

The Nature of Coastal Areas Reclamation in Indonesia: Legal Perspectives

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Abstract

Natural resources have important role in human life that the human existence completely depends on preservation of available natural resources. The treat of reclamation in coastal area shows that uncertainty of reclamation arrangement results in no legal protection in coastal area considered being justice in Indonesian law. The country in covering coastal area should focus on the main size in deciding, caring, arranging, and occupying for mostly society welfare. The human existence will be treated if the natural resources suffer from exploration, polluting, and the worst destroying. The arrangement of reclamation in coastal area, in fair way, needs to reconsider to give guarantee that the national development will run in good way and give benefit to fulfillment of justice, welfare and prosperity of the society as stated in The Indonesian Constitution of 1945.

Keywords: The Nature, Reclamation, Coastal

1. Introduction

The country has authority in controlling utilizing spaces based on instruction of constitution 33 verse (3) of the Indonesian Constitution of 1945, this act also becomes base of arranging development in coastal area as stated in the Law No 27 of 2007 on Development of Coastal Area and Small Islands (LN 2007-84, TLN 4739) issued in Jakarta, 17 July 2007. (Then, known as the Law 27/2007). The Coastal space based on the Law 27/2007, one of the beneficial is for reclamation purpose. This Law of 27/2007 arranges on reclamation in only one of its act that is Act 34 point, while in its changing Act 1 point (23) of the Law 1/2014 gives definition that “reclamation is an activity conducted by any person in the purpose of developing benefit of land resources in line with environmental and social economic perspectives by backfill, land drying or drainage”. (See regulation act 1point (23) the Law 27/2007)

Reclamation is not forbidden action based on Act 1 point (23) the Law of 1/2014 jo Act 34 the aw of 27/2007, however reclamation that does not followed the basic purpose of the Law regulation have potential disadvantages for certain parties. The regulation purpose in line with the Law becomes necessary to evaluate philosophy or the regulation principle.

2. The Philosophical Fundamental of Reclamation in the Law of 27/2007 jo the Law 1/2014

The technique of creating the laws, describing its clear purposes, is stated in consideration part, including in explanation part. This purpose gives clue for any one related to implementing law that he knows easily on the purpose of the law maker. It is important especially when there are any weaknesses in the related regulation.

The nature of “Clear Purpose” in a Regulation covers 3 levels that are: *First*, the framework of general policy for regulation made; *Second*, the certain purpose of the regulation; and *Third*, the purpose of various parts of the regulation. (A. Hamid S. Attamimi : 2001, pg. 337)

The scope of reclamation criterion arrangement in the Law is only decided in Act 1 point (23) the Law 1/2014 and Act 34 the Law 27/2007, however, viewing the purpose of the regulation, it still bases on the Law 27/2007 that covers several purposes as stated in consideration regulation as follow:

- a. That the Coastal Area and Small Islands are parts of natural resources given by the God the Only One and richness occupied by the country, that need to keep its preservation and use the benefit for highly the society welfare, for present generation and the next generation;
- b. That the Coastal Area and Small Islands have high diversity of natural resources potentials, and are important for social, economic, culture, environmental developments and support the national integrity, thus it need to control continuously and global, by focusing the society aspiration and participation, and the national value principle based on the national law norm;
- c. That based on consideration stated in a and b, it needs to create the Law on the Development of Coastal Area and Small Islands; (See konsideran UU 27/2007)

Evaluating the purpose of legal regulation on reclamation, it means to evaluate in line with the available consideration in the Law UU 27/2007, because reclamation is part of activity using coastal area benefit and part of norm regulation in the Law related. The purpose of this regulation is supported by the explanation of the Law 27/2007 stating that the purpose of formulating the Law 27/2007 is:

- a. To prepare regulation in level of the law on the Coastal Management and Small Islands especially related with planning, utilizing, right and access of the society, dispute resolution, conservation, disaster mitigation, coastal reclamation, recovery of coastal destruction, and explanation of international conventions related;
- b. To develop synergy and enforcement between governmental institutions in central and local by occupying coastal areas that there appear correlation among the institutions in harmony way and prevent and decrease conflict on benefiting and authority among the activity in coastal areas and small islands;
- c. To give legal certainty and protection as well as to recover the level of society welfare in coastal areas and small islands through constructing regulation that guarantee the access and rights of coastal society and other related society, including employers. (See explanation of the law 27/2007)

According to A. Hamid S. Attamimi, a clear basic purpose will be accepted by all governmental systems, including the system of Indonesian government based on the Indonesian Constitution of 1945. In opinion, this basic will evaluate to how far a regulation needed to construct.. (Yuliandri, 2009 : pg. 337)

Van der Vlies stated that the clear purpose will be obtained:

"...firstly, the law maker needs to give appropriate explanation on the real conditions being solved by a regulation. Then, it needs to reveal what changes may be applied from the regulation based on real situations happened and to explain how the points in the regulation will cause the changes. In this explanation, it needs to include summary on the benefit and the weakness. It is logical that the law maker focus on the situation he needs to change." (Yuliandri, 2009 : pg. 337)

Moreover, Van der Vlies added that:

"In formulating the purpose of regulation, there are several methods applied. *First*, it states generally. *Second*, it states instrumentally. Regardless of the method applied in placing the purpose basic, one of main aspects is place first the service of general interest that should be obtained in formulating the regulation. This purpose can also state instrumentally, however, the important one is the clear purpose basic should cover clear explanation on related interests that appear in the regulation being issued as well as additional explanation on how the interests compare one another, thus the purpose of general interest obtain." (Yuliandri, 2009 : pg. 337)

Then, Van der Vlies states:

"... sometimes official purpose is not the real purpose. In this case, people talk about regulation as symbol. The symbol of regulation is used for political purpose. People get impression that there is regulation of certain things, but the fact is on the other hand. To satisfy the pressure group or group of voter, it creates impression that the regulation given by the people have been made. That a regulation has symbolic meaning is often shown from instruments used to create them." (Ibid., pg. 261)

The nature of reclamation based on regulation in the Law 27/2007 jo the Law 1/2014 can be applied in the condition that:

- i. Used for highly the society welfare, for present and next generation
- ii. Occupied in continuously and global perspective
- iii. Focus on society aspiration and participation
- iv. Focus on national value based on national law norm.

3. Justice Reclamation

The law in line with justice, in obtaining its goals, separates right and duty among the people in the society, separates authority and arranges the way of legal problem solving.

Gustav Radbruch states that the legal purpose or legal goal is nothing but justice, "*Est Autem jus a justitia, sicut a matre sua ergo prius fuit justitia quam jus*", meaning that "however, the law comes from justice such as born from its mother, thus, justice happened before the law. (Kurt Wilk : 1950, pg. 73)

The welfare for people economically has been used as basic reason for construction of space utilization. Act 33 verse (4) of the Indonesian Constitution of 1945 states that "the national economy is conducted based on economic democracy covering principles of togetherness, efficiency of justice, continuity, environmental perspective, independence, and keeping equality of economic advance and unity". The development of coastal areas and small islands as the economic resources for people and national interests reveals as part of implementing national economy that should focus on constitutional mandate and spirit.

The development of coastal areas by giving reclamation certificate will potentially result in the coastal areas as targets of reclamation by rich investor. In other hand, the people living from these coastal resources will push away. In this case, the country is considered to be negligent in conducting responsible to implement national economy giving protection and justice to the society, meaning that it has violated principle of social justice for all Indonesian people as stated in fourth alenia of the Preamble of the Indonesian Constitution of 1945. If the meaning of statement "occupied by country" means only as ownership as private sense by the

country then give certificate for reclamation, it is not appropriate to obtain the purpose of "highly for society welfare", thus the responsibility to "develop general welfare" and "create social justice for all Indonesian people" in the Preamble of the Indonesian Constitution of 1945 will never happen.

Reclamation can be conducted but it needs to consider the society aspiration and participation as well as national values. The law goal or *rechtsidee* appears from their value system on its good and bad, perspective of individual and social correlation, material, women position and others. All of them are philosophical, meaning that they include perspective on principle of thing. The law hopefully *reflects the* value system as instrument to protect the values and to obtain the values in society behavior.

In nowadays fact, the participation of society in process of deciding reclamation policy becomes special problem to be noted. The participation in deciding reclamation policy is a form of honor for the right embedding in coastal areas. These rights strongly imply with national values constructed by several parts of society in coastal areas, such as society of custom law, local and traditional. The scope of participation purposes to minimalist conflict of space utilization.

The society participation in developing coastal areas becomes necessary point supported by decision of Constitutional Court on material test lawsuit of the Law 27/2007. In 2010 eight (8) civic people organizations and 27 traditional farmers conduct material test of the Law 27/2007 toward Preamble of the Indonesian Constitution of 1945 with number of case: CASE NUMBER 3/PUU-VIII/2010, the test of the Law 27/2007. The claim is given by petitioner:

1. People coalition for Fishery Justice (KIARA)
2. Indonesian Human Right Committee for Social Justice (IHCS)
3. The Study Center of Maritime Development and Civilization (PK2PM)
4. Agricultural Renewal Consortium (KPA)
5. Indonesian Farming Union (SPI), Foundation of Bina Desa Sadajiwa
6. Indonesian Legal Aid Foundation (YLBHI)
7. Vehicles Environmental Indonesia (WALHI)
8. Indonesian Farmer Alliance (API)
9. 27 traditional fishermen. (Seen the Constitutional Court Decision Number 3/PUU-VIII/2010, about Judicial Review Law Number 27/2007)

Materials of lawsuit on constitutions:

1. Act 1 points 4, point 7, point 18, Act 16 verse (1)
2. Act 14 verse (1)
3. Act 18
4. Act 20
5. Act 21 verse (1), verse (2), verse (3), verse (4) and verse (5)
6. Act 23 verse (1), verse (2), verse (4), verse (5), and verse (6)
7. Act 60 verse (1)

Petitioners of the right to judicial review on the Law 27/2007 in line with Constitutional Court decision already have legal standing to fill a lawsuit because it is appropriate to the criterion of Constitutional Court Decision number 006/PUU-III/2005 and Decision Number 010/PUU-III/2005 have decided 5 (five) requirements of constitutional weaknesses as stated in Act 51 verse (1) The Law Number 24 of 2003 on Constitutional Court, as follow:

- a. The existence of constitutional right and/or authority given by the Indonesian Constitution of 1945;
- b. The constitutional right and/or authority considered has been suffered by issued the Law petitioned;
- c. The weaknesses of constitutional right and/or authority is specific and actual at least potential considered logically might happens;
- d. The existence of causal effect between weaknesses of constitutional right and/or authority and the law petitioned;

The possibility of the granting test results in the weaknesses of constitutional right and/or authority stated might not happen; (Seen the Constitutional Court Decision Number 006/PUU-III/2005 and Decision Number 010/PUU-III/2005)

The above acts contradict to twelve constitutional norms in the Indonesian Constitution of 1945, in general based on the description of petitioners' arguments, explanation of Government and Parliament as well as legal facts revealed in the court, where there are 2 constitutional problems that the Court must answer:

1. Whether giving the Right of Occupying Coastal Area (or HP-3) contradict to the principles of national occupying on natural resources for the society welfare, constitutional guarantee for coastal people, not discriminate principles and fair legal certainty as stated Petitioner;
2. Whether formulating of RSWP-3-K, RZWP-3-K, RPWP-3-K, RAPWP-3-K that not placing society as meeting participants violate constitutional rights of Petitioner and contradict the constitution;

Statement of Constitutional Court decision on case of *a quo* number 3/PUU-VIII/2010 (known

as Decision 03/PUU-VIII/2010) states:

- to grant the petition of the petitioner for apart ;
- States that Act 1 number 18, Act 16, Act 17, Act 18, Act 19 Act 20, Act 21, Act 22, Act 23 verse (4) and verse (5), Act 50, Act 51, Act 60 verse (1), Act 71 and Act 75 the Law Number 27 of 2007 on Occupying the Coastal Areas and Small Islands (Papers of Indonesian Republic of 2007 Number 84, additional Papers Indonesian Republic Number 4739) contradict to the Indonesian Constitution of 1945;
- States that Act 1 number 18, Act 16, Act 17, Act 18, Act 19, Act 20, Act 21, Act 22, Act 23 verse (4) and verse (5), Act 50, Act 51, Act 60 verse (1), Act 71 also Act 75 the Law Number 27 of 2007 on the Development of Coastal Areas and Small Islands (Papers of Indonesian Republic of 2007 Number 84, Additional Papers of Indonesian Republic Number 4739) has no binding strength;
- Give order that this Decision included in State News not more than 30 work days since it stated;
- Refuse the petition of the petitioners for other and more; (Minutes of hearing pronunciations the Constitutional Court decision No. 03 / PUU-VIII / 2010, on June 16, 2011)

The decision of Constitution Court Number 3/PUU-VIII/2010, referring to the earlier judgment No. 001, 021, 022/PUU-I/2003 on 15 December 2004 interprets on the meaning of words "occupied by the country" which not only means as ownership privately by the country because it cannot obtain the country purpose to "give welfare for the society", thus responsibility to "develop general welfare" and "create social justice for all Indonesian people" in the Preamble of Indonesian Constitution of 1945 will be impossible to create. The definition of occupying by the country is interpreted widely in meaning by Constitutional Court based on conception of Indonesian integrity of all the resources of "land and water also natural richness in them", including public ownership by people collectivity on the richness resources. The consideration gives meaning on coastal areas and small islands as *common property* by accepting the right of traditional farmers together with personal right, right of custom law society, and right of other society. The private Ownership is constructed as people collective property on the richness resources of "land, water and natural richness included".

The nature of reclamation in line with arrangement purpose is necessary to create justice and protection for all Indonesian people especially the people in coastal areas being marginal. Thus, reclamation must not be conducted if considered it could not create the people welfare as stated in act 33 Verse (3) of the Indonesian Constitution of 1945, meanwhile Constitutional Court has decided that occupying by the country on land, water and natural resources included, meaning that country has authority and freedom to arrange, make policy, employ and control the utilization of land, water and natural resources included based on constitutional parameter that is "for highly the people welfare". Thus, Constitutional Court gives the meaning of for highly the people welfare using 4 parameters:

- i. Utilization of natural resources for the society
- ii. The level of Utilization of natural resources for the society
- iii. Level of people participation in deciding benefit of the natural resources, also
- iv. Honorable toward people rights from generation to generation in utilizing natural resources.

(Constitutional Court Decision No. 3/PUU-VIII/2010. 2011, pg. 156-157)

Reclamation in coastal areas cannot be applied when the parameter on the highly for people welfare as stated in Constitutional Court decision cannot be conducted:

- a. Injustice in utilizing of resources coastal for reclamation
- b. Injustice in spreading benefit of resources coastal for reclamation
- c. There is no/minimal people participation in deciding policy of reclamation
- d. Loss of coastal people right because of reclamation.

Reclamation conducted without focusing on the nature or basic purpose for highly the people welfare has potentially lost the sense of justice and protection for the right of marginal people.

4. Conclusion

The nature of reclamation in coastal areas refers to utilize coastal areas in order to create welfare for the prosperity of the people with requirement giving justice in its expedience, giving justice in spreading its resources, including coastal people participation in deciding the reclamation policy, and tolerant the rights of coastal people by not swap roll the existence of traditional rights that exist and happen from generations such as right to pass, to develop, to take benefit resource and culture norm as well as right to get clean and healthy water.

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