

Regulation Of Water Resources Utilization of Justice and Human Rights Perspective in Law Indonesia

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Abstract. This research examines, analyzes, criticizes in depth and finds regulatory models related to water resources. Good laws and regulations should have enforceability and pay attention to philosophical, juridical and sociological aspects. Water is a gift from God Almighty and is very important for the life and livelihood of humans and other living creatures, as well as a unifying nation and as a means of equitable development There are (2) problems studied in this research, namely: How is the formulation and construction of the philosophical basis for the formation of legislation in the field of water resources in the perspective of justice and human rights? What is the model of legislation in the field of water resources in realizing people's welfare in the future? This research uses normative legal research which is then supported by primary and secondary legal materials, the approach used is a conceptual approach, legislation and a philosophical approach. The findings obtained in this study can be described as follows: in the first problem, namely there are still serious problems related to the fulfillment of the right to water for the community in general, a legal construction is needed that aims to provide legal certainty and justice in the fulfillment of the right to water. namely in the form of a legal instrument that accommodates aspects of justice and human rights at the philosophical level. For this reason, in the formation of the Water Resources Law, the considerations on the philosophical basis are constructed as follows: that water is a basic need of human life which is bestowed by God Almighty, therefore in its use it must provide a sense of justice and respect for human rights in fulfillment of the right to water for all Indonesian people. Furthermore, the second finding is a model for regulating water resources (SDA) in future legislation related to the water resources law to better accommodate community participation, especially indigenous peoples who are historically, philosophically, geographically and genealogically still in their daily lives. provide respect, protection and fulfillment of the right to water for others, the environment and the Creator in their daily lives.

Keywords: human rights; justice; water resources

1 Introduction

Water is a very important and vital need in human life and livelihood, for this reason, based on Article 33 paragraph (3) of the 1945 Constitution jo. Article 2 paragraph (2) of Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles, states that the state has the authority to regulate and control it. The definition of controlled is used in the public aspect as

formulated in Article 2 of the BAL (Basic Agrarian Law). Article 2 of the BAL further gives the meaning of controlling as an act of regulating, planning, as well as managing and preserving it. The state's authority in regulating and making policies in relation to earth, water and natural resources still does not reflect the values of justice so that it is felt that the side of the community has not provided overall benefits. John Rawls describes the state of justice as "a normal condition in which human cooperation is possible and necessary," otherwise known as the circumstances of justice (COJ), a formulation derived from David Hume. Hume himself called COJ to illustrate that new justice is a relevant virtue only when there are scarcity and people are not spontaneously moved in emotional bonds to lend a helping hand.

The principle of justice has not been seen in the Water Resources Law Number 7 of 2004, seen from its orientation which focuses more on the sector of economic value by providing a very large opportunity for the private sector to work on it, so that through the Constitutional Court Decision Number 85/PUU-XI/2013 regarding the Request for Judicial Review of Law Number 7 of 2004 concerning Water Resources, the Law on water resources was canceled. The state in carrying out its duties for the welfare of the people, forming various laws and regulations is very important, because the state's intervention in managing the welfare of the people in the legal, social, political, economic, cultural, environmental, and defense and security fields is carried out by establishing legislation is unavoidable.

Therefore, in the formation of legislation, especially in the field of water resources, it is necessary to pay attention to the principles and norms in the formation of legislation. Thus the formation of legislation must take into account the principles of establishing good laws and regulations, among others: based on the values of Pancasila, the principles of the state based on law, principles based on the constitution, and principles based on legislation developed according to expert opinion. There is a discrepancy between the philosophical and ideological values of water and the problem of fulfilling human rights to water which is the study of this research. In essence, this research will discuss about water in the perspective of justice and human rights to water in Indonesia, especially in its regulation.

Based on the description above, there are several things that can be studied as issues or problems in this research, they are as follows:

How is the formulation and construction of the philosophical basis for the formation of legislation in the field of water resources in the perspective of justice and human rights?

What is the model of legislation in the field of water resources in realizing people's welfare in the future?

2 Research Methods

This research uses normative legal research, normative legal research is used because it examines and analyzes laws and regulations related to water resources, the emphasis of this study is on the philosophical aspect which is the basis in the formation of legislation. This study will use a statutory approach and a philosophical approach, the reason for using a statutory approach is used so that researchers can analyze and examine the reasons or legit ratios of the formation of legislation which is the study in this case is water resources. Legal materials used include primary legal materials, secondary legal materials, and supporting legal materials.

3 Results and Discussion

3.1 Philosophical Basis for the Formation of Legislation in the Field of Water Resources in the Perspective of Justice and Human Rights

The philosophical basis is a consideration or reason that describes the regulation of the use of water resources which is formed by taking into account the views of life, awareness, and legal ideals which include the spiritual atmosphere and the philosophy of the Indonesian nation which originates from Pancasila and the Preamble to the 1945 Constitution. Philosophically, water is actually a public good that is given by God to humans to be used and enjoyed in order to carry out their lives.

Thus, the concept of ownership of water resources is the common property of mankind (*res communis*) and therefore cannot be privately owned like a private good. The Constitution of the State of Indonesia has regulated matters relating to the control of natural resources, including water resources. State control (Indonesia) over natural resources obtains legitimacy based on Article 33 paragraph (3) of the 1945 Constitution. The basis for obtaining this authority in State Administrative Law is called 'attribution'.

Normatively, state control of natural resources can be seen in Law no. 5 of 1960 concerning Basic Agrarian Law, Article 2 paragraph (2), which states: that the authority of the right to control the state includes:

- a. regulate and administer the allotment, use, supply and maintenance of the earth, water and space;
- b. determine and regulate legal relations between people and the earth, water and space;
- c. determine and regulate legal relations between people and legal actions concerning earth, water and space.

Basically, the right to control the state is a reflection of the implementation of state values, norms and legal configurations that regulate the control and use of the environment and water resources or is an expression of ideology that gives authority and legitimacy to the state to control and utilize the environment and natural resources. (water) within its sovereign territory. Because water is a very vital and important need, it should be given equal access to all citizens in its fulfillment.

Thus, the importance of water for human life, it is not surprising that the right to water today, both at the global level and at the national level, has been recognized as one of the human rights, namely the human right to water.

Based on the existing provisions in the regulation of water resources that open up the opportunity for privatization, so that it is not in accordance with the state's understanding of welfare. As a modern democracy, there are several economic functions that must be carried out in managing water resources, as stated by W. Friedman:

“Among the economic functions now generally undertaken by the state in modern democracies, he concentrates on four: those in which the state is (1) provider of social services; (2) regulator of private economic activity, through the licensing of investment, the management of exchange controls, and the like; (3) entrepreneur of a nationalized public sector; and (4) umpire, seeking to meet the community's standard of justice in resolving conflicts and competing claims to economic resources, privileges and opportunities.”

Thus, considering that water includes the livelihood of many people, the State is given the authority to manage water resources in making policies that should pay attention to various factors, especially on the fulfillment of rights for the community. Guarantees for the fulfillment of these rights should be an important consideration in carrying out the functions of the state and government.

Hans Kelsen stated that law is included in the system of dynamic norms (nomodynamics) this is because the law is always formed and abolished by the institutions or authorities authorized to form and abolish it, so that in this case it is not seen from the perspective of its enactment or its formation. Therefore, the law tends to be dynamic, so the law will always develop and change along with the development of society, but still pay attention to the formal provisions that exist in forming or making laws. Likewise, the laws that are made may not accommodate all the interests of the community or are unfair, but they are still called laws as long as they meet the formality requirements in law formation.

3.2 The Right to Water as a Human Right

Access to safe water is a fundamental human need and, therefore, a basic human right. Contaminated water jeopardizes both the physical and social health of all people. It is an affront to human dignity, said Kofi Annan, the former secretary-general of the United Nations. Water is an essential human need. Not only as a basis for health and life, but also affects food production and the totality of human life. The right to water is a dimension of rights that stems from the “right to an adequate standard of living” and the “right to health”. In Article 25 of the Universal Declaration of Human Rights, it is stated as follows:

Everyone has the right to a standard of living that is adequate for the health and well-being of himself and his family, including the right to food, clothing, housing and health services, necessary social services, as well as the right to security when unemployed, sick, disabled, abandoned by his partner, old age, or other conditions that result in a decline in the standard of living that occurs outside of his control.

The Universal Declaration of Human Rights is a declaration containing human rights. This declaration is a common standard of achievement for all people and all nations. The UDHR contains rights which are further elaborated on in the International Covenant on Civil and Political Rights (SIPOL Covenant on Rights) and the International Covenant on Economic, Social and Cultural Rights (ECOSOB Covenant on Rights). Article 11 paragraph (1) of the Covenant on ECOSOB Rights provides an elaboration of the right to an adequate standard of living (as referred to in Article 25 of the Declaration Of Universal Human Right) as follows:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including food, clothing and housing, and to the continuous improvement of living conditions. States Parties will take appropriate steps to ensure the realization of this right by recognizing the importance of international cooperation based on voluntary agreements.

Then, Article 12 paragraph (1) of the Covenant on ECOSOB Rights outlines the right to an adequate standard of living and the right to health (as referred to in Article 25 of the DUHAM) as follows:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. From the description above, it can be seen that the concept of Human Rights is developing dynamically following the development of the need for renewal of values that are considered to provide benefits for human civilization. If at the beginning of the establishment of the DUHAM the right to water was not explicitly referred to as a human right, it was more because many parties had understood that indeed water, as well as air, is fundamental to human life, so that mentioning the right to water as a separate right is considered as a repetition. But times have changed, humans need water to live but with the fact that development in the world is increasingly complicating the right to water, it is necessary to explicitly recognize the right to water along with the concepts and obligations of the state that accompanies it.

Based on the description above, it can be concluded that the philosophy of regulating water resources in the framework of legal reform is that between water, humans and God cannot be separated, they are permanent, namely social, cultural, emotional, and ritual relationships, spiritual which is reflected in the principles of religious-magical communalism. and cosmic contained in the BAL. There is a very steady relationship between Water, Humans and God reflected in religious perspectives, customary law views, ideological views and human rights.

Given that there are still serious problems related to the fulfillment of the right to water for the community in general, especially faced with the massive global agenda to liberalize and privatize water which often contradicts the idea and efforts to fulfill human rights to water itself, it is necessary a legal construction that aims to provide legal certainty and justice in the fulfillment of the right to water, namely in the form of a legal instrument that accommodates aspects of justice and human rights at the philosophical level.

Thus, in the formation of the Water Resources Law, in consideration of the philosophical basis it is constructed as follows: that water is a basic need of human life which is bestowed by God Almighty, therefore in its use it must provide a sense of justice and respect for human rights in fulfillment of the right to water for all Indonesian people.

3.3 Regulation of Legislation in the Field of Water Resources in Realizing People's Welfare in the Future

In the Indonesian constitution which is a guideline in the administration of the state, the provisions regarding the guarantee of the right to water for all Indonesian people are affirmed in Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. State control over water as a natural resource of a national nature is for the fulfillment of people's welfare. Fulfillment of the welfare of all Indonesian people as a manifestation of the struggle of the Indonesian people in escaping from colonialism which has created suffering ends and the obligation of the Indonesian people to realize prosperity as a consequence of the agreement of all Indonesian people to establish a state called Indonesia.

In the context of the Indonesian state, those relating to earth, water and natural resources have been regulated in the constitution, namely the 1945 Constitution of the Republic of Indonesia Article 33 paragraph 3 whose purpose is to realize the greatest prosperity and prosperity for the people, nature is functioned to realize social justice. Indirectly that Article 33 paragraph 3 contains the greatest benefit. When analyzed with the theory of Jeremy Bentham and John Stuart Mill, the flow of utilitarianism, which puts benefit as the main goal of law. Benefit here is defined as happiness (happiness).

For this reason, it is strived for that happiness to be enjoyed by as many individuals as possible in the society (the nation) (the greatest happiness for the greatest number of people). In line with the historical school of law, one of the schools of law that influenced the development of law, which was developed by Frederich Carl Von Savigny, it is further said that law is not made but grows and develops together with the community and grows by itself from public awareness.

In the context of a legal state, Pancasila has a position as a legal ideal (rechts idee) which according to Bernard Arif Shidarta is an idea, initiative, creativity and thought regarding the law or perception of the meaning of law which contains three basic foundations, namely justice, usability and legal certainty. Bernard Arif Shidarta explained that the core of the legal ideals of Pancasila as the legal ideals of the Indonesian nation has core values, namely, divinity in one and only, respect for human dignity, national insight and insight into the archipelago, equality and feasibility, social justice, moral character and noble character. and participation and transparency in public decision making.

Jimly Asshidiqie argued that the precepts in Pancasila became the ideological philosophical basis for realizing the ideals of the state, namely: (a) protecting the entire Indonesian nation and the entire homeland of Indonesia; (b) improve general welfare; (c) the intellectual life of the nation; and (d) participate in carrying out world order based on freedom, eternal peace and social justice. Furthermore, Jimly Asshidiqie positioned Pancasila as the Staatsfundamentalnorm which was first conveyed by Notonagoro. Pancasila as a view of life and the basis of the state is seen as a legal ideal (*rechtsidee*) as a guiding star for law formation and law implementation. This position requires that the formation of positive law is to achieve the ideas in Pancasila and can be used to test positive law.

Thus, in the formation of legislation or in the formation of laws in the field of water resources, Pancasila as Staatsfundamentalnorm. For this reason, in the formation of law, its application and implementation cannot be separated from the values of Pancasila. Philosophically, the need to put back the meaning of Pancasila both conceptually and contextually as a philosophical ideological foundation becomes the mainstream in the management of water resources (SDA) based on Pancasila values. Pancasila should be interpreted in its entirety and comprehensively. This means that Pancasila is a necessity in the formation of legislation as a principle or basis both conceptually and in its implementation

The existence of universal values in Pancasila should be imprinted in every aspect of community life, nation and state. These values come the foundation for sustainable development. Development must be based on the basic values of Pancasila. Within this framework, the values of Pancasila are realized to bridge the reality of society, nation and state with ideals which are the hopes and aspirations of the Indonesian nation. The existence of Pancasila ethics is needed to condition the government and people to always be at the original goal of establishing the nation.

Thus, based on the above description of the management of water resources (SDA) based on Pancasila values above, the model for regulating water resources (SDA) in future legislation is related to the water resources law to better accommodate community participation, especially the community. customary law which historically, philosophically, geographically and genealogically in their daily lives still provides respect, protection and fulfillment of the right to water for others, the environment and the Creator in their daily lives.

4 Conclusion

Based on the discussion of the description above, it can be concluded as follows:

There are still serious problems related to the fulfillment of the right to water for the community in general, especially in the face of the massive global agenda to liberalize and privatize water, which are often contradictory to the ideas and efforts to fulfill human rights to water itself. a legal construction is needed that aims to provide legal certainty and justice in the fulfillment of the right to water, namely in the form of a legal instrument that accommodates aspects of justice and human rights at the philosophical level. For this reason, in the formation of the Water Resources Law, the considerations on the philosophical basis are constructed as follows: that water is a basic need of human life which is bestowed by God Almighty, therefore in its use it must provide a sense of justice and respect for human rights in fulfillment of the right to water for all Indonesian people.

The existence of universal values in Pancasila should be imprinted in every aspect of the life of the community, nation and state. These values are the foundation for sustainable development. Development must be based on the basic values of Pancasila. Regulation of water

resources (SDA) based on Pancasila values, then the model of regulating water resources (SDA) in future legislation is related to the Water Resources Law to better accommodate community participation, especially customary law communities which historically, philosophically, geography and genealogy in their daily lives still provide respect, protection and fulfillment of the right to water for others, the environment and the Creator in their daily lives.

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