

# The licensing policy for groundwater extraction and management for hospitality industry in cities in developing countries

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## Abstract

The fulfillment of water needs for living things is the responsibility of the State. State control of dealing with water is done through the arrangement and management of licenses ensuring the right of everyone to get water as a primary need. Groundwater extraction and management will be a separate issue when the legal norms do not guarantee certainty and justice for society. The Constitutional Court decision No. 85/PUU-XI/2013 dated February 18th, 2015, states that Law No. 7 of 2004 on Water Resources has no legal force. Therefore, the re-enactment of Law No. 11 of 1974 on watering gives impact to the regulation of groundwater extraction. This should meet the principles of the decision of the Constitutional Court. Governments, including local governments, have an important duty regarding groundwater management, so that the water needs can be fulfilled for all people.

*Keywords:* Groundwater extraction; Legal norm and management

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## Background

Population growth in urban areas will influence the development of cities. Acceleration of development continues, especially in developing countries like Indonesia, and contributes to adding value to the economic growth of cities. The level of community dynamics to fulfill the needs is growing. The development and growth of a city has a huge impact on the capacity and endurance of the city from the effects of growth. Population settlement pressure, community activity, and social interaction of the population result in problems for the city (Sutrisno, 2017). In this case, the water demand becomes a very important issue due to the increasing numbers of the population.

The existence of a city in Indonesia caused by the impact of development has required the city to fulfill the interests of people's development. The conflict of new values has affected the lives of the people. Confrontation of the traditional norms with modern norms results in reality at the intersection of norm encounters; communities lose their basis foundation to undergo the development process, while the modern norms are not fully accepted as guidance for the development process (Sutrisno,

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2015). These conditions have affected the lives of people in developing countries such as Indonesia. Social interaction supports more of a tendency in consideration of economic dimensions for profit interests, ignoring the environmental interests of the development approach and putting more emphasis on an *anthropocentrism* approach instead of a *biocentrism* approach.

The reality of the social setting is found in Cirebon Regency of West Java, an area located in the northern coastal area of Java Island bordering Brebes Regency of Central Java. Urban spatial planning is an essential reference as a guide for regional development planning, including the development of tourism, which has an impact on the hospitality sector.

The existence and progress experienced by a city through the field of hospitality services must be balanced with basis needs' facilities, including the need for clean water. This problem must be handled seriously by the local government so that the clear regulation of law becomes a solution to solve the problem. Regulation is required for planning and controlling the fulfillment of water, along with an increasing population growth rate. These needs include the fulfillment of water needs for hospitality services. Furthermore, it should be a concern considering the growth of Cirebon Regency since it has become a tourist destination now. Thus, the development of hospitality facilities become a necessity that cannot be ignored.

The fundamental problem is that the legal norms regulating the extraction, utilization, and control of groundwater have not completely provided the assertion of legal certainty and justice. Even in the State constitution, it has been regulated in Article 33 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia that the water resources are controlled by the State and they are fairly used, as much as possible, in the interests of the people. Having authority, the State is responsible for fulfilling the water needs of the community. This implies that license issuance for the use of groundwater for the hospitality industry should not affect the fulfillment of water needs for other communities.

The facts can be described as, that prior to the Constitutional Court Decision No. 85/PUU-XI/2013 on February 18th, 2015, and before the enactment of Law No. 23 of 2014 on Local Government, the licensing of groundwater extraction was regulated in Law No. 7 of 2004 on Water Resources and its implementation rules. This licensing became the Regency/City authority after accepting the Governor's recommendation, and this is based on the regulation of West Java Provincial Regulation No. 5 of 2008 on Groundwater Management.

Policy on the authority to issue a license by the Regent/Mayor, concerning the license for groundwater extraction within the Regency/City area, also includes the monitoring and evaluation of the license issuance. During the period of 2014, 120 licenses for groundwater extraction were issued by the Government of Cirebon Regency for various business activities. The licensing for groundwater extraction under this provision is issued by the Regent through the Head of the Integrated Licensing Agency after obtaining a recommendation from the Regional Device Work Unit (*Satuan Kerja Perangkat Daerah/SKPD*) of West Java Province, in charge of groundwater.

During the period prior to the enactment of Law No. 23 of 2014, the Regional Government of Cirebon Regency did not issue any legal products providing related guidelines for the SKPD in charge of groundwater. The Regional Government only issued a Regent Regulation arranging the standard operating procedure of the licensing service including the procedure for issuance of groundwater extraction licenses. This condition resulted in difficulties in determining whether the license issuance did not obstruct the fulfillment of water needs for residents around the place of business. Licenses issued by the Regional Government, through the Regent, must be observed by the Water Resources Management Agency.

In the Constitutional Court decision No. 85/PUU-XI/2013, which was delivered on February 18th 2015, the Constitutional Court disqualified the enforcement of Law No. 7 of 2004 regarding Water Resources and its implementing regulations. In addition, the Constitutional Court also re-enacted Law No. 11 of 1974 on Irrigation to prevent a legal vacuum until the establishment of a new law. This cancellation was due to the substance in Law No. 7 of 2004 regarding water resources being considered not to guarantee the control of water management by private parties. Thus, it is considered contradictory to the 1945 Constitution of the Republic of Indonesia. The re-enactment of Law No. 11 of 1974 on Irrigation considers that this law does not have much substance for regulating groundwater. The Government stipulates Government Regulation No. 121 of 2015 concerning Water Resources Management as the implementation rule of Law No. 11 of 1974 on Irrigation. The Constitutional Court decision affects the application of West Java Provincial Regulation No. 5 of 2008 on Groundwater Management, which guides the issuance of licenses for groundwater extraction. The subject of the study should hold legal norms of assurance and justice that are able to regulate licensing policy for groundwater extraction and management in the hospitality industry in cities in developing countries that are trying to become tourist destinations.

In the context of the substance for groundwater extraction and utilization, concerning the regulation of the issuance of licenses for groundwater extraction after the Constitutional Court decision is still based on the provisions of West Java Provincial Regulation No. 5 of 2008 on Groundwater Management. This resulted in authorization in the Constitutional Court decision that cannot yet be elaborated in the issuance of a license for groundwater management which controls the groundwater management by private parties.

The scope of the study is focused on the issue of the necessity of law that regulates the extraction, utilization, and controlling of water in the municipality area resulting from the development of the urban area. This condition calls for urgency in law enforcement. The regulation of Government No. 121 in 2015 concerning Water Resources Management as the reference in implementing Constitution No. 11 in 2008 on water utilization and Regional Regulation of West Java Province on water and soil management at the level of implementation must be consistently applied in order to ensure legality.

## Theoretical framework

The formulation of government policy on water resources management includes strategy, planning, and implementation which consists of conservation, utilization, control, and evaluation. It must fulfill the values contained in Article 33 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia, Law No. 11 Year 1974 on Irrigation, and Government Regulation No. 121 of 2015 on Water Resources Management so that the development implementation should be sustainable development.

The policy pattern of the development is oriented to the management of natural resources which seek protection and development because of the environmental management based on the maintenance of the pleasant and balanced environmental capabilities to support sustainable development for human interests (Askin, 2003). In Law No. 23 of 2014 on Regional Government, it gives autonomy to the autonomous regions of the Province and District/City. The concept of autonomy implies the existence of rights, authorities, and obligations. It is attached to the autonomous regions in regulating and managing their own governmental affairs and the interests of local communities in the system of the Unitary State of the Republic of Indonesia.

The concept of regional autonomy is carried out by giving broad and responsible authority to the regions, proportionately embodied in the proper regulation, sharing, and utilization of national resources. In addition, the concept of regional autonomy should be implemented democratically, involving community participation, generating equity, fairness, and attention to the potential of regional diversity (Ridwan & Sodik, 2008). The meaning of the autonomous region has resulted in the decentralization of authority as stipulated in Article 12 of Law No. 23 of 2014 on Regional Government, and groundwater affairs becoming the authority of the Provincial Government.

Law is an important element in the development of politics and it makes the relationship with government policy clearer. Through legislation, the Government determines what it can do and what not to do. Law defined as legislation is a system of norms where the rule of law is arranged in unity within a hierarchical manner. The lower legal norms should not be contradictory to the higher legal norms.

In the formulation of legislation, the process of public consultation in order to be aware of and understand the aspirations of society becomes an absolute requirement. The process of formulating legislation is not only in the juridical process stages. Various aspects and elements of society are a source of influence and become the material for the formulation. The transformation process of social desires into legislation in both political and sociological contexts is not only present at the time of the formulation. In the stages of the work of any law, this process continues and corrects the resulting legal product. This process by David Easton is called the input, conversion process, and the black box (Warassih, 2015). Thus, the organizer of the legislation is required to shape a regulation creating responsive legal conditions so that it can fulfill the various demands of society.

In the study of the science and theory of legislation, there are at least four requirements for good legislation, namely, juridical, sociological, philosophical, and the techniques for designing good legislation (Indriati, 1998).

In the framework of regulation of licenses for groundwater extraction after the Constitutional Court decision No. 85/PUU-XI/2013, the Government Regulation No. 121 of 2015 on Water Resources Management was issued. This Government Regulation needs to be followed up with some implementation rules issued by the Minister according to authorization. The same thing happens with Provincial Government that is authorized to issue a license for groundwater extraction in the provincial area. It is delegated to produce a regional legal product as a guide for issuing licenses in the region. Authorization of the process of formulating the regulation sometimes is not established in time, leaving a question in the implementation of the regulation. Hence, the objective of the regulation is not yet achieved. A series of legislations that is arranged by applying a positivist approach sometimes creates an impasse in providing solutions to the existing legal issues. In progressive law theory, where the law is only one sub-system of a larger social system, the law is not in a vacuum situation but always interacts with other sub-systems in society (Sutrisno, 2014).

## Research methodology

The research approach is normative juridical to conceptualize law in written legal understanding that the texted legal norm becomes the main basis of the study, thus the law principles and legal basis of the norm enforcement can be obtained. Efforts are undertaken through this approach to investigate, examine, and observe the secondary data, primary legal materials in the form of legislation related to the study of groundwater extraction. The discussion is related to the juridical study of the application of

licensing of groundwater extraction for the hospitality industry in a city with the vision to become a tourist destination in the northern coastal area of West Java: Cirebon Regency, after the Constitutional Court decision No. 85/PUU-XI/2013.

The normative juridical approach in this study is important since the enforcement of the legal norms should be used as the basis reference for all activities of the community after the Constitutional Court decision No. 85/PUU-XI/2013 concerning groundwater extraction and management. This is a fundamental issue particularly in line with the developing city. Cirebon Regency was chosen to become the area of this study since the city is experiencing growth development. Furthermore, the city infrastructure is enduring a great deal of development and urban spatial changes.

Conclusively, the normative juridical method emphasizes the aspect of positive law study in the form of Government Regulation No. 121 in 2015 on Water Resource Management as the reference in implementing the Constitution No. 11 of year 1974 on water utilization and regional regulation and West Java Province No. 5 of year 2008 on the management of groundwater. The overall normative substances are studied comprehensively at the level of implementation for legal certainty.

## Results and discussion

The existence of cities in developing countries like Indonesia through the era of regional autonomy has provided a vision of prosperity for the people. This fact occasions the declaration of the city that it should continue to encourage the development in all fields. Development has an impact on the extensive pressure on environmental issues including water supply issues.

The continuous hotel development in Cirebon Regency is not balanced with the study of the Regional Government in issuing licenses. It has placed impact for the use of water at hotel development locations. Water needs during the pre-construction stage, construction stage, and the post-construction stage have burdened the hotels with licensing obligations.

The licensing of groundwater management after the Constitutional Court decision No. 85/PUU-XI/2013 can be described by two time periods, as follows.

### *Periods before April 2017*

In this period, this applies to West Java Provincial Regulation No. 5 of 2008 on Groundwater Management as amended by West Java Provincial Regulation No. 8 of 2012. In this local regulation is contained the determination of the groundwater basin which is the source of groundwater extraction.

West Java Provincial Regulation No. 8/2012, an amendment to West Java Provincial Regulation No. 5 of 2008 concerning Groundwater Management, is a Local Regulation that is oriented to the provisions of Law No. 7 of 2004 on Water Resources and Government Regulation No. 43 of 2008 on Groundwater.

Based on the provisions of Article 22 of the Local Regulation, the licensing of groundwater extraction is divided into two, as follows:

1. The right to use groundwater is provided to fulfill the needs of a household, agriculture, and non-business activities.
2. The right to use groundwater is provided to fulfill the needs of the business either as a raw material of production, potential utilization, business media, and water use for supporting materials.

Legal norms of the Local Regulations for groundwater extraction for the hospitality industry use more groundwater sourced from groundwater basins and in the area of West Java Province, there are 15 groundwater basins, namely:

1. Bogor, area of 1,311 km<sup>2</sup>, located in Bogor and Bogor Regency;
2. Sukabumi, area of 868 km<sup>2</sup>, located in Sukabumi and Sukabumi Regency;
3. Bekasi-Karawang, area of 3,641 km<sup>2</sup>, located in Bekasi Regency, Bogor Regency, Karawang Regency, and Purwakarta Regency;
4. Subang, area of 1,514 km<sup>2</sup>, located in Subang Regency and Indramayu Regency;
5. Ciater, area of 566 km<sup>2</sup>, located in Purwakarta Regency, Subang Regency, and Bandung Regency;
6. Bandung-Soreang, area of 1,716 km<sup>2</sup>, located in Bandung, Bandung Regency, Cimahi, and Sumedang Regency;
7. Cibuni, area of 621 km<sup>2</sup>, located in Cianjur Regency and Bandung Regency;
8. Banjarsari, area of 605 km<sup>2</sup>, located in Bandung Regency and Garut Regency;
9. Tasikmalaya, area of 1,219 km<sup>2</sup>, located in Tasikmalaya, Tasikmalaya Regency, Garut Regency, and Ciamis Regency;
10. Malangbong, area of 514 km<sup>2</sup>, located in Garut Regency, Majalengka Regency, and Sumedang Regency;
11. Ciamis, area of 581 km<sup>2</sup>, located in Ciamis Regency and Tasikmalaya Regency;
12. Kuningan, area of 507 km<sup>2</sup>, located in Kuningan Regency and Majalengka Regency;
13. Majalengka, area of 686 km<sup>2</sup>, located in Majalengka Regency and Sumedang Regency;
14. Indramayu, area of 1,282 km<sup>2</sup>, located in Indramayu Regency and Majalengka Regency;
15. Sumber-Cirebon, area of 1,659 km<sup>2</sup>, located in Cirebon, Cirebon Regency, Indramayu Regency, and Kuningan Regency.

Provisions on the Local Regulations concerning the right to use groundwater should be issued by the Regent/Mayor after obtaining a recommendation from the Governor. This authority was declared by the enactment of Law No. 23 of 2014 on the Local Government which was enacted on October 2nd, 2014. With the enactment of the law, there are several transitional authorities in certain affairs including in the geological sub-sector. The determination of conservation zones for groundwater in the groundwater basins in provinces, issuance of groundwater drilling licenses, digging licenses, utilization licenses, and management licenses in the province, and the determination of the value of groundwater in the provinces come under the authority of the Provincial Government. Thus, groundwater extraction contained within the groundwater basin both in the Regency/City area and across the Regency/City comes under the authority of the Governor.

After the Constitutional Court decision, as a follow-up to regulate the provision of the water resources licensing, the Government shall issue Government Regulation No. 121 of 2015 on the Water Resources Management. The provisions of this Government Regulation have not been followed up with the West Java Provincial Regulation. Therefore, for issuing a license for groundwater extraction, the Governor shall not only follow the requirements stipulated in Government Regulation No. 121 of 2015 concerning the Water Resources Management but also follow the licensing procedures. They are stated in West Java Governor Regulation No. 92 of 2014 on Implementation Guidelines of the Local Regulation of West Java Province No. 7 of 2010 on Implementation of Integrated Licensing Services.

The policy on the issuance of water resource management aims to improve the damaged, critical zones, and restrict the use of groundwater and lead to the use of surface water. There are several license types for the use of groundwater, as follows:

1. License for drilling for groundwater. This permission is given for water with a debit  $>72 \text{ m}^3$ .
2. License for drilling exploration wells for groundwater. This permission is given for water with a debit  $>72 \text{ m}^3$ .
3. License for drilling monitoring wells for groundwater.
4. License for groundwater utilization. This permission is given for water with a debit of between  $>3.3 \text{ m}^3$  a day and  $72 \text{ m}^3$  a day.
5. License for groundwater utilization. This permission is given for water with a debit  $>72 \text{ m}^3$ .
6. License for a drill-well for groundwater utilization.
7. License for a dig-well for groundwater utilization.

Law No. 23 of 2009 on Environmental Protection and Management declares that the conservation of natural resources is the management of non-renewable natural resources to ensure its wise use and continuous availability by maintaining and improving the quality of its value. Hence, the license issuance for groundwater extraction is inseparable from the obligation to protect the surrounding environment. Thus, every license application for groundwater is a required document. The effort of environmental management is an obligation form of the implementation of environmental development. According to Yakin (2007), there are three important dimensions that must be considered, as follows:

1. The economic dimension connecting the influences of the macroeconomic and microeconomic elements on the environment and how natural resources are treated in economic analysis.
2. Political dimensions including a political process that determines the form and development figure, population growth, and environmental degradation in all countries. This dimension also includes the role of community agents and social structures and their effects on the environment.
3. The socio-cultural dimension connecting the tradition or history with western science, the mindset, and religious tradition. These three dimensions are integrated with each other to support the concept of environmental development.

In the issuance of a license, attention should be paid to the principles as stipulated in Article 2 of Government Regulation No. 121 of 2015, declaring that the efforts to develop water resources to fulfill the needs of business are established by regarding these following principles:

- a. Never disturb, dominate, and eliminate people's right to water.
- b. State protection of people's right to water.
- c. Environmental sustainability as one of the human rights.
- d. Supervision and control by the state of water is absolute.
- e. The main priority of the water management is provided to state-owned enterprises or regional-owned enterprises.
- f. The license issuance for Water Resources Operation and Groundwater Business to private business can be established with the certain and strict condition after the principle stated in A letter until E letter is fulfilled and there is still water availability.

The principles of water resources management are aimed at increasing the utilization of water resources for the interests of the people. Therefore, the use of water resources is given based on the following priorities:

- a. The fulfillment of basic daily needs for groups requiring large amounts of water.
- b. The fulfillment of basic daily needs changing the natural condition of water resources.
- c. The agriculture outside the existing irrigation systems.
- d. The water resources management to fulfill basic daily needs through a drinking water supply system.
- e. Non-business activities for the public interest.
- f. The water resources management by state-owned enterprises or regional-owned enterprises.
- g. The water resources management by private units or individuals.

These principles and priorities are implemented in accordance with the plan for the water supply and/or zones for space utilization at water resources for the operation of water resources contained in the water resources management plan. Obstacles encountered to fulfill the principles and priorities in the license issuance for groundwater extraction are the absence of a plan for the water supply; moreover, the zones for space utilization at water resources for the operation of water resources contained in the water resources management plan.

The water resources management plan in this period is presented in the attachment of West Java Provincial Regulation No. 5 of 2008 on Groundwater Management. The legal provisions of this management plan serve as regulation in the license issuance for groundwater extraction. This Regional Regulation hierarchically should not be enforceable considering that the law on which its establishment has been declared has no binding legal force by the Constitutional Court.

Based on the West Java Governor's Regulation No. 92 of 2014 concerning the Implementation Guidelines of West Java Provincial Regulation No. 7 of 2010 on the Implementation of Integrated Licensing Services, groundwater extraction is a type of licensing that requires consideration from the technical team consisting of the elements of the Department of Energy and Mineral Resources, UPT of Department of Energy and Mineral Resources Region VII Cirebon and Investment Service and Integrated Service (*Dinas Penanaman Modal dan Pelayanan Terpadu Satu Pintu/DPMPTSP*) in West Java Province.

The decision to issue licenses is also forwarded to the Head of the Department of Energy and Mineral Resources as supervisory material. Supervision is important to the fulfillment of the rights, and the obligations of the licensee are one of the aspects that aim to maintain the groundwater cycle. The purpose of the supervisory aspect is to control the implementation in accordance with the provisions in the technical recommendations. Supervision is an effort to control groundwater extraction and to prevent the occurrence of groundwater environmental damage.

The supervision of the license implementation is established by the Governor through the Department of Energy and Mineral Resources. The responsibilities for supervision in the area of West Java Province, especially the area of Cirebon Regency, are held by the UPT of Department of Energy and Mineral Resources Region VII Cirebon.

The results of this field supervision are presented in the news. The findings and suggestions of actions/recommendations on licensing are submitted to the Head of the Department of Energy and Mineral Resources and the Civil Service Police Unit of West Java Province. This recommendation becomes the basis for evaluation of the issued license, i.e., whether the license holder has fulfilled the rights and



obligations or law enforcement must be implemented. This is to maintain the sustainability, continuity, availability, encouragement, groundwater utility, and maintain the sustainability of the use of groundwater.

#### *Periods after April 2017*

In this period, on April 25th, 2017, West Java Provincial Government promulgated West Java Provincial Regulation No. 1 of 2017 on Groundwater Management. This Local Regulation is a follow-up of Government Regulation No. 121 of 2015 concerning the Water Resources Management.

Even though the provisions of the law were promulgated in April 2017, the license issuance for groundwater is not based on the West Java Provincial Regulation No. 1 of 2017 on Groundwater Management, especially in the stages of providing technical recommendations by UPT ESDM Department Region VII Cirebon.

The license issuance based on the provisions of West Java Provincial Regulation No. 5 of 2008 on Groundwater Management is inconsistent with the hierarchy of laws and regulations. In the aspect of authority, during the period after the Constitutional Court decision No. 85/PUU-XI/2013 was delivered on February 18th, 2015 until the enactment of West Java Provincial Regulation No. 1 of 2017 on Groundwater Management, Cirebon has followed the Local Regulation.

The legal basis of the license issuance for groundwater extraction in West Java is Provincial Regulation No. 1 of 2017.

Analysis of the study shows that the provision of Law No. 7 of 2004 on Water Resources cannot be used as a rule since it is contradictory to the higher regulation of the 1945 Constitution of the State of the Republic of Indonesia.

The city's development and expansion resulting from the development process has placed the city under considerable pressure. This is due to the dynamics of economic growth, population density, employment, and social interaction that have accelerated exceedingly quickly so that the needs are much more diverse. This reality underlines the commitment to support the current norms, including the rule of law that must be formulated and implemented to be enforced. Thus, law enforcement with certainty and justice is the key to overcoming the problems, including in terms of groundwater extraction and management by the hospitality industry, so that they must follow a clear legal basis and strict law enforcement.

#### **Conclusion**

Groundwater management, especially the license for groundwater extraction after the Constitutional Court decision No. 85/PUU-XI/2013 is based on Law No. 11 of 1974 on Irrigation, Government Regulation No. 121 of 2015 concerning Groundwater Management, and West Java Provincial Regulation No. 1 of 2017 on Groundwater Management. These laws and regulations imply the basic principles of the decision of the Constitutional Court.

The principles contained in the Constitutional Court decision have not been fully realized due to the lack of a complete implementation regulation which is the guideline for license issuance for groundwater extraction. This is one of the forms of disharmony between laws and regulations prevailing in groundwater management and the Constitutional Court decision No. 85/PUU-XI/2013. The solution for the problem in each region is to set a regulation on technique which can be the reference at the

regional level and then it is expected that legal assurance of the extraction, utilization, and controlling water can be implemented well.

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