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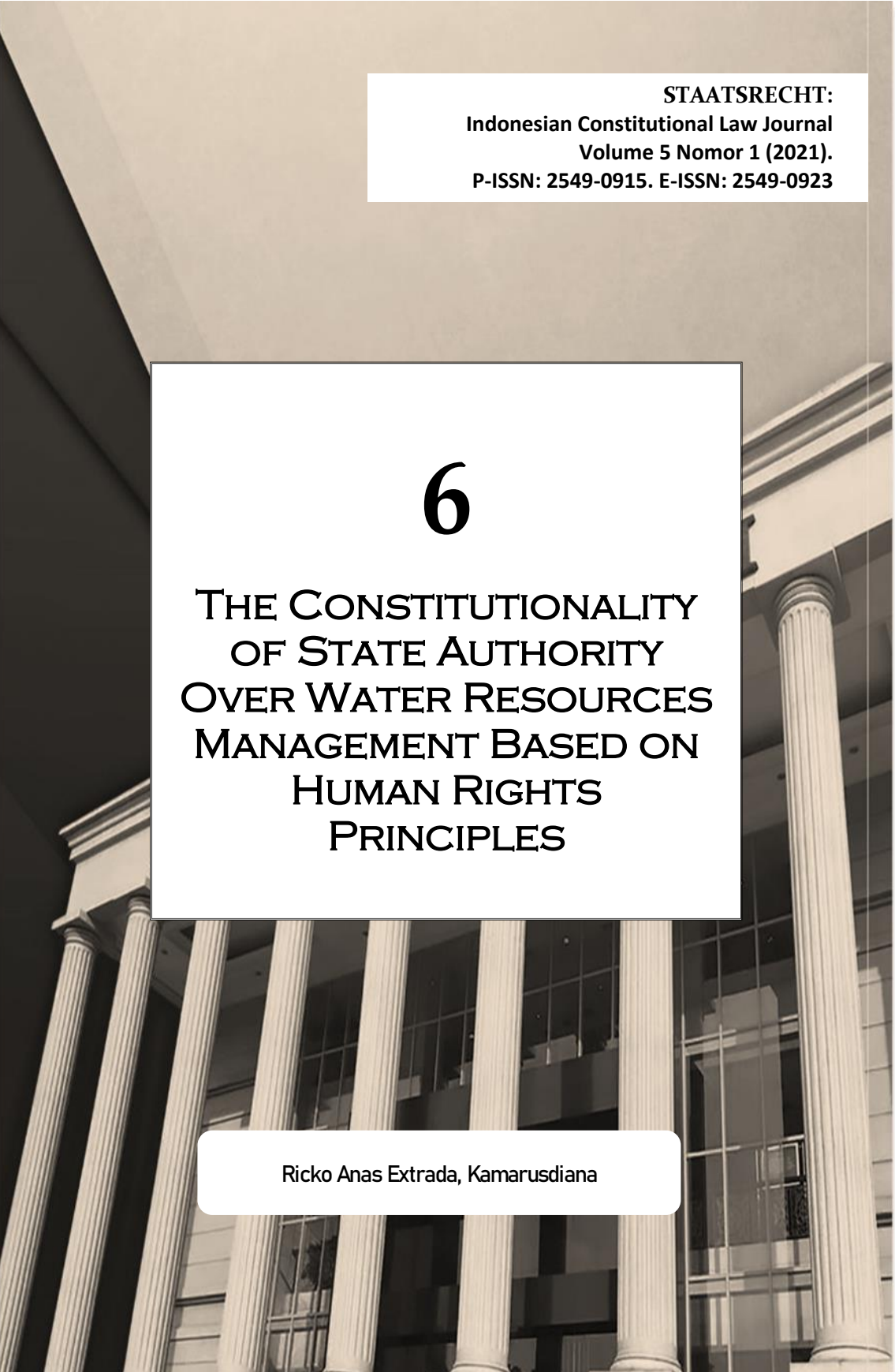

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The Constitutionality of State Authority Over Water Resources Management Based on Human Rights Principles

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THE CONSTITUTIONALITY OF STATE AUTHORITY OVER WATER RESOURCES MANAGEMENT BASED ON HUMAN RIGHTS PRINCIPLES*

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Abstract:
This study intends to investigate the contrast between the private sector's implementation of water privatization in Indonesia and the state's responsibility for managing water resources in light of human rights standards. In accordance with the mandate of the constitution, which states in Article 33, paragraph 3, that "Earth and water, as well as the natural resources contained therein, are under the control of the state and used for the greatest prosperity of the people," the state controls and uses all natural resources for the benefit of the people. This research employs normative legal research methods, while its methodology is a statutory approach, library research methods, and a conceptual approach that will be harmonized with statutory provisions. According to the findings of this study, the state is responsible for managing water resources in compliance with the constitutional requirement to ensure, defend, and fulfill human rights to water. Water administration by the private sector (water privatization) that is monopolistic, exclusive, and materialistic is contrary to the spirit of the Indonesian constitution and the foundation of the nation. In addition, based on the decision of the Constitutional Court to invalidate the Water Resources Law, it mandates that the state manage water resources for the sake of societal welfare.

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A. INTRODUCTION

In essence, water is a public good that is given by God to humans to be used and enjoyed for the survival of all living things. On the basis of the function of water, the concept of ownership of water resources should be the common property of mankind (res communitis), and therefore it is not appropriate for the private sector to be given a full role in managing water to fulfill human needs, because water is not a private object (private property). good) which can usually be controlled by the corporation.

Fulfillment of water for humans is categorized as natural rights, which means rights that are inherent in human nature due to historical conditions, basic needs, and the idea of justice. The right to water is a human right that is not given by the state, but a human right that is obtained because of the ecological context of human existence that gives rise to the right to water. Therefore, the state has an obligation to manage water resources solely to protect and fulfill human rights to water that is natural in nature.

Article 33, paragraph 3, of the 1945 Constitution of the Republic of Indonesia stipulates the state's obligation to manage water resources for the welfare of its people: "Earth and water and the natural resources contained therein are under the control of the state and used for the greatest prosperity of the people." The provisions of the constitution are the legal basis and legal objectives, as well as a manifestation of the noble ideals of the Indonesian people, which are the focal point of social life in the context of implementing optimal management of natural resources in Indonesia to achieve social welfare for the Indonesian people (Saragih, 1977).

The need for water among humans continues to rise. This is due to the expanding range of human water needs and the growing number of people who require water. On the other side, the quantity of water available in nature may decrease (Silalahi, 2006). Water serves as a social and environmental necessity; therefore, the state should not allow and give the private sector

as much latitude as possible in managing water, as privatization of water management is only one of the major goals of economic liberalization (Khalil, 2006).

The concept of economic liberalization encourages and animates several sectors whose orientation is public services, such as the water resources management sector in Indonesia, because it is influenced by the monetary crisis experienced by Indonesia during the New Order era, which later drew the attention of international organizations such as the World Bank, which attempted to restructure the system of water management and invest in the sector in Indonesia. To reorganize water sector policy in Indonesia, the World Bank provides loans in the water resources sector or Water Resources Sector Adjustment Loan (WATSAL) totaling USD 300 million. This arrangement will enable chances for engagement by the private sector (privatization) in the management of water services. The agreement has consequences for the initiation of a water privatization plan.

As a result of collaboration between the Indonesian government and international organizations like the World Bank, Presidential Decree No. 96 of 2000 was established and is now in effect, allowing foreigners to control up to 95% of the management and supply of drinking water. Because the private sector's (corporations') primary motivation is profit maximization, the Indonesian government has thereby turned on the water for a privatization of the economy (profit oriented). Since water management isn't the primary focus, the private sector's position in this area can be indifferent to the needs of the community at large (Wahidin, 2016).

In order to continue the practice of commercialization or materialization of water management, the concept of water privatization has established a new framework of thinking about water, which was previously viewed as a public object that can be easily accessed by the people. Again, this would alter the significance of water, which was previously seen to be a common resource whose provision falls under the purview of the state.

Consequently, water is being treated as an economic commodity, which is a step toward privatization and commercialization in which only a select few have access (Wahidin, 2016).

The issue of limited water quality and quantity has become a very important issue that has attracted international attention. As Maria Adelaida Henao Canas wrote: (Canas, 2010) "Water is today subject of debate in the international arena due to the deep politic, economic and social implications it carries, along with challenges that require strong commitment by government and international agencies."

It is the same as what is described in the research of international journals indexed by the Scopus Harvard law review which explains the essence of water for humans in the midst of water scarcity that occurs in parts of the world. The journal is entitled what price for the priceless:

> "Implementing justiciability of the right to water is scare, such as Asia, South America, Sub Saharan Africa, the relative cost of purchasing water is high, and water takes on radically different level of importance. When its general importance is coupled with scarcity, waters value increases exponentially, making it more comparable to gold or diamond than to air, with the added weight of being necessary for survival. In this sense, there are few (perhaps no) other resources of equal importance." (Note, 2007)

In order to continue the practice of commercialization or materialization of water management, the concept of water privatization has established a new framework of thinking about water, which was previously viewed as a public object that can be easily accessed by the people. Again, this would alter the significance of water, which was previously seen to be a common resource whose provision falls under the purview of the state. Consequently, water is being treated as an economic commodity, which is a step toward privatization and commercialization in which only a select few have access (Samekto; Suteki, 2015).

Consumers' negotiating position with the government has weakened due to lax government oversight and the tangled web of corruption, collusion, and nepotism at the bureaucratic level. When backed into a corner, private investors may resort to desperate measures, such as demanding a larger slice of the government's capital pie or negotiating for longer terms on existing contracts, in order to maximize profits from the exploitation of scarce natural resources at the expense of taxpayers and the general public. At this point, the foundations for the current colonization of water access, control, and participation are laid (www.ampl.or.id).

The state's limited position as a rulemaker and supervisor under the Water Resources Law is further constrained. Water privatization is a more developed application of a liberal economic system in which the state plays only a regulatory role and the private sector organizes the water infrastructure. A profit-driven corporate sector cannot take on the social responsibility of implementing a comprehensive water management system.

A state that merely acts as a regulator runs the risk of not being able to oversee the entire water management process and guarantee the safety and quality of the water for all consumers. One way in which the state fails to protect its most vulnerable citizens is by failing to ensure that everyone has access to clean, cheap water.

B. METHODS

The research under consideration here made use of both a qualitative approach and a strategy created from an analysis of the existing body of literature. The examination that motivates this study is carried out using the approach of normative legal research. When compiling the information offered here, we relied on main legal sources, also known as authoritative sources of primary legal data. Books and

publications of legal commentary sit alongside statutes and other pieces of law like the Law on the Establishment of Legislation in this library's collection of legal documents. The Law on the Establishment of Legislation is one example of such a statute. In terms of overall importance, the Law on the Establishment of Legislation stands out as the must-have document here.

C. RESULTS AND DISCUSSION

1. Guarantee of Protection and Fulfillment of Human Rights to Water by the State

The notion of human rights (HAM) is now internationally accepted as a moral, political, and legal framework and as a guideline for the creation of a more peaceful, oppression-free, and fair-treatment-free world. Therefore, in the notion of the rule of law (rechtsstaat), safeguards for the protection of human rights are regarded as an absolute characteristic that every nation must possess.

The concept of the right to water, which is recognized as a human right, was initiated at the international level in 1946, when the WHO (World Health Organization) constitution was drafted. WHO does not directly mention the right to water in the constitution, but it does include the right to enjoy the best achievable quality of health.

Additionally, the 1948 Universal Declaration of Human Rights (UDHR) recognizes the right to a healthy life. This acknowledgement is stated in Article 25 of the UDHR, specifically paragraph (1), which states:

> "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family including food, clothing housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

The human right to life recognized in the Universal Declaration of Human Rights was subsequently recognized as a human right by the International Covenant on Economic, Social, and Cultural Rights (ICESCR) or the International Covenant on Economic, Social, and Cultural Rights, particularly in Article 12 paragraph (1), which states: "The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

One of these recognitions and commitments at the international level can be seen in the "General Comments on the Right to Water" or commonly referred to as "General Comments Number 15 (GC-15) issued by the Committee on Economic, Social and Cultural Rights (CESCR) on November 2002, which includes the following statements: "The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, reduce the risk of water-related disease and provide for consumption, cooking, personal and domestic hygienic requirements." (UN ECOSOC, 2002)

On the basis of a variety of infectious and non-communicable health hazards, policymakers anticipate that, in the future, each nation will be able to overcome its water-related sustainability issues. Human rights provide a normative foundation for furthering global justice through public policy, articulating legal obligations to increasingly realize that water and sanitation are for everyone (Donnelly, 2003).

Meanwhile, regarding the problems that arise as a result of the practice of water privatization, there are rules in the international scope regarding corporate responsibility in fulfilling the right to water, especially those related to water privatization. This has been regulated in The Norms on the Responsibilities of Transnational Corporations and Other Business Entities with Regard to Human Rights (UN Draft Norms). The document stipulates the obligations of transnational companies to ensure the fulfillment of human

rights as regulated in national law and international law. The document also requires the protection and fulfillment of the right to water for parties involved in water privatization (Williams, 2007).

Control by the state is a reflection of the responsibility of the state in administering the government as a public servant in this case the management of water resources. Management by the state is a formal authority attached to the state and provides opportunities for the state to act both actively and passively in the field of state government (Ilmar, 2012).

According to Soepomo, the phrase "managed by the state," which appears in Article 33, paragraph 3, of the 1945 Constitution, has the concept of regulating and/or organizing, notably to enhance and consider production. In the meantime, according to Mohammad Hatta, the concept of "controlled" is not necessarily administered directly by the state or government, but can be delegated to the private sector as long as it is supervised by the government.

Mohammad Hatta's opinion differs from that of Bagir Manan, that the scope of the notion is controlled by the state or the right to control the state, as follows:

(1) Control is a kind of ownership by the state, meaning that the state through the Government is the only authority holder to determine the right of authority over it, including here the earth, water, and the wealth contained therein.

(2) Regulate and supervise the use and utilization.

(3) Equity participation and in the form of a state company for certain businesses.

The control of natural resources by the state, as regulated in the 1945 Constitution cannot be separated from the purpose of such control, namely to realize the greatest prosperity of the people. According to Bagir Manan, the connection between

control by the state for the prosperity of the people will realize the state's obligations in terms of: (Saleng, 2004)

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

The meaning of the phrase "production branches which are important for the state and which affect the livelihood of the people" in Article 33 of the 1945 Constitution can be viewed from the opinion of Jimly Asshiddiqie who gives 4 (four) categories of prosperity and welfare associated with control by the Government, namely: a). Sources of wealth that are important for the State and control the livelihood of many people (must be controlled by the Government); b). Sources of wealth that are important to the State, but do not control the livelihood of the people (can be controlled by the Government); c). Sources of wealth that are not important to the State, but control the livelihoods of many people (no need to be controlled by the Government); d). Sources of wealth that are not important to the state and do not control the needs of the people (not to be controlled by the government) (Asshiddiqie, 1994).

2. Water Resources Management System in Indonesia After the Cancellation of the Natural Resources Law through the Constitutional Court Decision Number 85/PUU-XII/2013

Article 33 of the 1945 Constitution of the Republic of Indonesia is the spirit or basis of the regulation of water resources management. This article grants the state jurisdiction as an organization of power for all the people to control water-related concerns, including water resources management.

Therefore, the state has control over the land, water, and natural resources contained therein. To be controlled is to own, not in the sense of total ownership, but the state has the authority based on the nation's delegated rights to completely manage, regulate, utilize, and cultivate water where all kinds of government treatment are directed at the greatest welfare of the people (Hajati; Winarsai, 2018).

On water resources, the state primarily carries out administrative and management actions, but not domaindad (ownership actions). In the meantime, based on the interpretation of the Constitution's values, water is essentially a public good and the state is a trustee responsible for regulating, supervising, and managing water for the benefit of the people.

The Indonesian constitution basically does not cover private participation in the operation of production branches that affect the livelihoods of many people, including the provision of drinking water, but also does not eliminate the meaning of control by the state. Private participation can be carried out within the framework of cooperation and in stages of implementation that do not hinder the state in the provision of drinking water.

In contrast, the government actively promotes the commercialization of clean water through its policy of issuing the broadest licences for private enterprises to regulate water resources (domestic and foreign). Therefore, it appears that the government's policy regarding privatization or the privatization of businesses engaged in water resources is in conflict with the provisions of its own legal policy, namely Law No. 7 of 2004 and Government Regulation No. 16 of 2005, which stipulate that the central government and local governments are obligated to provide clean water facilities for every citizen.

The water privatization policy outlined in the policy on water resources included in Law No. 7 of 2004 pertaining to Natural Resources has led to the development of an increasing number of regional policies in the form of regional regulations that offer numerous opportunities for privatization in the field of

water resource management. As a result of the Government's confidence in the privatization of the natural resources sector, the government appears to be reacting by establishing laws that offer excellent chances for foreign and domestic investors in water-related businesses in Indonesia. Currently, it appears that our nation is undergoing a dehumanization process that frequently culminates in anti-people state policies (Rahmida, 2012).

On the basis of Law No. 7 of 2004 concerning Water Resources, the private sector has been granted the right to use water extensively to participate in the management of water resources, so that there is an understanding of social and economic functions as well as the occurrence of privatization and commercialization of water resources that are detrimental to the community (Sudarwanto, 2015). Another rule is found in the TAP MPR Number IX/MPR/2001, which highlights the significance of natural resources as a national asset in achieving prosperity and justice for the Indonesian people. This provision requires effective management of natural resources, particularly water, as an expression of thankfulness for the natural bounty bestowed by God. In order to accomplish the lofty aspirations articulated in the preamble of the Republic of Indonesia's Constitution of 1945, the government's political commitment must be unwavering.

In light of the foregoing, the Constitutional Court nullified the central leadership of Muhammadiyah and others' proposed amendments to Law Number 7 of 2004 concerning Water Resources. This is due to the fact that statutory provisions limiting private water management are either not present or are not guaranteed. It was determined that this requirement fundamentally went against the Republic of Indonesia's 1945 Constitution. In order to fill the void left by the law's repeal, the Constitutional Court reverted to Irrigation Law 11 of 1974.

If the government wants to open the tap for investment or water exploitation to the private sector, it must adhere to at least six restrictions outlined in the Constitutional Court's decision in

case number 85/PUU-XI/2013, which was issued on February 18, 2015 and contained the decision to annul Law number 7 of 2004 concerning Water Resources. These six limitations are:

a. The right of the people to water must be protected at all costs, as the state has the responsibility to manage the use of the earth's and ocean's resources for the benefit of its citizens.

b. Every citizen has a legal right to clean drinking water, and the government must ensure that they receive it. Given that Article 28I Paragraph 4 indicates that "the protection, promotion, recognition, and fulfillment of human rights are the responsibility of the state, especially the government," it follows that the state has a duty to ensure that citizens have access to clean water.

c. Article 28H Paragraph (1) of the 1945 Constitution states, "Everyone has the right to live in physical and spiritual prosperity, to have a place to live, and to have a good and healthy living environment and to obtain health services," so environmental sustainability is a human right and must be taken into account.

d. Water is under absolute State supervision and control since it is a vital component of production and because its management determines the fate of many people (see Article 33, Paragraph 2, of the 1945 Constitution).

e. As a continuation of the state's right to control and because water is something that really controls the livelihood of many people, the main priority given to water exploitation is State-Owned Enterprises or Regional-Owned Enterprises, and

f. If after all the restrictions mentioned above have been met and it turns out that there is still water availability, it is still possible for the Government to grant permits to private business entities to operate water under certain and strict conditions.

Prior to privatization, a selection action on enterprises must be taken using the criteria specified by government regulations. After obtaining a recommendation from the Minister of Finance, the DPR and the public are made aware of the companies that have been chosen because they match the established criteria. Privatization requires DPR approval, and the method for privatization is further regulated in Government Regulation Number 33 of 2005 concerning Procedures for Privatization of Limited Liability Companies in line with Article 83 of the BUMN Law (Persero).

The constitutional perspective of water resources management can be found in two sources, namely the constitutional text itself and the decision of the Constitutional Court. In the 1945 Constitution, water is explicitly mentioned in the provisions of Article 33 paragraph (2). Referring to the decision of the Constitutional Court No. 058-059-060-063/PUU-II/2004 and No. 008/PUU-III/2005 and Decision No. 85/PUU-XI/2013 then there are at least four considerations that underlie the building of the constitutional perspective presented by the Constitutional Court in the management of water resources, namely: (1) the relationship between the state, the people and water; (2) Guarantee of human rights to water in the Natural Resources Law; (3) State control of water; and (4) Restrictions on water exploitation.

The first consideration regarding the relationship between the state, the people and water emphasizes the necessity of state intervention in the regulation of water based on two considerations. First, consideration of the state's obligation to respect, protect and fulfill the human right to access to water. In this regard, the Constitutional Court stated in its decision that:

"Considering that the recognition of access to water as a human right indicates two things, on the one hand it is an acknowledgment of the fact that water is such an important need for human life, on the other hand the need for protection for everyone on access to water. For the sake of this protection, it is necessary to posit that the right to water is the highest right in

the legal field, namely human rights. The problem that arises then is what is the position of the state in relation to water as a public object or social object which has even been recognized as part of human rights. As with other human rights, the position of the state in relation to water as a public object or social object has even been recognized as part of human rights. As with other human rights, the position of the state in relation to its obligations posed by human rights, the state must respect, protect, and fulfill it."

The second consideration regarding the guarantee of the human right to water requires that in the law on water resources there must be a guarantee by the state of the right of everyone to obtain water for basic daily life at least in order to meet the needs of a decent life. This kind of guarantee is actually contained in Law 7/2004 which has been annulled by the Constitutional Court as stated in Article 5 which reads, "The state guarantees the right of everyone to obtain water for their daily minimum basic needs in order to fulfill a healthy, clean and productive life." However, the Constitutional Court emphasized in its decision that this state guarantee must be described in more detail in the form of the responsibilities of the Government and the Provincial Government as well as the Regency/City government while still basing it on respect, protection and fulfillment of human rights to water. Although Law 7/2004 has been annulled by the Constitutional Court, the substance of the regulation as stipulated in Article 5 of the Law, which is followed by an explanation of the responsibilities of both central and local governments, is an important aspect that should be regulated in the law on water resources that will be established later. This is because Law 11/1974 does not contain the substance of such a regulation. There is also no detailed description of the responsibilities of the central and local governments.

In this regard, the Constitutional Court's decision to abolish the Water Resources Law and reintroduce the Water Resources Law, the consistency of the decision is questionable, is there any denial of its implementation, is there a spirit of

togetherness in water management that is still in the spirit of togetherness in favor of the people.

The decision of the Constitutional Court is final and binding, so the parties who are the addresses, all state institutions, state administrators and all citizens related to the decision must comply and implement it. This is what gave rise to and the application of the erga omnes principle in the decisions of the Constitutional Court because the Constitutional Court decisions are decisions that are not only binding on the parties (inter parties) but also must be obeyed by anyone (erga omnes). The principle of erga omnes is reflected in the provision which states that the decision of the Constitutional Court can be directly implemented without requiring the decision of the competent authority unless the laws and regulations provide otherwise. These provisions reflect binding legal force and because of their legal nature publicly.

Problems then arise when the decisions of the Constitutional Court are often not immediately implemented by the litigants, state institutions, state administrators and also citizens associated with the decision for various reasons. Empirical facts show that in fact, the power of the decision of the Constitutional Court which is final and binding and the application of the principle of erga omnes from the decision of the Constitutional Court cannot necessarily make the decision be implemented in a concrete manner (non-excutiable) and only floating (floating execution).

In empirical reality, the problem of implementing the decisions of the Constitutional Court often experiences difficulties, at least showing many variations of problems and patterns of implementation. The problem of implementing the Constitutional Court's decision is caused by at least 3 (three) things, namely: (1) as stated in Article 24 C paragraph (1) of the 1945 Constitution of the Republic of Indonesia, the decision of the Constitutional Court is only final but is not accompanied by the word binding so that it is sometimes perceived as not binding; (2) The Constitutional Court does not have an execution

unit tasked with guaranteeing the application of final decisions (special enforcement agencies); and (3) the final decision is highly dependent on other branches of state power, namely the executive and legislative branches, namely the willingness and awareness to implement the decision (Nugroho, 2019).

The impact of the cancellation of Law No. 7 of 2004 concerning Water Resources has an impact on the Government (executive), water management business entities, and the community.

a). Impact on the Government

First: Implications for the laws and regulations as implementing regulations, Law Number 7 of 2004 does not apply, so that as a legal umbrella, Law Number 11 of 1974 concerning Irrigation is re-enacted. Second: the state has the right to control water resources, the main priority for controlling water is given to State-Owned Enterprises (BUMN) and Regional-Owned Enterprises (BUMD).

b). Impact on Water Management Business Entities

First: The cancellation of Law No. 7 of 2004 concerning Water Resources (SDA) has implications for the derivative regulations as implementing regulations to be canceled so that the loss of the legal umbrella that forms the basis for issuing water extraction permits for Water Management Business Entities both at the central and regional levels. Second: For the water exploitation process, the Private Water Management Business Entity must partner with BUMN or BUMD in their area. Third: It has an impact on the obstruction of an unfavorable climate and the investment process where there is no legal certainty to regulate the establishment of water-based industries in Indonesia.

c). Impact on Society

First: The cancellation of Law Number 7 of 2004 concerning Water Resources will have a positive impact on people's lives at large. This means that the spirit of the

community's right to water can be fulfilled according to the constitutional basis of the 1945 Constitution Article 33 paragraph (3). Second: Natural wealth in the form of water can be fully utilized for the prosperity of the community and the opportunity for commercialization of water by private companies must be regulated and closely monitored. Third: Public access in the management of water resources is wide open, meaning that it must place the community on greater access in order to strengthen the bargaining power of civil society.

D. CONCLUSION

Based on the constitutional mandate affirmed in Article 33 paragraph (3) of the 1945 Constitution, it implicitly states that the state has a trias obligation, namely the obligation to respect, protect, and fulfill human rights to water. Thus, the role of the state in the management of natural resources, specifically water resources, is very vital and dominant because the state has great authority in regulating, supervising, and managing water resources for the survival of many people. Coupled with the decision of the Constitutional Court which has annulled the Water Resources Law, it has legal consequences and implications for the state to take over the management of water resources from the private sector which has been massive and has been going on for a long time. Because if the privatization of water continues in the midst of the water crisis, it will result in the non-fulfillment of the rights of all Indonesian people to enjoy easy and affordable water. Massive privatization of water is a capitalistic liberal understanding in materialistic exploitation of water resources solely to seek the maximum profit and not to carry out public services as attached to the responsibility of the state.

The implementation of water privatization in Indonesia is still very possible based on the prevailing laws and regulations and based on the decision of the Constitutional Court. However, in its implementation, the state is obliged to intervene at every stage of water management by the private sector by granting

permits and very strict supervision and must first ensure that the rights to water of all Indonesian people have been fulfilled. Because water is not an object that can only be used for its economic value (economic value), but social and environmental functions must also be prioritized.

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