

Water Resources Management: Comparative of Law Indonesia and India

I Ketut Kasta Arya Wijaya

Lecturer of Law Faculty, Warmadewa University, Jalan Terompong Nomor 24 Denpasar, Bali, Indonesia

Abstract

In Indonesia philosophically the existence of Article 33 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia, the incarnation of the Five Principles of Pancasila is justice for all Indonesian people, where water as one of the national wealth which is the needs of the people controlled by the state in the framework of providing justice and prosperity For all the people of Indonesia, whereas in India water resources arrangements are still formed from different components, including international treaties, federal and state rules as well as customary law. The national water law arrangements in India are more developed than the international water law, but India does not have comprehensive water management. The existing water law framework in India is characterized by the existence of a number of different principles, rules and actions adopted over the decades of colonial law. This includes the principles of general law and irrigation provisions of the colonial period.

Keywords: water rights, justice and prosperity, principles of common law.

1. Introduction

Indonesia has an area rich in natural resources, both types and quantities. Recognizing the grace given by this Almighty God, the founding fathers have established the basic principles of natural resource management in the country's constitution which survives up to now, namely the earth, water and natural resources contained therein are controlled by the state and utilized as much as possible for the welfare of the people. In the Constitution it is also stated explicitly that further provisions regarding the implementation of this article shall be regulated in law.

Law Number 11 Year 1974 on Irrigation is a law issued in regulating the problem of irrigation in Indonesia, but in its development this law is replaced by Law No. 7 of 2004 on Water Resources, the existence of legal political shift that occurs when Law No. 7 of 2004 was made concerning the involvement of the private sector in its management process. This is inseparable from the shift in the meaning of water that previously was public goods turned into a commodity in the search for profit.

This shift in meaning is seen in the regulation on the right to use water that can be given to Private Enterprise as shown in Article 9 paragraph (1), stating that the Water Utilization Right may be given to an individual or a Business Entity with a Permit from the Government or Local Government in accordance with its authority. Article 11 Paragraph (3) stating that the drafting of water resources management pattern as referred to in paragraph (2) shall be done by involving the role of the society and the business world as widely as possible and article 14 which regulates the authority and responsibility of the government in Law No. 7 of 2004. Decision of the Constitutional Court on 18 February 2015 through Decision No. 85 / PUU-XI / 2013 has revoked the enactment of Law no. 7 of 2004 on Water Resources, which states also contradict the 1945 Constitution of the State of the Republic of Indonesia and also decides Law No. 11 of 1974 on Irrigation to be valid again. Re-enactment of Law no. 11 of 1974 on Irrigation which has been forty-two years made in lieu of Law no. 7 of 2004 on Water Resources, essentially does not solve the problem, because in many cases the law is no longer in accordance with the current conditions. Population, consumption, sanitation and environmental levels and other development activities (agriculture, infrastructure) have increased human demand for water.¹

The fundamental criteria are good governance, efficiency, and equity. The mode of service provision chosen should, on balance, improve the four pillars of governance: accountability, transparency, participation, and predictability. Improvements in governance may occasionally need to be balanced against significant efficiency considerations or pressing social needs.²

The policy on water resources in Indonesia is contained in the 1945 Constitution of Article 33 paragraph (3) which mandates that the water resources are controlled by the State and used for the greatest prosperity of the people. Implicitly, the concept of water resources ownership in Indonesia states that water resources belong to God Almighty. The state has an obligation to manage and distribute fairly for the welfare of all people. The article clearly states that every citizen has the same right to access natural resources in Indonesia, especially water.³

¹ Ida Nurlinda, *Pengaturan Penguasaan Dan Pemanfaatan Sumber Daya Air Pasca Pembatalan Undang-Undang No. 7 Tahun 2004 Tentang Sumber Daya Air*, Paper presented at the event Unpad in respond March 2015 edition, Bandung, March 30, 2015.

² Salvatore Schiavo-Campo And Pachampet Sundaram, *To Serve And To Preserve: Improving Public Administration In A Competitive World*, chapter 6 *Nonministerial Government Bodies and Corporate Governance of Public Enterprises* page.188

³ Ajeng Kartika, et al. *Ekonomi Sumber Daya Air Perspektif Islam*, UB Press, Malang, 2013, page. v

In the management of water resources must be based on a comprehensive, integrated, and environmentally sound management in order to realize the sustainable use of water resources for the welfare of the people based on the principles of sustainability, equilibrium, public utility, integration and harmony, justice, independence and transparency and accountability.

The State as the highest Agency or Organization to represent all the people has the authority to regulate and organize allotment, use, inventory and maintenance; determine and regulate the relationship of legal relations between persons; determine and regulate the relationship of legal relations between persons and legal deeds dealing with earth, water and space. The implementation of the state in the economic field as an effort to achieve social justice as the objective of the state must be based on the economic democracy which positions the people as individuals in the social framework. Related to it, the real state with power given to him is a means for the people in realizing social justice.

The swift flow of globalization and economic liberalization also affect the management of water resources, the entry of Private Enterprise in the management of water resources also affect the aspects of economic justice, democratization, ecological sustainability and the local or socio-cultural wisdom that exists in a society. The global economy that tends to have the attributes of liberal capitalist flows that are not pro-management of natural resources based on the needs of the people, this demands the privatization in all the economic life of the State.¹

As noted, the criterion of “economy” (which is common to both public and private procurement) involves acquiring goods and services of defined specifications on a timely basis and at the lowest cost. Economy is a useful criterion for administrative purposes, as it is linked to the performance of the procurement function.²

Law Number 11 Year 1974 on Irrigation in Article 11 paragraph (2) stipulates that Legal Entities, Social Institutions and or individuals conducting water business and / or water sources must obtain licenses from the Government, based on the principles of joint and family enterprises, meaning that the means of joint effort and kinship are among others efforts to develop cooperatives. Business entities such as cooperatives in the era of economic globalization are less able to keep up with such rapid developments, hence the need to expand in seeking water resources to other entrepreneurs such as Private Owned Enterprises.

Law No. 11/1974 on Irrigation in article 13, paragraph 1 states that in order to fulfill the social function and used for the greatest prosperity of the people, the water resources must be protected and secured, maintained and preserved. In the management of water resources must be based on a comprehensive, integrated, and environmentally sound management in order to realize the sustainable use of water resources for the welfare of the people based on the principles of sustainability, equilibrium, public utility, integration and harmony, justice, independence and transparency and accountability.

The inclusion of private parties in the exploitation of water resources in addition to providing economic benefits also provide other impacts such as social, cultural and environmental, therefore it is necessary arrangements that can meet all interests in the exploitation of water resources whose goal is to provide prosperity and prosperity of for the society as what is mandated in Article 33 paragraph (3) of the 1945 Constitution.

India is one of the most water-rich countries, and a wealth of other resources. The regulation of water resources in India is still not optimal and can be categorized poorly in clean water services as a challenge in the future.³ The problems faced by the two countries of Indonesia and India have similarities, so it is relevant to be discussed in this paper. From the description that has been described previously it can be formulated problems as follows, how is the regulation of water resources in Indonesia and in the State of India? How to compare the arrangement of water resources between Indonesia and India?

2. Research Methode

In discussing the legal issues contained in this paper the authors use normative legal research methods, namely by reviewing legislation applicable in the State of Indonesia and India, while the approach used is a legal history approach and comparative legal approach in each country, so that there will be a match between the two legal arrangements relating to water resources.

3. Management of Water Resources in Indonesia

Indonesia as a country in the form of a republic should understand the essence of the republican meaning that is republica rep, which means for the public interest. In accordance with the meaning of republica res, state organizers should always be oriented to the public interest.⁴ The provisions on water rights guarantee for all Indonesian people are affirmed in Article 33 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia.

¹ Samsul Wahidin, 2016, *Hukum Sumber Daya Air*, Penerbit Pustaka Pelajar, Yogyakarta, page. 14

² Salvatore Schiavo-Campo And Pachampet Sundaram, To Serve And To Preserve: Improving Public Administration In A Competitive World, chapter 6 Nonministerial Government Bodies and Corporate Governance of Public Enterprises page.318.

³ www.wateraid.org/uk/who-we-are/annual-reports

⁴ Padmo Wahyono, 1984, *Masalah Ketatanegaraan Indoensia Dewasa Ini*, Ghalia Indonesia, Jakarta hal. 34.

State control over water as a natural wealth that is national for the fulfillment of the welfare of the people, to realize the welfare of the people of this country must be present to utilize and control the natural resources including water that concerns the livelihood of the people. Protection of the right to water for all Indonesian people is an embodiment of the fulfillment of the human rights of Indonesian society is contained in Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. The right to expel the state in the earth, water and natural resources contained therein is a form of social rights, government in its management to realize the prosperity of the people themselves. The purpose of Article 33 Paragraph (3) of the Republik of Indonesia Constitution has a noble purpose in providing prosperity to the people and must be followed by a strong spirit and desire to make it happen.

The entry of the state in the regulation and management of the right to water as a form of the right to control that arose in Article 33 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia is a form of protection of these human rights in order to be safeguarded and guaranteed for all Indonesian people who can not be eliminated by anyone, because the right to water is a natural right. So it is clear that water as a human need is a right that must be met by the state as a form of recognition of the right to life itself. Philosophically, the existence of Article 33 Paragraph (3) of the 1945 Constitution of 1945 the incarnation of the Five Principles of Pancasila is justice for all the people of Indonesia, where water as one of the national wealth which is the needs of the people controlled by the state in the framework of providing justice and prosperity for all Indonesian people. The affirmation of the right to water in a constitution and the laws under it is in the framework of providing justice for all the people, and this is a form of limitation on man himself in the use of water only for the benefit of the person and / or interest of a particular group with no regard for the interests of others, so that the existence of such arrangements will give justice to all the people without any discrimination and monopoly by any particular person or group.

In Article 33 Paragraph (3) of the 1945 Constitution of 1945 the regulation on earth, water and natural resources contained therein as a wealth shall have implications for social welfare. The state's control over the earth, water and space as defined in Article 2 sub-article (1) of Basic Agrarian Law is not in the sense of belonging, but in the sense of member authority to the State as the power organization of the Indonesian nation, to the highest degree:¹

1. Arranging and organizing the designation, use, stock and its maintenance;
2. Establish and regulate the rights that may belong to the earth, water and spacecraft;
3. Establish and regulate legal relationships between people and legal acts concerning earth, water and space.

The right to control the State is to smooth the management, use of national wealth. This is intended to maximize the potential of natural wealth itself. So it is very clear the right to control the State exists in order to create social justice for all Indonesian people in accordance with the mandate of article 33 paragraph (3) of the 1945 Constitution of 1945 which aims to realize the welfare of the people. The foundation of the idea of the birth of Article 33 of the 1945 Constitution of the Republic of Indonesia is inseparable from the values contained in society itself, such as help and joint effort that distinguishes it from the ideology of capitalism which eliminates the values which exist in the nature of mutual cooperation. This is due to the understanding of capitalism in the management of the economy by relying on capital and production tools is only to seek the maximum profit by not paying attention to the interests of the weak community. The State of Indonesia, in the management of something that the life of the people must be controlled as mentioned in Article 33 paragraph (2) of the 1945 Constitution of the Republic of Indonesia, within the framework of social justice. This is to prevent the occurrence of monopoly by a person or a few people only so that the role of the State in controlling the national wealth to provide guarantees to all people who lead to welfare.

The linkage of the state's controlling rights to the size of the people's prosperity according to which Bagir will realize the obligations of the State:

1. All forms of utilization (earth and water) and the results obtained must significantly increase the prosperity and welfare of the people.
2. Protect and guarantee all the rights of the people contained in or on earth, water and certain natural resources that can be produced directly or enjoyed directly by the people.
3. Prevent any action from any party that will cause the people do not have the opportunity or will lose their chance in enjoying the natural wealth.

Therefore, the economic system in accordance with the values of Indonesia according to Muhammad Hatta is a system of cooperative socialism which is then outlined in Article 33 of the 1945 Constitution of the Republic of Indonesia. The system of cooperative socialism contains three important elements, namely: 1. The ideals of Western socialism which suggests a fair humanity with the implementation of democracy concerning political democracy. 2. Islamic teachings that express the basics of justice and brotherhood and high judgment to the personal human being of God, 3. Gotong royong (working together) as the innate nature of indigenous

¹ See the explanation of Law No. 5 of 1960 on the Basic Regulation of Agrarian Principles

Indonesian people. From the above important elements, it is seen that water management as one of the national wealth contained in article 33 paragraph (3) of the 1945 Constitution of 1945 relies heavily on the values that can support and in accordance with the development of Indonesian society that is in the form of adopting the ideals western socialism by maintaining and maintaining the values and philosophy of the Indonesian nation. The most important is how the values that live in our society are always the main reference in the process of policy making so as to create a populist and participatory policy.

As a result of globalization, colonialization in various forms that bring about the notion of capitalism causes rights in the utilization of water shifts. Water that belonged to the public or belonged to the public began to be private property, or liberalization occurs in the use of water, causing problems in the fulfillment of water needs for the community at large. In Indonesia, the existence of two rights in water utilization, namely the right to use water and water use rights, indicates that the effect is due to globalization.

The essence of globalization is essentially an increase in interaction and integration within the economy both within countries and between countries, covering aspects of trade, investment, displacement of production factors, in the form of migration, labor, and foreign investment, finance and banking international and foreign exchange flows.

Utilization and entrepreneurship of the right to water in the economic globalization can not be avoided, but the essence of the concept of water rights can not be separated from the very nature of water itself. Water is an object not created by man, but is God's creation given through nature. In addition, water is a basic and irreplaceable human need for human life, where no human water can not live. All aspects of human life are related to water. Therefore, in utilizing the water must pay attention to the nature of the water, which is very important for his life and also for the lives of others. Based on the fact that the right to water is a common res or public goods (public goods) or common property (common property). Water has traditionally been necessary as a natural right. A right arises from human nature, its historical conditions, the need for basic needs, or the notion of justice. The right of water as a natural right does not come from the state, but develops slowly from the ecological context of human existence. As a natural right, water can be used but not owned. People have the right to life and natural resources to defend it, as well as water.

In achieving the objectives mandated in article 33 paragraph (3) required the management of water resources is good. In his book Carol Harlow and Richard Rawlings stated that there are several criteria in good administrative service, Principles of Good Administration, Good administration by a public body means:

- 1 Getting it right
- 2 Being customer focused
- 3 Being open and accountable
- 4 Acting fairly and proportionately
- 5 Putting things right
- 6 Seeking continuous improvement¹

Some of the normative provisions on water rights in positive law in Indonesia are as follows which can be accommodated in Water Resources law in the future:

- a. In Article 33 paragraph (2) of the 1945 Constitution states: "The branches of production that are important to the State and which affect the livelihood of the masses are controlled by the State". Furthermore, in paragraph (3) states that: "The earth and the water and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people". There is also Article 28H of the 1945 Constitution providing the basis for the recognition of the right to water as part of the right of life of inner and outer prosperity. It also means that the right to water is a part of human rights.
- b. The International Covenant on Economic, Social and Cultural Rights (ICESCR) which places the right to water as a human right which Indonesia has ratified, so that the Government of Indonesia is obliged to respect and protect the rights of the people over water.

4. Management of Water Resources in India

India has the largest number of people without access to safe and clean water. The discovery was reported by Water Aid on World Water Day celebrations. The report is entitled "Water: At What Cost? The State of the World Water 2016".

In India, water laws are made up of different components. These include international agreements, federal and state rules. It also includes a number of less formal arrangements, including water and water-related policies as well as customary rules and other regulations. Water laws in India are evolving to date and then proposed and ongoing water law reforms are in the process of completely redrawing the Indian water law framework.

¹ Carol Harlow and Richard Rawlings, 2009 *Law and Administration, Third Edition*, Cambridge University Press The Edinburgh Building, Cambridge CB2 8RU, UK, page: 536.

5. Legal framework in India

The national water law arrangement in India is more developed than the international water law, but India does not have comprehensive water regulation. The existing water law framework in India is characterized by the existence of a number of different principles, rules and actions adopted for decades. These include general principles of law and irrigation actions of the colonial period as well as the more recent regulations of water quality and recognition of human rights courts for water.

The lack of legislative umbrella at the national level has meant that states and centers of different legal interventions and other principles do not always coincide and may in fact be contradictory in certain cases. Thus, the claim that landowners have more underground water. The principles of general law may not be compatible with a legal framework based on human rights to water and need to allocate water exclusively for domestic use and to provide water for all, whether landowners or not on the same basis.

In terms of legal development, irrigation laws are historically the most advanced part of water law, largely due to the fact the colonial government saw the promotion of large irrigation works as a center for its mission. It also includes the need to introduce a framework at the regional level of regulation in this area. As a result, some of the basic principles of water law that apply today in India come from irrigation laws.

In terms of water control, the Government at the central level has the authority to provide fulfillment of community services. In general the water resources arrangements in India are based on the State, the constitution of the State of India authorizes the State to regulate relating to water resources. Thus, the state has exclusive powers to regulate water supplies, irrigation and canals, drainage and embankments, water storage, hydro power and fisheries. In connection with the inter-state water dispute the constitution of India also regulates that in article 262.

When viewed at a glance what is of concern to both countries in the regulation of water resources, it can be explained the similarities and differences, from the similarity that the State is given power in regulating and utilizing water resources related to public services both in India and in Indonesia, while viewed of the differences in the regulation of water resources in India, the legislation still inherited from the colonial state while Indonesia in the regulation of water resources is not so great the influence of colonial law, because Law number 11 year 1974 about irrigation born in the new order government.

6. Conclusion

- A. Whereas the management of water in Indonesia as one of the national assets contained in Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia highly relies on the values of the philosophy of the Indonesian nation, the values that live in our society are always the main reference in the process of taking policy to create a populist and participatory policy. The management of water resources in India has also recalled that water is prioritized to the fulfillment of exclusive rights to the domestic people, meaning that the Indian government in the regulation of water resources observes the principles of common law in the regulation of water resources.
- B. Political Law on the Right to Control State in the management of water resources has denied social justice in accordance with Article 33 of the 1945 Constitution, when the meaning of the State's Controlling Right is the State as the provider and the regulator for water resources management. meaning that the State is given a larger portion again to regulate water governance in Indonesia on the basis of "Right to Control the Country. But the concept of water rights by States used by the government to undertake a number of denials of the rights of customary law communities over the existing water resources in their customary territories, and utilize them to give space for large companies on behalf of development. The right to control land by the State needs to be strictly limited, so that this right has clear boundaries both conceptually and in its implementation. Whereas in India the law of water resources management is almost the same: the right to control over water remains in the power of the State, prioritizing the service of the domestic society in priority, as governed by the Indian constitution.

7. Recommendation

- A. Indonesian people who have characteristic or characteristic of cultural values and noble values should be in making the management policy in the field of water resources still pay attention to the philosophy and cultural values of the Indonesian nation such as divine value, kinship, mutual cooperation, and respect for wisdom local government policy so that acceptable and effective in society.
- B. The need to change the concept of the meaning of the right to control the State so that there is a separation between the regulator and its implementation, in the management of water resources there is still no restriction between the regulator and its implementation or the operator so there needs to be a firmer arrangement that separates the regulator and the operator, water power can be more efficient, effective and professional.

References

- Abrar Saleng, 2004, *Hukum Pertambangan*, UII Press, Yogyakarta, Cetaka, Pertama
- Ajeng Kartika, et al. 2013, *Ekonomi Sumber Daya Air Perspektif Islam*, UB Press, Malang.
- Carol Harlow and Richard Rawlings, 2009, *Law and Administration, Third Edition*, Cambridge University Press The Edinburgh Building, Cambridge CB2 8RU, UK
- Dewi, R. Ismala, 2013, *Pengaturan Air Untuk Industri Air Kemasan dan Dampaknya Bagi Masyarakat Lokal*. Jakarta: UI Press
- Hadi Suprpto, Bobby Andalan, 2015 “Bali Krisis Air Bersih Saat ini, perlu ada Regulasi Pembatasan Penggunaan Air Bawah Tanah,” Viva.co.id, Selasa, 28 April 2015 di akses pada tanggal 9 Oktober 2016 jam 06 wita.
- Ida Nurlinda, *Pengaturan Penguasaan Dan Pemanfaatan Sumber Daya Air Pasca Pembatalan Undang-Undang No. 7 Tahun 2004 Tentang Sumber Daya Air*, Makalah disampaikan pada acara Unpad Merespon edisi Maret 2015, Bandung, 30 Maret 2015.
- Imam Soetikno, 1990, *Politik Agraria Nasional*, Gajah Mada University Press, Yogyakarta, Cetakan Ketiga.
- Isharyanto, 2016, *Hukum Kebijakan Ekonomi Publik*, Penerbit Thafa Media, Yogyakarta.
- Mahmud Thoah, 2002, *Globalisasi Krisis Ekonomi dan Kebangkitan Ekonomi Kerakyatan*, Pustaka Quantum.
- Mansour Fakih, 2002, *Jalan Lain, Manifesto Intelektual Organik*, Yogyakarta: Insits Press dan Pustaka Pelajar.
- Padmo Wahyono, 1984, *Masalah Ketatatanegaraan Indoensia Dewasa Ini*, Ghalia Indonesia, Jakarta.
- Philippe Culle, *Water Law In India Overview Of Existing Framework And Proposed Reforms, IELRC WORKING PAPER 2007 – 0*.
- Salvatore Schiavo-Campo And Pachampet Sundaram, *To Serve And To Preserve: Improving Public Administration In A Competitive World, chapter 6 Nonministerial Government Bodies and Corporate Governance of Public Enterprises*.
- Samsul Wahidin, 2016, *Hukum Sumber Daya Air*, Penerbit Pustaka Pelajar, Jogjakarta.
- Soetandyo Wignyosoebroto, 1995, *Sebuah Pengantar kearah Perbincangan Tentang Pembinaan Penelitian Hukum dalam PJP II*, Jakarta: BPHN Departemen Kehakiman.
- Videh Upadhyay, *Water Rights and the ‘New’ Water Laws in India Emerging Issues and Concerns in a Rights Based Perspective*, India Infrastructure Report 2011
- Bali Post tanggal 7 Oktober 2016 “Badung Kekurangan air Bersih 394 liter per detik”
- Article 262, *Constitution of India*.
- Undang-undang Nomor 11 Tahun 1974 tentang Pengairan
- Undang-undang Nomor 7 Tahun 2004 tentang Sumber Daya air
- Peraturan Pemerintah Nomor 121 tahun 2005 tentang Pengusahaan Sumber Daya Air
- Peraturan Pemerintah Nomor 122 tahun 2005 tentang Sistem Penyediaan Air Minum.