

LEGAL RECONSTRUCTION OF WATER RESOURCES MANAGEMENT BY REGIONAL WATER COMPANIES (PDAMs) BASED ON JUSTICE VALUES

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ABSTRACT

With the birth of Law Number 17 of 2019 Concerning Water Resources, the commercialization of water cannot be avoided by the attachment of water resources that have an economic function. This research aims to analyze and find the legal reconstruction of water resources management by PDAM based on justice values. The paradigm in this research is constructivism, using an empirical juridical approach. The data used are primary and secondary data, with descriptive analytic data analysis. The results of the study found that the construction of water resources management by PDAMs is currently not based on justice. There are juridical and non-juridical weaknesses. The value of justice is putting something in its place, burdening something according to one's carrying capacity, giving something that is their right in a balanced level. This value is the basis for reconstructing the norms of Article 21 of Law Number 17 Year 2019.

Key words: Reconstruction; Management; Water Resources; justice;

A. Introduction

Philosophically, Article 33 Paragraph (3) of the 1945 Constitution stating that the earth and water as well as natural resources are controlled by the State and used for the social prosperity.¹ Water is God's creation to meet the needs of human life in the world. Thus, the use of clean water must be based on a sense of responsibility and fully for the welfare of mankind.² Based on this, water management must also be in line with natural law, be responsible, fair and empower the community.³ Utilization of clean water resources must be aimed as much as possible for the welfare and prosperity of the community, so that the availability and distribution of potential clean water sources must be planned comprehensively and meet the principles of benefit, justice, independence, sustainability and sustainability.⁴

Since 1998, 28 countries in the world have experienced water scarcity. In fact, this figure is expected to increase to 56 countries by 2025. In Indonesia, the clean water crisis has begun to be felt by residents of the capital city and in several areas on the island of Java. This fact is very ironic, because Indonesia is an archipelago with 470 watersheds (DAS) flowing throughout Indonesia.

Meanwhile, the environmental crisis and failure of water management will inevitably trigger social conflicts between regions, when water management in the watershed unit (DAS) between upstream and downstream does not heed adequate attitude, economic and social arrangements. Water is a source of basic human needs because almost all aspects of human life need water. However, water tends to be squandered when it is abundant and sought after when it is scarce. This tendency occurs because water is Public Good, which cannot be owned by anyone, has no competition, and has weak Property Rights, so that it is not uncommon for water to be treated as a resource with joint ownership (Global Commons), namely a resource that is managed collectively. The water is not to be sold or traded for profit.⁵

In the present and the coming years, there is a problem of fulfilling a large basic need for Indonesia and for countries in other worlds, namely water scarcity. The problem of increasingly limited access to water is faced by many people, because water is becoming more expensive due to the commercialization and management of water resources that are widespread.

The traditional view of water tends to be abandoned, because water is not just a Public Good, but has become an economic commodity, which has market value and can be traded.⁶ This traditional paradigm contradicts the modern water management paradigm which is based on the intrinsic value of water, which is based on the assumption that there is limited and scarcity of water and the need for investment or the provision of clean water, as the fulfilment of the rights of every citizen.⁷ The phenomenon of water resource crisis has occurred in many parts of the world. Indonesia is one of the countries in the world that is rich in water, but several regions in Indonesia have experienced a water resource crisis. This of course cannot be separated from the increasing population growth and increasing economic development which tends to focus on per capita income and ignores social indicators.⁸

Law Number 17 of 2019 concerning Water Resources has succeeded in fulfilling the wishes of multinational companies and free trade regimes (World Bank and international financial institutions) to make water a profitable commodity. Commercialization and management of water resources by private parties tend to place water as an economic function rather than

¹Haris Budiman, Anis Mashdurohatun, & Eman Suparman, A Comparative Study Of Spatial Policy In Indonesia And The Netherlands, Jurnal Dinamika Hukum Vol. 18 No. 3, September 2018, pp.295. see too Bambang Suprabowo, Anis Mashdurohatun & Eman Suparman, The Inhibiting Factors On Legal Protection For Recipients Of Fiduciary Warranties With Inventory Guaranteed Objects, International Journal of Business, Economics and Law, Vol. 13, Issue 4 (August) ISSN 2289-1552. 2017, pp. 212.

² Ari Handriatni, 2007, The Role of Islam in Saving the Environment, Millah, Vol. VI, No. 2, pp. 35.

³ Azis Ghufro dan Saharani, 2007, Islam and Environmental Conservation, Millah, Vol. VI, No. 2, pp. 60.

⁴ Atyanto Dharoko, 2006, Land Use Directional Model for Water Resources Conservation in Sleman Regency, Journal of Humans and the Environment, Vol. 13, No. 2, 2 Juli 2006, h. 92.

⁵ Bunasor Sanim, 2011, Water Resources and Public Welfare (A Theoretical Review and Practical Study), Issue I, IPB Press, Bogor, p. xviii-xix.

⁶ *Ibid.*,

⁷ *Ibid.*,

⁸ Ajeng Kartika et al. 2013, Islamic Perspective of Water Resources Economics, UB Press, Malang, p. v

a social function. The current development regarding water resources is the increasing scarcity of clean water and its distribution, which shows injustice. This can be seen from the large number of Indonesians who have not been able to access water.⁹

This condition clearly shows that there is an inconsistency between the 1945 Constitution Article 33 paragraph (2) and (3) and Law no. 17 of 2019 concerning Water Resources. This inconsistency occurs because Law Number 17 Year 2019 concerning Water Resources cannot carry out the State mandate mandated by the 1945 Constitution. Article 33 of the 1945 Constitution should have been the basis for policies related to water resources which are one of the people's livelihoods. The constitution in Indonesia adheres to the ideology of the welfare state, and it is clear that natural wealth (including water resources) is controlled by the State for the welfare of all the people.¹⁰

B. Research Methods

The approach method used in this research is juridical empirical¹¹. The research specification used in this research is descriptive analysis, that is, research that aims to obtain a clear and systematic picture of the circumstances or facts that exist regarding the problem being researched and being studied as something intact.¹² This study uses primary and secondary data.¹³ Data collection techniques through library research and field studies. The collected data were analyzed descriptively analytic.¹⁴

C. Research Results and Discussion

Regional-owned enterprises have the following functions and roles assigned to them:¹⁵

- a. Implementing government policies in the field of economy and regional development;
- b. Accumulating of funds for financing regional development;
- c. Encouraging community participation in the business sector;
- d. Becoming a pioneer of activities and businesses that are less attractive to the private sector.

The management of BUMD (Regional owned enterprises) needs to be optimized so that it truly becomes a reliable economic power so that it can play an active role, both in carrying out its functions and duties as well as a regional economic strength. Profits from BUMD are expected to provide a large contribution to Regional Original Revenue.

Regional autonomy has considerable consequences for the role of Regional Owned Enterprises (BUMD) in supporting Regional Original Revenue (PAD). In fact, regional economic business and activities originating from BUMD have been running for a long time before the law on regional autonomy was passed. To achieve the objectives of BUMD as a means of PAD, it is necessary to optimize BUMD efforts, namely by increasing professionalization both in terms of management, human resources and adequate facilities and infrastructure so that they have an equal position with the strengths of other economic sectors.

Constitutional Court decision on February 18, 2015 regarding case decision Number 85/PUU-XI/2013 which annulled all contents in Law Number 7 of 2004 concerning Water Resources and returned water management to Law Number 11 of 1974 concerning irrigation. The water concession system should use a joint venture system based on kinship if it is managed by the private sector, or the state takes over the exploitation of water.

Law number 17 of 2019 concerning water resources (SDA) was passed in 2019. However, until now there have been no derivative regulations from the law. In fact, this law is included in the amendments to the Omnibus Law on the Job Creation Act. The government has submitted a revision of a number of articles of Law 17/2019 concerning water resources. This revision of Law 17/2019 is contained in Chapter III of the Job Creation Act on improving the investment ecosystem and business activities. It was recorded that there were 30 proposals for amendments to Law number 17 of 2019 that were submitted by the government. Namely 23 proposals for revising the sound of articles and abolishing 7 articles in Law number 17 of 2019. The 7 abolished articles are articles which state that the regional government, namely the provincial government and district/city governments can regulate and manage water resources. The abolished articles included article 12, article 13, article 14, article 15, article 16, article 17 and article 20. The elimination of the seven articles caused the provincial and district/city governments to lose their authority to regulate and manage water resources. Meanwhile, most of the proposed revisions to the article have made local governments lose their duties and authority in the use of water resources, water resources management patterns, water resources management plans, operational implementation and maintenance of water resources.

The management of water resources in Cisaat Village shifted from the community to the private sector, namely PT. Wooden Pillar Kencana. The company exploited the water source in the Blue Mountains or Ciwiru. The company was founded by Mr. H. Fahmi from Bandung and has started production since April 2010 on a land area of 580 m which was formerly a rice field area. This company produces raw water that is ready for consumption, either for drinking or for other purposes, because it has been clinically tested that this water is hygienic.

In a day, usually the number of consumers who buy from the company is usually up to 15 to 20 tankers at a price of Rp. 25,000 per tank. If one day 20 tanks are priced at Rp. 25,000, then the income in that day is Rp. 500,000 and a month or 30 days Rp. 15,000,000. Water production is not only for water refill depots but for PDAM *Perumahan Taman Sumber* with a bill according

⁹ *Ibid.*,

¹⁰ Ajeng Kartika, *Op. Cit.* p. vii.

¹¹ Anis Mashdurohaturun & M. Ali Mansyur, Product Capabilities Dynamic on Industrial Design Carved Wood in Small and Medium Enterprises (SMES) Jepara Furniture in Promoting the Protection of Intellectual Property Rights, *International Journal of Applied Engineering Research* ISSN 0973-4562 Volume 12, Number 19 (2017) pp. 8212.

¹² Mukti Fajar ND., et al, 2010, Dualism of Normative and Empirical Legal Research, *Student Library*, Yogyakarta, page. 192.

¹³ Soerjono Soekanto, 2007, *Normative Legal Research A Brief Overview*, PT. RajaGrafindo Persada, Jakarta, p. 13.

¹⁴ Anis Mashdurohaturun, Hayyan UI, Sony Zulhuda, Social Function Reconstruction Of Intellectual Property Rights (IPR) Based On Justice Values, *International Journal of Law Reconstruction* Volume I, Issue 1, September 2017. pp.143.

¹⁵ Rustian Kamaluddin, 2019, BUMD's Role and Empowerment in the Context of Regional Economic Improvement, page.2

to usage which is calculated at the end of each month. Distribution for housing uses a separate pipe that is planted underground. Water cylinders usually experience a shortage of supply every evening, so filling is stopped. Replenishment is usually until 03.00 the next day and the filling is opened again at dawn. So service cannot be 24 hours. Until now there have been no complaints from consumers.

With the existence of PT. Kayu Agung Pilar Kencana, it is emphasized that the management of water resources that was previously managed by the village community has now changed hands to the investors. Not only that, water resources that were previously enjoyed by the community or become public goods have now turned into private goods, even people who want to enjoy this water have to spend money first to be able to enjoy it. This shows that the process of water resources which was previously a public good has now moved into a private good. And what was previously a public good has now turned into a commodity.

The construction of Water Resources Management by PDAMs, which is currently not fair, is reflected in implementing water resources management according to Law Number 17 of 2019 concerning Water Resources. The Central Government and Regional Governments play a role as regulators in determining water resources management policies. It is listed in Article 10, Article, 11, Article 13, Article 14, Article 15, and Article 16 of Law Number 17 of 2019 concerning Water Resources. Part of the duties and authorities of the Central Government and/or Regional Governments as referred to in managing Water Resources covering one River Basin can be assigned to the Water Resources Manager. Water Resources Managers can be in the form of technical units of ministries/regional technical implementing units or state-owned/regional-owned enterprises in the field of Water Resources Management. So that the control of Water Resources management administrators is not explicitly the only entity authorized to manage water resources. Furthermore, in Article 21 and Article 44 of Law Number 17 of 2019, the use of Water Resources is divided into 2 things, namely for non-business needs, and for business needs where this is the implementation of the economic function of water resources management. So that the position of PDAM, apart from being a public service, has now been aligned with a private business entity that in managing water resources, must take a predetermined permit in the interests of managing water resources for business needs. Although Article 46 paragraph (1) letter e has prioritized water resources management permits, it must be granted to State-Owned Enterprises, Region-Owned Enterprises, and Village-Owned Enterprises. This does not preclude the involvement of private enterprises in water resources management.

Weaknesses in Water Resources Management by PDAM consist of legal aspects and non-legal aspects

a. Legal Aspects

Weaknesses in Water Resources Management by PDAMs in Indonesia are currently only a business entity in the field of water resources management that is unable to carry out Water Resources Management as a result of the conception of the right to water in Article 21 of Law No. 17 of 2019 concerning Water Resources. It has rearranged the Economic Function of Water Resources. Private involvement in water resources management by PDAM shows that the government wants to escape from its absolute responsibility for providing drinking water for the community by giving space to the private sector in drinking water management. This, of course, will change the meaning of water, which was previously a public goods whose fulfillment was a government obligation as mandated in the 1945 Constitution Article 33 paragraph (3). The right to health as an inclusive right which includes not only continuous and proper health services but also includes the factors that determine good health, including one of which is access to safe drinking water. Health is a human right, the state must respect, protect and fulfill it. In its implementation, it must guarantee the fulfillment of the constitutional mandate regarding the state's control over water. State control rights over water can be said to exist when the state, which is mandated by the 1945 Constitution to make policies (*beleid*), is still in control in implementing management actions (*bestuursdaad*), regulatory actions (*regelendaad*), management actions (*beheersdaad*), and actions surveillance (*toezichthoudensdaad*)

b. The limited budget that is managed by the PDAM in providing equal distribution of access to clean water to the community is caused by the PDAM's aim not to be based on seeking profit and the lack of clean water quality supplied by the PDAM.

Legal Reconstruction of Justice-Based PDAM Water Resources Management should be guided by Article 33 paragraph (1) paragraph (2), and paragraph (3) of the 1945 Constitution. The water must be fully controlled by the state. PDAM in this case as a Regional Company in the field of management of water resources, should be the only entity authorized to manage and utilize water resources. Supposedly the state through state-owned enterprises and region-owned enterprises must have a management function (*bestuursdaad*) with the authority to issue and revoke licensing (*vergunning*), license (*licentie*), and concession (*concessie*) facilities. The regulatory function by the state (*regelendaad*) is carried out through legislative powers by the DPR (People Representative) together with the Government, and regulation by the Government (executive). The management function (*beheersdaad*) is carried out through a share-holding mechanism and/or through direct involvement in the management of State-Owned Enterprises, Region-Owned Enterprises, and Village-Owned Enterprises as institutional instruments through which the state through the Government makes use of its control over resources. -the source of the wealth is to be used for the greatest prosperity of the people. Likewise, the supervisory function by the state (*toezichthoudensdaad*) is carried out by the Government in the framework of supervising and controlling so that the implementation of control by the state over the production branches which are important and/or which control the livelihoods of the public is actually carried out for the greatest prosperity of the whole people.

The concept of fairness is known in four ways; First, fair means balance in the sense of a society that wants to survive and be stable, then that society must be in a balanced state, where everything in it must exist in its proper level and not with the same degree. Social equilibrium requires that we look at the balance of needs with a relative viewpoint by determining the relevant balance by applying the due potential to that balance. Al-Qur'an Surat ar-Rahman verse 7 which means: "Allah exalted the heavens and he put a balance (justice)".¹⁶

The commentators say that what this verse means is a state of nature created in a balanced manner. Nature was created and everything and every matter in the right amount and distances are measured in a very precise manner. Second, fair is an equal denial of any difference. Justice is meant to maintain equality when the rights to have it are the same, because justice requires such equality, and requires it. Third, fair is maintaining individual rights and giving rights to everyone who is entitled to receive them.

¹⁶ See: Al-Qur'an Surat Ar-Rahman ayat 7

Justice like this is social justice that must be respected in human law and every individual is ordered to uphold it. Fourth, fair is maintaining the right to continue existence.¹⁷

The conception of Islamic justice has a deeper meaning than Aristotle's so-called final and distributive justice; formal justice of Roman law or other human-made conceptions of law. It penetrates into the deepest and most human being, because everyone must act in the name of God as the starting place for everything, including motivation and action. The implementation of justice in Islam is rooted in the Qur'an and the sovereignty of the people or the Muslim community, namely the *ummah*.

The meaning contained in the conception of Islamic justice is to place something in its place, impose something according to one's carrying capacity, to give something that is due to one's right in a balanced degree. The main principle of justice is described by Madjid Khadduri¹⁸ by grouping it into two categories, namely substantive and procedural aspects, each of which includes one aspect and different justice. The substantive aspect is in the form of elements of justice in the substance of sharia (substantive justice), while the procedural aspect is in the form of elements of justice in the implemented procedural law (procedural justice).

The Legal Concept of Water Resources Management which is ideal based on justice is First, the management of planning and technical planning is regulated, among others: (a) the arrangement of Water Management and Irrigation and Development of Irrigation is compiled on the basis of technical planning and planning aimed at the public interest; (b) the results of planning and technical planning in the form of technical plans and plans for water and irrigation management as well as irrigation development, are drawn up for the needs of the people in all fields by taking into account the priority order; (c) technical plans and plans are drawn up in order to obtain a good water system based on the National Development Basic Pattern and implemented for national, regional and local interests. As a basis for planning, development and utilization, research and inventory are carried out to determine the capital of natural resources in the form of water and its sources throughout Indonesia.

Second, regarding the management in its development, the government shall stipulate guidance procedures in the framework of irrigation activities according to their respective fields in accordance with their functions and roles, including: (a) determining conditions and arranging planning, technical planning, use, exploitation, and supervision. and permits for utilization of water and or water sources; (b) regulate and carry out the management and development of water sources and irrigation networks (channels and structures thereof) in a sustainable manner and to achieve maximum efficiency; (c) take precautions against water contamination which may harm its use and the environment; (d) to safeguard and / or control the destructive force of water in the surrounding areas; (e) conduct research and investigation of water sources; (f) regulating and organizing counselling and special education in the irrigation sector.

Third, in its exploitation, it shall be regulated, among others: (a) exploitation of water and/or water sources aimed at increasing their benefit for the welfare of the people, in principle, shall be carried out by the Government, both central and regional; (b) legal entities, social entities and/or individuals who are undertaking exploitation of water and/or water sources, must obtain a permit from the Government, guided by the principles of joint venture and kinship.

Fourth, in terms of exploitation and maintenance it is regulated, among other things (a) irrigation structures intended to provide direct benefits to a community group by involving the community, whether in the form of legal entities, social entities or individuals, who benefit directly from the existence of these buildings, the implementation of which is further regulated by a Government Regulation; (b) irrigation structures intended for public welfare and safety are basically carried out by the Government, both central and regional.

Fifth, in terms of protection, water sources and irrigation structures must be protected and secured, maintained and preserved, in order to fulfill their functions by means of among other things: (a) undertaking efforts to save land and water; (b) safeguard and control the destructive force of water against its sources and in the surrounding area; (c) to prevent water contamination, which may harm its use and environment; (d) provide security and protection for irrigation structures, so that they continue to function properly.

Sixth, the matter of financing, is regulated as follows: (a) financing for carrying out activities within the framework of Water Management and Irrigation Development shall be further regulated by the Government; (b) people who benefit directly from the existence of irrigation structures, either for further operation or for their own purposes, may be involved in financing as a substitute for management services; (c) Legal entities, social entities and/or individuals who benefit from the existence of irrigation structures, whether for further business or for their own purposes, are obliged to share in the financing in the form of contributions given to the Government.

The values of justice that are the basis for the reconstruction of the Water Resources Management Law by the Regional Drinking Water Company (PDAM) are as follows: putting something in its place, charging something according to one's carrying capacity, giving something that is indeed his right in a balanced level. This value is the basis for reconstructing the norms of Article 21 of Law Number 17 of 2019 Concerning Water Resources.

The norms in Article 21 of Law Number 17 of 2019 Concerning Water Resources, which originally read, are as follows: Article 21 of Law Number 17 of 2019 Concerning Water Resources

- (1) Water resources have social, environmental, and economic functions that are organized and realized in harmony.
- (2) Water Resources are managed in an integrated, sustainable, and environmentally sound manner.

It reads as follows: Article 21 of Law Number 17 of 2019 Concerning Water Resources

- (1) Water resources have social, environmental, and economic functions which are organized and realized in a harmonious and balanced manner.
- (2) Water Resources are managed in an integrated, sustainable, and holistic environmental perspective.

¹⁷Murtadha Muthahhari, Perspective of the Qur'an on Humans and Religion, Introduction By Jalaluddin Rahmat, Cet. IV. Bandung:Mizan, 1990, page. 58.

¹⁸ Madjid Khadduri, Theology of Justice (Islamic Perspective), Risalah Gusti, Surabaya, 1999, page. 119-201

D. Conclusion

Construction of Water Resources Management by PDAMs are currently not fair, Weaknesses in Water Resources Management by PDAMs in Indonesia are currently only as business entities in the field of water resources management that cannot carry out Water Resources Management as a whole. As a result of the conception of the right to water in Article 21 of Law number 17 of 2019 concerning Water Resources. It has rearranged the Economic Function of Water Resources. Private involvement in water resources management by PDAM shows that the government wants to escape from its absolute responsibility for providing drinking water for the community by giving space to the private sector in drinking water management. The limited budget that is managed by the PDAM in providing equal distribution of access to clean water to the community is caused by the PDAM's aim not to be based on seeking profit and the lack of clean water quality supplied by the PDAM. Legal Reconstruction of Water Resources Management by PDAM based on justice based on the provisions of Article 33 paragraph (1) paragraph (2) and paragraph (3) of the 1945 Constitution and the value of justice, namely placing something in its place, imposing something according to one's carrying capacity, providing something that is his right to a balanced degree. This value is the basis for reconstructing the norms of Article 21 of Law Number 17 of 2019.

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