

CHAPTER FOUR

FINDING AND ANALYSIS

A. The Legal Implications on Regulation and Clean Water Supplying System in Indonesia After the Constitutional Court Decision Number 85/PUU-XI/2013

1. The Cancellation of Law Number 7 of 2004 on Water Resources

Water is a very important necessity in life, both human, animal, and plant. Water is a natural resource that is absolutely necessary for human life.¹ The importance of water for human life is like an oxygen.² The availability of water in Indonesia is sufficient. Indonesia is one of the five countries with the largest of water availability in the world. The main factors which can affect the availability of global water resources are population growth, economic growth, changes in production patterns and trade, increased competition over water due to increased demand for household, industrial and agricultural purposes and the manner in which various community sectors will respond to increasing water scarcity and pollution.³

The main factor which caused the crisis of clean water in Indonesia is human behaviour in sufficient need that changes the land use for their necessity in making a living and residence. The environmental damage that is natural or caused by human activities and added with the rapid increase in population resulted in problems in the management of water resources.

¹ Abrar Saleng, 2013, *Kapita Selekta Hukum Sumber Daya Air*, Membumi Publishing, Makassar, p.165

² Suteki, 2010, *Rekonstruksi Politik Hukum Hak Atas Air Pro-Rakyat*, Surya Pena Gemilang, Semarang, p.3

³ Hary Jacom *et al*, 2016, "Air dan Konflik: Studi Kasus Kabupaten Timor Tengah Selatan", *Jurnal Ilmu Lingkungan*, Vol 14 No 1, p.56-61

Water resources are one part of natural resources that nature is different from other natural resources. Water is a renewed, dynamic natural resource following a hydrological cycle which naturally moves and changes shape and nature. No one can deny that water is a basic necessity for life, both human beings, animals, and plants. Therefore, the ownership or management of water resources is only managed by the state in order to guarantee the life.⁴

Good water resources management also requires coordination between central and local government (provincial/district/city). However, the existence of excessive regional autonomy can lead to a less harmonious relationship between the central government and local governments (provincial/district/city), especially coordination in water resources management. The less harmonious relationship between the central government and local government itself results in the many agencies involved in managing water resources, such as the Department of Public Works, the Department of Energy and Mineral Resources, the Ministry of Forestry, the Ministry of Agriculture, the Provincial/District/Municipal Provincial, etc. Technically, each of department undertakes its interests without coordinating and integrating inter-agency, the coordination is only limited to coordination on paper. Therefore, with the huge problems occurred in the management of water resources, the Constitutional Court ruled that the management of water resources was submitted to the state in accordance with Article 33 Paragraph 3 of the 1945 Constitution with decision Number 85 / PUU-XI / 2013 in

⁴ Sutardi, 2002, *Pengelolaan Sumber Daya Air yang Efektif*, Lokakarya, Bandung: Badan Perencanaan Daerah, p. 2

which the article states that Earth, water and natural resources contained therein are controlled by the state and used for the greatest prosperity of the people”⁵

These provisions provide legal certainty in which there are utilization and ownership of water. Then in further confirmation, Article 5 of Law No. 7 of 2004 on water resources states that the state guarantees everyone rights to get water for basic daily needs to meet their healthy, clean and productive.

The reactivation of Law No. 22 of 1999 was in conjunction with Law No. 32 of 2004 on regional governments where local governments had the authority given by the central government in the management of natural resources and the environment, and in particular, the regulation of water resources. In the implementation of water resources management, not only the central government or regional authorities, the public also had the authority or right to:⁶

1. Obtain information related to the management of water resources;
2. Obtain adequate reimbursement for any losses suffered as a result of water resources management;
3. Get the benefit of the management of water resources;
4. Declare an objection to the water resources management plan that has been announced within a certain time according to local conditions;

⁵ This Article is a form of state control which is intended for the prosperity of the people who are insightful to a social environment. Therefore, Indonesia based its country on the sovereignty of the ecocracy which is restricted in use only for the sustainable welfare of the people. In Mohammad Toha Hasan, S. HI, *Pengelolaan Sumber Daya Air Pasca Putusan Mahkamah Konstitusi Nomor 85/PUU-XI/2013*, Artikel, p. 3

⁶ Article 82 Law No 7 of 2004 on Water Resources

5. File a report and complaint to the authorities for any losses incurred to them relating to the management of water resources;
6. File a lawsuit against the various water resources issues that are detrimental to his life;

In the context of the state, the existence of the water is one aspect that has become the state control as the constitutional mandate where the state or government is responsible to fulfill the livelihood of Indonesian citizens of water needs in their various activities since the cancellation of the Law No 7 of 2004 on Water Resources by the Constitutional Court on February 18th, 2015, through Decision Number 85/PUU-XI/2013. Indonesia did not yet have specific legislation which regulates water resources. The basic of the cancellation of the law based on the Constitutional Court Decision is because the government in terms of water resources management does not hold on the 1945 Constitution. This restriction is to ensure the right of the state control over water resources and also to eliminate privatization. The six limitations consist of the following explanations:⁷

- 1) Any exploitation of water shall not interfere with, exclude, furthermore exclude the people's right to water;
- 2) The state shall fulfil the people's right to water. As considered above, access to water is one of its own rights: Protection, Promotion, enforcement, and fulfilment of human rights are the responsibility of the state, especially the government”;

⁷ Constitutional Court Decision No 85/PUU-XI/2013 concerning reviewing Law No 7 of 2004 on Water Resources

- 3) The preservation of the environment must be encouraged;
- 4) As an important production branch and which controls the livelihood of the people that must be controlled by the state, the supervision and control of the state of water is absolute;
- 5) As a continuation of the right to control by the state and because water has an important role over the livelihood of the public, the main priority given by the exploitation of water is a state-Owned Enterprise or Regional-Owned Enterprise;
- 6) If all of the above restrictions have been fulfilled and there is still water availability, the government are allowed to grant licenses to private businesses as long as the government still conducts water on certain conditions and strict.⁸

As discussed in the introductory chapter, water resources are one of the important resources for human life in conducting activities, including development activities. The increase in population and development activities is in line with the water resource requirements. Water resources are sources of water that are potentially useful. Uses of water include agricultural, industrial, household, recreational and environmental activities. All living things require water to grow and reproduce.⁹

The management of water resources in Article 33 Paragraph (3) of 1945 Constitution which state that the state controls water, the notion of the right to control the state in relation to water is in the context of the state as the

⁸ *Ibid*

⁹ https://en.wikipedia.org/wiki/Water_resources, Accessed on Feb 6th, 2018 at 10.23

personification of all the people, so the context of mastering is not “owning”.¹⁰ Rather it becomes the basis for the country to:¹¹

- 1) Organize the use, inventory, and maintenance of water;
- 2) Determine and regulate the legal relationship between people and water;
- 3) Determine and regulate the legal relationship between persons and legal actions concerning water;

The management of water resources itself is an effort to plan, monitor, and evaluate the implementation of conservation of water resources, utilization of water resources, and control the water damage. Water resources managers are the institutions which have an authority to implement water resources management. Institutions which authorized to implement water resources management are technical implementation units of central and regional water resources management, State-Owned Enterprises in the field of water resources management and regional government-owned enterprises in the field of water resources management.

According to Anik Sarminingsih, water resources management has to consider 6 (six) principles as follows:¹²

- 1) Sustainability. This implies that the utilization of the water resources is organized to preserve the function, environmental function, and economic function harmoniously;

¹⁰ Ida Nurlinda, 2009, *Prinsip-Prinsip Pembahasan Agraria (Perspektif Hukum, Rajawali Pers, Jakarta*, p. 52

¹¹ *Ibid*

¹² Anik Sarminingsih, 2007, “Evaluasi Kekritisn Langkah daerah Aliran Sungai (DAS) dan mendesaknya Langkah-Langkah Konservasi Air”, *Jurnal Presipitasi*, Vol. 2 No.1, p. 8-14

- 2) Public benefit. This means that water resources management is carried out to provide the greatest benefit to the public effectively and efficiently;
- 3) Cohesion and harmony. This implies that integrated management of water resources management is done to realize the consistency for various needs by taking account of the water dynamic nature;
- 4) Justice. This suggests that management of water resources is done proportionally for communities in the country to enable each other citizen to have equal opportunity in participating and relishing the results and providing protection to low economic society;
- 5) Self-reliance. This refers to the understanding that water resources management is done with the capability, the advantages, norms, and local resources;
- 6) Transparency and Accountability. This implies that the management of water resources is open and responsible;

By the six principles, water resources need to be managed comprehensively, integrated to realize the benefits of sustainable water resources for the maximum benefit of the people in accordance with the Article 33 Paragraph (3) of the 1945 Constitution along with the mission management,¹³ including: *first*, water resources conservation; *second*, water resources exploitation; *third*, water damage control; *fourth*, public, private,

¹³ *Ibid*, p. 7

and government role empowerment increase; and *fifth*, openness and availability of data information about water resources.

As a mentioned before, the Law Number 7 of 2004 on Water Resources has been deleted as a whole because it violates the Article 33 Paragraph 3 of the 1945 Constitution and opens a wide space for the water privatization. According to the Constitutional Court, the regulation of water resources should be based on the principles of the state control over water resources for the welfare of the people.

There are 5 (five) factors to succeed in the water resources management policy, those are:¹⁴

- 1) Cooperation in coordination between sectors and regions. The water does not recognize borders so that good cooperation between local governments in water management is required. In addition, water is closely linked to other sectors that also require water resources. So, inter-sectoral coordination becomes important;
- 2) Sources of funding. Management of water resources from upstream to downstream require substantial funding so that water resources management programs need to be budgeted properly.
- 3) Stability and political commitment. Water is a human right that must be guaranteed by the government. The fulfillment of this right should be a political commitment that can only be achieved through political stability;

¹⁴ *Ibid* p. 210-211

- 4) Good governance. Good governance is required to manage good water resources, because good governance encourages community involvement in water resources management;
- 5) Strict regulation. The need for water resources is very high which is vulnerable to conflicts. Therefore, strict regulation is necessary to prevent conflicts and ensure that these water resources are equitably met.

The main reason why the Law No. 7 of 2004 on Water Resources is completely aborted as mentioned in the introductory chapter since the law allows for the privatization of water resources management in Indonesia. Privatization and/or commercialization of water resources will encourage tariff increases. Companies use tariffs to get the profit as the basic orientation of companies where those profit-making companies make water as an economic commodity rather than seeing water as a human right necessity and that causes the rights of people with no economic capacity to become neglected. Because life without water is not an option, people are sometimes forced to consume water which has no good quality or even dangerous to consume.

Although there is no privatization or commercialization in the Law No 7 of 2004 on Water Resources, in its implementation precisely in Article 9, Paragraph 1 of Law No. 7 of 2004 provides opportunities for privatization in the management of water resources by private or foreign parties. So, it tends to ignore the role of state-owned enterprises or regional government-owned enterprises, and is not in accordance with the mandate mentioned in Article

33 Paragraph 3 of the 1945 Constitution stating that the earth, water, and natural resources in it are controlled or regulated by the state and in the designation as much as possible for the welfare of the people. In practice, licensing is only procedural and formal. The field supervision is very weak which can lead to the exploitation of uncontrolled water resources, which ultimately affects the community is the decrease in groundwater level.

The meaning of the phrase "controlled by the state" is defined in five benchmarks: the right of state control consists of policy (*beleid*), arrangement (*bestuursdaad*), regulation (*Regelendaad*), management (*beheersdaad*), and supervision (*toezichthoudenstaad*).¹⁵ Therefore, the State's control over the water can be said to exist whereby the 1945 Constitution is mandated to make policy, management, and supervision.

The management functions are undertaken by the government with the authority to issue and revoke licensing facilities, licenses and concessions. The regulatory function by the state shall be conducted through a mechanism of sharing ownership and/or through direct involvement in the management of State-Owned Enterprises as an institutional instrument through a state conducted by the government through control over the resources to be used for the greatest prosperity of the people. Also, the supervisory function by the state in order to supervise and control the implementation of state control

¹⁵ Boesman Batubara, 2015, Menafsir Pasal 33: Analisis Terhadap Putusan Mahkamah Konstitusi Nomor 85/PUU-XI/2013 tentang Undang-Undang Nomor 7 tahun 2004 tentang Sumber Daya Air, *Artikel (Front Nahdliyin untuk Kedaulatan Sumber Daya Alam (FNKSD)*, p. 2

over the important production branch and/or which controls the livelihood of the people intended for the greatest prosperity of all the people is necessary.¹⁶

The definition of "intended for the greatest prosperity of the people" is determined in four benchmarks which are the benefit of natural resources for the people, equity, the level of people's participation and respect for the people's right in utilizing natural resources¹⁷. According to Prof. Dr. Suteki, S.H., M.H, in the field of water resources management, Pancasila can be a legal basis of the state's right to control over water resources to be directed so that the management of water resources does not oppress those who are socially and economically weak (the poor).¹⁸ For the poor people, especially those who live in urban areas, water is very important and scarce of one-third of poor people's income is allocated to meet the water demand due to lack of clean water channels in their dwellings, and at the water supply stage, the principle of justice becomes very important in the management of water resources.

The Constitutional Court through its decision has considered that in the exploitation of water there should be restrictions. There are three restrictions:¹⁹

- a. The first restriction is any exploitation of water shall not interfere with, exclude and eliminate the people's right to water because the earth, water

¹⁶ See: Constitutional Court Number 85/PUU-XI/2013, p. 141

¹⁷ *Ibid*, p. 161

¹⁸ *Ibid*, p. 36

¹⁹ See: Constitutional Court Decision Number 85/PUU-XI/2013

and wealth contained therein shall not only be controlled by the state, but also for the greatest prosperity of the people.;

- b. The second restriction is that the state must fulfill the people's right to get water. As mentioned above, access to water is a part of human rights, then article 28I paragraph (4) determines that the protection, promotion, enforcement, and fulfillment of human rights is the responsibility of the state, especially the government;
- c. The third restriction is considering the preservation of the environment is a must because one of the human rights, article 29I paragraph (1) of the 1945 Constitution determines that everyone has the right to live a prosperous and spiritual, good and healthy environment and entitled to health care;
- d. The fourth restriction is that as an important production branch and controlling the livelihood of the people that must be managed by the state under Article 33 paragraph (3) of the 1945 Constitution, water shall be controlled by the state and used for the people's welfare, so the supervision and control of the state shall be absolute;
- e. The fifth restriction is a continuation of the right of control by the state and water is something that is very important for life then the main priority given the exploitation of water is a State-Owned Enterprise or Regional Owned Enterprise;
- f. If after all of the above-mentioned restrictions have been fulfilled and there is still water availability, then the government is allowed to grant

permission to private parties to carry on water exploitation on certain conditions and strictly monitored.

With the six restrictions or principles of water resources management, it is clear that the management of water resources is absolutely managed by the state, whereas the private sector only obtains a residual role, if the exploitation of water conducted by state-owned enterprises or regional government enterprises as a priority company which is mandated to carry out the exploitation of water by the state cannot perform its functions.²⁰ Therefore, the first placement of the control of water resources is in the form of management by the state directly or through state-owned enterprises formed by the state because it will guarantee the fulfillment of water rights for the people of Indonesia.

Because of the occurrence of a legal vacuum in the regulation of water resources, the Constitutional Court re-activated the Law Number 11 of 1974 on Irrigation. This will lead to new problems. Among others are:

- a. The Law of Irrigation that has been revoked since a few years ago must have been obsolete and not in accordance with the conditions, developments, and needs of the present time. In addition, the Law of Irrigation was established before the era of regional autonomy, so it does not regulate the role of local government in the management of water resources in the region.

²⁰ Irfan Nur Rachman, 2015, "Implikasi Putusan Mahkamah Konstitusi tentang Pengujian Konstitusionalitas Undang-Undang Sumber Daya Air, *Kajian*, Vol 20, No 2, p. 125

- b. The second legal application resulting from the re-activated of law No 11 of 1974 is related to the constitutionality of the Law of Irrigation.²¹

The explanation of the first legal implication which states that the Law of Irrigation was established before the era of regional autonomy where the role of government does not regulate the management of water resources in its area. Whereas if seen, the water resources law was born after the amendment of the constitution that has given autonomy to the region to arrange and take care of their own natural resources, especially water or other governmental affairs according to the principle of autonomy as mentioned in Article 18 Paragraph (2) of the 1945 Constitution where the government provinces, districts, and municipalities govern and manage their own governmental affairs according to the principle of autonomy and the task of unification and Paragraph (5) also explains that local governments exercise the broadest autonomy, except for government affairs which by law are determined as central government affairs.

In contrast to water resources law, within the context of Law Number 7 of 2004 on Water Resources, the management of water resources itself has provided space or opportunity to local government to manage natural resources, especially water in its territory, as stated in Article 6 Paragraph (2) of the Law of Water Resources which states that the control of water resources as referred to in Paragraph (1) is carried out by the government

²¹ Irfan Nur Rachman, 2015, "Implikasi Putusan Mahkamah Konstitusi tentang Pengujian Konstitusionalitas Undang-Undang Sumber Daya Air", *Fakultas Hukum Universitas Gajah Mada Yogyakarta*, Vol. 20, p. 116

and/or local government by still recognizing customary rights of local customary law of the community and rights which is similar to that, as long as it is not contrary to the national interest, laws, and regulations.

A description of the second implication of the reactivation of the Law of Irrigation is related to the constitutional. It is also known that if the Constitutional Court overturns the entire law, the Constitutional Court will re-apply the previous law which has been revoked to meet a legal void, whereas the re-activation of law is not necessarily constitutional. In this case, the Constitutional Court ruled the case with Number 85/PUU-XI/2013 stating that the Constitutional Court overturned and abolished Law No. 7 of 2004 on Water Resources and re-activated the Law No. 11 of 1974 on Irrigation. The annulment of the Law on Water Resources causes the uncertainty of the constitutionality of Law of Irrigation.

To determine the degree of the constitutionality of the Law on Irrigation, then the Law should be tested as well as described in Article 5 of the Draft Law above. However, the Constitutional Court also does not have the authority to assess the constitutionality of a Law of Irrigation if there is no application for judicial review of Law No 11 of 1974. From the description above, it is concluded that the cancellation of water resources law and re-activating the Law of Irrigation are not an appropriate solution, so the House of Representatives and the President must immediately make a new water resources law.

2. The Reactivation of Law No 11 of 1974 on Irrigation

The reactivation of the Law No. 11 of 1974 on Irrigation, automatically, in the clean water supplying system itself has undergone many changes, not only changes in the clean water supplying system but also the decisions of the Constitutional Court Number 85/PUU-XI/2013 which resulted in the Law Number 7 of 2004 concerning the supplying water resources have consequences for the existence of the regulations below them, the implementation of the Government Regulations (PP). So, to avoid a legal vacuum, after the cancellation of Law No. 7 of 2004 on Water Resources, the government made a number of the Ministerial Regulations to regulate water resources. Among others are:²²

- 1) Regulation of the Minister of Public Works and Public Housing Number 04/PRT/M/2015 on Criteria and Determination of River Region;
- 2) Regulation of the Minister of Public Works and Public Housing Number 06/PRT/M/2015 on Exploitation and Maintenance of Water UMBER and Irrigation Building;
- 3) Regulation of the Minister of Public Works and Public Housing Number 07/PRT/M/2015 on Coastal Protection;
- 4) Regulation of the Minister Number 08/PRT/M/2015 on Stipulation of Line of Irrigation Network;
- 5) Regulation of the Minister of Public Works and Public Housing Number 09/PRT/M/2015 on the use of Water Resources;

²² Constitutional Court's Decision Number 85/PUU-XI/2013 regarding reviewing Law No 7 of 2004 on Water Resources

- 6) Regulation of the Minister of Public Works and Public Housing Number 023/PRT/M/2015 on Management of Irrigation Assets;
- 7) Regulation of the Minister of Public Works No.30/PRT/M/2015 on the Development and Management of Irrigation Systems;
- 8) Regulation of Minister of Public Works and Public Housing Number 27/PRT/M/2015 on Dams;
- 9) Regulation of Minister of Public Works and Public Housing Number 29/PRT/M/2015 on Swamp;
- 10) Regulation of the Minister of Public Works and Public Housing Number 13/PRT/M/2015 on Emergency Disaster Management;
- 11) Regulation of the Minister of Public Works and Public Housing Number 14/PRT/M/2015 on Criteria and Stipulation of Regional Status of Irrigation;
- 12) Regulation of the Minister of Public Works and Public Housing Number 26/PRT/M/2015 on the Transfers of River Flows and/or Utilization of River Sections.

These Ministerial Regulation are made to provide legal certainty for the utilization of water resources. As can be seen in the arrangement, the focus of water resources utilization in various ministerial regulations is to support agriculture through irrigation.

The reactivation of the Law Number 11 of 1974 on Irrigation makes the Government Regulation under the Law No 7 of 2004 concerning the water resources is losing its legal basis or legal strength. However, this cannot

defeat the rules easily because the constitutional court does not have the authority to examine the regulation under the law, so it cannot invalidate the legislation other than the law. While the authorities for the examination of legislation under the law are only the authority of the Supreme Court. The six Derivative Regulation are among others:

1. Government Regulation No 16 of 2005 on the development of Drinking Water Supply System as the implementation of article 40 of the Water Resources Law;
2. Government Regulation No 20 of 2006 on Irrigation as the Implementation of Article 41 of the Law of Water Resources;
3. Government Regulation No 42 of 2008 on Water Resources Management as the implementation of Article 11 Paragraph (5), Article 12 Paragraph (3), Article 13 Paragraph (5), Article 21 Paragraph (5), Article 22 Paragraph (3), Article 25 Paragraph (3), Article 27 Paragraph (4), Article 28 Paragraph (3), Article 31, Article 32 Paragraph (7), Article 39 Paragraph (3), Article 42 Paragraph (2), Article 43 Paragraph (2), Article 53 Paragraph (4), Article 54 Paragraph (3), Article 57 Paragraph (3), Article 60 Paragraph (2), Article 61 Paragraph (5), Article 62 Paragraph (7), Article 63 Paragraph (5), Article 64 Paragraph (8), Article 69, Article 81, dan Article 84 Paragraph (2) Law of Water Resources;
4. Government Regulation No 43 of 2008 on Ground Water as the Implementation of Article 10, Article 12 Paragraph (3), Article 13 Paragraph (5), Article 37 Paragraph (3), Article 57 Paragraph (3), Article

58 Paragraph (2), Article 60, Article 69, and Article 76 Law of Water Resources;

5. Government Regulation No 38 of 2011 on River as the implementation of Article 25 Paragraph (3), Ground Water as the Implementation of Article 36 Paragraph (2), dan Ground Water as the Implementation of Article 58 Paragraph (2) Law of Water Resources;
6. Government Regulation No 73 of 2013 on a swamp as the Implementation of Article 25 Paragraph (3), Ground Water as the Implementation of Article 36 Paragraph (2), dan Ground Water as the Implementation of Article 58 Paragraph (2) Law of Water Resources;

The Supreme Court itself is a judicial body in which the judge of the Constitutional Court is passive to the case. Therefore, the Supreme Court cannot review the regulations under the Law if there is no request for a judicial review first. In the other side, the petition for judicial review in the Supreme Court is only a law. Therefore, the Supreme Court cannot possibly cancel all six Derivative Regulations that are not in accordance with the basic principles of water resources management restriction because the Constitutional Court has ruled that the Law No. 7 of 2004 has been canceled and it is not legally binding.

This condition has the potential to cause problems in the management of water resources based on the Law No 11 of 1974 on the Irrigation of which the law is a substitute of Law No. 7 of 2004 on Water Resources. Due to unclear decisions of the non-enforcement of the Derivative Regulation, then

the formal juridical, Derivative Regulation of the Law No. 7 of 2004 is still valid even though it has no legal force. On the other hand, the provisions contained in the Law No 7 of 2004 are not in accordance with the provisions of the Law No 11 of 1974. Therefore, it will cause confusion in practice. Although in the end, it will be in accordance with the principle of *lex superiori derogat legi inferiori*. It means that the regulation which has high power is applicable, so the Law of Irrigation will avoid the existence of the six of implementing regulation under the Law of Water Resources. Therefore, the six of Derivative Regulation to Law No 7 of 2004 will be declared that it is not lined with the basic principle of water resources management restrictions will not running well.

3. The Clean Water Supply system in Indonesia

Article 11 of the Law of Water Resources states that to ensure the implementation of water resources management, especially clean water that can provide the greatest benefit for the interests of the community in all areas of life, the arrangement of water resources management pattern arranged based on river basin with the principle of integration between surface water and groundwater. The pattern of management itself is based on the balance principle between conservation efforts and utilization of water resources.

Clean water is the one used to meet daily needs and its quality meets the health requirements and can be drunk after the process. Therefore, the management system should be done well. The management of water resources itself is an effort to plan, implement, monitor and evaluate the

implementation of conservation of water resources and control of water damage.²³

KepMenKes No. 907/MENKES/SK/VII/2002 states that every water resources manager is required to manage and supervise water sources in the following way:

- a. Ensuring that the produced water meets the health requirements by conducting periodic inspections of the quality of water produced through:
 - 1) Inspection of water treatment agency;
 - 2) Inspection of distribution pipelines;
 - 3) Inspection on pipeline network to consumer;
- b. Conducting safeguards against raw water sources managed from all forms of pollution in accordance with legislation

The Water Resources Law as the decision of the Constitutional Court No. 85/PUU-XI/2013 ruled that water resources law has no legal binding anymore or canceled completely and reactivated the law no 11 of 1974 on irrigation but inside the management of water resources still use the Derivative Regulation that exists in the water resources law itself until now.

The availability of clean water is a difficult problem and is always faced by all countries in the world, including the developed countries. Economic and social development is highly dependent on the availability of water, including for the fulfillment of basic human and environmental needs. The provision of water resources, especially clean water, is an effort to meet the

²³ Article 8 Law No 7 of 2004 on Water Resources

water needs to fulfill the various needs with the appropriate quality and quantity.²⁴

Population growth is the main factor in the emergence of pressure on water resources that require development efforts to meet the needs of the community, both directly and indirectly due to the influence of population migration. Generally, it is known that access to get water is a basic human right. The International conference on water and environment (ICWE) in Dublin in 1992 confirmed that It is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price.

Provision of clean water in Indonesia, especially for urban areas has existed since the Dutch colonial era. After independence, most of the provision of clean water needs in Indonesia is done by Local Water Company (PDAM) in every province, district, and city in Indonesia. Water supply systems in urban areas usually use piped networks that are below ground level. The advantage of using this method is that the distributed water has a safer and healthier quality.

In general, the water supply system in Indonesia is divided into two systems: individual and communal systems. The individual system is the fulfillment of clean water needs individually. This system usually uses shallow springs that contain lots of substances and dissolves salts as raw water, and so less feasible for consumption. While the communal system is a

²⁴ Article 1 Paragraph 19 Law 7 of 2004 on Water Resources

system that is done in an organized manner by utilizing the services of drinking water companies or community-based. This system uses a lot of groundwater as raw water.

The communal systems in Indonesia is used by local Water Company (PDAM) services as service providers that use piped networks as a feature of modern water supply systems. However, this system has not been able to reach all urban areas so that some of the upper-middle-income households that have not been reached by this system use alternative water sources from the soil to fulfill the needs of clean water in their environment. This system is also relatively better because the water has been through the filtration system and other treatments before being distributed to households that are in this system.

With regard to regional authorities in relation to the management of water resources, as provided for in the Law of Irrigation which can be seen in Article 3, it is stated that water and its resources contained therein as mentioned in article 1 number 3, 4 and 5 in the Law of Irrigation is controlled by the state. This suggests the right of control and authority are in the hand of the state and government. Furthermore, Article 4 of the Law on Irrigation also states that the authority of the government as referred to in Article 3 may be delegated to the central and regional government agencies and/or certain legal entities that terms and the ways are governed by regulations government.²⁵

²⁵ Articles 4 paragraph 2 Law no 11 of 1974 on Irrigation

The reactivation of a Law of Irrigation indicates that water resources management is still centralized in that local governments have full authority to regulate and manage water resources, while local governments can only assist the implementation of delegated central government authority (assistance tasks). Nevertheless, the reactivation of the Law No 11 of 1974 on Irrigation is contrary to the principle of regional autonomy which has been rolling since 1999 simultaneously with the formation and repeated changes to the law on regional governments that lead to the principle of decentralized government administration where local governments are given the authority to conduct their own government affairs including in the field of water resources management which is used to encourage the acceleration of development in the regions.

The principle brought by the Law of Irrigation was centralized and it is not only inconsistent with the principle of regional autonomy, but it can also hinder development in the regions. Therefore, the decision of Constitutional Court implies the need of the government to immediately draft a new law related to the management of water resources that can integrate the principle of regional autonomy and also strengthen the role of the state in the management of water resources as a life necessity towards the people's equitable prosperity.

According to Mr. Subarjo, regarding the clean water supplying system in Indonesia, said that:

“Although the Constitutional Court has ruled that the Law No. 7 of 2004 has been abolished and reactivated the Law No. 11 of 1974 on irrigation, the water management system itself still use the system of Law No. 7 of 2004”. (Subarjo:2018).²⁶

In his opinion, we can conclude that the water resources management system in Indonesia still use the Law No 7 of 2004 on Water Resources although that Law has abolished and re-activated the Law No 11 of 1974 on Irrigation.

Based on data analysis and facts in the field, it is stated that the legal implications on the regulation and water management system in which Derivative Regulation such as government regulations, Ministerial regulations, and regulations under the Law No. 7 of 2004 on water resources are still being used, the law has been cancelled as a whole by the Constitutional Court with a decision No 85/PUU-XI/2013. Based on the legal aspects in Indonesia, the actual Derivative Regulation under Law No. 7 of 2004 should not be used anymore.

The reason that the Derivative Regulation under the Law No. 7 of 2004 should not be used again is strengthened by the principle of *the Lex superiori derogate inferiori* which means that high regulation overrides the low regulation.

²⁶ Subarjo, “*Direct Interview*”, Balai Pegelolaan Sumber Daya Air, Yogyakarta, interviewed on July 16th, 2018 at 09.29 p.m.

In knowing the type and hierarchy of legislation, it cannot be separated from the explanation of the *Theory of Aquo* by Hans Kelsen, where this theory discusses the level of legal norms. He argues that the legal norms are tiered and layered in a hierarchy which is used if there is a conflict, in this case, that must be considered in the hierarchy of legislation. For example when there is a conflict between Government Regulation and the Law, then the Law is used because Law has a higher position than the Government Regulation..

The theory above is increasingly clarified in the positive law in Indonesia in the form of Law on the establishment of Legislation according to the provisions of Law No. 12 of 2001, the type and hierarchy of Legislation consist of:

- a. The 1945 Constitution;
- b. The Provision of the People's Consultative Assembly;
- c. Law/Government Regulation in lieu of Law;
- d. Government Regulations;
- e. President Regulations;
- f. Provincial Regulations, and
- g. The Regulations of District/City

Therefore, based on the existing facts, legally, Derivative Regulation under the Law No. 7 of 2004 on Water Resources is declared invalid and not applicable. This is because the Law No. 11 of 1974 on Irrigation which has been re-activated by the Constitutional Court based on the principle *lex*

superiori derogate legi inferiori has a higher position than government regulations.

B. The Similarities and Differences between the Law No 7 of 2004 on Water Resources and the Law No 11 of 1974 on Irrigation

1. The Similarities between Law No 7 of 2004 on Water Resources and Law No 11 of 1974 on Irrigation

To know the similarities between the Law No 7 of 2004 on Water Resources and the Law No 11 of 1974 on Irrigation, we can read and analysis of both. In this research, both Laws are regulating the same thing, which is water. Referring to article 2 of Law No. 11 of 1974, it states that water and its resources, including natural resources contained therein, have social functions and are used for the greatest prosperity of the people. This is the same as what stated in article 5 of the Law No. 7 of 2004 that the state guarantees the right of everyone to get water for a minimum of basic daily needs to fulfill a healthy, clean and productive life. The two articles contained in both of these Laws are essentially the same. It is emphasizing that the state has an obligation to endure the fulfillment of every citizen needs of water for their life continuity.

The second is both legislations also have a similarity in regulating on the water resources management, such as

- 1) Like in the Article 51, Article 52, Article 53 Article 64 of Law No 7 of 2004, in Article 13 of Law No 11 of 1974 on Irrigation also regulate the protection of water and the sources, such as:
 - a) Conducting an effort to save water and its sources;
 - b) Conducting supervision and control water damage to water sources and surrounding areas;
 - c) Preventing the occurrence of water contamination which can harm the use and the environment;
 - d) Conducting supervision and prevention of the water and its sources;

2. The Differences between the Law No 7 of 2004 on Water Resources and the Law No 11 of 1974 on Irrigation

The difference between the Law No. 7 of 2004 on Water Resources and the Law No. 11 of 1974 on Irrigation conclude that:

- 1) The Water Resources Management Principles contained in the Law on Water Resources and Law of Irrigation are very different:
 - a) The Water Resources Law embraces the principle of decentralization in water resources management while the Law of Irrigation embraces the centralized principle in the management of water resources and their sources. In this case, the meaning of the Water Resources Law embrace the decentralization principle since the existence of

Government Regulation No 16 of 2005 on the Development of Drinking Water Supply System in which Article 1 Paragraph 9 states that the implementation of the development of drinking water supply systems is State-Owned/Regional-Owned Enterprises, cooperatives, private business entities or community groups and that the development of the drinking water supply system is the central/regional government. Therefore, in essence, those responsible are State-Owned/Regional-Owned Enterprises.

Government Regulation No. 16 of 2005 is the implementation of Article 40 of the Law on Water Resources. Here it contains the principle of privatization in the development of the Water Supply System and causes a mindset where water managers always benefit and will provide the maximum profits for shareholders, so this situation clearly contradicts the 1945 Constitution.

The Constitutional Court considers that the reactivation of the Law No. 11 of 1974 embraces the principle of centralization. The purpose of this Law is to apply Article 33 Paragraph 3 of 1945 Constitution, where natural resources are controlled by the state for the greatest possible prosperity of the people. As long as the state has the capability of both capital, technology, and management in managing water resources, therefore, the state must directly to manage of water resources. With direct management, it is ensured

that all the results and profits obtained will become state benefits which will automatically benefit the people.

The direct management should be better carried out by the state through state-owned enterprises or regionally owned enterprises. This is because if the state provides management of water resources to be managed by private companies or other legal entities outside the country, profits for the country will be divided so that the benefits for the people are also reduced.

The direct management here is the meaning of Article 33 of the 1945 Constitution which was revealed by Muhammad Hatta as one of the founding leaders of Indonesia. In his opinion, if the direct management cannot be implemented, the government can provide opportunities for foreign parties with the conditions which is determined by the Indonesian government itself, given that the condition of the state/government has not been able to manage natural resources, in this case, water. The conditions determined by the government primarily guarantee that Indonesia's natural wealth must be maintained, the opportunity for foreign parties is temporary, considering that the state that have full rights to manage natural resources.

- b) In the Law No 7 of 2004 there is a principle of privatization in the water resources management process, while the Law No 11 of 1974

has no principle of privatization or involvement of the private sector in the water resources management process.

The meaning of privatization refers to the following articles:

- (1) Article 6, Article, Article 26, Article 45, Article 46, and Article 80 Law of Water Resources contain the content of control and monopoly on water resources that contradict the principle controlled by the state and used for the greatest prosperity of the people.
- (2) Article 6, Article 7, Article 8, Article 9, and Article 10 of the Law on Water Resources contain the content which positions the use of water for commercial interests.
- (3) Article 29 Paragraph 2, Article 48 Paragraph 1, Article 49 Paragraph 1 of Law of the Water Resources contain water resources contain of the content that triggers horizontal conflict. This conflict occurred between river areas, especially identical river areas with administrative areas. This suggests that it is more important and prioritizing to exploit water for the activities of a business and export of water out of the country as it is possible according to article 49 of water resources rather than distributing water to other river communities who need water especially for basic needs.
- (4) The Law on Water Resources eliminate the responsibility of the state to meet water needs for the people.

In the Law No. 7 of 2004 concerning Water Resources, the implementation of the private sector can be carried out if there is no State-Owned Enterprise or Regionally-Owned Business Entity in the area that provides water fulfillment services for the community. With these rules, it is clear that the Law No. 7 of 2004 opens opportunities for the involvement of the private sector in the provision of water for its people. Giving opportunities to private business entities in the provision of raw water for the community will obviously eliminate the state's control over water resources. This contradicts the constitutional mandate in Articles 33 Paragraph (3) which states that the earth, water, and natural resources contained therein are controlled by the state and used for the prosperity of the people.

The diversion of responsibility for ensuring public access to water, especially clean water from the government to the private sector, led to the emergence of the practice of commodification and commercialization of water. From the perspective of environmental ethics, applying water as a commodity and then trading it is a violation. The belief that water is the blessing and source of all life is in a universal value that continues to live in the traditions, beliefs, and even religions embraced by all corners of the world. Most traditional and religious beliefs in Indonesia

regard water as a source of life, blessings, and healing.

Therefore, water is not only for life, but water is life itself.

- (5) Article 92 Paragraph 1 of Water Resources Law is a discriminatory article. The inclusion of a word that is an organization engaged in the field of water resources, as stated in Article 92 of the Law on Water Resources, has violated the main principles in law enforcement based on Article 28I Paragraph 2 of the 1945 Constitution namely recognition and guarantee, fair legal protection and certainty, and equal before the law.
- c) The Law No 7 of 2004 on Water Resources contradicts the 1945 Constitution. While the Law No 11 of 1974 does not contradict the 1945 Constitution. Apart from there is privatization of the water resources management process contained in the Law No. 7 of 2004, another reason is the Law No 7 of 2004 itself contradicts the 1945 Constitution.

There are so many articles in the Law No 7 of 2004 which contradict the 1945 Constitution, among them are 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 also Article 92 Paragraph (1), Paragraph (2), Paragraph (3) of the Law No 7 of 2004 on Water Resources is contradicted with the 1945 Constitution. The number of articles contained in Law No. 7 of 2004 contradict

the 1945 Constitution, therefore, the constitutional court ruled that the water resources as a whole were abolished and did not have legal binding anymore.

Basically, the 1945 Constitution does not close the private sector in the implementation of production resources that control the lives of many people, including in the provision of drinking water. However, the private sector must not eliminate the meaning of controlled by the state. The private sector can be carried out in the form of cooperation and in the implementation stages which do not prevent the state from implementing water, especially drinking water. These limits are not explained in terms of water resources. Therefore, it can provide space for water privatization. If that happens, then it is in much contradiction with the mandate of the 1945 Constitution, especially in Article 33 Paragraph 2 of the 1945 Constitution which affirms that production branches that are important to the state and which control the livelihood of many people are controlled by the state.

From the data analysis on the similarities and differences between the Law 7 of 2004 and the Law No 11 of 1974, it can be concluded that in the similarity between those Laws is concerned about water regulation, but there are differences between the Law No 7 of 2004 and the Law No 11 of 1974. As water resources embrace the principle of privatization and many articles are contradicted with the 1945 Constitution, the Constitutional Court

stipulates that the water resources are removed and reactivated through the Law No. 11 of 1974 on Irrigation to fulfill the legal vacuum until the new law about water resources and management systems is established.