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# LEGAL IMPLICATIONS OF THE NORMS CONFLICT IN THE GOVERNANCE REGULATION OF THE WATER RESOURCES

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**Abstract:** *Arrangements for water resources or irrigation governance designs from the colonial era to the reform order always cause controversies and problems. In physiological issues, there is no known change in the meaning of water as a public good being a private good. Theoretical problems, the basis for the design theory of management of chaotic water resources is in line with the existence of law 17 of 2019 concerning water resources. The purpose of this study is to analyze and find the implications of norm conflicts in water resources governance arrangements, both vertically between Law 17 of 2019 on Water Resources with Article 33 (2) and (3) with the 1945 NRI Law, and horizontally with RI Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles. This research uses normative legal research methods with various approaches, including the statute approach, historical approach and conceptual approach. The analytic technique of this research is using an investigation strategy. The results showed that 1) That the article in Law No. 17 of 2019 shows that the production branches that are important for the State that controls the public interest can not be controlled by the State, therefore the article in Law No. 17 Hold 2019 is contrary to Article 33 paragraph (2) and (3) of the 1945 Constitution of the Republic of Indonesia cause that water is a State asset and national assets can be used not so much for the prosperity of the people, therefore article 46 paragraph (1), Article 47, Article 48, Article 49, Article 51, Article 52 Law No.17 of 2019 is contrary to Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia.*

**Keywords:** Water Resource, Legal Implication, Regulation, Governance
**Research Area:** Environmental Law, Water law
**Paper Type:** Research Paper

## 1. INTRODUCTION

Water becomes a vital component that is very important for the life of living things, especially humans. The existence of water with its management functions to maintain the continuity of life, develop civilization and modernization, as the discussion and discussion of water law becomes a treasure and enrichment for thinkers and legal experts.

The world view of progress in the economic field without regard to the existence of nature causes inequality. The existence of water resources is not utilized as well as possible for a variety of necessities of life and can be guaranteed so that everyone gets their rights to these natural resources. The state guarantees the right of every person to water to meet the daily basic needs stipulated in Article 33 Paragraph (3) of the 1945 NRI Constitution as the basis for the constitution of natural resource management which states that the utilization of natural resources including water must be utilized with good for the prosperity of the people. Starting from the description, that contained in the constitution is the state guaranteeing the availability and regulation of water resources for the people of Indonesia so that the utilization of water resources must be managed optimally so that they can meet the standards of benefit, equality and justice. However, the problem of water governance occurs along with

the good governance regimes of the colonial period until the reformation period, the problem of water is always compatible with the politics of law.

Therefore, an old problem was identified, namely the regulation of water governance, which was marked by the interests and political orientation of the law at the time, although the output arising from the legal politics did not improve and provide protection to the community for water needs. The next issue is that the regulation of water resources governance through Law 17/2019 on Water Resources has new problems, but substantially contains provisions that open up new investment opportunities and the sustainability of investment in water resources reduces the fulfilment of people's rights to water (Chapters III, VI) and the supervisory authority should refer to the decision of the Constitutional Court Number 85 / PUU-XI / 2013 (Chapter VIII), whereby the formulation of these rules can be formulated at all in Law Number 17 of 2019 by adopting Law Number 32 of 2009 concerning Protection and Management Living environment. The SDA Law also does not regulate the evaluation provisions of existing SDA business licenses.

Other problems in the management of water resources governance also impact on philosophical aspects (ontology, epistemology and axiology), theoretical and juridical. Philosophical Problems in Water Resources Governance Arrangements are the essence of water resources governance that should be by the State, in this case, the government, but with the enactment of Law Number 17 of 2019, what happens is that the private sector is granted the authority to manage water resources. The management of water resources is not guided by the NRI Act of 1945 which mandates the state where the state has the obligation to realize prosperity for the people who, as mandated by Article 33 paragraph (3).

The 1945 Constitution of the Republic of Indonesia Article 33 paragraph (3) is the basis in the economy and economic activities desired in the country, and the article does not stand alone but correlates the objectives of welfare and social justice (Bagir, 1995). The article emphasizes that natural resources consisting of earth, water and natural resources in the territory of the Republic of Indonesia are under the control of the State and that their assets are managed to realize the welfare of Indonesian citizens today and in the future (Bambang, 2007). Theoretically, there must be harmony and synchronization between one and the other legislation, vertical synchronization and horizontal harmonization (Zainuddiin, 2013). Legislation vertically must not conflict with other legislation vertically and in a hierarchy in the order of legislation which is in a lower position. In a hierarchical position, the 1945 NRI Act is higher than the Act (Muchsin, 2006).

Legal problems in the management of water resources are conflicting norms in the management of water resources management, both vertically between Law 17 of 2019 on Water Resources with Article 33 (2) and (3) of the 1945 NRI Law, and horizontally with RI Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles. Referring to the theory and legal material that the author found that norm conflicts have occurred in the management of water resources, the politics of resource management law was formulated by the Constitutional Court Decision Number 85 / PUU-XI / 2013.

Another issue is Law Number 17 of 2019 concerning Water Resources is not in line with the Constitutional Court's decision, because it does not explain the supervision of the exploitation of water resources. Article 56 Paragraph 3 of the SDA Law states that supervision will be regulated further through a Government Regulation. The formulation of these rules may include formulated in the Act by adopting Law Number 32 of 2009 concerning Environmental Protection and Management. The Water Resources Act also does not regulate the evaluation provisions on Water Resources business licensing.

Based on the description above, this study aims to discuss, analyze and find the implications of norm conflicts in water resources governance arrangements, both vertically between Law 17 of 2019 on Water Resources with Article 33 (2) and (3) with Law NRI 1945, and horizontally with RI Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles.

## 2. RESEARCH METHOD

This type of research is normative juridical research, which asks about the application of rules or standards in positive law (Marzuki, 2011). The research approach used is the statute approach, historical approach and conceptual approach (Johny, 2006). The legal material from normative research can be divided into three namely,

1. Primary legal material is the main legal material in this study, made up of the NRI Constitution of 1945, the law relating to water resources.
2. Secondary legal law, Academic texts Draft Law on Water Resources, the results of research related to water resources governance laws.
3. Tertiary Law Materials are legal materials that provide an understanding of primary and secondary legal materials, consists of legal dictionaries, legal encyclopedias and index lists of court decisions or judicial institutions relating to water resources governance arrangements.

The technique of searching primary and secondary legal materials is done by studying literature which is a way to gather information by looking at and examining library materials (literature, previous research results, scientific magazines, scientific bulletins, scientific journals, Web Ministries or institutions) and internet searching (Sutjipto, 2000). The analysis technique in this research is investigation strategy (Abdilatif and Hasbi, 2012), by using the deduction method which is to explain a general thing then draw it to a more specific conclusion. Furthermore, inventorying and identifying the laws and regulations, and then analyzing the relevant cases and the laws and regulations by interpreting the law, to then draw conclusions from the results of the analysis. Interpretation of the law used in this research is Grammatical Interpretation (interpreting the law according to the meaning of words (terms)) and Systematic Interpretation (connecting one article with another article in law or with other laws) (Yudha, 2012).

## 3. RESULTS & DISCUSSION

### *3.1 Implications of Conflict of Norms to the Rule of Law in the Management of Water Resources*

According to Arief Sidharta (2009), Scheltema, formulating his views on the elements and principles of the rule of law in a new way, which includes five things as follows::

1. Recognition, respect and protection of human rights rooted in respect for human dignity.
2. The validity of the principle of legal certainty. The rule of law is aimed at ensuring that legal certainty is realized in society. The law aims to realize. Legal certainty and high predictability, so that the dynamics of shared life in society are 'predictable'.
3. Validity of the Equality (Similia Similius or Equality before the Law) In a State of Law, the Government may not privilege certain people or groups of people, or discriminate against certain people or groups of people.
4. The principle of democracy in which everyone has the same rights and opportunities to participate in government or to influence government actions.

5. The government and officials carry out the mandate as a public servant in order to realize the welfare of the community in accordance with the objectives of the state concerned.

Brian Tamanaha (2004), as quoted by Marjanne Termoshuizen-Artz in the Jentera Law Journal, divides the concept of 'rule of law' into two categories, "formal and substantive". Each category, namely "rule of law" in the formal sense and "rule of law" in the substantive meaning, each has three forms so that the concept of the rule of law or the "Rule of Law" itself according to him has six forms as follows:

1. Rule by Law (not rule of law), where the law only functions as an "instrument of government action".
2. Formal Legality, which includes characteristics that are (i) the principle of prospectivity (rule written in advance) and may not be retroactive, (ii) are general in the sense that it applies to everyone, (iii) clear (clear), (iv) public, and (v) is relatively stable.
3. Democracy and Legality. Dynamic democracy is balanced by laws that guarantee certainty. But, according to Brian Tamanaha, as "a procedural mode of legitimation" democracy also contains limitations similar to "formal legality." As in "formal legality", democratic regimes can also produce bad and unfair laws.
4. Substantive Views that guarantee "Individual Rights".
5. Rights of Dignity and / or Justice
6. Social Welfare, substantive equality, welfare, preservation of community.

In the sense that the legal norms apply, sourced and based on higher legal norms, and higher legal norms apply, sourced and based on higher legal norms, and so on until it reaches a basic norm of the Indonesian state, namely: Pancasila (the legal aspirations of the Indonesian people, the basis and source for all legal norms below) (Jazim, 2006).

The building of this legal pyramid is to determine the degree of norms of each arrangement of higher legal norms and lower norms. The consequence of building a legal pyramid is if there are conflicting legal / regulatory norms (conflicting norms), then what is declared to be applicable is a higher degree. In this context applies the legal principle of the lex superiori derogat legi inferiori (a higher degree law overrides a lower degree law). In addition, the consequence of the building of the legal pyramid is the harmonization between various layers of law (for example, the level of Law), in the sense that between legal norms in the same layer/level may not conflict with each other (Bagir and susi, 2014).

The Indonesian legal norm system forms the building of a pyramid, the prevailing legal norms are in a tiered, multi-layered and grouped system (Maria, 1998). Legal norms are sourced and based on higher legal norms, and higher legal norms are valid, sourced and based on higher legal norms. So that legal issues in water resources management are conflicting norms in water resources governance arrangements, both vertically between Law 17 of 2019 on Water Resources with Article 33 (2) and (3) of the 1945 NRI Law, and horizontally with RI Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles.

Based on Nawiasky's theory, A. Hamid S. Attamimi then compared it with Hans Kelsen's theory and applied it to the structure of the prevailing legal system in Indonesia. Attamimi (1993) shows the hierarchical structure of Indonesian law based on the theory, viz:

1. *Staatsfundamentalnorm:* Pancasila (Opening of the 1945 Constitution).
2. *Staatsgrundgesetz:* The body of the 1945 Constitution, MPR Decree, and the Constitutional Convention.
3. *Formell gesetz*: Laws.

*4. Verordnung en Autonome Satzung*

Hierarchically starting from the Regulation placing Pancasila as the Staatsfundamental-norm was first delivered by Notonagoro. Pancasila is seen as a legal ideal (rechtsidee) as a guiding star. This position requires the formation of positive law is to reach ideas in Pancasila, and can be used to test positive law. With the enactment of Pancasila as a Staatsfundamentalnorm, the formation of law, its application, and its implementation cannot be separated from the values of Pancasila.

Placing Pancasila as a Staats-fundamentalnorm is placing it above the Basic Law, then Pancasila is not included in the definition of the constitution, because it is above the constitution. To discuss this problem can be done by tracing back the concept of basic norms and constitutions according to Kelsen and the development made by Nawiasky, as well as looking at the relationship between Pancasila and the 1945 Constitution.

The effort to realize Pancasila as a source of value is to make the basic values of Pancasila as a source for the preparation of legal norms in Indonesia. This is in accordance with its position as a basic (philosophical) state as stated in the opening of the 1945 Constitution Paragraph IV, which is further elaborated in the provisions of Article 2 of Law No. 12 of 2011 which states that Pancasila is the source of all sources of state law.

The State of Indonesia has a national law which is a unified legal system. The Indonesian legal system originates from and is based on Pancasila as the basic norm of the state. Pancasila is located as a grundnorm (basic norm) or staatfundamentalnorm (state fundamental norm) in the level of legal norms in Indonesia. The values of Pancasila are further elaborated in various existing laws and regulations, in the form of laws, decrees, decisions, government policies, development programs, and other regulations which are essentially instrumental values as a translation of values basic Pancasila.

Explanation of the implications of regulating water resources governance is as follows:

First, the results of the study of primary legal materials show that there is a conflict in the regulation of water resources governance, namely Law No. 19 of 2019 concerning water resources with Article 33 of the 1945 Constitution.

Both the results of the primary legal study show that the enactment of Law Number 17 of 2019 is a contradiction with the constitution and Law Number 12 of 2011 concerning the Formation of Legislation.

### *3.2 Implications of Norm Conflict Over Legal Politics in Water Resources Governance Arrangements*

The political law of the state produces a constitution, while the products of legislation are the product of law politics. Knowing the legal politics and philosophy of a country and the goals of the country can be understood through the state constitution. Political law is an instrument of encouragement for all elements of the national legal system so that it serves in accordance with the objectives of the state, the ideals of the nation, the ideals of the law and the guiding principles contained in the Preamble of the 1945 Constitution. The constitution can be interpreted as "moral reading" or moral rules and messages. the constitution is no longer understood merely as a legal document, but also as something that is "metayuris" that is a charter of humanitarian statements, statements of expression of the cosmology of the nation, the ideals of the nation and the basis for the purpose of where the country is taken. After the amendment of the 1945 Constitution, Indonesia embraced the rule of law which had

implications for the policy to accept a combination of the "legism tradition" and the "common law" tradition in the legal system in the future (constituendum). The willingness to accept the combination of the two traditions has an impact on the policy of strengthening the DPR and the judiciary through the provision of adequate human resources. The aspired Indonesian law politics ("iusconstituendum") is depicted in the Indonesian scientific law tree which contains the Pancasila Philosophy as the root of law or the philosophy of law, while the Preamble of the 1945 Constitution as the basis of legal politics.

Satjipto Rahardjo (2007), defines political politics as the activity of choosing and the means to be used to achieve a certain social and legal objective in society. According to Satjipto Rahardjo, there are several fundamental questions that arise in the study of legal politics, namely: (1) what goals are to be achieved with the existing legal system; (2) which methods and which are considered best to be used to achieve these objectives; (3) when the law needs to be changed and through ways in which the change should be made; and (4) can a standard and established pattern be formulated, which can help decide the process of selecting goals and ways to achieve these goals properly.

Whereas legal politics is a legal policy that has been or will be implemented nationally by the Indonesian government which includes: 1. Development of law with the core of making and updating legal materials to be in accordance with needs 2. Implementation of existing legal provisions including affirmation of the functions of institutions and fostering law enforcement. In the study of legal politics in the management of water resources, researchers use the benchmarks and indicators of legal politics by Bernard L. Tanya, among others:

1. Ideological basis;
2. Normative basis;
3. Constitutional basis;
4. Moral base.

In the macro-political scale, the law on resource management can be seen from the constellation of Law Number 17 of 2019 which refers to Article 33 paragraph (2) and paragraph (3) of the 1945 NRI Law. However, the study of legal politics always places interpretation of meaning in accordance with the rules of the regulation outside the rules, the political analysis of the law of water resources management also examines the issues that underlie all the ideas that animate the laws and regulations is the practice of water privatization adopted in Law 19 of 2019 on Water Resources.

### *3.3 Implications of Norm Conflict Over Legal Politics in Water Resources Governance Arrangements*

Howard (2001) states pro argumentation or which fully supports the concept of welfare state can be understood as follows, they are based on 1) humanitarianism is the idea that people do not suffer); 2) ethical-reciprocity is a universal moral principle, and most welfare systems are based on a "mutual" pattern. Altruism or helping others is a moral obligation in almost all cultures, and assistance and support for poor people is a universal moral principle; 3). Utilitarianism is a theory in terms of normative ethics which states that appropriate action is that which maximizes use (utility or utility). "Use" or "utility" is usually defined as happiness or prosperity 4). The failure of the private sector provides advocacy regarding the social provisions that are required in the private sector that are contrary to social goals. The counter-arguments or those who reject the concept of welfare state base their concepts on 1) libertarians (state intervention violates individual freedom; individuals should not depend on other parties' subsidies for their interests; 2) conservative (social

expenditure gives unfavourable effects on behaviour, fostering dependence, and reduce morale; 3) economic (social expenditure requires high costs and high taxes. Welfare state gives an unfavourable effect on the economy so that paradoxically has a negative effect on people's welfare; 4) individualist (social spending reduces freedom of enjoying prosperity and individual success by sharing part of his prosperity with others. this argument is also important for libertarians and conservatives); 5) anti-regulatory (welfare state is the justification of greater state control over business, limiting growth and creating unemployment; 6) the free market - advocating for markets will encourage more effective and efficient production compared to organizing social programs.

By the beginning of the 20th century, the heyday of individualist anarchism had passed. HL Mencken and Albert Jay Nock were the first prominent figures in the United States to describe themselves as libertarians because they believed Franklin D. Roosevelt had co-opted the word liberal for the New Deal policies they opposed and used. libertarians to signify their loyalty to individualism. The critic HL Mencken wrote that it was editorial for three short years Freeman set a sign that no one else in his trade had ever reached. They are knowledgeable and sometimes even learn, but there is never the slightest trace of the pedantry in it. "Executive Vice President of the Cato Institute David Boaz wrote:" In 1943, at one of the lowest points for freedom and humanity in history, three outside women used to publish books that could be said to have spawned modern libertarian movements ". by Isabel Paterson, God of Machines, Discovery of Freedom from Rose Wilder Lane, and The Fountainhead by Ayn Rand each of which promoted individualism and capitalism. None of the three used the term libertarianism to described their beliefs and Rand specifically rejected the label, criticizing the growing American libertarian movement as "hippies of the right." Rand's Objectivism philosophy was very similar to libertarianism and he accused libertarians of plagiarizing his ideas.

### *3.4 Implications of Norm Conflict Over ULR2 (Utilitarianism, Libertarianism, Rule of Law and Rule of Ethics) in Water Resources Management Arrangements*

Our public policy is a deficit in two ways; firstly, it does not understand what is called injustice and secondly, it intentionally embezzled the history of the poor in the process of making public policy. The dominant theory position is used as the basis of public policy. These principles can be found in two groups of philosophical theories, namely utilitarianism and libertarianism. Utilitarianism was conceived by Jeremy Bentham in the seventeenth century to show that happiness can only be called fair if it satisfies the majority, society is called fair if the majority of the majority gets the most happiness from national products or community products. The critical question is then who is justice for? The idea of the majority regards all humans as equal in their needs. During the New Order era, the measurement for calculating human utilities to formulate basic needs was stated that human needs were measured based on the needs of the rich, so fuel was included as a basic need, while water was not considered a basic need. So the State budget is allocated based on the physical needs of the rich because the productive ones are rich. So from the beginning, we can see that there is a bias in the theory of justice and that bias is infiltrating into public policy. But the principle of utilitarianism was quite egalitarian in its time because at that time justice was only determined by the mercy of an aristocrat or determined by the laws governed in theology. At that time the right was only to a king, feudal lords, or priests. Today this theory is undemocratic because it does not pay attention to the type of injustice that works in minority societies. However, current public policy practices still use the principles of utilitarianism as happened in the process of preparing the APBN or APBD.

Another theory cluster that also dominates public policy-making is libertarianism. If utilitarianism views justice based on the greatest amount of happiness a society can enjoy, libertarianism on justice is based on the right of each individual to produce happiness for himself. Libertarians see everyone as having their own preference for happiness, so it is impossible for happiness to be accumulated and counted in the aggregate. According to Immanuel Kant man is a complete subject, so he must be respected, including if he chooses to be poor. Evidence of the effectiveness of public policy can be seen from the output.

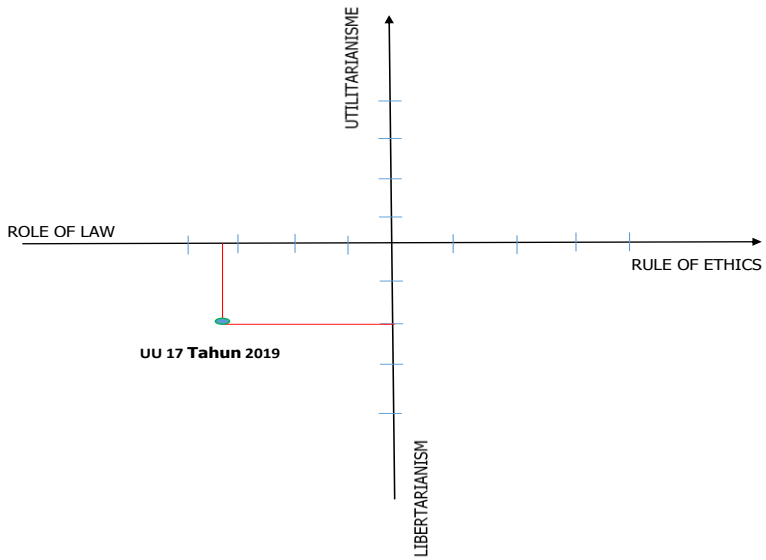


**Figure 1 Analysis of the Governance of Water Resources Management Law Number 17 Year 2019**

Public policy is often held not with a critical theoretical position so that injustice grows and we can only see the consequences after one or two periods in the future. In addition, public policy also cannot distinguish between injustice in society. If a prosperous person experiences injustice, he may only experience misfortune but for citizens or citizens of the poor who experience injustice then this is called suffering, a concept that cannot be understood by wealthy citizens.

Suffering for the rich is suffering due to lack of rights, while suffering for the poor is the culmination of all kinds of suffering, including suffering for the hope of the future. So from the beginning, we can see that the distinction is not included as a consideration in public policymaking. Legal systems and ethical systems need to be built in complementary, mutually supportive relationships to create clean, fair and civilized lives (Jimmy, 2014). Then the idea of positivation and ethical functionalization in the justice function for the occurrence of linkages and partnerships between the two systems, in law there is a rule of law principle consisting of a code of law device, in an ethical system, it is necessary to introduce a rule of ethics with a code of ethics device and a court of ethics (ethics court).

In figure 1 illustrates the position of Law Number 17 of 2019 overlaying between the values of philosophical utilitarianism, libertarianism, rule of law and rule of ethics, the position is in the lower-left quadrant that is part of the rule of law, then the arrangement as an effort of political termination and legal politics by the makers of the Law, the regulation of water resources governance with Law Number 17 of 2019 that has been enacted is a re-ignorance of the Constitutional Court's decision at points one to five. The controversy and criticism of the decision of the Constitutional Court on the 6th phrase is an entry point and an

opportunity for the private sector to get back involved in water management. Substantially Law 17 of 2019 resides in the theory of libertarianism and the content and message are no different from Law Number 7 of 2004.

## 4. CONCLUSION

Implications of conflicting norms governing water resources governance.

1. Whereas the article in Law No. 17 of 2019 shows that production branches which are important for the State that controls the people's interests may not be controlled by the State, therefore the article in Law No. 17 Hold 2019 is contrary to Article 33 paragraph (2) and (3) ) The 1945 Constitution of the Republic of Indonesia causes that water is a State asset and national assets cannot be used as big as the people's prosperity, therefore article 46 paragraph (1), Article 47, Article 48, Article 49, Article 51, Article 52 of Law No.17 Year 2019 contrary to Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia.

2. The global rule of the game that applies is that mastering must be by possessing. The subject matter of Article 33 is to control, if control cannot be done without ownership, then the government should have it, at least 51 percent towards Indonesianization in order to save the interests and sovereignty of the state.

3. Consideration of the legal history of water resources governance arrangements since the colonial era Algemene Water Reglement (AWR 1936) until the reform era, water resource management is a political tool and the legal political objectives of the ruling / ruling government.

4. Law Number 17 Year 2019 is the implementation of a shift in meaning over the governance of water resources as an ethical-political tool in the colonial era, as a fulfilment of the centralistic desires of the new order era, as a commitment to donors by carrying out economic liberalization in the reform era, and as a repeat of economic liberalization in the regulation of Law Number 17 of 2019.

5. As the ruling of the Constitutional Court Number 85 / PUU-XI / 2013 of the principle of natural resource management indicates that the management of natural resources is absolutely carried out by the state, the phrase "it is possible to give permission to private businesses to carry out water acquisition and certain conditions and strict" 6th point principle of the Decision MK The phrase "If all after all the above restrictions have been met and it turns out there is still water availability, the government is still possible to give permission to private businesses to do business on water with certain conditions and strict" is the entry point for private parties to do business on water because there is no stipulation:

a. Indicator restrictions for points 1-5
b. Indicator of water availability.

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