The progressive realization of human rights to water: the legal basis, policy implications, and monitoring challenge

Anindrya Nastiti[1,*] and *Teddy* Prasetiawan[2]

[1] Environmental Management Technology Research Group, Faculty of Civil and Environmental Engineering, Institut Teknologi Bandung, Jalan Ganeca 10 Bandung
[2] Research Center of Expertise Agency, The House of Representatives of the Republic of Indonesia, Central Jakarta, Indonesia

Abstract. Since 2010, the United Nations General Assembly had explicitly recognized the human right to water and sanitation and obliged States to provide for its progressive realization and entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for essential personal and domestic uses. This paper scrutinizes the legal basis and the policy implication for human right to water in Indonesia, before and following the annulment of the Water Resource Law 7/2004. This paper considers that one of the greatest challenges is to find an appropriate and internationally-comparable methodology in measuring the progressive realization of human rights to water and sanitation. We also highlight the importance of composite indicators and concludes that single variable indicators are insufficient to capture the range of issues involved in the realization of the human rights to water.

1 1 Human Rights to Water

A long journey towards the international recognition of water as a basic human rights started in decades ago. The International Covenants on Economic, Social and Cultural Rights (ICESCR) did not specifically mention water as human rights, but water is indispensable part the right to an adequate standard of living. In 1993, the Vienna World Conference on Human Rights avowed that extreme poverty constitutes a violation of human dignity. Although water was not also specifically recognized as basic human rights, the association of poverty with water shortage is well established—poverty is prevalent mostly in water-short area. The victory of a global level recognition of water as human rights was finally celebrated with the issuance of UN Resolution 64/292 by the UN General Assembly, 28th of July 2010. The right to water is now a legal right, rather than a merely charitable service. Internationally-binding convention will drive States to focus more on their responsibility in fulfilling this right to their citizens (Nurcahyono et al., 2015).

But what is a right to water? Scanion et al. (2014) explained the two contents of the human right to water: substantive right and procedural right (Fig. 1).

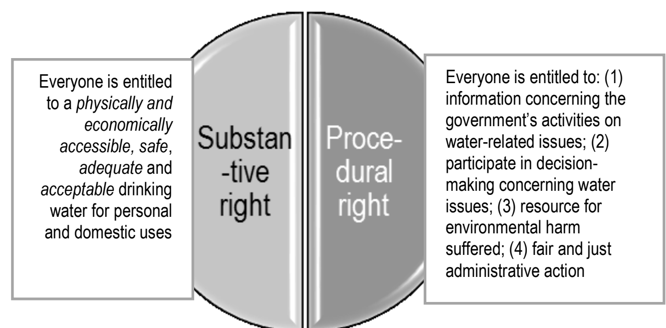

Fig. 1. The contents of the human right to water

Substantive right constitutes how a human right should be defined. The definition of the human right to water was firstly declared during the 1977 Mar del Plata Conference: "all people, whatever their stage of development and their social and economic conditions, have the rights to drinking water in quantities and of a quality equal to their basic need." The UN Resolution 64/292 further mentions that everyone is entitled to a physically and economically accessible, safe, adequate and acceptable drinking water for personal and domestic uses. Physically accessible means that water should be within safe physical reach. The National Statistical Agency (2013) requires water collection time is no more than 30 minutes a roundtrip. Economically accessible means that costs and charges associated with water must be affordable and must not prevent a person from accessing safe water and should not compromise his or her ability to enjoy other basic rights. Safe means water

* Corresponding author: anindrya@tl.itb.ac.id

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should be free from contaminations than endanger health. Water should also be adequate and continuous for drinking, cooking, and maintaining basic hygiene (United Nations, 2007). Aside from those requirements, the human right to water also holds a principle of nondiscrimination in which water should be accessible for all: the most vulnerable and marginalized groups of population, regardless of their gender, race, and socioeconomic status, should have access to water services. Here, accessibility includes both physical and economic accessibility.

Even so, the recognition of a right to water does not immediately eliminate the barriers in extending this right to citizens (Wutich et al., 2016). Water supply in many countries often does not meet the requirements of physical and economic access, quality, quantity, and continuity (see Bain et al., 2014; Kumpel & Nelson, 2014; Banerjee et al., 2008; Kayaga & Franceys, 2007; Vollaard et al., 2005). In Indonesia, access to piped water as the best form of provision only accounts for 10.2% of the total population by 2015 (National Statistical Agency, 2015). In addition, the existing house connections often fail to deliver contaminant-free and reliable water on daily basis. Non-piped water sources, such as deep groundwater and commercial water (including water delivered from vendors and all forms of bottled water) are expensive to obtain, thus limiting economic accessibility of the poor citizen to such sources.

Meanwhile, procedural right deals with the enforcement of the substantive rights; a well-established of the former will serve as a protective shield above the latter. According to Scanion et al. (2014), the core procedural right to water includes the rights of individuals to: (1) information concerning the government's activities on water-related issues; (2) participate in decision-making concerning water issues; (3) resource for environmental harm suffered; (4) fair and just administrative action. All of these rights are inter-related. Scanion et al. (2014) mention that access to information enables citizens to participate meaningfully in an accountable and transparent decision-making and effective enforcement in the water sector. In other words, the procedural right includes the institutional aspects in realizing a physically and economically accessible, safe, adequate, and non-discriminative water service for all.

In the discussion about institutional factors of the water sector, privatizations in the operational aspects of water supply services had been in the spotlight. Albuquerque and Roaf (2012) suggests that privatization of water and sanitation service utilities can prove detrimental to human rights, where there is not a simultaneous implementation of specific measures to regulate service provision and to ensure that there are sufficient incentives to expand and improve access in low-income areas.

This paper aims to see whether the national regulations have incorporated the substantive right and procedural rights to water and link it with the issue of privatization. The remainder of the paper is as follow. Section 2 follows the legal basis of the human right to water in Indonesia, before and following the annulment of the Water Resource Law 7/2004. Section 3 elaborates on the human right to water in the context of SDGs.

1 2 Legal Dimensions of the Human Right to Water in Indonesia

The Constitution of Indonesia resolutely expresses that water is a prime resource for the sustenance of life, with Clause 33 verse (3) firmly claims the state's ownership of water. This clause is a parental ruling for all the forthcoming water resource-related regulations. However, it is inevitable that the development of international conventions, mainly exploited as a legal landing during many water resources advocacies, largely influence the tidal courses of Indonesian water resource regulations.

In this section, we discuss the evolution of the national legal regimes for the protection and promotion of human rights to water. We specifically discuss three legal regimes: (1) The 1974 Watering Act; (2) The 2014 Water Resource Act (WRA); and (3) The Post-annulment of the 2014 Water Resource Act (WRA). The debates over the legal framework of the human right to water centers around the notion of the ownership of water.

The Watering Act Number 11 Year 1974 is a very first lex specialis, or law governing a specific subject matter, comprehensively regulated all water resources affairs in Indonesia. The previous colonial water regulation, the 1936 Algemeen Waterreglement was focused mainly to irrigation and only applied to some parts of the country. In the context of human right, the Watering Act highlighted the social function of water and that water should be used predominantly for the prosperity of the society. Water is owned by the state in which central and local governments serves as executing bodies in implementing water resource management.

In 2004, the Water Resource Act Number 7, was enacted. Clause 5 mentions that: "The State guarantees individual rights to obtain water for basic needs towards a healthy, hygienic, and productive life"; a statement of accountability that was never mentioned in the previous Watering Act. Clause 26 verse (7) states that all water resource utilization shall rank the social function of water first; hence, this Act prioritizes individual basic needs and irrigated people agriculture in water allocations. However, aside from the social function, the economic and environmental functions of water were also recognized in this 2004 Act (Fig. 2). The economic function of water, often narrowly understood as water privatization, had since become the main focal point in the debate stage of human rights to water.

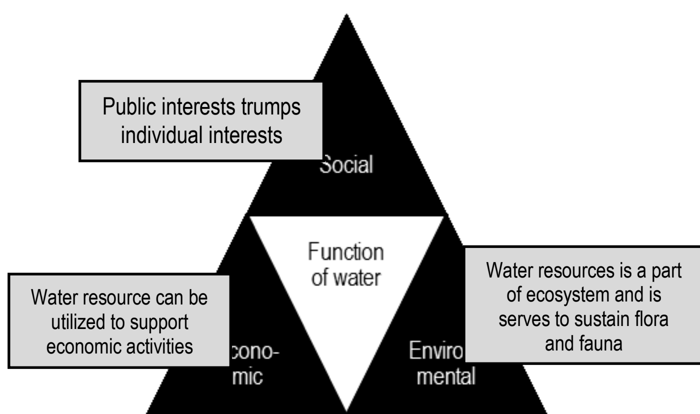

Fig. 2. The three functions of water mentioned in the 2004 Water Resource Act: social, economic, and environmental functions.

Both the 1974 and 2004 legal regimes, and all their derivative regulations, do not firmly regulate the 'what's-allowed and what's-not' in the context of private sector privatization. For example, although the 1974 Watering Act put forth the social function of water, it also allows private sector participation by granting the executive role in water resource management to individuals or groups. In fact, the first water privatization in Indonesia (North Serang, Batam, and Jakarta) took place during this regime. The sketchy ruling of private sector participations is suspected to sustain obscured privatizations (Al' Afghani, 2012).

Water sector privatization is what brought the 2004 Act into the spotlight by human right activists. Indeed, the evidence against water privatizations had shown that such an institutional approach in water resource management fail to achieve intended development goals, particularly water service for the poor (Bakker, 2008). McIntosh (in KruHa, 2016) suggests that private water companies were reluctant to invest on expanding piped water network towards poor residential areas. Swyngedow even went further by suggesting that private companies cherry-picked those who were willing to pay high for mediocre service quality (KruHa, 2016). These debauched reputations of water sector privatization serve as a basis of community pressure to erase all forms of water resource commercialization.

The strong opposition towards water privatization finally led to the annulment of the 2014 Water Resource Act and the re-enactment of the 1974 Watering Law through the Decree of Constitutional Court Number MK No. 85/PUU-XI/2013. This Decree further declares six strict principles in water resource management:

1. Control over water resource shall never disturb, forsake, or negate the human rights to water;
2. The State is responsible in realizing the human rights to water for the people, in which access to drinking water is a standalone basic rights;
3. Environmental conservation remains one of basic human rights as regulated in the 1945 Constitutional Act.
4. Absolute command and control over water belongs to the State;
5. The priority of commercial operational activities is given to the central state- or local state-owned companies; and
6. Tightly regulated private sector privatization is permissible.

In regard to the context of drinking water service, the newly enacted Government Regulation Number 122 year 2015 re-emphasizes that the drinking water provision is conducted in a manner to fulfil the citizens' right to drinking water. The substantive right is included in the Clause (1) of the regulation, where: "The development of the drinking water supply system … in order to fulfil the requirements of quantity, quality, and continuity of drinking water supply," and Clause 2, where: "..to achieve a high quality drinking water supply management and service in an affordable manner.

Meanwhile, the sketchy ruling of water privatization was undertaken by the enactment of the Government Regulation Number 121 year 2015 regarding Water Resource Commercial Operations. This regulation practically adopts the Constitutional Court's six principles of water resource management. Private sector participations becomes 'the last resort' when public sectors are unable to provide service albeit with 'certain and tight conditions'. But these conditions are not specified anywhere in this 121/2015 regulation, thus undesired multi-interpretations of this regulation is plausible. The previously mentioned regulation, 122 year 2015, at least provides conditions that allow private sector involvement in drinking water supply management services. Private sector can participate under certain principles: firstly, the state agencies partnering with the private agencies are the ones that hold the Water Extraction Permit, rather than the private agencies. Secondly, the partnerships prioritize low-income communities. Private sector also can only participate in the form: (1) of the expansion and management of the raw water supply and production units of drinking water supply system; and (2) the investment of operation and maintenance technologies and systems that subsequently operated and managed by the state agencies; and (3) the investment of operation and maintenance technologies and systems based on the performance-based contract mechanisms. However, the procedural rights to ensure that any private sector involvement will not violate the principle of the human right to water is unclear.

At present, the House of Representatives of Indonesia (DPR RI) is attempting to pass the draft of the new Water Resource Act towards the 2017 Priority Legal Program. This new draft was prepared in the spirit of returning legal and policy framework to gravitate into the ideologies of human rights to water. The new Water Resource Act calls for incorporating the Constitutional Court's six principles of water resource management in explicit manners in order to leave multi-interpretations behind.

1 3 Human Rights to Water and the SDGs: A Progressive Realization

The Millennium Development Goals had been valuable in raising awareness among States of the situation that too many people suffer because of the lack of access to safe water (and sanitation). However, the MDGs did not reflect the principles of the human right to water as it only called for a proportion of those without access to drinking water rather than universal access (Albuquerque & Roaf, 2012). The nondiscrimination principle of access to water becomes a foundation for the Sustainable Development Goals (SDGs) that calls for a universal access to water.

Meanwhile, following the recognition of water as a human right, the post-2015 development framework also suggests that States are responsible and legally accountable to use the maximum resources available to ensure that universal access to "sufficient, safe, acceptable, physically accessible and affordable water". The SDGs calls for equitable access to water. 'Equitable' indicates a progressive reduction and elimination of inequity between population subgroups, not only in term of physical accessibility, but also economic accessibility, quality, continuity, and quantity. Therefore, the SDGs also concerns about the distributive outcomes of water supply provision is without discrimination.

In the midst of the anti-privatization that successfully led to the annulment of the 2014 Water Resource Act, Indonesia has streamlined the goal in achieving universal access to water, enacted through the Presidential Regulation Number 2 year 2015 regarding the National Mid-term Development Plan or RPJMN 2015-2019. The RPJMN emphasizes the non-discriminatory principle in drinking water provision system by stating that the fulfilment of the basic rights, including drinking water and sanitation, for the poor households needs to be the center of attention. According to Luh et al. (2013), a State's compliance with the right to water is not determined by the level of achievement of water-related goals, but rather through the principle of progressive realization. Since States may be constrained by prior conditions and resources available in realizing the human right to water, a compliance is attained when a State shows that it has "taken steps", or made progress, towards realizing universal access (Luh et al., 2013). Thus, the rate of change of certain human rights criteria is similarly important in the level of achievement of such a criteria.

According to the RPJMN, the developed drinking water system should consider the four principles: quality, quantity, continuity, and affordability. The National Statistical Agency (2016) assesses potential indicators for the SDGs' water target. To measure physical accessibility, the Government of Indonesia still relies on the concept of "minimum basic service" by defining populations with "access" as those who use water from improved sources that are accessible within 30 minutes per trip. This single variable indicator is insufficient to capture the range of issues involved in the realization of the human rights to water. However, a comprehensive monitoring system with composite indicators to ensure the substantive right to water, including the one that also take into account water adequacy, quality, and affordability, has yet to be developed. In the context of affordability principle, the RPJMN also calls for the full-cost recover-based tariff system. More studies need to be conducted in order to assess the effect of this tariff system towards access to water for the poor and marginalized community.

Meanwhile, a path towards enabling the procedural right to water subsists in the RPJMN document. This document mentions that knowledge management is done through an integrated data and information management through NAWASIS that involve active participations from the related stakeholders. But the specific regulatory framework, let alone the monitoring, of such procedural rights, has yet to be seen. Future researches should also focus in analyzing whether Indonesia has enough regulatory instruments that specify not only substantive right, but also procedural right, and how the available rules through which distributive outcomes ensue accommodate the principle of the human right to water.

1 4 Conclusion

We conclude that explicit codifications of human rights to water in the national (and local) regulations are crucial in bridging the access gap and service quality of water service, particularly for the poor. The commencement of the SDGs that demands universal access to water for all put forward the issue of human rights to water in the center of the global stage of water. The substantive right to water requires water should not only be physically accessible, but also economically accessible, safe, and adequate for all without discrimination. For this to be realized, the current challenge is to ensure that the distributive outcomes of water service provision, such as physical access, costs, reliability, and water quality, is fair. Finding appropriate and internationally-comparable methodology in measuring the distributive outcomes of the progressive realization of human rights to water is in itself challenging.

The efforts in doing so are upscaled when not only those distributive outcomes needs to be constantly monitored, but also the rules through which these outcomes ensue needs to be assessed. At the moment, it is unclear whether the Indonesian regulatory framework has accommodated the procedural right to water sufficiently. We suggest future studies of the progressive realization of human rights to water in Indonesia to also focus on developing the way the institutional and regulatory aspects can be best evaluated.

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