

LEGAL POLITICS OF WATER RESOURCES REGULATIONS IN INDONESIA

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ABSTRACT

Implementation of watershed management and conservation of soil and water are not correlation directly with the cancellation of Law No. 7 of 2004 on the Water Resources Act, as a basic regulation been regulated in Law Number 37 of 2014 on the Soil and Water Conservation which is currently in the process of completion and harmonization at the State Secretariat. As we know that the cancellation of Law No. 7 of 2004 on Water Resources by the Constitutional Court with Decision No. 85 / PUU-XII / 2013 dated February 18, 2015, stems from a request Testing Act proposed by 11 (eleven) applicant through their Legal Counsel to Assembly Law Team and Human Rights of Muhammadiyah and the petition filed on September 23, 2013.

Key words: Legal, Politic, Water Resources, Regulation.

A. Introduction

According to Bagir Manan, the conception of a modern constitutional state is the combination of the concept of rule of law and the welfare state. In this concept of state or government task not solely as security or public order, but have responsibility for social justice, general welfare and the greatest prosperity.¹ In their petition, the Petitioners filed a 10 (ten) norm Act on Water Resources, which is the norm of Article 6 paragraph (2), Article 6 paragraph (3), Article 7, Article 8 paragraph (1), Article 8 (2), Article 9 paragraph (1), Article 11 paragraph (3), Article 29 paragraph (3), Article 40 paragraph (4), Article 49 to be declared contrary to the 1945 Constitution and has no binding legal force, as follows:

1. Article 6 (2): The control of water resources referred to in paragraph (1) is held by the Government and / or regional governments based on customary rights of indigenous and local communities rights serupadengan that, to the extent not contrary to the national interests and regulations legislation.
2. Article 6 (3): customary rights of indigenous people on water resources as referred to in paragraph (2) continues to be recognized throughout the reality is still there and has been confirmed with local regulations.
3. Article 7: Paragraph (1) The right to water as referred to in Article 6 paragraph (4) in the form of water utilization and water exploitation rights .; Paragraph (2) The right to water as referred to in paragraph (1) can not be rent or transferable, partially or completely.
4. Article 8 (1): Water utilization right was obtained without permission to meet daily basic needs for individuals and for the people who are farming in irrigation systems.
5. Article 8 (2): The right to use water as referred to in paragraph (1) requires a permit if:
 - a. How to use it is done by changing natural conditions water sources;
 - b. Intended for groups that require amounts of water big; or
 - c. Used for farming folk outside the existing irrigation system.
6. Article 9 paragraph (1): water exploitation rights may be granted to an individual or entity with the permission of the Government or regional government in accordance with their authority.
7. Article 11 (3): The preparation of water resources management scheme as referred to in paragraph (2) is done by involving the community and business world widely.
8. Article 29 paragraph (3): Provision of water to meet daily basic needs and irrigation for the agricultural community within the existing irrigation systems is a top priority in the provision of water resources for all needs.
9. Article 40 paragraph (4): cooperatives, private enterprises, and the public can participate dalam penyelenggaraan minum. Pengaturan development of water supply system for the development of water supply system aims to:
 - a. The creation and management of drinking water services quality at an affordable price;
 - b. The achievement of the balance between the interests of consumers and providers services; and
 - c. Increased efficiency and coverage of drinking water services.
10. Article 49: Paragraph (1) The utilization of water for other countries are not allowed, except for the provision of water for various needs as referred to in Article 29 paragraph (2) were met; Paragraph (2) The utilization of water for the other countries

¹ Bagir Manan, *Politik Perundang-undangan dalam Rangka Mengantisipasi Liberalisasi Perekonomian*, FH-UNILA, Bandar Lampung, 1996, Hlm. 16.

referred to in paragraph (1) shall be based on water resources management plan sungaiyang region concerned, and considering the interest in the surrounding area; Paragraph (3) The water utilization plan for the other countries is done through a process of public consultation by the government in accordance with its authority; Paragraph (4) The utilization of water for the other countries referred to in paragraph (2) and (3) must obtain a permit from the Government on the recommendation of the local government and in accordance with legislation.

B. Problems

How create legal politics of Water Resources Regulation in Indonesia?

C. Methods

1. Method of Approach.

The approach used in the research problem is to use an empirical approach and normative approach. The study documents the analysis consists of legislation and various policies relating to the subject matter studied in Jabodetabek area and the problems it faces and report the results of the various meetings, seminars, public hearings and so on.

2. Types and Sources of Data

The data used in this study can be classified into two types:

a. Primary Data

The primary data sources such as interviews, questionnaires and observations from the field.

b. Secondary Data

Secondary data sources include primary legal materials, secondary and tertiary, which include: laws, government regulation and other legislation relating to the policies in the Local Government as well as the applicable provisions that support the research data.

3. Methods of Data Collection

To obtain the data of primary legal materials and secondary legal materials and legal materials tertiary study conducted with business documents or literature studies which include data collection efforts by visiting libraries, reading, literature review and study materials that have a strong link with subject matter. Furthermore, the data obtained, edited, specifically identified objectively and systematically, clarified, presented and then analyzed further in accordance with the objectives and research problems. To obtain primary data conducted in-depth interviews with stakeholders, questionnaires, field surveys, and also performed in the form of colloquium with relevant sources, as well as intensive discussions with the participants is limited.

4. Data Analysis

Data were analyzed inductively, all existing data is interpreted and translated by basing on the prevailing theories. The analysis model is used interactively (Interactive Model of Analysis). This analytical model includes four phases: data collection, data reduction stage, stage presentation of the data and drawing conclusions stage of verification or interactive, as visualized in the following cycle materials.

D. Analysis and Discussion

1. The 1945 Constitution

One state institution that is present after the 1945 changes (Third Amendment) is the Constitutional Court, which determined its authority under Article 24C of the Constitution NRI 1945, called: (1) a law against the Constitution; (2) rule on the dispute the authority of state institutions whose authorities are granted by the Constitution; (3) dissolution of political parties; (4) to decide disputes concerning the results of the election. The authority is in the first and final level, and the Constitutional Court decision is final, that directly has permanent legal force and there is no attempt to change the law. In addition to the authority, the Constitutional Court is also obliged to examine, hear and decide on the opinion of the House that the President and / or Vice President has violated the law in the form of treason, corruption, bribery, other felonies, or misconduct, and / or opinions that the President and / or Vice President is no longer qualifies as President and / or Vice President (Article 7B). It should be noted that this decision is not final because its subject (subject to) the decision of the Assembly, a political body that is authorized to dismiss the President (Article 7A). So different in the United States that put the political process rather than the process hukum.²

Under the authority of the Court is the guardian of the constitution associated with the four powers and the obligations it has. That brings consequences MK serves as interpreter of the Constitution. The Constitution as the supreme law regulating the conduct of states based on the principles of democracy and a constitutional function is to protect the human rights guaranteed in

² Ni'matul Huda, *Politik Ketatanegaraan Indonesia Kajian Terhadap Dinamika Perubahan UUD 1945*, Cetakan Kedua, FH UII Press, Yogyakarta, 2004, Hlm. 195-200.

the constitution so that the constitutional rights of citizens. Therefore, the Court also serves as a guardian of democracy, protector of citizens' constitutional rights as well as the protector of human rights.³

The subject matter is the reason for the Petitioners in this case:

1. That Testing Act (PUU) This is a test back, because previously the Court has issued a ruling on the SDA Law Case Number 058-059-060-063 / PUU-II / 2004 and Case Number 008 / PUU III / 2005 in a verdict declared rejected Applicant.
2. The applicant in perkara Nomor 85 / PUU-XI / 2013 view of the fact that the opinion of the Court which gave guidelines in the management of natural resources as stipulated in consideration of Decision No. 058-059-060-063 / PUU-II / 2004 and Case Number 008 / PUU -III / 2005 ignored.
3. That the elaboration Decision No. 058-059-060-063 / PUU-II / 2004 and Case Nomor 008 / PUU-III / 2005 is not fully implemented because of the substance of the Act which gives leeway to foreign capital. Because historically, the formation of water resource Act originated from the government's need for donors who provide assistance to Indonesia in the face of crisis. Among other things one of the agreements made between the Indonesian government and the IMF some of them are directly related to the conglomeration and trade arrangements. This is evident in the provisions of Article 9 paragraph (1), Article 11 paragraph (3), and Article 14 of the Law on Water Resources.
4. The shift of responsibility in natural resource management appears from Regulation No. 16 Year 2005 on Development of Water Supply System (SPAM) Section 1 Item 9, which states, "Implementation of Development SPAM is the state / local enterprises, cooperatives, private enterprises, or group public." where it should be according to Article 40 paragraph (2) of the water resources that SPAM development is the responsibility of the central government / local government.
5. In the description hereinafter, the Petitioners principally outlines some flaws / weaknesses of the Law on Water Resources to the argument as follows: 1) Law on water resources containing the charge control and monopoly of resources of water that is contrary to the principles of state-controlled and used for welfare of the people; 2) Law on water resources containing payload position that water use is skewed to commercial interests; 3) Law on water resources contains a payload that triggered social conflicts, especially between the river areas identified with the administrative area; 4) Law on water resources eliminate the responsibility of the state in water supply; 5) Law on water resources is discriminatory (Article 91) because it reduces everyone's right to defend life and living on its needs for water.

The Constitutional Court expressly in pertimbangannya menggariskan six conditions for the development of water restrictions that are tight in order to preserve the availability and sustainability of water for the life of the nation in accordance with the basic principles adopted in Article 33 paragraph (4) of the 1945 Constitution. Furthermore, the Court found the requirement constitutionality of the water resources is that the Law on Water Resources in the implementation must ensure the realization of the constitutional mandate of the right of state control over the country's top water. Which by 1945 is mandated to make policy (beleid), still holds the lead in carrying out the maintenance action (bestuursdaad), regulatory action (regelendaad), operations (beheersdaad), and control measures (toezichthoudensdaad). The concept of the Right to Water rights should be distinguished from the concept of rights in a general sense. The concept of the Right to Water rights should be in line with the concept of res communes that should not be the object of prices in the economy. Right to Water has two properties: 1) the rights in personayang is a reflection of human rights and therefore inherent in human subjects who are inseparable. Embodiments of the nature of the first Right to Water exists on Right to Use Water; 2) The rights arising solely from the permission granted by the government or local government daerah. The principle of "beneficiaries of water resource management services required bear the costs of management" should be interpreted as a principle that is not placing water as an object to be charged the price is economics.

Thus, there is no water pricing as a component of calculating the amount to be paid by the beneficiaries. In addition, this principle must be flexible by not wearing the same calculation without considering the kinds of utilization of water resources. Therefore, farmers water users, users of water for agricultural purposes the people released from the obligation to finance water resource management services. Customary rights of indigenous people (MHA) surviving over resources. Water is recognized, in accordance with Article 18B (2) Constitution 1945. Adanya MHA provisions on strengthening of unity alive through the regulation must be interpreted as not constitutive but rather declarative. The Court found six Government Regulation (PP) which is prepared by the Government, namely: 1) Regulation No. 16 Year 2005 on Irrigation; 2) Regulation No. 20 Year 2006 on Irrigation; 3) Regulation No. 42 Year 2008 on the Management of Water Resources; 4) Regulation No. 43 of 2008 on Groundwater; 5) Regulation No. 38 Year 2011 on the river; and 6) Government Regulation No. 73 Year 2013 concerning Swamp, does not meet the six basic principles of water resources management restrictions as has been considered by the Court. But to Regulation No. 69 Year 2014 on the Right to Water, the Government has set them long after the Court ended the trial in this case, namely on March 18, 2014, so that the PP is not taken into account in this Decision.

The Constitutional Court at the end of the decision states clearly that the right of control by the state over the water is the "spirit" or "heart" of the Law on Water Resources. The enactment of the right of control by the state over the water as "spirit" or "heart"

³ See *Enam Tahun Mengawal Konstitusi dan Demokrasi, Gambaran Singkat Pelaksanaan Tugas Mahkamah Konstitusi 2003-2009*, Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, Cetakan Pertama, Jakarta, 2009, Hlm. 13.

of the overall implications for the cancellation of the norm in the Constitution of 1945. In addition, in order to avoid a legal vacuum, the court ruled that Act No. 11 of 1974 on Water reinstated.

2. Regulation of Watershed

Watershed is an area of land which is an ecosystem with a river and its tributaries which serves to accommodate, store, and drain the water from rainfall to the lake or the ocean naturally, that the limit on land is a topographic divider and the sea boundary to the irrigation area are still affected by land activities. Watershed management is man's attempt to control the interrelationship between human activities and natural resources (particularly soil, vegetation and water) in the watershed to obtain the benefits of the goods and services at the same time preserving the watershed and improve the welfare of society. Up to now no one institusi that manages all aspects of the watershed is intact from upstream to downstream, besides that there are many differences in the understanding of the definition of a watershed at the level implementers and decision makers. Watershed management objectives are: 1) the creation of watershed optimal conditions, such as adequate water yield (quality, quantity, and continuity) and controlled erosion, sedimentation, floods and droughts; 2) Increasing the productivity of land and the Environment; 3) Increased awareness, ability and public participation; 4) well-organized institutional watershed management; and 5) The realization of sustainable development and environmentally friendly. Watershed management is done through planning, implementation, monitoring and evaluation, coaching and supervision is carried out in accordance RTRWP and Resource Management Pattern Water. Watershed management implemented based Watershed Management Plan which has been set and the reference sector development plans and plans the construction of the restored river basin and watershed carrying capacity carrying capacity will be maintained. Medium Monitoring and evaluation shall be conducted in watershed management in both the recovery and maintaining the carrying capacity to obtain performance data.

In essence the construction of a conscious effort to manage and exploit natural resources, including land and water in order to improve the quality of life of the people. National development which is and will be implemented by the Indonesian people need land and water, both for the development of agriculture and infrastructure in all regions of the country. In the development of agriculture, the soil is a natural resource is a container / a nutrient for plants, the media for the growth and development of plant roots and storage of water in everyday life. In land used as an element of production to meet the needs of human life all the time, either in the form of food, clothing or boards. Indonesia recorded total area of \pm 190 million hectares, of which including the critical area of \pm 24.3 million hectares (2014). Condition critical land has caused global concern that the adoption of the Convention of the United Nations on the Control of Desertification / land degradation (UNCCD) in conjunction with the UN Convention laintentang Biological Diversity (CBD) and the UN Convention on Climate Change (UNFCCC) and the 2015 has been set by The UN as the International Year of Soil. Law No. 37 Year 2014 on the Soil and Water Conservation (KTA) regulate the implementation of soil and water conservation is complete and comprehensive, so it is a system of legal rules that round. It is hoped the law could be used as a legal basis for soil and water conservation activities for the period lama. Kegiatan is proper soil conservation is an obligation that must be carried out either by individuals, groups or entities that manage and use land. Facts show that prime land conversion that occurred in the cultivation area of about 100,000 hectares per year. Due to the land conversion led to decreased land productivity, and ultimately, food sovereignty, water, energy, quality, quantity and environmental services will be threatened. Forest and land rehabilitation efforts were carried out in 2009-2014 through the state budget is only capable of 2.5 million hectares or 500,000 hectares annually. In the National Medium Term Development Plan (RPJMN) 2015-2019, forest and land rehabilitation efforts will be implemented area of 5.5 million hectares in supporting the resilience of water and food. To achieve these objectives, the watershed management into major programs to be implemented from upstream to downstream. Watershed management is an effort that is very important as a result of environmental degradation watersheds in Indonesia caused by the management of natural resources that are not environmentally friendly and increasing the potential of sectoral ego and ego cantonal due to the utilization and use of natural resources in the watershed involves the interests of various sectors administrative areas and disciplines. To improve the performance of watershed management in order to improve water resistance that can support other programs, among others, will be implemented through: a) Internalization 108 RPDAS into RTRWP; b) Determination of Watershed / MoU on Cross Country Watershed Management; c) Application of new innovations such as the use of Hydrological Model SWAT (Soil and Water asessment Tool) in the preparation of watershed management plans and implementation of watershed management in all parts of Indonesia; d) Preparation of government regulation as the implementation of Law No. 37 Year 2014 on the Soil and Water Conservation (KTA), which was promulgated on 17 October 2014 and e) Increasing public participation through the acceleration of forest and land rehabilitation, among others carried out by the Local Government, Community and Business. The basic policy of watershed management as the Government Regulation No. 37 Year 2012 on Watershed Management, namely: 1) Do a holistic, integrated, well-planned and sustainable; 2) Target management area is full of local watershed upstream to downstream; 3) Do the responsible decentralized approach to river basin as the unit of management areas; 4) Based on public participation and consultation at every stage of watershed management; 5) To overcome the limitations of government funds, should the application of "Beneficiaries pay principle, poluter pay principle and costsharing"

3. Management Position Watershed

With regard to the decision of the Constitutional Court Number 85 / PUU-XII / 2013 dated February 18, 2015 against the cancellation of Law No. 7 of 2004 on Water Resources, Law No. 7 of 2004 on Water Resources regulates the planning, implementation, monitoring and evaluation of the conservation, utilization and control of power river basin-based water damaged and its implementing regulations have been published as:

- a. Government Regulation (PP) No. 16 of 2005 on Water Supply System (SPAM).
- b. Government Regulation No. 20 Year 2006 on Irrigation.
- c. Government Regulation No. 42 Year 2008 on the Management of Water Resources.

- d. Government Regulation No. 43 Year 2008 on Groundwater.
- e. Regulation No. 37 Year 2010 on Dams.
- f. Regulation No. 38 of 2011 on the River.
- g. Regulation No. 73 Year 2013 concerning the Swamp.
- h. Regulation No. 69 Year 2014 on the Right to Water.
- i. Presidential Decree (Decree) No. 149 Year 2014 on Water Resources Board, which the Minister of Forestry and Environment Minister a member of the National Water Resources Board (DSDAN).
- j. Presidential Decree No. 33 Year 2011 on the National Policy of Water Resources Management.

Overall canceled and returned to the Law No. 11 of 1974 on Water.

Based on the above conditions Ministry PUPERA along the National Water Resources Board (DSDAN) where the Ministry of Environment and Forestry are included in DSDAN, have taken steps as follows:

- a. Develop RPP implementation of Law 11 of 1974 concerning Irrigation adapted to current conditions;
- b. PUPERA issued Decree on Establishment of the River Basin, as the basis for the implementation of the tasks Center / Center for River Basin (UPT DGWR);
- c. Reviewing the substance of Law No. 7 of 2004 on SDA and adapted to the decision of the Court to draw up a new law on natural resources.

Implementation of watershed management and conservation of soil and water are not corekation directly with the cancellation of Law No. 7 of 2004 on the Water Resources Act, as a basic regulation been regulated in Law Number 37 of 2014 on the Soil and Water Conservation (KTA) which is currently in the process of completion and harmonization at the State Secretariat.

In connection with the foregoing, the Ministry of Environment and Forestry Cq. Directorate General of Forest Protection and Watershed Management has coordinated, consolidated by involving experts Watershed and Soil and Water Conservation and Forestry Development Agency researchers to discuss:

- a. Strengthening Law No. 37 of 2014 concerning the issuance of PP KTA and the acceleration of the Planning and Implementation KTA;
- b. Refinement and adjustment of Government Regulation No. 37 Year 2012 on Watershed Management with Law No. 23 Year 2014 on Regional Government.
- c. Discussion Draft Government Regulation (RPP) On Exploitation of Water Resources (NRM);
- d. RPP Discussion About the Water Supply System (SPAM);
- e. Draft Decree of the President of the National Water Resources Council.

E. Conclusion

- a. RPP on Exploitation of Water Resources and RPP about SPAM is derived from Act No. 11 of 1974 on Water Resources, which is a very urgent need in overarching implementation of utilization of water resources and provision of drinking water that is currently underway as well as the legal basis for the implementation of task Center / Center for River Basin (BBWS) Unit of the Ministry PUPERA;
- b. The substance in the RPP on Water Resources Exploitation that has not been agreed in discussions with the Ministry of Justice and Human Rights are: 1) Related to permit utilization of water resources (authority of the Ministry PUPERA) and ground water exploitation permit (the authority of the Ministry of Energy and Mineral Resources); 2) priority allocation of water; 3) The authority of state enterprises, and private enterprises;
- c. The substance in the RPP of SPAM that has not been agreed in discussions with the Ministry of Justice and Human Rights are: 1) Licensing implementation of SPAM; 2) Setting the pipe network within and outside the state-owned enterprises or local government service; 3) Monitoring the implementation of drinking water services; 4) the determination of rates / levies and private drinking water.
- d. Coordinating Minister for Economic affirmation in the RPP discussion above, among others: 1) The preparation of CSPs is expected to range Ministry PUPERA have to change the mind set of powers, licensing and investment; 2) the maintenance of underground water outside the authority of the Ministry PUPERA and has been regulated in the Law on Mining and implemented oleh Ministry of Energy and Mineral Resources; 3) Control and supervision (control) can be done with government regulations, and the Secretariat of State in guarding the CSP process be consistent;

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