

INDONESIA INFRASTRUCTURE INITIATIVE

Center for Regulation, Policy and Governance

THE ROLE OF REGULATORY
FRAMEWORKS IN ENSURING THE
SUSTAINABILITY OF COMMUNITY BASED
WATER AND SANITATION

AIIRA RESEARCH REPORT

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The government aims to achieve universal access to water supply and sanitation by 2019. According to some calculations, this ambitious target cannot be fulfilled by relying on regional water utilities (Perusahaan Daerah Air Minum or “PDAM”) alone. It is estimated that PDAM can only contribute around 40% of the total target, whereas the other 60% would be expected to come from community-based systems.

The policy framework for CB Watsan was introduced by the government in 2003. The 2003 National Policy on The Development of Community-Based Water and Sanitation introduced a duality in Indonesian national water policy: one being “institution-based” and the other being “community-based”. Our research outlined several problems surrounding Community Based Water and Sanitation (CB-Watsan) from the conceptual level down to regulatory practice.

The conceptual problem surrounding “community-based” watsan is on the definition and delineation between CB watsan and institutional watsan. In the policy framework, the term “institution-based” is used to denote water services operated by corporate water utilities including PDAM, whereas “community-based” is used to describe services provided by local communities for their own needs. How communities and institutions are defined, at least in the academic sense, might not be compatible with what is intended by the policy framework.

There are also inconsistencies and discrepancies in the regulatory framework from the national down to regional and village levels, with regards to the role of CB watsan. The legal framework at the national level appears to favour “institution” based watsan, such as PDAM. Community based Watsan’s role are considered to be residual – in providing access only where “institutional” system cannot serve.

Within the community based watsan itself, there is a major issue with regards to the clarity of assets ownership. Our Focus Group Discussion reveals that in some large scale projects, the assets still belong to the ministry of public works as it has not been transferred and thus, is accounted as liability and subsidy. FGD participants agreed that *“Assets transfer is Indeed a big homework. The legal frameworks need to be completed.”* Some community watsan activist considered that assets should be owned by the “communities” whereas according to another, it should be owned by the village. The national policy on community-based watsan on the other hand, advocates “community” ownership and suggests that a legal framework be conceived by the government to smoothen the transfer of assets *from the government to the “community”*. On the Pamsimas program technical manual it is suggested that it is the operation that is transferred, but not the asset ownership.

We also found that there are cases where PDAM systems overlap and compete with CB Watsan. This is caused, partly by the introduction of the dualist system of watsan services in the 2003 framework. How these community watsan initiatives could coexist

with existing PDAMs or – to maintain the economies of scale – be merged with or acquire existing PDAMs is a problem which yet to be solved, let alone, researched.

The FGD reveals that there are unresolved fundamental differences among regulatory stakeholders, in terms of whether CB should be perceived as a temporary “approach” with the overall intention to integrate it to the PDAM or “institutional” system in the future, or whether it stands equally to the existing “institutional” system.

There are also problems with respect to service standards and how the government can foster monitoring, supervision and enforcement of such standards through regulatory frameworks. Community initiative and demand-driven approach is central to the community watsan movement. However, this approach is at odds with existing national legal frameworks requiring water and sanitation services to comply with minimum service standards enacted by local government.

Whether or not similar standards should apply to both government owned water utilities and community watsan is a matter of debate. Some interpret “universal water provision” in the sense that similar quality, quantity, continuity, affordability should be applicable to everyone and every service providers. However, such ideal standard is difficult to achieve in Indonesian rural water provision, especially in the remote regions such as Nusa Tenggara and Papua. FGD participant considered the need for a universal/national menu and a local menu (adjusted to climatic conditions, etc) in regulation.

Aside from the above problem, there is a trend towards an increase of regulation on community watsan in the last few years, coming mostly from provincial, municipal and regency governments in the form of regional by laws on community watsan (hereinafter “community watsan bylaws” or “CB bylaws”) or executive regulations such as governor or mayor regulations. Aceh Besar Regency enacted its by law on 2010; Bima regency (in East Nusa Tenggara) enacted in 2011; while the East Nusa Tenggara province enacted a Governor Regulation on community based watsan in 2012 and is considering to regulate it in a higher form of legislation: a provincial-by-law. Sikka regency drafted its by-law recently and is being considered for adoption by its parliament. Other regencies in East Nusa Tenggara seemed to follow suit.

The increase of regulation on community watsan at the regional level is an interesting phenomenon that warrants some investigation as to its actual motives. In the Academic Draft of the Sikka Regency Community Watsan By-Law, it is found that the law was intended to make village governments to take charge in repairing and maintaining community watsan assets. In one discussion, the participants remarked that when community watsan assets are transferred to the village (and thus becomes village assets), then there will be justifications to allocate some state funding for operation and maintenance. However, when the assets are owned by the “community”, village government may not be able to utilize its funds to maintain them.

The motive in transferring community watsan assets to local or village government is interesting, as it appears to indicate that implementation by non-state actors does not

actually offer security and sustainability. Is calling for the return of state intervention – in terms of water provision to rural society – the actual motive for the rise of regulation?

We sum-up the above problematique in the following research question: How can regulatory frameworks ensure the sustainability of community-based water and sanitation? After going through a lengthy social and regulatory analysis, we came up with the following answers and recommendation:

1. In regions where Adat is prevalent, CB-Watsan initiatives should be integrated with Adat, both in pre and post construction stages

In Maukaro, Ende, East Nusa Tenggara, all CBOs are facing problems with operation and maintenance, especially with regards to low compliance in terms of assets maintenance and fee collection. Such low compliance is caused, partially, due to resistance from Adat leaders and their family towards paying fee. Adat is sufficiently integrated in the pre-construction process, in the form of release of control towards spring location, acknowledgement of right of way and transfer of control of standpipes location from Adat leaders to the CBO as well as the prohibition on wood cutting on catchment areas controlled by Adat leaders.

However, Adat is not sufficiently integrated in the post construction process. The Mosalakis (Adat leaders) are treated as common water users – which prompt some resistance – and fee collection and sanctioning system are dominated with modern concept which does not go along with traditional sanctioning method. We recommend that Adat be integrated also in the post-construction process, in which Mosalakis becomes the figurehead of the CBO and that fee collection, sanctioning and assets protection are integrated with ordinary Adat system. Regional-by-law and Village Regulation should accomodate this integration in its provisions.

2. Limited professionalization is the way forward

In both Ende and Lamongan, central, dominant authoritative figures are important for CBO's survival. Surviving CBOs have hierarchial culture. CBO Chairmen and executive board members are not motivated by financial incentives, they have their own day-jobs (mostly, as teachers) which secure their income stream. They are motivated by external and community recognition of their work, which accords them special status in their village. Forced introduction of financial incentives to CBO leader may be detrimental and contradict local values. Regeneration of CBO leadership is (and has been) problematic.

In eastern Indonesia where Adat is prevalent, professionalization agenda may be challenged by Adat. Professionalization is more likely to be implemented in Eastern Java – notwithstanding the motivation and hierarchial culture of CBOs as discussed above. In both cases, technical personnel are vital in safeguarding water infrastructure. Technical personnel, in both Lamongan and Ende, typically do not engage in strategic CBO decision-making process as that is the responsibility of CBO chairman. Despite their important role,

public recognition is low, although salary is relatively above other CBO executives. Since the knowledge that has been accumulating in technical personnel is invaluable and their training cost is expensive, replacing technical personnel may bring negative impact on CBO sustainability.

Regulatory framework can insulate technical personnel from interference with local politics by requiring their replacement to be agreed by public meeting or CBO meeting. Community Based Organization's statutes and village regulation can mandate regeneration and training of technical personnel. CBO's articles of association should limit the term of office for CBO Chairman and executive board in order to allow accountability to take place at the end of their term but allows for reappointments.

3. CB-Watsan should be recognized as a distinctive actor and model of provision

In the 2005 and 2015 Court Decisions, the Court was preoccupied with the binary distinction between state (direct provision and state/regional owned enterprise) versus private enterprise. In a bid to prevent privatization of the water sector, every other actors other than State and Regional Owned Enterprise are either discouraged or prohibited to enter the arena. This research demonstrate that the distinction is actually more complicated than that, since there is a third actor, the "community". Unfortunately, CBOs does not fall into the category of State and Regional Owned Enterprises and thus are unintentionally marginalized in the Court's debate an in national legislations.

This research recommends that the "community" be recognized as a distinctive actor and model of water services provision in addition to state/state owned enterprise and the private sector. Section 1.4.4 developed criteria for "community-based", which contain these elements: (i) similarities in terms of locality, values and problem faced (ii) participation and decision making on the planning process (iii) there is a cost sharing, in kind or in cash, by the community in the construction process and (iv) undertakers are appointed from, by and are accountable to the community.

4. National Legislations must regulate CB-Watsan *in equal level* with the "institutional" system

Our research have explained in detail how – despite its expectation and contribution to universal access – CBOs in CB-Watsan have been "discriminated", both in terms of policy discourse and the regulatory framework. CB-Watsan are considered to be only a "temporary" solution, an auxiliary of PDAMs. This manifested in the lack of acknowledgement of CBOs as "water undertaker" in secondary legislation, which enjoys certain priveleges as well as responsibilities. This further manifests in the lack of clarity towards licensing types used by CBO for operation and water abstraction, and consequently, its monitoring, evaluation and government counterpart which are directly in charge of them. This also has implication towards planning framework and budgetary

politics. In order to foster further formalisation, CBO officials from the field advocate the use of single, uniform name for Watsan CBO throughout Indonesia, which should be regulated in a legislation.

Note however that regulating CBO in equal level with PDAM may be difficult, given the Constitutional Court's preference of water services delivery by State and Regional Owned enterprise such as PDAM. This preference is a result of anti-privatization debate in Indonesian judicial saga from 2005 to 2015 which result in the annulment of the Water Law. In a bid to prevent privatization of the water sector, every other actors other than State and Regional Owned Enterprise are either discouraged or prohibited to enter the arena. Unfortunately, CBOs does not fall into the category State and Regional Owned Enterprises and thus they are unintentionally marginalized by national legislations.

5. Regulatory framework must clarify the roles and responsibilities of local agencies in post construction stage

The role and responsibilities of each local government agency are typically detailed in regent's regulation. We found no regent regulation specifying the roles and responsibilities of local government agencies in providing support, monitoring and evaluation to CBOs. Some local government agencies are mandated with development of water infrastructure, however in practice, this is interpreted as a responsibility in building the infrastructure themselves. Thus, regulatory framework should clarify its roles in terms of technical and institutional support as well as water quality regulation for CBOs. This could be outlined in a regional by law or regent's regulation.

6. CB Watsan and non-CB Watsan Planning Framework must be integrated

Our field study demonstrated incidences of conflict and cooperation between PDAM (and other water initiatives) with CB-Watsan. Conflict arises because of potential overlap between the two actors. Several models of cooperation have been explored in our research, notwithstanding their technical difficulties. In order to prevent conflict, foster cooperation and sustainable operation of both actors, the planning framework should be integrated. The RISPAM has been the planning framework for water services in general, however, due to the cost of RISPAM, it is mostly focused on PDAM. Regulatory framework *can* require, subject to financial capability, that CB Watsan planning framework are integrated into RISPAM. Regulatory framework – which could be in the form of Regional By Law -- *should* require that coordination between CB Watsan initiator and PDAM are in place before and after the construction process.

7. Legal forms of CBO should be compatible with the “CB-Watsan” concept

In selecting the appropriate legal form for CBO, several elements must be considered:

(a) accommodation of the “community-based” concept; (b) financials and profit (c) the degree of independence and (e) assets security. The community based concept means that there are: (i) similarities in terms of locality, values and problems faced (ii) participation and decision making on the planning process (iii) cost sharing, in kind or in cash by the community in the construction process and (iv) operators are appointed from, by and are accountable to the community.

Ideally, a CBO should be constituted as a legal entity for the purpose of securing assets (point e above) --although assets could also be owned by Village – and in limiting the liability of their executives. All legal forms has its own drawback and advantages, however, after evaluating all relevant legal forms in Indonesia, we come up with the conclusion that BUM Desa (Village Business Entity), Perkumpulan (Association) and Koperasi (Cooperatives) are the forms which can best accommodate the elements above.

However, each of these options also have some drawbacks. For example, BUM Des *per se* is not a legal entity and it is not clear if BUM Des can be also be constituted as cooperatives or another legal entity. There are critiques from our field study that a BUM Des may not be independent and will be under the influence of local politics. This critique is confirmed by our legal analysis which suggests that BUM Des budgeting, appointment and dismissals of its executive are under the authority of the Village Head. Meanwhile, association (*perkumpulan*) which is the most common type of watsan CBO in Indonesia, has limitation in terms of some restriction on profit motive. Profit – depending on the CBO -- might be important for professionalization (and further scaling up) agenda. Recent regulatory trend appears to be moving towards categorizing association as non-profit, voluntary, humanitarian organization. This restriction would mean that professionalisation agenda could be impeded. Finally, cooperative, which is the second most common type of Watsan CBO found in practice, has drawback in terms of the distribution of retained earnings. After cooperative law 17/2012 which prohibits the distribution of transaction gain with non-members to cooperative members are repealed, every surplus **can** now be distributed cooperative members. In practice this could mean that less funds are available for network expansion, repair and maintenance.

8. Most CB Watsan (immovable property) assets are ownerless. Assets must be owned, either by CBO or by Village

Interviews with CBO executive and Watsan activists suggest that CB Watsan assets are “owned” by the community. However, upon conducting legal analysis of documents obtained, we have never found any immovable property assests (land, building) which can be directly linked to CBO. There are no land certificates or building permits which are under the CBO name. This is primarily because CBOs are not constituted as legal entites, which therefore, cannot own immovable property. Non legal entity CBOs can own movable properties, but legally, such movable properties are actually owned by people whose name are listed in the CBO articles of association. We thus found discrepancy between the idea of community ownership of assets and its actual practice.

Regulatory framework at the local level should clarify if assets should be owned by CBO (which should be a legal entity) or villages. Each option carries different legal consequences and has its own advantages and drawbacks. Notarization and certification processes are often cumbersome and the transaction costs is high. Therefore, legalization of assets should be a part of national government infrastructure policy. Certification should be provided to CBO at affordable or at zero cost. A local notary could be appointed by the local government to deal with registration processes. A local government agency should be tasked with monitoring and reporting CBO assets.

9. Assets Infrastructure should be protected by a combination of Regional By Law, Village Regulation and (where applicable) Adat

As provisions on the protection of assets infrastructure are binding on the public at large, they should not be regulated through CBO Articles of Association, which are binding only to members and signatory parties they should be regulated through public law mechanisms which impose efficient sanctions with an aim at deterrence and reparation of damages. Sanctioning mechanisms by imprisonment and enforcement through court system should generally be avoided as they tend to be ineffective. If destruction of assets are massive and caused by business entities, a local government agency should be given the responsibility and the legal standing to sue.

Regional by law should protect CB Watsan assets from damage or destruction, arising out of intention or omission from third parties, by imposing direct financial penalties. Similar rules should be provided by Village Regulation, but using sanctioning mechanisms which are accepted by local customs and tradition. Regulation can provide that when sanctioning mechanisms by Village are agreed, no sanction should be imposed by Regional by Law. If Adat system is in place, damages to assets at the village level should be resolved by Adat mechanism, except if the damages are too massive, which should prompt local government to intervene.

10. There should be a specific type of CB-Watsan water abstraction licence

Most CB-Watsan are not equipped with abstraction licences, this is due to lack of clarity of licensing types in each region and whether those types are applicable to CB Watsan. Without a licensing framework, there can be no legal guarantee of water allocation for CB Watsan. Thus, in order to realize the human right to water, a specific type of licensing for CB Watsan should be conceived. Its application should be simplified and the cost should be affordable. The licensing framework should also establish monitoring mechanism.

11. CBO should be granted access to all planning instruments

Water allocation framework that eventually determine CBO's access to raw water are determined through planning exercise at the basin level. CBO needs to be guaranteed access to information on river basin planning. CBO should be recognized as a specific stakeholder at river basin commissions and water allocation for CBO should be specifically considered.