in the Law on Water Resources is rather of respect and protection of the basic right of water, because the utility right to use according to the Elucidation to Article 8 of the Law as such (*a quo*) is only enjoyed by those who take water from water sources and not from distribution channels based on the construction as required by the aforesaid Law as such (*a quo*), therefore the Law as such (*a quo*) is contrary to Article 33 section 3 of the Constitution of 1945;
e. Article 11 section (3) of the Law on Water Resources is a justification that the private sector can play a role in the water resources management which increasingly affirms the series of the articles that perceive water as an economic commodity;
f. The Law on Water Resources restricts the role of the state merely as the maker and supervisor of regulations (regulator), the state limited as a regulator would lose control over each stage of the water management to ascertain the guaranty of safety, and the quality service for each utilizer of water, the State cannot assure and grant protection in incapable groups and prone to obtain access to healthy and affordable water. The aforesaid role cannot be replaced by the private sector having a profit orientation being its main objective.

**C. Testimony of the People's Representative Council (*Dewan Perwakilan Rakyat*, DPR) of the Republic of Indonesia**

The DPR conveyed its testimony against the postulate of Petitioners as described in the petition as such (*a quo*), as follows:

**1. The Legal Standing of the Petitioners**

The DPR perceived that the Petitioners should first be able to prove whether the Petitioners were truly a party deeming their constitutional rights and/or authorities harmed by the validity of the provision petitioned for review, particularly in the construction of the existence of the loss of its constitutional rights and/or authorities being an effect of the validity of the provision petitioned for review.

With regard to the legal standing of the Petitioners, the DPR left it fully to the honorable Chair/Tribunal of Justices the Constitutional Court to consider and to judge whether the Petitioners possess legal standing or not as regulated by Article 51 section (1) Laws regarding the Constitutional Court and based on the Decision of the Constitutional Court Number 006/PUU-III/2005 and Number 011/PUU-V/2007.

**2. Basic Testimony against the Review of the Law on Water Resources**

a. Whereas against the review of Article 6 section (2) and section (3) of the Law on Water Resources deemed by Petitioners being contrary to the Constitution, the DPR opined that the substance of Article 6 section (2) and section (3) regulating the domination of water resources by the Central Government and the regional governments by keeping to pay regard to the rights of the *adat* communities is a form of execution of the domination of the state against land and waters and the natural wealth contained in it shall be utilized for the optimal welfare of the people, as mandated Article 33 section (3) of the Constitution of 1945.
b. Whereas the provision of Article 6 section (3) of the Law on Water Resources is also defined as a form of recognition and respect of the state of the rights of the *adat* communities to the extent it still exists as guaranteed by Article 18B section (2) of the Constitution of 1945. The aforesaid rights of the *adat* communities are confirmed by regional regulations. The confirmation of the rights of the *adat*

communities by virtue of regional regulations is to grant protection and to assure legal certainty against the existence of rights of the *adat* communities.

c. Whereas against the provision of Article 6 section (2) and section (3) of the Law on Water Resources, the Constitutional Court through its Decision Number 058-059-060-063/PUU-II/2004 and Number 008/PUU-III/2005 in its legal consideration in page 504 stated:
*"whereas the existence of Article 6 section (2) of the Law on Water Resources is precisely to protect* the rights of the *adat law communities of water resources as referred to. The existence of adat law communities still possessing the ulayat right of water resources shall become a subject matter in the drafting of the pattern of the water resources management by the Governments of the regencies/cities, the provincial Governments, as well as by the central Government."*

d. Whereas against the review of Article 7, Article 8, Article 9, Article 10 Article 11, Article 40 and Article 49 of the Law on Water Resources regulating the rights to utilize and to manage water which according to the Petitioners contain a content of water being commercial commodities and being contrary to the constitution, the DPR opined that the concept of domination by the state over natural resources and the production branches important for the State and vital for the livelihood of the people at large shall be understood as a mandate which shall be executed by the state to make policy (beleid), arrangement (*bestuursdaad*), regulation (*regelendaad*), management (*beheersdaad*) and supervision (*toezichthoudendaad*) for the objective of the optimal welfare of the people.

e. Whereas the formulation of Article 7, Article 8, Article 9, Article 10, Article 11, Article 40 and Article 49 of the Law on Water Resources regulate the utility right of water and to whom the aforesaid utility right can be granted through an instrument of licensing by the Government or the regional governments. The Central Government and the regional governments are granted the authority to control and to supervise as well as to assess the granting of the utility right of water as referred to, through the aforesaid instrument of licensing.

f. Whereas the water resources management involving the participation of the public and the business realm in the context of the Law on Water Resources is in the frame of involvement of the public and the business realm in the drafting of a pattern of the water resources management is intended to catch inputs, problems, and/or desires of the stakeholders to be processed and be set out in a policy direction (*beleid*). The involvement of the aforesaid public and the business realm is conducted through public consultation organized at least in 2 (two) stages. The intention of these normative provisions are clearly stated in the elucidation to Article 8 of the Law as such (*a quo*). From the aforesaid provision of the article and its elucidation there is no intention to let go the privatization and/or commercialization access to water resources.

g. Whereas against the provision which regulates the involvement of the business realm in the management of Water Resources, the Constitutional Court through its Decision Number 058-059-060-063/PUU-II/2004 and Number 008/PUU-III/2005 in its legal consideration in page 497 stated:
*"The Court opined that the provision of Article 11 section (3) which stated that:"The arrangement of the pattern of the water resources management is conducted by involving the public participation and the business realm as extensive as possible" sufficiently reflects transparency in the drafting of the pattern of water resources management. The existence of the sentence "as extensive as possible" should not be interpreted as if only granting the larger role only to the business realm but it shall also be to the public. The involvement of the public and the business realm referred to render input for the drafting plan of*

*water resources management, and the assumption of the pattern which will be utilized in water resources management. The role of the state being one who controls water, thus is the order of Article 33 section (3) of the Constitution of 1945, shall be executed by the Government or the Regional Governments, which will stay and is not transferred to the business realm or the private sector"*

h. Whereas based on the aforesaid elucidation herein above the DPR opined that the provisions of the articles as such (*a quo*) has reflected the concept of domination by the State according to the mandate of Article 33 section (3) of the Constitution of 1945. Therefore it is not contrary to Article 33 section (3) and section (4) of the Constitution of 1945

i. Whereas against the opinion of the Petitioners which stated that Article 91 and Article 92 of the Law on Water Resources is a discriminative law, the DPR rendered an elucidation as follows:

   1. Article 91 and Article 92 is one serial with the provision of Article 90 of the Law on Water Resources. The articles as such (*a quo*) are intended to give space for the public to file a claim if there occur matters related to the water resources management harming their livelihood. The aforesaid matter clearly sets out as to what are the right of the public (Article 90), what are the obligations of the Government agencies (Article 91) and how if a claim is made through an organization (Article 92).

   2. The right of the public to file a claim are guaranteed as extensive as possible without discrimination written down in Article 90 which stated:
      "*The public harmed due to various problems of water resources management is entitled to file a class action to court*."
      Therefore, it is not true that there is a derogation and limitation of the right of each individual to defend his/her life and livelihood.
   3. Whereas such is also the case with a claim filed by an organization, whereby a regulation is needed as to what kind of organization is eligible to file a claim, in other words the aforesaid organization shall have legal standing to file a claim. An organization possessing legal standing to file a claim shall know matters related to water resources in order for the claim filed would be a claim relevant with the problems of water resource and the aforesaid organization is really concerned with its field. As such we may expect that the problems questioned are truly linked with water problem resources management. Such regulations are needed in order for the public to also obtain a correct comprehension and to channel its aspiration through a proportional channel. If it is not regulated as such, there may occur obscurity in the problems and it is precisely worried that it would not help the public. That is also regulated in the event of claims in the field of the environment and forestry.

   4. Whereas against the provisions of Article 90, Article 91, and Article 92 of the Law on Water Resources, the Constitutional Court through its Decision Number 058-059-060-063/PUU-II/2004 and Number 008/PUU-III/2005 in its legal consideration in page 501 stated:
      *"The Court opined that the existence of Article 90, Article 91, and Article 92 of the Law on Water Resources does not mean to eliminate the rights of individual citizens/members of the public. If a civil loss arises, then it is the right of each individual to file a claim, such is also the right to file a claim because the loss caused by an administrative decision of the state. Article 90, Article 91, and Article 92 of the Law on Water Resources regulate the claims*

> *of the public and organizations. By virtue of Article 90 then one may file a claim as a class action, namely representing the other members of the public who share the loss. Article 91 of the Law on Water Resources basically raises an obligation of the Government to actively protect the interests of the public so that greater loss of the public could be prevented early. Therefore, the Court opined that there is no reason to state that Article 90, Article 91, and Article 92 of the Law on Water Resources are contrary to the Constitution".*

[2.6] Considering whereas related to the petition of the Petitioners, the National Council of Water Resources (*Dewan Sumber Daya Air Nasional*), as represented by its Daily Chair namely the Minister of Public Works Ir. Djoko Kirmanto, Dipl.HE., conveyed a verbal testimony in the hearing of 12 February 2014, and gave a verbal and written testimony dated 12 February 2014 received by the Court on the date of 12 February 2014, substantially testified as follows:

**I. General**

Water being a grace of God The One Only is one of the natural resources that is all the time very vital and absolutely needed for the livelihood and living of mankind. The position of water is to date not replaceable in its function by any other substance or elements. As such there is nobody who doubts and argues that water is a basic need of humans. Such is the importance of water for humans, that the right of water is a fundamental basic human right. A good water resources management may render the benefit to actualize welfare for all the Indonesian people in all fields.

In order to support the aforesaid condition, an integrated concept in the water management resources is needed. Therefore the water management resources shall be on an overall, integrated, and environmental insight based management with the aim of actualize expediency of sustainable water resources for the welfare people based on the principle of preservation, balance, general expediency, integration and harmony, justice, autonomy, as well as transparency and accountability. These are already in line with the mandate of the Law Number 7 of 2004 regarding Water Resources.

The function of water being a substantial source of public life has a nature of being dynamic, flowing to lower places, without recognizing borders of administrative areas. The existence of water which follows hydrological cycles is closely related to the weather condition in a region, so that water availability is not even at each time and in each area. At a certain time, water would be very abundant, particularly in the rainy season. Nevertheless the other way around in extended dry seasons, the public have it very difficult to get to clean water. Besides, the development of the number of the inhabitants and the increasing public activity has given cause to the change in the function of the environment leading to negative effect vis-à-vis the preservation of water resources, and the increase of the damaging potential of water, as well as the decreasing quality of water.
As such water resources having a cross-sectoral nature, cross-area, and cross generation, demands an integrated act which is intact from the upstream down to the downstream bases on river zones, without being influenced by borders of administrative areas it passes through. It is increasingly clear that water is a nationally strategic element which is an instrument to achieve welfare of the people. In order to support the aforesaid condition, a legal instrument which is firm, being a base for water resources management, is needed. Moreover, with the development of public demand for a more real recognition of basic human right of water as well as the existence of protection for the interest people's

agriculture and the weak economy public has encouraged the emergence of a new paradigm in water resources management, namely:
1. Overall and integrated management.
2. Protection of basic human right of water.
3. Balance between utilization and conservation.
4. Balance between physical and non-physical handling.
5. The involvement of stakeholders in the water resources management in the spirit democracy and coordinative approach.

6. To adopt the principle of sustainable development based on harmony between the social function of water, environment, and economy.

**II. The Need of a Coordination Forum**

In line with the aforesaid matter as above mentioned, the Law Number 7 of 2004 regarding Water Resources has the capability to actualize the water resources management comprising efforts of planning, execution, monitoring, and evaluation of the organization of water resources conservation, empowerment of water resources, and the control of the damaging potential of water which shall be executed according to the mandate of the Constitution of 1945. Therefore, in accordance with the obligation of the state to respect, to protect, and to fulfill human rights, including the right of water, then the Law Number 7 of 2004 contains three basic thoughts, namely:

1. Philosophically, water is the grace of God The One Only being a source of life and source of livelihood. Therefore, the state is obliged to render protection and assurance against the basic rights of each individual to obtain water being the fulfillment of the daily minimum basic needs, in order to fulfill a livelihood that is healthy, clean, and productive.
2. Sociologically, the water resources management shall pay regard to the social function of water, accommodate the spirit of democratization, decentralization, transparency in the order livelihood in the public, in the nation, and in the state, as well as recognizing the *ulayat* rights of the *adat* law communities.
3. In juridical sense, Article 33 section (3) of the Constitution of 1945 stated that the land and waters and the natural wealth contained in it shall be controlled by the state and utilized for the optimal welfare of the people. In line with the aforesaid matter, the Law Number 7 of 2004 has mandated the same in the context of regulating, organizing, cultivating, and supervising, particularly in the case of repairing and increasing service, so that the available water resources can be utilized equitably and sustainably.

Considering that water resources is in the interest of many sectors, its flow area penetrates borders of administrative areas and is a basic need for the continuance of the public life, so that the aforesaid Law Number 7 of 2004 mandated the need of the formation of a coordination forum for the water resources management consisting of members being the representative of the related parties, either from elements of the Government as well as non-Government. The aforesaid coordination forum is formed at the national and provincial levels. At the level of the regencies/municipalities and river zones it will be formed in accordance with the needs.

The coordination forum is expected to be capable to coordinate various interests of the agencies, public institutions and the other stakeholders of water resources. This is due to the variety of actors involved in the water resources management with their respective roles, either as a *regulator* as well as *operator*, *developer,* and from elements of *users* all the way

to observers, so that the formation of the National Council of Water Resources (*Dewan Sumber Daya Air Nasional*), as mandated by the Law Number 7 of 2004 regarding Water Resources as well as of the Decree of the President Number 12 of 2008 regarding the Council of Water Resources is an answer to the need of a coordination forum necessary for the integration of the interest of the various sector areas and stakeholders as well as to actualize the integration of acts to safeguard the continuance of function and the benefit water resources.

**III. The Role of the National Council of Water Resources**

The National Council of Water Resources is an institution which is of nonstructural nature with a status beneath and is accountable directly to the President, is a coordination forum that integrates the interest of various areas, sectors, *stakeholders,* and cross-generations. The National Council of Water Resources is a transformed coordination forum from a coordination forum already existing before, which from its beginning was still based on the Law Number 11 of 1974 regarding Waters.

In accordance with the Decree of the President Number 12 of 2008, the National Council of Water Resources has a membership being elements of the Central Government and non-governmental elements in a balanced number based on the principle of representatives, whereby the structure of the organization and the work order of the National Council of Water Resources shall be further regulated by the Decision of the President Number 6 of 2009 regarding the Formation of the National Council of Water Resources.

1. The membership of the National Council of Water Resources stemming from elements of the Government comprises 16 Minister and the Head of the Agencies and Institutions linked with water resources management.
2. The representatives of the Regional Governments as referred to herein above consist of:
   a. 2 (two) governors representing areas of west Indonesia;
   b. 2 (two) governors representing areas of central Indonesia; and
   c. 2 (two) governors representing areas of east Indonesia.
   The election and the designation of the representatives of the regional governments is conducted by the Coordinating Minister overseeing the economy as Chair of the National Council of Water Resources based on the consideration from the Minister of Home Affairs and the membership of governors in the representation of the aforesaid regional governments is determined by turns for a timeframe of 2 (two) years.

3. The membership of the National Council of Water Resources stemming from non-governmental elements at the national level may consist of 11 elements of organizations/associations representing:
   a. The utilizer of water for agriculture;
   b. Entrepreneurs of potable water;
   c. The industry using water;
   d. The utilizer of water for fishery;
   e. The conservation of water resources;
   f. The utilizer of water resources for electrical energy;
   g. The utilizer of water resources for transportation;
   h. The utilizer of water resources for tourism/sports;
   i. The utilizer of water resources for mining;
   j. Entrepreneurs in the field of forestry; and
   k. Controller of the damaging potential of water.

Moreover in accordance with the mandate of Article 6 of the Decree of the President Number 12 of 2008 that the National Council of Water Resources has the task of assisting the President in the following matters:

1. To draw-up and formulate the national policy as well as water resources management strategy.
2. To render consideration for the stipulation of river zones and ground water basins.
3. To monitor and to evaluate the execution of the follow-up the stipulation of river zones and ground water basins as well as proposing revisions to the stipulation of river zones and ground water basins.
4. To draw-up and formulate policy regarding hydrology, hydrometeorology, and hydrogeology information system at the national level.

In order to execute its tasks the National Council of Water Resources organizes the coordination function of the water resources management through:

1. Consultation with related parties for the policy integrity and integration and as well as the achievement of understanding and harmony of inter-sectoral, inter-regional and inter-stakeholders interests.
2. Monitoring and evaluation of the execution of the national water resources management policy.
3. Consultation with related parties for the rendering of consideration for the stipulation of river zones and ground water basins.
4. Consultation with related parties for the integrity of the policy of hydrology, hydrometeorology and hydrogeology information system.
5. Monitoring and evaluation of the execution of the hydrology, hydrometeorology and hydrogeology information system at the national level.

One of the main tasks of the National Council of Water Resources is to draw-up and formulate the national policy as well as strategy for the water resources management through a transparent and democratic process, in line with the current paradigm of being in public and being in a state. This national policy is a strategic directive in the water resources management nationally for the period of 2011-2030 having the function of:

1. As a reference for the ministers and non-ministerial Government institution leaders in the stipulation of sectoral policy.
2. As a reference in the drafting of water resources policy in the management at the provincial level.
3. As a guidance in the drafting of pattern of the water resources management of the national strategic river zones and inter-state river zones.

This national policy consists of 6 (six) policies as follow:

1. General policy comprising the enhancement of coordination and integrity of water resources management, the development of science, technology, and water related culture, enhancement of funding for water resources management, and enhancement of the supervision and enforcement of law.
2. The enhancement of water resources conservation policy with three strategies which among others is the enhancement of efforts of protection, the enhancement of efforts of conservation, and the enhancement of efforts of the management of quality water, and the control of water contamination.
3. The policy for the utilization of water resources for justice and welfare of the people comprises the enhancement of efforts of the administration of the use of water resources, the enhancement of efforts of the provision of water, the enhancement of efforts of efficiency of water utilization, and the enhancement of efforts of the development of water resources.

4. The policy for the control of the damaging potential of water comprises the enhancement of efforts of prevention, enhancement of efforts of tackling, and the enhancement of efforts of recovery.
5. The enhancement policy of participation of the public and the business realm in the water resources management comprising the enhancement of participation of the public and the business realm in the planning, the execution, and supervision.
6. The policy for the development of the network for water resources information system (*Sistem Informasi Sumber Daya Air*, SISDA) in the water resources management comprising the institutional and energy managing human source of SIADA enhancement, the development of networking of SIADA, and the development of information technology.

**IV. Evaluation on the Execution of the Law Number 7 of 2004**

**1. The execution of the integrated water resources management**

In the frame of the execution of the authority and the responsibility to manage the water resources, the river zone unity of hydrological areas is divided into three level of authorities, namely the central authority having the responsibility of cross-state river zones, cross-provincial river zones, and national strategic river zones, while the authorities and the responsibility of the provinces comprise cross-regencies/cities river zones, and the authorities of the governments of regencies/municipalities lies on the river zone in one regency/city. All river zones with a total of 131 river zones, are divided into:

a. Cross-state areas of 5 River Zones (*Wilayah Sungai*, WS).
b. Cross-province areas of 29 WS.
c. National strategic river zones of 29 WS.
d. Cross-regencies/municipalities river zone of 53 WS.
e. River zone in one regencies/municipalities numbering 15 WS.

The pattern of the water resources management which is the authority and the responsibility of the Central Government being a basic framework in the water resources management in river zones subject to the principle of integrity, is arranged in 63 WS. A number of 23 patterns have been stipulated by the Minister of Public Works, 39 patterns are in the process of stipulation, and one pattern is in the process of drafting. Meanwhile for the pattern of water resources management, the provincial authorities have arranged for 53 WS detailed as follows: 8 patterns have been stipulated by governors, 32 patterns are in the process of stipulation, and 13 draft patterns have yet to be drafted. Whereas the pattern of water resources management for the authorities of regencies/cities, have not been drafted to date.

The coordination forum which has been formed to support the integrated water resources management, covers:

a. The National Council of Water Resources.
b. 27 Provincial Councils of Water Resources.
c. 39 Coordination Teams for the Management of Water Resources under the Central Authority.
d. 7 Coordination Teams for the Management of Water Resources under the Provincial Authority.

**2. Derivative Products of the Law Number 7 of 2004**

a. Several Government Regulations have been determined in the frame of the further execution of the Law regarding Water Resources as follow:

1) The Government Regulation Number 16 of 2005 regarding the Development of Potable Water Provision System;
2) The Government Regulation Number 20 of 2006 regarding Irrigation;
3) The Government Regulation Number 42 of 2008 regarding the Management of Water Resources;
4) The Government Regulation Number 43 of 2008 regarding Ground Water;
5) The Government Regulation Number 37 of 2010 regarding Dams;
6) The Government Regulation Number 38 of 2011 regarding Rivers ; and
7) The Government Regulation Number 73 of 2013 regarding Swamps.

b. Several implementing regulations have been issued as a follow-up of the regulation product particularly those related to Potable Water Provision System, as follows:
1) The Decree of the President Number 29 of 2009 regarding the Granting of Guaranty and Subvention of Interest by the Central Government in the Frame of Acceleration of the Provision of Potable Water;
2) The Regulation of the Minister of Public Works Number 294/PRT/M/2005 regarding the Support Agency for the Development of Potable Water Provision System;
3) The Regulation of the Minister of Public Works Number 20/PRT/M/2006 regarding the National Policy and Strategy for the Development of potable water provision system (*Kebijakan dan Strategi Nasional Pengembangan Sistem Penyediaan Air Minum*, KSNP SPAM);
4) The Regulation of the Minister of Public Works Number 18/PRT/M/2007 regarding the Organization of the Development of the SPAM;
5) The Regulation of the Minister of Public Works Number 01/PRT/M/2009 regarding the Organization of the Development of potable water provision system Non-Piping Network;
6) The Regulation of the Minister of Public Works Number 21/PRT/M/2009 regarding the Technical Guidelines of Investment Worthiness in the Development of the SPAM by the PDAM;
7) The Regulation of the Minister of Public Works Number 12/PRT/M/2010 regarding the Cooperation Guidelines for the Exploitation of the Development of Potable Water Provision System;
8) The Regulation of the Minister of Public Works Number 18/PRT/M/2012 regarding the Cultivation and Supervision of the Organization of Potable Water Provision System;
9) The Regulation of the Minister of Public Works Number 7/PRT/M/2013 regarding the Guidelines for the Granting of the Permit for the Organization of the Development of the SPAM by Enterprises and the Public to Fulfill Own Needs;
10) The Regulation of the Minister of Home Affairs Number 23 of 2006 regarding the Technical Guidelines and Procedure to Regulate Potable Water Tariff in Regional Potable Water Companies;
11) The Regulation of the Minister of Home Affairs Number 2 of 2007 regarding the Organ and Personal Affairs of the Regional Potable Water Companies;
12) The Regulation of the Minister of Finance Number 229/PMK.01/2009regarding the Execution Procedure of the Granting of Guaranty and Subvention of Interest by the Central Government in the Frame of Acceleration of the Provision of Potable Water;
13) The Regulation of the Minister of Finance Number 91/PMK.011/2011 regarding the Amendment to the Regulation of the Minister of Finance Number 229/PMK.01/ 2009 regarding the Execution Procedure of the Granting of

Guaranty and Subvention of Interest by the Central Government in the Frame of Acceleration of the Provision of Potable Water; and

14) The Regulation of the Minister of Finance Number 114/PMK.05/2012 regarding the Settlement of State Accounts Receivable Sourced from the Continuation of Foreign Loans, the Account of Investment Funds, and the Account of Regional Development in Regional Potable Water Companies.

**V. The Response of the National Council of Water Resources against the Material Petitioned for Review**

1. In response to the assumption of the Petitioners stating that the Law on Water Resources contains subject materials of domination and monopoly of water resources is contrary to the principle of water resources being controlled by the state, the National Council of Water Resources opined that the Government has attempted to shy away from the monopoly by certain groups, reversely it has sided with the fulfillment of the minimum basic needs of the people and people's agriculture. A permit for the exploitation of water resources can only be granted if:
   a. the water provision for the daily basic needs and irrigation for the people's agriculture in an existing irrigation system has been fulfilled and there is still water allocation for such kind of business.
   b. a process of public consultation has been conducted.
   c. the volume and water allocation for which a permit has been requested for exploitation shall be in accordance with the allocation plan stipulated in the water resource management plan on the respective river zone.

   In the exploitation of water resources, the Government has determined the following criteria:
   a. It is organized by paying regard to the social function of water and the environment.
   b. It encourages the participation of small and medium enterprises.
   c. The exploitation of water resources comprising one river zone as a whole (from the upstream down to the downstream) can only be executed by enterprises owned by the state/a region (the BUMN/BUMD) managing water resources.
   d. Individuals, enterprises, or cooperation among enterprises can be given the opportunity to exploit (not to control) water resources by the Government, a Province Government, or Government of a Regency/a Municipality through the mechanism of licensing.
   e. With the validity of the aforesaid licensing mechanism, the Government keeps holding control over the water utilization resources.

      Based on the aforesaid facts, the Council opined that the role of the state being in control of water as mandated by Article 33 section (3) of the Constitution of 1945 shall remain to be executed by the Government or a Regional Government.
2. In response to the assumption of the Petitioners stating that the Law on Water Resources contains a content positioning that the water utilization leans towards the commercial interest and may give rise to horizontal conflicts, the Council opined that the Government has rendered protection and guaranteed the right of the people of water as mandated by the following articles:

   a. The State guarantees the right of each individual to obtain water for the minimum daily basic needs to fulfill his/her healthy, clean, and productive livelihood.
   b. Water resources shall be controlled by the state and be utilized for the optimal welfare of the people.
   c. The Utility Right to Use Water is obtained without permit to fulfill the daily basic needs for private persons and people's agriculture situated in an irrigation system.

d. The provision of water to fulfill the daily basic needs and irrigation for agriculture in an existing irrigation system is the main priority of the provision of water resources herein above overcoming all needs.
e. If the stipulation of priority for the provision of water resources gives rise to the loss of the user who has used water resources previously, the Government or a regional government is obliged to regulate the compensation to its user.
f. The development of potable water provision system is the responsibility of the Central Government and the regional governments.

The aforesaid regulation herein above will further be set out more detailed through a Draft Government Regulation (*Rancangan Peraturan Pemerintah*, RPP) of Water Utility Right.

3. In response to the assumption of the Petitioners stating that the Law on Water Resources eliminates the responsibility of the state in the fulfillment of water need, the Council opined that the Law on Water Resources has regulated the substantial subject in water resources management. Although the Law on Water Resources opens the opportunity for the role of the private sector to obtain the Utility Right to Exploit Water and the exploitation permit of water resources, yet the aforesaid matter will not cause the domination of water to fall into the hands of the private sector.
4. In response to the assumption of the Petitioners stating that the Law on Water Resources is a Law which is of discriminative nature, the Council opined that Article 91 and Article 92 should be understood in their entirety with the provision of Article 90 being one unity. The aforesaid articles in the Law on Water Resources are intended to render space for the public to file claim if there occur matters related to the water resources management that harms their livelihood, and it has been set out clearly as to what the right of the public is (Article 90), what the obligations of a government agency are (Article 91), and what if a claim is filed through an organization (Article 92).

The right of the public to file a claim has been guaranteed as extensive as possible without discrimination as written down in the provision of Article 90 which stated:

"The public harmed due to various problems of the water resources management is entitled to file a class action to court."

5. With regard to the execution of the potable water provision system, the Council opined that the Government has carried out its obligation to respect, to protect, and to fulfill the right of water for the public in accordance with the previous mandate of the Constitutional Court, by issuing various implementing regulations of the Law Number 7 of 2004 regarding Water Resources and the Government Regulation as mandated by the aforesaid Law, among others:
   a. To stipulate the National Policy and Strategy for the Development of Potable Water Provision System, as regulated through the Regulation of the Minister of Public Works Number 20/PRT/M/2006 and renewed through the Regulation of the Minister of Public Works Number 13/PRT/M/2013, regulating efforts of enhancement of potable water service by prioritizing the public with low earning and zones prone to water shortage, comprising the implementation of laws and regulations, enhancement of access service, institutional cultivation, provision of standard water, enhancement of the role of enterprises and the public, the provision of alternative funding, as well as the development of innovation and technology. This has been followed-up by allocating a budget in the APBN with a significant increase, as of the year 2010 which was only amounting Rp2,7 trillion, increased to become Rp9,6 trillion in the year 2013.

b. The responsibility for the development of the SPAM shall be organized by the Central Government and the regional governments. The participation of enterprises and the public is of limited nature in the event that the Government is not yet able to organize it on its own. In regulating the participation of enterprises, the Government has regulated the participation of enterprises in the development of the SPAM, through the Regulation of the Minister of Public Works Number 12/PRT/M/2010. The Government has also regulated the permit for the organization of the SPAM by Enterprises and the public as set out in the Regulation of the Minister of Public Works Number 7/PRT/M/2013. In the aforesaid cooperation the Government remains to play the role of controlling the tariff stipulation, the quality supervision, and potable water service.

c. To stipulate the Minimum Standard Service in accordance with the Regulation of the Minister of Public Works Number 14/PRT/M/2010 at the volume of 60 liter/individual/day or 10 m3/month/household. This effort has produced an enhancement in the scope of potable water service from 47.71% in the year 2009 becoming 58.05% in the year 2012, and at the end of the year 2013 it has increased becoming 61.83%.

d. To stipulate the regulation regarding the tariff stipulation through the Regulation of the Minister of Home Affairs (*Peraturan Menteri Dalam Negeri*, Permendagri) Number 23 of 2006, by providing cross-subsidy to the public with low earning to pay for water in the amount of maximum 4% from the Regional Minimum Wage (*Upah Minimum Regional*, UMR) of a Province. As a matter of fact, the lower tariff ranges between 0.6%-2.6% of a Provincial UMR. Besides, the protection of consumers is also conducted through the Ministerial Regulation of Health (*Peraturan Menteri Kesehatan*, Permenkes) Number 492 of 2010 regarding Water Quality Requirements (*Syarat-Syarat Kualitas Air*).

e. In increasing the performance of the PDAM, the Government has stipulated the order of organization of the SPAM as regulated in the Permen of Public Works Number 18/PRT/M/2007. The Government has allocated technical sanitation assistance funds for the PDAMs, so that the number of the healthy PDAMs increases from 17.4% in the year 2006 becoming 49.6% in the year 2013.

f. To stipulate the regulation regarding the obligation of the Government in the cultivation of the regional governments being the bearer of responsibility of the potable water service through the Regulation of the Minister of Public Works Number 18/PRT/M/2012. This is intended to be supported by the Government to the regional governments and the public for the increase of the performance of the development of potable water provision system in the regions (including the PDAMs and managing public groups), either in the physical or non-physical form.

**VI. Conclusion**

Based on the whole description of the aforesaid elucidation herein above to that which has been executed by the Government, the National Council of Water Resources opined:

1. The Law on Water Resources is already in line as well as it does not deny the mandate of the Constitution of the State of the Republic of Indonesia of 1945.
2. In the frame of the execution of the Law on Water Resources, the Government has stipulated several laws and regulations in order to actualize the meaning of water domination by the state.

3. Pursuant to the vision regarding the water resources management set out in Article 6 section (1) of the Law on Water Resources stating that Water Resources be controlled by the state and shall be utilized for the optimal welfare of the people, the norms in the

Law on Water Resources do not recognize privatization, commercialization, or monopoly in water resources management.

4. Bearing in mind that the Law on Water Resources has been executed by the Government seriously, the National Council of Water Resources opined that the *conditionally constitutional* nature against the Law on Water Resources, as referred to in the Decision of the Constitutional Court Number 058-059-060-063/PUU-II/2004 and Number 008/PUU-III/2005 dated 19 July 2005 be revoked and declared not applicable.

[2.7] Considering whereas the Petitioners conveyed their written conclusion dated 1 April 2014 and the President conveyed his written conclusion dated 1 April 2014, both of which were received by the Office of the Clerk of the Court on the date of 1 April 2014 and 7 April 2014, while both retain their respective standpoint substantially;

[2.8] Considering whereas to shorten the description in this decision, all things occurring in the hearings refer to the minutes of the hearings, being one unity inseparable from this decision;

## 3. LEGAL CONSIDERATION

[3.1] Considering whereas the purpose and objective of the petition as such (*a quo*) is to petition the review of the constitutionality of the Law Number 7 of 2004 regarding Water Resources (State Gazette of the Republic of Indonesia of 2004 Number 32, Supplement to the State Gazette of the Republic of Indonesia Number 4377, hereinafter referred to as the Law on Water Resources) as a whole, or at least Article 6 section (1), section (2), section (3), and section (4); Article 7 section (1) and section (2); Article 8 section (1), section (2), section (3), and section (4); Article 9 section (1), section (2), and section (3); Article 10; Article 26 section (1), section (2), section (3), section (4), section (5), section (6), and section (7); Article 29 section (2) and section (5); Article 45 section (1), section (2), section (3), and section (4); Article 46 section (1), section (2), section (3), and section (4); Article 48 section (1); Article 49 section (1); Article 80 section (1), section (2), section (3), section (4), section (5), section (6), and section (7); Article 91; as well as Article 92 section (1), section (2), and section (3) of the Law on Water Resources against the Constitution of the State of the Republic of Indonesia of 1945.

[3.2] Considering whereas prior to considering the principal petition, the Constitutional Court (hereinafter referred to as the Court) shall first consider:

a. The authority of the Court to adjudicate the petition as such (*a quo*);

b. The legal standing of the Petitioners to submit the petition as such (*a quo*);

The Court opined against both aforesaid matters, as follows:

**The Authority of the Court**

[3.3] Considering whereas based on Article 24C section (1) of the Constitution of 1945, Article 10 section (1) letter a the Law Number 24 of 2003 regarding the Constitutional Court as amended by the Law Number 8 of 2011 regarding the Amendment to the Law Number 24 of 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia of 2011 Number 70, Supplement to the State Gazette of the Republic of Indonesia Number 5226, hereinafter referred to as the Law on the Constitutional Court), as well as Article 29 section (1) letter a the Law Number 48 of 2009 regarding the Judicial Power (State Gazette of the Republic of Indonesia of 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076, hereinafter referred to as the Law Number 48/2009), one of constitutional authorities of the Court is to adjudicate at the first

and final instance its decision of which is of final nature for the review of laws against the Constitution;

[3.4] Considering whereas the petition of the Petitioners is to petition for the review of the constitutionality of the Law on Water Resources as a whole or at least Article 6 section (1), section (2), section (3), and section (4); Article 7 section (1) and section (2); Article 8 section (1), section (2), section (3), and section (4); Article 9 section (1), section (2), and section (3); Article 10; Article 26 section (1), section (2), section (3), section (4), section (5), section (6), and section (7); Article 29 section (2) and section (5); Article 45 section (1), section (2), section (3), and section (4); Article 46 section (1), section (2), section (3), and section (4); Article 48 section (1); Article 49 section (1); Article 80 section (1), section (2), section (3), section (4), section (5), section (6), and section (7); Article 91; as well as Article 92 section (1), section (2), and section (3) of the Law on Water Resources against the Constitution of 1945, which is one of the authorities of the Court, so that therefore the Court has the authority to adjudicate the petition as such (*a quo*);

**The Legal Standing of the Petitioners**

[3.5] Considering whereas based on Article 51 section (1) of the Law on the Constitutional Court along with its Elucidation, those eligible to submit a petition for the review of a Law against the Constitution of 1945 are those who deem their constitutional rights and/or authorities as granted by the Constitution of 1945 are harmed by the validity of a Law, namely:

a. Indonesian individual citizens (including groups of people sharing the same interest);
b. unities of the *adat* law societies to the extent that they are still alive and are in accordance with the development of the public and the principle of the Unitary State of the Republic of Indonesia as is regulated in the Laws;
c. public or private legal entities; or
d. state institutions;

Therefore, the Petitioners in the review of a Law against the Constitution of 1945 shall first explain and prove:

a. its position as Petitioners as referred to in Article 51 section (1) of the Law on the Constitutional Court;
b. their loss of constitutional rights and/or authorities as granted by the Constitution of 1945 is caused by the validity of the Law petitioned for review;

[3.6] Considering also whereas the Court as of the Decision of the Constitutional Court Number 006/PUU-III/2005, dated 31 May 2005, and the Decision of the Constitutional Court Number 11/PUU-V/2007, dated 20 September 2007, as well as the further decisions is of the standpoint that the loss of the constitutional rights and/or authorities as referred to in Article 51 section (1) of the Law on the Constitutional Court shall fulfill five requirements, namely:

a. The existence of constitutional rights and/or authorities of the Petitioners as granted by the Constitution of 1945;
b. The aforesaid constitutional rights and/or authorities by the Petitioners are deemed harmed by the validity of the Law petitioned for review;
c the aforesaid constitutional loss shall be of specific and actual nature or at least has the potential which according to common sense can be ascertained that it will happen;
d. The existence of causal relationship (*causal verband*) between the loss as referred to and the validity of the Law petitioned for review;
e. The existence of possibility that with the granting of the petition the constitutional loss as postulated will not or does no longer occur;

[3.7] Considering whereas based on the description as aforesaid in paragraph **[3.5]** and **[3.6]** as above mentioned, further the Court will consider the legal standing of the Petitioners as follows:

[3.8] Considering whereas substantially all the Petitioner I, the Petitioner II, the Petitioner III, and the Petitioner IV, have postulated themselves being private legal entities, and all the Petitioner V, the Petitioner VI, the Petitioner VII, the Petitioner VIII, the Petitioner IX, the Petitioner X, and the Petitioner XI, have postulated themselves being private persons Indonesian citizens possessing constitutional rights as regulated, among others, in Article 18B section (2), Article 28C section (2), Article 28D section (1), Article 28H section (1), Article 28I section (4), as well as Article 33 section (2) and section (3) of the Constitution of 1945, harmed due to the validity of the Law on Water Resources or at least Article 6 section (1), section (2), section (3), and section (4); Article 7 section (1) and section (2); Article 8 section (1), section (2), section (3), and section (4); Article 9 section (1), section (2), and section (3); Article 10; Article 26 section (1), section (2), section (3), section (4), section (5), section (6), and section (7); Article 29 section (2) and section (5); Article 45 section (1), section (2), section (3), and section (4); Article 46 section (1), section (2), section (3), and section (4); Article 48 section (1); Article 49 section (1); Article 80 section (1), section (2), section (3), section (4), section (5), section (6), and section (7); Article 91; as well as Article 92 section (1), section (2), and section (3) of the Law on Water Resources. The aforesaid constitutional rights of the Petitioners have been harmed or bear the potential to be harmed by the provisions as such (*a quo*), because the provisions as such (*a quo*) open the space for water privatization and simultaneously the release of the responsibility of the state in the provision of potable water for the people, consequential to the occurrence of difficulties in the fulfillment of water need, as well as triggering the occurrence of horizontal conflicts related to the utilization of water.

[3.9] Considering whereas all the Petitioner I up to the Petitioner IV submitted the petition in their capacities as private legal entities, while all the Petitioner V up to the Petitioner XI submitted the petition as Indonesian individual citizens. The postulate of the Petitioners regarding their legal standing is evidenced by photocopies of personal identities of the Petitioners, the Decree of the Minister of Law and Human Rights (*Menteri Hukum dan Hak Asasi Manusia*, Menkum HAM), as well as the photocopy of the Articles of Association/Bylaws (*Anggaran Dasar/Anggaran Rumah Tangga*, AD/ART) (*vide* Evidence P-2 up to Evidence P-14).

After the Court has examined meticulously the instruments of evidence submitted by the Petitioners, the Court judges the Petitioner I, the Petitioner II, the Petitioner IV, the Petitioner V, the Petitioner VI, the Petitioner VII, the Petitioner VIII, the Petitioner IX, and the Petitioner X, have proven their existence as private legal entities as well as private person Indonesian citizens, while the Petitioner III namely the Solidarity of Parkers, Street Vendors, Entrepreneurs, and Employees (*Solidaritas Juru Parkir, Pedagang Kaki Lima, Pengusaha, dan Karyawan*, SOJUPEK) did not prove their existence as a private legal entity because it did not submit instruments of evidence. Whereas the Petitioner XI, namely individuals on behalf of Fahmi Idris, despite not submitting the photocopy of his identity card which can prove himself being an Indonesian citizen, yet it has been public knowledge that the respective person is an Indonesian citizen.

Whereas the article petitioned for review of its constitutionality by the Petitioners has a causal relationship (*causal verband*) in the form of potential for the rise of constitutional loss for the Petitioners. According to the Court the potential for the aforesaid constitutional loss has the possibility of no longer occurring provided that the petition of the Petitioners is granted.

Based on the aforesaid legal consideration, the Court opined that the Petitioners I, the Petitioner II, the Petitioner IV, the Petitioner V, the Petitioner VI, the Petitioner VII, the Petitioner VIII, the Petitioner IX, the Petitioner X, and the Petitioner XI possess legal standing, while the Petitioner III do not possess legal standing to submit the petition as such (*a quo*);

[3.10] Considering whereas because the Court has the authority to adjudicate the petition as such (*a quo*), and the Petitioners possess legal standing to submit the petition as such (*a quo*), save to the Petitioner III, then the Court will further consider the principal petition;

**Subject of the Petition**

**The Opinion of the Court**

[3.11] Considering whereas the principal petition of the Petitioners is to review the constitutionality of the articles in the Law on Water Resources as mentioned completely in the part State of the Case which can grouped into the principal problems as follow: i) Water management by utilizing an instrument of the granting of the utility right of water, as regulated in Article 6, Article 7, Article 8, Article 9, and Article 10; ii) of the water utilization resources, including the water exploitation, as regulated in Article 26, Article 29, Article 45, Article 46, Article 48, and Article 49; iii) Funding as regulated in Article 80; and iv) of the claim of the public and organizations as regulated in Article 90, Article 91, and Article 92, with postulates which are substantially as follows:

1. This repeated constitutional review of the Law on Water Resources is because the Court considered in the Decision of the Case Number 058-059-060-063/PUU-II/2004 and the Case Number 008/PUU-III/2005, dated 19 July 2005, in page 495, among others, "*... if Law* as such (*a quo*) *in its execution is interpreted other than the intention as contained in the consideration of the Court as above mentioned, then the possibility is not closed that against the Law* as such (*a quo*) *be submitted again a review* (*conditionally constitutional*)*";*

   The Court gives a new interpretation against "the right to control of the state" by placing the first rank on the management of natural resources by the state on its own, in this matter oil and gas, in order to gain more revenues, which would increase the APBN and would further increase efforts towards the optimal welfare of the people (*vide* its Decision Number 36/PUU-X/2012, dated 13 November 2012);

2. The Law as such (*a quo*) contains a content of domination and monopoly of water resources contrary to the principle of being controlled by the state and be utilized for the optimal welfare of the people. [*vide* Article 6 section (2) and section (3), Article 9, Article 26 section (7), Article 80, Article 45, as well as Article 46 of the Law on Water Resources];

3. The Law as such (*a quo*) contains a content positioning the utilization of water leaning for the commercial interest (*vide* Article 6, Article 7, Article 8, Article 9, and Article 10 of the Law on Water Resources);
4. The Law as such (*a quo*) contains a content that triggers horizontal conflicts [*vide* Article 29 section (2), Article 48 section (1), as well as Article 49 section (1) and section (7) of the Law on Water Resources];
5. The Law as such (*a quo*) eliminates the responsibility of the state in the fulfillment of the water need [*vide* Article 9 section (1), Article 40 section (4) and section (*7), Article* 45 section (3) and section (4), Article 46 section (2), as well as Article 29 section (4) and section (5) of the Law on Water Resources];

6. Law as such (*a quo*) is a discriminative Law (*vide* Article 91 and Article 92);
To prove their postulate the Petitioners submitted written instruments of evidence marked as Evidence P-1 up to Evidence P-15 as well as proposed 7 (seven) experts namely Suteki, Absori, Erwin Ramedhan, Aidul Fitriciada Azhary, Hamid Chalid, Irman Putra Sidin, and Salamuddin (Daeng), whose testimonies are contained in in the part State of the Case;
[3.12] Considering whereas the President rendered his testimony basically stating that the Law on Water Resources does not recognize privatization/privatization, commercialization, as well as monopoly in water resources management, but the water resources management aims at the optimal welfare of the people, so that the Law on Water Resources is already in line with the mandate of the Constitution of 1945. For that the President submitted written instruments of evidence marked as Government Evidence-1 up to Government Evidence-23 as well as proposed 5 (five) experts namely I Gede Pantja Astawa, Imam Anshori, Jangkung Handoyo Mulyo, Raymond Valiant Ruritan, Budiman Arif, and 4 (four) of the witness namely Teguh Suprapto, H. Agus Sunara, Sardi Ahmad Khani, Endah Angreni, whose testimonies are contained in the part State of the Case;
[3.13] Considering the DPR rendered its testimony which substantially stated that Article 6 section (2) and section (3) of the Law on Water Resources is an actualization of the domination of the state over land and waters and the natural wealth contained in it shall be utilized for the optimal welfare of the people. According to the People's Representative Council (*Dewan Perwakilan Rakyat*, DPR), Article 7, Article 8, Article 9, Article 10, Article 11, Article 40, and Article 49 of the Law on Water Resources has reflected the concept of domination of the state according to the mandate of Article 33 section (3) of the Constitution of 1945. Likewise, Article 90, Article 91, and Article 92 of the Law on Water Resources are not contrary to the Constitution of 1945, because the articles as referred to had been made to grant space for the public to file a claim if there occur harming matters related to water resources management;
[3.14] Considering the Related Party, namely the National Council of Water Resources Nasional, conveyed its testimony which substantially stated that the Law on Water Resources is already in line and does not deny the Constitution of 1945. Moreover, the National Council of Water Resources testified that the Government has stipulated several laws and regulations to execute the Law on Water Resources. Based on the aforesaid two matters, the National Council of Water Resources opined that the *conditionally constitutional* nature of the Law on Water Resources, as referred to in the Decision of the Constitutional Court Number 058-059-060-063/PUU-II/2004 and Number 008/PUU-III/2005, dated 19 July 2005, has been fulfilled by various regulations on the aforesaid so that the aforesaid nature be revoked and be stated not applicable;
[3.15] Considering whereas in order to consider the problems of the petition of the Petitioners, the Court needs to express the following matters:

History is the witness that as of a long past, prior to the public bound themselves as a nation and state, to date water is the human basic need graced by Allah *Subhanahuwata'ala* God The One Only, so that water became public right (*res commune*), namely a right which is jointly owned by the public. The independence fighters had as of the struggle for independence up to the struggle to defend and to fill-in the independence of Indonesia named the place where this nation lives and defends its livelihood by the term "land (and) water", rather than "the *fatherland*" (English) and not either "*das Vaterland*" (German) which mean "father's land."

The use of the term "land and water" indicates that in the perspective of the Indonesian nation land and water are two energy sources important in their livelihood which is inseparable one from the other. The citizens of the state of Indonesia recognize and understand that Wage Rudolf Supratman, the composer of the National Anthem "*Indonesia*

*Raya*" (Great Indonesia), which was commenced to be sung and played on the date of 28 October 1928 renowned as the Day of Youth Oath (*Hari Sumpah Pemuda*), wrote in the first line: *"Indonesia my land and water."*

The close link between land and water, between mainland and ocean is contained in Article 25A of the Constitution of 1945 which stated: "The Unitary State of the Republic of Indonesia is an archipelagic state having an Archipelagic (*Nusantara*) character with a territory, the borders and rights of which shall be stipulated by laws" which prior to the amendment to the aforesaid Constitution has been confirmed in Article 1 section (1) of the Law Number 4 Prp 1960 regarding Indonesian Waters which stated: "*The Indonesian waters are the Indonesian sea regions along with the Indonesian internal waters",* and the Law Number 17 of 1985 regarding the Adoption of the United Nations Convention On the Law Of the Sea (*Konvensi Perserikatan Bangsa-Bangsa mengenai Hukum Laut*). Therefore between the one islands (mainland) and the other islands (mainland) as well as its waters are one unity. This is what used to be mentioned as *nusantara* or *archipelagic state*. In other words, the whole mainland consisting of islands in Indonesia are united by water. One of the sources of the people's welfare stems from natural resources including therein its water resources. Water resources being a source of welfare possess a meaning which is closely related with the term "*ibu pertiwi*" (motherland) being an epithet of personification for the state of Indonesia being a mother who breastfeeds and have compassion on the people being her children.

The perception as described herein above is constitutionally defined in Article 33 section (3) of the Constitution of 1945, which stated: "The land and waters and the natural wealth contained in it shall be controlled by the state and utilized for the optimal welfare of the people." The aforesaid section is one of the 3 (three) sections of Article 33 of the Constitution of 1945 which have not been amended in the amended Constitution of 1945 during the year 1999 up to year 2002. According to the Court, the three sections as referred to is the form of the constitutionality of the embraced democratic economy, other than political democracy, which is linked with the organization of the state as referred to the fourth and the fifth principle of Pancasila. The fifth principle of the foundation of the state which is implemented into the provisions of the Constitution of 1945 contained in Article 33 section (3) of the Constitution of 1945 does not only points to the foundation of the state, but is also an objective of the state. In other words, the fifth principle, "social justice for all the people of Indonesia" as a foundation of the state is implemented in the Constitution of 1945 regarding the organization of the state in the field of economy is in the form of democratic economy with the aim of actualizing the optimal welfare of the people. That is indeed the meaning of the core of social justice, which is also interpreted as an equitable and prospering society.

In the aforesaid perspective, democratic economy is a democracy conceptualized based on the fact regarding the perspective of the Indonesian nation which is of collective, non-individualistic, and non-liberal nature, so that the national economy is arranged as a joint enterprise based on the principle of kinship (*kekeluargaan*) [*vide* Article 33 section (1) of the Constitution of 1945]. Therefore the organization of the state in the field of economy being efforts to achieve social justice being an objective of the state should be based on democratic economy positioning the people as individuals in the frame of the society. Related to the aforesaid matter it is indeed the state with the power granted to it is a facility for the people in the actualization of social justice;

[3.16] Considering whereas the law is one of the facilities which shall be utilized by the state to organize the function of achieving the objective. The norms of law recognize the existence of the hierarchy or the order of norms, whereby the Constitution of 1945 occupies the highest position in the aforesaid hierarchy. In the perspective of the arrangement of the norms of law, the Constitution of 1945 is a measurement of the validity and legitimacy for laws and regulations beneath it. The law as referred to, among others, should integrate and coordinate the interests of the public to prevent collisions among members of or among the communities of the society, or at least the aforesaid collisions could be minimalized. Moreover in the livelihood of the state, the law also regulates the relations between the state

and the public. For the aforesaid purpose the law organizes various interests by means of granting protection on the one hand and conducts limitation on the other hand. The law grants protection by providing power to certain legal subjects and lays obligation on other legal subjects.

The State with its power regulates all resources, including water resources by the instrument of right. Related to the aforesaid matter, the General Elucidation of the Law on Water Resources states that the regulation on the right of water is actualized through the stipulation of the utility right of water, namely the right to obtain and to use or to exploit water for various needs. The utility right of water pursuant to the aforesaid term is not a right to own water, but is only limited to a right to obtain and to use or to exploit a certain quota of water in accordance with the allocation stipulated by the Government to a utilizer of water, either to parties subject to obtaining a permit or those not subject to obtaining a permit.

The utility right of water for the fulfillment of the non-business daily basic needs, people's agriculture, and activities is termed the utility right to use water, while the utility right of water for the fulfillment of business needs, either water utilization for the production of raw material, the exploitation of its potentials, media business, as well as the water utilization for the production of support material is termed the utility right to exploit water. The volume of water allocation stipulated is not of absolute nature and shall be complied with as set out in the permit, but which can be reviewed if the requirement or situation being made the base for the granting of the permit and the condition of water availability in the respective natural water source become subject to significant change if compared to the current condition.

The utility right to use water to fulfill the daily basic needs for individuals and people's agriculture situated in an irrigation system is guaranteed by the Government or the regional governments. The utility right to use water to fulfill the aforesaid daily basic needs for individuals and people's agriculture includes also the right to flow water from or to the owned lands through the land of others bordering with the owned land. The Government or the regional governments guarantee water allocation to fulfill daily basic needs for individuals and people's agriculture by keeping to pay regard to the condition of water availability in respective river zones, as well as keeping to safeguard order and tranquility.

Whereas the increasing public need of water encourages the increase of water economy value compared with its social value and function. The aforesaid condition bears the potential to give rise to conflict of inter-sectoral, inter-regional and various parties' interests linked with water resources. On the other hand, the water resources management which relies more on the economic value tends to take side with capital owners as well as may ignore the social function of water of water resources. Based on the aforesaid consideration, the Law as such (*a quo*) should rather grant protection to the interest of the public groups of weak economy by implementing the principle of the water resources management capable to harmonize the social function of water, environment conservation, and economy of water;

[3.17] Considering whereas Article 60 of the Law on the Constitutional Court stated: "(1) A repeated review cannot be petitioned against the material substance of a section, article, and/or part of a law which have been reviewed. (2) The provision as referred to in section (1) can be exempted if the material substance in the Constitution of the State of the Republic of Indonesia of the Year 1945 being the basis for review is different. Considering the base of review of the constitutionality between the petition as such (*a quo*) and the base of review in the petition Number 058-059-060-063/PUU-II/2004 and Number 008/PUU-III/2005, is the same. However, in the Decision of the Constitutional Court Number 058-059-060-063/PUU-II/2004 and Number 008/PUU-III/2005 dated 19 July 2005, in page 495 which has also been made a postulate by the Petitioners in their petition, among others,

considered: "*... if the Law as such (a quo) in its execution is interpreted other from the intention as stated in the consideration of the Court as above mentioned, then against laws as such (a quo) the possibility is open for it to file a repeated review (conditionally constitutional).*"
According to the Court, as which will be considered herein below, there is a different interpretation in the execution of the Law on Water Resources with the consideration of the Court in its Decision Number 058-059-060-063/PUU-II/2004 and Number 008/PUU-III/2005 previously. Therefore the petition of the Petitioners as such (*a quo*) is acceptable;
[3.18] Considering, prior to considering that the Law on Water Resources in its execution has been interpreted differently from the aforesaid consideration of the Court in its Decision Number 058-059-060-063/PUU-II/2004 and Number 008/PUU-III/2005 as considered in paragraph [3.17] as above mentioned, the Court needs to affirm that in Indonesia the signification that the land and waters and the natural wealth contained in it shall be controlled by the state and utilized for the optimal welfare of the people mandated that in the perspective of the founders of the nation, particularly the drafters of the Constitution of 1945, water is one of the elements which is very important and fundamental in the life and livelihood of humans or controlling the livelihood of the people at large. As one of the elements important in human livelihood controlling the livelihood of the people at large, water should be controlled by the state [*vide* Article 33 section (2) and section (3) of the Constitution of 1945]. Based on the aforesaid consideration then in the exploitation of water there shall be a very strict limitation as an effort to safeguard the preservation and sustainability of water availability for the livelihood of the nation [*vide* Article 33 section (4) of the Constitution of 1945];
[3.19] Considering whereas the **first** limitation is that each exploitation of water shall not disturb, waive, let alone eliminate the right of the people of water because the land and waters and the natural wealth contained in it other than shall be controlled by the state, its allocation shall be also for the optimal welfare of the people;
[3.20] Considering the **second** limitation that the state shall fulfill the rights of the people over water. As considered as above mentioned, access to water is one of the basic rights in its own, Article 28I section (4) determined: "*The protection, advancement, enforcement, and fulfillment of basic human rights is the responsibility of the state, particularly the government.*"
[3.21] Considering whereas the **third** limitation, we shall bear in mind the preservation of the environment as being one of the human rights, Article 28H section (1) of the Constitution of 1945 determined: "*Each individual is entitled to live prosperous outwardly and inwardly, having a place to reside, and to obtain a good and healthy environment as well as is entitled to obtain health service.*"
[3.22] Considering whereas the **fourth** limitation is that being an important production branch and vital for the livelihood of the people at large, water shall be controlled by the state [*vide* Article 33 section (2) of the Constitution of 1945] and water which according to Article 33 section (3) of the Constitution of 1945 shall be controlled by the state and be utilized for the optimal welfare of the people, then the supervision and the control by the state over water is of absolute nature;
[3.23] Considering whereas the **fifth** limitation is a furtherance of the right to control by the state and because water tremendously control the vital livelihood of the people at large, then the State Owned Enterprises or Regionally Owned Enterprises has the main priority to be granted with the exploitation of water;
[3.24] Considering whereas if following all the aforesaid restrictions herein above has been fulfilled and apparently there is still water availability, it will still be possible for the Government to grant permit to the private sector to conduct the exploitation of water subject to certain and strict requirements;

**[3.25]** Considering whereas the consideration as described in paragraph **[3.19]** up to [3.24] herein above is a reconfirmation of fundamental matters which are the bases of the Court to consider the requirement of the aforesaid constitutionality of the execution of the Law on Water Resources in its Decision Number 058-059-060-063/PUU-II/2004 and Number 008/PUU-III/2005, the Court has clearly and firmly put the starting point of its consideration in Article 33 section (3) of the Constitution of 1945 which stated: "*The land and water and natural wealth contained therein shall be controlled by the state and be utilized for the optimal welfare of the people.*" The study of the Court against the mandate contained in Article 33 section (3) of the Constitution of 1945, particularly regarding water resources, has led the Court to the conclusion that access to water is a part of human rights. That has been strengthened by the perspective of the international public as reflected in the adoption by the Committee of the United Nations for Economic, Social and Cultural Rights of the General Comment regarding the right of health as set out in Article 12 (1) of the ICESCR, which was quoted in the aforesaid decision of the Court, which stated: *"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."*

In the legal consideration of the decision as referred to, the Court further stated, among others: *"The aforesaid* General Comment *interpreted the right of health being inclusive rights comprising not only sustainable and decent health service but also comprises factors which determine good health, including one thereof is access to safe potable water. In 2002 the Committee further acknowledged that access to water is a distinct basic rights.*" Therefore, the Court subsequently affirmed that being a part of the basic rights, the state is obliged to respect, to protect, and to fulfill them. At the same time the Court also emphasizes that the three aspects of the aforesaid basics right of water, namely the respect, the protection, and the fulfilment thereto, does not only relate to the current needs but shall also be guaranteed of its sustainability for the future because it deals with the existence of humans [*vide* page 486-489].

**[3.26]** Considering, in its aforesaid Decision Number 058-059-060-063/PUU-II/2004 and Number 008/PUU-III/2005 the Court stated also that, besides being a part of the basic rights, the energy source existing in water is also needed by humans for the fulfillment of other needs, like for agricultural irrigation, electric power generators, and for the need of industry, having an important contribution for the advancement of human livelihood and is also an important factor for humans to live decently [*vide* page 490].

**[3.27]** Considering whereas based on the consideration that perceives the existence of water from the two aspects as mentioned in paragraph **[3.25] and [3.26]** herein above, the Court in its aforesaid Decision Number 058-059-060-063/PUU-II/2004 and Number 008/PUU-III/2005 subsequently determined the requirement the constitutionality of the Law on Water Resources. To make it short, the aforesaid opinion of the Court regarding the requirement of the constitutionality of the Law on Water Resources is that the Law on Water Resources in its execution shall guarantee the actualization of the mandate of the constitution regarding the control right of the state over water. The right to domination by the state over water is there if the state, which by the Constitution of 1945 is granted the mandate to make policy (*beleid*), still holds the control in executing the act of arrangement of (*bestuursdaad*), the act of regulating (*regelendaad*), the act of management (*beheersdaad*), and the act of supervision (*toezichthoudensdaad*).

In the Decision of the Court Number 001-021-022/PUU-I/2003, dated 15 December 2004, the Court subsequently explained as to how the function of arrangement

(*bestuursdaad*), the regulation (*regelendaad*), the management (*beheersdaad*), and the supervision (*toezichthoudensdaad*) are executed. The Court stated among others:

> *The function of arrangement (bestuursdaad) by the state is conducted by the Government by its authorities to issue and to revoke the facilities of permits (vergunning), licenses (licentie), and concessions (concessie). The function of regulation by the state (regelendaad) is conducted through legislative authorities by the DPR jointly with the Government, and of regulation by the Government (executive). The function of management (beheersdaad) is conducted through the mechanism of shareholding and/or through the direct involvement in the management of State Owned Enterprises or State Owned Legal Entities being an institutional instrument through which the state c.q. the Government empowers its domination over wealth sources to be utilized for the optimal welfare of the people. Such is also the function of supervision by the state (toezichthoudensdaad) conducted by the state c.q. the Government in the frame of supervising and controlling in order for the execution of domination by the state over important production branches and/or vital for the livelihood of the people at large as referred to is truly conducted for the optimal welfare of the whole people;* [*vide* page 334]

The guaranty that the state will keep holding the right of domination over water is a requirement which cannot be eliminated in the judgment of the constitutionality of the Law on Water Resources, as only by such means the following matters, as emphasized in the aforesaid Decision of the Court Number 058-059-060-063/PUU-II/2004 and Number 008/PUU-III/2005, can be actualized namely:

1. The utilizers of water resources to fulfill their daily basic needs and for people's agriculture shall not be charged for water resource management service cost, to the extent it is for the fulfillment of daily basic needs and for people's agriculture herein above is obtained directly from the water source. Nevertheless, bearing in mind that the need of water to fulfill the daily public basic needs does no longer suffice if obtained directly from water source operated by the public, then the state is obliged to guarantee the right of each individual to obtain water for the fulfillment of his/her basic needs, including those relying for such need on the distribution channel. In that regard, the Central Government and the Regional Governments have the responsibility to develop potable water provision system and which shall be the priority program of the Central Government and the Regional Governments.
2. The concept of right in the Utility Right of Water shall be differentiated from the concept of rights in the general term. The concept of right in the Utility Right of Water should be in line with the concept of *res commune* which shall not be the object of economic price. The Utility Right of Water has two characters:
   - Firstly, rights *in persona* being a reflection of the basic rights and therefore clings to the human subject which is of inseparable nature. The actualization of this first nature of this Utility Right of Water is in the Utility Right to Use Water.
   - Secondly, rights which merely stem from permits granted by the Government or a Regional Government. The actualization of this second nature of Utility Right of Water is in the Utility Right to Exploit Water.
3. The concept of the Utility Right to Use Water in the Law on Water Resources shall be interpreted as being a derivative from the right to live which is guaranteed by the Constitution of 1945. Therefore, the exploitation of water outside of the Utility Right to Use Water, in this matter the Utility Right to Exploit Water, should be through an application for a permit to the Government, the issuance of which shall be based on the pattern which is arranged by involving the participation of the public as extensive as possible. Therefore, the Utility Right to Exploit Water shall not be intended as the granting of right to dominate water sources, river, lakes, or swamps. The Utility Right to Exploit Water is an instrument in the system of permits utilized by the Government

to restrict the volume of water which can be obtained or operated by those entitled so that in this context, the permit shall be made an instrument of control, rather than an instrument to dominate. Therefore, the private sector shall not conduct control of water sources or water resources but can only conduct the exploitation only in a certain volume or a certain location in accordance with the allocation as strictly determined in the permit granted by the state.

4. The principle of "the beneficiary of the water resources management service shall bear the management cost" shall be understood as the principle which does not place water as an object to be charged with an economic price. Therefore, there is no price of water as a component of the volume that shall be paid by the beneficiary. Besides, this principle shall be executed flexibly by not applying an equal calculation without considering the kinds of exploitation of water resources. Therefore, the farmers being water users, the utilizers of water for the need people's agriculture are exempted from the obligation to fund the management of water resources service.
5. The *ulayat* right of the *adat* law communities which are still alive of water resources is recognized in accordance with Article 18B section (2) of the Constitution of 1945. The provision regarding the confirmation of the unity of *adat* law communities which ae still alive through a Regional Regulation shall not be understood as constitutive in nature but is of declarative nature.
6. As a matter of principle the exploitation of water for other countries is not permitted. The Government can only grant permit for the exploitation of water for other countries if water provision for own various needs have been fulfilled. The needs as referred to, are among others, basic needs, environment sanitation, agriculture, energy, industry, mining, transportation, forestry and bio-diversity, sports, recreation and tourism, ecosystem, esthetics as well as other needs.

[3.28] Considering whereas based on the whole consideration as described herein above it is obvious that the right to dominate by the state over water is the "soul" or the "heart" of the Law as such (*a quo*) *as* mandated by the Constitution of 1945. Therefore, the other matter that shall be further considered by Court is as to whether the implementing regulation of the Law on Water Resources has been arranged and defined in accordance with the interpretation of the Court so that it guarantees the right to dominate of the state over water will truly be actualized in reality? The only one means available for the Court to answer this question is by examining meticulously the implementing regulation of the Law of Water Resources, in this matter the Government Regulation. By taking this step it does not mean that the Court conducts a review against laws and regulations beneath a Law against the Laws, but it is merely because the constitutionality requirement of the Law being reviewed (*c.q. the Law on Water Resources*) is made dependent on the compliance with the implementing regulation of the respective Law in implementing the interpretation of the Court. That said, being implementing regulation of Law, a Government Regulation is an evidence for explaining the real intention of the Law being reviewed of its constitutionality before the Court, so that if the aforesaid intention appears to be contrary to the interpretation granted by the Court, such indicates that the respective Law is indeed contrary to the Constitution.

[3.29] Considering in relation to the consideration as described in paragraph **[3.28]** as above mentioned, it appears that up to the completion of the examination hearing against the petition as such (*a quo*), the President has stipulated a number of Government Regulations (hereinafter referred to as PP) being the execution of the Law on Water Resources, which is relevant for the petition as such (*a quo*), namely:

1) The PP Number 16 of 2005 regarding the Development of Potable Water Provision System being the execution of Article 40 of the Law on Water Resources;
2) The PP Number 20 of 2006 regarding Irrigation being the execution of Article 41 of the Law on Water Resources;

3) The PP of Number 42 of 2008 regarding the Management of Water Resources being the execution of Article 11 section (5), Article 12 section (3), Article 13 section (5), Article 21 section (5), Article 22 section (3), Article 25 section (3), Article 27 section (4), Article 28 section (3), Article 31, Article 32 section (7), Article 39 section (3), Article 42 section (2), Article 43 section (2), Article 53 section (4), Article 54 section (3), Article 57 section (3), Article 60 section (2), Article 60 section (2), Article 61 section (5), Article 62 section (7), Article 63 section (5), Article 64 section (8), Article 69, Article 81, and Article 84 section (2) of the Law on Water Resources;
4) The PP Number 43 of 2008 regarding Ground Water being the execution of Article 10, Article 12 section (3), Article 13 section (5), Article 37 section (3), Article 57 section (3), Article 58 section (2), Article 60, Article 69, and Article 76 of the Law on Water Resources;
5) The PP Number 38 of 2011 regarding Rivers being an implementation of Article 25 section (3), Article 36 section (2), and Article 58 section (2) of the Law on Water Resources;
6) The PP of Number 73 of 2013 regarding Swamps being the execution of Article 25 section (3), Article 36 section (2), and Article 58 section (2) of the Law on Water Resources;

[3.30] Considering whereas despite the Government has stipulated six Government Regulations to execute the Law on Water Resources as such (*a quo*), yet according to the Court the aforesaid six Government Regulations do not fulfill the six basic principles of limitation of the water resources management yet as considered in paragraph **[3.19]** up to paragraph **[3.24]**. Nevertheless, on the date of 12 September 2014, the Government has stipulated the PP Number 69 of 2014 regarding the Utility Right of Water being the execution of Article 10 of the Law on Water Resources, long after the Court has ended the trial in the case as such (*a quo*) on the date of 18 March 2014 so that it has not been considered in this decision.

[3.31] Considering whereas because the petition of the Petitioners was linked with the heart of the Law on Water Resources the petition of the Petitioners is reasoned according to law for the whole of it.

[3.32] Considering whereas because the Law on Water Resources is stated contrary to the Constitution of 1945 and to prevent the occurrence of a vacuum in the regulation regarding water resources, then while awaiting the making of a new Law which pay regard to the decision of the Court by the lawmakers, the Law Number 11 of 1974 regarding Irrigation is reenacted.

## 4. CONCLUSION

Based on judgment of the facts and laws as described as above mentioned, the Court concluded:

[4.1] The Court has the authority to adjudicate the petition as such (*a quo*);

[4.2] The Petitioner III does not possess legal standing to submit the petition as such (*a quo*);

[4.3] The Petitioner I, the Petitioner II, the Petitioner IV, the Petitioner V, the Petitioner VI, the Petitioner VII, the Petitioner VIII, the Petitioner IX, the Petitioner X, and the Petitioner XI, possess legal standing to submit the petition as such (*a quo*);

[4.4] Petition of the Petitioners is reasoned according to law.

Based on the Constitution of the State of the Republic of Indonesia of 1945, the Law Number 24 of 2003 regarding the Constitutional Court as amended by the Law Number 8 of 2011 regarding the Amendment to the Law Number 24 of 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia of 2011 Number 70, Supplement to the State Gazette of the Republic of Indonesia Number 5226), and the Law

Number 48 of 2009 regarding the Judicial Power (State Gazette of the Republic of Indonesia of 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076);

5. VERDICT

**Adjudicating,**

**Declaring**:

1. The Petition of the Petitioner III not acceptable;
2. Granting the petition of the Petitioner I, the Petitioner II, the Petitioner IV, the Petitioner V, the Petitioner VI, the Petitioner VII, the Petitioner VIII, the Petitioner IX, the Petitioner X, and the Petitioner XI for the whole of it;
3. The Law Number 7 of 2004 regarding Water Resources (State Gazette of the Republic of Indonesia of 2004 Number 32, Supplement to the State Gazette of the Republic of Indonesia Number 4377) contrary to the Constitution of the State of the Republic of Indonesia of 1945;
4. The Law Number 7 of 2004 regarding Water Resources (State Gazette of the Republic of Indonesia of 2004 Number 32, Supplement to the State Gazette of the Republic of Indonesia Number 4377) does not possess legal binding force;
5. The Law Number 11 of 1974 regarding Irrigation (State Gazette of the Republic of Indonesia of 1974 Number 65, Supplement to the State Gazette of the Republic of Indonesia Number 3046) is reenacted;
6. To order the entering of this decision by placing it in the Official Gazette of the State of the Republic of Indonesia as it should be.

Thus has been decided in the Justices Consultative Session by nine Constitutional Justices namely Hamdan Zoelva, as Chair concurrently as Member, Arief Hidayat, Muhammad Alim, Anwar Usman, Maria Farida Indrati, Ahmad Fadlil Sumadi, Aswanto, Wahiduddin Adams, and Patrialis Akbar, respectively as Members, on the day of Wednesday**, dated the seventeenth, of the month of September, of the year two thousand fourteen**, pronounced in the Plenary Session of the Constitutional Court which is open to the public on the day of Wednesday**, dated the eighteenth, of the month of February, of the year two thousand fifteen**, completely pronounced at **15.02** hours **West Indonesian Time**, by seven Constitutional Justices, namely Arief Hidayat, as Chair concurrently as Member, Anwar Usman, Muhammad Alim, Maria Farida Indrati, Aswanto, Wahiduddin Adams, and Suhartoyo, respectively as Member, accompanied by Mardian Wibowo being Substitute Registrar, as well as attended by the Petitioners/their proxies, the President or as represented, and the People’s Representative Council or as represented.

**CHAIR,**

**signed**
**Arief Hidayat**
**MEMBERS,**

**signed**
**Anwar Usman**

**signed**
**Muhammad Alim**

| signed<br>**Maria Farida Indrati** | signed<br>**Aswanto** |
| --- | --- |
| **signed**<br>**Wahiduddin Adams** | **signed**<br>**Suhartoyo** |

**SUBSTITUTE REGISTRAR,**
**signed**
**Mardian Wibowo**