



Utilization of Water Resources from the Perspective of Justice and Human Rights in Indonesian Legislation

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Abstract. This study looks at, evaluates, and critiques laws and regulations pertaining to water resources. Aspects of justice and human rights are among the many topics covered in these laws and regulations, water resources is important and one of the vital resources of human beings, as mentioned in 33rd Article (3rd) clause of Indonesian Constitution of 1945. Effective legislation should be practical and consider philosophical, legal, and sociological dimensions. The life and survival of humans and all living creatures, as well as the unification of nations and the promotion of equitable development, depend heavily on water, which is a gift from God Almighty. The existence of water resources is so important that it is included in the list of human rights. This article is using the concept of relevant virtue, when scarcity of the resources mentioned are not making people unified by their emotional bonds to help each other. Normative legal research methodologies were applied in this work. Normative legal research method is strictly using Primary, Secondary and Tertiary legal sources, such as constitutions and doctrines as the aim for this article is to explain the current condition of water resources management from a legal perspective. Preference theory and justice theory emphasize more on philosophical aspects as instruments for analyzing and considering the content of legal norms, preference and justice theory are used to make amends between the needs of the people and the applications of legal norms. This study will use philosophical and legislative approaches. The study's findings demonstrate that laws and regulations governing water as natural resources have not provided the protection of human rights in their control and use, and have not guaranteed the aspects of justice for most Indonesian, and the Constitutional Courts of Indonesia has offered 4 perspectives: 1.) Relations between the nations, people and water resources; 2.) Basic Human Rights that are protected by the Constitution concerning Natural Resources; 3.) Water management by the Nations; and 4.) Limitations of Water management.

Keywords: Water Resources, Justice, and Human Rights.

1 Introduction

For human existence and livelihood, water is a necessary and critical resource. Thus, the state has the power to manage and control it in accordance with Article 33 paragraph (3) of the 1945 Constitution and Article 2 paragraph (2) of the 5th Act of 1960 respecting Basic Principles of Agrarian Law. According to Article 2 of the Agrarian Law, the word "control" refers to the public aspect. Control is further defined as the

process of planning, managing, conserving, and regulating water resources under Article 2 of the Agrarian Law (Harsono, 2003).

The values of justice are still not reflected in the state's power to control and formulate laws pertaining to land, water, and natural resources. Consequently, it is believed that the community-bias has not yielded any overall advantages. Using a definition taken from David Hume, John Rawls (Rawls, 1999) defines a state of justice as "a normal condition in which human cooperation is possible and necessary," or Circumstance Of Justice (COJ). Hume himself coined the term COJ to explain that justice is only a significant virtue under situations of scarcity and when people are not compelled to act on their own initiative to assist others (Suteki, 2015).

The principle of justice has not been apparent in 7th Act of 2004 concerning Water Resources, which was later replaced by 17th Act of 2019 concerning Water Resources. This is because the law is more oriented towards the economic value sector by giving a very large opportunity for the private sector to manage it. Thus, the water resources law was repealed by the Constitutional Court's Decision Number 85/PUU-XI/2013 regarding the Request for Judicial Review of 7th of 2004 concerning Water Resources (Kasta & Wijaya, 2017)

The creation of numerous rules and regulations is crucial to the state's ability to fulfill its obligations to promote the prosperity of its citizens. This is because it is impossible to avoid state intervention in regulating the welfare of the populace through the creation of rules and regulations in the areas of law, society, politics, economics, culture, the environment, and defense and security. Therefore, it is essential to consider the principles and norms while creating laws and regulations, particularly when creating regulations pertaining to water resources. The principles of good lawmaking, such as those based on Pancasila values, the principle of a state based on law, the principle based on the constitution, and the principle based on laws and regulations developed in accordance with expert opinion, must therefore be taken into consideration when creating laws and regulations. As previously explained, a number of topics can be examined as concerns or issues in this study: How does Indonesian law regulate the use of water resources from a human rights and justice standpoint?

Literature Review

Hans Kelsen states that law is included in the dynamic norm system (Nomodinamics) because law is always formed and abolished by institutions or authorities that have the authority to form and abolish it, so that in this case it is not seen from the point of view of its validity or its maker. (S, 2007)

Since law is inherently dynamic, it will always evolve and adapt to the needs of society while still taking into account the formal provisions that are in place when creating new laws. Similarly, even if a legislation is unjust or does not take into account all societal interests, it nevertheless qualifies as law as long as it satisfies the legal prerequisites for lawmaking.

The principles of social fairness outlined in Article 33 of the 1945 Constitution of the Republic of Indonesia as a whole are still not reflected in the regulation of water resources. Both the 7th Act of 2004 and the 11th Act of 1974, which establish the direction of policy in the regulation of water resources, does not place Article (1) of the 1945 Constitution of the Republic of Indonesia concerning “The economy is arranged as a joint effort based on the principle of kinship,” Article (2) concerning “Branches of production that are important for the state and control the necessities of life of many people are controlled by the state” and Article (4) pertaining to the fundamentals of national economic organization. Since Article 2 of the Agrarian Law merely establishes the state as a regulator, such a construction will lead to the formation of legal politics about the Authority of the State on Water Resources. (Sanim, 2010)

Water or Water Resources is a social object that controls the necessities of life of many people so that its branches of production are also important for the state. Therefore, the state should be in charge of many people’s basic needs rather than private persons or organizations, whether domestic or foreign. (Arinto Nurcahyono, Husni Syam, 2015)

2. Method

Normative legal research, which looks at and analyzes water resource rules, will be employed to undertake this study. The researcher will highlight the philosophical foundation of the regulations under investigation—specifically, those pertaining to water resources—when he looks at the regulations that are the focus of the study. The focus will then also be observed from the perspectives of human rights and justice.

Both a statutory and a philosophical approach will be used in this study. In order for scholars to investigate and examine the Ratio Legis behind the creation of the regulations that are the focus of the study—in this example, water resources—a statutory approach is used.

3. Results and Discussion

In some countries, the constitution, which contains various materials including rules on human rights, is placed as the highest or high-ranking regulatory law, a statute fraught with direct legal consequences (Michelman, 2003). Human rights are now widely acknowledged as a moral, political, and legal framework as well as a set of principles for creating a more peaceful society free from oppression, injustice, and terror. Therefore, guarantees for the preservation of human rights are regarded as an essential feature that any nation must have in order to be deemed a legal state (Asshiddiqie, 2006).

Human rights are governed by Articles 28 A to 28 J of the Constitution of the Republic of Indonesia, as well as additional regulations included in the 39th Act of 1999 concerning Human Rights. Since it creates room for human rights issues to arise, this needs to be reexamined. Laws and regulations must govern the expansion and limitation of governmental authority (Dian Aries Mujiburohman, 1985)

The Explanation of Article 50 of 17th Act of 2019 implicitly entrusts the business of bottled drinking water to the private sector. The 17th Act of 2019 does not regulate the

legal obligations of bottled drinking water business actors. These obligations are regulated in the Minister of Public Works and Public Housing of Republic of Indonesia Regulation Number 1 of 2016. Ministerial Regulations cannot contain sanction provisions as a result of violations of legal obligations according to the principle of no punishment without representative. The 17th Act of 2019 has been improved in the 11th Act of 2020 concerning Job Creation which focuses on increasing investment.

The government has abolished provisions that are considered to make it difficult for investors to enter and hinder economic growth, such as the abolition of the authority of regional regulations in managing natural resources in their regions. Privatization and commercialization of water resources have eliminated the right of the people to water that is just without regard to their economic class. (Arsyad, 2023)

At first, the right to water was only seen as a subordinate right to the right to live in the framework of human rights to water. An attempt to isolate the right to water from the right to life as a distinct human right did not begin until 1977. Mar del Plata, Argentina, hosted the first international conference on water. According to a resolution passed by the conference, "all peoples have the right to have access to drinking water in quantities and of a quality equal to their basic needs." (Plata, 1977)

The idea of human rights is evolving dynamically in tandem with the need to revitalize principles deemed advantageous to human civilization. If the right to water wasn't specifically stated as a human right when the Universal Declaration of Human Rights was being formed, it was more because many parties realized that water and air are essential to human life and that mentioning the right to water as a separate right is a repetition (Barlow, 2012) But things have changed; although humans still require water to survive, access to it is becoming more and more difficult due to global development. Therefore, the right to water, along with the associated ideas and responsibilities of the state, must be explicitly recognized.

then seen from the constitutional standpoint of managing water resources, specifically the viewpoint of human rights as stated in Article 28H of the 1945 Constitution and the viewpoint of state control as stated in Article 33, paragraph (3). The management of water resources must be under state control from upstream to downstream, as further articulated from the standpoint of state authority. To meet citizens' water demands, the state must regulate water sources and construct distribution networks.

The state has a duty to uphold, advance, and provide for the right to water from a human rights standpoint. Given its core function, the private sector cannot be given this responsibility, particularly in the area of water management. Therefore, the state must use State-Owned Enterprises or Regional State-Owned Enterprises to handle comprehensive water management. As a result, the investigation's formulation of the social function associated with water management does not specifically regulate the social function; rather, it merely asserts that the function of water resources is a social function in addition to the ecological and economic functions.

From the main points of the changes to the 16 articles that were amended to the Water Resources Law in the form of replacing terms, adding sentences & paragraphs, and deleting phrases of words, sentences & paragraphs, it can be concluded that the Direction of Policy for Regulating and Managing Water Resources will still be carried out in a "Decentralized" manner through the formation of Water Resources

Management which can be in the form of Ministry Technical Implementation Unit/Regional Technical Implementation Unit/State-owned enterprises/Regional-owned enterprises in the field of Water Resources & Division/Delegation of Tasks and Authorities for Water Resources Management in accordance with the norms, standard procedures and criteria which are set by the Central Government. However, the entire process of Approval or Business Permit for the use of Water Resources will be carried out by referring to the norms, standard procedures and criteria which are set by the Central Government in order to provide Ease in Licensing, so that it leads to “Centralization.” (Yuwono, 2021)

4. Conclusion

The state is responsible for protecting the people’s right to water because access to water is a separate human right. In addition, Article 28I Paragraph (4) states that “the protection, promotion, recognition, and fulfillment of human rights is the responsibility of the state, especially the government.” Constitutional manuscripts and Constitutional Court decisions are two sources that can be used to provide a constitutional perspective on water resource management.

In terms of water resource management, the Constitutional Court provides the following perspectives: (1) the relationship between the state and the people with water; (2) the protection of the right to water guaranteed by the Water Resources Act; (3) state control over water; and (4) restrictions on water management. However, it can be observed that the entire process of Approval or Business Permit for the use of Water Resources is carried out by referring to the Standard Procedures and Criteria set by the Central Government in order to provide Ease in Licensing, which leads to “Centralization”.

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