Does "Regulation By Contract" Decreases Transparency?
Evidence from Jakarta Water Services Sector

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1. Introduction

Most of the world's water utilities are state-owned and in many cases such status is "entrenched" in a legislative or constitutional provision. Since divestiture may change the state ownership status of the water utilities and is therefore prohibited, the private sector potentials are tapped by the use contract between them and the municipalities (or the state owned utilities).

A regulatory system by which contracts are utilized to embody ex ante agreements between a public entity and the private sector, stipulating rights, obligations and conditions which regulates the parties are often termed "regulation by contract".[1]

Regulation by contract however, comes with criticisms that it reduces transparency. Authors such as Lobina and Hall suggests that oftentimes it is "…*the private operator* [which has] *control over who can access the text of the concession agreement and tariff formulae*".[2] As discussed above, the contract document embodies crucial regulatory information stipulating the rights, obligation and condition of the public service in question.

Rouse also criticized "regulation by contract: "*What it* [regulation by contract] *doesn't do is provide any means of regulating the contract owner, nor does it provide for transparency and public participation. On the contrary, it tends to reduce transparency and assumes that governments can look after the consumers' interests. Also, this lack of transparency risks providing the conditions for corruption.*"[3]

Similar criticism is voiced by Eberhard: "*Transparency is also often compromised in regulatory contracts, such as concession agreements or power purchase agreements. Few of these contracts are open to public scrutiny. Government officials and private operators often justify such secrecy on the grounds of "commercial necessity or competition." But it is unclear why the secrecy is needed if the operator has been granted a de facto or de jure monopoly that eliminates any possibility of competition, at least for a significant number of years."*[4]

Meanwhile, Prosser[5] had warned against viewing regulatory relation as "essentially contractual": "*…the concept of an overall regulatory contract fits badly with the openness to changing democratic goals and principles...*" Prosser said. Freeman also criticizes "regulatory

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[1] Shugart, C.T., 'Regulation-by-Contract and Municipal Services: The Problem of Contractual Incompleteness' (Ph.D Thesis Harvard University 1998)

[2] Lobina, E. and Hall, D., 'The comparative advantage of the public sector in the development of urban water supply' 8 Progress in Development Studies 85

[3] Rouse, M., *Institutional governance and regulation of water services*, vol 2 (2007) p.26-27

[4] Eberhard, A., 'Infrastructure regulation in developing countries: an exploration of hybrid and transitional models' (African Forum of Utility Regulators, 3rd Annual Conference, 15-16 March 2006, Windhoek, Namibia) <http://www.ppiaf.org/ppiaf/sites/ppiaf.org/files/publication/AFUR_hybrid_and_transitional_models_ebhart_paper_0.pdf> accessed on February 6, 2012

[5] Prosser, T., 'Regulatory contracts and stakeholder regulation' 76 Annals of Public and Cooperative Economics 35

contract" for its democratic deficit. If regulation is all about standard setting, implementation and enforcement, then regulatory contract may subsume regulatory process into mere negotiation between a public authority and the private sector, excluding its beneficiaries from the whole process.[6]

Nevertheless, the view that regulation by contract is not transparent is not without a contender. Aquafed, The International Federation of Private Water Operators is of the opinion that Private Sector Participation "*…ensures key requirements related to transparency and accountability*" as the contract or license defines "*…the respective roles of the public authority and the operator….; the content of a regular detailed reporting, at least annual, on achievements and performance and that the private operator is permanently regulated by an authority, which checks its compliance with the contract / licence*."[7]

Proponents of private sector participation such as Payen et al[8] and Marin[9] also contends that licences or PPP contracts always spells out in a great detail the private sector's performance targets and also contain some form of mandatory reporting to their public counterpart. Oftentimes such mechanism provides for better transparency than unregulated public sector.

Nevertheless, the views that regulation by contract is not transparent are backed by empirical evidence. Water contract were made confidential in Berlin and was released only after a referendum mandates public bodies to disclose the contracts relating to the Berlin water privatization.[10] Concession contracts and other regulatory information are also categorized as confidential information in Jakarta, Indonesia.[11] The state owned water utility PAM Jaya had repeatedly refuse to disclose the concession contract along with other regulatory information.[12] At the time of writing, an adjudication process is underway at the National Freedom of Information Commission to decide whether the contract and other information pertaining

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[6] Freeman, J., 'Contracting State, The' 28 Fla St UL Rev 155

[7] Payen, G., Moss, J. and Waeyenberge, T.V., *Private Water Operators Contribute to making the Right to Water & Sanitation real, AquaFed's submission, Part 3 Avoiding misconceptions on private water operators in relation to the Right to Water and Sanitation* (AquaFed 2010) <http://www.aquafed.org/pdf/2010%20CDA_RTWS_Aquafed5.pdf>

[8] Ibid see para 6.2 also Payen, G., *UN Human Rights Council Public hearing by the Independent Expert on the Right to Water, Introductory remarks by Gerard Payen* (AquaFed 2010) <http://www.aquafed.org/pdf/RTWSGeneva_CDA_PublicHearing_GPspeech_finalb_Pc_2010-01-27.pdf> para 2

[9] Marin, P., *Public-private partnerships for urban water utilities: a review of experiences in developing countries* (World Bank Publications 2009) p.131

[10] Dix, A., 'Proactive Transparency for Public Services: the Berlin Model' <http://www.freedominfo.org/2011/10/proactive-transparency-for-public-services-the-berlin-model/#2> accessed July 19, 2012

[11] Al'Afghani, M.M. and others, *Transparansi Lembaga-lembaga Regulator Penyediaan Air Minum Di DKI Jakarta* (ECOTAS/KRuHA/TIFA, 2011) See also, statement of support from Article 19 Taing, J., 'Indonesia: Jakarta's Water Agreement muddied by lack of transparency' <http://www.article19.org/resources.php/resource/2957/en/indonesia:-jakarta%E2%80%99s-water-agreement-muddied-by-lack-of-transparency> accessed February 16, 2012

[12] Reza, M., *Permintaan Dokumen dan Informasi Kontrak Konsesi Layanan Air Minum Jakarta (Freedom of Information Law Request for Documents and Contractual Information Concerning Jakarta's Water Services Concession), Letter No.019/KIP/V/2011 dated October 31, 2011* (KRuHA 2011)

Jakarta water services can be released.[13] Lack of transparency is also cited in water projects in other regions: Budapest[14], Johannesburg[15], China[16] and the Czech Republic[17].

Given the prevalence of regulation by contract in private sector participation (PSP), it is desireable to evaluate the premise that regulation by contract decreases transparency and to provide explanation of such phenomenon.

This paper will discuss water utilities regulation in Jakarta where regulation by contract is applied and will occasionally refer to other jurisdiction, Victoria and England, to provide comparison on how similar issues are treated.

2. Regulation by contract versus regulation by agency

There are differences – and indeed oftentimes confusion – on the definition of "regulation by contract". Shugart suggests that "*The key feature of regulation-by-contract is that **agreement** is reached ex ante between the private company and the public entity on detailed rights, obligations, and conditions, and this agreement is what regulates the subsequent behavior of the company*".[18] Shugart (and Balance) later confirm his position; "[regulation by contract] *refers to the fact that the details of the arrangement are based on a **formal** agreement between the two parties (rather than being imposed unilaterally by law or by a discretionary regulator) and that the organisations with responsibility for applying and adjudicating the regulatory rules are those typically used for commercial contracts – i.e. courts or arbitrators – and do not include a statutory regulator*. Hence, it is the use of private contract which embodies the rule of the game that is emphasized on the definition of regulation by contract.

However, authors such as Bakovic.et.al, have different approach. Although they agreed that "*…the essence of regulation by contract is pre-specification, in one or more formal or **explicit agreements**, of the formulas that determine prices that a distribution company is allowed to charge for the* [product] *it sells*" they contend that such "agreement" could be embedded in concession, licenses, decrees secondary regulation and laws.[19] Similar position is followed by Eberhard which views that "regulatory contract" can be pre-specified in detail in basic law, secondary legislation, licences, concession contracts or power purchase agreements.[20]

This paper does not take such view. If the rules of the game are embodied in contracts – in the meaning that lawyers normally understood-- then they are subjected to the *pacta sunt servanda* principles i.e. that agreements are binding to the parties as if they are laws. Interpretation of

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[13] Rizal, *Tanda Terima Pendaftaran Pengajuan Sengketa Informasi No. A26/RSI/P/XII/KIP/2011, KRuHA vs PDAM DKI Jakarta, 07-12-2011* (Komisi Informasi Pusat (KIP) 2011)

[14] Lobina, E., 'Problems with Private Water Concessions: A Review of Experiences and Analysis of Dynamics' in Asit K. Biswas and Cecilia Tortajada (eds), *Water pricing and public-private partnership* (Routledge 2005)

[15] McKinley, D., 'Water is life: the anti-privatisation forum and the struggle against water privatisation' Public Citizen

[16] Ge, Y. (2008). "Rethinking China's Urban Water Privatization." Xinjiang Conservation Fund.

[17] Skapová, H., *Water industry privatisation in the Czech Republic: money down the drain?* (Transparency International - Czech Republic 2009)

[18] Shugart, 'Regulation-by-Contract and Municipal Services: The Problem of Contractual Incompleteness'

[19] Bakovic, T. and others, *Regulation by contract : a new way to privatize electricity distribution?* (World Bank 2003)

[20] Eberhard, 'Infrastructure regulation in developing countries: an exploration of hybrid and transitional models'

such agreement must resort to the will of the parties. Basic law and statutes on the other hand are not commonly referred to by lawyers as contracts although political scientist (as an allusion) often refers to them as a reflection of "social contracts". What differentiates basic law and statutes from ordinary private contract is the reflection of the will. The later reflects the will of the people whereas the former reflects the will of the parties.

The easiest way to distinguish regulation by contract from other forms of regulation (such as regulation "by agency" that we shall discuss below) is on the determination of service level and prices.[21] If they are determined ex-ante (by way of indexation or other things) through a formal private contract between a public authority and a private entity then it is a regulation-by contract.

The direct opposite of regulation by contract is "regulation by agency" (often called "regulation by commission"[22] or "independent regulation"[23]) in which, instead of curtailing discretion ex-ante through contracts, a regulatory agency is established to regulate the companies and accorded with discretionary powers to decide on regulatory matters.

The distinction between "regulation by contract" and "regulation by agency" originates from two different regulatory traditions. The former is used in France while the latter is a commonplace in Anglo Saxon countries.[24]

The adoption and subsequent spreading of the "French Model" of regulation by contract by the World Bank has been cogently elaborated by Finger and Allouche.[25] Regulation by contract model is attractive because the World Bank thought that it could reconcile the tension over water as economic good versus aspiration towards user participation in water resources management.[26] Moreover, the fact that ownership of the water companies are still left in the hands of the state in a regulation by contract is more appealing than England's full divestiture model.

Thus, decentralization of water management coupled with the treatment of water as economic good and user participation was thought to be a good recipe to solve the world's water problem by the World Bank. As Allouche and Finger notes however, the World Bank did not elaborate how private firms would be inclined to work under such structure.[27]

Regulation by contract had been a failure in various cases. In Latin American countries renegotiation occurred roughly every two years after the contract was concluded.[28] This problem is often perceived as a problem of contractual incompleteness:[29] contract can never

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[21] See Rouse, *Institutional governance and regulation of water services*

[22] See Shugart, 'Regulation-by-Contract and Municipal Services: The Problem of Contractual Incompleteness'

[23] See Eberhard, 'Infrastructure regulation in developing countries: an exploration of hybrid and transitional models'

[24] See Rouse, *Institutional governance and regulation of water services,* also Quesada, M.G., *Water and Sanitation Services in Europe: Do Legal Frameworks provide for "Good Governance"?* (UNESCO Centre for Water Law Policy and Science at the University of Dundee 2010) <http://goo.gl/g2zN6> accessed January 3, 2012. See also Neto, F., 'Water privatization and regulation in England and France: a tale of two models' [Wiley Online Library] 22 107

[25] Finger, M. and Allouche, J., *Water privatisation: trans-national corporations and the re-regulation of the water industry* (Taylor & Francis 2002) See in particular Chapter 3

[26] Ibid

[27] Ibid

[28] Guasch, J.L., *Granting and renegotiating infrastructure concessions: doing it right* (World Bank Publications 2004)

[29] Shugart, 'Regulation-by-Contract and Municipal Services: The Problem of Contractual Incompleteness'

draw all possible contingencies. It would need a specific institutional framework in order for contract to function properly. Shugart have explained in detail that among the prerequisites are the culture of delegation and an administrative law system.[30]

Apprently, in most countries the instititutional prerquisites for regulation by contract are not present. For example, the term "concession" that is often used by the World Bank refers only to a business model where the private sector is accorded with rights and obligation in operating, maintaining assets, collecting revenue and investment while the assets are still legally owned by the public sector until the concession period ends.[31] However in its country of origin, a *concession* is a legal term which carries different meaning than its casual understanding as a business model as it involves a delegation of governmental function backed by a system of accountability under public administrative law.[32] The French system of *concession* which regards contract as an administrative contract reviewable before the administrative court is, as a matter of practice, not recognized in Indonesia.[33]

To cope with these deficiencies, some contracts now institute an "independent" regulator to adjudicate dispute and to prevent frequent renegotiation, often refereed as the "hybrid" system. In practice, such as in Jakarta, the powers of the regulator are still constrained and do not have the liberty to decide on matters regarding service level and prices. This move towards the hybrid system is perceived as a transitional model in which a fully independent agency may develop.[34] As we shall see later apprently this hybrid system still have some problems, among other, with respect to its transparency.

3. Methodology, Analytical Framework and Justifications

By no means is the term "transparency" easy to define. The word originates from the Latin phrase *trans* (through) and *parere* (appear).[35] This Latin meaning influences the modern dictionary definition of the word "transparent": *"(of a material or article) allowing light to pass through so that objects behind can be distinctly easy to perceive or detect"*[36] Other dictionaries also invoke similar definitions: "*fine or sheer enough to be seen through*"; "*free from pretence or deceit*"; "*readily understood*".[37]

The academic notion of the term is often similar to that. Hall and Rogers suggests that transparency and accountability in water governance "*…are built on the free flow of information*".[38] Florini's definition of transparency is more specific: "*…the release of*

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[30] Ibid

[31] Public-Private Infrastructure Advisory Facility, *Approaches to private participation in water services : a toolkit* (International Bank for Reconstruction and Development and the World Bank 2006)

[32] Elnaboulsi, J.C., 'Organization, management and delegation in the French water industry' 72 Annals of Public and Cooperative Economics 507

[33] Al'Afghani, M.M., 'The Role of Legal Frameworks in Enabling Transparency in Water Utilities Regulation' (PhD Thesis, University of Dundee 2012 Forthcoming)

[34] Eberhard, 'Infrastructure regulation in developing countries: an exploration of hybrid and transitional models'

[35] Oxford University Press, 'Oxford Dictionaries' (*Oxford University Press*, 2011) <http://oxforddictionaries.com/definition/transparent?q=transparent> accessed December 26, 2011

[36] Ibid

[37] Merriam-Webster, 'Merriam-Webster Online Dictionary' (*Merriam-Webster, Incorporated*, 2009) <http://www.merriam-webster.com/dictionary/transparent> accessed December 26, 2011

[38] Rogers, P. and Hall, A., *Effective water governance (TEC background papers no. 7)* (Global Water Partnership, Stockholm 2003)

information by institutions that is relevant to evaluating those institutions".[39] In a later publication she offers another definition: "*…the degree to which information is available to outsiders that enable them to have informed voice in decisions and/or to assess the decisions made by insiders*".[40]

From all definition of transparency, there is only one emphasis without which the concept of transparency would not be acceptable: ***information***. For that reason, transparency is defined in this paper as the public disclosure of information. Transparency has several dimensions: (1) the availability of information, (2) the public disclosure of such information and (3) the quality of information disclosed. Modes of disclosure can be categorized into passive and active. Passive disclosure rules establish the right of individuals to file an information request to public bodies. Individuals are entitled to request any information that the public authority holds, as long as they are not exempted by legislation. On the other hand, active disclosure rules establish specifically the types of information that should be published by discloser. Disclosers do not have any obligation to publish any other information, unless as stated in the legislation. The former is found mostly in freedom of information (FoI) legislation whereas the latter is found mostly in sectoral rules.

Finally, there are two types of active disclosure rules that will be evaluated in this paper. These concern disclosure of information regarding service level/ customer service and investment. These items are essential to water utilities regulation and as we will discuss later its disclosure may a part of the human right to water requirements. The paper will compare whether such information is available in Jakarta – where regulation by contract is employed and occasionaly refers to another municipality in Indonesia, Bogor, as well as England and Victoria where more advanced form of regulation exist.

The Jakarta model of water PSP has been discussed by various authors.[41] Contracts were entered into between PAM Jaya the municipality owned water company and the private contractors Palyja and Aetra. The scope of the PSP covers all aspects of water services from treatment to distribution. Later, an independent regulator the JWSRB, was set up. However, the JWSRB's powers are limited to facilitating mediation in the case of dispute and coordinating liaison between the concessionaire and various government institutions.

Bogor has a publicly owned water company and uses regional by laws as the primary instrument for regulating its water company. England privatized its water companies by way of full divestiture of ten regional water authorities. As such, the scope of privatisation stems from bulkwater provision to treatment and distribution. An independent regulator, OFWAT is installed for economic regulation and consumer protection purpose.

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[39] Florini, A.M., 'Does the invisible hand need a transparent glove? The politics of transparency' (Annual World Bank Conference on Development Economics, Washington, DC http://wwwworldbankorg/research/abcde/washington_11/pdfs/florinipdf)

[40] Florini, A., 'Introduction: The Battle Over Transparency' in A. Florini (ed), *The right to know: transparency for an open world* (Columbia Univ Press 2007)

[41] 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 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)

Victoria's water companies are publicly owned but regulated by a multi utility regulator the Essential Services Commission (ESC). Victoria's water services system is segregated between bulkwater provision and treatment with distribution. The latter is provided by Melbourne Water and the former are provided by three water retail companies. All of these companies are state owned and regulated by the ESC. However, the State of Victoria entered into build-operate-transfer contract with a private operator called Aquasure – on behalf of Melbourne Water – to provide the state with bulkwater from desalinated sea water. Thus, in Victoria there is a scope of contracting, but this is done at the bulkwater provision level and not at the distribution level whereas in Jakarta, the concession contract privatizes all segments of water services from treatment to distribution.

As previously discussed, the paper will discuss active disclosure mechanism with respect to service level/customer service information and investment planning process. As Hendry[42] and Graham[43] both note, one of the regulatory tasks is to ensure that providers maintain service levels. Service levels, in addition to tariffs and protection of vulnerable groups are essentially the heart of regulation. It is – in addition to determining prices or rate of return -- is one of the primary reasons why a water company is regulated and a manifestation of the price that consumers are paying. Therefore, it is logical if consumers are informed about what the service levels are since it is what they can legally expect to get from the water company. Transparency of service levels requires that not only that the standards for supply, customer service, compliance review and consumer grievances are made transparent but also that non compliance with service levels and the consequences for companies in breach be disclosed.

Service levels could be elaborated in the form of legislation or, alternatively, embodied in a contract. There could be a problem with transparency if the service levels are set through contractual terms – which are not published – rather than if they were set through legislation, which by default, is always promulgated.

Closely related to service level is the utilities' investment policy. Regulation can serve many values: environment, equity or higher water quality. This could trigger tradeoffs in the "regulatory quadrangle": prices, network expansion, water quality and the environment. If utilities invest on expanding the network to provide more coverage, then less money is spent on investing in other priorities. What is it that the consumer really wants? Better water quality, more extension to the poor or higher environmental standards? Consumers need to be informed on the utilities investment plans so that they can give a proper feedback. Hence, utilities' investment planning should be made transparent and participatory.

At the same time, network expansion or other forms of investment as discussed above could also mean higher prices. To some who cannot afford a price hike, such burdens are unacceptable. In developing countries, especially, utilities prices are politically sensitive. There have been cases in the past where a riot occurs because of a price increases.[44] In big cities where the gap between the rich and the poor is wide, prices could be related to supply security. There have been cases in Jakarta where main water pipes are being tapped into illegally by the

[42] Hendry, S.M., 'An Analytical Framework for Reform of National Water Law' (PhD thesis, University of Dundee 2008) Chapter 5

[43] Graham, C., *Regulating public utilities : a constitutional approach* (Hart 2000) p.39-40

[44] Wood, D., 'Bridging the Governance Gap: Civil Society, Democratization and Electricity Sector Reform ' (Arusha Conference,"New Frontiers of Social Policy" – December 12-15, 2005) <http://pdf.usaid.gov/pdf_docs/PNADO643.pdf> accessed July 03, 2010

citizens to provide for their daily consumption as they cannot afford to pay the price.[45] More investment may require a tariff increase, but tariff increase may provoke unrest.[46] The private sector tends to take the position that a tariff increase is the only solution as they believe that the poor actually pay more with the status quo. [47] However, previous research by Bakker indicates that the discussion on willingness to pay is too simplistic as it does not take into account disincentives embedded within the current system, such as high transaction costs and high connection fees.[48] In order to mitigate such adverse effect, cross subsidization might be required. Furthermore, to a certain extent, even the lower part of the tariff band may need to get a tariff increase on the condition that more flexibility is given to the poor. In order to be legitimate, cross subsidization and the increasing of the tariff rate needs to effectively communicated to the poor. This requires transparency of the tariff setting methodology for the consumption of intermediariess organizations such as civil society, and simplified explanation of tariff increase combined with ease of payment mechanism for the poor.

There are also some normative justification for the transparency of service level and investment planning. The General Comment 15 on the Human Right to Water states that: "*The right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water. Individuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties.*"[49]As service level/customer service and investment planning information affect the fulfillment of an individual's human right to water, the disclosure of such information would be mandatory under human rights mechanism.

Furthermore, the Independent Expert (now Special Rapporteur) on the Human Right to water states in its report to the UN General Assembly: "*The process of decision-making and implementation, any instruments that delegate service provision including contracts, and instruments that outline roles and responsibilities must be transparent, which requires the disclosure of adequate and sufficient information and actual access to information*".[50] Such

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[45] 'Water Worries: Special Issue' *The Jakarta Globe* (July 25, 2009) <http://www.thejakartaglobe.com/pages/downloads/Water_Worries.pdf>

[46] Ibid According to a former Jakarta regulator: "*This is a very difficult puzzle. If you want to raise the tariff on poor people to create equilibrium with rich people, there will be social unrest — even though they are paying more for vendor water. It's a vicious cycle.*" At p. 6

[47] Ibid In the words of PT Palyja (The private concessionaire, a subsidiary of Suez Environnement in Jakarta) Director Philippe Folliasson**:** "*...note that the city's poor who don't have piped water pay 20 times more than the current tariff rate to water truck gangs, and inflation alone dictates that rates must be increased*. "The only way forward is to expand the network, increase connections and make sure everyone has access to piped water." At p.6

[48] These are higher transaction cost to connect in the form of: infrastructure costs to build storage due to intermittent supply, line-ups and time off work to pay bills (for those without access to banking or regular income), difficult geographical position requiring more investment to connect and lack of security of tenure. Private sector also has disincentive to extend into unprofitable area as they exist in the lower part of the tariff band, hence, will indirectly affect their revenue collection. Bakker, K., 'Trickle Down? Private sector participation and the pro-poor water supply debate in Jakarta, Indonesia' 38 Geoforum 855

[49] General comment no. 15 (2002), The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)

[50] de-Albuquerque, C., *Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, A/HRC/15/31* (2010) <http://www2.ohchr.org/english/issues/water/iexpert/docs/A-HRC-15-31-AEV.pdf> February 11, 2011

access of information is – in Independent Expert's view -- vital to ensure the right of the public to participate in the decision making process.[51]

To conclude, irrespective of any ownership model of water utilities (public or private), the scope of PSP in water services (in bulkwater, treatment or distribution) or any regulatory model implemented ("by contract", "by agency" or "hybrid"), or whether the regulation conducted at the local (Jakarta or Bogor municipality), national (England) or the state level (Victoria), information pertaining service level/customer service and investment planning must be published as they form a part of the human right to water.

4. Confidentiality problem in Jakarta

Jakarta's regulatory bodies are constrained from disclosing information arising out of the concession due to the confidentiality clause on the Cooperation Agreement. This has been the primary impediment towards transparency.

The clause obligates the parties to keep all information arising out of the contract confidential, unless both of the parties agree otherwise. Through some informants and a reply to an FoI request from PAM Jaya the author is able to confirm that the confidentiality clause reads as follows[52]:

> *47.1 General Provisions*
>
> *The parties, officers, directors, experts and/or personnel and agents of each Party are obliged to maintain the confidentiality of all commercial and technical information which they possess and has been obtained from each Party, and are forbidden from using the information except for the purposes intended in this Agreement, except for that categorized as:*
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> *(a) information which was already controlled/possessed by one Party, unless it should have been known by such Party that such information constitutes confidential information of the other Party;*
>
> *(b) information which was public knowledge at the time it was revealed under this Agreement; and*
>
> *(c) information which became public knowledge after being revealed under this Agreement.*
>
> *47.2 Disclosure of Confidential Material*
>
> *(a) The Parties may disclose the confidential information referred to in Clause 47.1 to a third party for the purpose of implementation of this Agreement, with the stipulation that a written agreement has been made before the information is disclosed to ensure that the third party receiving the information will maintain its confidentiality and only use the information for the purpose for which it was disclosed.*

[51] Ibid

[52] Cooperation Agreement Between PAM Jaya and The Concessionaire, 2001 Clause 47.1 and 2. See also Daryanto, A., *Jawaban Surat KRuHA (Letter No. 581/DIV.T&P/XI/2011 dated November 8 2011 on PAM JAYA's response to FoI Request by KRuHA)* (PAM Jaya 2011)

(b) In the event of a disclosure of information as intended in Clause 47.2(a), in the interest of the implementation of this Agreement, the disclosure must first be approved by the other Party.

First, it is relevant to ask: who are bound by this provision? The Cooperation Agreement mandates that all parties (PAM Jaya and the concessionaires) and people affiliated with them (this includes directors, experts, personnel) shall "*…maintain the confidentiality of all commercial and technical information which they possess and has been obtained from each Party*".[53] It is to be noted that the term 'party' here refers to the concessionaires and PAM Jaya It is interesting to ask if the regulatory body (JWSRB) and officials at the Governor's office can also be bound by this clause. Strictly speaking, as a non-party, they cannot be directly bound by the contract. However, as the regulatory body is instituted under the contract, they adopt some of the principles stipulated therein, and this includes the policies to preserve confidentialities. This brings a question on the transparency impact of the *hybrid* model.

Secondly, it is relevant to discuss the breadth of this provision. Which information is covered by the confidentiality clause? One must note that the term "commercial and technical information" covers a wide range of information. In practice, this clause effectively shields all information acquired by PAM Jaya through reports and investigation towards the concessionaires. In other research conducted by the author, not only regulatory information is treated as confidential, but also the Cooperation Agreement itself. [54] The regulator considers the contract confidentiality clause extends into the contract document itself. This was confirmed by a field interview to Palyja, which also interprets that the confidentiality clause is meant to cover both information arising out of the contract and the contract itself.[55] Finally, this stance was confirmed by an official FoI request[56] made by an NGO to PAM Jaya. The NGO request demanded that PAM Jaya discloses (a) Jakarta Water Cooperation Agreements along with its amendments, (b) results of financial audits conducted by the state audit agency and (c) financial projections used in determining water tariffs. However, PAM Jaya, through a letter[57] cited the summary of clause 47 above and refused to disclose the requested information, including the Cooperation Agreement itself. Thus, the private sectors, JWSRB and PAM Jaya all have one voice in this matter: the confidentiality clause extends to the concession contract itself. The case, at the time of this writing, is currently being appealed to the National Freedom of Information Commission.[58]

This restriction from disclosure under Clause 47 has four qualifiers: (1) disclosure can only be made to "third parties", (2) disclosure can only be made with a purpose of implementing the Cooperation Agreement, (3) the disclosing party and the third party must enter into a confidentiality agreement prior to the disclosure and, (4) all parties to the Cooperation Agreement must agree to the disclosure.[59] Public disclosure of any regulatory

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[53] Cooperation Agreement Between PAM Jaya and The Concessionaire, 2001 Clause 47.1
[54] Al'Afghani and others, *Transparansi Lembaga-lembaga Regulator Penyediaan Air Minum Di DKI Jakarta*
[55] Interview with Palyja in Jakarta, January 10, 2011. Palyja regard that the confidentiality clause may provoke suspicion and erode public trust.
[56] Reza, *Permintaan Dokumen dan Informasi Kontrak Konsesi Layanan Air Minum Jakarta (Freedom of Information Law Request for Documents and Contractual Information Concerning Jakarta's Water Services Concession), Letter No.019/KIP/V/2011 dated October 31, 2011*
[57] Daryanto, *Jawaban Surat KRuHA (Letter No. 581/DIV.T&P/XI/2011 dated November 8 2011 on PAM JAYA's response to FoI Request by KRuHA)*
[58] Rizal, *Tanda Terima Pendaftaran Pengajuan Sengketa Informasi No. A26/RSI/P/XII/KIP/2011, KRuHA vs PDAM DKI Jakarta, 07-12-2011*
[59] Cooperation Agreement Between PAM Jaya and The Concessionaire, 2001 Clause 47.2

information acquired by PAM Jaya is then virtually impossible, as the contract requires any third parties to enter into confidentiality agreement with the disclosing party. The qualifiers are only designed to disclose information to specific third parties, such as accountants and auditors but not the public.

Furthermore, this clause serves primarily the interest of the concessionaire, although it is formulated to apply to both parties. This is because all regulatory information tends to flow from the concessionaires to PAM Jaya through the reporting duties and investigative powers as discussed in the previous section, and not the other way around. It is PAM Jaya who has obligation to be accountable in its dealing with third parties, including the concessionaire, and therefore might be required to disclose some regulatory information.

Governor Regulation 118, which is the primary legal basis for the establishment of the regulatory body outside the Cooperation Agreement stipulates that the JWSRB is obligated to maintain confidentiality of *all* information and can only utilize information for the purposes of mediating disputes between the contracting parties.[60] This is despite the fact the Pergub 118 refers to the Indonesian Freedom of Information Law. In addition, JWSRB enacted its internal code of conduct on participation and transparency, the Regulatory Body Rule No. 2 Year 2007 on the Mechanism and Procedure of Transparency in Jakarta's Water Services.[61] Since JWSRB's initial mandate is weak, the rule has no legitimate binding power, although in practice it is used as a basis for JWSRB's operation. Despite the word "transparency" in the rule's title, the rule makes no mention of public disclosure of regulatory information.

To conclude, although the JWSRB and its officials and agents are not a party to the contract, the regulation which establishes them incorporate the contract's confidentiality principles. As a result, public disclosure of regulatory information becomes impossible.

This is in contrast with other regional-owned waterwork companies which do not engage with private sector participation, such as Bogor. Unconstrained with any confidentiality obligation to another party, Bogor, a city 60 kilometers south of Jakarta, regulates in its regional by-law that the utility must provide periodical performance reports for the purpose of transparency to the public.[62]

5. Service Level/Customer Service

The Cooperation Agreement obligates the concessionaires to meet certain service levels[63]. Concessionaires are given the liberty to determine the *means and method* for delivering the service standards as set on the contract schedule. There is also an obligation to conduct sampling and testing of water quality in accordance with standards agreed by the ministry of health, complemented by the obligation to deliver the test results to PAM Jaya, every month. PAM Jaya is allowed to exercise its own testing on the condition that it does not

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[60] Peraturan Gubernur DKI Jakarta No.118 Tahun 2011 Tentang Badan Regulator Pelayanan Air Minum Article 5.b . Note that the JWSRB's primary function is mediating disputes. See section 5.1.2 above. The JWSRB lacks the power normally accorded to independent regulatory bodies, such as in determining tariffs or imposing penalties. This article appears to be drafted in light tof that purpose.

[61] Peraturan Badan Regulator Pelayanan Air Minum DKI Jakarta No. 02 Tahun 2007 Tentang Mekanisme Dan Prosedur Transparansi Pelayanan Air Minum Jakarta

[62] Peraturan Daerah Kota Bogor Nomor 5 Tahun 2006 Tentang Pelayanan Air Minum Perusahaan Daerah Air Minum Tirta Pakuan Kota Bogor Article 3 (2) (c)

[63] Cooperation Agreement Between PAM Jaya and The Concessionaire, 2001 Schedule 8

hinder the concessionaire's daily operation. The parties may refer examination to an independent expert should disagreement concerning compliance of water quality arise.

Service levels[64] consist of ambient water quality standards, drinking water standards, pressure at customer connection, maximum response time to answer phone calls, attendance time to response complaints, time for completion of repairs, and the obligation to connect in areas where mains are available. Categorization of these standards is made available at the JWSRB's website[65], but the details have never been officially disclosed by the authorities and the concessionaire.

Hence, there is no way for customers in Jakarta to know the services to which they are entitled. In 2007, the regulatory body insisted to the media that the Cooperation Agreement contains a clause mandating compensation to consumer in the amount of IDR 50000 (approximately USD 5) if a disruption occurs for more than one day. A member of the regulatory body stated:

> *"The JWSRB has requested, on the last 6 months, that customer rights should be published. However, the operators always refuse. Without publication on the mass media, Jakartans will never know their rights with respect to service disruption"*[66]

Note that the JWSRB is constrained from publishing the contract due to a confidentiality clause[67] and its statute[68] which – pursuant to the contract – prohibits the disclosure of regulatory information.

Such a stance was also supported by the JWSRB Chairman at that time, Ahmad Lanti, who suggested that disclosure of consumers' rights would enable the community to file class action suits in order to obtain such compensation.[69] The PAM Jaya Director however, denied that such a compensation scheme exists.[70]

The Cooperation Agreement obliges the concessionaire to complete repairs to any interruption, at maximum, within 24 hours after it occurs. Failure to comply such requirement may trigger a penalty and in addition, the obligation to pay compensation to consumer.[71] Schedule 15 reads:

> *"Every Customer who complains in writing to the Second Party shall be entitled to a rebate in the next month's Customer bill of 10% of the Customer's bill for the month in which the complaint arose - with a minimum rebate of Rp. 10,000 and a maximum rebate of Rp.50,000.*

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[64] Ibid Clauses 31.1 and 31.2

[65] Jakarta Water Supply Regulatory Body, 'Kinerja Operator' (*JWSRB*) <http://www.jakartawater.org/index.php?option=com_content&view=article&id=96&Itemid=257&lang=en> accessed August 18, 2011

[66] Statement of Dr. Riant Nugroho as quoted by Kompas See 'Hak Pelanggan Disembunyikan (Customer's Rights are Concealed)' *Daily Kompas* (Jakarta, November 27, 2007). On Personal Communication with the author, Dr. Nugroho confirmed such statement.

[67] Cooperation Agreement Between PAM Jaya and The Concessionaire, 2001 Clause 47

[68] Peraturan Gubernur DKI Jakarta No.118 Tahun 2011 Tentang Badan Regulator Pelayanan Air Minum Article 5b

[69] 'Hak Pelanggan Disembunyikan (Customer's Rights are Concealed)'

[70] Ibid

[71] Cooperation Agreement Between PAM Jaya and The Concessionaire, 2001 Schedule 15

If a Customer claims that compensation in excess of Rp.50,000, the Customer shall only be entitled under this Schedule to a maximum of Rp.50,000 with the balance of any claim to be settled by mutual agreement between'the Second Party and the Customer or through some other mediation, arbitral or court process.

Rebates will be made directly to the Customers in the next month's Customer bill, without affecting project revenue."

When water quality is not in compliance with the prescribed standard, the Cooperation Agreement obliges the parties to hold 'discussion' "*…for the purposes of establishing the reason for the non compliance*".[72] Only when it is found that the concessionaire is at fault will it be responsible to repair the service and pay a penalty. The italicized clause above implies that non-compliance is permissible if it is not due to the first party's fault. [73]

In order to avoid the presumption that such problem is typical in developing countries where there is a general lack of governance, it is relevant to briefly provide another Indonesian case study. Bogor is a municipality 60 km south of Jakarta where the company is publicly owned. In Bogor, service disruptions, the duty to connect, certain continuity and quantity of water flow, customer service standards and compensation mechanism for breaching these standards are clearly stipulated in its regional by law and are therefore published. [74]

Note that as a part of a regional by law, changes to these standards and the enforcement thereof follows the regular pattern of democratic rulemaking consisting of "notice and commenting".[75] Parliament members were given notice of the draft and then the draft is discussed and enacted as law. Conversely, in Jakarta any changes to these standards must be negotiated bilaterally with the concessionaire.

In England, information on both service levels and customer service standards is regulated in a Statutory Instrument (the "GSS Rule") and so they are available to the public. [76] Meanwhile, water quality is regulated in a separate Statutory Instrument and the DWI (Drinking Water Inspectorate) is tasked with supervising its enforcement.[77] Utilities must enact a code of practice, basing on GSS Rule, to be approved by Ofwat.[78] An important transparency mechanism in England is that in the licence condition, Ofwat requires that such code and any

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[72] Ibid Clause 21.g.

[73] There are probabilities that the supply of bulkwater decreases in terms of quality and quantity. Such condition is beyond the reach of concessionaire's abilities. This clause protects the concessionaire from being penalized for failures in bulkwater supplies. See ibid Clause 11

[74] Article 20, Peraturan Daerah Kota Bogor Nomor 5 Tahun 2006 Tentang Pelayanan Air Minum Perusahaan Daerah Air Minum Tirta Pakuan Kota Bogor. These includes the rights to have meters tested, obtain results on exmaniation of water quality testing, obtain information about structure and amount of tariff, some compensation rights and some rights to complain.

[75] Notice and commenting is a common process of democratic rulemaking. This howeve can be absent in contracting Freeman, 'Contracting State, The'

[76] The Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, The Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008 No. 594

[77] See The Water Supply Regulations 2010, SI 2010 No. 1991 This SI is regularly amended. Particularly see Regulation 4 (2) (a).

[78] *Instrument of Appointment by the Secretary of State for the Environment of Thames Water Utilities Limited as a water and sewerage undertaker under the Water Act 1989* (2005) <http://www.ofwat.gov.uk/industrystructure/licences/lic_lic_tms.pdf> accessed May 24, 2011 Condition G

substantive amendment thereof be put to the attention of customers, its copies made available for inspections and anyone requesting it should be able to obtain it free of charge.[79]

Likewise, in Victoria Drinking water quality are regulated directly by legislation.[80] The service standard is regulated through the Customer Service Code (CSC).[81] Utilities must enact and publish a customer charter which is formulated based on the CSC. [82] The guaranteed service level compensation however is not mandatory. If utilities choose to enact them, they must be approved by the ESC and published as a part of the CSC.

Service Levels and Customer Service standards in Bogor, England and Victoria are transparent because they are a part of the regulatory instruments available in the public domain. The regional-by-law is a public document in Bogor, the GSS Rule and the drinking water quality standard in England is a Statutory Instrument while in Victoria the drinking water standard is in primary legislation wehereas the the service level and customer service standard is a part of the Customer Service Code enacted by the regulatory body. Conversely in Jakarta, they form part of the Cooperation Agreement which is confidential. It is important to emphasize that in other municipalities in Indonesia where no concession takes place, the national guideline on drinking water quality is incorporated into regional-by-law (which is a form of secondary legislation and therefore published) and service level and customer service standards also enumerated in the by-laws.[83]

Another reason why England and Victoria is more transparent than Jakarta is because in addition to stipulation of service standards in a regulatory instrument (in a Statutory Instrument or in a Code), there is a legal obligation to further disseminate the service standard information in the form of a customer charter (Victoria)[84] or code of practice (England).[85]

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[79] Thames Water, 'Code of Practice: important helpful information and advice for household customers' (*Thames Water*,) <http://www.thameswater.co.uk/cps/rde/xbcr/corp/codes-of-practice-and-customer-guarantee-scheme.pdf> accessed May 31, 2011

[80] Safe Drinking Water Act 2003, No.46 of 2003 (Victoria)

[81] Essential Services Commission, *Customer Service Code Metropolitan Retail and Regional Water Businesses* (Issue No 7, 15 October 2010, 2007) <http://www.esc.vic.gov.au/NR/rdonlyres/D8B6324D-1531-4BD2-B9A6-80FE9E0A44D1/0/CustomerServiceCode.pdf> Part B

[82] See ibid Part C (Customer Charter)

[83] Peraturan Daerah Kota Bogor No. 4 Tahun 2004 Tentang Perusahaan Daerah Air Minum Tirta Pakuan Kota Bogor Peraturan Daerah Kota Bogor Nomor 5 Tahun 2006 Tentang Pelayanan Air Minum Perusahaan Daerah Air Minum Tirta Pakuan Kota Bogor See also Al'Afghani, M.M., 'Anti-Privatisation Debates, Opaque Rules and 'Privatised' Water Services Provision: Some Lessons from Indonesia' in Alan Nicol, Lyla Mehta and Jeremy Allouche (eds), *IDS Bulettin: 'Some for All?' Politics and Pathways in Water and Sanitation*, vol 43.2 (Institute of Development Studies, Wiley-Blackwell 2012)

[84] Essential Services Commission, *Customer Service Code Metropolitan Retail and Regional Water Businesses* Part C.

[85] This is regulated in licence condition G see for example , *Instrument of Appointment by the Secretary of State for the Environment of Thames Water Utilities Limited as a water and sewerage undertaker under the Water Act 1989 Instrument of Appointment by the Secretary of State for Wales of Dwr Cymru Cyfyngedig as a water and sewerage undertaker under the Water Act 1989* (1989) <http://www.ofwat.gov.uk/industrystructure/licences/lic_lic_wsh.pdf> accessed May 24, 2011 *Instrument of Appointment by the Secretary of State for the Environment of Severn Trent Water Limited as a water and sewerage undertaker under the Water Act 1989* (1989) <http://www.ofwat.gov.uk/industrystructure/licences/lic_lic_svt.pdf> accessed May 24, 2011

These charters and codes are drafted based on the empowering regulatory instrument, but in a language which is simpler and more understandable than a legal instrument.[86]

6. Investment

The contract stipulates for a 5 year investment programme and an annual Investment and O/M programme.[87] The 5 year program must be agreed by PAM Jaya but the yearly investment and O/M program requires only to be discussed with them.[88] The obligation to invest and extend the network is also formulated in terms of "technical targets"[89], detailed on schedule 8[90] of the contract, which consist of the volume of water billed, production of potable water, non revenue water, number of connections and the ratio of service coverage[91]. The companies have full discretion on how to implement them.[92] By the end of the contract period, the contract target is 100 per cent of coverage, which mean that all of Jakarta should be connected to the water network.[93]

Bakker maintained that the system in Jakarta is implicitly 'anti-poor' as it conveys disincentives to both providers and the poor to connect to the network.[94] The disincentives for the poor to connect according to Bakker are: "*insecure tenure, the need for flexibility of payment, convenience, status and high 'transaction costs' which includes the infrastructure costs to build storage because networked water supply is only intermittent; line-ups and time off work to pay bills (for those without bank accounts and regular income); fear of time required to deal with mis-read meters and over-charging)*".[95]

The concessionaire also faces some disincentives in connecting to the poor. On the face of it, the system of water charges which pays the concessionaire based on the volume of water they sold (in accordance with indexation formula and other variables) should not influence their decision to connect. This assumption was confirmed by the private sector during an interview in Jakarta.[96] Bakker found that disincentives occur because the poor is covered by the lowest tariff band and the income generated by extending the network to them falls below the production cost.[97] Connecting to the poor means reducing PAM Jaya's capability to collect more revenue and this will eventually affect PAM Jaya's ability to pay[98] water charges to the

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[86] Especially in Victoria: See Part C, para 16.2 "*Summary of charter: A water business may summarise or otherwise communicate the contents of its charter if the summary document at least addresses:*" Essential Services Commission, *Customer Service Code Metropolitan Retail and Regional Water Businesses*

[87] Cooperation Agreement Between PAM Jaya and The Concessionaire, 2001 Clause 9.4.F

[88] Ibid Clause 9.1.F

[89] Ibid Clause 9.4.B

[90] Ibid, Clause 20

[91] Ibid, Schedule 8

[92] Ibid Clause 9.4.B

[93] Ibid, Schedule 8 Aetra's coverage in 2007 was 66.08% while its target was 74%. See Lanti and others, *The First Ten Years of Implementation of the Jakarta Water Supply 25-Year Concession Agreement (1998-2008)*

[94] Bakker, K., 'Conflicts over water supply in Jakarta, Indonesia' in B Barraqué and E Vlachos (eds), *Urban Water Conflicts, an analysis on the origins and nature of water-related unrest and conflicts in the urban context* (UNESCO Working series SC-2006/WS/19. 2006)

[95] ibid p. 115

[96] The private sector commented that, due to the in built system of water charge, they extend water network solely due to demand consideration. PAM Jaya's Concessionaire, *Personal Communication with the Private Sector* (January 11, 2011)

[97] According to Bakker's research in May 2005, the lowest tariff is IDR 500 whereas the production ost is approximately IDR 3,000

[98] See also the discussion on PAM Jaya's debts above

concessionaires.[99] Other disincentives built in to the system are due to the disorderly distribution of homes which raises the transaction costs, and lack of land tenure.[100]

Expansion to poor areas with lack of land tenure has been inhibited by the presence of mafia-like[101] organizations controlling public hydrants, which benefit from very high prices from the amount of water sold from these taps to the poor. [102] The flow of money from these activities could also be used to capture policy-making in network expansion to the poor. Bluntly said, not connecting to the poor benefits both the concessionaire (by reducing the risk of non payment from PAM Jaya and the high risk of transaction cost by connecting to the poor) and it also benefit complicit officials through high rent-extraction from selling water from public taps.

A transparent system would enable the public to comment and participate in network expansion and investment plans.[103] Achievement of the concessionaire's technical targets is published partially (but not routinely) by the regulatory body at its website[104] and is discussed widely in books published by them.[105] However, what is urgent for the citizen is the *plan* itself, the outcome of which will have direct affect on their livelihood. In an interview with Palyja[106], they pointed out that they voluntarily submitted an investment plan every three months before year-end to PAM Jaya although it is not required by the contract. This is a good practice but unfortunately, this submission is not followed by a public disclosure from PAM Jaya or the regulatory body to the public. There are also no adequate mechanisms for the public to be able to obtain, comment and participate in the concessionaire's investment plan.

In Victoria, every investment plan for the upcoming regulatory period is stipulated in each utility's "Water Plan".[107] Each utility's Statement of Obligation contain an obligation for the utility to "*…develop and implement open and transparent processes*[108] in its planning stage. This becomes the legal basis for the dissemination of the Water Plan. Utilities are also required to submit corporate plans to the treasurer. There is no obligation to publish them, but there is an obligation to have it ready for inspection, upon request.[109] When the ESC finally makes determination, there is a legal obligation to include a statement of purpose and the reason for making such determination[110] and the notice must be published in the Government Gazette, daily newspaper generally circulating in Victoria ***or*** on the internet.[111]

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[99] Bakker, 'Conflicts over water supply in Jakarta, Indonesia' p.123

[100] Ibid p.128

[101] Lovei, L. and Whittington, D., 'Rent-extracting behavior by multiple agents in the provision of municipal water supply: a study of Jakarta, Indonesia' 29 Water Resources Research

[102] 'Pay Up: How the Water Mafia Controls Access' (*The Jakarta Globe*, 2009) <http://thejakartaglobe.com/waterworries/pay-up-how-the-water-mafia-controls-access/319989>

[103] In many instances, the high cost of transaction in making the connection can actually be reduced through public work conducted by the poor themselves.

[104] Jakarta Water Supply Regulatory Body, 'Kinerja Operator'

[105] Lanti and others, *The First Ten Years of Implementation of the Jakarta Water Supply 25-Year Concession Agreement (1998-2008)*

[106] Interview with Palyja, Jakarta, January 10, 2011

[107] Utilities are required by their SOO to submit water plan, for the purpose of price determination. See SOO CWW para 14.1

[108] CWW SOO para 10.1. See also Water Industry Act 1994, Water Industry Regulatory Order 2003 para 14 (1) (a) (ix) If utilities fail to adhere this provision then the Water Plan may be deemed contrary to 'regulatory principles' and as a result they may need to be revised or the ESC will instead prescribe prices

[109] Water Act 1989 No. 80 of 1989, Verson 102 s.249

[110] Essential Services Commission Act 2001 No. 62 of 2001 s.35 (1)

[111] Ibid. s.35 (2)

In England, the primary transparency tools in investment and price determination are the publication of companies' Five Years Business Plans,[112] and annual June Returns – which contains regulatory information submitted by the utilities. In addition, customer representative-- which are set up under statute – represent the public interest in investment planning process.[113] Understanding consumer preferences is a part of the process which the company must undertake.[114] This leads the company to publish their draft business plan and consult with customer in its drafting. There are no *per se* legal requirements to publish these plans, but the company websites publishes them and Ofwat's website compiles its links. Ofwat also publishes each companies' leakage target in its 5 yearly Price Determination.[115] There is also a yearly monitoring of each company's leakage target.[116] If companies fail to achieve leakage targets, Ofwat will "name and shame" them in its annual report or if it is serious, categorize it as breach of its licence condition. [117] The cornerstore of transparency mechanism in the English water regulation is the Water Industry Act which stipulates that the Secretary of State and the Director (of OFWAT) ***may*** arrange for the publication, "*…in such form and in such manner as he considers appropriate*"[118] of information related to the companies which would be in the *public interest*[119] to be published.[120]

Ideally, investment (and service levels) should reflect consumer demand and therefore be appropriately reflected in prices, as is done through various stakeholder participation mechanisms preceding price determinations in England and Victoria. However, in Jakarta, the system where the private sector is paid based on the volume of water sold to consumer and the contractually pre-determined investment targets disconnect prices from politics, as they put investment matters bilaterally between the state owned utility PAM Jaya and its concessonaire any without public involvement.

7. Mitigating the transparency problem

[112] Ofwat, 'Periodic review 2009: water & sewerage companies' final business plans - one page summaries' (*Ofwat*) <http://www.ofwat.gov.uk/pricereview/pr09phase3/sub_fbp_pr09partasumm> accessed August 20, 2011

[113] The legal basis for the Customer Council for Water (CC Water) can be found on Water Industry Act 1991 c.56 Chapter III. CC Water is involved in stakeholders research which feeds in to utilities draft business plan.

[114] Ofwat, 'Setting price limits for 2010-15: Framework and approach' <http://www.ofwat.gov.uk/pricereview/pap_pos_pr09method080327.pdf> accessed January 12, 2012

[115] Ofwat, 'Future water and sewerage charges 2010-15: Final determinations' (*Ofwat*) <http://www.ofwat.gov.uk/pricereview/pr09phase3/det_pr09_finalfull.pdf> accessed August 20, 2011 See Table 19: Leakage assumptions 2010-11 to 2014-1

[116] Ofwat, 'Security of Supply' (2011) <http://www.ofwat.gov.uk/publications/securityofsupply> accessed November 28, 2011

[117] Announcement of leakage target was included in Ofwat's *Security of supply, leakage and water efficiency* issued annually. Currently, company's leakage performance is reported in the *Service and delivery – performance of the water companies in England and Wales*".

[118] Water Industry Act 1991 (England) s 201 (1)

[119] The exact term of s201 (1) is: "*…as it may appear to him to be in the public interest to publish.*" Hence, the legislation provides discretion to the regulator to judge which matters is considered to be in the public interest.Ibid s 201 (1)

[120] This is further reinforced in the company's licence condition. See Condition M.3. , *Instrument of Appointment by the Secretary of State for the Environment of Severn Trent Water Limited as a water and sewerage undertaker under the Water Act 1989 "…nothing in this paragraph shall prevent the Director from using or disclosing any Information with which he has been furnished under this Condition or any other Condition of this Appointment for the purpose of carrying out his functions under the Act*"

Despite the rejection to disclose contracts and other regulatory information in Jakarta, in Indonesia, both the Law on Public Service[121] and the Law on Freedom of Information[122] actually require any contract entered between a public body with a private sector to be published. The problem is when the state owned water utility (PAM Jaya) or the Jakarta Governor office publishes such contract in compliance with the Freedom of Information Law, they could be held liable for a breach of contract.[123] This is despite the fact that the contract does not explicitly prohibits the disclosure of the contract document, although in practice, the regulator, PAM Jaya and the private sector share the view that the confidentiality clause cover both information arising out of regulatory processes and the contract document itself.[124]

Common to most concession contract and driven by the distrust towards the host state legal system, the Jakarta concession contract refers any disputes to be settled by an international arbitration. A breach of contract would mean that PAM Jaya and the Jakarta local government could be dragged into an international arbitration. Such proceeding will likely to trigger intervention from the central government as it involves Indonesia's image as an investor host state. Furthermore, the Jakarta concession has been not been stable ever since it was invoked in 1997. It has now been renegotiated for several times through painstaking process and is currently under effort to further renegotiate some of its financial clauses.

Thus, the hesistancy of PAM Jaya and the local government in disclosing the contracts and other regulatory information is understandable. Some transparency effort would jeoperdize the current effort in renegotiating the concession contract, it could drag them to international arbitration and it will trigger intervention from the national government.

Victoria has developed a good policy for dealing with contractual confidentiality problems by requiring public bodies to publish in full all contract documents worth over $10 million of value – through its procurement and public sector accounting rules.[125] The state of Victoria also establish a Contract Publishing System (CPS) to act as a repository of all contract entered by the Victorian government and other Victorian public bodies. Some of the contract provision can be excised if it concern trade secret or commercial information, but the general rule presumes towards full disclosure. The policy guidelines state that any excision must be justified and time-limited.

In addition, in order to tackle any possible breach of contract litigation, the Victorian procurement guideline require that any private counterpart should acknowledge and permit any

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[121] Undang Undang No. 25 Tahun 2009 Tentang Pelayanan Publik Article 13 (1) (b), (d) and (e). The Public Service Law only obligates the publication of contract's key terms.

[122] Undang Undang No.14 Tahun 2008 Tentang Keterbukaan Informasi Publik, Article 11.1 (e).

[123] Cooperation Agreement Between PAM Jaya and The Concessionaire, 2001 Clause 47.1

[124] Personal Communication, *Field Interview with Palyja, Jakarta, January 10, 2011* Personal Communication, *Field Interview with Stakeholders, Jakarta, January 11, 2011* . See also the rejection of contract disclosure by PAM Jaya, citing clause 47.1 Daryanto, *Jawaban Surat KRuHA (Letter No. 581/DIV.T&P/XI/2011 dated November 8 2011 on PAM JAYA's response to FoI Request by KRuHA)*

[125] Bracks, S., *Ensuring Openness and Probity in Victorian Government Contracts, A Policy Statement* (2010) <http://www.growingvictoria.vic.gov.au/CA256D800027B102/Lookup/EnsuringProbityPolicy/$file/Open_pro.pdf > Bracks, S., *Ensuring Openness and Probity in Victorian Government Contracts, Implementation Guidelines* (2010) <http://www.growingvictoria.vic.gov.au/CA256D800027B102/Lookup/EnsuringProbityGuide/$file/Guide.pdf> See also Department of Treasury & Finance (Victoria), *National PPP Guidelines, Partnerships Victoria Requirements* (2010) Australian Government, *National Public Private Partnership Guidelines, Volume 2: Practitioners' Guide* (2011) On integration of this policy with Public Sector Accounting Rules, see Department of Treasury & Finance (Victoria), *FRD 12A Disclosure of Major Contracts* (2005)

disclosure required for governmental accountability mechanism or if the information is requested under a Freedom of Information Act. The PSP desalination contract entered into between Melbourne Water (a company owned by Victorian Government) and Aquasure (an SPV established by SUEZ, Thies and Degremont) discussed earlier contain this waiver clause which a forms a part of the contract's general confidentiality clause.[126] Thus, confidentiality clause remains a feature of the contract, but it contains waiver that it will not be enforceable under an Freedom of Information request and that the private sector a counterpart would agree to the contract disclosure.

The Victorian system of contract publication is not perfect. There are still problems with its enforcement. A report by a Victorian Auditor General alleges the government to deliberately dissect contract into separate contracts each worth less than $10 million of value in order to evade the obligation to publish it at the Contract Publishing System.[127] The report also suggests that many of the excision made under the desalination contract were not accompanied by justification and explanation as to the time limit. Finally, despite all those policies, the excised key financial information on the desalination contract is still not able to be disclosed at a parliamentary inquiry.[128]

Despite all the weaknesses, the Victorian system demonstrates that it is possible to mitigate the lack of transparency caused by contracting out of public services. At the heart of this is the high integration between Victorian Freedom of Information law and contract disclosure requirement with the procurement policy and public sector accounting rules. On the other hand, despite the regulation on contract disclosure at the primary law – the Indonesian Public Service Law and the Indonesian Freedom of Information Law, the Indonesian procurement rules does not contain any contract disclosure requirement or reference to the aforesaid legislation. As a result, the procurement system in Indonesia is conducted without adherence to the FoI rules.

Last but not least, the enforcement of Victorian contract publication policy is made possible with empowering institutions: the Victorian Auditor General which is tasked with evaluating and supervising the probity and transparency of government contracting and the Contract Publishing System (CPS) which contain a repository of all contract documents. Without these supporting institutions, the contract publication policy would have problems with its enforcement. None of these supporting institutions is available in Indonesia. The Indonesian state audit agencies are tasked with auditing government contract, but they do not have obligation to evaluate anything beyond value for money consideration. Likewise, the National Freedom of Information Commission has some responsibilities with respect to FoI enforcement, but has yet to develop a capacity in supervising the transparency of contract. Indonesia also has a centralized procurement website, but this website only lists "expression of interests" and calls for suppliers and does not publishe the final contract. However, these also mean that Indonesia has the potential to modify its institution to develop a contract publication system such as that in Victoria.

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[126] The Minister for Water of the State of Victoria and others, *Victorian Desalination Project D&C Direct Deed* (2009) See clause 14

[127] Pearson, D.D.R., *Managing the Requirements for Disclosing Private Sector Contracts* (2010) <http://www.audit.vic.gov.au/pdf/20100623_Disclosures_Full_Report.pdf> November 10, 2010

[128] Standing Committee on Finance and Public Administration, *Inquiry into the business case for water infrastructure (Transcript), Hearing With Chloe Munro, Chairman of AquaSure Pty Ltd, 17 June 2010* (Victoria Parliament 2010) <http://www.parliament.vic.gov.au/images/stories/documents/council/SCFPA/water/Transcripts/Munro_Final.pdf> accessed 15 February 2012

Had the concession contract been published and the confidentiality clauses modified to allow FoI disclosures, would it guarantee the transparency of water regulation in Jakarta? In terms of the content that might be the case; if the contract is published, the public in Jakarta will obtain information on service level or customer rights. However, the process which leads to the enactment of those standards will remain to be a bilateral negotiation between the authorities and the private sector while the actual beneficiary, the public, will be regarded only as a third party.

As for investment planning, the Jakarta concession contract can in theory be modified so that investment and corporate planning documents are published and the investment planning process should involve other stakeholders. However, using contract to embody transparency and participatory mechanisms will not change the essence that such obligation is only owed from one party to another as a matter of contractual obligation and not to the public in general.

This means that if these transparency and participatory requirements are contractually imposed, the private sector concessonaire will not be directly obligated to 'the public' to become transparent and participatory. Their obligation is owed to the counterpart and not the public which, as a result, the public has no direct legal recourse to compel the concessionaire and their public sector counterpart to participate in the process and to ask the contracting parties to be transparent. It is an adagium in law that contract does not become binding on third parties. In the Jakarta water concession contract, the public is the third party. This is a contrast to investment planning process in Victoria and England as explained above.

Furthermore, there are inherent constrains for transparency of service level/customer service standard and investment planning when regulation is conducted in a contractual setting. First is the reluctance of the private sector to sincerely disclose information as it may uncover its negotiating position. Second is the culture of negotiation which is often conducted behind closed door – as common in procurement in which secrecies of the negotiating process are protected by law. This is difficult to change. Third, even if the public is represented on the negotiating table, it will not change its position as a third party which is always "one step further removed" from the regulatory process. If the public representative wishes to express its aspiration, it must first express it to the public authority (PAM Jaya in this case) which is a contracting party which will then further negotiate it with the concessionaire. Conversely in England and Victoria and Bogor, public aspiration is more direct and the regulator (or the parliament in Bogor) is compelled to take into account public aspiration.

8. Applicability of FoI to regulatory bodies

Regulators in England (including Ofwat) and Victoria (including ESC) are subject to the provisions of FoI laws, but in Jakarta there is disagreement whether the FoI law applies to the independent water regulator in Jakarta the JWSRB. The main reason for this is because, unlike Ofwat (England) and ESC (Victoria), the JWSRB is an entity established under a contract.

The JWSRB does have a legal mandate under a Governor Regulation, but it suffers from some problems, namely, that the mandate itself lacks regulatory power – the functions of JWSRB is limited to mediating disputes before referring it to external dispute resolution organization and in coordinating government relation in the regulatory process. Secondly, the Governor Regulation has no actual binding power since it is not legislation. As a comparison, the English OFWAT and the Victorian ESC are both set up by primary legislation. These

weaknesses prevent the JWSRB from being categorized as a public body under the Indonesian FoI Law.[129]

The inapplicability of FoI Law to regulatory bodies set up under contracts brought another question as to the transparency and accountability of the "hybrid" model of regulation. Where regulators have a public body status – such as OFWAT and the ESC – the FoI and many other public law mechanisms are applicable to them. As a result they are forced to be transparent and accountable to the public *vis a vis* all regulatory stakeholders. However, when regulators are set up under contract – such as JWSRB – FoI Law and many other public law mechanisms may not be applicable to them.

9. Conclusion

This paper confirms the hypothesis quoted at the beginning of this paper that regulation by contract as applied in Jakarta has some transparency problems. The paper defines transparency as the public disclosure of information. Such disclosure is categorized into active disclosure and passive disclosure rules. The active disclosure rules are divided into disclosure of service level/customer service and investment planning information. Passive disclosure rule is analyzed in term of the applicability of Freedom of Information law to the regulatory body.

The paper finds that information regarding service level/customer service not disclosed in Jakarta where regulation by contract is employed. Conversely, they form a part of public document in Bogor municipality, Victoria and England. Investment planning is also not disclosed in Jakarta. However, the planning documents are regularly disclosed in England and Victoria.

One of the main culprits for the lack of transparency in Jakarta is the confidentiality clause, but as Victoria shows, this could be mitigated by the use of Freedom of Information Law waiver clause in contracts and by publishing the contract through a government-managed contract repository. This would require more integration between Freedom of Information Law and procurement policy and public sector accounting rules – something that Indonesia must pursue.

However, lack of transparency which is caused by factors beyond the confidentiality clause such as problems with investment planning and inapplicability of FoI rules to regulator may be difficult to mitigate. In regulation by contract bilateralism tends to prevail. As such, matters such as investment planning are decided bilaterally between contracting parties. If regulators are installed such as in Jakarta's "hybrid" system, their mandate and the interpretation thereof would be limited to the concession contract and the parties' original intentions. This signifies that the ultimate "principal" for regulator in regulation by contract is not the public, but the contracting parties.

Conversely, in other forms of regulation, such as regulation by agency (in England and Victoria) as well as direct regulation by government (in Bogor), all service service level/customer service information including investment plan is available as a public document. Regulators in a regulation by agency setting is either empowered by legislation by a discretionary power to disclose regulatory information which it deems to be in the public interest (England) or there are public law rules which mandates the process to be transparent

[129] Undang Undang No.14 Tahun 2008 Tentang Keterbukaan Informasi Publik Article 1.3

(Victoria). Furthermore the process of setting those standards and plan are also open to public, either throgh the statutory customer representative (England) or other means. In a regulation by agency se\

tting – although there might be element of negotiation in practice – companies investment plan are "adopted" by the regulator whereas in regulation by contract they are formally "negotiated". Thus in regulation by agency or direct government regulation the public have direct recourse to the regulator. In regulation by contract on the other hand, the public is one step further removed from the process. It relies on the contracting public authority to express its aspiration and the contracting authority still need to further negotiate such aspiration with its private sector counterpart.