

Imposition of Double Charges on Hydroelectric Power Plants

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Abstract—In meeting electricity needs, there is currently a shift in the use of fossil energy to water energy because fossil energy is no longer available. The use of water as a new renewable energy, as stated in the Electricity Supply Business Plan (RUPTL), which prioritizes Hydroelectric Power Plants (PLTA), is considered to require lower investment and stable electricity production compared to Solar Power Plants (PLTS) or Wind Power Plants (PLTB). Providing this water requires conservation costs and other water management costs. So the main topic studied in this research is the problems and impacts of the imposition of water fees including Natural Resource Management Services Fees (BJPSDA) and Surface Water Tax (PAP) on water resource conservation. The research used is explanatory doctrinal research using document studies. The results of the research are that apart from the BJPSDA, there is a PAP which has not been subject to earmarking. Both are regulated in different regulations but are imposed on the same object, namely water. Based on the analysis, it is necessary to evaluate how the implementation of the fee has been able to fulfill the community's rights to water and can maintain the sustainability of water availability through water resource conservation. Therefore, it is necessary to reconsider the imposition of double levies on surface water beneficiaries by changing the BJPSDA manager to a party who has a greater interest in water conservation results and applying the PAP earmarking concept.

Keywords: earmarking; hydroelectric power plant; multiple charges; water resource conservation

Introduction

Water conservation funds should come from the BJPSDA and earmarking on the LAP carried out by parties who have sufficient competence and interest. This is because sustainable water availability requires environmental conservation and costs in its implementation, which can be achieved if the manager has the ability or competence. In this way, the community's water rights can be fulfilled.

Electrical energy is currently a basic need for society. This is shown by the widespread shift in people's preferences for using electronic devices ranging from electric stoves to electric vehicles. This reflects the existing public awareness to switch to green energy. This shift did not occur in a short time, but began with Indonesia's urgency to ratify the Paris Agreement, namely, first, that Indonesia's geographical position is very vulnerable to climate change considering that the country is an archipelago, so the temperature increase will cause sea levels to rise. This really threatens the survival of many people, especially

the extreme weather that we have experienced recently, starting from anomalous seasonal changes to several natural disasters caused by extreme climate change, such as flash floods and rising sea levels to landslides.

Second, Indonesia must be more concerned about these changes because currently its reserves of non-renewable energy sources are running low while exploration and exploitation are still being carried out without preparation for the transition to new or renewable energy sources. For this reason, significant funding or investment is needed to build infrastructure for new and renewable energy sources, especially those that are more "green" or environmentally friendly, characterized by the use of safer energy sources such as ocean currents, winds, and the like, as well as low production waste, carbon and hazardous and toxic waste materials. Therefore, the Paris Agreement was signed, so that developing countries like Indonesia can obtain funding or investment for green energy development.

Five years have passed since the Paris Agreement was signed, Indonesia's follow-up includes participating in the agenda held from 31 October 2021 to 12 November 2021 which took place in Glasgow, Scotland. The representative from Indonesia is the Ministry of Finance together with other stakeholders at the 26th Conference of the Parties (COP26) of the United Nations Framework Convention on Climate Change (UNFCCC). The result Each country is competing to determine its commitments in a roadmap. Meanwhile, the Indonesian government has also expressed its commitment to implementing clean and environmentally friendly energy which has become increasingly evident with the presentation of the 2021-2060 roadmap through six stages, namely:

2021 to 2025, issuance and implementation of regulations (EBT, termination of coal plants, Co-firing of PLTU, as well as conversion of diesel to gas and EBT). Target: 2025, renewable energy target of 23% and dominated by Solar PV,

2026 to 2030, no new PLTU. Solar PV as well as electric vehicles are being developed. It is hoped that Indonesia's Nationally Determined Contribution (NDC) can be achieved by reducing emissions in the energy sector by 314 million tons of CO₂ in 2030.

2031 to 2035, first stage of PLTU retirement and reduction in diesel use. Target: Solar, hydro and geothermal power plants dominate 57%,

2036 to 2040, the second phase of PLTU shutdown includes sub-critical, critical and partially super-critical. EBT increased 66%, dominated by solar, hydro and bioenergy power plants. Sales of conventional two-wheeled vehicles were reduced.

2041 to 2045, large-scale ocean current power plants and nuclear power plants are scheduled for Commercial Operation Date (COD). Increased use of renewable energy to 93%, dominated by solar, hydro and bio-energy power plants.

2051 to 2060 is the final period for stopping PLTU operations. Development of hydrogen for electric power generation and optimization of NRE plant operations.

Based on the roadmap, Indonesia needs alternative energy that is "greener and cleaner" or environmentally friendly, including from ocean currents, wind, solar and the like. This type of energy also has low carbon production waste and low levels of hazardous and toxic waste. Even though it is considered better, the energy produced by the power plant cannot be produced continuously in this case because the energy is very influenced by natural conditions which are the main factor in being able to produce electrical energy. The potential of renewable energy resources, specifically various renewable energies (hydro, solar and wind), is site-specific and the characteristics of various renewable energy sources are very crucial. For example, wind or wind power plants are very dependent on the speed of the wind which will rotate the wind turbine blades to produce electricity. Likewise with solar power plants, even though Indonesia passes the equator, it does not rule out the possibility that there will be clouds which will prevent the solar panels from capturing sunlight and then converting it into electrical energy. As a solution, hydroelectric power plants can be baseload or can be the base load for electricity production. This is indicated by the characteristics of large

capacity, can produce constant electricity, and relatively cheap fuel.

Hydroelectric power plants use water as a turbine driver which will be converted into electrical energy, for this reason water resource management is needed starting from planning, utilization, controlling the destructive power of water, and conserving water resources. Overall these efforts are to realize the mission of water resources management itself, namely sustainable water conservation, fair use of water for community needs in accordance with quality and quantity, control of the destructive power of water, empowerment and increasing the role of the people, private sector and government to managing water, and most importantly improving publication and ease of accessing data related to water resources management. This is in line with the mandate of Article 33 of the 1945 Constitution of the Republic of Indonesia, namely that water is categorized as a public good which is owned by the Indonesian people and is controlled by the state. If viewed from the context of water resources, every community has the right to fulfill its water needs to create prosperity for the people.

Business activities carried out by PLTA have rights and obligations that must be carried out to operate, including the imposition of taxes and Non-Tax State Revenue (PNBP). Hydro power plants are subject to BJPSDA based on Article 53 of Law Number 17 of 2019 concerning Water Resources (UU SDA) which was amended by Law Number 6 of 2023 concerning Job Creation (UU CK) to Article 51 paragraph (1) letter d. In essence, this article regulates the fulfillment of water resource conservation costs which are a component of the BJPSDA and other financial obligations in accordance with statutory provisions. It is also explained in Article 51 paragraph (2) of the CK Law which amends the Natural Resources Law, it is stated that further provisions regarding Business Licensing to use Water Resources as referred to in paragraph (1) are regulated in Government Regulations. Meanwhile, the Government Regulation in question has not yet been regulated.

Apart from that, hydroelectric power plants are also subject to PAP which is regulated in Law Number 1 of 2022 concerning Financial Relations between the Central Government and Regional Governments which has amended parts of the CK Law and the Regional Government Law. Based on Article 1 number fifty two of the HKPD Law, it is explained that PAP is a tax on the extraction and/or use of surface water. Further regulations on PAP are contained in paragraph 6 starting from article 28 to article 32 in this regulation. The basic price for surface water utilization refers to the Decree of the Minister of Public Works and Public Housing Number 12/KPTS/M/2019. In this regard, it is appealed to all communities and business departments that extract and/or utilize surface water, to process permits for the extraction and/or utilization of surface water in accordance with applicable regulations.

Based on this regulation, PLTA has an obligation to make payments for PAP and BJPSDA, both of which are payment obligations for the same object, namely water charged to hydro power plants. Departing from these problems, this research will discuss: problems and impacts of the imposition of BJPSDA and PAP on hydro power plants on water resource conservation.

Method

This research uses a statutory regulation approach or statute approach, namely researching statutory regulations related to legal issues in this research, by studying consistency and stability as well as conformity between the statutory regulations being studied. The application of law and harmonization of the implementation of statutory regulations is seen using secondary data originating from books and scientific journal articles in addition to primary data, namely in the form of statutory regulations and court decisions through literature searches.

Result and Discussion

State Control Rights over Natural Resources

Article 33 paragraph (3) of the Constitution is the basis of the philosophy of natural resource management in Indonesia and has a deep meaning that must be adhered to by state administrators in managing natural resources, especially the words "controlled by the state" and "for the greatest prosperity of the people". Firstly, "controlled by the state" in this case refers to the word "state" which is of course different from the word "government" which can be interpreted as the central government and regional government, but the state refers to an organization that has sovereignty. Second, the meaning of "as much as the prosperity of the people" is that the use of natural resources must prioritize the prosperity of the people, so the two meanings of these words cannot be separated because they are a systematic unity, the first word is instrument or is instrumental and the second word is the goal, so the people give a mandate to government to manage natural resources in Indonesia.

Even though the words of the article can already be interpreted, the meaning shifted after the 1945 Constitution was amended 4 (four) times. There was a significant shift because the explanation of Article 33 of the Constitution was deleted and there was no explanation. Therefore, a review of the law in the agrarian and natural resources sector was carried out against Article 33 of the 1945 Constitution to the Supreme Court which was carried out several times to clarify and sharpen its meaning. The Constitutional Court (MK) interpreted the meaning of the phrase "controlled by the state" contained in Article 33 of the 1945 Constitution specifically because this article contains a higher and broader meaning than that contained in the concept of civil law.

It was explained that the concept of state control is a public law concept related to the principle of popular sovereignty as in the 1945 Constitution which includes both political and economic fields. The people have a position as the source, owner, and at the same time the holder of the highest power in state life, in this case natural resources are public ownership by the people collectively. Apart from that, the use of the word "State" refers to an organization that has sovereignty and then refers to the term central government and can be carried out together with the Blood Government. The Constitutional Court determined based on the request for a judicial review of the Electricity Law that the state was given a mandate to carry out five functions regarding the "right to control the state" for the purpose of maximizing the prosperity of the people, namely:

policy (beleid): carried out by the government by formulating and implementing policies.

management (bestuursdaad): the government has the authority to issue and revoke permit (vergunning), license (licentie) and concession (concessie) facilities.

regulation (regelendaad): state regulation through legislative authority with the formation of statutory regulations and decrees issued by government agencies (DPR and government/executive).

management (beheersdaad): Share-holding mechanism, and/or through direct involvement in BUMN management while regional governance can be carried out by regional companies.

supervision (toezichthoudensdaad): carried out by the state-government in order to supervise and control so that the implementation of control by the state over important branches of production and/or which control the lives of many people is truly carried out for the greatest prosperity of all the people

In addition to the five functions of state authority, the production branches that must be controlled by the state are also explained, namely:

a branch of production that is important for the country and affects the lives of many people

important for the country but does not affect the lives of many people, or

is not important for the country but affects the lives of many people

The two main points of the previous explanation are additional interpretations from the Constitutional Court regarding the review of the Electricity Law. Apart from these decisions, there are also

several decisions related to natural resources and agrarian affairs which result in expanding the interpretation of Article 33 of the Constitution. The Constitutional Court's examination of statutory regulations against the Constitution has been carried out several times and in particular Article 33 of the Constitution has been interpreted to be broader and more rigid. Not only related to authority, production branches, and parameters for measuring "people's prosperity" but also briefly touched on the economy. In the Natural Resources Law in particular, the shift from the social function of water to an economic commodity/commercial good is the main emphasis. This also includes restrictions that must be taken into account by the government regarding the entry of investment or water exploitation to private parties for consideration by the Constitutional Court in reviewing the Natural Resources Law., that is:

Water exploitation must not interfere with, override or negate the people's right to water

The state must fulfill the people's right to water, because access to water is a human right that must be fulfilled

environmental sustainability

An important branch of production that controls the livelihoods of many people must be controlled by the state, in this case water, so supervision and control by the state is absolute.

The main priority in water exploitation is State-Owned Enterprises (BUMN) or Regional-Owned Enterprises (BUMD), then it is possible to grant permits to private businesses with certain and strict conditions.

If the restrictions have been met and there is still water availability, it is possible to issue permits to private companies that carry out water exploitation with certain and strict conditions.

This is relevant to the Public Trust Doctrine (PTD) theory. This theory stipulates that the government is obliged to manage natural resources for the public interest even though access to natural resources (SDA) has been given to certain parties. In the context of water, this doctrine raises two major points, namely first, water is a public good. Second, control of resources by the state with its authority as trustee of the resource owner, or in the context of this research, water, which is actually the public.

Recognition of joint ownership of water and control rests with the government as stated in Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. However, the PTD concept in the Constitution has two prerequisites. First, natural resources are included in the country's important production branches and affect the lives of many people, so they must be under the control of the state whose authority is given to the public. Second, the government's main consideration in its decision to consider the phrase "greatest prosperity of the people" when implementing its authority in the Right to Control the State (HMN).

Water Resources Management Regulations

Regulation of water exploitation in Indonesia has a long history, namely through the establishment of Law Number 11 of 1974 concerning Water Resources, Law Number 7 of 2004 concerning Water Resources, Law Number 17 of 2019 concerning Water Resources, and Law Number 11 of 2020 concerning Job Creation. The regulatory shifts in this law are as described below.

Water exploitation in Law No. 11 of 1974 concerning Irrigation

The right to control natural resources in this law places control in the state and is used as much as possible for the prosperity of the people. Meanwhile, regional governments act as managers and the central government issues permits. Private parties can also carry out water exploitation, but with special conditions, namely being guided by the principles of joint business and kinship. The emphasis in this regulation is the function of water as a social function, which means that water is used to meet the needs of the people

This regulation is the first regulation but has been able to place water as a social function. The special conditions also have characteristics of Indonesian culture, namely allowing the private sector to exploit water resources but still be guided by the principles of joint business and kinship. The drafters of the regulations also made efforts to protect water resources through Article 12 of the SDA Law 11/1974. It was stated that "...in addition to maintaining the integrity of the irrigation building, it also instills a sense of ownership and responsibility...". In this phrase it is clear that the approach taken is not just to threaten certain punishments but also to encourage awareness of companies that exploit. However, Article 15 of the SDA Law 11/1974 strictly and strictly stipulates violations even though acts carried out through negligence or due to lack of knowledge cause the crimes regulated in this Law. When using water for business according to Law 11/1974, the social function of water must also be prioritized as stated in Article 2 of this Law. So that in its operation it is necessary to conserve and impose water taxes and also pay attention to the interests of the community by subjecting it to earmarking.

Water exploitation in Law No. 7 of 2004 concerning Water Resources

The right to control natural resources in this law places control on the state while its use is for the greatest prosperity of the people but still prioritizes sustainable and environmentally sound principles. This law uses the terms water use rights and water use rights. Private parties can carry out water exploitation which makes this regulation very strongly opposed by various groups because it has a monopolistic, commercial character, triggers conflict, is discriminatory, and eliminates the state's responsibility in meeting liberal and capitalist water needs. Therefore, a review was submitted to the Contribution Court in its decision number 85/PUU-XI/2013 concerning the review of Law Number 7 of 2004 concerning Water Resources.

Water exploitation in Law No. 17 of 2019 concerning Water Resources

The rights to control natural resources in this law stipulate that control is controlled by the state and managed for the prosperity of the people. Natural resources can only be controlled by the state but water use permits can be granted to the private sector. The function of water in this law is quite comprehensive, including social, economic and environmental functions. The exploitation of water resources is arranged based on priority, the main thing being the people, BUMD and BUMN, then lastly the private sector if there is still water availability.

This regulation is a combination of the two previous regulations, still prioritizing water needs for community needs but has also opened up opportunities for the private sector to be able to carry out activities after the main priority in exploitation of BUMN and/or BUMD. This regulation will not be in effect for a long time because in 2020 a new regulation emerged in the form of an omnibus law. Water regulation is also included in these regulations.

Water exploitation in Law No. 6 of 2023 concerning the Stipulation of Government Regulations in Lieu of Law Number 2 of 2022 concerning Job Creation into Law

The right to control over natural resources is managed by the regional government but in accordance with standard procedural norms and criteria set by the central government. Meanwhile licensing is centralized which will further be regulated in derivative regulations. With this, it completely restores central or centralized authority. The function of water is still the same as the previous law, namely covering social functions, economic functions and environmental functions. The economic function is slightly different with the ease of simplifying the licensing process and can be done online. Ease of business licensing in the regions for the people, MSEs and cooperatives. BUMD, BUMN and the private sector are carried out to encourage the creation of jobs and equitable regional development.

However, this is the ideal norm stated in the regulations. Because in its implementation, the CK Law experienced several obstacles. Some of these obstacles include the harmonization of regulations with the regulations they amend, changes in nomenclature related to licensing to become more common, centralization or reduction of regional authority related to regional autonomy, and changes to

Environmental Impact Analysis (AMDAL) requirements for environmental licensing. Therefore, it is necessary to re-examine whether the validity of the CK Law is in accordance with or even contradicts and violates the 1945 Constitution.

Apart from statutory regulations related to water resources, there are regulations below, including the following:

Government Regulation Number 6 of 1981 concerning Payment Contributions for Exploitation and Maintenance of Water Irrigation Infrastructure

Government Regulation 2 Number 2 of 1982 concerning Water Regulations

Government Regulation Number 42 of 2008 concerning Payment Contributions for Exploitation and Maintenance of Water Infrastructure

Government Regulation Number 79 of 2014 concerning National Energy Policy for Water and Irrigation Buildings

Government Regulation Number PP 121 of 2015 concerning Water Resources Management

PP Number 21 of 2023 concerning Types and Tariffs for Non-Tax State Revenues Applicable to the Ministry of Public Works and Public Housing

Presidential Regulation Number 112 of 2022 concerning the Acceleration of Renewable Energy Development for the Supply of Electric Power

Ministry of Public Works Decree Number 56/KPTS/M/2013 concerning the application of BJPSDA Tariffs for SDA users for Power Plants

Ministry of Public Works Decree Number 08/PRT/M/2014 concerning Guidelines for Calculating BJPSDA for Drinking Water, Industrial, Hydropower and Agricultural Business Activities

Decree of the Ministry of Public Works and Public Housing number 06/PRT/M/2015 concerning Exploitation and Maintenance of Water Sources and Irrigation Buildings

Decree of the Ministry of Public Works and Public Housing number 18/PRT/M/2015 concerning Exploitation and Maintenance of Water Sources and Irrigation Buildings

Regulations within the scope of water exploitation are also related to tax regulations, including the following:

Law Number 23 of 2014 concerning Regional Government

Law Number 18 of 1997 concerning Regional Taxes and Regional Levies

Law Number 33 of 2004 concerning Financial Balance between the Central Government and Regional Government

Law Number 28 of 2009 concerning Regional Taxes

Law Number 1 of 2022 concerning Financial Relations between the Central Government and Regional Governments

Law Number 6 of 2023 concerning the Stipulation of Government Regulations in Lieu of Law Number 2 of 2022 concerning Job Creation into Law

Government Regulation Number 37 of 2016 concerning River Watershed Management

Minister of Finance Regulation Number 195/PMK.02/2017 concerning Amendments to Minister of

Finance Regulation Number 9/PMK.02/2016 concerning Procedures for Payment of Surface Water Tax, Ground Water Tax, and Street Lighting Tax for Upstream Oil and Natural Gas Business Activities Paid by the Central Government.

Problems and Impact of BJPSDA and PAP on Water Conservation

Water conservation is an effort to maintain the existence and sustainability of the condition, nature and function of water resources so that they are always available in sufficient quantity and quality to meet the needs of humans and other living creatures, both now and in the future. This is important because it maintains the continued existence, carrying capacity, carrying capacity and function of water resources. Apart from that, branches of production which are important and affect the livelihoods of many people are controlled by the state to be used for the greatest prosperity of the people. In an effort to conserve water, special funding is needed. This has been regulated, one of the ways, through the imposition of BJPSDA on water resource users. The funds are then handed over to the appointed BJPSDA manager.

The problem is if the BJPSDA management only carries out maintenance only to fulfill obligations, and there is no final target as stipulated in the post-mining recovery activity regulations, where there is planning (Article 99 of the Mining Law) and monitoring (Article 100 of the Mining Law) until the final location Ex-mining can be restored as before (Article 123A of the Mining Law). This will have an impact on the failure to realize sustainable environmental development in the absence of justice between generations. A damaged environment, or in this context, clean water resources will no longer exist in the future.

What becomes ambiguous is the existence of PP Number 21 of 2023 concerning Types and Tariffs for Types of Non-Tax State Revenue that Apply to the Ministry of Public Works and Public Housing in Article 4 Paragraph (4). The regulation states that BJPSDA is income from the Managing Agency Partner (MIP). So the funds that should have been intended for water conservation are now becoming income from the BUMN managing the BJPSDA which is designated as PNBPN. However, technical details regarding the implementation of MIP have not yet been regulated in its derivative regulations. In fact, if BJPSDA is directly managed by water resource users, natural resource conservation can be created because the company is very interested in the continued sustainability of these water resources.

Apart from BJPSDA, the fee charged is PAP. Article 1 number fifty two of the HKPD Law defines PAP as a tax on the extraction and/or use of surface water. PAP is part of Regional Original Income (PAD). In this case, it is necessary to study how PAD from PAP also provides benefits for the continued availability of water resources so that people's water needs are met. In other words, PAD is not a commercialization of local government. Considering that the amount of income received by the region is not commensurate with the condition of natural resources which will continue to decline if not maintained properly. Regional taxes are indeed very necessary for the management of the region itself, but now earmarking can be a solution to these two needs.

Earmarking or earmarked taxes is a government policy in using a budget whose allocation of revenue sources and expenditure programs will be specifically determined, or in this context it is used for the conservation of water resources. The earmarking policy was first regulated in Law Number 28 of 2009 concerning Regional Taxes and Regional Levies. The types of taxes subject to earmarks are motor vehicle tax (Article 8 Paragraph (5)), cigarette tax (Article 31), and street lighting tax (Article 56 Paragraph (3)).

In the end, regional governments still have PAD but do not neglect water resource conservation efforts. The large amount of PAD should also be one of the government's efforts to provide happiness and prosperity for its people and also within the provincial and/or city districts for environmental maintenance. Fulfilling the right to water for the greatest welfare of the people is the main point of discussion which is also in line with Article 33 of the 1945 Constitution of the Republic of Indonesia with the phrase which reads "to be used for the greatest prosperity of the people".

The Natural Resources Law itself is also experiencing a shift from the initial regulations which really

prioritized the greatest prosperity of the Indonesian people, now has opened up opportunities for private parties to carry out water resource exploitation activities. The regulations currently in force have nuances of commercialization, liberalization and pro-private. This is now demonstrated by the increasing number of cases of water reservoirs or springs being used up by bottled drinking water companies. This has a massive impact by drying up the water sources of residents around the factory which has a reservoir, this is made worse because clean water is a natural resource that cannot be renewed.

The consequence that will occur is that the area will have difficulty accessing clean water because the springs have dried up from the reservoir and will make meeting basic needs, namely water, difficult. Private parties will easily look for new locations, while indigenous residents who cannot change houses or domicile have to face water scarcity. Private companies also cannot be responsible for returning water reservoirs to their original condition because water is a natural resource that cannot be renewed. In this case, the government has also failed to fight for the prosperity of the people which should be stated in regulations or even permits to limit the withdrawal of water discharge from reservoirs or even planning to grant permits for reservoir points in Indonesia.

Conclusion

Water conservation requires costs that come from the BJPSDA. In this case, it is necessary to evaluate whether the implementation of the fee has been able to fulfill the community's rights to water and can maintain the sustainability of water availability through conservation of water resources. Based on PP 21/2003, BJPSDA changes to the income of the Managing Agency Partner. Ideally, natural resource conservation is carried out by interested parties, namely companies that use water resources. This is because the company is very interested in the sustainability of the water resources used for company operations. Therefore, it is necessary to reconsider the imposition of double levies on surface water beneficiaries by changing the BJPSDA manager to a party that has more competence and is interested in water conservation purposes. Apart from that, you can apply the earmarking concept in the PAP as a form of local government concern and contribution to water conservation.

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