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PRINCIPLE OF JUSTICE IN MANAGEMENT OF MARINE RESOURCES IN AREA CHARACTERIZED BY ISLANDS

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Abstract

Indonesia has eight provinces that are characterized as island regions, but in the setting of marine resource management authority is equated with the continental characterized provinces. National government policies are deemed too oriented to the land where it is not appropriate to the needs of the regions. As a result, they are demanding to be no laws governing special about Islands Province. Government responded to amend the legislation on local government in accommodating the interests of the islands. The setting of the DAU and DAK, also provide more financial portion to the islands. It is expected to bring changes to the community. Development process should be done based on diversity of various aspects that also needed a different treatment in each province. Thus, the question is whether the political law of the islands is done through changes and harmonization of the local governments law to provide a guarantee of justice so the demands for legislation that specifically regulates an island province is not matter any more. This study expected to find the values of justice and the foundation to be harmonized, so there exist principle of fairness in the management of marine resources in the waters of the area characterized by islands

Keywords: *Harmonization of laws, Justice and island areas*

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I. INTRODUCTION

The need to maintain order and create the welfare of the people is absolutely necessary in a just society. Indonesia has insisted in (the constitution) preamble Homeland Year 1945, Paragraph IV which is the goal of nation and state, the Republic of Indonesia which is:

“... to form a government that protects the State Indonesia the entire Indonesian nation and the entire homeland of Indonesia and to promote the general welfare, educating the nation, and participate in implementing world order based on freedom, lasting peace and social justice ... and by fostering a social justice for all Indonesian people”.

The principle of fairness has also been an inspiration to international

community in all of its activities in order to realize a new world order in international cooperation relations more equitable and prosperous. One of them is to give recognition to the island nations by providing a set of rights to them to organize and manage the natural resources owned and mastered as “continental shelf”, “exclusive economic zone” and “fisheries zone” and “archipelago state”, for the welfare of its people, as written in the Convention on the Law of the Sea 1982 (UNCLOS). The international community has applied the “principle of distinction” in determining the width of the territorial sea of a third country through the implementation of the withdrawal means the baselines to determine the width of the territorial sea, thus reflecting the absence of justice in the international community. For those countries with characteristics of continental used baselines of regular (normal baseline), the countries of continental with a characteristic bay wide or there are islands in the sea-shore used straight baselines (straight baseline), whereas for countries with the characteristics of the islands as Indonesia using the straight archipelagic baselines (archipelagos straight baseline) to measure the width of its territorial sea.¹ Different treatment is intended to better satisfy the justice for island countries.

This different treatment, taken by the people in the islands in Indonesia, as something that should also be able to inspire the Indonesian nation to practice the values of justice of the province that has the characteristics islands. In Indonesia, there are 8 provinces that are characterized as island regions, but in setting authority to manage marine resources as contained in Article 27 paragraph (3) of Law Number 23 Year 2014 on Regional Government equated with the province that has the characteristics continental namely as far as 12 nautical miles from the shoreline towards the open sea or into the waters of the archipelago.² The provision normatively generates inequality (disorder) in the

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¹ Final Report of the Evaluation of Policy Implementation in the Context of International Law of the Sea (UNCLOS 1982)

² Indonesia. Law regarding Regional Government. Law number 23 year 2014, SG.2014-244. Paragraph 3 Verse (3), “*Regional Authority of the provinces to manage natural resources in the sea as referred to in paragraph (1) maximally 12 (twelve) nautical miles from the coastline to the open sea and / or toward the archipelagic waters*”.

framework of regional autonomy for the islands that sea space is larger than its land.

When viewed from the side of authority apparently also authorizes the provinces in management sea areas as stipulated in Article 18 paragraph (1) and paragraph (3) of Law Number 32 Year 2004 regarding both the regulatory authority of Administrative form of licensing and enforcement of regulations issued by local there is a synchronize discrepancy with other laws. It is as said by Nirahua Salmon that in fact various specific sectorial legislation has not been delegated the authority to manage the natural resources in the sea area to the regional and / or substances not adjust legislation by Law No. 32, Year 2004³. It can be seen from an implementation of no legislation referred to in Law No. 22 Year 2001 and Law No. 31 year 2004. There were overlapping authorities to grant permissions in the management of natural resources in the sea areas in the region have led to a conflict between the provisions of legal norms relating to the authority to grant such permission

Formal legal rationality crisis of this kind causes the public and the government in the island group feel marginalized as a result of laws and policies of national governments that do not correspond to the needs of the regions that have the characteristics aquatic terrestrial (archipelago). The inability of the law to respond to community needs the islands cause the region to become less noticeable and in a state that is segregated. This condition is the reality of forcing the islands to propose to the executive and legislative council even to the Regional Representatives (DPD) in order to ratify the draft law on the island province to further ensures the existence and well-being.

Responding to these conditions, the government then amends Law No. 32 Year 2004 on Regional Government and Law No. 23 Year 2014 and the latest by Law No. 9 Year 2015. In the law of the province is characterized by islands given the authority to manage the natural resources in the sea in their area. Besides having the authority in question, which is characterized Islands Provincial gets the assignment from the Central Government to implement the central government authority in the field of marine based on the principle Tasks after the provincial

³ Nirahua Salmon E.M. "Licensing Law Natural Resources Management at the Regional Sea region", PT. RajaGrafindo Persada, Jakarta, p. 9.

government, characterized by islands meet the norms, standards, procedures, and criteria established by the Central Government.

In terms of policy-setting DAU formerly calculated based on the total land area, is now done by calculating the area of ocean under the authority of the Provincial characterized by islands in the management of natural resources in the sea area. So to set the policy DAK, the Central Government must take into account the development of the Province, characterized by islands as activity in the achievement of national priorities based regional programs, and in order to support the acceleration of development in the Province, characterized by islands, the national government can allocate funds acceleration to the DAU and DAK⁴.

Every legislation should be made to implement the principle of fairness in the management of marine resources in the waters characterized by islands, by giving authorities greater autonomy (Article 18 paragraph (5)) and financial support in areas characterized by islands the maritime resources to be able to manage better.

II. PROBLEMS

Based on this background, the problem is whether the rule of law in the management of marine resources to the areas that have the characteristics of the islands are in accordance with the principles of justice.

III. METHODS

A. TYPES OF RESEARCH AND RESEARCH APPROACH

This type of research is a normative legal research, the research carried out or addressed in the written rules and other legal materials that are secondary data available in the library or other legal journals⁵. Implementation of this research will be addressed to⁶:

⁴ Article 28 and 29 of the Law regarding Regional Government. See note 46.

⁵ Bambang Sunggono, *Legal Research Methodology*, (Jakarta: Pres Rajawali, 2011) p. 94

⁶ Bambang Waluyo, "Legal Research in Practice" (Jakarta: Sinar Grafika, 2008) ps. 13-14

- a. Research on the principles of law,
- b. Research on synchronization of law
- c. A study of comparative law

While the approach used in this study is an approach that starts from the principles of law, such as the study of positive law is written or research on legal norms that live in the community. I.e. by examining materials written law, legal theories. Furthermore, according to Peter Mahmud Marzuki approach in the study of law consists of: approach the law (statute approach), the approach of the case (case approach), the historical approach (historical approach), a comparative approach (comparative approach), and the conceptual approach (conceptual approach)⁷. In this study, the authors will use the conceptual approach (conceptual approach) do depart from the views and doctrine in legal studies, researchers will find the ideas that gave birth to notions of law, legal concepts, and principles of law that relevant. Approach legislation (statute approach) is used to search for and find the legislation related to the Principles of Justice in Marine Resources Management in Aquatic characterized Islands. With purpose that this study can illustrate the answer carefully and systematically research and descriptive characteristic.

B. DATA TYPES AND SOURCES OF DATA

Research data collection using library study to utilize.⁸

- a. Primary legal materials, which includes doctrines and theories relating to the problems examined.
- b. Secondary law, a material that provides an explanation and closely related to the primary material, which can help to analyze and understand the primary legal materials. The primary legal materials such as books, research, magazines, legal journals or general journals, articles, lecture notes and papers, as well as others associated with the problems examined.
- c. Tertiary legal materials are materials that are supporting legal materials primary and secondary law, such as the Indonesian General

⁷ Peter Mahmud Marzuki, "Legal Research", (Jakarta: Kencana, 2011), p.93.

⁸ Soerjono Soekanto and Sri Mamudji, "Normative Legal Research: A Brief Overview", (Jakarta: Press Rajawali, 2006), p. 14.

Dictionary.

C. DATA COLLECTION TECHNIQUES

In a normative legal research to do some data collection techniques, including:

- a. Gathering information to get an idea or information on similar research and deals with the problems studied.
- b. Inventory of materials to obtain the methods, techniques, or approaches to solving problems which is used as a secondary data source.
- c. A visit to the library, both local libraries, library faculty or university library to get books, previous research findings related to research problems, such as research reports, newsletters, brochures, and so on.

D. DATA ANALYSIS TECHNIQUES

On normative legal research, data management activity is essentially to hold a systematization of the materials written law. Systematization means a classification of the materials written law is to facilitate the work of analysis and construction⁹.

IV. DISCUSSION

A. ESTABLISHMENT ACT DISCOURSE ABOUT ISLANDS PROVINCE

Discourse to form the Law on Islands province a trending topic and get serious attention from politicians in Senayan. Even the Regional Representative Council urged that the Act was passed soon Islands Province. Ratification will accelerate development in island regions.¹⁰ While the House of Representatives are more likely to form the Law on Regional Development Acceleration Islands (Bill PPDK). The executive branch itself more PPDK bill want integration into the Local

⁹ Soerjono Soekanto, a quote by Bambang Sunggono, "Legal Research Methodology", (Jakarta: Press Rajawali, 2011), p. 186.

¹⁰ "Explanation on why the Law on Islands Should be Ratified", available at: <http://nasional.kompas.com/read/2012/02/28/15315839/UU>, accessed on 12 August 2016.

Government Bill. in lieu of Law No. 32 Year 2004 on Regional Government¹¹. Law No. 32 of 2004 eventually amended by Law No. 23 of 2014 and the latest by Law No. 9 Year 2015 on Regional Government.

B. PRINCIPLE OF JUSTICE IN MANAGEMENT OF MARINE RESOURCES THAT HAS THE CHARACTERISTICS OF REGIONS FOR ISLANDS

1. Terminology Islands province Unknown in Legal System In Indonesia

The principle of justice in the islands in the management of natural resources, in addition to be fulfilled implementation of open government, the islands also must also have this sense of fairness in the utilization of natural resources in order to achieve the welfare of island communities. Justice is the fundamental thing and one measure of the validity of an order in the society, nation and state. Therefore, it is necessary to realize collateral against the welfare of justice. According to John Rawls, a guarantee of justice must begin by introducing two basic principles of justice, is as follows:

a. The principle of equal freedom as much as possible (principle of the greatest equal liberty). Based on this principle, everyone has the same rights on the entire system of freedom that exist and which correspond to these freedoms. This principle includes the freedom to participate in political life, freedom of speech / freedom of the press, freedom of belief or religion, the freedom to be yourself, and the right to maintain private property.

b. The principle difference (the difference principle) and the principle of equality that is fair for the opportunity (the principle of fair equality of opportunity). Based on these principles, socio-economic differences must be regulated so as to provide maximum benefit for those who are most disadvantaged¹².

For these two principles to apply simultaneously, it should be sys-

¹¹ "The Planning of the Law regarding Regional Development Acceleration on Islands", available at: http://nasional.kompas.com/read/2012/02/28/1531_5839/UU, accessed on 12 August 2016.

¹² "The Principles of Justice", available at: <http://www.edukasipkkn.com/2015/10/prinsip-dasar-keadilan.html>, accessed on 5 August 2016.

temically institutionalized. Therefore, to realize their guarantee of justice needed certain institutions that serve to fight for the enactment of these two principles in the life of society, nation and state.

Indonesia as an archipelagic country has many islands, which based on the study of satellite imagery in 2002 states that the number of islands in Indonesia are as many as 18,306 pieces,¹³ therefore the issue of maritime boundary becomes a very important thing. Territorial sea boundary is a boundary of a country that is drawn from the outer coast and outer islands as far as 12 miles (19.3 km) toward the open sea. In the territorial sea, the state has full sovereignty as well as in the mainland while the area within 200 miles of the outer islands of Indonesia became the exclusive economic zone. In this region, Indonesia has the right to take up and utilize all the natural resources that exist in it, including managing and conserving natural resources. With the determination of the government of the territorial sea waters, continental shelf and exclusive economic zone, then the waters of Indonesia with its islands is one unit.¹⁴ (Based on the Convention on the Law of the Sea 1982 which has been ratified by Law No. 17 of 1985 on the Ratification of the United Nations Convention on the Law of the Sea in 1982, and Law No. 6 of 1996 Indonesia).

With the various rules of law above as part of the positive law of Indonesia, the question is if so, whether it can be developed the term “island provinces” due in accordance with the incorporation doctrine which states that international law is a part that automatically integrates with the national law, and even closer to the theory of monism which does not separate between the national legal system and international legal system.¹⁵

Indonesian legal system to know their terms only in the context archipelago island nation in accordance with Article 25A of the 1945 Constitution, Act No. 17 of 1985 and Act No. 6 of 1996. Article 25A

¹³ https://id.wikipedia.org/wiki/Daftar_pulau_di_Indonesia, access on monday, 15 August 2016, at 12.30pm

¹⁴ “Explanation about Continental Shelf and the Exclusive Economic Zone”, available at: <http://www.berpendidikan.com/2015/06/batas-landas-kontinen-laut-teritorial-dan-zona-ekonomieksklusif.html>, accessed on 15 August 2016.

¹⁵ Johanis Leatemia, “The Management of Legal of Islands Region”, (Jakarta: Deepublish, 2015), p.36.

of the 1945 Constitution affirms that the state of Indonesia as a country with its limits Islands. Affirmation of Indonesia as an archipelagic country is declared in the constitution to assert UNCLOS. Law No. 17 of 1985 on Ratification of UNCLOS justifies the Republic of Indonesia as an archipelagic country in relation to other countries in the marine areas. The legal aspect is more focused on the legal aspects of the ocean (marine law) that are international.

As a country, the country setting the islands and archipelagic waters is the justification of state sovereignty in relation to other countries in the system of international maritime law. In connection with the area, the sea area remains under the jurisdiction of state and based on Article 18 of Law No. 32 of 2004 the area was given the authority to manage the resources.

The authority is essentially a previous granting authority is the authority of the Government but is decentralized. Thing to understand is authorized only state in the management of marine areas and not “local marine areas”, because the sea area remains under the jurisdiction of the country. In this meaning, the autonomy given to ‘local’, but the term ‘region’ is still an administrative nature related to the territory and the sea as one of the elements of the country. Therefore, decentralization of vertical power delivered to the region in the form of decentralization of authority and autonomy is not the territory. The islands are a regional aspect and remain a state jurisdiction.

Legal facts which have the characteristics of their area in the islands of the Republic of Indonesia is an integral part of the characteristics of the state, and territorial “islands” are still in the context of the country. In the implementation of regional autonomy in accordance with Article 18 of Law No. 32 of 2004 does not necessarily mean the region in the form of islands region characteristics has been justified as island regions, since Article 18 is only associated with the authority to manage the resources and not the territory.

2. Principle of Justice in Licensing Aspects of Marine Resources Management

Associated with the authority to manage the resources in the region

for the region with the characteristics of the islands should be made clear territorial boundaries in the sea area as closely related to the authority (affairs). Resource management organizations in the form of licensing in the sea area on several sectorial laws are the domain of the State, because this aspect is the functional aspect of government in the administration of center-periphery relations. Against this, there needs to be coordination between the regions with the Government in the form of government policy.

The central government may delegate its authority to the regions based on Article 28 of Law No. 23 of 2014 which confirms that the provinces are characterized Islands given the authority to manage the natural resources in the sea in their area. Besides having the authority in question, Provincial, characterized Islands can also receive assignments from the central government to carry out the authority of the Central Government in the field of marine based on the principle Tasks after the provincial government, characterized by islands meet the norms, standards, procedures, and criteria established by the Central Government ,

3. Principle of Justice in DAU Calculation

As related to the calculation of the DAU, each area is based on parameters of fiscal needs and fiscal capacity. One variable is the fiscal needs of an area (the area), and based on the elucidation of Article 40 paragraph (3) of Government Regulation No. 55 Year 2005 that is the area is land area. Based on the elucidation of Article 40 paragraph (3) above, the coverage area is limited to an area of land in the calculation of DAU is certainly unfair and would create legal problems for regions that have a wider sea area of land. Variable area are in the ratio of law in a territory under the authority of the regions in the affairs of government (decentralized functions), for in Act No. 32 of 2004, the implementation of government affairs carried out also in marine areas to areas that have an area 12 nautical miles, Marine areas under the authority of the management of these resources as well as a local region in the implementation of government affairs.

The purpose of giving DAU is for the good functioning of local government, it should DAU calculation formula should include also

the sea area. In determining the formulation of this DAU calculation, should not distinguish between the islands and not the islands. This should apply in general to all areas that have a sea area, as the sea area of each region, including the islands which will determine the amount of DAU received. Thus, Article 29 of Law No. 23 of 2014 have the right to assert that in order to support governance in the Province, characterized by islands, the central government in planning the development and set policy must pay attention to the DAU and DAK Provincial characterized by islands. DAU policy determination is done by calculating the area of ocean under the authority of the Provincial characterized by islands in the management of natural resources in the sea area. In addition, the central government set DAK policy should take into account the development of the Province, characterized by islands as activity in the achievement of national priorities based on territorial by strategizing accelerated development of the region by referring to the provisions of the legislation. Regional development acceleration strategy includes the development priorities and the management of natural resources in the sea, the acceleration of economic development, social development, culture, human resource development, development of customary law related to marine management, and community participation in the development of the Province, characterized by islands. All of this, would require a large development, for it then in order to support the acceleration of development in the Province, characterized Islands Central Government can allocate funds acceleration to the DAU and DAK.

V. CONCLUSION

A. CONCLUSIONS

Amendment Act No. 32 of 2004 on Regional Government and Law No. 23 of 2014 and the latest by Law No. 9 Year 2015 has provided justice for areas that are characterized as island regions to manage maritime natural resources. Thus, the demand to ratify the Draft Law on Islands Province had become urgent again.

B. SUGGESTIONS

Legal solution is not to establish legislation island province, but with coordination of governance between the center and regions. Policy governance in the management of natural resources in the sea area sufficiently reinforced by the authority of the Presidential Decree on the management of natural resources in the sea area. Meanwhile, regarding the licensing authority can be established through local regulations based on the authority granted by Law No. 23 Year 2014 on Regional Government.

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