

The State Retreats and Never Returns: Consequences of Neoliberal Reforms on Administrative Law Protection in Indonesia

By

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1. Background

In neoliberal reforms, to maximum extent possible, goods and services should be provided by private entities and not by the state. As such, the role of the state is minimized into the creation or preservation of institutional frameworks relevant for such purpose. The purpose of legal structure is noneother but to ensure the proper functioning of markets “...by force if need be”.¹ Thus, neoliberalism favors the minimum state, as Harvey puts “...state interventions in markets (once created) must be kept to a bare minimum because the state cannot possibly possess enough information to second-guess market signals (prices) and because powerful interest groups will inevitably distort and bias state interventions (particularly in democracies) for their own benefit.”²

How can individual (and the corporation for the matter) gain access to the market in order to realize the neoliberal vision of the human nature? Privatization, deregulation, liberalization, contracting out and corporatization have become the means, in which individuals can have more access to market. Therefore, they form an integral part of neoliberal reforms around the globe.

What is left for the state? In the US and Europe it seems, the vision of a true *laissez-faire* state never materialized. In the UK, it was first thought that regulation is something temporary in nature, a mechanism for ‘holding the fort’ until competitive forces arrives.³ But clearly, this is not the case. Instead, regulation is there as something more permanent.⁴ As Majone said: “...neither American deregulations nor European privatizations can be interpreted as a retreat of the state, but rather as a redefinition of its functions.”⁵

Thus, in the northern hemisphere, the state is not in retreat, it merely reconfigured itself. The advent of new public management is accompanied by a rise of the regulatory state, whose function is not in delivering goods and services, but acts, among other, as a referee, standard-setter, rule-maker and enforcer to those who does. Oftentimes, some of the functions are done through “independent” commission or regulatory bodies with parliamentary oversight. In this regard, the regulatory state are supposed to be as transparent, as inclusive and as accountable – and even more so, than the positive state.⁶ It is to be noted that the objectives of regulation, Prosser asserts, is not only in efficiency-

¹ Harvey, D., *A brief history of neoliberalism* (Oxford University Press 2005)

² Ibid

³ Littlechild, S.C. and Great Britain. Dept. of, I., *Regulation of British Telecommunications' profitability : report to the Secretary of State, February 1983* (Department of Industry 1983)

⁴ Prosser, T., *Law and the Regulators* (Oxford University Press, USA 1997)

⁵ Majone, G., ‘The rise of the regulatory state in Europe’ 17 *West European Politics* 77

⁶ Palast, G., Oppenheim, J. and MacGregor, T., *Democracy and Regulation: How the Public Can Govern Privatised Essential Services* (Pluto Press 2002) also Lodge, M. and Stirton, L., ‘Regulating in the Interest of the Citizen:

Towards a Single Model of Regulatory Transparency’ 50 *Social and economic studies* 103 Stirton, L. and Lodge, M.,

maximization, but also has equity and social considerations, such as in protecting citizenship and providing some measures of affirmative action.⁷ This is evidenced by some duties of universal access vested in British utility regulators and various public interest discretionary power vested on the regulator.⁸

The reconfiguration of the role of the state, from provider to regulator, both in the US, UK and Australia, is accompanied by the reconfiguration of the role of its public law, particularly administrative and constitutional.⁹ One of the function of administrative law is to protect the citizen amid the monopoly of force by the state.¹⁰

This paper argues by way of legal analysis that such reconfiguration does not occur in Indonesia. The state thus retreats and does not redefine its role. When services are privatised, corporatised or contracted out, regulation has either been extremely minimal or even absent. I am not suggesting that the state is attempting to reconfigure itself but is lacking in regulatory capacity, rather, I am suggesting that the state avoids in reconfiguring itself as a regulatory state.

Administrative protections granted to citizen which were available under status quo are no longer available after neoliberal reforms take place. As a consequence, citizen are left without avenues to obtain redress and are left-out from the decision making processes in public service functions which are transferred to non-state actors.

I offer two explanation for this phenomenon. First, there are political contestation taking place between the judiciary and the government, in which, at the constitutional level, the transformation of state functions from provider to regulator is rejected while at the same time, privatization, outsourcing, contracting out and other forms of neoliberal reforms are occurring “in disguise” through government policy and actions. Secondly, governance reforms – supported by various civil society actors -- which demands more accountability from the government, occurs in conjunction with such neoliberal reforms. But since the emphasis of such governance reform is on the state instead of non-state actors delivering public service functions, less efforts are taken in holding non state actors accountable and in affording citizen with same level of protection granted under the status quo.

2. Retreat of the state in Batam Water Privatization

Water services is an interesting example on how the state repositions itself following neoliberal reforms, because of its character as a natural-legal-local monopoly.¹¹ As competition is not

‘Transparency mechanisms: building publicness into public services’ 28 *Journal of Law and Society* 471 Lodge, M., ‘6. Accountability and transparency in regulation: critiques, doctrines and instruments’ *The politics of regulation: institutions and regulatory reforms for the age of governance* 124

⁷ Prosser, *Law and the Regulators*

⁸ Ibid also Al'Afghani, M.M., ‘The Role of Legal Frameworks in Enabling Transparency in Water Utilities Regulation’ (PhD Thesis, University of Dundee 2012)

⁹ See Graham, C. and Prosser, T., *Privatizing public enterprises : constitutions, the state, and regulation in comparative perspective* (Clarendon Press 1991) also Aronson, M., ‘A Public Lawyer's Response to Privatization and Outsourcing’ in Michael Taggart (ed), *The Province of Administrative Law* (Oxford, UK: Hart Publishing 1997)

¹⁰ Grimm, D., ‘The State Monopoly of Force’ in Wilhelm Heitmeyer and John Hagan (eds), *International Handbook of Violence Research* (Springer 2003) Public officials and the bureaucracy derives their legitimacy on the use of such power if they acted in the “public interest”. See Weber, M., Mills, C.W. and Gerth, H.H., *Politics as a Vocation* (Fortress Press Philadelphia 1965)

¹¹ The monopoly characteristics of a water utility is usually natural (technically indivisible), local (a “regional” service) and legal (the monopoly exist in a legal sense through transfer of authorities from the state). See Al'Afghani, ‘The Role of Legal Frameworks in Enabling Transparency in Water Utilities Regulation’

possible or minimal, this kind of monopoly would require some sort of regulation in order to achieve efficiency¹² or in protecting customer.¹³ As full commodification is not possible and that water has a 'contested' nature, what has been emerging elsewhere is not only a privatization but a privatization accompanied by regulation.¹⁴

However, this is not the case with Batam, in which privatization is not accompanied by a reconfiguration of the state's role as a regulator. The case of Batam's concession is an illustration on how the judiciaries were forced to apply an inadequate legal framework to adjudicate emerging regulatory problems, with the risk of over-interpretation and a compromise to legal certainty.

The case involves PT Adhitya Tirta Batam ("Provider") who is awarded a 25 year concession¹⁵ contract by the Batam Authority. The Provider is obligated to supply drinking water to the consumer in the concession area, provide its own financing, build new water storage, reservoir and pumping facilities as well as new transmissions and distribution networks and pay lease-fee for the use of incumbent network in the amount of 15% of the provider's dividends.¹⁶ At an interview with a member of the BPPSPAM, it was revealed that this concession is not accompanied by any regional-by-law specifically designated to regulate the contract. Hence, the said cooperation contract and other rules at the central level are the only governing laws.

The trouble begins when in 2008, around 4500¹⁷ houses which have already been occupied, failed to be connected to the network. The provider claim that it has been facing cash flow¹⁸ difficulties since 2006 and that its proposal to increase tariffs was not approved by the authority. Because of this financial problem, the Provider sent a letter to the authority, declaring that they will not be able to connect those on the waiting list, without comprising its service towards existing consumer.

Since the provider were not able to meet consumer demands, housing developers in the contract area had to invest in building infrastructure such as water storage facilities, wells, and purchasing water tanks from the provider. The case was brought – apparently by the developer's association - to the KPPU which subsequently held the provider in violation of the Indonesian Competition

¹² Hantke-Domas, M.P., 'Economic Regulation of Public Utilities with Natural Monopoly Features. A Study of Limitations Imposed by Property Rights from a Legal & Economic Approach' (Dissertation, University East Anglia 2005)

¹³ Hendry, S.M., 'Ownership Models for Water Services: Implications for Regulation' in Aileen McHarg and others (eds), *Property and the Law in Energy and Natural Resources*, vol 1 (Oxford University Press 2010) Hendry, S., 'Scotland's Water-Safe Clean Affordable Public' 43 *Nat Resources J* 491

¹⁴ Bakker, K.J., *An uncooperative commodity: Privatizing water in England and Wales* (Oxford University Press, USA 2003) Bakker, K., 'Neoliberalizing nature? Market environmentalism in water supply in England and Wales' 95 *Annals of the Association of American Geographers* 542

¹⁵ The author does not have the copy of the agreement, but the KPPU (competition commission) termed it with "Concession Agreement". *Putusan Perkara Nomor: 11/KPPU-L/2008 terhadap PT Adhya Tirta Batam* Komisi Pengawas Persaingan Usaha Republik Indonesia. The KPPU Decision however, cited the concession document as *Perjanjian Kersama No. 05/PERJ-KA/III/2007; 01/PKS/HK/III/2007 tanggal 1 Maret 2007 (Cooperation Agreement No. 05/PERJ-KA/III/2007; 01/PKS/HK/III/2007 dated March 1st 2007)*

¹⁶ Ibid p. 6-7

¹⁷ According to the developer's data, the number of houses in the waiting list is 12,781 ibid p.32

¹⁸ The company's account receivable in 2007 was IDR. 38,200,000,000 or around 4.3548 million USD

Law. The KPPU disputed the argument that the provider was short on cash, due to the facts that they pay a large amount of dividends to their shareholders. The provider was charged for (i) discriminating business entities¹⁹, (ii) abusing its dominant position²⁰ and (iii) controlling the production and marketing of goods which results in monopolistic practices.

The case above presented several difficulties.

First, without any specific regulation on the Batam cooperation contract, Batam residents have lack of redress mechanism. The cooperation contract does contain a “duty to connect” but as this contract is only between Batam Authority and the provider, they do not transform into direct legal obligation of the provider towards the consumers. In addition, since Batam residents are not a party to the “cooperation contract” the court will likely dismiss their legal standing to sue for a breach of contract (although undoubtedly they are the most important stakeholders!). The competition law and the KPPU were then perceived as the *forum conveniens* by the consumer, in alliance with the housing developers.

Second Batam consumers at the very end of the pipeline are not business actors. The allegation for ‘discriminating business entities’²¹ was not relevant to them. This charge was later unproven.

Third, the allegation that provider was abusing its dominant position was also irrelevant. The competition law maintains that business actors shall not abuse their dominant position by *a. determining the conditions of trading with the intention of preventing consumers from obtaining competitive goods and or services, b. limiting markets and technology development; or c. bar other potential business actors from entering the relevant market*. None of these clauses apply to the provider. Paragraph (a) does not apply because water is not a competitive good, paragraph (b) does not apply as the case does not deal with the question of market development and (c) also does not apply as no question of business entrance is at issue. This charge was later dropped.

Fourth. Although the two counts above were not successfully argued, the third one does. On the cassation level, the Supreme Court upholds the earlier KPPU Decision which declared that the provider is in breach of the competition law Article 17²²: ‘...controlling the production and or marketing of goods and or services which may result in monopolistic practices or unfair business competition’.²³ The Supreme Court also reaffirm KPPU’s IDR 2 billion fine to the provider and the order to connect to the customer.

The problem with this Decision is that the cooperation agreement actually already makes the provider a *de jure* and *de-facto* monopolist. Article 17 of the Competition Law which prohibit *monopolistic practice* should have been simply irrelevant. Dodging the counter-argument, The

¹⁹ Indonesia, *Undang Undang No.5 Tahun 1999 Tentang Praktek Monopoli dan Persaingan Usaha Tidak Sehat* Article 19.d

²⁰ *Ibid* Article 25.1

²¹ *Ibid* Article 19.d

²² *Ibid* Article 17 states: (1) *Business actors shall be prohibited from controlling the production and or marketing of goods and or services which may result in monopolistic practices and or unfair business competition. (2) Business actors may be reasonably suspected or deemed to control the production and or marketing of goods and or services as intended in paragraph (1) in the following events: a. there is no substitute available yet for the goods and or services concerned; or b. causing other business actors to be unable to enter into business competition for the same goods and or services; or c. one business actor or a group of business actors controls over 50% (fifty percent) of the market segment of a certain type of goods or services.*

²³ *Putusan Perkara Nomor: 11/KPPU-L/2008 terhadap PT Adhya Tirta Batam p.87-88*

KPPU reinterpret the provision of the law by differentiating between ‘monopoly’ and ‘monopolistic practice’. The refusal to connect, the KPPU said is a ‘monopolistic practice’ barred by Article 17.²⁴ Clearly, this definition does not apply to the case. The definition of monopolistic practices under this provision is relevant only when the product or services can be served by competition.²⁵ How can a natural monopoly entity (such as a water utility) be punished for their very nature in being a monopolist?

The provider has repeatedly asserts that by an entrustment of public service task from the authority, it should be excluded from the competition rule, Article 50²⁶, and that such entrustment is absolute. This plea was unheard. The Supreme Court, somewhat daringly, decides that the exclusion under Article 50 does not apply. Invoking Article 33 of the Constitution, the Court suggests that such exclusion would only apply if such monopoly serves the public interest. This is a bold decision because Article 50 which regulates exclusion from competition rules does not contain any public interest test. The competition law does mention something about ‘the interest of the public’, and that is, *the interest towards the working of a competitive market*, something irrelevant to the case at hand.²⁷

Although the KPPU and Supreme Court’s Decisions might be a popular one, this decision creates an awful legal precedent. There are thousands of households in Batam that does not have any access to water and there is no mechanism for them to directly ask the Provider to connect them to the water network (*that is, because such right to claim does not exist!*). Thus, they resort themselves to the competition law, a ‘neoliberal’ instrument whose sole purpose is actually in maintaining the proper functioning of the market and in turn, the judiciaries needs to bend (or violate) the law in order to protect the citizens.

Elsewhere, privatization is accompanied by regulation, whose objective, among other, is in protecting customer’s interest.²⁸ In the UK, a regulator is installed and specific legislations and licensing systems are created to ensure duty to supply, universal coverage, redress mechanism and participation in the decision-making process.²⁹

²⁴ Ibid

²⁵ Monopolistic practices is defined under the competition law as “...*the centralization of economic power by one or more business actors, resulting in the control of the production and or marketing of certain goods and or services thus resulting in unfair business competition and potentially harmful to the interests of the public.*” Indonesia, Undang Undang No.5 Tahun 1999 Tentang Praktek Monopoli dan Persaingan Usaha Tidak Sehat Article 1.2

²⁶ Ibid Article 50. “*Excluded from the provisions of this law shall be the following: (a) actions and or agreements intended to implement applicable laws and regulations*”.

²⁷ Monopolistic practices is defined under the competition law as “...*the centralization of economic power by one or more business actors, resulting in the control of the production and or marketing of certain goods and or services thus resulting in unfair business competition and potentially harmful to the interests of the public.*” Ibid Article 1.2 The Article suggest that the control of goods and services under certain business actor is not fair for competition and such ‘unfairness’ towards competition is harmful for the public’s interest. Hence, the Article aligns the interpretation of public interest with the workings of the market. Public interest is served when the market is competitive. This Article is not relevant in the water sector where public interest may be served exactly *when* there is no competition.

²⁸ See Section 2 (2A) Water Industry Act 1991 c.56 also Hendry, S.M., ‘An Analytical Framework for Reform of National Water Law’ (PhD thesis, University of Dundee 2008)

²⁹ Water Industry Act 1991 (England)

This is in contrast with Batam case, in which the government signed a concession contract and then retreats, enacting virtually no regulation and leaving its citizen in a legal vacuum. After this Decision, Batam citizen still has no direct redress mechanism against the private water monopolist. I need to remind and emphasize that the claim was brought by developers association and was awarded by the courts to them and not to citizen as an individual or a collective. Citizen, after the contracts were awarded, have no solid legal standing to sue.

One of the most important point to make here is that, had the service been provided directly by Batam Authorities, the citizen would have some redress mechanism through the general administrative law. They would have the legal standing to sue and question the refusal to supply under principles such as *Algemene beginselen van behoorlijk bestuur* (general principles of good administration), “arbitrariness” or “abuse of authority” known under Indonesian administrative law.³⁰ But since the delegation was made by way of private contracts, the citizen’s legal recourse is lost.

More details on why citizens cannot have adequate redress mechanism through general administrative law when contracting is involved will be explained in later sections. However, we can conclude that case of Batam is a blatant illustration where the state retreat and does not return or reconfigure itself to protect the public.

3. Limits of the Public Service Law

One of the fruits of the 1998 reform movement is the Public Service Law. Indonesia has been suffering enough from 32 year authoritarian “New Order” regime which ended in 1998 and following the reforms, its people demand some form of guarantee in the working of the public service. Hence a law was created with the purpose of increasing the quality of public service, protecting citizen from ‘abuse of authority’ in public service and providing clarification in terms of citizen’s rights and obligation in public service.³¹

Needless to say, in some respect, the public service law is a progress, especially in holding governmental public service to accountability. There are administrative sanctions available against an offender. Public officials can be removed from office, their salary suspended or even terminated from the civil service.³²

It is important to note, that although the primary purpose of the law is to increase the quality of public service and hold the government accountable for its delivery, Article 13 enables the government to delegate some parts of its task through a “cooperation” with “another entity”.³³ The law stipulates: “*An undertaker [of public service function] may conclude cooperation in the form of delegation of parts of its public service provision in with another entity ...*” The law does not exactly say that the government can “privatize” or engage in “public-private partnership” since this would be hugely unpopular, but the phrase is sufficient to authorize such schemes to be carried out.

³⁰ See Article 53 Undang-Undang Republik Indonesia Nomor 6 Tahun 2004 Tentang Perubahan Atas Undang Undang Nomor 5 Tahun 1986 Tentang Peradilan Tata Usaha Negara also Bedner, A., *Administrative courts in Indonesia: a socio-legal study* (Martinus Nijhoff Publishers 2001); see also

³¹ Undang Undang No. 25 Tahun 2009 Tentang Pelayanan Publik

³² Ibid Article 54

³³ Ibid

Which public services can be delegated? The articles are silent, but the elucidation states that it can delegate anything, unless for services which has to be carried out by the state themselves, *such as* ID Card, Driving Licence, Passport, Land Certificate and “*other*” licensing activities. Some other examples in which operator runs the function of an undertake is “*parking management*” and “*drinking water which are transferred to the private sector*”.³⁴

As the term, *such as* is used – and only in the elucidation and not in the articles – this is subject to reinterpretation. This means that when a lawyer reads this provision, it actually says that there is nothing that restricts a service from being delegated or contracted out to the private sector. The public service law is therefore, the subtle legal instrument for neoliberalization.

What happens when services are delegated? Does the state reposition itself as a regulator and guarantees citizenship rights?

Civil servant is regulated by the law on civil service, while privatised or corporatized services are regulated by ordinary labor law. This means that executive in private or corporatized entities are outside the reach of government’s administrative discipline. Thus, provisions pertaining removal from office, demotion, suspension from salary raise or termination are not applicable to private executives despite their public service tasks, since they are not civil servant.³⁵

Elucidation of the law does suggest that such sanctions should be given by either the corporation’s shareholders, if the services are provided by corporations or the “advisory board” if they are provided by NGOs.³⁶ But this explanation is absurd, because there is no way the law could compel shareholders of a corporation to dismiss their CEO or fire their executive. Such would amount to state intervention and violation of “good corporate governance” principles which Indonesia have been trying to foster.

The Public Service Law require that complains towards services which are carried out by corporatized or private entities are directed to the government official which entrust them with such tasks.³⁷ With this provision, it appears that the ability to directly complain to non-state actors entrusted with public service functions is overruled.

What can the state do, if something went wrong with delegation of public service to non-state actors? From all the list of sanctions provided by the public service law, only suspension or revocation of licenses would be relevant to public services delegation.³⁸ But this provision is not effective. How can common problems in water services, such as disconnection, intermittent service, leakage, metering dispute, non-payment due to economic situation be addressed by suspending a company’s licence? The government will not bother revoking a company’s licence only because the water in a citizen’s tap hasn’t been running in a few days. Even in the case of

³⁴ Ibid Elucidation, Article 13

³⁵ Al’Afghani, M.M., ‘Can public service law be applied to private sector?’ *The Jakarta Post* (Jakarta, July 14th, 2009) <<http://www.thejakartapost.com/news/2009/07/14/can-public-service-law-be-applied-private-sector.html>> accessed February 20, 2010

³⁶ Undang Undang No. 25 Tahun 2009 Tentang Pelayanan Publik Elucidation of Article 57

³⁷ Article 45 (3) *ibid*

³⁸ *Ibid* Article 54 (10) and (11)

Batam, where hundreds of households cannot obtain water, the government did nothing with the company's licence. If it is indeed applied, this provision is an overkill. If a company's licence is suspended, then it cannot operate. If the company does not operate, the whole city would suffer.

What we can conclude from the Public Service Law is that, delegation of public service to the private sector is facilitated and authorized, albeit discreet and vague. Despite such delegation, there is no clarity as to the status of private sector.

There is no acknowledgement that delegation to non state actor is a serious issue that may cause the protection granted by citizen under general administrative law to diminish or even disappear. There is no effort to counter-balance the loss of "publicness" caused by delegation to private sector in the legal framework. This is in contrast with the development in the UK, in which, the rise of its public service law has been dubbed as the "unexpected offspring" of the wave of privatization.³⁹

4. Limits of the Freedom of Information Law

Another fruit brought by the post 1998 reform era is the Indonesian Freedom of Information Law No 14 year 2008, enacted in 2008 and entered into force in 2010 ("Fol Law"). The law was created to promote good governance, by providing the citizen with the right to know information in possession of public bodies. This paper will evaluate how the Fol Law applies to non-state actors in charge of public service delegation from the government.

Jakarta water concession has been discussed quite exhaustively by water scholars.⁴⁰ Nonetheless, there is lack of discussion on how the state protects the citizen rights in the face of such delegation. This section will evaluate the applicability of Indonesian right to know law in the case of contracting.

According to the Fol Law, the law is applicable to public bodies, which are defined as:

"any branches of the executive, legislative and judiciary as well as other bodies whose functions and main tasks are related to the organization of the state, whose funds are derived partially or in entirety from the state and/or regional government's budget, or non-governmental organizations insofar as part or all of its budget is derived from the state or regional government's budget, community's contribution and/or foreign funds".⁴¹

³⁹ Prosser, T., 'Public service law: privatization's unexpected offspring' 63 Law and Contemporary Problems 63

⁴⁰ See for example Lanti, A. and others, *The First Ten Years of Implementation of the Jakarta Water Supply 25-Year Concession Agreement (1998-2008)* (Jakarta Water Supply Regulatory Body (JWSRB) 2009) Lanti, A., 'A regulatory approach to the Jakarta Water Supply concession contracts' 22 International Journal of Water Resources Development 255 Kooy, M.É., 'Relations of power, networks of water: governing urban waters, spaces, and populations in (post) colonial Jakarta' (University of British Columbia 2008) Iwan, R., 'Ten Years of Public Private Partnership in Jakarta Drinking Water Service (1998-2007): Eastern Jakarta Drinking Water Service by Thames PAM Jaya' (Victoria University of Wellington 2008) Braadbaart, O., 'Privatizing water. The Jakarta concession and the limits of contract' A World of Water Rain, Rivers and Seas in Southeast Asian Histories 297 Bakker, V.K. and others, *Disconnected: poverty, water supply and development in Jakarta, Indonesia* (Human Development Office Occasional Papers (1992-2007), 2006) Argo, T.A., 'Thirsty downstream: the provision of clean water in Jakarta, Indonesia' (University of British Columbia 2001)

⁴¹ Undang Undang No.14 Tahun 2008 Tentang Keterbukaan Informasi Publik Article 1(3)

With such definition, there can be no doubt that the FoI law is applicable to government's bureaucracies such as ministries or department. In the case of contracting, such as the Jakarta concession, the matter becomes a little complicated.

The Jakarta water concession involves the Jakarta regional government, a State Owned Water Enterprise called "PAM Jaya" which entered into contract with two private entities, Palyja – in charge of western part of Jakarta and Aetra, in charge of the eastern part.⁴² A regulatory body – the Jakarta Water Sector Regulatory Body ("Regulatory Body" or "Regulator") -- was set up under the contract in 2001, with the purpose of supervising and mediating disputes arising out of the concession contract.

For certain, the Jakarta municipal government is covered by the definition of "Public Bodies" under the FoI Law above. PAM Jaya – the state owned water enterprise – too, is covered by the definition since its funds "...are derived either partially or in entirety from the state and/or regional government's budget".⁴³ The position of the private water operators, Palyja and Aetra and the Regulatory Body however, is rather uncertain. The Regulator's budget comes from an escrow account as a result of tariff collection.⁴⁴ With this fact, they do not directly receive funds from the state budget. Neither Palyja nor Aetra also receives funds directly from the state or regional government's budget. Their budget comes from tariff collection in the escrow account which are then divided among Palyja/Aetra, PAM Jaya and the Regulator.

The Regulatory Body claimed that they are neither a branch of the executive, legislative nor the judiciary in the definition of "Public Bodies" under the FoI Law, as they are set-up under a contract.⁴⁵ In fact, they consider themselves a private body or, at the very least, a non-governmental organisation.⁴⁶

It is important to note that the Regulator's charter is enabled by a Governor's Regulation⁴⁷ and not only by the Concession Contract. However, as the Concession Contract contain confidentiality provision, the Governor's Regulation also contain provisions mandating confidentiality of information in the regulatory process, thus effectively avoiding public scrutinies.⁴⁸

The Regulator's position in being regulated by the Governor may not automatically transform their status as "Public Bodies". They are not perceived as carrying out a state function but merely in supervising a private contract between the State Owned Water Operator PAM Jaya and the private sectors.

The private sectors (Palyja and Aetra) positions are no less different. Despite their natural-local-legal monopoly status as water companies entrusted with the power to collect tariffs and decide on matters such as investment, network expansion and the connection and disconnection of

⁴² For detail see Al'Afghani, 'The Role of Legal Frameworks in Enabling Transparency in Water Utilities Regulation'

⁴³ Undang Undang No.14 Tahun 2008 Tentang Keterbukaan Informasi Publik Article 1(3)

⁴⁴ Al'Afghani, 'The Role of Legal Frameworks in Enabling Transparency in Water Utilities Regulation' also Peraturan Gubernur DKI Jakarta No.118 Tahun 2011 Tentang Badan Regulator Pelayanan Air Minum

⁴⁵ Cooperation Agreement Between PAM Jaya and The Concessionaire, 2001 Clause 51

⁴⁶ Al'Afghani, M.M. and others, *Transparansi Lembaga-lembaga Regulator Penyediaan Air Minum Di DKI Jakarta* (ECOTAS/KRuHA/TIFA, 2011) See box 1 "Status BR PAM Sebagai Badan Publik" (Status of JWSRB as Public Body) summarizing field interviews with members of the regulatory body. If they are categorized as an NGO under the Indonesian FoI Law, they will be subject to lesser disclosure requirements.

⁴⁷ Peraturan Gubernur DKI Jakarta No.118 Tahun 2011 Tentang Badan Regulator Pelayanan Air Minum

⁴⁸ Ibid also Al'Afghani, 'The Role of Legal Frameworks in Enabling Transparency in Water Utilities Regulation'

customers from the water network, they are not regarded as “Public Bodies” under the FoI Law. Thus, although some power, such as that in disconnecting customer is delegated to the private sector by way of concession, it is not accompanied by accountability mechanism through coverage by FoI.

5. Rejection towards the regulatory state and disguised “Privatization”

I would like to offer an explanation that the loss of administrative protection, as seen in the cases of Batam water privatization, Jakarta Water Concession, as well as the limited reach of the Public Service and Freedom of Information law, is caused, partially, by political contestation taking place between the judiciary and the government. In this respect, at the constitutional level, the transformation of state functions from provider to regulator is rejected while at the same time neoliberal reforms are enabled by disguised privatization clauses and take place through government policy and actions, despite such rejections.

As explained by many authors⁴⁹, the Indonesian constitution was drafted with a socialist and leftist spirit, in which, according to Article 33 of the Constitution, production sectors which are “vital” to the livelihood of many, are to be “controlled by the state”.⁵⁰ What “control” is all about and how “vital” is interpreted is a matter of debate. I have argued elsewhere that the Constitutional Court through several judicial reviews developed an analytical framework in which state control encompass of 5 (five) cumulative elements: policy making (beleid), administrative (bestuursdaad), managerial/share ownership (beheersdaad), supervisory (toezichthoudensdaad) and regulation (regelendaad).⁵¹

Administrative functions has been elaborated by the Court as governmental actions in issuing permits, licenses and concessions. Meanwhile, regulatory function, is interpreted as the House of Representatives and the government’s actions in enacting laws and the government creating rules. The managerial function is interpreted as an exercise of ownership through shareholding or direct involvement in the management of state-owned enterprises or state-owned legal entities.⁵² I have also conjectured that this 5-element construction was probably developed out of Wolfgang Friedmann’s ideas on mixed-economies and his defence of the welfare state, in which he suggests that the state has four functions: as a regulator, umpire, entrepreneur and provider.⁵³

⁴⁹ Al’Afghani, M.M., ‘Constitutional Court’s Review and the Future of Water Law in Indonesia’ 2 *Law, Environment and Development (LEAD) Journal* (2006); Susanti, B., ‘Neo-liberalism and Its Resistance in Indonesia’s Constitution Reform 1999-2002: A Constitutional and Historical Review of Indonesian Socialism and Neo-Liberalism’ (LL.M Thesis, University of Warwick 2002); Butt, S. and Lindsey, T., ‘Economic Reform when the Constitution Matters: Indonesia’s Constitutional Court and Article 33’ Vol. 44, No. 2 *Bulletin of Indonesian Economic Studies*

⁵⁰ Undang Undang Dasar Negara Republik Indonesia Tahun 1945 Article 33

⁵¹ Al’Afghani, M.M., ‘The elements of ‘state control’ *The Jakarta Post* (Jakarta, January 14 2013) 6; also *Judicial Review of Law Number 20 of 2002 Concerning Electricity, Judgment of 1st December 2004, No. 001-021-022/PUU/2003*, Constitutional Court of the Republic of Indonesia and *Judicial Review of Law Number 7 Year 2004 regarding Water Resources, Judgment of 13th July 2005, No. 058-059-060-063/PUU/2004* Constitutional Court of the Republic of Indonesia

⁵² Al’Afghani, ‘The elements of ‘state control’

⁵³ Friedmann, W.G., *State and the rule of law in a mixed economy* (London: Stevens & Sons 1971)

Other scholars such as van Vollenhoven⁵⁴, which suggests that state has four functions: *regeling* (rule-making), *bestuur* (administration), *rechtspraak* (judiciaries) and *politie* (policing), may have some influence. However, looking at how the Court articulate the elements in justifying its defence against neoliberal reforms, and especially, because Friedmann's theory is aimed at defending mixed-state economies while van Vollenhoven's 1934 treaties refers to the state in general, it would appear that the influence of Vollenhoven is minimal. Needless to say, Friedmann's 1970s idea of state functions is pervasive among Indonesian jurists and among one of the mandatory basic course studied by first year law students in the "General Theory About State" (*Allgemeine Staatslehre*).⁵⁵ Whether such theory is adequate in safeguarding the law against neoliberal advances is another question.

Due to the similarities between Friedmann's theory and framework used by the Constitutional Court, it appears indisputable that the Court used Friedmann's concept about the state to elaborate its 5-element of "state control". This framework has been used by the Constitutional Court in striking down neoliberalization efforts in the forms of deregulation, liberalization, privatization and contracting out in legislations, from electricity to water, coastal management to oil and gas since they failed to fulfill the 5 element required for state control.

The water law decision was particularly important, in which, the Court maintains the law to be "conditionally constitutional" as it was not particularly clear that "privatization" was sought by the law, despite the fact that it allows for "private sector and the society" "to participate" in water services and resources.⁵⁶ The water law reads: "Cooperatives, privately-owned business enterprises and the [members of the] society may participate in the undertaking of the development of drinking water provision system".⁵⁷ In the water law decision, one judge claim in his dissenting opinion that the vague, ambiguous and bizarre provision which allows for "private sector" to participate is essentially a "disguised privatization".⁵⁸ This was not a majority opinion however, and the law remains in force, despite its "conditionally constitutional" status.

The water law decision sets a precedent for the government: if a law is to survive constitutional review, it must avoid terminologies such as "privatization" and it must regulate non-state actors in a discreet, ambiguous way. Indeed, oftentimes, private sector participation is regulated in a very general provisions which enables the public, including the cooperatives and the private sector "to participate" in the delivery of public services. In addition to the water law provision

⁵⁴ van Vollenhoven, C., *Staatsrecht overzee* (HE Stenfert Kroese's uitgevers-maatschappij 1934)

⁵⁵ The subject is known in Indonesia as "Ilmu Negara", derived from the German *Allgemeine Staatslehre*. The basic doctrine in "Ilmu Negara" is essential in understanding the thinking of Indonesian Jurists and their views about ideas such as "Rule of Law" and state functions.

⁵⁶ *Judicial Review of Law Number 7 Year 2004 regarding Water Resources, Judgment of 13th July 2005, No. 058-059-060-063/PUU/2004* also Al'Afghani, 'Constitutional Court's Review and the Future of Water Law in Indonesia'

⁵⁷ Undang Undang No. 7 Tahun 2004 Tentang Sumber Daya Air Article 40 (4)

⁵⁸ *Judicial Review of Law Number 7 Year 2004 regarding Water Resources, Judgment of 13th July 2005, No. 058-059-060-063/PUU/2004* See the original Bahasa Indonesia version, particularly p.412 and p.435. See also dissenting opinion of Judge Mukhtie Fadjar which labels the law as a disguised "privatisation" at p.512

above, this discreet regulation of private sector participation can be found in Government Regulation of Water Services⁵⁹ as well as in the Public Service Law discussed earlier.⁶⁰

Indeed, contracting occurs in various sectors. The government has always expected the private sector to pour money on Indonesia's infrastructure developments. Various policies that enables private sector participations in toll roads, electricity, water, oil and gas and many other has been drafted by the government, taking the form of secondary legislations and ministerial-level regulations. The government have been releasing the "PPP Book" since 2009, containing all tendered and prospective projects in a bid to attract investors. The 2013 edition of the Public Private Partnership Book lists a total of 27 projects, in which 14 are "prospective" comprising 4 water supply and sanitation projects (including solid waste), 4 transportation projects, 5 toll road projects and 1 power plant whereas the remaining 13 are potential projects comprising of 1 water supply and sanitation, 9 transportation and and 3 toll roads.⁶¹ Like any other PPPs, private contracts were entered by the government and the private sectors.

In later development, in the Oil and Gas Judicial Review, the Constitutional Court reinterprets its 5-elements framework and decides that (a) the court dismissed the idea that the state function in the sector was "only" in regulating and requires that the other four elements must also be applied; (b) the element of *beheersdaad* (managerial/share ownership) is in the primary and the first hierarchy of all the 5 elements and (c) the state upstream regulatory body of oil and gas is unconstitutional and as a consequence, was dissolved.⁶² The case is important not only because a regulatory body in charge of oil and gas was dissolved but also because state ownership in "vital branches of production sector" is re-emphasized. What the Court was suggesting was that it prefers state ownership – and by state ownership it means government shareholding in the form of state owned enterprise -- to sector's liberalization.

In the oil and gas case above, the court is oblivious to the fact that neoliberalization can also take the form of corporatisation, in which state-owned enterprises will be subjected to market discipline, its product commercialized, its entity ring-fenced and decisions become corporate decisions not subjected to checks and balances under ordinary administrative law.⁶³ No single paragraph in the Constitutional Court cases refers to the possible negative effects of corporatized public service delivery.

⁵⁹ In addition to Article 40 (4) of the water law which was deemed to be "disguised privatization", see also Article 64 (1) of Peraturan Pemerintah No. 16 Tahun 2005 Tentang Pengembangan Sistem Penyediaan Air Minum which stipulates "cooperatives and/or privately owned business enterprises **may** participate in the development of drinking water provision **system in regions which are not yet covered** by services provided by SOE or regional SOE. The "green field" exception (region not yet covered) does not apply in practice. See Al'Afghani, 'The Role of Legal Frameworks in Enabling Transparency in Water Utilities Regulation'

⁶⁰ "An undertaker may conclude cooperation in the form of delegation of parts of its public service provision in with another entity ..." Undang Undang No. 25 Tahun 2009 Tentang Pelayanan Publik Article 13 ; See also Section 3 above

⁶¹ *Public-Private Partnership Infrastructure Project Plans in Indonesia* (Ministry of National Development Planning, 2013)

⁶² Putusan Mahkamah Konstitusi Republik Indonesia Nomor 36/PUU-X/2012, Tanggal 13 November 2012 tentang Pengujian Undang-Undang Nomor 22 Tahun 2001 tentang Minyak dan Gas Bumi

⁶³ See for example Smith, L., 'The murky waters of the second wave of neoliberalism: corporatization as a service delivery model in Cape Town' 35 *Geoforum* 375

Earlier in the electricity judicial review, the Court already suggests:

*“Even if supposedly Article 33 is not included in the 1945 Constitution, as common in many countries which adopt the liberal economy principle which do not regulate basic economic norms in their constitutions, the state automatically has the authority to perform the regulatory function. Therefore, it is impossible to reduce the meaning of the phrase “controlled by the state” as merely concerning the authority of the state to regulate the economy.”*⁶⁴

This position is reemphasized in the oil and gas law decision. Indeed, the understanding of “regulation” by the Court appears to be different than mainstream regulatory scholars.⁶⁵ In the Court understanding, regulation appears to be understood narrowly in “command and control” mode, such as in the creation of binding rules by the legislature or by the government itself. But the rejection of regulatory state in oil and gas law comes not only from this understanding, but also, from the requirement of all 5 elements (policy making administrative, managerial/share ownership, supervisory and regulation) to be fulfilled and that the element of share ownership to rank the first among the five.

It is thus the state function as *entrepreneur* (borrowing Friedmann’s term) of nationalized public service which is paramount according to the Court, and not its role as *regulator* and *umpire*.⁶⁶ The presence of state function as *regulator* and *umpire* alone will not satisfy the Court’s 5-element framework if there are no *entrepreneurship* function and therefore violates the “state control” clause of the Constitution. With this interpretation, the rejection of the regulatory state becomes entrenched in Indonesian Constitutional precedents. Ironically, at the same time, “disguised privatization” occurs in order to avoid invalidation by the Court. The Court could not do anything to prevent *de-facto* “privatization”.

6. Conclusion: The State in Full “Retreat”

Administrative law protections, such as review of decisions by the Court based administrative law principles such as *Algemene beginselen van behoorlijk bestuur* (general principles of good administration), “arbitrariness” or “abuse of authority” may no longer be applicable in the case of privatization, corporatisation or contracting out. Decision such as disconnection from water service or refusal to supply are regarded not as “Administrative Decision” reviewable by the courts but a business decision. The Administrative Court will no longer have jurisdiction over public service functions which are delegated to the private sector.

The case of Batam clearly illustrates that no individual redress mechanism is available when water service is contracted to the private sector. Citizen must reorganize and present themselves before

⁶⁴ *Judicial Review of Law Number 20 of 2002 Concerning Electricity, Judgment of 1st December 2004, No. 001-021-022/PUU/2003,*

⁶⁵ Dubash, N.K. and Morgan, B., ‘Understanding the rise of the regulatory state of the South*’ [Blackwell Publishing Asia] Regulation & Governance no Morgan, B. and Yeung, K., *An introduction to law and regulation: text and materials* (Cambridge University Press 2007) Palast, G. and others, ‘Democratic regulation a guide to the control of privatized public services through social dialogue : working paper’ <<http://ilo.org/public/english/dialogue/sector/papers/pubserv/demreg.pdf>> accessed 2000 Graham and Prosser, *Privatizing public enterprises : constitutions, the state, and regulation in comparative perspective*

⁶⁶ Friedmann, *State and the rule of law in a mixed economy*

the Court as “business entities” and argue the case as a commercial matter under the Competition Law. Although they eventually win, the Competition Law was actually misapplied and individual redress mechanism remains non-existent.

Transparency is no longer available following contracting, concession or privatisation of public service as the Freedom of Information law is not applicable to the private sector. The case of Jakarta water concession showed the the FoI Law is applicable neither to the concession’s Regulatory Body nor the private water operators. This is despite the fact that the water operators possess some power under the public law, such as that pertaining disconnection, diversion or network expansion.

Sanctions such as removal from office, demotion, suspension from salary raise or termination which are normally available under the Public Service Law is no longer available when the task is delegated to the private sector. Governance mechanism within the private sector relating to employment matters are regulated separately in a different labor law. The government has no jurisdiction whatsoever with respect to private sector’s internal processes such as in terms of hiring or firing.

In northern hemisphere, the “retreat” of the state through privatization, corporatisation, contracting and outsourcing is usually followed by the reconfiguration of its role as regulator and marked by the establishment of independent regulatory bodies which guarantees some “public sphere” in the regulatory process. In Indonesia, regulatory bodies, when they are setup through primary legislations (parliament-enacted law) such as that in the electricity and oil and gas sectors, will be dismantled by the Constitutional Court.

The Constitutional Court also dismissed that the “state control” requirements towards vital branches of the production sector can be fulfilled through state’s regulatory functions as it is found in the west. It takes a further step and require that “state control” be manifested through shareholding and state-owned enterprises. This constitutes a clear rejection towards “regulatory state” in Indonesia.

However, neoliberalisation does not stop there. Private sector participation are enabled by insertion of vague and ambiguous clauses in legislations known as “disguised privatization” clauses. Oftentimes, there are only one clause regulating the transfer of public service functions from the government to non-state actors. This is because more regulation of private sector involvement and obvious acknowledgement on “privatisation” will only trigger invalidation by the Court, as was the case in oil and gas, electricity, coastal management and various other legislations.

In Indonesia, the retreat of the state enabled by “disguised privatizations” above are not followed by its return as a regulator. The loss of administrative law protections caused by such retreat is therefore not remedied. As a result, citizens are left without recourse, remedy and access to justice.

Good Governance reforms advocated by the civil societies through the Public Service and Freedom of Information Laws have not been able to protect the citizen due to neoliberal reforms as their emphasis is on making the traditional “provider” state accountable. The growing power of the private sector and the subsequent loss of protection afforded to citizen is outside the good

governance reform radar. I have demonstrated above that when public service functions are delegated to the private sector, those laws are either inapplicable or ineffective.