

Harmonization of Water Management Regulations Post Constitutional Court Decision Number 85/PUU-XI/2013 in the Perspective of *al-Maslahah al-Mursalah*

Abstract

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Background. *The Constitutional Court has annulled Law Number 7 of 2004 concerning Water Resources because it is contrary to the 1945 Constitution of the Republic of Indonesia. The Court returned all forms of water resource regulation to Law Number 11 of 1974 concerning Irrigation. The legal changes have an impact on water management companies in Indonesia.*

Aim. *This article examines the legal consequences of Constitutional Court Decision Number 85/PUU-XI/2013 on corporate water governance from the perspective of al-Maslahah al-Mursalah.*

Methods. *Normative legal studies, using the legislative, case, and conceptual approaches. Data were obtained through literature studies, and analyzed using qualitative descriptive analysis.*

Results. *Companies that continue to utilize water resources without clear authority can be categorized as a form of theft or seizure of water resources. According to Article 15 Paragraph (2) of the Water Law, this is detrimental to the state. The Water Law does not fully emphasize that only the state has the right to manage water resources. Based on al-maslahah al-mursalah with the right to exploit water resources, water is a source of livelihood and hifdz a-maal. The government should make strict regulations in accordance with al-maslahah al-mursalah to create benefits and avoid damage (jalb al-mashalih dar'u wa al-mafasid).*

Keywords: *Decision of Constitutional Court, Company Water Governance, al-Maslahah; al-Mursalah*

INTRODUCTION

Indonesia as a sovereign country, has a role and obligation to protect and prosper the people in every aspect of social and economic life, and must prioritize environmental insight. The 1945 Constitution of the Republic of Indonesia Article 33 is the foundation of the people's welfare economic system, the economic democracy system which is the principle of the national economy. The problem of water as a very valuable Natural Resource is also regulated in the constitution. Article 33 specifically becomes the foundation of Indonesia's political, economic and environmental ideology.

Constitutional Court Decision Number 85/PUU-XI/2013 has a legal impact on water management companies. The Court's decision is binding and has an impact on the object of the decision. The Court's decision has permanent legal force since it was pronounced in a plenary session open to the public.¹ This is a consequence of the nature of the Court's decision as determined by the 1945 Constitution of the Republic of Indonesia as final. The Constitutional Court is the first and last court. The Court's decision cannot be subject to legal action. After the decision is read, the Court is required to send a copy of the decision to the parties within a maximum period of 7 working days since the decision was pronounced.²

¹ Article 47 of Law Number 24 of 2003 concerning the Constitutional Court.

² Article 49 of Law Number 24 of 2003 concerning the Constitutional Court.



Constitutional Court Decision Number 85/PUU-XI/2013 raises problems for water management companies that have been established, whether they are State-Owned Enterprises, Private Enterprises, or other business entities. Water management companies must comply with all applicable regulations. If Constitutional Court Decision Number 85/PUU-XI/2013 revokes Law Number 7 of 2004 concerning Water Resources and re-enacts Law Number 11 of 1974 concerning Irrigation, it will have a normative legal impact on water management companies.

In practice, many basic laws are also found to be unable to serve as references in the formation of new laws and regulations. There are still many overlapping regulations that cause legal uncertainty. For example, in terms of the environment, Government Regulation Number 142 of 2015 concerning Industrial Areas states that "Industrial Companies in Industrial Areas are exempted from permits concerning disturbances, the environment, location, business premises, land use designation, approval of land site plans, and Traffic Impact Analysis."³ This is contrary to Law Number 32 of 2009 concerning Environmental Protection and Management which requires permits without exception, and provides criminal sanctions for officials who issue permits without the conditions that must be met.⁴ Local government officials fear criminal threats for issuing business permits related to environmental management.

Law Number 22 of 2011 concerning Oil and Gas in Chapter III Article 4 states that the issue of exploitation/production of Water Resources must go through a forum, either in the form of a State-Owned Enterprise, Regionally-Owned Enterprise, Privately-Owned Enterprise, Cooperative and so on. Unlike Law Number 11 of 1974 concerning irrigation, exploitation/production of water can be carried out by individuals, or business entities as long as they prioritize environmental conservation. This article examines the harmonization of water governance regulations after the Constitutional Court Decision Number 85/PUU-XI/2013 from the perspective of *al-Maslahah al-Mursalah*.

LITERATURE REVIEW

Following the Constitutional Court Decision Number 85/PUU-XI/2013 which revoked Law Number 7 of 2004 concerning Water Resources, the regulation of Water Resources in Indonesia was returned to Law Number 11 of 1974 concerning Irrigation until the formation of the new Law Number 17 of 2019 concerning Water Resources.⁵ Law Number 17 of 2019 concerning Water Resources is a new law. The closing provisions of Law Number 17 of 2019 concerning Water Resources have revoked the validity of Law Number 11 of 1974 concerning Irrigation. Law Number 17 of 2019 concerning Water Resources is the only regulation related to the Water Resources sector.⁶

Consideration of Law Number 17 of 2019 concerning Water Resources

Referring to the considerations of the considering and remembering sections, Law Number 17 of 2019 concerning Water Resources is not based on the provisions of other laws that are still in force, especially laws relating to Natural Resources. The considerations of the considering section letter d state that with the re-enactment of Law Number 11 of 1974 concerning Irrigation after Law Number 7 of 2004 concerning Water Resources was revoked by the Constitutional Court, there are still many shortcomings and it has not been able to comprehensively regulate the management of Water Resources in accordance with developments and the legal needs of the community so that it needs to be replaced.⁷ Meanwhile, the consideration of the remembering section is only based on Article 18A, Article 188, Article 20, Article 21 and Article 33 of the 1945 Constitution of the Republic of Indonesia.⁸

The consideration is not based on Law Number 5 of 1960 concerning Basic Agrarian Regulations. In fact, Law Number 5 of 1960 concerning Basic Agrarian Regulations is a basic provision that can be a legal umbrella for the formation of a Law. Although the validity of several

³ Government Regulation Number 142 of 2015 concerning Industrial Areas.

⁴ Law Number 32 of 2009 concerning Environmental Protection and Management.

⁵ Constitutional Court Decision Number 85/PUU-XI/2013.

⁶ Article 75 of Law Number 17 of 2019 concerning Water Resources.

⁷ *Vide*, Consideration of section d, Law Number 17 of 2019 concerning Water Resources.

⁸ *Vide*, Considering section, Law Number 17 of 2019 concerning Water Resources.

provisions of Law Number 5 of 1960 can be questioned regarding the relevance of its current validity, Law Number 17 of 2019 concerning Water Resources completely ignores the provisions in Law Number 5 of 1960. So that Law Number 17 of 2019 concerning Water Resources and Law Number 5 of 1960 concerning Basic Agrarian Regulations run independently (not reviewing each other). This has the potential to cause the possibility of conflicting provisions of the articles, or repeated regulations in the validity of the two Laws. The government's discourse on forming an omnibus law can be a momentum in terms of reviewing the validity of Law Number 17 of 2019 concerning Water Resources and Law Number 5 of 1960 concerning Basic Agrarian Principles, especially in terms of discussing the legal basis for its formation and articles.

Water Use Rights in Law Number 5 of 1960 concerning Basic Agrarian Principles and water use permits in Law Number 17 of 2019 concerning Water Resources

Applicability of Law Number 5 of 1960 concerning Basic Agrarian Regulations and Law Number 17 of 2019 concerning Water Resources, without any interrelated legal basis, has the potential to cause conflicting provisions in their articles. The provisions regarding water use in the two laws are different. Law Number 5 of 1960 concerning Basic Agrarian Regulations defines water use in the form of "rights" which only consist of two articles as regulated in Article 47, which reads: "(1) Water use rights are the rights to obtain water for certain purposes and/or to flow the water over someone else's land. (2) Water use rights as well as fish maintenance and fishing are regulated by Government Regulation."

Law Number 17 of 2019 concerning Water Resources, regulates the use of water as a "permit" from the Central Government for business needs and a permit to use Water Resources for business needs at certain locations. These provisions are fully regulated through CHAPTER VI concerning Licensing. Water Use Permits can be granted by the Central Government or Regional Governments in accordance with their authority by taking into account the function of the area and environmental sustainability.

The regime provisions of Law Number 17 of 2019 concerning Water Resources and Law Number 5 of 1960 concerning Basic Agrarian Regulations are very different, even tending to be contradictory. The provisions regarding "rights" and "permits" are nomenclatures that have different legal meanings. Rights are interpreted as something that must be obtained and become the property of the legal subject holding the rights. While a permit means an act that is permitted for the recipient of the permit, even though the act is actually prohibited from being carried out. There are no transitional provisions in Law Number 17 of 2019 concerning Water Resources that mention the existence of Water Use Rights. Meanwhile, the provisions of Article 47 of Law Number 5 of 1960 concerning Basic Agrarian Regulations still apply to Water Use Rights. Water Use Rights are also regulated in Government Regulation Number 69 of 2014 concerning Water Use Rights.

If using the principle of *lex posteriori derogat legi priori*, then what applies is the Water Use Permit according to Chapter VI of Law Number 17 of 2019 concerning Water Resources. However, this kind of regulation still creates overlapping regulations. This situation creates legal uncertainty, even at the level of the Law. The implication is that subsequent provisions regarding licensing will reap conflicts and obstacles. So that it can disrupt the investment climate. This is also one of the urgent matters for the formation of an omnibus law. Through the omnibus law, it is hoped that there will be harmonization of laws and regulations at the Law level in order to create legal certainty.

Applicability of Government Regulation Number 69 of 2014 concerning Water Use Rights

The only Government Regulation that survived after the Constitutional Court annulled Law Number 17 of 2019 concerning Water Resources was Government Regulation Number 69 of 2014 concerning Water Use Rights. This Government Regulation specifically regulates the provisions for implementing Water Use Rights in the old regime of Law Number 17 of 2019 concerning Water Resources. Government Regulation Number 69 of 2014 concerning Water Use Rights Article 2 aims to provide recognition, fulfillment, and protection for Water Use Rights holders. Government Regulation Number 69 of 2014 concerning Water Use Rights explains that Water Use Rights are not ownership rights to Water. Government Regulation Number 69 of 2014 concerning Water Use Rights

tends to regulate the use of water as a permit. Government Regulation Number 69 of 2014 concerning Water Use Rights is still valid because in the Constitutional Court Decision Number 85/PUU-XI/2013, the Court is of the opinion that because this Government Regulation was enacted long after the Court ended the trial, this Government Regulation is not considered for its validity to be annulled. The legality of the validity of Government Regulation Number 69 of 2014 concerning Water Use Rights is currently questionable, considering that the legal basis for its formation has been replaced by Law Number 17 of 2019. The facts show that currently there are no provisions that cancel the validity of Government Regulation Number 69 of 2014 concerning Water Use Rights. In fact, Law Number 17 of 2019 concerning Water Resources also provides legal legitimacy for the validity of previously existing Government Regulations. Law Number 17 of 2019 concerning Water Resources Article 76 letter b stipulates that all implementing regulations governing Water Resources are declared to remain in effect as long as they do not conflict with and have not been replaced based on Law Number 17 of 2019 concerning Water Resources. Government Regulation Number 69 of 2014 concerning Water Use Rights can be said to have no legal basis for the initial intention of its formation, but it gains legitimacy from other provisions.

Further problems arise in Article 75 letter b of Law Number 17 of 2019 concerning Water Resources. It is stipulated that when Law Number 17 of 2019 concerning Water Resources comes into effect, applications for Water Resources Use Permits or Water Resources Business Permits and Groundwater Business Permits submitted before the enactment of this Law and whose permits have not been issued must comply with Law Number 17 of 2019 concerning Water Resources. Until now, there has been no Government Regulation that regulates 10 Vide, Article 2 of Government Regulation Number 69 of 2014 concerning Water Use Rights. 11 Vide, Article 4 paragraph (1) of Government Regulation Number 69 of 2014 concerning Water Use Rights. 12 Vide, Article 76 letter b, Law Number 17 of 2019 concerning Water Resources. What technical provisions are applied to this Water Use Permit, so that there is a legal vacuum regarding the application of the a quo article.

The provisions between Article 75 letter b and Article 76 of Law Number 17 of 2019 concerning Water Resources are also contradictory. Article 75 letter b requires adjustments to the implementation of permit policies in accordance with Law Number 17 of 2019, while Article 76 still considers other regulations to be applicable, including Government Regulation Number 69 of 2014 concerning Water Use Rights. Meanwhile, Government Regulation Number 69 of 2014 concerning Water Use Rights itself has different regulations from the Water Use Permit regime. The question is which of the two provisions should be used? This is one of the things that urgently needs to be responded to by the omnibus law. In addition to the harmonization of regulations, the resolution of this problem is also awaited to respond and provide legal certainty related to permit applications that have been submitted, but the permits have not been issued at this time.

METHOD

Normative legal studies, using the legislative approach, case approach, and conceptual approach. Primary, secondary, and tertiary data sources are obtained through literature studies, and analyzed using qualitative descriptive analysis.

RESULTS AND DISCUSSION

The urgency and relevance of the right to water in the perspective of *al-Maslahah al-Mursalah*

The economic system in Indonesia is based on the economic democracy system. The 1945 Constitution of the Republic of Indonesia has mandated to direct the Indonesian economy towards an economic system that supports the welfare of the people. The national economy is organized based on economic democracy with the principles of togetherness, efficiency with justice, sustainability, environmental insight, independence, and by maintaining the balance of progress and unity of the national economy. Privatization of Water Resources that makes water a commodity of the economy that is profit oriented to a certain group means that the economy in Indonesia is still not certain in the direction as mandated by the constitution.

The core of the economic problem from a conventional economic perspective (capitalists and needs come from the same place, namely human instincts of desire).⁹ Islam rejects the notion that human needs are unlimited. Because in certain needs, for example, eating and drinking, if the stomach feels full, then it feels satisfied because its needs have been met. The conclusion is that human needs are limited. The law of diminishing marginal utility explains that the more goods are consumed, at a certain point it will actually cause additional satisfaction from each additional amount of goods consumed to decrease.¹⁰

Islam emphasizes the importance of every individual to pay attention to and achieve welfare in their lives. asy-Syatibi uses the term *maslahah* to describe the purpose of sharia. Humans are always required to seek welfare. Economic activities of production, consumption and exchange that include welfare, as defined by sharia, must be followed as a religious obligation to obtain goodness in this world and the hereafter. The welfare in economic activities means that economic activities carried out on the basis of *maslahah* will bring benefits and blessings. All economic activities that contain welfare for mankind are called needs. These needs for *maslahah* must be met.

al-Maslahah al-Mursalah is used to answer cases or problems that continue to develop in accordance with the demands of human life, but there is no law that has been decided with certainty regarding these problems.¹¹ As-Syathibi explained that basically the sharia is established to realize the welfare of the servant (*al-mashalih- 'ibad*), both in this world and in the hereafter. The welfare is seen as *maqashid al-syariah*. The establishment of the sharia, both as a whole (*jumlatan*) and in detail (*tafshilan*), is based on an *'illat* (motive for establishing the law), namely realizing the welfare of the servant.

The main purpose of establishing Islamic law is to realize the welfare of humanity, both in this world and in the hereafter. This is in line with the overall mission of Islam which is *rahmatil lil' alamin*.¹² ash-Syatibi in *al-Muwafaqat* emphasized: *ومعلوم ان الشريعة انما وضعت لمصالح الخلق باطلاق* Meaning: It is known that Islamic law is prescribed/enacted to realize the absolute welfare of all creatures.¹³

The above statement illustrates the close relationship between Islamic law and public welfare. Water privatization that leads to profit-oriented fields is a reflection that water is still a business field. Private control of water that leads to neo-liberalism has truly harmed the fact that water is shared ownership and the livelihood of many people. The role of Islamic law in responding to the challenges of the times is very important to answer cases or problems that continue to develop in accordance with the demands of human life. ash-Syatibi stated that Islamic law is prescribed to realize the welfare of creatures. The role of Islamic law on water problems is to make water a human benefit.

The urgency and relevance of *al-Maslahah al-Mursalah* to the right to water lies in the nature of water, the human need for water, and the purpose of enshrining Islamic law. The principle of *al-Maslahah al-Mursalah* is to obtain benefits and avoid damage (*jalb al-mashalih wa dar'u al-mafasid*) in an effort to maintain legal objectives that are independent of the provisions of the sharia propositions.¹⁴ The concept of *al-Maslahah al-Mursalah* brings benefits between the people as the object of prosperity in the use of water and water management companies that are still operating to exploit Water Resources in Indonesia. The role of *al-Maslahah al-Mursalah* in answering the problem is expected to provide benefits in the economic world in Indonesia.

al-Maslahah al-Mursalah is an argument to determine a new problem that has not been explicitly mentioned in the main sources, the Qur'an and the Sunnah. The Constitutional Court Decision Number 85/PUU-XI/2013 has an impact on legal uncertainty. *al-Maslahah al-Mursalah* has

⁹ Muslimin Kara, "Pemikiran Al-Syatibi Tentang Maslahah dan Implementasinya dalam Pengembangan Ekonomi Syariah" *Jurnal Assets*, Vol. 2, No. 2 (2012). p.179

¹⁰ *Ibid.*

¹¹ M. Cholil Nafis, *Teori Hukum Ekonomi Syariah*, (Jakarta: UI-Press, 2011). p.45

¹² Nur Kholis, Antisipasi Hukum Islam Dalam Menjawab Problematika Kontemporer, *Jurnal Al-Mawarid*, edisi X (2003). p.169

¹³ Asy-Syatibi, *al-Muwafaqat fi Ushul al-Ahkam* (Beirut: Dar al-Fikr). Juz II. p.19

¹⁴ Beni Ahmad Saebani, *Fiqih Siyasah: Pengantar Ilmu Politik Islam*. (Bandung: Pustaka Setia, 2007). p.77

relevance and urgency to be used in answering problems that continue to develop according to the development of human life demands, but there is no law that has been decided with certainty regarding water management problems in Indonesia.

State control over water from the perspective of *al-Maslahah al-Mursalah*

The right to water is the right to obtain and use or exploit water for various purposes. Water is public property or the livelihood of many people. Water must be placed in a position of public interest. The state as the person responsible for public interest (*maslahah al-ammah*) must ensure that the earth, water, sky and fire can be accessed by all citizens for the needs of life. All means and efforts to monopolize sources of life for many people just to satisfy the interests of a group of people must be prevented by the state.

ash-Syatibi recognizes individual property rights, but rejects individual ownership of any resource that can control the livelihood of many people. Water is not an object of ownership and its use cannot be owned by anyone. There are two types of water, namely water that cannot be used as an object of ownership, such as river water and oases; and water that can be used as an object of ownership, such as water that is purchased or is part of a plot of land owned by an individual.

asy-Syatibi stated that no ownership rights can be claimed over the river due to the construction of the dam.¹⁵ Islam as a revealed religion also regulates the ownership and management of Natural Resources which consist of: individual ownership (*milkiyah fardhiyah*); public ownership (*milkiyah 'ammah*), and; state ownership (*milkiyah dauliyah*).¹⁶

Private parties with authorized government permits have the right to manage water as an economic commodity. The concept of state control is interpreted with five benchmarks of state control rights including policy (*beleid*), management (*bestuursdaad*), regulation (*regelendaad*), management (*beheersdaad*), and supervision (*toezichthoudensdaad*). The state's control rights over water can be said to exist if the state, which by the 1945 Constitution of the Republic of Indonesia is given the mandate to make policies (*beleid*), management (*bestuursdaad*), regulation (*regelendaad*), management (*beheersdaad*), and supervision (*toezichthoudensdaad*).

If transformed the values of Islamic teachings in the contemporary context of Water Resources. According to the mandate of the constitution, the State plays an important role in the management and control of Water Resources for the welfare of the people. The context of control and ownership has the same value towards the existence of an object (in this case Water Resources). If the concept of ownership and control is integrated, it will give rise to a new understanding of state control over water control.

The nature of Water Resources which are basically shared property (*ress commune*) in the Islamic perspective is interpreted as public ownership (*milkiyah 'ammah*). Public ownership is ownership of something whose utilization rights are determined for a community group, with the provision that each member of the community has the right to use it in the name of a part of the community. Along with the proliferation of water management companies, both state-run and private, ownership of water has shifted slightly to individual or group ownership with the concept of privatization. The state plays an important role in realizing the welfare of the position of ownership of Water Resources for the prosperity of the people. Based on the Constitution of the Republic of Indonesia Article 33 Paragraph (3), the State is the first party to have power over water which is used as much as possible for the prosperity of the people. The state plays a role in the existence of water as the ruler over water as its control has been explained in the Constitution.

¹⁵ Muhammad Khalid Mas'ud, *Filsafat Hukum Islam: Studi tentang Hidup dan Pemikiran Al-Syatibi* (Bandung: Pustaka, 1996). p.136

¹⁶ Private ownership is ownership of something whose use is only for a certain person as the owner of the property; Public ownership is ownership of something whose right to use it is determined for a community group with the provision that each member of the community has the right to use it on behalf of a part of the community; State ownership is property that is the right of all Muslims/people and its management is the authority of the caliph/State. In, Said Muhammad Basyuni, *al-Hurriyah al-Iqtishadiyyah I al-Islam wa Atsaruhā fi al-Tammiyah*, (Cairo: Dar al-Wafa', 1988). p.4

al-Maslahah al-Mursalah is a *maslahah* found in new cases that are not designated by a particular text, but contain benefits that are in line (*al-munâsib*) with sharia actions. The state is an element or instrument in bringing about benefits according to the urgency of *al-Maslahah al-Mursalah* in the issue of the legal consequences of the Constitutional Court's decision on water management companies in Indonesia. The urgency of *al-Maslahah al-Mursalah* is used to solve the problems of the demands of human life which continue to grow, but there is no law that has been decided with certainty regarding water management problems in Indonesia.

Legal consequences of Constitutional Court Decision Number 85/PUU-XI/2013 from the perspective of *al-Maslahah al-Mursalah*

Islamic law as a guideline for human life accommodates all forms of social conditions and problems of society without having to lose the basic principles. Islamic law must continue to function and be felt to be needed,¹⁷ so as not to lose its actualization.¹⁸ Actualizing Islamic law in the context of community interests requires reinterpretation efforts according to the context of space and time¹⁹ to realize a legal product that is contemporary and contemporary. The Constitutional Court's decision to annul Law Number 17 of 2019 concerning Water Resources is a public issue that is uncertain in its direction. The goal of the Court's decision is to minimize the privatization of Water Resources. However, there are still many private companies that exploit Water Resources.

Maliyyah muamalah fiqh requires a theoretical framework or methodology of thinking known as *Usul al-Fiqh*.²⁰ One of the problems that is the main theme in the study of Ushul Fiqh is the benefit of humanity contained in the *Shari'a* revealed by Allah SWT. The theory of legal *istinbat* which refers to the concept of benefit, including *al-Maslahah al-Mursalah*.²¹

al-Maslahah al-Mursalah is a fundamental method in building, studying and determining the suitability of the ratio legis (*'illat*) in discussions about *Qiyas*. *al-Maslahah al-Mursalah* focuses on discussions on cases where the law does not yet exist based on the text (*al-Qur'an* and *Hadith*).

The Court's decision has legal consequences for water management companies. The activities of water management companies that continue to exploit Water Resources without clear legal force (illegal), can be categorized as a form of theft or seizure of Water Resources. Illegal activities that can cause losses to the State according to Article 15 Paragraph (2) of the Irrigation Law. Dominant control by State-Owned Enterprises or Regional-Owned Enterprises means that control of Water Resources is fully given to the State. The Irrigation Law has not fully confirmed the State as the only one entitled to manage Water Resources. Legal Entities, Social Agencies and/or individuals who carry out water and/or water source business must obtain permission from the government, guided by the principles of joint ventures and family.

al-Maslahah al-Mursalah according to ash-Syatibi is a valid method to be used in determining Islamic law;²² the *ijtihad* method in order to explore Islamic law (*istinbath*), but not based on a specific text, but based on the approach to the intention of the revelation of Islamic law (*maqasid asy-syari'ah*).²³ *al-Maslahah* in the sense of the term is the benefit put forward by the *syar'i* in establishing laws for its servants in the effort to maintain religion, soul, mind, lineage and property.²⁴ *al-Maslahah*

¹⁷ Ahmad Mubaligh, "Dinamika Hukum Islam Dalam Kontek Perubahan Sosial," *Jurnal El-Harakah*, Vol. 63, No.01, (Januri-April, 2006). p.53

¹⁸ Ahmad Rofiq, *Pembaharuan Hukum Islam di Indonesia*, (Yogyakarta: Gama Media, 2001). p.99

¹⁹ Ahmad Mubaligh, "Dinamika Hukum Islam Dalam Kontek Perubahan Sosial," *Jurnal El-Harakah*, Vol. 63, No.01, (Januri-April, 2006). p.54

²⁰ M. Cholil Nafis, *Teori Hukum Ekonomi Syariah....* p.27

²¹ Noorwahidah, "Esensi Al-Mashlahah Al-Mursalah Dalam Teori Istinbat Hukum Imam Syafi'i," *Syariah Jurnal Hukum dan Pemikiran*, Issue No.1 vol.13, September 2014.

²² Duski, "Metode Penetapan Hukum Islam Menurut Al-Syâthibî (Suatu Kajian Tentang Konsep Al-Istiqrâ' Al-Ma'nawî)," *Al-Adalah*, vol. XI, no. 2, Juli 2013, p.136

²³ Mahmuzar, M. Hum, "Maslahah Mursalah Suatu Metode Istinbath Hukum," https://www.academia.edu/4417211/maslahah_mursalah_suatu_methode_istinbath_hukum?auto=download. p.10

²⁴ Asfri Faya Bakri, *Konsep Maqasid Syari'ah Menurut Al-Syatibi*, (Jakarta: PT Raja Grafindo, 1996). p.142

(realizing the benefit) is the goal of *maqasid shari'a*.²⁵ The main aim of *shari'i* makers is *tahqiq masalih al-khalaqi* (realizing the benefit of creatures) that the *shari'a* obligations are intended to maintain al-maqasid.²⁶ *al-Maslahah* includes the welfare of the world and the hereafter, and must be seen and measured from the level of basic human needs. There are three categories of levels of human needs, namely: *dharuriyat* needs (primary needs), *hajiyyat* (secondary needs), and *tahsiniah* (tertiary needs).²⁷

Water Resources are a necessity because they cannot be avoided in supporting the *masalih ad-din* (religion and the hereafter) and the world. If the *maslahah* of Water Resources is damaged, then the stability of worldly life will also be damaged. Damage to the *maslahah* of Water Resources ends life in the world and the hereafter due to the loss of safety and mercy. Human life cannot be avoided with the need for water.

Maqasidus syari'ah is an effort to maintain religion, soul, mind, descendants and property. Protecting Water Resources is the maintenance of soul and property. Water is a source of human life that must be protected. Water Resources with water business rights make water one of the sources of livelihood. *al-Maslahah al-Mursalah* draws benefits and avoids damage (*jalb al-mashalih wa dar'u al-mafasid*) in an effort to maintain legal objectives that are free from the provisions of sharia evidence. Legal Entities, Social Agencies and/or individuals who carry out water and/or water source business must obtain permission from the government, guided by the principles of joint business and family. The government must make clear Water Resources management regulations to realize benefits and avoid damage (*jalb al-mashalih wa dar'u al-mafasid*). Regulations must support water management companies based on the principle of avoiding damage and bringing prosperity to the people from the benefits of Water Resources.

CONCLUSION

Constitutional Court Decision Number 85/PUU-XI/2013 has a major impact on water management companies. Basic laws cannot be used as a reference in the formation of new laws and regulations, so that many rules overlap, are not synchronized, and create legal loopholes. The activities of water management companies that continue to exploit Water Resources without a clear legal basis (illegal) are the result of legal loopholes. The dominant control of State-Owned Enterprises or Regional-Owned Enterprises means that control of Water Resources is indeed given entirely to the State. The Irrigation Law has not fully confirmed the state as the only one entitled to manage Water Resources. Legal Entities, Social Agencies and/or individuals can still conduct water and/or water source business. Companies and Business Entities must obtain permits from the government based on the principles of joint ventures and family. The government as the water authority must provide strict conditions for the private sector to manage Water Resources as an economic commodity. Water Resources are a necessity. Protecting Water Resources includes preserving lives and property. The government must create clear, firm, harmonious and non-overlapping water resource management regulations to realize public welfare and avoid damage (*jalb al-mashalih wa dar'u al-mafasid*).

The regulation regarding the follow-up of the Constitutional Court's decision by the institution that forms the Law should contain a time limit provision. Because often the Constitutional Court's decision is allowed to drag on without any follow-up by the institution that forms the Law, even though the provisions of the Law have provided a fast procedure or mechanism for following up on the Constitutional Court's decision through the formation of a Law. Do not let the follow-up to the

²⁵ Muslimin Kara, "Pemikiran Al-Syatibi Tentang *Maslahah* Dan Implementasinya Dalam Pengembangan Ekonomi Syariah," *Jurnal Assets*, Vol. 2, No.2, (2012). p.174

²⁶ Galuh Nashrullah Kartika Mayangsari R Dan H. Hasni Noor, "Konsep Maqashid Al-Syariah Dalam Menentukan Hukum Islam (Perspektif Al-Syatibi Dan Jasser Auda)," *Al-Iqtishadiyah*, Vol I (Desember 2014). p.58

²⁷ *Maqasid al-Daruriyat* is intended to maintain the five basic elements in human life. *Maqasid al-hajiyyat* is intended to eliminate difficulties or make maintenance of the five basic elements even better. Meanwhile, *maqasid al-tahsiniah* is intended so that humans can do their best to perfect the maintenance of the five main elements.

Constitutional Court's decision be followed up first by implementing regulations under the Law. This is not good from a legal order perspective. Because the implementing regulations should implement the Law. Testing of laws and regulations will be problematic if the implementing regulations are tested for legality, because the touchstone does not yet exist, and is still in the form of a Constitutional Court decision. It is also better to determine the legal consequences if the follow-up to the Constitutional Court's decision through the formation of a Law actually conflicts with the content or substance of the decision itself. Because that will close the potential for the formation of a Law that conflicts with the Constitutional Court's decision. In the provisions on the non-follow-up of the Constitutional Court's decision carried out by the People's Representative Council or the President, an explanation or provision should be provided that the follow-up is carried out by the institution that initiated the Law when it is formed or amended. This is to emphasize the institution that has the responsibility to follow up on the Constitutional Court's decision, and does not give the impression of waiting for each other between the House of Representatives or the President.

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