

The Ideal Concept of the State's Responsibility for Fulfilling the Right to Water

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Abstract

The state should be responsible for guaranteeing and meeting the needs of all citizens' rights in the form of the right to water, including the obligation to respect, protect, fulfill, and provide facilities for the benefit of these rights and in this case, the state as the ruler in managing water resources. This study aims to analyze and find a legal reconstruction of the state's right to control water and its resources as well as legal restrictions on the exploitation of water resources. This study is a normative legal research using a statutory approach and a conceptual approach whose main ingredients are derived from the results of the author's dissertation research. The results of this study indicate that the state is responsible for the right to water and uses the law as a means of regulating, administering, providing guarantees to meet minimal water needs, regulating access and distribution of water fairly and equitably, so that all people can enjoy the right to water. The state can fully control water resources if the legal reconstruction of the state's right to control is carried out through a dialectical process, namely bringing together the ideal legal construction of state control rights as a thesis and the legal construction of state control rights that exist as antithesis to produce an ideal legal construction. Legal restrictions on the exploitation of water resources are carried out referring to the RI Law No. 17 of 2019 and in the decision of the Constitutional Court Number 85/PUU-XII/2013 which lists 6 main requirements that limit the exploitation of water resources.

Keywords: State Responsibility, Right to Water, Water Resources

DOI: 10.7176/JLPG/120-13

Publication date: April 30th 2022

A. Introduction

Diverse natural resources, one of which is water resources with a renewable character, dynamic according to the hydrological cycle which naturally moves, cannot be replaced, does not change shape and nature, all of which are basic needs for the life of all living creatures created by God, which must be fully protected by the state.¹

Everyone has different water needs. Of the total human body, two-thirds is composed of water with the level of need for each person at least 50 liters of water used for drinking, cooking, washing, sanitation accompanied by the need to grow food² from agriculture and plantations. There are 60 million people in Indonesia who experience a shortage of clean water, as a result of the inability of humans to maintain the water resources environment and most of them are controlled by the private sector.³ Such failure impacts on dignity and threatens the fundamental survival of all people. In other words, rights are owned by humans because of their creation as humans⁴ so that if their rights can no longer be exercised, then human extinction is in sight.

According to international law, the state is responsible for every action in accordance with the sovereignty and authority it has. If there is an abuse of sovereignty in the form of an internationally wrongful act or a violation refers to an essential international obligation to protect the fundamental needs of the international community which is then justified that the action is indeed an international crime, then the act gives birth to state responsibility.⁵ This responsibility is also closely related to the affirmation that parties whose interests have been damaged have the right to obtain compensation for their suffering. Therefore, the risk of the state in relation to its responsibilities is highly dependent on the basic provisions and conditions that require the state to be responsible.⁶

The function of the state which consists of guarantors, regulators, entrepreneurs and intends to formulate

¹ Pradhyksa, D. P. (2021). Pengaturan Pendayagunaan Sumber Daya Air dalam Undang-Undang Cipta Kerja dan Korelasinya dengan Pasal 33 UUD 1945. *Ascarya: Journal of Islamic Science, Culture, and Social Studies*, 1(2), 70-92.

² Sakharina, I. K., (2016). *Kewajiban Negara Terhadap Pemenuhan Hak Atas Kecukupan Pangan Yang Layak Di Indonesia*. Makassar: Pustaka Pena. p. 63.

³ Fatah, E. S., (2007). delivered at the Indonesian House of Representatives/DPRD LH Caucus Meeting, International Conference on Climate Change, Bali.

⁴ Ashri, M. (2008). Gugatan Warga dan Tanggung Jawab Negara dalam Pemenuhan Hak Atas Pendidikan. *Indonesian Journal of International Law*, 5(2).

⁵ Smith, R. K., Asplund, K. D., & Marzuki, S. (2008). *Hukum hak asasi manusia*. Pusat Studi Hak Asasi Manusia, Yogyakarta: Universitas Islam Indonesia. p. 75.

⁶ Sefriani, S. (2017). *Hukum Internasional Suatu Pengantar Edisi Kedua*. Jakarta: Raja Grafindo Persada. p. 94.

several standards that are equitable and fair apart from the main task of the state in serving the community in general and trying to protect the welfare of its citizens.¹ According to W. Friedmann, in a country that always strives for prosperity, it is permissible to fully intervene in the economic field which is clearly not the same as the principle of a night watch state which has the principle of trying to stay away from and not take care of the economic affairs of its people. It is famous for the *Laissez Faire*. Its motto is *The Last Government Is The Best Government*.²

Humans are subjects of international law and the state as a large forum for humans as people must complement each other with the government in managing the state, so that the state is also responsible and obliged to guarantee and fulfill all the rights of citizens such as the right to water among the things that are required including providing respect, protect, fulfill and provide facilities for the implementation of a number of rights that are positively recognized in the provisions of human rights law to the international level.³

After the amendment to the 1945 Constitution of the Republic of Indonesia, Chapter XIV which later formulated Article 33 which originally consisted of 3 paragraphs to 5 paragraphs⁴ through these five paragraphs, there are concepts that are key in the management and exploitation of water resources in Indonesia, including: 1) State control; 2) Important production branches are under the control of the state over the livelihoods of the people related to natural resources and; 3) The prosperity of the people⁵ contained in the Fourth Paragraph of the Preamble to the 1945 Constitution of the Republic of Indonesia and Article 33 of the 1945 Constitution of the Republic of Indonesia, which is carried out by the central and regional governments with a fair and equitable mechanism.

The provisions of Article 33 paragraphs (2) and (3) of the 1945 Constitution of the Republic of Indonesia do not give up the right to control as well as ownership, but only hand over the right to control to the state to manage resources and the right to water according to state objectives. The position of the state is only to be the trustee of natural wealth in the form of water. Water still belongs to the people as a public good. The philosophy is that, as a public good, water must be used and enjoyed together for the survival of all Indonesian people and the 1945 Constitution of the Republic of Indonesia has adopted this principle through joint control.⁶

The definition of the right to control the state can be found in a limited way in the Republic of Indonesia Law no. 5 of 1960, as Article 1 states in paragraph 2⁷ that the entire earth, water and space are the result of the struggle of the Indonesian people and become the right to own and control the entire Indonesian people, not only the sovereign rulers. This is a kind of ulayat right but on a higher level. Article 2 reviews the state's authority in controlling in accordance with the forms detailed in the article.⁸

The main problems that will arise due to inconsistencies related to the state's right to control water resources include: 1) State control; 2) State guarantees; 3) Management objectives; 4) The role of the private sector in the exploitation of water resources. For the sake of improving all these problems, the evaluation was carried out using Article 33 of the 1945 Constitution of the Republic of Indonesia to all levels. This is because when it comes to the level of the superstructure (politics), it will result in a conflict regarding the concept of public control with the concept of state civil ownership of water resources and the risks arising from the legal relationship between the two.⁹

Investors who see business opportunities from water resources, take big profits which have an impact on the availability of increasingly scarce water. From the data obtained, water reserves in Indonesia are 2,019 m³¹⁰ implying that water resources still exist but water reserves are decreasing. Communities belonging to non-business groups feel the long-term impact of the availability problem. In fact, if you follow the theory, then the water reserves should still be fulfilled, both in the rainy and dry seasons.¹¹

Adopting the right to water as a basic human right, then Article 11 paragraph (1) of the International

¹ Razak, A. (2012). *Peraturan Kebijakan (Beleidsregels)*. Yogyakarta: Republik Institut & Rankang Education, p. 4.

² W Friedmann, W. (1971). *state and the rule of law in a mixed economy*. London

³ Sefriani, *Op.Cit.* p. 94.

⁴ See amendments to article 33 of the 1945 constitution Republic of Indonesia.

⁵ Magnar, K., Junaenah, I., & Taufik, G. A. (2016). Tafsir MK atas pasal 33 UUD 1945: Studi atas putusan MK mengenai judicial review terhadap UU No. 7/2004, UU No. 22/2001, Dan UU No. 20/2002. *Jurnal Konstitusi*, 7(1), 111-180.

⁶ Chalid, H., & Yaqin, A. A. (2018). Studi Tentang Hukum Air Dan Problematika Pemenuhan Hak Asasi Manusia Atas Air Di Indonesia. *Jurnal Hukum & Pembangunan*, 48(2), 411-435.

⁷ Article 1 paragraph 1 and paragraph 2 of Law no. 5 of 1960

⁸ Paragraph 2 of Law no. 5 of 1960

⁹ Arizona, Y. (2016). Perkembangan konstitusionalitas penguasaan negara atas sumber daya alam dalam putusan Mahkamah Konstitusi. *Jurnal Konstitusi*, 8(3), 257-314.

¹⁰ 7 Negara dengan Cadangan Air Tawar Terbesar di Dunia, Ada Indonesia. <https://www.idntimes.com/hype/fun-fact/brahm-1/air-tawar-negara-clc2> accessed on January 26, 2020. See also, 5 Negara dengan Ketersediaan Air Tawar Terbesar di Dunia. <https://www.liputan6.com/global/read/4377000/5-negara-dengan-ketersediaan-air-tawar-terbesar-di-dunia> accessed on January 26, 2020.

¹¹ I Gusti Ayu K. Rachmi Handayani, et al., (2007) "Pengelolaan Sumber Daya Air Berdasarkan Pasal 33 UUD 1945", *Pusat Penelitian dan Pengembangan Konstitusi dan Hak Asasi Manusia (PPKHAM) Lembaga Penelitian dan Pengabdian Kepada Masyarakat (LPPM) Universitas Sebelas Maret*.

Covenant on Economic, Social and Cultural Rights, which contains the right to an adequate standard of living both food, clothing and housing, as well as Article 12 paragraph (1) contains the feel the standard of human physical and spiritual health. The right to water that is expected in Articles 11 and 12 is described in General Comment No. 15 of 2002 on the International Covenant on Economic, Social and Cultural Rights.¹ This general comment becomes a UN instruction intended for signatory countries in carrying out steps to ensure and provide certainty of access to clean water and sanitation for every citizen of these countries.² Based on this description, the problems that have been formulated, namely; 1) How is the legal reconstruction of the state's right to control water resources; 2) What are the legal restrictions on the exploitation of water resources.

B. Method

This study used normative legal research through a statutory and conceptual approach.³ The main legal material for writing uses the results of the author's dissertation research at the Faculty of Law, Hasanuddin University Makassar as well as rules and laws as well as references.

C. Results and Discussion

The welfare state perspective found its way through the birth of the Regulatory State in the 1930s in the United States through President Franklin Roosevelt, which contained elements of the welfare state. The birth of the government's authority to regulate private entrepreneurs is a real step to regain public trust through the statement "private economy is also public trust". Modernization and a democratic system of government have shifted the perspective of the state's responsibility that the state is nothing more than a guard than as a creator of people's welfare.

The responsibility of the state stems from the opinion regarding the relationship between the state and its role as the bearer of the obligation to carry out the rights of its citizens. If the responsibility for the welfare of the people by the state has undergone a paradigm shift from the concept of a "night protector" state which is the designation for a liberal law state to a formal legal state, which is gradually moving towards a material law state with the idea of becoming a welfare state that works for the needs of the people.⁴

Indonesia as a state of law and a welfare state has the obligation and responsibility to regulate the distribution of natural wealth within the state so that all people can enjoy prosperity by applying the principles of freedom, equality of rights, togetherness, kinship and mutual cooperation. Responsibility is a normal burden and consequence of the exercise of rights which, if those rights are described from the point of view of international law, will result in international responsibilities and consequently carry out the obligation to make improvements.⁵

Basic rights are inherently absolute from birth as a gift from God Almighty, which under any circumstances actually does not require juridical legitimacy to apply nationally and internationally. However, due to the regulation of human life which tends to be secular and positivistic, the existence of human rights also requires a juridical basis to be able to be applied in directing the traffic of human life which requires the state to provide regulations to ensure the sustainability of these human rights.⁶

The dynamics of the position and obligations of the state (government) based on the adequacy of the need for the right to water as part of welfare, occur simultaneously with the dominance of ideology which is understood by the people, that Indonesia is a welfare state in addition to being a legal state that must deal with the ideology run by a state that has influenced by globalization since the 15th century. This ideology has provided space for the role of capitalistic liberals in controlling the world economic system through deregulation, privatization, market economy and so on which intends to reduce the role of the state as the embodiment of people's welfare.

A number of obligations in addition to respecting and protecting, fulfilling the right to water is by placing appropriate facilities, promoting promotion and preparing water resources. Efforts to fulfill the placement of facilities require the state to take positive actions in helping every individual and society to enjoy these rights. The obligation to promote is to take steps to ensure that outreach activities are carried out regarding the use of healthy and clean water, reduce excessive use and efforts to protect water resources in all conditions, including if there are people or community groups who are unable to provide those outside their control.⁷

The balance between the water supply, which tends to decrease, does not match the increase in the water

¹ *Ibid.*

² National Commission on Human Rights General Comment of the International Covenant on Civil and Political Rights, Economic Social and Cultural Rights Number 15 to Articles 11 and 12 of the Convention on Economic, Social and Cultural Rights.

³ Marzuki, M. (2017). *Penelitian Hukum: Edisi Revisi*. Jakarta: Prenada Media.

⁴ Muntoha, A. (2009). *Demokrasi Dan Negara Hukum*. *Ius Quia Iustum Law Journal*, 16(3), 379-395.

⁵ Ashri, *Op. Cit.* p. 303.

⁶ Abdul Hakim, G. N. (1996). *Penyiksaan Dalam Anarki Kekuasaan*. Yogyakarta: UII. p. 49.

⁷ National Commission on Human Rights General Comment of the International Covenant on Civil and Political Rights, Economic Social and Cultural Rights Number 15 to Articles 11 and 12.

needed, which is ultimately felt by the community. Although the limits for the suitability of clean water may vary according to conditions, there are factors that always apply, namely: first, the supply which involves the distribution of water to each person adequately and continuously for personal and domestic use, including drinking water, personal hygiene family and environment, water for washing, food preparation; Second, the need for quality water is related to needs, free of micro-organisms, chemical and radiological substances that are harmful to health. Color, taste and smell must also be tolerated by all users; Third, the ability to access water and its services and facilities can be accessed by everyone without discrimination. The dimensions of accessibility are physical access, economically, without discrimination and easy access to information.¹

The state is responsible for fulfilling the right to water for the people and empowering legal instruments to regulate, administer and guarantee the right to water through meeting minimum water needs, regulating access and distribution of water fairly and equitably, so that all people can enjoy the right to water. In order for the responsibility of the state to be carried out properly, the author proposes two things that must be implemented, namely:

1. Legal reconstruction of the state's right to control water resources.

The making and application of laws often results in deviations and denials of the ideals and objectives, so that regulations that reflect the objectives of the law are not produced. The discovery of social realities in the form of causes and impacts of deviations and denials is used as the basis for studies to rebuild (reconstruct)² the legal structure of state control over water resources.

Article 33 of the 1945 Constitution of the Republic of Indonesia has become a strong foundation for the elaboration of the State's Right to Control. Although in substance, there have been inconsistencies with several natural resource laws, including the water resources law, namely Law no. 7 of 2004 which was revoked through the decision of the Indonesian The Constitutional Court as a judicial institution plays an important role in enforcing the law in Indonesia which was formed to oversee and translate the constitution in a singular manner called the guardian and interpreter of the constitution. One of these powers is to examine the consistency of the law against the constitution.³

Relationships such as rights, which are built from the legal relationship between water and the surrounding environment, have been abstracted to be elevated to a higher level, namely embracing the parts of the territory of the Indonesian state into one complete whole. Water resources as a mandate as well as the burden of duties and responsibilities of the state to cultivate and manage it like private property or public property.

The Right to Control by the State is composed of rights that are structured in general regarding the subject, substance, basis and purpose of rights. This is because there are 2 opinions regarding the actual rights and rights that are part of the moral and legal concepts that are formal and relational.⁴ If it is detailed and correlated again with the subject, substance, basis and purpose of the State's Right to Control, it will be connected with Article 2 of Law no. 5 of 1960 that the holder of the right to control all existing resources in Indonesia is the Republic of Indonesia whose substance is in the form of a number of authorities (implicit in Article 2 paragraph (2) of Law No. 5 of 1960) through the basis of the delegation of duties and authorities from people to the state which aims to implement all the welfare of the people in real terms.

By its nature, the task of cultivating, managing, regulating and leading land, water and other natural resources is a legal domain that regulates the public interest. The implementation and enjoying the results must be jointly with the government and the people as stated in Article 33 paragraphs (2) and (3) of the 1945 Constitution of the Republic of Indonesia. This means that in order to produce social justice as stated in the mandate of the 5th precept of Pancasila, ideally Indonesia as a state organization should not gravitate to the collective or individual side. This can be seen in the three regulations starting from paragraphs (1), (2) and (3) in Article 33 of the 1945 Constitution of the Republic of Indonesia which does not focus specifically on people's prosperity and social justice or individual justice.

Article 33 of the 1945 Constitution of the Republic of Indonesia should be used fully as a basis for consideration in the preparation and formation of a law on the water sector that relies on the state's right to control, so that the ideals and goals of realizing social justice are welfare through a system with legal instruments that are consistent with Article 33 paragraphs (2) and (3) of the 1945 Constitution of the Republic of Indonesia can be achieved. Deviations in interpretation of the state's right to control water resources which should refer to Article 33 paragraphs (2) and (3) of the 1945 Constitution of the Republic of Indonesia also have the potential to provide space for human rights violations, one of which is through access to clean water that is not available to everyone.

¹National Commission on Human Rights General Comment of the International Covenant on Civil and Political Rights, Economic Social and Cultural Rights Number 15 to Articles 11 and 12.

² Garner, B. A. (1999). *Black's Law Dictionary Seventh Edition*, West Group Minn, St. p. 1278.

³ Librayanto, R., Riza, M., Ashri, M., & Abdullah, K. (2019). Penataan Kewenangan Mahkamah Konstitusi dalam Memperkuat Independensi Kekuasaan Kehakiman. *Amanna Gappa*, 43-66..

⁴ Saphiro, I. (2006). *Evolusi Hak dalam Teori Liberal*. Jakarta: Yayasan Obor Indonesia. p. 15.

The phrase "state control" in Article 33 paragraphs (2) and (3) of the 1945 Constitution of the Republic of Indonesia emphasizes the aspect of ownership of rights by the state (not the government) in order to control the implementation of all branches of production that are important to the state through State-Owned Enterprises. Even though private companies will be involved later, their accountability is directly to the state (government) and the mechanism is controlled by the state. This is corroborated by the view of Moh. Hatta, who stated that public utilities must be managed by the state¹. Individually managed companies may only operate in sectors that do not manage the livelihoods of many people.

The new legal construction of the State's Right to Control can be formed through a dialectical process. A search was conducted on the ideal State Construction of the Right to Control Law and the current Legal Construction of the State's Right to Control on the basis of the value of social justice in Pancasila. The ideal construction of the law of the right to control by the state as a thesis is confronted with the construction of the law of the right to control by the state which is currently the antithesis. After that, a synthesis was carried out which contained a new form of legal construction of the State's Right to Control which was in accordance with the prismatic legal conditions in Indonesia.²

This dialectical process then results in the legal construction of state rights in controlling ideal water resources, in the form of:

- a. The state is obliged to respect, protect and fulfill the people's right to water as a human right.³
- b. The people collectively have mandated the state to control, formulate policies;⁴ carry out management, regulation, management and supervision actions.⁵
- c. Delegation of state authority based on Article 33 paragraphs (1) to (4) through the creation of Indonesian neo-socialism.
- d. The government and the people carry out the management and exploitation of water resources by the state through limited public participation. The clean water production process is carried out based on a family-friendly joint effort.
- e. The goal that must be achieved is the greatest prosperity of the people by prioritizing the social function of water with social justice.
- f. Regional drinking water companies (PDAMs) as regionally owned companies should be under state control.
- g. The participation of indigenous peoples through all customary institutions in Indonesia which in managing them is given the broadest rights of customary rights recognized by the state.
- h. The state controls water resources, which if the management is delegated to managers outside the country, it becomes a license⁶ not a usufructuary right as has been the case so far, so that it does not have the potential to violate the people's right to water.
- i. Evaluating legal products in the field of water management and exploitation and their resources which are inconsistent with the constitution because they are contrary to the value of social justice.
- j. Placement of a maximum of 49% shares of individuals in state-owned companies if they want to invest in state companies in order to prevent control of the lives of many people by individuals.

It is very important to emphasize the obligations and responsibilities of the state in protecting and guaranteeing the right to water so that the governance of the exploitation of water resources, from being controlled to supervising by establishing legal norms and carrying out law enforcement if deviations occur. The state as the executor of people's sovereignty in representing God on earth when managing water resources, is not only for the benefit of humans but also for the survival of other living creatures.

2. Legal restrictions on the exploitation of water resources

The dynamic development and changes in various aspects of life nationally and internationally, have resulted in

¹ Hatta, M., Abdulgani, R., & Saleh, M. (1977). *Penjabaran Pasal 33 Undang-Undang Dasar 1945*. Jakarta: Mutiara. p. 29.

² Fred W. Riggs developed a prismatic society theory based on the fifth dichotomy of Talcon Parsons, which distinguishes between a complete society with "fused types of society" and "diffracted types of society" which is a society that distinguishes and separates complete functions, such as subsystems. economics, politics and so on with their organization and carry out their respective organizations and functions with their autonomy and dependent nature. Riggs then created "prismatic types of society". Riggs, F. W. (1964). *Administration in developing countries: The theory of prismatic society*. Houghton Mifflin.

³Obligation to respect is the ability of the state to respect so that there is no intervention unless it is based on a legitimate law. Obligations to protect are in the form of a fundamental obligation to protect, not only from violations by the state but violations from other (non-state) entities that interfere with the legal protection of human rights, as well as obligations to fulfill in the form of state actions in taking legislative, administrative, judicial steps, and practical in ensuring the implementation of human rights. Sakharina, *Op. Cit.*, p. 2-3.

⁴ The concept of legal protection for citizens from policy regulations (beleidregels). This concept is very important to be studied in the context of legal protection for community members related to environmental permit holders, including the protection of water resources. The policy formulation includes its normative function and its sociological function.. Razak, *Op. Cit.*, p. 19.

⁵ Absori, M., Dimiyati, K., & Wardiono, K. (2008). Model Penyelesaian Sengketa Lingkungan Melalui Lembaga Alternatif. *Mimbar Hukum-Fakultas Hukum Universitas Gadjah Mada*, 20(2), 367-382.

⁶ Issuance of permits is an act of the government in the field of state administration which has one aspect. In this field, the government's one-sided legal action is usually called a "stipulation" (beschikking). The essence of granting a permit by the ruler is an action that is prohibited unless it is permitted with the aim that in the relevant provisions it is carried out in certain ways and refusal can be made if the criteria determined by the ruler are not met. Razak, *Op. Cit.*, p. 80.

problems and crises of water resources which have become very worrying. The problem that must be addressed as soon as possible is the supply of water reserves in overcoming the increasing water demand. The fact is that environmental damage has had an impact on the quality and quantity of water resources. Therefore, it is important in the Indonesian legal paradigm to lay down a framework of public trust and expectations in order to remain confident in the harmonization of the right to control the state with the laws and regulations. Law regulates human life by living and developing in society with its values that are full of meaning.¹

Through the promulgation of Law no. 17 of 2019 is an important barometer in order to fulfill state responsibilities by implementing the constitutional mandate in Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. Through this law stipulates a number of duties and authorities of the state which, when compared with the previous law, it can be seen clearly the difference in the state's efforts to fulfill the people's right to water through the application of certain conditions in granting permits for businesses in the water sector.² This regulation also no longer clearly recognizes local institutions that are still traditional in nature as managers of the irrigation system, which it is feared will become the entrance for individuals (private sector) and return to dominate and intervene in state law through co-optation.³

Law no. 17 of 2019 contains 79 articles out of 16 chapters that regulate and instruct the management of water resources carried out by the Central Government as stated in Article 9 paragraph (1), Article 10 to Article 11. Arrangements are for water resources that are located in cross-country river areas, trans-provincial river areas as well as national strategic river areas and groundwater basins.⁴

Meanwhile, the regulation of water resources by the Provincial Government and/or Regency/Municipal Government, is in accordance with the provisions of Article 9 paragraph (1) which also refers to the right to control by the state over water resources, whose duties and authorities are contained in Article 13, Article 14, Article 15 and Article 16 which regulate water resources and groundwater basins in cross-regency/municipal river areas. Article 17 continues on the duties of the Village Government. Then Article 18 which states that the duties and authorities of the Central Government are carried out alone or the authority can also be delegated to Central Government officials or representatives of the Central Government located in the regions in accordance with statutory regulations.⁵

Article 19 paragraph (1) which stipulates that if not all of the duties and authorities of the Central Government and/or Regional Government as stated in the articles that cover one river area can be carried out, it can be assigned to the manager in the form of a technical implementing unit from the ministry or unit. technical implementer from the region or State-Owned Enterprises/Regional Owned Enterprises, in accordance with Article 19 paragraph (2). Paragraph (1) refers to including the actions referred to in paragraph (3) along with actions that are excluded. All actions of the duties and authorities must pay attention to the relationship between the use of surface water and ground water by prioritizing the utilization of surface water in accordance with Article 22 paragraph (1).⁶ Regulations regarding the criteria for determining river areas are regulated through regulations from the government as stated in Article 22 paragraph (5). The river area is further regulated according to a Presidential Decree, as referred to in Article 22 paragraph (6).⁷

Obligations in water management and exploitation by State-Owned Enterprises/Regional-Owned Enterprises through Article 19 paragraph (4) which is based on Article 19 paragraph (2) must be sufficient in terms of: 1) Tasked with carrying out several management functions, namely building, operating and maintaining ; 2) Running water business only in its territory; 3) Serve with the principle of good state enterprise management; 4) Collecting, determining tariffs, receiving and using Water Resources Management Service Fees; 5) Carry out special tasks by the Central Government and/or Regional Governments and; 6) Not pursuing profit. The assignment of the Central Government to State-Owned Enterprises in managing water resources in accordance with paragraph (2) is regulated by a Government Regulation while the Central Government's assignment to Regional-Owned Enterprises in managing water resources in accordance with paragraph (2) is regulated by a Regional Regulation.

Based on this description, it appears that Law no. 17 of 2019 regulates water exploitation and management more strictly and measurably and prioritizes the role of the state through more detailed government duties and authorities to limit the exploitation of water resources. When measured from the transformation of water

¹ Anshori, I. (2005). *Makalah Sosialisasi UUSDA" Ditjen Sumber Daya Air, Departemen Pekerjaan Umum, Pokok-Pokok Pengaturan Sumber Daya Air Menurut UUSDA*. p. 3.

² Syurkawi, R. P., & Bakhtiar, H. S. (2017). Legal Aspect of Environmental Health on Sanitation Hygiene of Refill Drinking Water Depot. *International Journal of Advanced Research (IJAR)*, 5(2), 2054-2060.

³ See Law No. 17 of 2019 Articles 9 to 20. Co-optation is the acceptance of new elements in the leadership of an organization as a way to avoid shocks in the stability of the organization concerned.

⁴ See Law No. 17 of 2019.

⁵ See Article 9 paragraph (1), Article 13, Article 14, Article 15, Article 16 and Article 17 Law No. 17 of 2019.

⁶ Article 19 paragraph (1) and (2), Law No. 17 of 2019 .

⁷ Article 22 paragraph (1) and paragraph (5) Law No. 17 of 2019.

resources management and exploitation issues in Indonesia from time to time, the State is expected to: 1) Manage water resources in a comprehensive and integrated manner; 2) Obligation to protect the right to water by taking into account human rights norms standards; 3) Balancing between physical and non-physical handling of water resources; 4) Utilizing and dominating the management and exploitation of water resources over conservation; 5) Must involve the community in decision making and management of water resources; 6) Adopt the principle of sustainable development; 7) Change the paradigm from a top-down approach to a bottom-up approach using the regional autonomy law.

The Constitutional Court through its decision Number 85/PUU-XII/2013 stated the requirements in the form of 6 basic principles of limiting the management of water resources, as follows: 1) Water exploitation should not interfere, rule out, or even negate the people's right to water; 2) The state is obliged to fulfill the people's right to water and access to water resources in accordance with the basis of Article 28I paragraph (4) of the 1945 Constitution of the Republic of Indonesia; 3) Article 28H paragraph (1) of the 1945 Constitution of the Republic of Indonesia stipulates that environmental sustainability is a human right; 4) The state absolutely performs the function of supervision and control; 5) State-Owned Enterprises as state-owned enterprises and Regional-Owned Enterprises as regional-owned enterprises must be prioritized in managing and exploiting water resources as a follow-up to the State's Right to Control over the lives of many people; 6) Establish special and strict conditions in granting permits to private water management companies that can be granted if there are still remaining from the available restrictions.¹

Based on the decision of the Constitutional Court, the author's limitations on adopting the exploitation of water resources must be implemented through, namely:

- a) Improvement of legal instruments such as laws and implementing regulations.
- b) Intensive supervision of the licenses of private companies that manage water resources with a mechanism starting from the issuance of permits to the expiration of the permit.
- c) Building a legal system that regulates consistently, coherently and integratedly along with the renewal of legal structures and institutions that regulate and manage water resources in harmony with the water needs of the people.
- d) The working principle of water resource exploitation given to parties outside the government should not override or eliminate the right to water, in accordance with the mandate of the Constitutional Court.
- e) Supervise and control water exploitation by the state by limiting private shares in the management and control of water resources with priority given to State-Owned Enterprises and Regional-Owned Enterprises with a share limit of 49% for the private sector.
- f) The state absolutely fully manages water resources from upstream to downstream.
- g) The state is responsible for the fulfillment of access to clean water by taking an equal position between the state and the people, from management to enjoying the right to water, not as a producer who usually determines tariffs for consumers, because usually the tariffs that are determined do not benefit the people.
- h) The exploitation of water resources, both by the state and through cooperation with the private sector, must prioritize service to the people and not for profit. It is enough for the government to determine the Break Event Point, then the management has provided benefits to the people.
- i) The management and exploitation of drinking water through the Drinking Water Supply System (SPAM) has been separated from the supervision and control by the state and the Regional Drinking Water Company seems to have been privatized, so if the Regional Drinking Water Company is no longer functioning properly, the government can dissolve it and replace it with State-Owned Enterprises and Regional-Owned Enterprises which are fully managed and managed by the state, are more structured and guarantee the people's right to water.

In the future, it is important to think about the existence of a policy on the state's right to control regarding the exploitation and management of clean water which emphasizes checks and balances so that all interests between government institutions and the interests of the people can be properly maintained. It should be noted that thinking about the model of a humanist and ideal relationship approach, which emphasizes the importance of good relations and preventing disobedience as well as inter-institutional supervision that is responsible to the people as the holder of the highest sovereignty, the government as a representative of the state and directly to God.

The meaning of all these restrictions is to return the management and exploitation of clean water in Indonesia to the state in full without the involvement of parties outside the state. Legislative regulations are also drawn up based on all aspects such as environmental, social, economic and others, so that hidden agendas such

¹ Gunawan, Y. (2016). Masa Depan Hak Atas Air Pasca Putusan Mahkamah Konstitusi No. 85/PUU-XI/2013. *Jurnal Kajian Hukum*, 1(2), 113-132.

as privatization and commercialization do not occur again and socially just water resource management is a reflection of the fulfillment and protection of the right to water as a human rights will be fulfilled.

D. Conclusions

The legal reconstruction of the right to control by the state over water resources through a dialectical process, namely bringing together the legal construction of the right to control by the state which is ideal as a thesis and the legal construction of the right to control by the state currently in effect as an antithesis to produce legal construction according to the value of social justice in Pancasila and Article 33 of the 1945 Constitution of the Republic of Indonesia. Legal restrictions on the exploitation of water resources through: 1) Improvement of legal instruments; 2) Supervise permits intensively; 3) Build legal systems, structures and institutions that regulate consistently, coherently, integrated and harmoniously with the people's water needs; 4) The working principle of the exploitation of water resources should not override or eliminate the right to water; 5) Supervise and control water exploitation by the state and the private sector by limiting private-owned shares to 49% and the priority is given to State-Owned Enterprises and Regional-Owned Enterprises; 6) Full management of water resources from upstream to downstream; 7) The state is responsible for fulfilling access to clean water by determining tariffs that benefit the people; 8) Prioritizing service to the people and not looking for profit. The government determines the Break Event Point, then the management has provided benefits to the people; 9) Management and exploitation of drinking water through SPAM by the state and regional drinking water companies are replaced with State-Owned Enterprises and Regional-Owned Enterprises which are managed and managed by the state in a structured manner and guarantee the people's right to water.

E. Recommendations

The national legal basis for water resources based on the right of control by the state must change from a legal construction in accordance with Article 33 of the 1945 Constitution of the Republic of Indonesia after the amendment in accordance with the 5th Precept of Pancasila, namely social justice for all Indonesian people. The state's right of control over water can be realized if the state fully carries out its mandate to make policies, is in control of acting in managing, regulating, managing and supervising. The state guarantee of the right to control over water is a conditional provision that must be implemented and implemented in order to assess and evaluate the consistency of constitutional water resources legislation as seen in the limitation of exploitation and management of water resources through the Constitutional Court's decision which requires 6 the basic principle of limiting the exploitation of water resources.

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