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Regulating Equitable Water Resources Governance in Indonesia

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ABSTRACT

This research starts from the case where Law Number 17 of 2019 is seen to support privatisation (commercialisation) and the control over rights to water that can trigger injustice. This surely contravenes Article 33 of the 1945 Indonesian Constitution. Indication concerning water commercialisation is clearly stated on Article 46 of Law Number 17 of 2019 stating that private companies can play a role in running the drinking water system. The state guarantees the rights of every individual to water to fulfill their daily primary need as regulated in Article 33 Paragraph (2) and (3) of the 1945 Indonesian Constitution. In reference to that issue, what is implemented is that the state guarantees the availability and management of water resources for the citizens of Indonesia, which is aimed for more optimal water resources management to achieve social justice. This is a legal research employing statute and historical approaches. In terms of regulating water resources governance following the reform to date, there has not been an indicator showing the practice of good environmental governance, and this has raised an impact causing a gap in water services for members of public. There seems to be a connection between centralistic legal politics and what influences political patterns that are pro-investment, leading to a counter-productive issue to the effectuation of justice and the principle of good governance.

Key Words: Regulation, water resources management, justice.

1. Introduction

Water is the main resource for all forms of life especially humans. Demand for water follows the development and the growth of population, where competition for water will also rise. Water as a vital part is essential for the life of all living things. Its abundant availability on earth is unique, marking the difference as 'blue planet' from other planets in the universe.

Vandana Shiva (2016) defines that basic philosophical changes on water has led to serious social and environmental issues. The change in perception towards water surely involves competition in obtaining water resources, by which conflicts in society, business, and the state are raised. Shiva believes that humans have their rights to water since these rights and fulfilment of the need for water

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are the routine the human body must biologically gains, but this fulfilment takes social and cultural expression into account in the society. The history of growing civilisation has involved water as a primary element. Water brings life to living forms.

Issues concerning regulation of water resources management represent the condition of the enforceability of law in the community or in the state. Phillipe Nonet and Selznick (Nonet & Selznick, 1978) argue that systematic correlation in configured law which is broken down into three enforceability in the society and the state such as repressive law, autonomous law as a system as to neutralise repressive conducts in the power of integrity; this is the law functioning to respond all social issues and aspiration of the members of public. Tailored attention to law-related variables such as law enforcement, correlation between law and state politics, moral system, discretion, role and objective of legal decisions, participation, legitimation, and compliance with law is given. Phillipe Nonet and Selznick through responsive law places response as social provision and public aspiration. This type of law brings accommodation to accept social changes to the fore to achieve justice and public emancipation.

In terms of potential of responsiveness in every advanced compliance with law, fulfilling the responsiveness relies on relevant political context. Responsive law puts those with political capacity in sight to help resolve existing issues and to set priority and make commitments as needed. The achievement depends on willingness and political commodity resources. The unique contribution is facilitating public objectives and embedding vigour of self-correction into government process. Understanding law as a set of rules that regulates people is followed by system of assertive and clear sanction imposition to provide justice. The justice is more referred to as vindictive justice, not absolute one, where punishment is imposed according to legal procedure and clear and principal reasons, not interfered with friendliness, compromising factors, or others that may spoil the principles of justice. Systematic correlation in the law configured in a complex way by Phillipe Nonet and Phillip Selznick is broken down into three conditions regarding the enforceability of law in the society and the state: (1) repressive law is used as powerful legal instrument that is autonomous, the law utilised as a system that neutralises repressive condition of those holding power for the integrity of the law per se. Responsive law is aimed to respond to varied social issues and aspiration of the members of public. This law has several modes aimed to promote the status quo regime of those with power, with the expectation that it could guarantee the stability of social, political, and cultural aspects, and justice and order. The norm of repressive law is rigid but it is flexible for authorised parties. The enforceability of law is under supremacy of politic power, where compliance with current law is absolute. Democracy does not have room to survive between authorised parties and members of public. (Nonet & Selznick, 1978) In regards to the context of water resources management, centralised legal indicator existed during New Order through Law Number 11 of 1974. Responsive law is a correction of autonomous law. This law based on our understanding about social changes is supported by efforts to seek for ways of adaptation that bear new historical alternatives that are able to survive (Tomlins, 2007). This can be seen from an example of change from status to contract, from Gemeinschaft (community-based people) and Gesellschaft (community of patembayan), from severe law to justice.

Water resources management during post-reform to date has not been in line with the indicator of responsive law. As a result, the impact raised still triggers gap in water services for the members of public. This is related to centralistic legal politics and this also affects political pattern that tends to support investment. Since this is the case, from legal perspective, this is considered contra-productive to justice and enforceability of the principles of good governance.

2. Research methods

This paper is based on legal research, which is aimed to study legislation in a coherent legal system and queries the implementation of the regulation and standard in positive law. This concept sees law as something identical to written norm, made and stipulated by an authorised governmental body. This concept also sees law as a normative framework that is free, closed, and autonomous from the life of public members. The approaches used in legal writing involve: a. statute approach; b. historical approach; c. conceptual approach.

3. Results and discussion

3.1. History of legislation concerning water resources management in Indonesia

Law concerning Water and Water Resources in Indonesia has been in progress through the 1871 before independence or during the era of Dutch East Indies, up to the independence, the period of 1970 to 1990, 2000 to 2014, 2015 to 2017 to 2019. There are four legislative products stipulated, where each reflects political interests in each of its era. In politics, it is seen as an aggregate and it is complex among people in a society or a state attempting to gain power. Good water governance is a political dimension in water resources governance. Therefore, when water crisis takes place, it is often called as crisis of governance. Water issues are not only restricted to management, operational strategy, and maintenance, but it is also relevant to social-political structure.

In the 19th century, large-scale irrigation was built in Java Island. In reference to the report by Van der Meulen, large scale Dutch irrigation was built at Brantas Watershed sitting on Delta Sidoarjo with an area of 34,000 hectares, while in 1880, the development of irrigation and drainage that involved technology took place in Demak on 33,800 hectares of land. This development was initiated with famine that hit Demak, where the issue extended from drought and flood. Irrigation supports export commodity, and the development of hydraulic technology requires testing in large-scale irrigation. From the report by Van der Gessen, as a result of harvest failure back in 1848 – 1849, death toll was 200,000 people in Demak, Dutch colonials started to build dam of Glapan in Tuntang river and east and west canal equipped with sluice. Despite this development, hunger still hit back. Famine made its comeback in 1872, and this situation stimulated a new project taking place in Demak and it took 12 years to complete.

Colonial government tested agricultural bodies at the level of tertiary irrigation. Van der Giessen opines that farmers were grouped based on irrigation unit of Pemali Comal. Water distribution at tertiary level was performed by ulu-ulu of community. A new idea for planting group and water distribution group in a tertiary unit emerged. (Gessen, 1946) This distribution was initiated since it was seen to be able to represent the interest of the farmers instead of those of village that only represent the interest of village government.

It can be concluded that Algemeen Water Reglement (AWR) 1936 AWR managed to embody the development of water resources especially the irrigation in the era of independence. In the first generation, irrigation development was initially stimulated by the development of infrastructure and hydraulic technology, followed by the institutional testing of the management for years. This was linked to political interest of colonial government, and brought to the formation of the legislation called AWR back in 1936. In a nutshell, irrigation management back in colonial era employed centralistic approach.

Politics of welfare in the first generation of independence still goes on. The use of the term irrigation in the related Law refers more to utilising water. Irrigation is not only defined as distributing water. Law Number 11 of 1974 concerning irrigation is an amendment to Aglemen Water Reglement 1936, where it does not put appropriate perspective in supporting the development, including the implementation of irrigation that takes into account irrigation, river management, flood control, swamp reclamation and tides. The plan for welfare is currently more focused on dam of Jatiluhur in West Java. (Blommestein, 1949) Within the period of Old Order, irrigation run by the government and multi-functioning irrigation were extended. The existence of irrigation system still went on. During the time of the cabinet of 100 ministries, there were two portfolios that organised the irrigation: Minister of Community Irrigation, responsible for the management of irrigation run by the community. In other words, it can be said that government-based pilot development of irrigation by the community to the mid of 19th century, the period that followed up to the beginning of New Order, is the new phase of co-existence between government-based and community-based water irrigation. During the era of New order, co-optation practice between government-based and community-based irrigation management took place.

Arrangement of Law concerning Water Resources was initiated by the government during post-reformation, and this is one of Structural Adjustment Loan agendas that was required for loan although it was not initiated by World Bank. When Indonesia performed deregulation due to oil crisis back in 1986, World Bank offered irrigation sector loan that principally changed investment approach that was more addressed to structural element to a managerial approach called efficient operation and

maintenance and also levy charged for irrigation management. The policy coming from irrigation sector was not effectively maintained as mentioned by the Minister of National Development Planning to the President of World Bank on a letter in April 1999, where the letter was written to get approval from Water Resources Sector Adjustment Loan (WATSAL) that stated that operation and maintenance were not efficient and the irrigation was too costly and failed to last long. (Pasandaran, 2006)

Formulation of Law concerning Water Resources contains interest regarding the scope of politics such as: (a). Interest to provide essential role for farmers in line with Government Regulation Number 77 of 2001 to further reflect it in Law concerning Water Resources; (b), interest to position the role of the government as the element in charge of water resources governance for domestic necessity and irrigation; (c) interest to assure the role of private sectors dominant in water resources management; (d) interest to refuse the function and role of private sectors that are dominant in water resources management, (e), the need to position the government as a regulator and facilitator. However, the need to refuse is not accommodated in the implementation of Law Number 7 of 2004.

On 15 October 2019, the Law Number 17 of 2019 concerning Water Resources was passed, not effectuating Law Number 11 of 1974 concerning Irrigation (State Gazette Year 1974 Number 65, Addendum of State Gazette Number 3046). The regulation concerning water resources is still in debate over the statement that water is under the control of the state through the government with private sectors delegated with the rights to manage the water. This condition has raised a legal issue that involves conflict of norm either between Law Number 17 of 2019 Article 46 Paragraph (1)[2] and Article 33 Paragraph (2).

Substantively, Law Number 17 of 2019 contains the provision that allows room for new investment and a chance for ongoing investment in water resources that has eliminated the rights of the community members to water. Principally, this law has meaning and objectives similar to those of law Number 7 of 2004 concerning Water Resources revoked by Constitutional Court in 2015.

3.2. Water for human life

Inevitable need for water has caused the rights to water, either at national or global level, to be recognised as human rights to water. (Salman, 2012)

With the above understanding, water should be accessible for everyone since it is the most fundamental part of human rights without which humans will never be able to live. (Chalid, 2009) However, ideal concepts and principles of water resources will certainly face interruption in their progress. Siahaan (Siahaan, 2004) argues good principles required to cultivate environment with sustainable resources are known as the principles of good environmental governance, while World Bank in Belbase argues (Belbase, 2010)

"...it is necessary to achieve the sustainable use of resources and the protection of environmental quality. This objective requires a transparent system of well-functioning environmental institutions, policies, and programs that actively involve the public in their formulation and implementation."

Clean water and sanitation are basically of economic activities that require capital, workforce, and water resources (water). On the other hand, recognition of access to clean water as part of human rights indicates that the development of clean water services is also controlled by political objectives to achieve social and economic development. Political mechanism and process have become inextricable part in the provision of clean water services. Delay in having awareness of the essence of development in clean water and sanitation sector is linked to the delay of recognising the principles of development in clean water and sanitation sector per se. This can be seen from low budgeting for clean water and

[2] Article 46 (4) concerning Utilisation of Water Resources for business purposes is performed based on the following principles:
a. not interrupting, not overriding, and not eliminating the rights of the people to water;
b. protection from the state to the people's rights to water;
c. environmental sustainability as part of human rights.
d. absolute supervision and control by the state over water.
e. main priority concerning water resources utilization for business purposes given to privates sectors is to be given under certain and strict conditions after the principles in point a to point e are fulfilled and as long as water availability is sufficient.
f. Water resources utilization for business purposes is aimed to improve the use of water resources for the prosperity of the people.
g. Water resources utilization for business purposes as intended in paragraph (2) is performed by prioritizing public interest.

sanitation, poor quality of clean water service provision and poor environmental management in Indonesia eventually leading to limited availability of water.

3.3. Basic philosophy of authority to manage water given to private sectors

It seems to contravene Article 33 paragraph (3) implying that lands, waters, and natural riches therein are to be controlled by the state to be exploited to the greatest benefit of the people when private sectors are given an authority to manage water. Law Number 7 of 2004 revoked by Constitutional Court, followed by the passed law Number 19 of 2019 seems to highlight water privatisation. Water privatisation is understood as water resources management dominated by private sectors. The privatisation is rising in line with increasing demand. People's tendency to keep consuming bottled water encourages private companies to exist as growing water providers. The involvement of private sectors in managing water should be addressed to improving the quality of clean water provision for people, but they turn out to be profit oriented. This practice of commercialising water seems to have interrupted people's access to clean water.

The revoked Law Number 7 of 2004 regulated the rights to distribute water when people's daily need for water is met. Moreover, private sectors are also required to get involved in the conservation of water resources. However, in the implementation, private water companies still violate the provision and harm local people.

3.4. Criticism over rarity and water privatisation

Water is a natural resource mostly needed by humans. Unfortunately, unlike other natural resources, water is irreplaceable, while, for example, fossil fuels are still replaceable by solar energy and others.

Water is the main source with which people and other forms of life live their life. Without it, it would have been impossible for life to exist, (Chalid, 2009) and it is inevitable.

As mentioned earlier, liberalism agenda and water privatisation promoted by international finances since the declaration of Dublin Principles in 1992 have reached Indonesia through its Law Number 7 of 2004 concerning Water Resources, where this law is dominant with liberalism and water privatisation.

With its seemingly fruitful agenda of liberalism and water privatisation in Indonesia through this law, World Bank seemed to have built its path to success since it was seen to have managed to bring law concerning water in Indonesia into the mind of capitalists by widely opening the opportunity to control and provide water.

The track and influence set by World Bank through the Law concerning Water Resources with liberalistic and capitalistic touch have been apparent since the initiation of the government to arrange bill concerning water resources. Proposing the bill to the House of Representatives (DPR) was due to suppression coming from World Bank through Water Resources Sector Adjustment Loan (WATSAL), a program relying on loan from World Bank for Indonesia based on the achievement made by Indonesian Government in an effort to promote the Law concerning Water Resources according to the global water policy set by World Bank (Chalid, 2009).

As views of life and the principle to unite the state, Pancasila (Indonesian Five Principles) serves as a reference in terms of arrangement of a norm that will be effectuated. With this, pancasila is positioned the highest in the hierarchy of legislations, which is called as theorie von stufenubau der rechtsordnung by Nawiasky. The system of norm follows the following order: (1) fundamental norm (staatsfundamentalnorm); (2) state primary rules (staatsgrundgesetz); Formal Constitution (formell gesetz); and (4) Implementing regulation and autonomous regulation (verodnung en autonome satzung). In reference to the theory by Nawiasky, A hamid S. Attamimi (Attamimi, 2012) compared it with the theory by Kesen and implemented in into the structure of legal system in Indonesia:

1. Staatsfundamentalnorm: Pancasila (Preamble of the 1945 Indonesian Constitution)
2. Staatsgrundgesetz: Content of the 1945 Indonesian Constitution, Decision of People's Consultative Assembly, and Convention of state administration;
3. Formel gesetz; Law;
4. Verordnung en Autonome Satzung: In hierarchy it starts from Government Regulation to Regent's or Mayor's Decision.

Based on the structure of legal system as mentioned, it can be concluded that pancasila is the main value in the structure and source of norm of each aspect of state administration, and pancasila is the source of compliance with law in Indonesia. All the legislations and elaboration mainly refer to the values in the five principles, pancasila. (Kaelan, 2013) All these elements are written in the Preamble of the 1945 Indonesian Constitution Paragraph IV, in which all the five basic principles were stipulated.

The Preamble of the 1945 Indonesian Constitution normatively involves, in the articles therein, the visions, bases, or principles of the state administration. The idea of the birth of the state, or commonly known as national objective as provided in Paragraph four, involves (a) protecting the whole people of Indonesia and the entire homeland of Indonesia, (b) advancing general prosperity, (c) developing the nation's intellectual life, and (d) contributing to the implementation of a world order based on freedom, lasting peace and social justice. All those visions are to be performed within a system of the Republic of Indonesia that comprises five principles called Pancasila as stipulated in Paragraph four of the Preamble of the 1945 Indonesian Constitution.

3.5. Legal politics of formation of law concerning water resources and irrigation

The issue lies on the irrelevance between ius constitutum and the legislation in place. Both law and morality have the same objectives to achieve justice. The problem is that law, morality, and justice are abstract, including the law in action or law in book. The proportional goal to be achieved is the highest achievement as visioned (ius constituendum). Certainly, the legal objective is to achieve justice, but where is the law to achieve certainty and appropriateness? The answer surely lies in ongoing procedural law and the law in action.

Peter Mahmud Marzuki mentioned legal issues as follows: (Marzuki, 2011)

1. Contravention of text of rules due to ambiguity in the rules;
2. Legal loopholes;
3. Gaps in interpretation of facts.

There are some legal sources concerning legal politics of Formation of Law concerning Water Resources and Irrigation, namely:

1. Law Number 11 of 1974 concerning Irrigation

Law Number 11 of 1974 concerning Irrigation has replaced Algemene Water Reglement (AWR) of 1936. The AWR only governed and dealt with one of water utilisation units and it left no reliable fundamentals concerning efforts of utilisation development/water utilisation. The loci were only found in some regions of Indonesia especially Java and Madura.

When the Law concerning Irrigation of 1974 was in progress, this law applied for all people in Indonesia; it generally governed definition derived from acceptable terms used in irrigation, control of water by the state, and execution of authority to control water, and utilisation and water and water sources management.

More simplified and wiser law concerning irrigation should cover all aspects of irrigation although it refers to the law of 1974. For example, Article 1 point 3 of Law concerning Irrigation states the waters regulated as water resources are not those in the oceans or the oceans per se. In other words, waters in the oceans are not regulated in law, but when the waters are utilised on lands and used for daily need, the law concerning irrigation is referred to.

2. Law Number 7 of 2004 concerning Water Resources

Law Number 7 of 2004 concerning Water Resources has replaced Law Number 11 of 1974 concerning Irrigation that is seen no longer relevant to the current condition and changes taking place in the society. The law concerning water resources involves thorough regulation concerning water resources management.

The law implies that water resources were controlled by the state and used for the great benefit of the people. The state guarantees the rights to water for each individual to fulfil their daily need, and it also governs the rights to water. Regulating rights to water is embodied in governing the rights to use water, the rights to obtain and use or attempt to obtain water for all purposes.

Water resources management is performed based on the locations of watershed within one pattern of governance without being interfered with administrative boundaries through which the water flows. The pattern of water resources management is the primary structure in planning, executing, controlling, and evaluating activities of water resources conservation, utilisation, and control

of level of water damage in river areas based on the principle of cohesiveness of surface water and groundwater. Water resources management is delegated to state-owned enterprises or regional-owned enterprises, private companies, and/or individuals based on permit to manage water resources issued by the government. Water resources management still has to pay attention to social function of water resources and environmental sustainability.

The law concerning water resources also governs forum for coordination consisting of representatives of related parties, either from government or non-government. To assure the practice of legal certainty and law enforcement, the presence of civil servants as enquirers working together with enquirers from Indonesian National Police is required. Bringing back the law concerning irrigation is aimed to cover legal loopholes. However the process of passing the law number 11 of 1974 was interrupted by an anomaly due to centralisation, where the need for and rights to water were not regulated, neither were the control over management and resolution to water issues. Moreover, the government made a policy giving access to water privatisation by implementing Government Regulation Number 121 of 2015, Government Regulation Number 122 of 2015 concerning Water Supply System, and Regulation of Minister of Public Works Services and Public Housing (PUPR) Number 50 / PRT / M / 2015 concerning Permit to use Water Resources, Constitutional Court Decision Number 85/PUU-XI/2013 concerning Revocation of law Number 7 of 2004 and re-effectuation of Law Number 11 of 1974 concerning Irrigation.

To assure that all the regulations are appropriately implemented as mandated by the Constitution, it is essential to establish independent bodies that are aimed to guard the constitution (Perwira, 2001). This measure is seen as check and balances from judicative bodies to other authoritative bodies. The common mechanism is by conducting reviews of a policy embedded into a particular legal product such as law, which is commonly known as judicial review. The Law concerning Water Resources was proposed twice for judicial review to Constitutional Court as follows:

1) Decision Number 058 – 059 – 060 – 063/PUU-II/2004 and Decision Number 008/PUU-III/2005 dated 19 July 2005, examining the provision of Article 6 paragraph (3), Article 7 paragraph (1) and paragraph (2), Article 8 paragraph (2) letter c, Article 9 paragraph (1), Article 29 paragraph (3) and paragraph (4), Article 29 paragraph (5), Article 38 paragraph (2), Article 40 paragraph (1), paragraph (4), and paragraph (7), Article 45 paragraph (3) and paragraph (4), Article 46 paragraph (2), Article 91 and Article 92 paragraph (1), paragraph (2), and paragraph (3) of Law concerning Water Resources.

2) Decision Number 85/PUU-XI/2013 dated 18 February 2015, examining provision of Article 6, Article 7, Article 8, Article 9, Article 10, Article 26, Article 29 paragraph (2) and paragraph (5), Article 45, Article 46, Article 48 paragraph (1), Article 49 paragraph (1), Article 80, Article 91, and Article 92 paragraph (1), paragraph (2), and paragraph (3) of Law concerning Water Resources. Injunction: Law concerning Water Resources is declared contravening the 1945 Indonesian Constitution and it does not have binding legal force, Law Number 11 of 1974 concerning Irrigation is re-effectuated.

Constitutional Court Decision Number 85/PUU-XI/2013 states that the Law concerning Water Resources contravenes the 1945 Indonesian Constitution and the law does not have any binding legal force. In the consideration, the court broke down the issues into three as follows:

1. Water management is based on the instrument to delegate the rights to use water, as governed in Article 6, Article 7, Article 8, Article 9, and Article 10.
2. Water resources utilisation including water companies, is governed in Article 26, Article 29, Article 45, Article 46, Article 48, and Article 49.
3. Financing is governed in Article 80
4. Lawsuits by members of public and organisations are governed in Article 90, Article 91, and Article 92.

Through the clause ‘lands and waters and all the natural riches therein are controlled by the state and utilised for the greatest benefit of the people’, it is emphasised, through the spectacles of the 1945 Constitution drafters, that water is considered the most essential and fundamental element in life or an element that shall protect the whole people of the state. Therefore, water should be controlled by the state. With this reference, there must be strict limitation in utilisation of water to guarantee the sustainability and availability of water:

a) Each and every water company must not eliminate people's rights to water since lands, waters, and all the natural riches therein are for the greatest benefits of the people although they are under the state's control.

b) The state must fulfil the people's rights to water, and access to water is a special human rights. (Article 28 paragraph 4 of the 1945 Indonesian Constitution)

c) Environmental sustainability must be maintained, as it is part of human rights. (Article 28H paragraph (1) of the 1945 Indonesian Constitution).

d) Production sectors vital and affecting the livelihood of the considerable proportion of people must be under the state's control and must be utilised for the greatest benefit of the people. With this, supervision and control by the state over water is absolute.

e) Water management must be mainly delegated to state-owned enterprises and regional-owned enterprises recalling that the state holds the control over water for the greatest benefit of the people.

f) When all the above limitation is fulfilled and water availability is still abundant, Government can give permit to private companies to manage and produce water under strict terms and conditions.

Law Number 7 of 2004 concerning Water Resources Management is quite controversial in Indonesia. Pros and cons over this law keep growing in debates among the members of public in this country, leading to the intriguing issue. No less than five petitioned were submitted to Constitutional Court for judicial review of law Number 7 of 2004: PUU Number 58/PUU- 11/2004 petitioned by YLBHI along with several social organisations, PUU Number 59/PUU-II/2004 petitioned by Indonesian Forum for Environment and other social organisations, PUU Number: 60/PUU-11/2004 by Zumrotun, et al representing farmers, PUU Number 63/PUU-11/2004 petitioned by Suta Widhya from members of public and PUU Number 08/PUU-11/2005 by Suyanto et al (2063 petitioners). Generally, there is similar concern among petitioners over the closure of access to water and they are worried it could impact poor people. With different perspectives and arguments of law, the petitioners submitted their petition for judicial review of the articles in Law Number 7 of 2004 that is considered to have violated the constitutional rights as stipulated in the 1945 Indonesian Constitution.

3. Law Number 17 of 2019 concerning Water Resources

Law Number 17 of 2019 concerning Water Resources has revoked and deactivated law Number 11 of 1974 concerning Irrigation (State Gazette of 1974 Number 65, Addendum of State Gazette Number 3046). Despite the fact that the Law Number 11 of 1974 concerning Irrigation was once re-effectuated after the Law Number 7 of 2004 was annulled by Constitutional Court, there are still issues and the new law is not capable of thoroughly governing water resources management according to the growth of the need of the people. In reference to ancient notion, water is an element needed in the livelihood equal to air, fire, and land.

Implied in Law Number 17 of 2019, since water availability tends to decrease in line with the growing demand for water, water resources management should take social, environmental, and economic function into account to embody the synergy and cohesiveness of regions, sectors, and generations to meet the people's need for water because it is part of essential production sectors that affect the livelihood of the considerable proportion of people and it is controlled by the state for the greatest benefit of the people according to the mandate of the 1945 Indonesian Constitution. Law Number 17 of 2019 concerning Water Resources is stipulated in State Gazette of 2019 Number 190 and the explanation of Law Number 17 of 2019 concerning Water Resources is stipulated in the Addendum of State Gazette Number 6405. Law Number 17 of 2019 concerning Water Resources annulled Law Number 11 of 1974 concerning Irrigation (State Gazette of 1947 Number 65, Addendum of State Gazette Number 3046) that was declared no longer effective.

Limited water availability and growing demand for water have raised competition among water resources users and it has strengthened the economic value. This situation tends to raise conflict among sectors, regions, and parties over water resources. Therefore, the regulation that is capable of providing protection for all people and to guarantee them to gain their daily need for water and irrigation for farming communities is required. Water availability to fulfill the daily need for water and irrigation for farming communities are the primary priority above all forms of need for water.

4. Conclusion

Law concerning Water Resources should be able to embody the constitutional mandate concerning the rights of the state to control water. The right to control by the state remains as long as the state, with its policy, still holds the authority to execute the following actions: making policy, administration, regulation, management, and supervision. The concept of rights in the rights to use water must be in line with res commune that should not represent the economic cost.

Based on all the considerations mentioned above, the rights to control water held by the state are seen as the 'core' or 'heart' of the Law concerning Water Resources, as mandated by the 1945 Indonesian Constitution. This is the role of the government to secure the interest of the people and their state, 'vital production sectors to the state" and that "affect" the considerable proportion of people, and lands, waters and the natural riches therein are "to be controlled by the state" for "the greatest benefit of the people". Article 33 Paragraph 2 and 3 of the 1945 Indonesian Constitution does not fully represent the expectation of free market, but it is more relevant to the expectation of contemporary era overtaking laissez-faire.

The Law concerning Water Resources must embody the mandate of constitution concerning rights of the state to control water. These rights will remain as long as the state still holds the authority to execute the following: making policy, performing administration, making regulation, management, and supervision. The concept of the rights to use water should be in line with the concept of res commune that should not represent economic cost. The government embodying Good Governance does not always guarantee that it has concern over the aspect of sustainable ecosystem, as according to environmentalism. Therefore, the government with its measures to actualise the principles of Good Governance still needs additional requirement regarding all development policy according to ecological sustainability principles (Santosa, 2008) to achieve good environmental governance.

The principle of access to justice is implemented for water resources governance as mandated in Law. However, it does not simply improve access to water among the members of public due to several impeding factors interrupting the maximisation of the principles. Moreover, the priority whether water resources management is mainly for the benefit of the people, either directly or indirectly, is not assertively stated in Constitutional Court Decision. Law concerning Water Resources even recognises delegation of right to manage water resources to private sectors. The interpretation of Article 33 paragraph (2) and (3) of the 1945 Indonesian Constitution will remain with 'uncertainty', which is unpredictable in terms of how Constitutional Court made a decision in case of another issue regarding water resources in the future. It is advisable that in the future the decision concerning natural resources management be formulated at the level of law making (government and House of Representatives/DPR) through assertive ideological preference.

References

Attamimi, A. H. (2012). Peranan Keputusan Republik Indonesia dalam Penyelenggaraan Pemerintahan Negara; Suatu Studi Analisis Mengenai Keputusan Presiden yang Berfungsi Pengaturan dalam Kurun Waktu Pelita I Pelita IV. In J. Asshiddiqie, & M. A. Safa'at, Teori Hans Kelsen tentang Hukum (p. 155). Jakarta: Konstitusi Press.

Belbase, N. (2010). Environmental Good Governance in The Future Constitution. Nepal: IUCN Nepal.

Blommestein, W. v. (1949). Een Federaal welvaartsplan voor het westelijk gedeelte van Java, De Ingenieur in Indonesie.

Chalid, H. (2009). Hak-Hak Asasi Manusia atas Air: Studi tentang Hukum Air di Belanda, India, dan Indonesia. Jakarta: Program Doktor Fakultas Hukum Universitas Indonesia.

Gessen, C. V. (1946). Bevloeiing van Rijst op Java en Madoera (Irrigation of rice in Java and Madura). Java: Landbouw Batavia.

Kaelan, H. (2013). Negara Kebangsaan Pancasila. Yogyakarta: Paradigma.

Marzuki, P. M. (2011). Penelitian Hukum. Jakarta, Indonesia: Kencana.

Nonet, P., & Selznick, P. (1978). Law and Society in Transition: Toward Responsive Law. New York: Harper Colophon Books.

Pasandaran, E. (2006). Politik Ekonomi Sumber Daya Air. In E. Pasandaran, B. Sayaka, & T. Pranadji, Pengelolaan Lahan dan Air di Indonesia (pp. 11 - 46). Jakarta: Badan Penelitian dan Pengembangan Pertanian.

Perwira, I. (2001). Inkonsistensi Pilar Negara. Bandung, Jawa Barat, Indonesia: LPPMD Unpad Press.

Salman, M. (2012). The Human Right of Water-Challenges of Implementation. Proceedings of the Annual Meeting (pp. 44 - 46). American Society of International Law.

Santosa, P. (2008). Administrasi Publik: Teori dan Aplikasi Good Governance. Bandung, Jawa Barat, Indonesia: PT Refika Aditama.

Shiva, V. (2016). Water Wars: Privatization, Pollution, and Profit. California, USA: North Atlantic Books.

Siahaan, N. (2004). Hukum Lingkungan dan Ekologi Pembangunan. Jakarta: Erlangga.

Tomlins, C. (2007). How Autonomous Is Law?, Annu. Rev. Law Soc. Sci., Vol. 3.