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CONSTITUTIONAL COURT'S REVIEW AND THE FUTURE OF WATER LAW IN INDONESIA

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'It is more appropriate to say that the state's power lies on its authority to create rules for the economy to function, a rule that forbids the exploitation of the weak by those who own capital'.

Mohammad Hatta
Founding Father of Indonesia

1

BACKGROUND

The enactment of the new Law on Water Resources in Indonesia ('the Law' or 'Water Resources Law') has given rise to many controversies as the Law was seen as an instrument to legalise privatisation of the water sector, an agenda of the World Bank.¹ Farmers, fishermen and various non-governmental organizations (NGOs) considered the Law to be in contradiction with the Constitution, which regulates that such sector shall be controlled by the state.

Acting as a proxy of community members, a group of legal aid foundations and NGOs lodged requests for judicial review to the Indonesian Constitutional Court on 9 June 2004 and 24 February 2005.

The Court however, with seven judges concurring and two dissenting, decided to reject the petition and declare Water Resources Law to be conditionally constitutional, which means that the law is constitutional, on the condition that it is interpreted or applied in a certain way.² This decision would enable the Water Resources Law or any of its provisions to be reviewed and annulled, if the court deems that the implementation of the regulations or its application, are not constitutional.³ Several NGOs are closely monitoring the 'implementing

regulations' of the Law and are ready to submit another judicial review in the near future.⁴

The Court's decision triggered questions from legal experts, especially on the concept of conditionally constitutional which has not been previously recognized in the Indonesian legal system.⁵ This will, however, serve as a signpost for the central and regional governments to remain cautious in creating implementing regulations or applying the Law.⁶ This paper highlights several issues under the law and its implementing regulation that needs to be modified to protect the concerns and interests of the society.

A. Water Regime in Indonesia Prior to the Water Resources Law

Before the Water Resources Law was enacted, Law No. 11 of 1974 on Irrigation served as the main instrument for water management. This law is implemented further by Government Regulation No. 22 of 1982 on Water Governance, Government Regulation No. 23 of 1982 on Irrigation and Drainage and is supported by Basic Agrarian Law No. 5 of 1960.

Law No. 11 of 1974 is a very broad and simple law, which consisted of only 17 Articles.⁷ One of its key issues is that the utilisation of inter-sectoral water

1 According to Benny D Setianto, '[i]t is no longer a secret that the enactment of Law No. 7 of 2004 had a lot to do with World Bank's promise to give a US\$ 300 million loan through its WATSAL program'. See B. Irianto, 'Chaotic Conflict of Constitutional Court Ruling on Water Resources Law', *International NGO Forum on Indonesian Development Newsletter* 6 (2005).

2 *Judicial Review of the Law No. 7 of 2004 on Water Resources*, Constitutional Court of the Republic of Indonesia, Judgment of 13th July 2005, No. 058-059-060-063/PUU-II/2004.

3 On Constitutional Courts applying the doctrine of constitutionally conditional, See V. Autheman, *Global Lesson Learned, Constitutional Courts, Judicial Independence and the Rule of Law* 9 (IFES Rule of Law Series, 2004).

4 'We lost. The Law will not be cancelled and will be implemented immediately. But, the battle has not ended. We are going to keep fighting... However, there are still chance (sic) for us to file another complaint to the court (they call it: conditionally constitutional) if we find any flaws in the implementation of the law, or if we can prove that the implementation of the water law harm the Indonesian people.' See, Nadia Hadad's email at http://www.vannbevegelsen.no/inter/2005-07-20_court_reject_indonesia.txt.

5 Statement of Chairman of the Constitutional Court Prof. Dr. Jimly Asshiddiqie, S.H., in a discussion titled 'Mahkamah Konstitusi dalam Sistem Ketatanegaraan Republik Indonesia' Simalungun Regency, North Sumatera, 11 December 2005.

6 The Chairman of the WALHI, an Indonesian environmental NGO said in a press conference: 'We will monitor several regulations to be submitted to the Constitutional Court, we will ask the parliament to annul Government Regulation No. 16 of 2005 and we will make sure that the people will stand together rejecting water privatisation.' See <http://hukumonline.com/detail.asp?id=13231&cl=Berita>.

7 Indonesia, Law No. 11 Year 1974 Concerning Irrigation. State Gazette Year 1974 No. 65; Supplementary to the State Gazette No. 3046.

uses is to be coordinated by the Minister responsible for water resources.⁸ Law No. 11 does not explicitly mention 'water rights' nor characterise or categorise any of such rights. The only thing that may somewhat be comparable to a form of 'water exploitation right' is Article 11, which requires private parties to obtain a license if they are to carry out a water exploitation project. Paragraph two of Article 11 emphasized that all forms of exploitation must be conducted with the spirit of 'joint enterprise' and 'familial principle'.

It is worthwhile to note that in 1974, the water condition in Indonesia was relatively good with abundant water source everywhere. Consequently, Law No. 11 does not really focus on water management and conservation, but focuses mainly on construction and protection of water installations and buildings. There is an effort to conserve 'land and water' at Article 13(1)a in Law No. 11 but there is no specific provision which protects the water sources.

Since its enactment, foreign investment in the water sector is in compliance with this law. Certainly, the spirit of 'joint enterprise' and 'familial principle' is not materialized in cases where foreign water work companies are involved. Regional water work companies on the other hand often apply this principle.⁹ However, it must be noted that the traditional management system of regional water work companies had caused losses; some are even under heavy debt and are desperately in need of restructuring.

B. Water Regime in Indonesia after Enactment of the Law

The Water Resources Sector Reform Program, a donor-funded government project was completed in May 1998. A draft Law on Water Resources was subsequently prepared in mid-2001. The President

then formally submitted the final Bill to the Parliament in October 2002. The Articles were later approved by the Commission IV of the National Parliament on 11 February 2004 and have been adopted by the General Session of the National Parliament to be enacted by 19 February 2004.

The new Water Resources Law has grown significantly in size (from 17 Articles to 100 Articles) in comparison with the old law. The Law now focuses on water conservation, infrastructure and its management. It targets surface and groundwater and has opened the door for public participation. There is an indication that proponents of this law really had the intention of applying real water management in Indonesia. However, as later discussed in this article, there are several provisions of this Law that need to be amended and there are several important issues on its implementation that require high attention.

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WATER RIGHTS UNDER THE INDONESIAN CONSTITUTION

The Indonesian Constitution perceives water both as a part of human rights and as a natural resource that shall be controlled by the State. The right to water as a part of human rights nonetheless is never explicitly mentioned. Such a right can be inferred from the human rights provisions of the Constitution, which were actually an adoption from various international human rights instruments during the amendment processes.¹⁰

The right to water can be deduced from (1) the right of children to develop and to be nurtured; (2) the right towards the fulfilment of basic needs; (3) the

8 Suharto Sarwan, et.al, 'Development of Water Rights in Indonesia', paper presented at the International Working Conference on Water Rights, Hanoi, Vietnam, 12-15 February 2003.

9 *Perusahaan Daerah Air Minum or PDAM* (Regional Water Work Company) is a Regional Government-Owned Enterprise with the task of providing drinking water to citizens. In several regions such as Jakarta, the companies hold cooperation with foreign water companies.

10 The constitutional amendment process also witnessed a battle between 'neo-liberals' and 'socialists'. The neo-liberals wanted to remove 'collectivism' and 'familial principle' from the Constitution and replace it with free and fair competition. The attempt did not succeed. See Perang Pasal Belum Usai, 'The Battle for Articles is not Yet Finished', *Gatra Magazine*, 23 April 2005.

right to a life of well-being in body and mind and to enjoy a good and healthy environment; (4) the right to obtain social security; and (5) the right to cultural identities and the acknowledgment of the rights of traditional communities.¹¹

Water as a natural resource is regulated in the Economic chapters of the Constitution.¹² In this regard, it is important to note that the Constitution adopts a socialistic approach towards the economy by mandating it to be structured 'as a common endeavour based on familial principles'.¹³ The Founding Fathers of the nation inserted the provision to restructure Indonesia's economy from the previous 'colonial' economy into an economy based on 'collectivism'.¹⁴

To materialize the economy based on 'collectivism' and 'familial principle', the Constitution holds that production sectors that are vital to the State and that affect the livelihood of a considerable part of the population are to be controlled by the State.¹⁵ Oil and gas, geothermal, some of the mining activities and the water sector, fall within this category.¹⁶

Sectors that are 'controlled by the State' are not open to appropriation by private entities. The exploration of this sector however may be undertaken through contractual arrangements between the government and private parties as has been done through Production Sharing Contracts in the oil sector and Mining License in the mining and coal sectors and *Kerja Sama Operasi* (Cooperation Contract) or Build-Operate-Transfer contracts for Water Resources.¹⁷ The Constitutional phrase of 'controlled by the State' is defined as the state's power to create policy, aimed at administering, managing, regulating and supervising certain sectors.¹⁸ The Constitutional Court had invalidated Law No.20 of 2002 on Electricity in its entirety because the unbundling of electricity production and the provision of such service by private parties made it impossible for the State to control the sector.¹⁹ The same Court had annulled several Articles on Law No. 22 of 2004, which 'authorise' enterprises to undertake exploration and exploitation of the Oil and Gas Sector and relinquish oil and gas price determination to the market's mechanism.²⁰ According to the Court, the 'authority' to undertake exploration and exploitation lie in the hands of the government and it cannot be delegated to private entities.²¹ Private entities can act only as a partner to the government through concession contracts.

The most important feature in the oil and gas judicial review is that the Court considers the Oil and Gas Sector as a production branch important to the State and pivotal to the lives of the people. As a consequence, the Court prescribes that the price determination in this sector must be conducted by the government and not to be relinquished to the market's mechanism, albeit taking into account the

11 See Constitution of the Republic of Indonesia, Year 1945 and its Amendments, Articles 28 B (2), 28 C (1), 28 H (1), 28 I (3) and 28 I (3) (hereafter the Constitution).

12 *Id.* Chapter XIV.

13 *Id.* at Article 33 (1).

14 See 'Ekonomi Indonesia di Masa Datang', ('Indonesia's Economy in the Future'), Address of the Vice President Dr. Mohammad Hatta, 3rd February 1946. See Sri-Edi Swasono et al. eds., *Mohammad Hatta: Demokrasi Kita, Bebas Aktif, Ekonomi Masa Depan* (Jakarta: UI-Press, 1992), pp. 5-8. Hatta's statements and writings have been used by the Constitutional Court as a supplementary tool for interpretation.

15 See the Constitution, note 11 above at Article 33 (2). Similar provision can be found in Article 7 of the Constitution of People's Republic of China and Article 7 of the Constitution of Russia 1993.

16 This is affirmed by Article 6 of Law No. 1 Year 1967 Concerning Foreign Investment (State Gazette Year 1967 Number 1) which states: 'The business sectors that are completely closed to foreign capital investment are sectors which are of vital importance to the State, and strongly affect the livelihood of many of the people, including: harbors; production, transmission and distribution of electric power for the public; telecommunication; navigation; aviation; drinking water; public railways; atomic reactors; mass media.' In order to tackle this provision, private parties often create a company under PMDN (national capital investment) scheme. However, in order to perform such scheme, foreign parties must share a great portion of the ownership in the company with local parties.

17 See, e.g., Indonesia, Law No. 22 of 2001 Concerning Oil and Gas, State Gazette, 2001, Supplementary to the State Gazette No. 4152.

18 'Controlled by the State' is therefore not similar with the notion of ownership as recognized in private law.

19 *Judicial Review of Law No. 20 of 2002 Concerning Electricity*, Constitutional Court of the Republic of Indonesia, Judgment of 1st December 2004, No. 001-021-022/PUU-I/2003.

20 *Judicial Review of Law No. 22 of 2001 Concerning Oil and Gas*, Constitutional Court of the Republic of Indonesia, Judgment of 15th December 2004, No. 002/PUU-I/2003.

21 *Id.* at p. 222.

interests of certain groups in the society and free and fair competition.²²

Water resources enjoy a different status compared to those natural resources explained above as it falls under two different provisions in the Constitution, as a human right provision that the State must fulfil and as a natural resource the utilisation of which must be conducted based on familial principle. Hence, the implementing regulations of the Water Resources Law should be more stringent compared to other ordinary natural resources. Compared to the undertakings in common natural resources, this salient character of the Water Resources Law shall result in a lesser degree of private entities' participation, increased subjection to government scrutiny and constitute heavier liabilities and responsibilities towards its consumers.

As per the Water Resources Law, both the central and the regional governments, are mandated to carry out water exploitation and they will have to take into account the above consideration to avoid the Law from being invalidated by the Constitutional Court. Every level of the implementing regulations issued from Government Regulation, Presidential Regulations to Regional Regulations and the contracts made by and between central or local governments and private entities must therefore ensure its compliance with the Constitution.²³

3 WATER RESOURCES LAW AND ITS JUDICIAL REVIEW

A. Structure of Water Resources Law

The Water Resources Law consists of 100 Articles divided into 18 Chapters. The first chapter regulates the

²² 'The Court considered that the Government's intervention in the form of price determination shall be a dominant feature in vital production sectors which involves the livelihood of many people'. *Id.* at p. 227.

²³ See Indonesia, Law No. 10 of 2004 on the Formation of Legal Rules, State Gazette, 2004 No. 53, Supplementary to the State Gazette No. 4389.

standard definitional and general provisions. The second chapter governs responsibility of the institutions related to water management. It provides for dividing and delegating authorities between central, provincial, city/regency and village government in managing water and establishing water councils from the national to village levels. The water councils are mostly advisory bodies. The decision making lies at the governmental agency.

The third chapter regulates water conservation and the fourth chapter regulates water exploitation. Other crucial chapters include the tenth chapter on financing, eleventh chapter on community's role, thirteenth chapter on the settlement of disputes, fourteenth chapter on litigation and sixteenth chapter on criminal provisions.

Before moving on further, it might be important to explain the hierarchy of laws and regulation in Indonesia.²⁴ The hierarchy is as follows, Constitution, Parliament enacted Laws, Government Regulation (enacted by the President as mandated by a specific Law), Presidential Regulation (enacted by the President as mandated by a specific Law or at his own initiative) and Regional Regulation (enacted by the Regional House of Representative).

Government Regulation, Presidential Regulation and Regional Regulations are often referred to as implementing regulations of a Law. However, the Ministerial Decree and Ministerial Decision (enacted by the Minister for his department), which implements a Law in their respective sectors are also often, referred as an important part of implementing regulations in practice. It must be noted that after decentralization is sought, plenty of Ministerial Regulations are in conflict with Regional Regulations.

The Water Resources Law mandated the government to enact more or less 25 governmental regulations, namely government regulation on the protection and preservation of the water sources; management of water quality and water pollution control; conservation of water resources; water source zone; water resources management plan for each river area; development of river, lake, swamp, and other surface water sources; development of

²⁴ *Id.*

ground water; utilisation of cloud by means of the weather modification technology; utilisation of sea water that exists on land; development of the drinking water provision; development of the irrigation system; development of water resources for industrial and mining purposes; development of the water resources for energy purpose; development of water resources as a network of transportation pre facilities; prevention of damage and disasters due to the destructive force of water; restoration of the destructive force of water; inventorying of the water resources; water resources management planning; construction work on the water source; water resources information system; empowering and supervising the water resources management; financing of water resources management; criteria and procedure to determine the river area and the ground water curvature; management of water quality and water pollution control; and procedure to stipulate the water source zone.

Many of these Governmental Regulations will be detailed in regional and ministerial regulations and will play a very important role for water governance in Indonesia. At the time of writing this article, the Government has made only one government regulation, namely Government Regulation No. 16, 2005 on the Drinking Water Provision System. This is indeed the most important Regulation, which needs to be prioritised. However, as discussed below, this regulation still requires modification to protect the public interest.

B. Purpose of the Water Resources Law

Water Resources Law was enacted to respond to the imbalance between the availability of water that continues to decrease and the need for water that continues to increase, and to replace Law Number 11 of 1974 concerning Irrigation.²⁵

Many parties accused the Law as an accessory to an international effort to conduct water

privatisation.²⁶ In 2001, the Asian Development Bank (hereafter ADB) had provided technical assistance to the Indonesian government to assess the regulatory framework for private and public supply and wastewater enterprises.²⁷ The project was expected to result in a recommendation in reforming the water regulatory framework in an effort to create the condition conducive to private sector participation.²⁸ The completion report of the Technical Assistance rated its project 'successful'.²⁹

C. Key Issues in the Water Resources Law

1. Right to Water

The Law does not explicitly mention the human right to water. However, the right to access water for minimum daily basic need is guaranteed by the state through Article 5.³⁰ Under this provision, the state holds the obligation to organize various efforts to guarantee the availability of water for everyone residing within the territory of the Republic of Indonesia. The extent of daily minimum basic need for water will be based on the guidelines to be stipulated by the Government. Under the Law, it is the city/regency governments that have a specific duty to fulfil the minimum daily basic need for water of the community in their respective areas.³¹

26 The Water Resources Law was approved in February 2004 by the Indonesian Parliament amidst public criticism and strong opposition. It cleared the way for the then long-delayed disbursement of the final \$150 million tranche of the World Bank's Water Resources Sector Adjustment Loan (WATSAL), which provided balance of payments assistance for policy, legal, regulatory, and administrative reforms in the water resources and irrigation sector. See http://www.bicusa.org/bicusa/issues/water_resources_sector_adjustment_loan_watsal_indonesia/index.php.

27 Technical Assistance to the Republic of Indonesia, Tar Ino 35142, Regulatory Framework for Private and Public Supply and Wastewater Enterprises, ADB, 2001.

28 The goal of the TA is to promote good governance in the water supply and wastewater sector and to create enabling conditions that are conducive to Private Sector Participation. *Id.* at p. 3.

29 TA 3761-INO: Regulatory Framework for Private and Public Water Supply and Wastewater Enterprises, SESS Division, ADB, 2004.

30 See Water Resources Law, note 25 above, Article 5.

31 *Id.* Article 16(h).

25 Preamble, Law No. 7 of 2004 on Water Resources, State Gazette, 2004 No. 32, Supplementary to the State Gazette No. 4377 [hereafter Water Resources Law], reproduced in this issue of LEAD-Journal. For a comparison on the motivation of the previous law (Law No 11 of 1974 on Irrigation), See Section Water Regime in Indonesia Prior to the Water Resources Law above page 3.

2. Water Rights

a) The term for 'water rights' under the law

The Law's characterization of 'water right' is somewhat ambiguous as it uses almost similar terms for different contexts.

The term *Hak Guna Air* (the rough English translation would be water usage right) is used to characterise what is generally known as 'water rights'. This right is interpreted as a general right which comprises of two other derivative rights, namely *Hak Guna Pakai Air* to describe water rights for daily subsistence and *Hak Guna Usaha Air* to refer to water rights for commercial purposes.

The confusion arises when interpreting what *Hak Guna Pakai Air* actually means. *Hak* in English is right, *Guna* means use, *Pakai* also means use or utilise and *Air* means water. If roughly translated, *Hak Guna Pakai Air* in English would be 'water use right in utilising water'.

It appears that the drafters intend to avoid the tendency that the Law was created to allow privatisation by adding the word *Guna* (use) in the article. Unfortunately, this will only create misunderstanding in the future. Judges and ordinary people may be unable to distinguish between the general idea and the derivative idea of the concept.³² The drafter of the Law should have avoided using repetition of the word in describing the rights. It would be wiser to use simply 'water rights' to describe a general idea of the right related to water, 'water use right' to describe the derivative concept which deals with the utilisation of water for daily subsistence and 'water exploitation right' to explain the subsidiary idea that deals with commercialisation of water. This article will use the suggested term to avoid confusion.

32 Promulgation of Law is very slow in Indonesia. It would be difficult even for judges to access the preparatory work (legislative drafts and Parliament's proceeding notes) of an Act at the House of Representatives. See Mohamad Mova Al 'Afghani, 'Hyperregulated Society and Its Discontents', available at http://www.theceli.com/modules.php?name=Downloads&d_op=getit&lid=32.

Under the Law, both 'water use right' and 'water exploitation right' may not be leased or assigned, partially or entirely.³³

b) Water Use Right

In general, so long as it is used to fulfil the daily basic needs of individuals and smallholders of estate crops within the irrigation system, 'water use right' can be implemented without permit.³⁴ However, if the method of utilisation is carried out by changing the natural condition of the water source, or is aimed for the interests of a group that requires a significant amount of water or is used for smallholder estate crops outside of the existing irrigation system, the utilisation would require a permit that will be granted by the central or regional government.³⁵

Article 8 (1) of the Law only exempts already existing irrigation scheme from license requirement, as such, future traditional irrigation effort conducted by farmers would require expressed license from the government.

c) Water Exploitation Right

The commercialisation of water is possible as the Law granted 'water exploitation right' that can be given to individuals or enterprises pursuant to the permit from the Government or regional government.³⁶ Holder of the water exploitation right may flow water above another person's land based on approval from the holder of rights over the relevant land. As the approval may take the form of indemnity or compensation, the Law stipulates that the amount of compensation shall be determined based on the agreement between the parties, or in other words, between the holder of water exploitation right and the land-owner or the traditional community.

d) 'Privatisation' through the Law

Legislators and government officials refuse to acknowledge that the Law opens door for privatisation.

33 Water Resources Law, note 25 above, Article 7 (2).

34 *Id.* Article 8 (1).

35 *Id.* Article 8 (2).

36 *Id.* Article 9 (1).

They define privatisation as the selling of government's shares at state owned enterprise to other parties in order to boost the performance and value of the company and to expand share ownership for the public. Such, is indeed the legal definition of privatisation as recognised in Indonesia.³⁷

However, it is generally accepted that transfer of government shares to private parties constitutes only a part of privatisation. Anything that leads to the transfer of management of a service or activity from the government to the private sector is in fact privatisation. The Water Resources Law opens the door to privatisation as it allows private parties to manage water resources, something that is traditionally administered by the government.³⁸

As has been discussed above, the legal basis for private entities to undertake water exploitation is conferred in the Law, by granting 'water exploitation right' to either individuals or enterprises. It is important to remind that this exploitation right is not transferable to a third party. Thus, a company will not be able to assign its license to exploit water or use it as security in a finance project. It is possible however, that a company's control over certain license to exploit water is 'transferred' to a third party through a change of ownership.³⁹

None of the existing laws and regulations set a limitation on private participation in water related projects. Thus, private entities can participate in every stage of water resources management.

³⁷ See Indonesia, Article 1 (12) of Law No. 19 of 2003 Concerning State Owned Enterprise, State Gazette, 2003 No. 70.

³⁸ Private participation in drinking water provision is regulated discreetly. Direct undertaking in drinking water is not possible since the Law in Article 40 (3) mandated state owned enterprises and/or regionally owned enterprises to carry out the development of the drinking water provision system. Article 40 (4) however allows cooperatives, private enterprises, and the community to participate in the development of the drinking water provision system. So, private parties can only operate drinking water when acting as the partner of state or regional-owned water work companies.

³⁹ See Indonesia, Article 103(6) of Law No. 1 Year 2005 on Limited Liability Company, State Gazette Year 1995 No. 13; Supplementary to the State Gazette No 3587.

e) Recognition of Customary Water Rights

Customary water rights are recognized under the Law on the condition that it does not contradict with national interest or the laws and regulations. In order to prove the existence of such right, the Law requires that such right should have been affirmed by the local regional regulations.⁴⁰

D. Judicial Review

The Applicants requested the Court to annul the Law in its entirety or, as an alternative, submitted a review on specific Articles of the Law, namely Articles 9, 10, 26, 45, 46, 80, 91, 92, 39 (2), 6 (3) and (2), 38 (2), 48 (1), 29 (5), and 49 (4).⁴¹

The Court decided to review the Law in its entirety, including answering Applicants' petitions in accordance with the Articles they had submitted. The Court with seven judges concurring and two dissenting decided to reject the petitions and declare the Water Resources Law to be conditionally constitutional. The Court's general overview of the Law, its per-article explanations and opinions of the dissenting judges, will be explained below.

1. General overview

The concurring decision quoted several articles from international human rights instruments related to water, namely the WHO Charter, Article 25 of the Universal Declaration of Human Rights, Article 12 of the International Covenant on Economic, Social and Cultural Rights and Article 24(1) of the Convention on the Rights of the Child.⁴²

⁴⁰ Water Resources Law, note 25 above at Article 6 (3) states that traditional rights of communities over water resources as referred to in paragraph (2) shall continue to be recognised to the extent that they still exist and have been affirmed by the local regional regulations.

⁴¹ The Court can decide either to annul a Law in its entirety or partially, annulling some Articles of the Law.

⁴² See Article 25 (1) of the Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), Article 11 (1) International Covenant on Economic, Social and Cultural Rights, New York, 16 Dec. 1966, 6 *Int'l Leg. Mat.* 360 (1967) and Article 24(1) Convention on the Rights of the Child, 20 November 1989, 28 *Int'l Leg. Mat.* 1448 (1989).

The decision recognised that as a protector of human rights, the state has the obligation to respect, protect and fulfil the right to water. However, it stated that although it also has a *res communis* nature such as the air, the character of water is different.

On the other hand, Judge Mukhtie Fadjar (dissenting) highlighted the society's resistance to the Water Law and suggested that the Law should have been revised. In general, he considered that the Court could actually approve some of the petitions of the Applicants.

2. State's duties with regard to the right to water

The decision considered that the formulation of Article 5 of the Law which guarantees 'everyone's right to obtain water for their minimum daily basic needs' is sufficient in protecting the citizens' human rights to water. However, it acknowledged that the Law did not detail such guarantee in the form of responsibility of Central and Provincial Government. The decision stated that the absence of provision for detailed responsibility of Central and Provincial governments in the Law should not be interpreted to mean that providing water for daily need is the sole responsibility of City/Regency government.

3. Water rights

Judge Mukhtie Fadjar (dissenting) disagreed with the term *Hak Guna Air* used in Article 7(1).⁴³ He considered the term to incline more towards 'water rights' than 'the right to water' and he feared that it would trigger misinterpretation. The Judge proposed to use the word 'License' instead of 'Right' so that the term will read 'water use license', 'water utilisation license' and 'water exploitation license'.

It is interesting that the judge wished the term to be replaced into license since basically each license also creates rights and obligations to its holders in a certain sense. Moreover, replacing 'water use right' (the right to use water for daily subsistence) with 'water use license' may imply the requirement for governmental license even to use it only for daily needs.

He further rejected Article 9(1), which allows licensing water to companies under 'water exploitation right'.⁴⁴ According to the judge, such license can only be granted to state owned enterprise or regional owned enterprise.

4. Role of regional water work companies

Regional owned water work companies according to the decision, shall be positioned as the state's operational unit and not as a profit oriented company.⁴⁵

5. Full cost recovery

According to the decision, charging a price for water processing is normal. However, the decision states that it shall not be used as a medium to charge high prices to citizens. Pricing should be transparent and involve community members. The decision also emphasises that implementing regulations of the Law should comprise the obligation of regional governments to include water charges in their yearly budget.

Judge Mukhtie Fadjar (dissenting) disagreed with the 'full cost recovery' in Article 80 and termed it 'cloaked privatisation'.

6. Water regulation

The decision recognised that the regulation of water stems from two Articles of the Constitution, namely, from articles regulating human rights and those regulating utilisation of economic resources. As a consequence, water regulation should be different in nature and unique compared to ordinary natural resources regulation. The decision suggested the Government to apply this principle when issuing implementing regulation of the Water Law.

7. Water exploitation right

The Court was of the view that Article 7(1) of the Law was not meant to give the right to appropriate water. It affirms the Law's elucidation, which states that water shall not be a subject of ownership. The decision affirmed two concepts entailed in water

⁴³ See page 9 above for a discussion relating to terminology.

⁴⁴ See page 13 above for a discussion concerning the 'Water Exploitation Right'.

⁴⁵ On the Regional Water Work Company, see note 9 above.

right, namely (i) the right *in persona*, which are attached to each individuals, and (ii) the right of exploitation, which originates merely from license.

Judge Maruaar Siahaan (dissenting) disagreed on Article 7. The Judge was of the opinion that although transfer of license is not possible under the Law, capital mobilisation through Stock Exchange will enable a change of share ownership. The Judge's dissenting opinion raises an interesting issue on how share ownership at water work companies should be limited. This will be elaborated further below.

8. Customary water right

The Constitutional Court rejected the Applicants' claim that the requirement of affirmation by Regional Regulations is inconsistent with Constitutional provisions that honour the right of traditional communities.⁴⁶

According to the Court, the requirement of affirmation by Regional Regulation shall not be interpreted as constitutively determining the existence of customary right, but only as a declaration.

Judge Mukhtie Fajar (dissenting) was of the opinion that currently there is no national standard to interpret the Constitutional Articles on regional governance.⁴⁷

9. Utilisation of sea water that exists on land

According to Article 39, enterprises and individuals may utilise the seawater that exists on land for business activities after obtaining the water resources exploitation permit from the Government and/or regional government. Applicants considered that this Article might endanger traditional salt farmers, as the law requires them to operate on licence.

The decision disagreed with the Applicants and stated that if this provision is annulled, the Law will no longer provide any protection towards commercial projects

such as large-scale shrimp farms, which could bring potential adverse effect to the environment. The Court suggested that traditional salt farmers could be protected by the Law's Implementing Regulations.

E. Consequences of the Judicial Review

The Court held the Law to be conditionally constitutional. It considers the Law sufficient in protecting the citizen's right and is so far compatible with the Constitution. It however warned that if the implementation is different than what has been outlined by the Court in its decision, the Law could be subjected to a re-judicial review.

The Court is silent with regard to the parameters of 'implementation'. Implementation can mean Implementing Regulations of the Law or the Government's Practice in the form of decrees, circulars or unwritten decisions of the bureaucracy. It is not known as to whether for example, a single cooperation contract between a regional government and a foreign investor or a bureaucratic order requiring a traditional salt farmer to obtain license from his village chief can be used as a ground for re-judicial review.

The author is of the opinion that examination of conditional constitutionality should refer to policies of the Central Government and validity of the Law's Implementing Regulations. It is also important to note that the Court tends to reinterpret the Law at several occasions in its judicial review as seen when examining customary water right.⁴⁸

4

RECOMMENDATIONS FOR WATER REGULATIONS AND POLICIES

Both the Water Resources Law and Government Regulation No. 16 of 2005 regulate private participation in the water sector half-heartedly. It regulates private

46 Constitutional Court Decision on the Judicial Review of Water Resources Law, *see* note 2 above at p. 503.

47 *See* note 51 above.

48 *See* page 13 above.

sector participation with a facade, in similar Articles regulating the participation from state/regional owned enterprise and cooperatives.⁴⁹

This is unfortunate given the conditions that over 90 per cent of regional drinking water companies are in critical conditions.⁵⁰ As of today, 22 percent of the total number of regional-government-owned water needs to be well managed. If privatisation is to be opted, an effective monitoring, oversight and regulation would then be required.⁵¹

The current half-hearted regulation results in an unclear extent of private participation, type of licenses, terms, conditions, and mechanisms of cooperation and concessions. The following part will recommend which part of the Law and its 'Implementing Regulations' need to be reformed in order to enhance water management in Indonesia.

A. Parts of the Law that should be amended

There are two parts of the Law which may require a Legislative Review (amendment by the House of Representatives) namely (i) confirmation on which prevails when there is a collision between water rights and (ii) protection toward water source.

1. Conflict between the two rights

It often occurs that the companies holding licenses to exploit water sources hinder the

enjoyment of right to water by the community members.⁵²

In cases where holders of the water exploitation license hinder enjoyment of the community members under the water use right, no instant remedy is available under the Law. The injured parties will have to undergo court proceedings.⁵³

It is unfortunate that the Law emphasises only the duty of the city/regency regional government in providing water for community's daily basic needs but fails to protect the community's access to water source that may be potentially disturbed by holders of water exploitation right licenses. The current formulation in the Law gives plenty of room for private parties that hold exploitation licenses to escape accusation of hindering the enjoyment of water use right holders. It would be better if in the future, the law is amended so as to include (1) recognition that water use right prevails over water exploitation right and that (2) private parties holding water exploitation rights have the duty to make sure that the implementation of their right does not affect the enjoyment of water use right holders and if such enjoyment is impeded then the water exploitation right holders must provide remedy to the injured parties.⁵⁴

An example of difficulty with the current law will arise when a water company requests the Regional Government to issue a regulation requiring their

49 See note 40 above. Cooperative is a legal entity based on familial principle.

50 Over 91 per cent of regional owned water work companies are ailing. See Tempo Interactive, May 13th 2004.

51 Many public systems are reasonably well managed. Often-cited examples include various U.S. Municipal Utility Districts, the Dutch Water Companies, Australian State Water Authorities, and the Singapore Water Board. Some private water utilities are also reasonably well managed, including utilities in France and the United Kingdom and at least a few private utilities in Latin America and Asia. Proponents of privatisation often cite La Paz, Bolivia; Macao, China; and many cities in Argentina as successes. See Gary H. Wolff, P.E and Meena Palaniappan, 'Public or Private Water Management? Cutting the Guardian Knot', *Journal of Water Resources Planning and Management*, ASCE, January/February 2004.

52 In 2002, farmers in the Polanharjo district staged a demonstration against PT Tirta Investama, a bottled water company which they believed to have been responsible for the malfunctioning of their irrigation system See Tuan-Tuan, Beta Terjajah, 'Gentlemen, We are Colonised!', *Gatra Magazine*, see note 16 at p. 141.

53 Water Resources Law, see note 25 above, Article 82 (f). Article 82 (b) states that the community has the right to obtain a reasonable compensation for the damage suffered by them due to the management of water resources. However, its elucidation clarifies that damage here means damage incurred due to the loss or decrease of function or rights over land, building, plants, and other items on it due to the construction of dams, barriers, dikes, channels, and other water resources management infrastructure buildings.

54 *Id.* Compare with elucidation of Article 29(3) of the Law which states that '[i]n the event of any conflict of interest between the fulfilment of daily basic needs and the fulfilment of the need for water irrigation for smallholder estate crops, for example in the event of extreme drought, the fulfilment of daily basic needs shall be prioritized'.

citizens to close any shallow or deep wells within their territory in order to make water management easier for the company.

If not modified with the above suggestion, the law can be interpreted as authorising Regional Governments to close wells as a part of an agreed water management plan. Although the law provides community members the right to object towards any water management plan in their region, given the condition of information dissemination and the low access of community to local governance, this provision could be rendered useless.⁵⁵

If there is a clear regulation concerning the unimpeded enjoyment of water use right, people can reject the regional government's decision in closing their wells and receive restitution if their well's performance is hindered due to the exploitation conducted by the private parties.

2. *Liabilities for damage caused to water sources*

A water source is defined as either the natural and/or artificial place or container for water that exists at, above, or under the ground surface. The Law distinguishes the mental element of perpetrators resulting in the damage of the water source into (1) conducts done with intention and (2) conducts performed negligently. The Law also distinguishes the circumstances in which the damage occurred due to (1) certain activities; and (2) water utilisation.⁵⁶

The Law criminalises everyone who intentionally:

i. committed acts that incurred damages to the water source and its pre facilities, disturbed the effort to preserve water, and/or causes water pollution, with a maximum jail sentence of nine years and a maximum penalty of Rp 1.500.000.000;

ii. committed acts of water utilisation that are detrimental to other people or parties and damages the

function of the water source with a maximum jail sentence of six years and a maximum penalty of Rp1.000.000.000,00 (one billion rupiah);

The Law also criminalises everyone who due to his or her negligence has:

i. caused damage to the water resources and its pre facilities, disturbs effort to preserve water, and/or causes water pollution with a maximum jail sentence of eighteen months and a maximum penalty of Rp 300.000.000;

ii. carried out water utilisation actions that are detrimental to other people or parties and damages the function of the water source with a jail sentence of one year and a maximum penalty of Rp 200.000.000.

The Law distinguishes between damages committed with intention or negligence and damages occurred due to certain activities or ordinary water utilisation and this distinction is unnecessary and ineffective. Intention requires proof of both a wish to do something and knowledge of the consequences that will result from the action. Unless the prosecutor can prove these two elements, the perpetrator can escape accusations. Negligence on the other hand requires prosecutors to prove that the perpetrator has abandoned a certain standard of diligence or has failed to do what a reasonable man is required to perform.

Distinction into (1) damages occurred due to certain activities and (2) damages occurred due to water utilisation is also not necessary as the expected outcome of the action is actually similar: the destruction or impairment of the water source.

In many environmental cases, the notion of strict liability has been applied.⁵⁷ With this principle, the perpetrators can be held liable if the prosecutor can prove the causal relation between the activities conducted by the perpetrator and the damage resulting from it, irrespective of his original intention or the due diligence he has exercised. Strict

⁵⁵ *Id.* Article 62(3) provides that the community shall be entitled to declare their objection against the draft of the water resources management plan that has been announced within a certain period in accordance with the local conditions.

⁵⁶ See Article 95 of the Law.

⁵⁷ C. O'Keefe, 'Transboundary Pollution and the Strict Liability Issue: The Work of the International Law Commission on the Topic of International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law', 18 *Denv. J. Int'l. L. & Pol'y* 145 (1990).

Liability will also be beneficial when a corporation is involved in the crime, as it would be difficult to prove the existence of a specific intention to conduct a crime.

In addition, the Law would also need to be modified in order to explain what it really meant by ‘in the event the crime concerning the water resources ... is committed by an enterprise, the criminal sanction shall be imposed on the relevant enterprises’.⁵⁸ This provision failed to specify which person that it tries to target. When corporation is involved, there could be several possibilities of persons liable:

I. Directors or Managers, for the conducts of their employee acting in the normal course of his employment based on the policies provided by them;

II. the Managers or superior officers, for the conducts of their employee acting in the normal course of his employment based on the instruction or commands directly inflicted by them; or

III. the Corporation itself, as a legal person

The law must clarify whom it intends to target and the condition that needs to be fulfilled, in doing so.

B. Reforming the Law’s Implementing Regulations

As has been discussed above, the ‘Implementing Regulation’ covers every regulation existing under a Law in its level of hierarchy, that is to say Presidential Regulations and Regional Regulations.

1. Share ownership in water companies

It can be suggested that in order to safeguard the constitutionality of Water Law’s Implementing Regulations, the government is required to regulate share ownership of water companies. The government can require that every change in ownership of water companies will only be valid upon the express approval of Regional Governments. Such a requirement can also

⁵⁸ See Water Resources Law, note 25 above. Article 96 provides: ‘In the event the crime pertaining to the water resources ... is committed by an enterprise, the criminal sanction shall be imposed on the relevant enterprises’.

be inserted as a mandatory negative covenant provision in water supply agreements.

Company law provides that when involved in violations of law conducted by their company, shareholders can be held personally liable.⁵⁹ However, through a Special Purpose Vehicle (SPV) or nominee agreement, a person can own a company indirectly. Such person can escape responsibility when his company is involved in a crime, as he is not the ‘legal owner’ of the company. To overcome these challenges, Regional Governments need to conduct a thorough and prudent enquiry about companies interested in undertaking water resources related projects and avoid engaging in business with companies using SPV or nominee agreements.⁶⁰

2. Type of contracts

The normal contracts between regional government/regionally owned companies and private parties take the form of cooperation contracts, management cooperation, joint ventures, Build-Operate-Transfer and concession contracts. These types of contracts are not regulated either in Law or in Government Regulation. While giving the regional government the liberty to determine its type of contract with private parties is proper, this raises questions as to whether contracts with a Build-Operate-Own mechanism can be allowed for drinking water companies.

Thus, the ‘Implementing Regulation’ of the Law needs to regulate the type of contracts that are not permissible. Contracts that lead to the transfer of ownership to private parties should not be allowed. All contracts must be aimed towards a regional self-reliant water resources management.

⁵⁹ *Id.* Article 3 (2). This specific Article introduces ‘piercing the corporate veil’ provision, which is commonly found in other jurisdictions. However, the masquerading of capital owners through multiple special purpose vehicles and nominee agreements often renders this provision useless.

⁶⁰ In light of regional autonomy, the Regional Governments become the pioneers in managing water resources in its territory. The Central Government’s role in this case is very minimal.

3. *Price determination*

Water Resources Law is silent with regard to price determination to consumers in water related projects, except that it prescribes that the Implementing Regulation on the development of the drinking water provision system shall be aimed at establishing a qualified drinking water service management at an 'affordable price'.

Provisions on price determination can be found in the Law's Implementing Regulation. According to Government Regulation No. 16 of 2005, the regional government has the right to determine the price for drinking water provisions that are administered by regional state owned enterprise. Unfortunately, Heads of regional governments must base their pricing on cooperation contracts when the drinking water provision is undertaken by private enterprises.

This requirement in basing price determination on cooperation contracts will hinder the government's role in creating policy, managing, regulating, administering and supervising the water sector. Judging from the Court's decision in the electricity and, oil and gas cases, price determination becomes the primary consideration in deciding whether certain provisions of a regulation have breached the Constitution. In both cases where production branches important to the State and pivotal to the lives of the people are involved, the Court held that prices must be determined by the government and are not to be relinquished to its market mechanism.

Consequently, price determination in drinking water provisions must also be conducted in a more stringent manner. The government cannot and shall not determine the price of drinking water based on its consensus with the private parties. This argument is derived from two different forms of constitutional protection guaranteed in relation to water namely, (1) water as a natural resource that is controlled by the State such as that of oil and gas and (2) the right to water as a human right that must be protected by the State.

From the economic point of view, the water sector has specific characteristics that demands a careful approach as to the way it is managed: water undertaking has a high level of natural monopoly.

Homogenous water pipelines and installations simply render it inefficient to be administered by many companies. This condition will in turn require government interventions in the form of a price ceiling, in order to protect consumers from corporate abuses.

As a consequence, the government must have direct control and the final say in determining drinking water prices. Government Regulation No. 16 of 2005 would need to be revised in order to comply with this constitutional requirement.

4. *Choice of law and choice of forum in contracts with private parties*

Freedom of contract is respected in Indonesia.⁶¹ However, in cases where public order is involved, the principle must be set aside.⁶² *Perjanjian Penyelenggaraan SPAM* (Drinking Water Provision Agreement) is a contract made by and between regional governments and private entities in which private entities undertake water resources-related operations based on an exploitation license from the government with an obligation to provide drinking water to the community.

Any impediment towards the provision of drinking water symbolises the failure of the State in providing its citizen's basic need as mandated by the Constitution. As a drinking water provision directly affects the lives of the people, it should be placed directly under State control in order to allow the State to remain the safeguarding authority. Accordingly, possibilities to choose law and forum outside Indonesia shall be dismissed. Any dispute arising out of drinking water provision contract with private parties should then be settled in an Indonesian dispute settlement forum using Indonesian law. This scheme will enable Indonesian law to be used as a method to interpret the contract entered into between the parties and will therefore ensure that the contract remained to be 'controlled by the State' whilst allowing the private party in question to have access to justice. In other words, any dispute such as the

61 Indonesia, Article 1338 of the *Burgerlijk Wetboek* (Civil Code).

62 See Sudargo Gautama, *Kontrak Internasional, Makalah Ilmiah Tentang Perkembangan Hukum Kontrak Dalam Bisnis di Indonesia* (Jakarta, 1994) p. 65.

above must be settled in accordance with the Indonesian 'sense of justice'.

To fulfil such a condition, Article 64 of the Government Regulation No. 16 of 2005 Concerning Drinking Water Provision System needs to be modified to include a mandatory Indonesian-exclusive choice of law and choice of forum in any contract involving the provision of drinking water.

5. *Control over operations including premises, machineries and files*

During the 1998 riots that claimed 2,500 lives and led to the resignation of former President Soeharto, thousands of expatriates including 30 executives from foreign water companies acting as partners of Regional Water Work Companies left Indonesia in search of refuge. Indonesian water officials were left with no clear chain of command and only three days worth of chemicals remained to clean the city's drinking water. Jakarta Governor then ordered the water officials 'if necessary to fully take over the operation to fill in the vacuum'.⁶³ City officials took over the operations, which lead to a threat of arbitration by the foreign partners.⁶⁴

Taking a lesson from this incident, it is vital for regional governments to have clear and unimpeded access to operation, premises, machineries and files of water constructions site, offices and buildings, at any time it deems necessary. The contract between the government and the private party must also highlight responsibility and liability in the event of riot, including the authority of the regional government or the city's water regulatory agency to take over the operation when necessary.

6. *Supervision, disclosure of information and audit requirement for water companies*

PT PAM JAYA, a regional-owned waterworks company in Jakarta has been engaged in cooperation contracts with privately owned entities for providing drinking

water to Jakarta's citizens from 1997 to 2000. However, although the cooperation contract between PT PAM JAYA and its counterpart granted the company the right to conduct financial audit, it has never been successfully enforced.⁶⁵ It is also reported that PT PAM JAYA has been denied information on financial condition in the escrow account and that information is only granted to its counterpart.

There had been cases worldwide where water governance is precipitated by bribes and other form of corruption.⁶⁶ This condition is worrying as corruption is very rampant in Indonesia. A survey by PERC ranked Indonesia as the worst corrupt nation among 12 Asian economies covered.⁶⁷ PWC's 2005 Survey reveals that 47 per cent of the 75 companies surveyed in Indonesia suffered an economic crime during the 2003-2005. From the suffering companies, 66 per cent had been subjected to corruption. The rest suffer from asset misappropriation, counterfeiting, and false pretences.⁶⁸

Meanwhile, the World Bank's decentralisation report noted that low capacity within oversight bodies challenges horizontal accountability at the sub national level. Local legislatures and judicial institutions often lack the financial and human resources to hold local administrations accountable.⁶⁹ In some cases, political corruption prevents local politicians from exercising control over local bureaucrats. There have also been cases where local members of House of Representatives were imprisoned in corruption cases.

Hence, supervision and monitoring by the public is undoubtedly important. Nevertheless, to assign

63 A complete story of the incident is provided by ICIJ. See <http://www.publicintegrity.org/water/report.aspx?aid=52>.

64 See Section 19 for a discussion on Choice of Law and Choice of Jurisdiction in contracts between the Government and private parties.

65 See Constitutional Court Decision on the *Judicial Review of Water Resources Law*, note 2 above, p. 146.

66 For example, the independent regulatory agency in Buenos Aires that was established to monitor the quality of service, represent consumers and ensure the fair implementation of the contract has been highly criticized because of co-optation and bribery by the private sector.

67 See Perc: Indonesia terburuk dalam korupsi ('Perc: Indonesia's Worst on Corruption').

68 <http://www.pwc.com/crimesurvey>.

69 International Bank for Reconstruction and Development, *East Asia Decentralises: Making Local Government Work*, (Washington, DC: World Bank, 2005), p. 19.

monitoring to be conducted by regional legislators or the BPP SPAM (Drinking Water Development System Supporting Agency) alone would be insufficient. The public in general should be able to monitor and supervise water governance processes. As a prerequisite, disclosure of information to the public must be made available. Mandatory financial audit and disclosure of internal information including financial conditions should be applied not only under contracts between the government/regional owned enterprise and water companies but also as a statutory requirement.

The Government Regulation No. 18 of 2005 in Article 65 has required companies undertaking drinking water provision to supply the government and the public with information concerning its undertaking. This provision needs to be detailed in regional regulations so as to include financial, managerial and other technical information deemed necessary by the government and the mechanism in disseminating this information to the public. To anticipate in case of non-compliance, such provision should also entail administrative sanctions in the form of license suspension or revocation.⁷⁰

5

OVERALL ANALYSIS

The Water Resources Law is designed with a water management and conservation paradigm. Compared to the previous law, which only consisted of 17 Articles, this Law marked an important legal development in the field of water in Indonesia. The Law created new institutions, mechanism and bureaucracy and answered the growing demand of decentralisation by emphasising the role of city/regional governments in providing water for its community's daily subsistence.

It must be noted that the Law is weak at several points, mainly on the issue of definition, acknowledgement on the right to water, hierarchy of rights, price determination and environmental protection.

High political pressure and resistance from society members during its discussion processes at the House of Representatives made the Law unclear on the definition of rights relating to water.

Acknowledgement of the right to water is also weak. Normally, all Laws that contain a derivative of a constitutional right will cite a particular article of the Constitution in its preamble, at the 'bearing in mind' section, to be precise. The Water Resources Law should have cited Article 28 H of the Constitution at its 'bearing in mind' section.⁷¹ The Law only cited Article 33 of the Constitution, which regulates natural resources instead.⁷² This negligence can imply that the drafters perceived the enactment as merely a law regulating natural resources, but not as a part of human rights protection.

The Law tends to deny privatisation if seen from a certain point of view but on the other hand confirms the 'right' of private parties in exploiting water. This confirmation is dangerous, as it is not accompanied by an explicit provision, which clearly lays down the provision that will prevail in the event of a conflict.

Another weakness that needs to be addressed is the lack of protection for the economically weak. The Law does not sufficiently regulate a mechanism for price determination of water-related services. The Law's protection towards the environment is also inadequate. The Law does not distinguish between natural and artificial water source and imposes a heavy burden of proof in establishing liability in cases where damage to a water source occurred.

The Constitutional Court decision in declaring the Law to be conditionally constitutional was actually quite strategic if seen from the considerations provided below.

⁷⁰ Publication of information will be highly beneficial for NGOs in conducting their supervision towards water undertaking.

⁷¹ See Section Water Rights under the Indonesian Constitution page 4 above and note 11 above.

⁷² See Section Water Rights under the Indonesian Constitution page 4 above and note 12 above.

First, the entire annulment of the Law may not be possible as the Law was designed in such a way in order not to be diametrically in contradiction with the Constitution by regulating privatisation through several layers. The Law does have several weaknesses but there is no strong reason to entirely annul the Law as these weaknesses can be repaired through a legislative review, not a judicial review.

Second, partial annulment of the Articles is possible. However once the Law is reviewed, it may close the door for future review. The Law does contain several weaknesses that are harmful for traditional people and to those who are economically weak. However, the decision prefers not to directly tackle the Articles of the Law but offered a reinterpretation instead. This can be seen from the Court's decision on the issue of customary water right, seawater existing on land and artificial rain.

Third, there are cases where the applicants were in an advantageous position due to the decision. The Court's decision on the issue of customary water rights for example would be highly beneficial for traditional people as they will not be subjected to a burden of proof by pointing certain regional regulation when engaged in litigation.

Fourth, by declaring it to be conditionally constitutional, the Government at both central and regional levels are subjected to heavier scrutiny. They must carefully observe the Court's recommendation.

Fifth, every party involved can see how the Law operates and subsequently decide a response. The Government can prove that its bureaucracy can protect the people and NGOs can wait and see if there is anything in the Law's implementation that is incompatible with the Court's recommendation.

Any incompatibility with the Court's recommendation in the Law's implementation can be regarded as an evidence for a judicial review in the future. The Legislature can modify the law to add more protection to the society and the Government can create better implementing regulations to avoid the Law from being re-submitted for a judicial review.

6 CONCLUSION

One hundred and fifty million people in Indonesia will require access to water services in 2015. It is clear that the water service in Indonesia needs to be enhanced to answer current and future demand for water service, either through private participation or development of the existing water work companies.

Although the Law opens the door for privatisation, the regional government should implement its provisions in a cautious way. In rural areas where its citizens are homogenous and have high dependency towards government, privatisation may not be the best option. However, where privatisation is to be opted for, some of the important features of the existing law and its implementing regulation needs to be modified in order to render more protection to the community.

Indonesia must learn from other countries where water privatisation has already taken place. One thing is certain, the law and its implementing regulation must be aimed towards the enhancement of poor people's access to clean water. As John Rawls said in his 'A Theory of Justice', 'rule making must be constructed in order to maximize the privileges of the least disadvantaged members of the society' or, as Mohammad Hatta puts it: 'to protect the weak from exploitation by those who own capital'.

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