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Constitutional Court Decision: Elimination Of Threat Of Prosecution For Companies Extending Waste Management Permits

1. Introduction

On 21 January 2015, the Constitutional Court issued Decision No. 18/PUU-XII/2014 on the judicial review of Article 59 paragraph (4) and Article 95 paragraph (1) of Law No. 32 of 2009 on the Protection and Management of the Environment (“**Law No. 32/2009**”) in respect of its compliance with the 1945 Constitution (“**1945 Constitution**”). The party who submitted the Petition was Bachtiar Abdul Fatah, a former General Manager of PT Chevron Pacific Indonesia (“**Petitioner**”). He was prosecuted for corruption and was convicted by the Anticorruption Court on account of breaches of Law No.32/2009. One of the reasons was that a bioremediation project for land contaminated by hazardous and poisonous waste (“**B3-classified waste**”) produced by PT Chevron Pacific Indonesia was conducted without a permit, even though at the time the company had submitted an application for a renewal of their previous permit and was awaiting its issuance by the relevant authority.

The statutory provisions that were reviewed by the Constitutional Court in the case were as follows:

Article 59 paragraph (4) of Law No. 32/2009

“The management of B3-classified wastes must obtain a permit from the minister, governor or regent/mayor in accordance with their respective authority”

Article 95 paragraph (1) Law No. 32/2009

“In the framework of law enforcement against the perpetrators of environmental crimes, integrated law enforcement may be performed by civil service investigators, police and prosecutors under the coordination of the Minister.”

2. Petitioner’s Arguments

The Petition for the Judicial Review of Article 59 paragraph (4) and Article 95 paragraph (1) of Law No. 32/2009 was based upon the following reasons:

- Article 59 paragraph (4) of Law No. 32/2009 obliges parties who manage B3-classified waste to obtain a permit from the relevant authority and is subject to criminal sanctions if they manage the waste without the required permit. However, on the other hand, based on Article 59 paragraph (1) of Law No. 32/2009, there is a provision which states that parties who produce B3-classified waste are under an obligation to manage that waste, and Article 102 of Law No. 32/2009 stipulates that if such waste management is not conducted, there is a threat of criminal sanctions.
- The problem is that the aforementioned provisions could create a legal issue for a party that is applying for a renewal of an existing permit. As the relevant institution has yet to issue the permit, that party could be criminally prosecuted on the grounds of managing waste without the proper permit as provided for under Law No. 32/2009
- The legal dilemma described above is exactly what happened in the case of the Petitioner. The Petitioner was prosecuted because he was deemed to have conducted waste management operations on B3-classified waste without a permit, even though the company where he was working at had

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already applied for the renewal of its previous permit in accordance with the prevailing law, but the permit had yet to be issued by the relevant authority. Because of that, the Petitioner then submitted its Petition for judicial review to the Constitutional Court on the grounds that Article 59 paragraph (4) and Article 95 paragraph (1) conflicted with Article 28D paragraph (1) and Article 28H paragraph (1) of the 1945 Constitution as it resulted in the denial of legal protection and certainty for the Petitioner.

3. Constitutional Court's Decision

After examining the case, the Constitutional Court issued its decision on 21 January 2015, which may be summarized as follows:

- Article 59 paragraph (4) of Law No. 32/2009 is in conflict with the 1945 Constitution if it is not interpreted as reading *"the management of B3-classified waste must obtain a permit from the minister, governor or regent/mayor in accordance with their respective authority, and those who are managing B3-classified waste and whose application for a permit renewal is still in process must be deemed to already have the permit"*.
- The word *"may"* in Article 95 paragraph (1) of Law No. 32/2009 is in conflict with the 1945 Constitution and thus no longer has any binding legal force.

4. Constitutional Court's Reasoning

The decision of the Constitutional Court was based on the following reasons:

- B3-classified waste is dangerous waste, which if improperly released into the environment could cause disastrous effects on the environment, health and the human life. Because of that, the control of such activities must be carried out by preemptive, preventive and repressive means. Therefore, the provisions which state that industries that produce B3-classified waste must manage such waste and must also obtain permits from the relevant authorities are correct and constitutional.
- In the case of those legal subjects that produce B3-classified waste and which have not yet obtained a permit but have applied for a permit and the process of the issuance of such permit is still underway, then legally that person is not yet considered to have obtained the permit. Which is why legal subjects that have not yet obtained a permit are prohibited from conducting management of B3-classified waste. However, for those legal subjects that had previously held a permit but whose permit has expired, then at the time when the party applies for a renewal of such permit in accordance with the applicable laws and the process of the issuance of the permit is still in progress, then formally that party has not yet obtained the permit. However notwithstanding this fact, materially that party should be considered as already having the permit. Especially when the delay in the issuance of the permit is not based on the fault or negligence of the party applying for the permit. Thus, it would be unjust for such legal subject to be treated the same as a legal subject that never held a permit.
- The spirit which is contained in Law No. 32/2009 is the spirit of cooperation between all law enforcement institutions in order to uphold environmental law. That is why the existence of the word *"may"* in Article 95 paragraph (1) of Law No.32/2009 should be erased as the existence of such word results in the coordination between legal enforcers not being compulsory, but rather merely an option. As a result, the upholding of environmental law can be conducted on an individual basis by each institution, which would not be in line with the spirit of *"integrated law enforcement,"* as mandated by Law No.32/2009.

5. Implications of the Decision

The Constitutional Court's decision in this case is of paramount importance to the enforcement of environmental law, where parties that are processing the renewal of their permits for the management of B3-classified waste in accordance with the law must be deemed as already having a permit. This means that they cannot be prosecuted (including on the ground of corruption by conducting waste management without a permit). We would like to see this decision serve as an important precedent so that the law enforcement

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authorities apply the reasoning and principles contained in the Decision to other sectors. In furtherance of the Decision and for the sake of legal certainty, parties that are in good faith renewing their permits before their expiration date, but the relevant permits have yet to be issued, should no longer be prosecuted on the ground of conducting activities without a permit.

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