

MODERNIZATION OF INDONESIAN WATER LEGISLATION

LESSONS LEARNED WITH THE DUTCH ASSISTANCE IN THE LEGISLATION PROCESS

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Samenvatting

Voor de aanpak van de waterproblemen in Indonesië is de nieuwe Waterwet van 2004 het richtinggevende kader. De uitwerking van die wet in government regulations is door de auteur ondersteund in de periode 2002-2010. Dit artikel geeft een impressie van zijn waarnemingen rond de organisatie en uitkomst van het wetgevingsproces. Ook zijn enkele lessen geformuleerd die gebruikt kunnen worden bij de ondersteuning van andere deltalanden. De belangrijkste lessen zijn de volgende.

Een luisterende houding is essentieel voor het verkrijgen van onderling respect en vertrouwen. Van groot belang is ook respect voor het institutioneel en wettelijk kader van het betreffende land. Introductie van elementen van het eigen bestel is meestal niet opportuun. De organisatie van de ondersteuning in het wetgevingsproces vereist maatwerk. Enkele korte missies per jaar kunnen al toereikend zijn. In alle gevallen is continuïteit in de begeleiding essentieel.

Introduction

Like many other Delta countries in the world, Indonesia has severe water problems: floods in downstream areas during the rainy season, water shortages in the dry season, and pollution of surface water and ground water. A proper institutional and legal framework for the water resources is essential for tackling these main problems. After the fall of the Soeharto regime in 1998, Indonesia started an institutional reform process with the focus on decentralization. In the same time a reform process of the water sector was started. The result was the new water law of 2004, which replaced the old one from 1974. Based on the new law, implementing government

regulations had to be established.

The author assisted in this part of the legal process during the period 2002-2010.¹ The objective of this paper is to give an impression of his experiences in this process.

A comprehensive assessment of the modernization of the water legislation can be found in a review report commissioned by the Dutch Water Governance Centre.

¹ By the start of the assistance in 2002 a draft of the new water law was already available and sent to the parliament. So, the assistance was focused on the drafting process of the different implementing government regulations, which had to be made based on the new law. The TA was done in two/three missions of three weeks per year.

The report can be downloaded from the WGC-website: www.watergovernance-centre.nl

The structure of the paper is as follows. The next paragraph provides some background information to set the scene. The subsequent paragraph outlines the old and new water legislation. This is followed by some observations about the organization and the outcome of the legislation process. The final paragraph formulates some lessons learned, which can be used for assistance to other Delta countries.

Some background information

Indonesia is a vast country with over 17.000 islands and is therefore also well-known in the Netherlands as 'Gordel van

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Smaragd'. The country has about 240 million inhabitants. 120 million of them are living on Java, the most densely populated and the most important economic and political island. It has been like that since the long colonial domination by the Dutch. This came to an end a few years after the end of the second world war in 1949 after big international pressure. The country then started a new era under the leadership of Soekarno and later Soeharto. Last mentioned was president from 1965-1998. He ruled the nation in a dictatorial way without real influence of the parliament and respect for the rule of law. The focus during this era was on economic development. Part of that was the development of infrastructures in different sectors. The water sector was one of them. Especially big dams/reservoirs and irrigation systems were developed, mostly with international technical assistance. At the beginning, Dutch assistance was not welcome. Normalization of the mutual relation started in the eighties but broke down in the nineties due to some Dutch critical statements about the political system.

The last decade the cooperation has been improved and intensified, based on a Memorandum of Understanding (MOU). The first MOU (2000-2005) was still project and technical oriented with only little mutual relation. Under the second MOU (2006-20011) the focus was more on themes like water safety, water supply and sanitation, and food security. The governance component did not form an integral element in these themes. The assistance of the author took place mainly under the umbrella of a Dutch funded Water and Sanitation Program of the World Bank. In the upcoming renewed MOU (2012-



Photo 1. The vulnerable coastal zone of Jakarta. Floods and bad water quality are serious threats for the poor people who are living here.

2016) governance as a cross-theme will be explicitly part of it.

Outline modernization water legislation

Old water legislation

To fully understand the new Indonesian water legislation, it is useful to place it in a historical context. In short, the context is as follows.

Water management has always been the responsibility of the ministry of Public Works. Under the supervision of this traditionally strongly infrastructural oriented ministry, the Law on Water Resources Development came about in 1974 (Law 11/1974).² The law stands out for its con-

² During the colonial period the Dutch "Waterreglement" of 1936 was the legal frame-

ciseness (it has only 17 articles), but is nevertheless very ambitious. As appears from the preamble, its aim was to create a framework for the development of water resources management, comprising river basins, irrigation, lowlands, water supply and water pollution control. In reality, the law's scope is limited. It only focuses on surface water. Groundwater was seen as a mineral resource and therefore the responsibility of the Ministry of Energy and Mineral Resources. Another important limitation is that the law only relates to the quantity aspects of surface water, with a focus on irrigation systems. This is not strange, because self-sufficiency in the cultivation of rice has traditionally political priority. The focus on irrigation systems is further limited to the develop-

work for the water resources.

Photo 2. Dam collapse situated in a densely populated area of Jakarta. Operation and maintenance of water infrastructure needs more attention.



ment dimension and not focused on the management dimension (operation and maintenance).

The water law of 1974 is a framework act. That means that the different issues are provided only in headlines. The substantive elaboration had to be done by implementing government regulations and underlying ministerial regulations. These regulations have come about in a phased

manner in the course of years. The most important government regulations are: PP³ on Water Resources Management (PP 22/1982), PP on Irrigation (PP 23/1982), PP on Lowland Water resources Management (PP 27/1991), and PP

³ The Indonesian term for (draft) government regulation is: (ranching) peraturan pemerintah.

on River (PP 35/1991).

It may be clear that the long process for establishing the government regulations was a big constraint for an effective implementation of the law in practice. In reality the concept of the rule of law did not play an important role during the Soeharto regime. In essence, in practice the focus was on development of water resources infrastructures with little

attention to operation and maintenance. Furthermore the institutional system was very centralized (top-down approach) with little attention to administrative coordination with the regional/local government (provinces, districts/cities) and almost no attention to a participative approach.

The new law has the objective to advance a coherent, integrated and open approach of the different aspects of water resources management in a sustainable way and with the river basin approach as leading principle. To achieve this goal, the law provides a number of organiza-

participation, a water resources information system and investigation.

Some notable characteristics of the new law

The law has become a true management law. It is not primarily about the deve-

ESTABLISHING SEPARATE REGULATIONS HAS THE RISK OF CREATING OVERLAP

New water legislation

The Water Law of 1974 was replaced in 2004 by a new water law: Law on Water Resources (Law 7/2004). This new law is characterized by far-reaching decentralization of administrative and financial competences in the water sector. This is a direct result of the Law on Regional Autonomy (Law no. 22/1999) and in relation to this the Law on Fiscal Equalizing between Central and Regional Governments (Law no. 25/1999). Both laws provide for far-reaching administrative and financial autonomy of the districts and municipalities. Both laws are the result of Indonesia's aim, instigated after the fall of the Soeharto regime, to distance itself from the old centralistic administrative system and to give more administrative and financial autonomy to the regional authorities. In other words, the creation of autonomy for regional government has disabled the old system for coordination, which relied heavily on the hierarchical relationship between central, provincial, and local governments.⁴

tional and substantive facilities. The first aspect concerns the formulation of the distribution of authorities and responsibilities between the various governments involved in water management. The second aspect is aimed at providing the competent authorities with strategic and operational legal instruments to enable them to perform their tasks properly. The integrated approach also entails that society is offered the possibility to participate in all stages of the decision making process.

The law contains 98 articles and is consequently far more substantial than the old law of 1974, which only had 17 articles. The larger scope of the law is a result of the fact that in the new law more subjects have been provided, also in more detail. A number of subjects, which were only provided for in regulations, are now included in the law itself. The law also contains several entirely new subjects such as community

development of water infrastructure and irrigation networks, but about creating conditions for a sustainable management of the water resources and the irrigation networks.

The scope of the law is aimed at water management in all its aspects: surface water and groundwater, both in quantitative and qualitative terms. In other words, a coherent integrated approach. This approach manifests itself also in the emphasis on the importance of the basin approach. Water resources management is based on a river basin approach. A strategic plan must be drawn up for every river basin management territory, in which all relevant aspects should be considered and weighed in relation to each other.⁵

All the civic organizations and the communities involved in water management, are given the opportunity to participate in all stages of the decision making process.

Alongside the social function of water (expressed in the law by the stipulation

are replaced in 2004 by Law 32/2004 and law 33/2004. An important new element is the strengthening of the coordination role of the Governor of the province and furthermore his tasks as central government representative.

⁵ The external coordination (especially with spatial planning) is addressed weakly in the planning structure arrangement.

⁴ The decentralization laws of 1999

that water use for basic daily needs and for traditional agriculture in existing irrigation systems is free of license and free of charge), the economic function of water is now also emphasized. This gives voice to the fact that water (surface water and ground water) is a scarce commodity, which in principle has to be paid for. Although the government remains responsible for a fair allocation of water for various social purposes, the option of further involvement of the market sector is emphatically opened.

Although the law has increased considerably in scope compared to the old law, the subjects contained in the law are only provided for in headlines. Consequently the law is a typical framework act. This approach is in line with modern legislation principles in complex policy areas. The elaboration of the law has to take place in government regulations and based on that in ministerial regulations for the more technical issues. The decision was made to do this for the different sub-sectors of the water resour-

about water quality and control of water⁶ has not yet been started.

Establishing separate regulations has the risk of creating overlap, duplication and sometimes even conflicting regulations. In fact, this risk has occurred indeed. That is a serious obstacle for a transparent and effective implementation of integrated water resources management. For that reason harmonization of the regulations focused on a more integrated approach is absolutely necessary. This issue will return in the next paragraph.

Legislation process

After the general picture of the modernization of the water legislation as such, this paragraph pays attention to some observations about the organization and the outcome of the legislation process.

Organization legislation process

The modernization of the water legislation was part of the so called WATSAL pro-

regulations (water resources management, and irrigation). This work was done by working groups (the so called Pokja-system) with the goal to create a broad support basis under the involved government levels and civic society stakeholders. The WATSAL program expired end 2003. From that moment, the Ministry of Public Works no longer followed this participative approach. The new policy was: first prepare an internal draft in the ministry, followed by interdepartmental discussion and public consultation.

How was the drafting process organized?

The drafting process of the several government regulations was not based on an integral approach. Every directorate in the Directorate-General of Water Resources established its own working group. Officially the coordination between the different working groups was safeguarded by the participation of representatives of the involved directorates and the legal department in the working group. Howe-

THERE IS LITTLE EXPERIENCE WITH MULTI-DIMENSIONAL LEGAL ISSUES

ces in separate regulations. Until now 6 of them are taken into effect, 3 are still under preparation and 1 is not yet started.

The enacted regulations concern the issues: drinking water and sanitation (PP 16/2005), irrigation (PP 20/2006), water resources management (PP 42/2008), groundwater management (PP 43/2008), dam and reservoir (PP37/2010), and river (PP 38/2011).

The regulations still under preparation are about: water resources lowland management, water use right, and natural lake. The review of the existing regulation

gram.⁷ This program focused on the preparation of the draft Law on Water Resources and two implementing government

⁶ This regulation (PP 82/2001) is based on Law 23/1997 on Environmental Management. The review of the PP should be based on both laws (Environmental Management Law and Water Resources Law). Meanwhile Law 23/1997 is replaced by Law 32/2009 on Environmental Protection and management.

⁷ WATSAL stands for Water Resources Sector Adjustment Loan and concerns the plan supported by the World Bank to reform the Indonesian Water Sector.

ver, in practice this coordination mechanism was very weak. An extra constraint was the lack of an overall direction on a Directorate General-level with attention to time planning and mutual consistency of the regulations.

The drafting process was lead by the technical policy directorates. Involvement of the legal department from the starting point was not standard. Besides this, the input from the legal side was weak. The legal specialists did not deliver substantive input with the goal to make a quali-

RESPECT THE ESSENTIALS OF THE LEGISLATIVE CULTURE

tative good regulation in accordance with principles of good legislation as formulated in the Law on Formulation of Laws (Law 10/2004). The legal capacity is very weak. The focus of the legal department is traditionally on advocating and not on legislating. There is little experience with multi-dimensional legal issues.

Another point of attention is the long duration of the drafting process. The main reason is that the working groups did not work on a project basis. Furthermore, personnel changes in the working groups took place frequently. That makes the process unpredictable. It is noted that the external interdepartmental process also took much time due to different opinions of other ministries.

Another aspect that contributes to the long duration is that the drafting process has to start with an academic paper, in which the issues, direction and structure of the regulation are mapped out. This activity is often contracted out and is therefore also costly. The academic paper for the water use right regulation for instance needed more than a year.

A last point of attention concerning the process is the top-down approach. The consequence of the decision in 2003 to stop with the Pokja-system, was that the drafting process was organized based on the traditional top-down approach. So, the input of the technical policy department of the Directorate General Water Resources was dominant. There was no real input from bottom-up. Public consultation took place on the end of the process when the draft regulation was available. That is too

late and also in conflict with one of the principles of the new water law: involvement of the civic society in all phases of the decision making process. This principle also applies to the legislation process.

Outcome legislation process

The outcome of the process as outlined in the previous section is: government regulations with a lot of overlap and duplication. Furthermore almost every regulation is very detailed with often many repetitions of a subject in the successive chapters. That applies especially the chapters about conservation, utilization and control of water damaging power. These three issues are main themes in the water law and are elaborated in all regulations in separate chapters. Due to the close mutual relation between the themes, a lot of articles in these chapters are overlapping and/or doubling, which makes especially these chapters not transparent.

Frequently a chapter ends with an article which stipulates that one or more subjects of that chapter shall be elaborated further in a ministerial regulation. For more technical details this is no problem. However, in practice a reason is often that one has not yet a clear idea about the subject. This is a very doubtful way of working. A clear concept about the mutual relation between the content of a government regulation and a ministerial regulation is lacking. Unfortunately, Law 10/2004 is also lacking to formulate clear articles about this. The result of this all is that the regulations are difficult to read and not transparent.

An extra complicating factor is that the elucidation of the regulations is too general in all cases. That applies especially to the general part of the elucidation. All relevant themes of the regulation are too short outlined with as result that the elucidation has not enough surplus value. The 'article-by-article' part of the elucidation states often: clear enough. That happens also in cases that the article causes interpretation questions.

The outcome of the modernization process of the water legislation is an integrated law for all types of water resources. However the integrated approach of the law does not continue in the implementing government regulations. The decision to make separate regulations for every sub-sector, has lead to regulations with too much overlap and duplication. For that reason the Ministry of Justice and Human Right has called for harmonization of the regulations. The Ministry of Public Works is also convinced now of the necessity and is taking initiatives to formulate a harmonization strategy for the water legislation. It concerns a complex and lengthy project. A roadmap for the harmonization strategy is already available and will be part of the new MOU between Indonesia and the Netherlands.

Lessons learned

This closing paragraph formulates some personal observations and lessons learned from the Dutch assistance to the preparation of the different government regulations, based on the new Indonesian water law of 2004.

In the starting phase of my assistance activities I had the tendency towards looking from a dutch perspective. Giving up such a mindset was necessary for getting a good feeling of what is feasible in the

Indonesian situation. An example is the decision to establish 10 implementing government regulations. Based on the Dutch experiences, it was clear for me that the result at the end of the process would be government regulations with a lot of overlap and duplication. Instead of discussing other options I focused on avoiding overlap and duplication as much as possible. This approach was in some regulations more successful than in other regulations. Many other examples can be given.

The lessons learned which can be used for the assistance to other Delta countries, can be formulated as follows:

Listening attitude. It is obvious that a listening attitude is essential, but in practice people do not pay enough attention to this. The approach “We will tell you what is good and how to handle” is fatal. A questioning attitude (What are the problems) is required. It is important to realize that ‘yes’ does not always mean ‘yes’ and that ‘smiling’ does not mean that they agree with you. Furthermore, useful information will be received more successful in informal contacts.

Respect for other institutional and legal systems. Indonesia has started a modernization process of the water legislation in a transition period in which a shift is made from a centralistic, authoritarian government system to a far reaching decentralized, democratic parliamentary government system. This shift is formalized in the decentralization legislation. The implementation of the new institutional system needs time. All related government levels are still looking for balance in sharing their role. This should be kept in mind by organizing assistance activities. The Dutch institutional system

for water resources is totally different and is more crystallized. So, do not try to transfer the Dutch institutional system to other Delta countries. Follow the institutional system of the other Delta country and focus on strengthening of (horizontal and vertical) coordination mechanisms which can improve the implementation of the institutional system in practice.

The same can be said about the legal system. Respect the essentials of the legislative culture. The editorial way of

sian legislation process is lengthy due to the lack of a project approach. Some short missions per year can be very efficient. However it should be done on a continuing base. That is essential for building up mutual respect and trust.

Assistance and legal training. Organizing legal training courses for strengthening the legal capacity of the legal departments is essential. This should be built permanently in the general capacity building program of the own

STRENGTHENING THE LEGAL CAPACITY OF THE LEGAL DEPARTMENTS IS ESSENTIAL

drafting a law/regulation for instance is often rather circumstantial, which is quite different from the Dutch compact style. Furthermore, do not try to introduce legal instruments which do not link-up with the legal system of the country. The license system for example is the driving regulatory instrument in the Indonesian water legislation for all types of activities concerning water resources. The license is an individual oriented regulating instrument and is labour-intensive. For a lot of types of activities such an individual approach is not necessary. However, introducing the Dutch system of ‘general rules’ for uncomplicated types of activities is a bridge too far now. It is wiser to look for solutions that match with the chosen license system (a simple standardized license process).

Organizing legal assistance. The legal assistance can be organized in different ways and depends on how the legal project is organized. The Indone-

ministry. Technical assistance can be given as a part of that program. Organizing an overseas legal training course for a whole group is not wise. The most important reason for that is the lack of connection with the own legal system. A practical reason is that such a course is very costly. Something different is an overseas trip for getting more understanding of developments in the European institutional and legal system. That can be useful and contribute to learn from each other.

Legal assistance and Water Mondial program. ‘Governance’ is one of the themes of the Dutch program Water Mondial. The legal component is an integrating element of this theme and needs also full attention in the assistance to the Delta countries.