



Discourse of Water Resources Law in Indonesia

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Abstract

Water resources regulation in Indonesia after enactment of the Law No. 7 of 2004 on Water Resources has given rise to many debate and rejection. Debate not only in parlemen, after enactment, some civil society organization and individual citizen petitioned for judicial review to the Indonesian Constitutional Court. This article analyze discourse of water resources law with text citizen opinion, press news, judicial record use DHA Wodak method. The result showed, nationalist ideology battle with neo-liberal ideology. Neo-liberalist can make state only be arranger to regulation water resources. The law heavy in economic value and not fulfill human rights protection will rejected by citizen. Indonesia Water Resources Law not yet to respect, to protect, and to fulfill human rights to water.

Keywords: discourse; economic value; the right to water; water resources law.

1. Introduction

The historic roots of the order of water often traced back to Roman law. Roman law distinguished between that which belonged to no one, *res nullius* and that which was 'common to mankind', *res communes*.

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While these concepts applied equally to natural resources such as animals, the complexity of this division was found predominantly around ownership of water, including groundwater. Overall surface water in rivers and lakes was regarded as *res communes*, which had the effect that it could not be appropriated for private use and use thereof was common to everyone [1].

The certain natural resources were considered common property to be used by all citizens. For example, the Institutes of Justinian state "[t]he things which are naturally everybody's are: air, flowing water, the sea, and the seashore." In addition, Roman law treated navigable waters and their associated uses-particularly commerce and fishing--in a different manner than nonnavigable public or private watercourses. Roman law sought to preserve use of navigable waterways for the public benefit [2].

Aspects of the Justinian notion of common ownership appeared in English common law with the advent of Magna Carta in 1215. The particular rights guaranteed by Magna Carta enlarged the public's interests in navigable waters. Wilkinson sees this English notion of *jus publicum* or public rights of use--the notion that the shores and submerged beds of navigable waters were held in trust by the English Crown for the benefit of all people--as the most direct source of the traditional American public trust doctrine.

Meinzen-Dick and Nkonya [3] state, Under this doctrine, control over water is an aspect of sovereignty, which the state cannot give up. The government can assert its rights over water by controlling the water allocation directly through government agencies, or by acting as a licensing or leasing agent for granting water rights.

After Indonesia independence in 1945, government use *Algemeen Water Reglement* (AWR) 1936 (Nederlands-Indie Water Law) to governance water irrigation in Indonesia. After thirty year independence, Indonesia have law about water Law No. 11 of 1974 on Irrigation. Irrigation Law served as the main instrument for water management. Law No. 11 of 1974 is a very broad and simple law, which consisted of only 17 Articles. Irrigation Law have social point of view of water.

Water Resources Reform , propose substitute Law No. 11 of 1974 which out of date with water new paradigm. Draft Law on Water Resources rejected by citizen has given rise to many controversies as an instrument to legalise privatisation of the water sector. In February 19, 2004 National Parliament to be enacted Law No. 7 of 2004 on Water Resources. Parliament Member from Reform Fraction submitted note objection (*minderheidsnota*) in General Session of the National Parliament and asked delay ratification of Water Resources Law. After enactment, some civil society organization and individual citizen petitioned for judicial review to the Indonesian Constitutional Court.

From that backgorund, research question in this article is how discourse of water resources law in Indonesia happened. The article objective are interpretation and analyze discourse and argumentation all party in conflict about water resources law.

2. Research Methodology

This article analyze discourse of water resources law with text citizen opinion, press news, judicial record use

DHA Wodak method. This article based on exploratory case study of event related to the water resources law in Indonesia, as reported by news media, organization web sites, organization documents, academic articles, books, and constitutional court sessions record with define Wynsberghe and Khan [4] multiple data source and regard boundedness during period 2002-2015.

Discourse-historical approach (DHA Wodak) is part of CDA (critical discourse analysis) method. In contrast to other paradigms in discourse analysis and text-linguistics, CDA focuses not only on texts, spoken or written, as objects of inquiry. Fairclough & Kress state, A fully "critical" account of discourse would thus require a theorization and description of both the social processes and structures, which give rise to the production of a text, and of the social structures and processes within which individuals or groups as social-historical subjects, create meanings in their interaction with texts. Consequently, three concepts figure indispensably in all CDA: the concept of power; the concept of history; and the concept of ideology [5].

Wodak [6] draw the specific discourse-analytical approach is three-dimensional: after (1) having established the specific contents or topics of a specific discourse, (2) the discursive strategies (including argumentation strategies) are investigated. Then (3), the linguistic means (as types) and the specific, context-dependent linguistic realizations (as tokens) are examined (4).

There are several discursive elements and strategies which, in our discourse analytical view, deserve to receive special attention. We orientate ourselves to five constitutive questions: Four salient characteristics of the DHA emerged in this research project: (1) interdisciplinary and particularly historical aims and interests; (2) team work; (3) triangulation as a methodological principle; and (4) an orientation towards application.

In the discourse-historical approach the connection between fields of action Wodak follow Girth, genres, discourses and texts is described and modelled. Although the discourse-historical approach is indebted to critical theory, general social theory plays a negligible part compared with the discourse model mentioned above and historical analysis: context is understood mainly historically.

Wodak [7] follow the *principle of triangulation*, which implies taking a whole range of empirical observations, theories and methods as well as background information into account. Triangulatory approach is based on a concept of 'context' which takes into account four levels:

1. the immediate, language or text-internal co-text and co-discourse.
2. the intertextual and interdiscursive relationship between utterances, texts, genres and discourses.
3. the extralinguistic social variables and institutional frames of a specific "context of situation".
4. the broader sociopolitical and historical context, which discursive practices are embedded in and related to.

3. Result and Discussion

3.1. Irrigation Law of 1974

Law No. 11 of 1974 on Irrigation served as the main instrument for water management. Law No. 11 of 1974 is a

very broad and simple law, which consisted of only 17 Articles and supported by Basic Agrarian Law No. 5 of 1960. One of its key issues is that the utilisation of inter-sectoral water uses is to be coordinated by the Minister responsible for water resources. Law No. 11 does not explicitly mention 'water rights' nor characterise or categorise any of such rights. The only thing that may somewhat be comparable to a form of 'water exploitation right' is Article 11, which requires private parties to obtain a license if they are to carry out a water exploitation project. Paragraph two of Article 11 emphasized that all forms of exploitation must be conducted with the spirit of 'joint enterprise' and 'familial principle' [8].

This law is implemented further by 7 (seven) Government Regulation (GR). List of Government Regulation (Peraturan Pemerintah) below:

- a. GR No. 6 of 1981 on Exploitation Cost Contribution and Maintenance of Irrigation Infrastructure,
- b. GR No. 22 of 1982 on Water Governance,
- c. GR No. 23 of 1982 on Irrigation and Drainage,
- d. GR No. 5 of 1990 on Jasa Tirta Public Company,
- e. GR No. 20 of 1990 on Water Pollution Control,
- f. GR No. 42 of 1990 on Otorita Jatiluhur Public Company,
- g. GR No. 35 of 1991 on River.

3.2. Water Resources Law of 2004

A draft Law on Water Resources formally submitted by The President to the Parliament in October 2002. The Articles were later approved by the Commission IV of the National Parliament on 11 February 2004 and have been adopted by the General Session of the National Parliament to be enacted by February 19, 2004.

Water Resources Law has 100 Articles divided into 18 chapters. The Law focuses on water conservation, infrastructure and its management. It targets surface and groundwater and has opened the door for public participation. Key issues in the resources water law are right to water and water right. The Law does not explicitly mention the human right to water. However, the right to access water for minimum daily basic need is guaranteed by the state through Article 5.

Water right under the law divided to somewhat ambiguous as it uses almost similar terms for different contexts. Al'Afghani [8] asserted, the term *Hak Guna Air* (the rough English translation would be water usage right) is used to characterise what is generally known as 'water rights'. This right is interpreted as a general right which comprises of two other derivative rights, namely *Hak Guna Pakai Air* (water use right) to describe water rights for daily subsistence and *Hak Guna Usaha Air* (water exploitation right) to refer to water rights for commercial purposes.

This law is implemented further by 7 (seven) Government Regulation (GR). List of Government Regulation below:

- a. GR No. 16 of 2005 on Development of Drinking Water Supply System (SPAM),

- b. GR No. 20 of 2006 on Irrigation,
- c. GR No. 42 of 2008 on Water Resources Management,
- d. GR No. 43 of 2008 on Ground Water,
- e. GR No. 38 of 2001 on River,
- f. GR No. 73 of 2013 on Basin,
- g. GR No. 69 of 2014 on Water Rights.

3.3. Macro Context of Water Resources Reform in Indonesia

Dublin Conference (International Conference on Water and the Environment [ICWE]) in 1992, United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, Brazil, in June 1992, the 1993 World Bank Policy Paper on water sector, and International Action Programme on Water and Sustainable Agricultural Development (IAP-WASAD) FAO have same message. The message highlighted by all these efforts is that water is an increasingly scarce and valuable resource. Of principal concern is the failure to recognize and accept that there is a finite or even diminishing supply of water. The consensus is that the growing water scarcity and misuse of fresh water pose serious threats to sustainable development [9].

Competition among agriculture, industry and cities for limited water supplies is already constraining development efforts in many countries. As populations expand and economies grow, competition for limited supplies will intensify and so will conflicts among water users.

Irrigation Law insufficient with water condition in 20 century. The imbalance between the availability of water that continues to decrease and the need for water that continues to increase made. Idea to water reform in Indonesia initiated since the early 1990's. Board of National Development and Planning (*Badan Perencanaan Pembangunan Nasional* -BAPPENAS) held the International Seminar on the Integrated Water Resources Development and Management for Sustainable Usage in Cisarua, West Java, 29 October - 1 November 1992. The Ministry of Public Works conducted the National Symposium on Water Resources Management at Cilegon, West Java on 19-20 July 1993. [10].

Sponsored by FAO and UNDP, at 1993 study about national water resources policy made action plan in title Indonesia's Draft National Resources Policy Action Plan 1994-2020. The action plan consist 7 (seven) policy divided to water utilization, water quality, water resources development, and water resources management structure. Each policy implemented in on 4 (four) acts i.e. water resources management program, socio-economic & finance program, environmental management program, and legislation & administration program. Policy number 5 is to enhance private sector and community participation in financing of water resources development. In legislation and administration, the policy was made with to draft legislation to give User's groups legal status before the law and to enable them to function in a corporate capacity 2. To draft legislation to enforce the beneficiaries' responsibility for O&M (operation and maintenance) of main water works 3. To draft legislation enabling and motivating the public, including financing institutions to participate in financing water resources management and development and establishing relevant procedures and requirements [9].

The 1997 economic crisis makes Indonesia experiencing balance of payments deficit that caused the debt to the IMF (International Monetary Fund) loan and have to implement the framework and macroeconomic policies stated in Memorandum of Economic and Financial Policies in Letter of Intent (LoI) agreement. The World Bank's *policy-based lending* to Indonesia is closely coordinated with the overall reform agenda that is underway with support from the IMF, ADB, Japan and our other development partners. There have been four adjustment loans to date: (a) The first *Policy Reform Support Loan (PRSL)* - \$1 billion (approved and declared effective on July 2, 1998); (b) *Policy Reform Support Loan II (PRSL II)* - \$500 million (approved May 27, 1999 and made effective on June 17, 1999); (c) *Social Safety Net Adjustment Loan* - \$600 million in two tranches (approved May 27, 1999 and to become effective in January, 2000); and (d) the *Water Sector Adjustment Loan (WATSAL)* - \$300 million in three tranches (approved May 27, 1999, effective and first tranche released in June 1999) [11]. PRSL plans to improve the water resources management in Indonesia. World Bank will not provide further loan if there is no large scale overhaul of the water resources and irrigation sector [12].

Water resources governance reform begins with the issued of a Presidential Instruction Number 3 of 1999 on Renewal of Irrigation Management Policy. The Presidential Instruction being early for the imposition of fees the use of water for irrigation and this became the basis for the rise of Government Regulation (GR) No 77 of 2001 on Irrigation. Coordinating Ministry for Economic Affairs Decree of 2001 on Direction of National Water Resources Policy as continuation of the water resources reform until the enacted Water Resource Law No 7 on 2004. Water Resource Law have new paradigm like Dublin Principle, seen water has social, environment, and economic function, not only social value like Irrigation Law.

Many parties accused the Law as an accessory to an international effort to conduct water privatisation. The Law does not explicitly mention the human right to water. However, the right to access water for minimum daily basic need is guaranteed by the state. Salient character of the Water Resources Law shall result in a lesser degree of private entities' participation, increased subjection to government scrutiny and constitute heavier liabilities and responsibilities towards its consumers. It appears that the drafters intend to avoid the tendency that the Law was created to allow privatisation by adding the word "*Guna*" (use) in the Hak Guna Usaha (water use right/water exploitation right). Economic value more than social value in Water Resource Law.

3.4. Discourse of Water Resources Law in Indonesia

The DHA Wodak [7] after having identified the specific *contents* or discourse topics of a specific discourse, field of action, and genres, discursive strategies are investigated., and the linguistic means (as types) and context-dependent linguistic realization (as tokens) are examined. The relationship between fields of action, genres and macro-topics in the area of political action.

Field of Action

Field of action Girth in Wodak [5] indicates a segment of social reality which constitutes the 'frame' of a discourse. Different fields of action are defined by different functions of discursive practices. Field of action in discourse of water resources law in Indonesia can analyzes from arena of political action taken by the actors, we

differentiate among three different political functions as three different fields.

Political action starting from the draft law on water resource session by the president (government) and DPR (national parliaments) in House of Representative building. The Articles were later approved by the Commission IV of the National Parliament and have been adopted by the General Session of the National Parliament to be enacted called by (1) filed of action on legislation.

Civil society refuse water resources law through demonstration, opinion in public sphere included press, or academic activities can be grouped into the field of action on (2) opinion and will formation. While the act of lodges request for judicial review to the Indonesian Constitutional Court called (3) judicial.

Genres

According Norman Fairclough, a 'genre' may be characterized as "a socially ratified way of using language in connection with a particular type of social activity". Field of action on legislation have genres, for example speeches and contributions of Member of Parliaments, recommendation, general opinion of fraction, tanggapan dan pertanyaan anggota dewan, pendapat umum fraksi, Minister speeches. Field of action on opinion and will formation have genres, for example protest, press opinion, academic article, research, press conference, press release, media interview. Field of action on judicial have genres, for example claims, testimony, evidence, advocacy.

Discourse Topics

Discourse topics of discourse of water resources law in Indonesia from three field of action and numerous genres is that water value and Rights of control water by the state. Sub topics can seen in Table 1.

Table 1: Selected discourse topics of discourse of water resources law in Indonesia

Macro Topic	Water value	Rights of control water by the state
Sub topics	<ul style="list-style-type: none"> - Social value - economic value - environment function 	<ul style="list-style-type: none"> - right to water - water right - Rights of control water by the state - Neo-liberalism - State as Provider - Permits

Discursive Strategies

By 'strategy', Wodak generally mean a more or less intentional plan of practices (including discursive

practices) adopted to achieve a particular social, political, psychological or linguistic goal. Discursive strategies are located at different levels of linguistic organization and complexity. Discursive strategies actors proponents and opponent water resources law described in Table 2.

Table 2: Discursive Strategies of water resources law in Indonesia

Discursive Strategies	Description
Nomination strategies	<ul style="list-style-type: none"> - <i>Professional anthroponyms:</i> Minister, DPR member (members of parliaments), activist CSO, judicial review applicant - <i>ideological anthroponyms:</i> nationalist, socialist, neo-liberalism, environmentalist - <i>ideological anthroponyms:</i> collectivist, new capitalism
Predication strategies	<ul style="list-style-type: none"> - Government opened the door for commercialization and privatization, neo-liberalism, new capitalism - DPR unindpendent and haste - Nasionalist expel foreigners/ privat sector, human right defenders - Farmers wastefull - PDAM customers wasteful - PDAM inefficient, not transparent, not opennes, unprofessional
Argumentation strategies	topoi : water as <i>res communes</i>
Perspectivation strategies	Power perspective: removing obstacles and reduction of state power (liberalism) versus increase state power (socialism)
Mitigation and intensification strategies	<p><i>Mitigation:</i></p> <p>Govmerment and DPR defend that water resources lawn not foreign orders or foreign interest.</p> <p><i>Intensification:</i></p> <p>judicial review applicant intensif ask to fulfill human right to water, state responsabilites, water resources for the purpose of the overall people's welfare.</p>

Argument Evaluation Analysis

Rational argument as a core of discourse. The style of critical theory that has followed in the footsteps of second-generation Frankfurt School theorists Karl-Otto Apel and Jurgen Habermas operates with a rather strong conception of discursive reason, predicated on the confidence that (1) participants in argumentation can respond insightfully to the *intrinsic force* of reasons, (2) in such a way that consensus that results from discourse has a context-transcending reach [14].

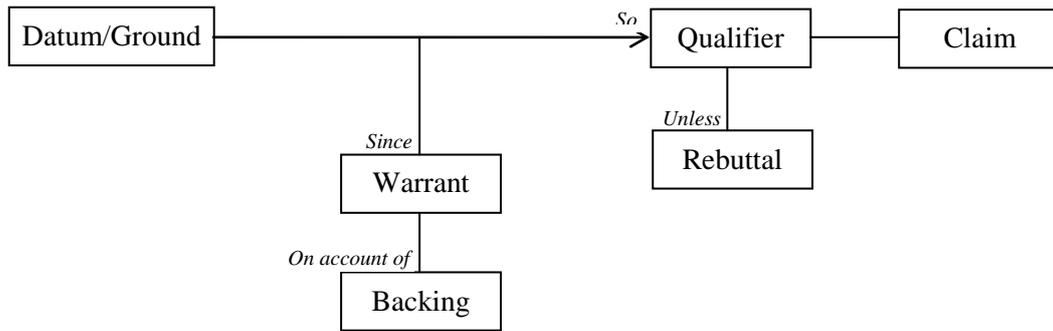


Figure 1: Toulmin Model Argument

Habermas (1987: 25) writes that, from the logical perspective, argumentation "has as its aim to produce cogent arguments that are convincing in virtue of their intrinsic properties". Stephen Toulmin [15] noticed that good, realistic arguments typically will consist of six parts. He used these terms to describe the items. Claim is the statement being argued (a thesis). Data is the facts or evidence used to prove the argument. Warrants is the general, hypothetical (and often implicit) logical statements that serve as bridges between the claim and the data. The Toulmin model can be seen in Figure 1.

Analysis using Toulmin [15] argument analysis to evaluate arguments of the applicant's judicial review. Although the model is not used by Wodak but we felt Toulmin model suitable for the benefit of this research. The result of analysis in Table 3.

3.5. Discussion

Water resources law controversy can be formulated in the debate between the socialist side and the liberalist side. In the Indonesian context, this debate is a long debate in the early formation of the state and the constitution-making. The founding fathers of Indonesia is dominated by those who reject the liberal-capitalist though that to become acquainted with the majority of politicians in the Netherlands at that time. The character of the Dutch colonialist-capitalistic and suck the wealth of Indonesian soil add hatred of the founders of the nation. No wonder the Indonesian constitution building has the characteristics of democratic socialism [16]. Political democracy and economic democracy is the character of Indonesia constitution UUD 1945.

Liberalism, now neo-liberalism different with socialism. The term "neo-liberalism" can be understood as referring to a political project aimed at removing obstacles (such as states with strong welfare programmes) to the

full development of the new capitalism Bourdieu in Wodak and Meyer [13]. As Bourdieu has pointed out, neo-liberal discourses are a significant part of the resources which are deployed in pursuing the neo-liberal project (Fairclough 2001 in Wodak and Meyer [13]. Negara penjaga malam *nacht-wachter staat* (night watchman state) . berlawanan dengan itu, sosialisme memberikan ruang yang lebar untuk peran negara dalam pemerintahan.

Table 3: Element Argument in Rights of control water by the state of water resources

Elemen Argument	Text
Claim	Privatization makes people insecure in obtaining rights to water
Qualifier	Citizens do not get sufficient water
Data	<ul style="list-style-type: none"> • The water flow PAM Jaya / Palyja privatized often not smooth, yellow water, smell. must pay but the water does not flow, if not pay fined (Sumiati testimony at the Constitutional Court in 2005). • In Klaten district, a lot of springs and wells drill PT. Tirta Investama was made exactly in the middle several springs that, so some springs that exist in our region water discharge decreased dramatically, whereas our lives to sufficient irrigation facilities rely on these springs (testimony Sumartono in the Constitutional Court in 2005). • In Cidahu and Cicurug West Java, shrinking water flow, so that the fields and wells dry because of excessive exploitation of water resources by a number of companies of bottled water (news KBR68H.com 2009).
Warrant	Overall surface water in rivers and lakes was regarded as <i>res communes</i> (commons property)
Backing	<ul style="list-style-type: none"> • Article 33 (3) UUD 1945: Soil and water and natural wealth contained therein shall be controlled by the state and used for the welfare of the people to the utmost • Articles 28C (1) UUD 1945: Everyone shall be entitled to develop themselves through the fulfilment of their basic necessities, receive education and benefit the science and technology, art and culture, to improve the quality of their life and for the welfare of the mankind. • General Comment No. 15, CESCR, 2002: “The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, reduce the risk of water-related disease and provide for consumption, cooking, personal and domestic hygienic requirements”.
Rebuttal	Management of natural resources by the state is often inefficient

Negara tidak hanya melakukan regulasi

In other hand, The formulation of economic democracy is found in article 33 UUD 1945, before the amandement had 3 (three) verse now has five verse as a result of constitution amandement. In Articiel 33(2), materialize the economy based on ‘collectivism’ and ‘familial principle’, the Constitution holds that production sectors that are vital to the State and that affect the livelihood of a considerable part of the population are to be controlled by the State. Especially on the issue of water resources, article 33(3) states that “Soil and water and natural wealth contained therein shall be controlled by the state and used for the welfare of the people to the utmost”.

Suteki [17] concluded that the enacted of water resources law prove that political law about the right of control by state in water resources law denying values of social justice mandate when the meaning of the right of control water by state only as a provider and regulator on water resources management. Suteki states the privatization of water resources management contrary to sosial justice and jeopardize people’s access to water.

In the same case, The Constitutional Court had invalidated Law No.20 of 2002 on Electricity in its entirety because the unbundling of electricity production and the provision of such service by private parties made it impossible for the State to control the sector. The same Court had annulled several Articles on Law No. 22 of 2004, which ‘authorise’ enterprises to undertake exploration and exploitation of the Oil and Gas Sector and relinquish oil and gas price determination to the market’s mechanism. According to the Court, the ‘authority’ to undertake exploration and exploitation lie in the hands of the government and it cannot be delegated to private entities. Private entities can act only as a partner to the government through concession contracts.

According to that Constitutional Court decision, the meaning of the right of control water by state can be interpreted as the rights of control water by the state made in the form of policies (*kebijakan -beleid*) and administrative action (*pengurusan -bestuursdaad*), regulation (*pengaturan -regelendaad*), management (*pengelolaan -beheersdaad*), and supervision & monitoring (*pengawasan -toezichthoudensdaad*) for the purpose of the welfare of the people to the utmost. Fifth state’s role is not meant as a nity but interpreted as a stratified based on their effectiveness to achive the prosperity of the people.

According Constitutional Court (Mahkamah Konstitusi -MK), form of state’s control in first rank and most important is the state manage directly over natural resources. Second rank of state’s control is policies and administrative action. Third rank of state’s control is regulation and supervision & monitoring.

The strength of the arguments of the applicants of water resource law judicial review made MK decide to cancel of Water Resources Law of 2004 and restore setting to Irrigation Law of 1974.

4. Conclusion and Recommendation

4.1. Conclusion

1. Water resources regulation must respect, protect, and fulfill human right to water for people.
2. Rights of control water by the state ensure the fulfillment of the right to water for the benefit of citizens

live healthy and prosperous.

3. Rights of control water by the state made in the form of policies (*kebijakan -beleid*) and administrative action (*pengurusan -bestuursdaad*), regulation (*pengaturan -regelendaad*), management (*pengelolaan -beheersdaad*), and supervision & monitoring (*pengawasan -toezichthoudensdaad*) for the purpose of the overall people's welfare.
4. Government as state trustee right over water can involve private sector or individual meeting water needs through government permits, licenses, or concession.
5. Citizen participation is still lacking in the decision making on water policy.

4.2. Recommendation

1. Right to water should be a major consideration in the regulation of water resources with due respect to environmental sustainability.
2. The economic function of water should be placed under the interest of water as a human right and made restriction on the value of the benefits derived from the management of water resources so as not be economic commodity.
3. Granting permission for extraction and exploitation of water at water sources in surface or groundwater (springs, rivers, basin, lakes, reservoir, groundwater reserves) must go through the approval of the citizens and monitored regularly by the obligation to conduct an open and periodic reporting.

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