

Old Wine in a New Bottle: Neoliberalism and Water Resources Law 2019 in Indonesia

Imam Koeswahyono

Faculty of Law, Brawijaya University, Indonesia

Email: imam.koes@ub.ac.id

Syahriza Alkohir Anggoro

Faculty of Law, Brawijaya University, Indonesia

Email: rizarathustra@yahoo.co.id

Muhammad Dahlan

Faculty of Law, Brawijaya University, Indonesia

Email: dahlan@ub.ac.id

Abstract

Resistance to neoliberal legal reforms around the world has increased in recent decades due to the failure of water privatization to ensure affordable and sustainable water access in global South. Referring to the 2004 and 2019 Water Resources Laws, this paper presents Indonesia's experience to explore how the law reproduces and normalizes neoliberalism that places water as an economic commodity. We argue that although Indonesia's current water resources legal regime is based on populist rhetoric regarding the fulfillment of the human right to water and the role of the state in water management, the adopted water governance aims to facilitate the establishment of a conducive investment climate for the private sector by shifting the responsibility of the state in the fulfillment of the human right to water to a market-based allocation system. This paper describes the strategy adopted by the government in securing the water privatization agenda when dealing with judicial activism that requires water to be managed as public good.

Keywords: *Neoliberalism, Water Governance, Human Right to Water, Privatization, Constitutional Court*

I. INTRODUCTION

In 2015, the Indonesian Constitutional Court (CC) announced the abrogation of Law No. 7/2004 on Water Resources (Water Resources Law/WRL 2004) on the basis that it

was contrary to Article 33 of the Constitution. This phenomenal decision was scorned by the business community as “leaving hundreds of legitimate businesses in limbo without any legal basis.”¹ Directly sponsored by the World Bank, WRL 2004 was one of the policy packages introduced after the 1998 Asian crisis to accelerate Private Sector Participation (PSP) in water resource management. This law has long been a target of civil society protests from coalitions including WALHI, KruHa, and PP Muhammadiyah who organized themselves under the banner of 'Constitutional Jihad' against neoliberal laws dictated by international actors. After the CC's decision was issued, President Joko Widodo (Jokowi) hastily announced two implementing regulations (*peraturan pelaksana*) to prevent a legal vacuum, while preparing a new draft Bill to replace the 1974 Irrigation Law (Law No. 11/1974 on Irrigation).² On October 16, 2019, this draft was adopted through Law No 17/2019 on Water Resources (WRL 2019). Investors enthusiastic response to the WRL 2019 for “creating a more business-friendly law to support the investment climate” is in stark contrast to the growing concern about the private sector's control of water which will likely have a negative impact on vulnerable groups.³ Countries in the Global South – such as Colombia, Peru, and South Africa – have demonstrated that treating water resources as an economic commodity has exacerbated injustice and inequality.⁴ Concerns about private monopolisation are also rooted in considerations of environmental pollution and the climate crisis, which has prevented nearly one billion people across the world access to proper water and sanitation.⁵ In 2020, the United Nations World Water Development Report stated that nearly six billion people globally will suffer from the scarcity of clean water by 2050 as a result of increasing demand for water supply, uncontrolled consumption, population growth, and global warming.⁶ Thus, ensuring access to affordable and sustainable clean water for communities is an important matter in mitigating the implications of water scarcity caused by climate change and environmental damage.

This paper explores the influence of neoliberalism in Indonesia's Water Resources Law and its impact on the fulfillment of the human right to water. It traces the continuity of the neoliberal concept of water governance that inspired WRL 2004 and informed its

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- 1 Jakarta Globe, “Editorial: Revoking Water Law Is a Washed-Up Move”, (26 February 2015), online: *Jakartaglobe.id*.
 - 2 These two delegative regulations are Government Regulation (GR) No. 121/2015 on Water Resources Business and GR No. 122/2015 on Drinking Water Supply System (Sistem Penyediaan Air Minum/SPAM).
 - 3 Riza Roidila Mufti, “House Accommodates Business Aspirations in New Water Law”, (2019), online: <www.thejakartapost.com/news/2019/09/18/house-accommodates-business-aspirations-in-new-water-law.html>.
 - 4 Karen Bakker, *Privatizing Water: Governance Failure and the World's Urban Water Crisis* (New York: Cornell University Press, 2010).
 - 5 Cristy Clark, “Water justice struggles as a process of commoning” (2019) 54:1 Community Dev J 80–99.
 - 6 *The United Nations World Water Development Report 2020 Water and Climate Change*, by UNESCO (Paris: United Nations Educational, Scientific and Cultural Organization, 2020).

reincarnation in 2019. We argue that although Indonesia's current legal regime governing water resources is based on a populist rhetoric of fulfilling the human right to water through state management. However, the adopted water governance regime aims to facilitate the establishment of a climate conducive to private sector investment by shifting responsibility for the fulfillment of the human right to water from the state to a market-based allocation system. The continued influence of neoliberalism in water management is one example of the authoritarian characteristics of Jokowi's administration which aggressively imposes investment and exploitation of nature that threatens environmental conservation and the protection and fulfillment of human rights.⁷ Almost one month before the adoption of WRL 2019 students, workers, and civil society mobilized in the *#ReformasiDikorupsi* action to denounce the privatization of water which has increased water tariffs and contributed to violations of the right to water for the poor and vulnerable groups.⁸ Although not the main target of debate throughout the protest cycle in 2019, the management of water remains an important intermediary in the [global] justice struggle. It is the nexus of food, energy, and climate change issues in Indonesia.

In Jakarta, while private operators have benefited tremendously from generous concessions, the service coverage is only up to 40% with poor water quality and multiple outage complaints causing financial loss to customers.⁹ The privatisation of water services in Jakarta has increased the monthly service fee almost 10 fold since the contract was signed, making Jakarta's water tariffs the most expensive in the Southeast Asia.¹⁰ With the implementation of the full cost recovery scheme, poor households who should be paying relatively low prices “may be unable to pay the lump sum fee for connection, and so are forced to depend on the more expensive, less frequently tested water sold by private street vendors.”¹¹ Water privatization is often supported by legal instruments that allow individuals to become exclusive rights holders who can control the distribution of water resources used by local communities to their personal benefit.¹²

Mirroring the continuity of neoliberal water governance over time, this paper is organised in a linear fashion. First, it discusses the neoliberal water governance features of WRL 2004. Neoliberalism should not merely be understood as an ideological and

7 Thomas Power, “Jokowi’s Authoritarian Turn and Indonesia’s Democratic Decline” (2018) 54:3 *Bull Indones Econ Stud* 307–338.

8 *Catatan Akhir Tahun 2019 Reformasi Dikorupsi Demokrasi Direpresi*, by LBH Jakarta (Jakarta: LBH Jakarta, 2019) at 54.

9 Emanuele Lobina, Vera Wegmann & Marwa Marwa, “Water Justice Will Not Be Televised: Moral Advocacy and the Struggle for Transformative Remunicipalisation in Jakarta” (2019) 12 *Water Altern* 725–748.

10 Tempo, “Expert: Water Tariff in Jakarta Highest in South East Asia”, *Tempo.com* (11 January 2015).

11 Emma Truswell, “Thirst for Profit: Water Privatization, Investment Law and a Human Right to Water” in Chester Brown & Kate Miles, eds, *Evol Invest Treaty Law Arbitr* (Cambridge: Cambridge University Press, 2011) 570 at 576.

12 Jennifer Franco, Lyla Mehta & Gert Jan Veldwisch, “The Global Politics of Water Grabbing” (2013) 34:9 *Third World Q* 1651–1675 at 1653.

pragmatic project seeking to restore the declining economic and political power of the global elite after the second world war; it is also a *juridical* project used to rebuild legal and institutional frameworks that facilitate capital accumulation.¹³ Drawing on the CC's judicial activism in the 2005 and 2015 rulings, we explain some of the reasons behind the change in their understanding of water privatization as well as the responses made by the Yudhoyono and Jokowi administration in the integration of neoliberal principles into regulations that lie outside the jurisdiction of the CC. By understanding the response to the CC's decision, this paper also presents contemporary evidence relating to 'constitutional disobedience' actions taken by the government to neutralize the negative impacts caused by the abrogation of WRL 2004. This discussion is crucial because it explains the political and economic context that informed this decision, exploring why the government and legislators continue to accommodate the water privatization agenda. The final section discusses WRL 2019. We argue that although WRL 2019 was formed in a tense context relating to national resource management, 'state control' (*penguasaan negara*) over water does not necessarily fulfil the human right to water. We demonstrate how WRL 2019 narrowly interprets the 'state control' over water resources clause by supporting the strengthening of institutional capacity to regulate PSP in the water sector. This paper contributes to one of the most contentious issues in natural resources law literature in the global South, particularly in post-*reformasi* Indonesia.

II. NEOLIBERAL WATER GOVERNANCE TRAJECTORY IN INDONESIA POST-NEW ORDER

Although the privatization of public utilities was intended to address the problem of chronic inefficiency in the global South, in Indonesia the PSP has long been associated with corruption, collusion, and nepotism which were common features of the New Order regime's repressive style of developmentalism.¹⁴ The first private water service contract was signed in June 1997 without a transparent tender process or adequate public participation. This quickly became one of the most lucrative sources of income for well-connected oligarchic elements in Soeharto's patronage network.¹⁵ In line with the nature of patrimonialism, and thanks to their close relationship with Sigit Harjojudanto's (Soeharto's son) and Anthony Salim's (Liem Sioe Liong's son) leading business groups, *pribumi* and *cukong*,¹⁶ two leading water corporations - Thames (UK) and Suez (France) - were awarded a 25-year contract for water services in Jakarta, which was split into two operational areas. Abuse of the tender process creates disappointment and mistrust

13 Honor Brabazon, "Introduction: Understanding Neoliberal Legality" in Honor Brabazon, ed, *Neoliberal Leg Underst Role Law Neoliberal Proj* (Routledge, 2017) at 2.

14 Lobina, Wegmann & Marwa, *supra* note 9.

15 Okke Braadbaart, "Privatizing Water The Jakarta Concession and the Limits of Contract" in Peter Boomgaard, ed, *World Water Rain Rivers Seas Southeast Asian Hist* (Leiden: KITLV Press, 2007) 297.

16 Lobina, Wegmann & Marwa, *supra* note 9 at 730.

among multilateral financial institutions, thus threatening the sustainability of agreed loans. However, the dramatic fall of the New Order regime in May 1998 marked a turning point, with neoliberalism opening opportunities for the World Bank and International Monetary Fund (IMF) to promote market-friendly legal reform models in various sectors, including water resources.

Many neoliberal supporters link the predatory practices of the New Order regime with the framework of state interventionism in Article 33 of the Constitution which states that the state must maintain control over the water sector to prevent private monopolies. Influenced by the ideals of collectivism that developed in the nationalist movement, Article 33 emphasizes that “the land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people.” Despite these progressive aims, the provisions were manipulated by Soeharto to develop policies that benefited his business cronies.¹⁷ During the four rounds of constitutional reform between 1999 and 2002, for instance, participants supported the development of pro-market proposals such as free competition, protection of property rights, and enforcement of contracts to be adopted in the Constitution. This proposal was intended as a political attack on the people’s economy (*ekonomi kerakyatan*) movement in an attempt to protect Article 33 from being targeted for neoliberal amendments.¹⁸ Although not entirely successful, the inclusion of neoliberal legal norms through the principle of fair efficiency (*efisiensi berkeadilan*) in paragraph (4) of Article 33 has provided a constitutional basis for the privatization project aimed at dismantling the state monopoly and the reconstitution of legislation that is more attractive to private investors.¹⁹ Constitutional reforms also included provisions for the fulfillment of social, economic, and cultural rights, laying the groundwork for the counter-hegemonic struggle for the fulfillment of the right to water. This contestation of norms at the constitutional level also influenced how WRL 2004 and WRL 2019 compromised the global legal imperatives related to the *res nullius* and *res commune* paradigms.

1. WRL 2004: Market Friendly Legal Reform

As a consequence of the Water Resources Structural Adjustment Loan (WATSAL) and including several *Letters of Intent*²⁰ imposed by the World Bank and IMF, the

17 See Richard Robison, *Indonesia: The Rise of Capital*, Sydney (Sydney: Allen & Unwin, 1986).

18 Bivitri Susanti, *Neo-liberalism and Its Resistance in Indonesia’s Constitution Reform 1999–2002: A Constitutional and Historical Review of Indonesian Socialism and Neo-liberalism* (Dissertation Master of Law, University of Warwick, 2002) [unpublished].

19 Syahriza Alkohir Anggoro, *Reformasi Pasar Dan Perubahan Konstitusi Ekonomi Di Indonesia Pasca Orde Baru* (Magister, Brawijaya University, 2019) [unpublished] at 186–208.

20 One of the agreements between Indonesia and the IMF on water resources sector can be found in the October 1997 *LoI* which encouraged the Government to cut subsidies for public services, including encouraging investment liberalization and readjustment of water service prices to be more in line with

Government of Indonesia introduced the WRL 2004, replacing the 1974 Irrigation Law which was inconsistent with neoliberal demands. The adoption of this law was part of a \$300 million foreign debt agreement aiming to dismantle the state monopoly on water services in Indonesia and to expand the role of the PSP in this sector.²¹ WATSAL was specifically designed to advance the *res nullius* paradigm and the concept of water as an economic commodity, promoted by the 1991 Dublin Conference, into the Indonesian water resources legal regime. This approach included setting water tariffs based on full cost recovery, allocation of water rights, PPP contracts, and the corporatization of State-Owned (BUMN) and Regional-Owned Enterprise (BUMD) management, such as the Regional Drinking Water Companies (PDAM).

WRL 2004 states that water has social, environmental, and economic functions that must be managed in harmony to protect vulnerable communities (Article 4). Despite the minimum recognition of the right to water, many crucial features of neoliberal water governance can hinder the fulfillment of such rights. WRL 2004 framed water as an economic commodity that is not owned by anyone (*terra nullius*) and therefore can be utilized for commercial purposes by anyone who can access it. This can be found in the provisions relating to ‘water right concession’ (*hak guna usaha air*) granted to the private sector (Articles 38, 39, and 40 paragraphs [4]) and ‘water resources commercialization permits’ (*izin pengusahaan sumber daya air*) that facilitate the commercialization of water. Article 26 Paragraph 7 stipulates that the determination of the cost of water management services by the private sector can be based on the principle of ‘ability-to-pay.’ According to normative considerations, PSP is the main requirement for achieving balance between service providers and consumers, the management of quality water resources at affordable and profitable market prices, and encouraging efficient water management.

The adoption of the WRL 2004 has sparked widespread debate, prompting judicial review applications in 2005 and 2015. Initiated by a number of leading Islamic and environmental organizations, the plaintiffs argue that the WRL 2004 has pushed for a waiver of state responsibility for the fulfillment of the right to water. The plaintiff against *water right concession* because they perpetuate the practice of commodifying, privatizing, and commercializing water, thereby ignoring the fundamental principle that water is a public good. The plaintiffs objected to the full cost recovery and the ‘ability-to-pay’ principle which reflect Indonesia's compliance with the interests of international financial institutions.²² Responding to the plaintiff's accusations, the Government emphasized that Indonesia only recognizes privatization as an act of divesting BUMN/BUMD shares to

the actual costs. See Letter of Intent 31 October 1997 <<https://www.imf.org/external/np/loi/103197.htm>>.

21 Petra Stockmann, *The New Indonesian Constitutional Court A Study into Its Beginnings and First Years of Work* (Jakarta: Hanns Siedel Foundation, 2007) at 54.

22 Indonesian Constitutional Court's Decision 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005 (*WRL 2004 Case I*) at 251.

private entities.²³ The *water right concession* does not transfer full control of water to the private sector; the state maintains the authority to regulate and supervise the allocation of water resources.²⁴

Against the plaintiffs' petition, the CC referred to the landmark decision in the Electricity Law Case, stating that state control over water resources must be interpreted in terms of public and private law to ensure public welfare.²⁵ The Court holds that the state must be seen as an authority in the management of water, either directly or indirectly, through BUMN/BUMD. Although the CC's decision provides opportunities for the private sector to obtain water rights concessions, this does not mean that the private sector has unrestrained control of water.²⁶ Private entities, as emphasized by the judges, "remain entitled to obtain, use or utilize water resources in the amount and manner determined in accordance with the regulation in licensing."²⁷ The majority of judges believed that "water rights concessions will not make water ownership fall into the hands of private entities."²⁸ They argue that the law is not in conflict with the Constitution given that the state maintains the primary authority to regulate, manage, and supervise the water resources sector.²⁹

WRL 2004 meets the standards for fulfilling the right to water, but its implementation must align with the water management policies determined by the CC. The ruling went further through a strong-judicial review approach which stated that any private entity with a license to exploit water resources must fulfill its obligations to meet the community's need for and right to water, prioritizing social over business interests.³⁰ Under the precedent of conditional constitutionality (*konstitusionalitas bersyarat*), the constitutionality of the law is highly dependent on the consistency of the government in establishing and implementing regulations that prioritize BUMN/BUMD.³¹ This

23 Mohamad Mova Al'Afghani, "Constitutional Court's Review and the Future of Water Law in Indonesia" (2006) 2:1 Law Environ Dev LEADJ 2006 1-18.

24 *WRL 2004 Case I*, at 312.

25 Simon Butt & Tim Lindsey, "Economic Reform When the Constitution Matters: Indonesia's Constitutional Court and Article 33" (2008) 44:2 Bull Indones Econ Stud 239-262.

26 Andy Omara, *Protecting Economic and Social Rights in a Constitutionally Strong Form of Judicial Review: the Case of Constitutional Review by Indonesian Constitutional Court* (PhD dissertation, University of Washington, 2017) [unpublished] at 183.

27 *WRL (2004) Case I*, at 496.

28 *WRL (2004) Case I*, at 498.

29 In their dissenting opinions, Judge Mukthie Fadjar and Judge Maruarar Siahaan stated that the WRL 2004 actually straitening individuals or communities to get access to water. The regulation of water rights cannot be equated with water rights because it is a concept derived from property rights in civil law which are owned exclusively by individuals or the private sector. Both differed from the majority of judges by asserting that public service is not a basic characteristic of private companies so it cannot be expected that they will dedicate themselves to the social interest of water. *WRL 2004 Case I*, at 506-519.

30 Philippa Venning, "Determination of Economic, Social and Cultural Rights by the Indonesian Constitutional Court" (2008) 10:1 Aust J Asian Law 100-132.

31 *WRL (2004) Case I*, at 492-493.

precedent offers a middle ground for the plaintiffs to revisit WRL 2004 if the order on which the decision is based is not accommodated in implementing regulations in the future.

2. From Second Petition to Victory

Although the CC's decision is final and binding, the policy prescriptions recommended by the Court do not have to be taken into consideration by the Government when drafting implementing regulations. One of the main objects targeted by the anti-privatization movement in its second lawsuit in the period between 2013 and 2015 was GR No. 16/2005 on the Drinking Water Supply System (SPAM) which, in the plaintiffs's view, has revived the spirit of water privatization set out in WRL 2004.³² Issued by President Yudhoyono a few months before the Court's decision, the plaintiffs alleged that the government took a unilateral initiative by shifting the privatization agenda to include regulations which outside of the CC's legal competence.³³ The protest movement has raised complaints within the Ministry of Public Works and Housing (MPWH) due to the damage made to foreign investors' interest in water infrastructure PPP projects.³⁴ Indeed, this regulation is supposedly designed to secure the legality of various private investment interests from the threat of judicial lawsuit that may end in the abrogation of the law. Article 37 of GR 16/2005, for instance, states that the government is responsible for ensuring public access to drinking water as a basic need by establishing BUMN/BUMD as water service providers. Should the private sector fails to meet the demand for water, the government is permitted to cooperate with the private sector to provide services. This provision is specifically designed to allow the state to withdraw from constitutional obligations that they may be unable to fulfill, providing greater certainty through the active involvement of private companies in the provision of drinking water services.³⁵

The plaintiffs also brought the case of activism led by PP Muhammadiyah and its allies for review in the 2013–2015 period, alleging that the government had failed to comply with the CC's decision. Referring to GR No. 16/2005, the plaintiff argued that the government treats water as *res nullius* so as to allow the private sector to control

32 Hukumonline, "Walhi Minta Kejelasan MK Soal Putusan UU SDA", (22 June 2005), online: *Hukumonline.com*.

33 Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Leiden: BRILL, 2015) at 70–72.

34 Mohamad Mova Al 'Afghani, "Anti-Privatisation Debates, Opaque Rules and 'Privatised' Water Services Provision: Some Lessons from Indonesia" (2012) 43:2 IDS Bull 21–26.

35 Butt & Lindsey, *supra* note 25 at 257.

water.³⁶ The CC agreed with the plaintiffs, stating that the Government had proved a failure to comply with the Court's decision by establishing and implementing regulations to WRL 2004 that contradicted the perspective of the Court.³⁷ In setting the tariffs, for instance, the regulation does not mandate an affordable cost structure for water services for the poor, nor does it contain a prohibition for drinking water companies to work based on a profit-oriented logic.³⁸ The CC took further action by establishing the principles of water management for the future, *inter alia*: (a) any water exploitation cannot exclude the right to water; (b) the state must fulfill the right to water in accordance with Article 28I paragraph (4) of the Constitution; (c) environmental sustainability is part of the rights protected in Article 28H paragraph (1); (d) water as an important production branch must be controlled by the state and used for the greatest prosperity of the people; (e) the state must prioritize water concessions on BUMN/BUMD; and (f) provided the human right to water has been fulfilled, the Government may grant a water concession license to the private sector with strict requirements.³⁹

Furthermore, it is important to understand that the CC's assessment of WRL 2004 is intimately linked to political movements and broader ideological tendencies in resource nationalism. According to resource nationalism the state—as the holder of permanent sovereignty over natural resources—must prioritize domestic interests through protective and inward oriented development policies. Based on the Declaration of Permanent Sovereignty over Natural Resources in 1962 and Article 33 of the Constitution, resource nationalism seeks to advance a romantic vision of historical justice from the independence revolution into the post-New Order reform period which, according to its exponents, has not significantly improved material conditions in Indonesian society.⁴⁰ The judges clearly reflected this view by stating that the policies dictated by multilateral financial institutions in supporting PSP has led to prolonged conflicts between investors and local communities.⁴¹ Therefore, the CC decided to abrogate WRL 2004; and thus, close the long period of judicial resistance against WRL 2004 which attempted to shift the state's responsibility for fulfilling the right to water to market mechanism.

36 Indonesian Constitutional Court's Decision 85/PUU-XI/2013 (*WRL 2004 Case II*) at 20.

37 Stefanus Hendrianto, "The Divergence of a Wandering Court: Socio-Economic Rights in the Indonesian Constitutional Court" (2016) 16:2 *Aust J Asian Law* 1-21.

38 Nicola Colbran, "Piped Water in Jakarta: A Political, Economic or Social Good?" in Anna F S Russell & Malcolm Langford, eds, *Hum Right Water Theory Pract Prospects* (Cambridge: Cambridge University Press, 2017) 463 at 526.

39 *WRL 2004 Case II*, at 138-139.

40 Butt & Lindsey, *supra* note 25 at 242.

41 MYa'kub Aiyub Kadir & Alexander Murray, "Resource Nationalism in the Law and Policies of Indonesia: A Contest of State, Foreign Investors, and Indigenous Peoples" (2019) 9 *Asian J Int Law* 298-333.

3. Delegated Legislation and Water Privatization Continuity

As mentioned earlier, the government's reaction to the CC's decision was to introduce a series of *ad hoc* regulations specifically designed in anticipation of the loss of a legal basis for water privatization. This decision affects the status of permits owned by the bottled water industry (Packaged Drinking Water/PDW), PPP projects planned by the government and the private sector such as hydropower, SPAM installations, and other industries that depend on water for production.⁴² The defeat of the water privatization agenda in Indonesia is a major setback in the region and has triggered anxiety among investors about the increasing trend of water remunicipalization in the global South.⁴³ More than 600 PDW companies that produce and market around 23.9 billion liters of PDW to domestic and international markets each year, suddenly being threatened with operating without a clear legal basis.⁴⁴ Badan Perencanaan Pembangunan Nasional (Bappenas) estimates that around 62 SPAM PPP projects throughout Indonesia involving various global and national investors were under construction when the Court announced its decision.⁴⁵ Regarding this complaint, MPWH ensured that the Court's decision would not hinder the continuity of any mutually agreed business agreements, concessions, or permits as long as they complied with the New Water Management Principles set by the CC.⁴⁶

Under pressure to maintain the neoliberal water governance regime from the *reformasi* era, President Jokowi used the same implementation strategy as his predecessor, President Yudhoyono – GR No. 121/2015 on Water Resources Management and GR No. 122/2015 on Drinking Water Supply System (SPAM). Developed in close consultation with business associations, these two implementation regulations restore many functions abrogated by the CC. GR No. 121/2015 including surface and ground water permits which are valid for a maximum of 10 years. Both permits can be granted to BUMN/BUMD cooperatives, individuals or through inter-private partnerships, using water resources either as the main material or production media (Articles 13 and 17). Although not fully regulated and open to legal interpretation, the provisions are sufficient to protect the PDW industry and the SPAM PPP projects being planned by the government.⁴⁷ Article 56 paragraph (1) of GR No. 122/2015 provides opportunities for private sector investment in SPAM on the condition that they cooperate with

42 Herliana, *Backlash Against Foreign Investment Regime: Indonesia's Experience* (PhD Dissertation, University of Washington, 2017) [unpublished] at 206.

43 Olivia Jensen, "Public-Private Partnership for Water in Asia: A Review of two Decades of Experience" (2017) 33:1 Int J Water Resour Dev 4–30.

44 Nila Ardhanie, "What next after the water law annulled", *Jkt Post* (3 March 2015), online: <<https://www.thejakartapost.com/news/2015/03/03/what-next-after-water-law-annulled.html>>.

45 MediaIndonesia, "Digodok, PP Pengelolaan Air", (27 February 2015), online: *MediaIndonesia.com*.

46 Tama Salim, "Govt to Draft Rules to Fill Void in Water Management", *Jkt Post* (2015), online: <<https://www.thejakartapost.com/news/2015/03/02/govt-draft-rules-fill-void-water-management.html>>.

47 David Ray & Lili Yan Ing, "Addressing Indonesia's Infrastructure Deficit" (2016) 52:1 Bull Indones Econ Stud 1–25.

BUMN/BUMD or equivalent state enterprise based on certain principles regulated through the licensing mechanism.⁴⁸ SPAM PPP can only be carried out through investment in processing, distribution, and the development of operating technology or installation maintenance. In 2016, MPWH also issued technical guidelines for BUMN/BUMD to act as the 'institution' in charge of PPP projects.⁴⁹

The government was able to overcome constitutional obstacles by channeling *lawfare* tactics from the anti-water privatization movement to the level of Supreme Court jurisdiction. Like many branches of the government, the Supreme Court has a reputation for corruption: many in-trial cases have been conducted so that the client wishes the process and direction of its decisions cannot be predicted by socioeconomic groups that struggle without the support of adequate strong resources.⁵⁰ Further, the CC does not have the formal authority to force government compliance with their recommendations. The proposal to review the constitutionality of GR No. 121/2015 and GR No. 122/2015 may be more pressing because they were formed without sufficient public participation or governmental accountability, marking a significant juncture from the process of drafting laws in the legislature.⁵¹ Therefore, “although the Supreme Court has the authority to examine delegative regulations against laws, there are rarely cases of delegative regulations such as GRs being legally annulled.”⁵²

III. NEOLIBERAL WATER GOVERNANCE UNDER JOKOWI'S ADMINISTRATION

The 2014 Jokowi and Jusuf Kalla election was initially met with a wave of optimism in water resource management following the CC's decision; their leadership was believed to start the progressive socio-economic development, as outlined in the *Nawacita* document of their campaign. Unlike his rival Prabowo Subianto, whose ruthless reputation as part of the New Order business elite has been widely recognized, Jokowi “introduced a new style of politics; he rose to the top of the pyramid by attracting the participation of a network of enthusiastic and politically independent volunteers, including anti-corruption and human rights activists.”⁵³ Many hoped that he would establish a more inclusive administration attuned to the interests of marginalized groups, departing from the neoliberal nature of the previous administration. However, like

48 *Ibid* at 24.

49 Mohamad Mova Al'Afghani, “Alienating the ‘Private’ Sector: Implications of the Invalidation of the Water Law by the Indonesian Constitutional Court” (2019) 26:3 J Water Law 1-24.

50 *The Indonesian Supreme Court, A Study of Institutional Collapse*, by Sebastiaan Pompe (Ithaca: Cornell Southeast Asia Program, 2005).

51 Simon Butt & Tim Lindsey, *The Constitution of Indonesia: A Contextual Analysis* (Oxford: Hart Publishing, 2012) at 93.

52 Butt & Lindsey, *supra* note 25 at 256.

53 Burhanuddin Muhtadi, “Jokowi’s First Year: A Weak President Caught between Reform and Oligarchic Politics” (2015) 51:3 Bull Indones Econ Stud 349-368.

President Yudhoyono, Jokowi entered his term almost exclusively focusing on a neoliberal economic program characterized by deregulation and debureaucratization, forming a coalition with oligarchic interests.⁵⁴ Once in power he proved less interested in embracing a more emancipatory approach to the protection of civil and political rights and the fulfillment of socio-economic rights, including the human right to water which was explicitly promised in the early days of his electoral campaign.⁵⁵ During the cabinet reshuffle following his second presidential term in 2019, Jokowi and his partner, Vice President Ma'ruf Amin, allied themselves with corrupt political parties and greedy business conglomerates to consolidate a legal and investment climate conducive to their interests.⁵⁶ Despite directly mobilizing BUMNs as catalysts for infrastructure projects, “his administration continues to demonstrate an unconditional commitment to neoliberal development, for example by opening up investment activities in the extractive sector,” perpetuating the dispossession of land and water resources and economic inequality.⁵⁷ Jokowi’s determination to reform investment law was enthusiastically welcomed by investors, reflecting the continued influence of neoliberal doctrines in the policy-making process.

As we will observe in the next section, in order to realize PSP in the water resource sector, one of the priorities of national strategic projects, Jokowi believes that WRL 2019 must live up to the same spirit as WRL 2004, developing a legal and institutional framework that supports the commercialization and privatization of water resources.

1. WRL 2019

Although formed under relatively different conditions to the previous law, WRL 2019 was inspired by the same notion of market environmentalism centered on the importance of PSP and the paradigm of water as resource extraction product. As such, this law can be considered a development of the interests of ‘in new clothes’ privatization.⁵⁸ WRL 2019 introduced the notion of *people’s right to water* (*hak rakyat atas air*) defined as a basic daily minimum quality and quantity of water (Article 6). According to Article 8 paragraph (1), the *people’s right to water*, as guaranteed by the state, is a basic daily rate of at least 60 liters/person per day for household uses. In

54 Yuki Fukuoka & Luky Djani, “Revisiting the rise of Jokowi: The triumph of reformasi or an oligarchic adaptation of post-clientelist initiatives?” (2016) 24:2 South East Asia Res 204–221; Eve Warburton, “Jokowi and New Developmentalism” (2016) 52:3 Bull Indones Econ Stud 297–320.

55 Warburton, *supra* note 54 at 299.

56 Gabriel Facal & Gloria Truly Estrelita, “Social Movements Facing Authoritarian-Style Neoliberal Governments: Comparative Positioning Towards Violence in Indonesia and France” (2020) 32:3 *Humaniora* 226–239 at 228.

57 Tania Murray Li, “Commons, Co-ops, and Corporations: Assembling Indonesia’s Twenty-First Century Land Reform” (2021) 48:3 *J Peasant Stud* 613–639 at 626.

58 Butt & Lindsey, *supra* note 25 at 256; *Tinjauan Lingkungan Hidup 2020 Menabung Investasi Menuai Krisis Multidimensi*, by Walhi (Jakarta: Walhi, 2020) at 14.

addition, the state guarantees and prioritises the use of water for agricultural and business needs through SPAM (Article 8 paragraph [2]). If the fulfillment of the *people's right to water* has been fulfilled, the state can then begin distributing water for business and non-business needs as regulated in the licensing (Article 8 paragraph [4]). WRL 2019 also prohibits individual, group, and private ownership of water; access for commercial needs can only be provided through a licensing mechanism.

WRL 2019 establishes a broad set of powers for the government to regulate and establish national policies in the water resource sector (Articles 10 and 11) which can be delegated to BUMN/BUMD (Article 19). This law allows for delegated authority from central and regional governments in determining the priority of water resource allocation from river areas based on the calculation of needs. Further, central government is to take-over the duties and authorities of regional government where they are unable or unwilling to fulfill said duties (Article 20). Interestingly, the central and regional governments can delegate some of their duties and authorities—including the collection of water tariffs from permit holders within their jurisdictions—to BUMN/BUMD which were established specifically to carry out the function of managing water resources.⁵⁹

In line with the principles of water resource management recommended by the Court, Article 28 paragraph (1) prioritizes the use of water resources in the following order: for basic daily needs, agricultural irrigation, non-business activities, and commercial business needs. The law introduces two types of permit: (a) 'Permits to Use Water Resources for Non-Business Needs' (*Izin Penggunaan Sumber Daya Air untuk Kebutuhan Bukan Usaha*); and (b) 'Permits to Use Water Resources for Business Needs' (*Izin Penggunaan Sumber Daya Air untuk Kebutuhan Usaha*).⁶⁰ While the first permit is allocated for daily needs and agriculture, which requires large amounts of water and can change the natural conditions of water sources, the second permit is intended for commercial purposes that require water as a material or production medium (Articles 45-49). The allocation of permits is based on a priority logic: 'Permits for the Use of Water Resources for Business Needs' are the last order that will only be granted if water for basic needs, agriculture, and non-business needs have been met, and with the assumption that sufficient water reserves remain for commercialization. This permit also

59 Ibrahim Sjarief Assegaf, Kanya Satwika & Aisyah Siregar, "Wading Through Indonesia's New Water Resources Law" (2019) Assegaf Hamzah Partn, online:

<<https://www.mondaq.com/water/863448/wading-through-indonesia39s-new-water-resources-law>>.

60 Thorough readers will find that WRL 2019 uses the term 'use' (*penggunaan*) instead of the phrase 'commercialization' (*pengusahaan*) used by WRL 2004 or Government Regulation Number 121/2015 for permit allocation. It must be understood that although the application of this kind of legal language seems to reflect a paradigm shift, this is clearly a systematic effort on the part of the legislators to create an appropriate language consensus that can neutralize the threats that may be posed by the resource nationalist movement. In other words, the shift of the term from the water resource concession permit in Government Regulation Number 121/2015 to the term water resource use permit in WRL 2019 is purely an editorial matter and does not have meaning of a significant change because it is a concession intended, without a doubt, for the sector of PDW manufacturing industry and so on.

provisions for drinking water needs provided by SPAM service owned by state entities (Article 50). However, the drafters seem to differentiate between “drinking water provided by SPAM” and “PDW,” excluding PDW as a product of the manufacturing industry which renders it outside the responsibility of the state.⁶¹

This licensing regime reaffirms the CC’s 2015 decision whereby the private sector can use water for commercial purposes only if certain requirements are met. A private entity can apply for a permit provided it meets the requirements of the water resource management plan and certain technical administrative requirements, in addition to obtaining approval from the relevant stakeholders in the region where the water is located.⁶² In the event that the river has been submitted under the control of a BUMN, the private actor must cooperate and pay the relevant water tariff. If the private sector wants to use river water for commercial purposes—such as the development of hydropower projects, raw materials for industry and plantation irrigation—they must not only obtain a permit from the Government, but must also cooperate with the BUMN that manages the river in question.

2. Contesting Water and the Human Right to Water

Despite the basic recognition of the human right to water, the standards of protection and fulfillment of rights adopted by WRL 2019 remain conceptually contested. Given the controversy of regulating water resources, it is not surprising that the emergence of WRL 2019 “is a topic which is consistently opposed, and becomes a topic of debate and an object of political struggle for the anti-water privatization movement.”⁶³ This law relates to the general regulation of water resources rather than focusing on “accommodat[ing] the human right to water in the context of drinking water and sanitation and focusing more on water as an economic resource.”⁶⁴ In the absence of adequate guarantees of universal access to water, the human rights narrative remains relevant to PSP as

61 See the explanation of Article 50 of WRL 2019. The initial draft of WRL 2019 was originally aimed only to allocate permits for the use of water resources for PDW-type business needs for state enterprise, and private companies that already operating had to be willing to divest their shares to state or regional companies. Industry associations oppose this discourse by arguing that the provision will encourage the nationalization of packaged drinking water industry which is contrary to Jokowi’s commitment Hendra Frianan, “RUU SDA: Dinilai Bakal Hambat Investasi & Tak Sesuai Visi Jokowi”, (31 July 2019), online: *tirto.id* <<https://tirto.id/ruu-sda-dinilai-bakal-hambat-investasi-tak-sesuai-visi-jokowi-ef17>>.

62 Assegaf, Satwika & Siregar, *supra* note 59.

63 Rutgerd Boelens & Margreet Zwarteveen, “Prices and Politics in Andean Water Reforms” (2005) 36:4 *Dev Change* 736–758 at 736.

64 Mohamad Mova Al’afghani, “Hak atas Air dalam Konteks Privatisasi dan Korporatisasi”, (15 March 2021), online: *investor.id* <<https://investor.id/opinion/186438/hak-atas-air-dalam-konteks-privatisasi-dan-korporatisasi>>.

developed by the classical liberal legal tradition.⁶⁵ People's access to water is legitimized not by the doctrine of water as a *res commune*, but by a perspective that frames citizens as consumers of water commodities.⁶⁶ One indicator of the successful fulfillment of rights is the fulfillment of the water needs of each customer so that the private sector can continue to invest in the provision of public services as long as their involvement is able to satisfy the customer's demand for water.⁶⁷ The fulfillment of the human right to water through private entities is closely related to the issue of production because it involves a full cost recovery scheme and the principle of ability-to-pay which will result in increasing tariffs for service users. Such a common mindset “leads to unintended instances where the human right to water ends up complementing (rather than opposing) the privatization agenda.”⁶⁸ Here, private intervention in water supply does not violate the right to water. Rather, it appears to be a necessary condition for expanding the scope of water services.⁶⁹ Without a progressive understanding of the right to water, it can easily be reduced to a neoliberal agenda that treats water as an economic commodity.⁷⁰

From the paradigm of the right to water adopted by WRL 2019, the allocation of authority to central or regional government has the potential to overlap in setting priorities for the use of water from river areas. Due to geographical differences, levels of prosperity, and comparative advantage between regions, the allocation of river surface water can increase the risk of cross-border water conflicts and provide opportunities for local political elites to allocate privileges to preferred business groups at the expense of local community interests and preservation of the environment from which they extracted the water.⁷¹ This authority allows many regions in Indonesia that are economically dependent on the income of the large-scale monoculture plantation sector, for example, to establish priorities for their agroindustry water needs in their water resources management plans. In fact, increased production of food and bioenergy commodities due to global market demand and pre-existing conditions of water scarcity have led to water expropriation that harm local communities. Water expropriation is often a logical consequence of large-scale corporate land tenure that allows them to

65 Cristy Clark, “Of What Use is a Deradicalized Human Right to Water?” (2017) 17:2 Hum Rights Law Rev 231–260 at 259.

66 Karen Bakker, “Neoliberalizing Nature? Market Environmentalism in Water Supply in England and Wales” (2005) 95:3 Ann Assoc Am Geogr 542–565 at 548.

67 Tadzki Nurshafira, “Swasta, Negara, dan Hak atas Air”, (2019), online: <<https://kolom.tempo.co/read/1255622/swasta-negara-dan-hak-atas-air>>.

68 Rene Uruena, “Global Water Governance and the Rise of Constitutional Regulatory State in Colombia” in Navroz Dubash & Bronwen Morgan, eds, *Rise Regul State South* (Oxford: Oxford University Press, 2013) 27 at 31.

69 Zeynep Kivilcim, “Articulating Human Rights Discourse in Local Struggles in a Neoliberal Age” in Ben Golder & Daniel McLoughlin, eds, *Polit Leg Neoliberal Age* (New York: Routledge, 2018) at 186.

70 Wijanto Hadipuro & Prathiwi Widyatmi Putri, “Right-to-water Alliances in Indonesia and Two Critical Disjunctions” (2020) 8:1 Power Confl Democr 29–47 at 30.

71 Karen Bakker, “The ‘Commons’ Versus the ‘Commodity’: Alter-globalization, Anti-privatization and the Human Right to Water in the Global South” (2007) 39:3 Antipode 430–455 at 438.

engineer landscapes and watershed area.⁷² WALHI also stated that WRL 2019 failed to adopt a sufficient monitoring mechanism to prevent the exploitation of water resources by delegating the scope of supervision from the area of legislation to the level of delegative regulation.⁷³ Due to weak supervision, the central government does not have sufficient information to determine whether industrial activities that carry out large-scale water extraction are desludging in accordance with the predetermined quota.⁷⁴

3. Securing Privatization through Delegated Regulation

Under the trend of democratic regression and the re-centralization of government power, WRL 2019 delegates many aspects of water governance to the level of delegative regulation which is centralized in the hands of the executive.⁷⁵ Described as a form of authoritarian neoliberalism and executive aggrandisement, the increasing concentration of centralized government power in unilaterally determining the implementation of laws or constitutions is also a logical consequence of the reconfiguration of the neoliberal capitalist state which seeks to eliminate public participation in the policy formation process.⁷⁶ This centralization not only gives privileges to certain executive institutions, rendering them “the sole of arbiter of social and economic policy at various levels of governance, but also facilitated the party’s increasingly recognized authoritarian drive by systematically blocking democratic and popular avenues for contesting its policies.”⁷⁷ In this context, the delegative regulation strategy not only offers an effective opportunity to secure water from the anti-water privatization movement, but also serves to provide a more politically stable legal framework on investment for PSPs. The technocratic, apolitical nature and structure of delegative regulation is an ideal medium to lock down a a binding neoliberal legal doctrine. This approach offers an alternative policy option that can be adopted when the country lacks the required resource capacity to directly manage water sector.

In practice, delegative regulations in Indonesia can take years to be passed as law, if ever. It has become a deep-rooted tradition in Indonesian legislation that in order to prevent a legal vacuum during the implementation of laws, the old regulations will usually

72 Franco, Mehta & Veldwisch, *supra* note 12.

73 Walhi, *supra* note 58 at 14.

74 Mohamad Mova Al’Afghani, “Open Government Improves Water Services”, (6 August 2018), online: <<https://www.thejakartapost.com/news/2018/08/06/open-government-improves-water-services.html>>.

75 WRL 2019 delegated 19 GRs, 1 presidential regulation, 1 presidential decree and 2 ministerial regulations. The provision of the law states that these implementing regulations must be completed within 2 years, although so far the government has not ratified any of the implementing regulations in question.

76 Ian Bruff, “The Rise of Authoritarian Neoliberalism” (2014) 26:1 Rethink Marx J Econ Cult Soc 113–129.

77 Cemal Burak Tansel, “Reproducing Authoritarian Neoliberalism in Turkey: Urban Governance and State Restructuring in the Shadow of Executive Centralization” (2018) 16:3 Globalizations 320–335.

continue until they are replaced by new legislation, despite potential conflict with other laws. The implementation of WRL 2019 itself must refer to the neoliberal water governance model adopted in GR No. 121/2015 and GR No. 122/2015. Rather than complying with the CC's decision, "these two regulations encourage the submission of state responsibility by surrendering water management to the private sector."⁷⁸ This idea is reinforced by the officials' belief that the state relies on private investment to accelerate the expansion of a clean water network and must implement a full cost-recovery scheme to overcome the losses suffered by PDAM.⁷⁹ Since the CC's decision in 2015, the Jokowi's administration has consistently supported the expansion of the private sector's role in infrastructure provision through technical policies at the ministerial level. These policies are designed to reduce risk for private sector investment, encourage commercially attractive tariff increases, and improve the access of new financial services to make public services more financially independent.⁸⁰

4. Corporatization of State Enterprise

The neoliberal sentiment of WRL 2019 has been reinforced by the longstanding misunderstanding that the state controls rights over the natural resource sector and strategic sectors must be mandated to 'public entities' and thus water resource exploitation permits should be prioritized for BUMN/BUMD.⁸¹ In the case of the 2004 WRL judicial review the Court seems to have expanded its constitutional interpretation of liberalization, asserting that direct management (*beheersdaad*) of water services by state enterprise is the most important element of Article 33 of the Constitution.⁸² This perspective is based on the romantic paradigm that the state mirrors the public will, whether consciously or not, which can interfere with the role of state enterprises in a neoliberal context. According to Al'afghani, the judges did not take into account the fact that "state enterprises can (and in some cases are legally required to) behave like the private sector."⁸³

Such calls have the potential to leads to the corporatization of public administration, encouraging BUMN/BUMD to establish legal partnerships with the private sector in fields such as the management of oil and gas.⁸⁴ Corporatization itself can be understood as a perspective that emphasizes the application of private management in organizing

78 *Tak Ada Rakyat dalam Omnibus Law/RUU Cipta Kerja Sebuah Kertas Kerja*, by John Petrus Talan et al (Jakarta: Koalisi Rakyat untuk Hak atas Air, 2020) at 85.

79 *Rancangan Teknokratik Rencana Pembangunan Jangka Menengah Nasional 2020-2024*, Jakarta, Bappenas., by Bappenas (Jakarta: Bappenas, 2020) at 144-145; Merdeka.com, "Menteri Basuki: Swasta Boleh Kelola Sumber Daya Air, tapi Kepemilikan Tetap Negara", (1 August 2019).

80 *Indonesian Infrastructure Stable Foundations for Growth*, by PwC (Jakarta: PwC, 2016) at 17-18.

81 *WRL 2004 Case 2004 II*, at 138.

82 *WRL 2004 Case 2004 II*, at 140-141.

83 Al'afghani, *supra* note 49 at 10.

84 *Ibid.*

services owned and run by public institutions to adapt their work ethic to seek profit.⁸⁵ Its proponents believe that corporatization will create a neutral and apolitical environment conducive to neoliberal management principles such as full cost recovery, volumetric measurement, consumption-based billing, service suspension, and market-based performance.⁸⁶ Corporatization can increase the independence of institutions from political intervention and rent-seeking, improving the performance of public sector administration which in turn leads to more efficient cost allocation for and expansion of public services.⁸⁷

The implementation of private management is an institutional form recommended by the World Bank, including the Organization for Economic Cooperation and Development (OECD) which has become an inherent part of Jokowi's regime's developmentalism project aimed at encouraging the state enterprises expansion.⁸⁸ A few months after the CC's decision the government provided support for BUMD to partner with private sector in the SPAM projects supported by the restructuring policy of state companies. Under the pressure of corporatization, water service providers are required to financially innovate to ensure long-term stability through the implementation of full cost-recovery strategies that can reduce dependence on state funding.⁸⁹ This can have implications for the fulfillment of the right to water, especially in terms of the affordability of tariffs for poor groups of people.⁹⁰ A number of cases of water privatization in South Africa and Colombia have demonstrated that the corporatization of public services leads to tariff increases and the removal of subsidies in the hope of making companies financially healthier.⁹¹ Increasing water service tariffs is clearly a method of recovery for full investment costs. As such, subsidized tariffs for poor households is not a priority for service providers.⁹² The corporatization of water services is a sensitive political issue: private management may be needed to improve performance and eradicate corruption in the administration of public services, but this will encourage commercial behavior that neglects the social requirement to fulfill the right to water.

IV. PPP IN SPAM PROJECT

85 Bakker, *supra* note 4.

86 Bakker, *supra* note 71 at 435.

87 Kathryn Furlong et al, "Rethinking water corporatisation: A 'negotiation space' for public and private interests, Colombia (1910-2000)" (2018) 11:1 *Water Altern* 187-208 at 188.

88 Shidarta & Stijn Cornelis van Huis, "Between Revenues and Public Service Delivery SOEs and PSAS in Indonesia" (2020) 176:202 *Bijdr Tot Taal- Land- En Volkenkd J Humanit Soc Sci Southeast Asia Ocean* 304-337.

89 Alex Loftus & Jessica Budds, "Neoliberalizing Water" in Simon Springer, Kean Birch & Julie MacLeavy, eds, *Handb Neoliberalism* (New York: Routledge, 2016) 503 at 507.

90 Al'Afghani, *supra* note 23.

91 Bakker, *supra* note 4.

92 Wijanto Hadipuro, "Indonesia's Water Supply Regulatory Framework: Between Commercialisation and Public Service?" (2010) 3:3 *Water Altern* 475-491 at 481.

Despite being a source of widespread resistance among civil society movements, WRL 2019 promises opportunities for private sector involvement in financing PPP SPAM projects. In line with the ambitious targets set by Jokowi's regime to liberalize the infrastructure sector, Article 57 paragraphs (6) and (7) provide opportunities for domestic and foreign investors to invest capital in water resource management as partners of BUMN, BUMD, or other state entities throughout the stages of planning, construction, infrastructure operations, and infrastructure maintenance. This provision is part of a broader neoliberal legal reform measure to address the gap in financing infrastructure development which, according to bureaucratic officials, will not be funded by the state.

Jokowi's administration has long accepted recommendations from international financial institutions such as the World Bank and Asian Development Bank for 'best practice' to implement the PPP scheme in overcoming the funding gap for water infrastructure development in the state budget. Of the necessary IDR 253.8 trillion during 2015–2019, only 20% (IDR 50 trillion) can be financed by the Government; the rest is to be obtained from private funding sources.⁹³ The 2015 World Bank report in 2015 noted the failure of the state to provide community access to clean water, recommending that Indonesia consistently encourage PPPs to accelerate the provision of access to water.⁹⁴ Opponents of state intervention emphasize the importance of private entities, good governance, and adherence to the rule of law to address the inefficiencies and corruption that undermine water governance in Indonesia.⁹⁵ Many PDAMs lack adequate funds to finance investment in drinking water supply, given that low tariffs, mismanagement, and local corruption can make water investment projects commercially unattractive.⁹⁶ In 2019, Badan Peningkatan Penyelenggaraan Sistem Penyediaan Air Minum (BPPSPAM) stated that around 40% of PDAMs in Indonesia were declared unwell/*kurang sehat* (26.84%) or broken/*sakit* (14.21%).⁹⁷ With the demand for water services continuously rising, and the ineffectiveness of PDAM services, it is clear that the fulfillment of the right to water through private sector is the most reasonable policy option to consistently satisfy the demand.⁹⁸ The target of 100% access to drinking water, which

93 Eko Adityo, "Swasta Masih Dibutuhkan Sediakan Air Bersih", *beritasatu.com* (21 December 2017), online: <<https://www.beritasatu.com/ekonomi/469667/swasta-masih-dibutuhkan-sediakan-air-bersih>>.

94 *Water Supply and Sanitation in Indonesia Turning Finance into Service for the Future*, by World Bank (Washington D.C: World Bank, 2015) at 19.

95 *Indonesia Country Water Assessment*, by ADB (Manila: Asian Development Bank, 2016) at 73.

96 PwC, *supra* note 80 at 17.

97 *Buku Kinerja BUMD Penyelenggara SPAM 2019*, by BPPSPAM (Jakarta: BPPSPAM, 2019) at 4.

98 Husna Yuni Wulansari & Tadzki Nurshafira, "In Indonesia, Water can be a Public and Private Good", (2019), online: <<https://www.asiaglobalonline.hku.hk/in-indonesia-water-can-be-a-public-and-private-good>>; However, despite emphasizing transparency and accountability in water service PPPs, PSP in water infrastructure projects during Jokowi regime cannot be separated from the interests of business oligarchs. One of the SPAM projects linked to the interests of these conglomerates is Umbulan SPAM project in East Java, which worth IDR 4.5 trillion. This project was carried out by

was recently adopted in the 2019–2024 development plan, is estimated to require funds of around IDR 243.8 trillion, consisting of IDR 67.5 trillion from the Government's budget, IDR 199.23 trillion from the regional government's budget, and IDR 49.05 trillion from the private sector.⁹⁹ Under this program, the private sector will operate the SPAM facility so that it can provide effective and efficient services at rates based on the ability-to-pay principle.¹⁰⁰ Pressure to ensure that PDAMs remain 'financially sound' ultimately forces state enterprises to work on a commercial management logic with significant changes to water tariff increases' which will impact access to water for the poorest of society.¹⁰¹

In other words, the PPP scheme could be understood as an instrument to expand the jurisdiction of capital accumulation to non-capitalist public utilities which are traditionally managed directly by the state. The PPP strategy is designed to rediscover the ideal form of the state's role in capital accumulation.¹⁰² Based on its conceptual understanding, PPP refers to a collaborative effort between the state and the private sector which involves a more significant role of the latter as the actor in charge of financing and operating infrastructure as a public asset.¹⁰³ These schemes often require long-term contracts of between 20 and 30 years. As a public asset management operator, a private contractor is expected to receive the invested funds and profits by charging a fee based on full cost recovery during the term of the contract.¹⁰⁴ PPP requires a form of accumulation through expropriation because it transfers some control of public assets to investors in the long term as a means to earn profit.¹⁰⁵

The application of the PPP contract contradicts the CC's decision that "water cannot be treated as an object that is economically priced."¹⁰⁶ In the case of PPP for Jakarta's water services, while the private sector continues to earn profit from the ever-increasing

Meta Adhya Tirta, a joint venture between Medco Gas Indonesia group owned by Arifin Panigoro, a member of the nationalist party, and Bangun Cipta Kontraktor owned by Siswono Yudo Husodo, one of the capitalist cronies of Soeharto family. Another prominent company in SPAM project is Adaro Energi group, which is connected with the Minister of BUMN, Erick Thohir, and the Minister of Tourism and Creative Economy, Sandiaga Uno, who are involved in strategic projects in Gresik and Banjar Baru, which worth \$11.3 million. See PT Cekindo Business International, "Where to Invest: Water Treatment Sector in Indonesia", (20 April 2021), online: *Cekindo* <<https://www.cekindo.com/sectors/water-treatment>>.

99 *Model Pembiayaan melalui Kontrak Berbayar Angsuran*, by BPPSPAM (2019).

100 Eric Teo Chu Cheow, "Privatization of Water Services via Public-Private Partnership and Implications for Southeast Asia" in Poh Onn Lee, ed, *Water Issues Southeast Asia Present Trends Future Dir* (Singapore: ISEAS-Yusof Ishak Institute, 2012) 76 at 89.

101 PwC, *supra* note 80 at 18.

102 Trissia Wijaya & Alvin Camba, "The politics of public-private partnerships: state-capital relations and spatial fixes in Indonesia and the Philippines" (2021) *Territ Polit Gov* 1-21 at 3.

103 *Ibid.*

104 Julien Mercille & Enda Murphy, "What is Privatization? A Political Economy Framework" (2017) 49:5 *Environ Plan* 1040-1059 at 1050.

105 *Ibid.*

106 *WRL 2004 Case 2004 II*, at 140.

demand for water, PAM Jaya, belonging to the Provincial Government as a PPP partner, bears the risk of an unfair contract. Based on the results of an audit by the Komisi Pemberantasan Korupsi (KPK), in 2016–2017 PAM Jaya suffered a loss of IDR 1.2 trillion and decreased asset value.¹⁰⁷ The total loss to be borne by Jakarta provincial government since the contract was signed in 1997 and ending in 2022 is estimated at IDR 18.2 trillion.¹⁰⁸ Although the PPP contract for Jakarta water services is intended to expand access to piped water services and reduce dependence on groundwater exploitation, private contractors are unable to develop piped connections to new areas, especially housing for the poor. Residents who do not use PDAM water services have to fulfill their water needs with ground water, collective wells, or purchasing jerry cans of water.¹⁰⁹ Despite the higher fees charged for private water services, the quality of Jakarta's SPAM is far from a reasonable standard.¹¹⁰ The Jakarta case demonstrates that private operators have failed to fulfill contractual mandates to ensure the provision of adequate and sustainable water services to communities.¹¹¹ The practice of water privatization through PPP, which has been heavily promoted by Jokowi's administration, contrasts the trend of water remunicipalization in the North and global South where many big cities are taking control of their water services for direct management by the city government.¹¹² The inclusion of the PPP project scheme in WRL 2019 is contrary to the global trend regarding the trend of increasing water management in the hands of public institutions which encourages the state to behave as a commercial entity that hinders the implementation of water justice in the community.¹¹³

V. CONCLUDING REMARKS

Indonesia's water governance regime is a useful case for understanding how the law reproduces and normalizes neoliberal doctrines that frame water as an economic commodity rather than a shared resource. This paper has shown how WRL 2019 seeks to establish a more facilitative legal environment for private investors in securing business

107 Fadiyah Alaidrus, "PAM Jaya: Temuan Kerugian Rp1,2 Triliun Saat Aset Dikelola Swasta", *tirto.id* (2019), online: <<https://tirto.id/pam-jaya-temuan-kerugian-rp12-triliun-saat-aset-dikelola-swasta-dCt7>>.

108 *History RePPeated How Public Private Partnership are Failing*, by Maria Jose Romero (Heinrich-Böll-Stiftung, 2018) at 32.

109 KruHa, "Air Ada Dimana-mana, Tapi Terlalu Mahal untuk Dijangkau", (2021), online: *kruha.org* <<https://kruha.org/air-ada-dimana-mana-tapi-terlalu-mahal-untuk-dijangkau/>>.

110 *Water Justice for All Global and Local Resistance to the Control and Commodification of Water*, by Friends of the Earth International (Amsterdam: Friend of the Earth International Secretariat, 2003) at 14.

111 Nila Ardhanie, "Water Privatization in Indonesia" in Belen Balanya, ed, *Reclaiming Public Water Achiev Struggl Vis World* (Amsterdam: TNI, 2005) 227.

112 Bakker, *supra* note 4 at 136.

113 betahitaid, "Kedok Investasi dalam Pengesahan RUU Sumber Daya Air", (20 September 2019), online: <<https://betahita.id/news/detail/4006/kedok-investasi-dalam-pengesahan-ruu-sumber-daya-air.html.html>>.

continuity from resource nationalist agitation. Developing loose regulations for the role of the state in fulfilling the right to water is a tactical effort adopted by law drafters to adapt to social and constitutional demands that require water to be managed as a public good. We argue that although WRL 2019 is based on populist rhetoric regarding the fulfillment of the right to water and the role of the state in the management of water resources, the water governance policy adopted is aimed at consolidating a conducive investment climate for water corporations while shifting responsibility from the state to a market-based allocation system.

Like the formation of WRL 2004 was sponsored by multilateral financial institutions, the drafters of WRL 2019 remained deliberately vague in regulating the PSP at the legislative level, leaving it open to broad legal interpretations and giving rise to allegations of what the Judge Mukthie Fadjar called 'covert privatization' (*privatisasi tersembunyi*).¹¹⁴ The threat of resource nationalism, supported by Article 33 of the Constitution, often acts as an obstacle to any government agenda introducing a series of legislative products aimed at expanding private sector investment in economic activities, including public water utilities. Therefore, securing neoliberal water policy at the level of delegative regulations, which is outside the CC's institutional domain, can expect judicial resistance. Our analysis shows that such a strategy motivates the government to implement "insurance regulatory to render a CC decision nugatory."¹¹⁵ By delegating specific aspects of water governance arrangements into the hands of the central government, which is isolated from democratic reach, the contestation for access to water will largely depend on the extent to which competing interests in the political economy are able to articulate their claims at the level of delegative regulation.

While PPP projects and the corporatization of public water services have failed to provide affordable and sustainable access in the global South,¹¹⁶ WRL 2019 and current implementing regulations are able to provide some opportunities for PSP to address funding gaps and state's inability to deliver water services to the community. We are of the opinion that the limited capacity of state funding is more due to the lack of political will and the interests of water corporations which continuously capture the process of forming state policies in order to produce decisions that support their business. Additionally, unlike other public goods, water is an essential requirement of living beings which cannot be substituted by other commodities. As such, the decision to privatize, commodify, and commercialize water to obtain financial gain does not make sense from any point of view. The possibility of a judicial review of WRL 2019 in the future with the

114 *WRL 2004 Case I*, at 507.

115 Butt & Lindsey, *supra* note 51.

116 Bakker, *supra* note 4.

rationale requisited in the previous lawsuits will remain.¹¹⁷ However, it is doubtful whether the CC will take the same judgement as adopted in the WRL 2004 case and its second decision in 2015.

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Dr. Imam Kuswahyono, SH., MHum. has served as an associate professor at the Faculty of Law Brawijaya University, Indonesia, since 2007 to date. His area of research and specialization covers Anthropology of Law, Sociology of Law, Natural Resources and Law. Dr. Imam Kuswahyono has been a Junior Research Fellow at the IIAS Leiden University concerning Ageing and Social Security (2004-03); Research Fellow of Sandwich-Like Programme from Directorate General of Higher Education Indonesia at the van Vollenhoven Institute: Law, Governance and Development, Leiden University The Netherlands (2010) regarding access to justice, natural resources management and conflict resolution; Junior and Senior Research Fellow of The Centre for Socio-Legal Studies, Brawijaya University Indonesia; a chairman of The Centre for Agrarian Law Studies Faculty of Law Brawijaya University Indonesia, since 2021.

Syahriza Alkohir Anggoro, S.H., M.H. is a doctoral student at Faculty of Law Brawijaya University, Indonesia. His interests are Constitutional Law, Legal history, International Human Rights Law and Environmental Law. He has published several articles in national and international journal, such as *Jurnal Hukum dan Pembangunan*, *Jurnal Undang*, *Jurnal Jurisprudence*, *International journal of marine and Coastal Law (Brill)* and *International Journal on Minority and Group Rights (Brill)*. He is currently preparing his first book about the history of interventionist constitution in Indonesia.

Muhammad Dahlan, S.H., M.H. is a lecturer in constitutional law and Islamic law at the Faculty of Law Brawijaya University, Indonesia. He graduated from Master of Law at Brawijaya University, and had experienced pesantren education in junior high and high school. Currently he also a researcher at the Center for Pesantren Studies and Community Empowerment. His interests are Sharia Law, Legislative Studies, International Human Rights Law and Law and Governance.