

# A Juridical Study on the Revocation of Local Regulation Number 15 of 2013 About Coastal Reclamation in Bangkalan Regency Area

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## Abstract

This study is based on the doctrinal legal research; it employs law approach in the sense of law in the book. However, the approach of empirical law is also applied to obtain precise answer and detailed information, resulting in confirmation to the information got. This is to propose the problem solving to the cases of the repeal of the Local Regulation No. 13 Year 2015 about coastal reclamation in Bangkalan Regency. The change of coastal management authority has strong implication on the need of the repeal of the Local Regulation, Bangkalan Regency pertaining to coastal reclamation policy. For that reason, the government of Bangkalan Regency has an obligation to implement Law No 23 Year 2014 and Law No 27 Year 2007 jo. Law No 1 Year 2014 about coastal area management and small islands. The current research demonstrates that (1) the shift of the government authority stated in Law No. 23 Year 2014 about the Local Government, especially in marine issues, leads to the confer of all marine license become province government authorities, including the license of the use of natural resources in coastal areas and small islands, (2) referring to the Local Regulation No 1 Year 2018 about the plan of coastal area zonation and small islands, East Java Province, the basic change on the government authorities ruled in Law of local government in which the local government has no authority anymore to make the plan to the coastal area zonation and small islands. Therefore, all activities related to the use of coastal areas are controlled by the government of East Java Province. The repeal of the local regulation No 13 Year 2015 is obviously taken to avoid the law and regulation disharmony horizontally and vertically pertaining to the coastal area management.

## 1. Introduction and Literature review

Indonesia is a maritime state with water width reaching 3.25 millions km<sup>2</sup> or about 63% of Indonesian area and with coastal line of 95.181 km. coastal area is the transition area between land and sea, the border of which can be defined in both governmental administration structure and ecological contexts.

Bangkalan Regency in 1,260.14 Km<sup>2</sup> width located in the most western part of Madura Island lies on coordinates 112°40'06"- 113°08'04" east Longitude and 6°51'39"-7°11'39" South Latitude.

Its area borders are as follows:

- Java sea in the North
- Sampang regency in the East
- Madura Narrow in the South and West

Viewed from topography, Bangkalan Regency area lies at 2-100 m altitude. The areas located in coastal area such as Sepulu, Bangkalan, Socah, Kamal, Modung, Kwanyar, Arosbaya, Klampis, Tanjung Bumi dan Labang sub districts have 2-10 m altitude. Meanwhile, those located in the center have 19-100m altitude, with Geger sub district being the highest one at 100 m altitude.<sup>1</sup>

Bangkalan Regency area is divided into 18 sub districts. Coastal area is divided into two: firstly, Java Sea coastal area including Socah, Bangkalan City, Arosbaya, Klamis, Sepulu, and Tanjung Bumi Sub Districts and secondly, Madura Narrow coastal area including Kamal, Labang, Kwanyar and Modung, while the rests are on land.

The attempt of realizing people welfare and prosperity through the state's authority is also taken to organize the utilization of space in coastal area. The regulation in national law related to the management of coastal area obligatorily takes care of, protects, and conserves environment as governed as well in the provision of Law Number 27 of 2007 about the Management of Coastal Areas and Small Islands (LN 2007-84, TLN 4739) as amended with the Law Number 1 of 2014 about the amendment to Law 27/2007 about the Management of Coastal Area and Small Islands (LN 2014-2, TLN 5490). Reclamation in coastal area has been a part of development concept and public (government) policy and therefore Indonesia provide legal framework in reclamation activity, through Law 27/2007 despite only contained in Article 34.

The determination of space utilization structure and pattern containing activity that may and may not be done, and the activity that can be done only is accomplished through acquiring license; it is this licensing that ensures law certainty. Government and Local Government obligatorily facilitates this licensing, however the

<sup>1</sup>Bangkalan Dalam Angka 2017

change of policy through Law no.23/2014 about Local Government has change authority related to the management of coastal areas. Article 407 of Law 23/2014 governs that “Any legislations related directly to local area obligatorily builds on and adjust its regulation with this law”.

Considering this, the authority of managing 0-12 mile long sea lies on province completely. Considering those regulations, Regency Local Government no longer has authority to make policy in coastal areas.

The presence of legislating function is very desirable in a constitutional state; the main objective of legislation is no longer to create codification for norms and life values that has precipitated within community, but to create modification in community life.<sup>1</sup>

Legislative science (*Gesetzgebungswissenschaft*), according to Burkhard Kreamer, is an interdisciplinary science related to political science and sociology that can largely be divided into big parts:

1. Legislative theory (*Gesetzgebungstheorie*), oriented to finding the clarity and purity of meaning or definition and cognitive in nature
2. Legislative science (*Gesetzgebungslehre*), oriented to doing action in the term of legislating, and normative in nature.<sup>2</sup>

In legislative science, there is a law norm hierarchy or law norm levels. The theory on this law norm is related to Hans Kelsen’s tenet about *stufentheori* stating that an inferior norm is enacted originating from, and building on the higher one; the norm originates from and builds on the higher one and so forth up to a norm that cannot be traced further, that is hypothetic or fictitious in nature, ground norm (*grundnorm*). These levels is interpreted that a rule originates from the higher rule so that it cannot be in contradiction with the higher rule.

In principle, the harmonization of law involves the adjustment of legislation, government decision, law unit improvement decision, law certainty, justice (*gerechtigheid*), and equity (*billijkheid*), utility and clarity, without blurring and sacrificing law pluralism if necessary.<sup>3</sup>

In another form, harmonization can be conducted as an attempt of:

“... ensuring that the process of drafting the law is conducted complying with the principle in the attempt of developing a good law meeting various preconditions related to its system, principle, expression and discussion procedure, arrangement technique, and treatment by opening an access for public participation..<sup>4</sup>

This change of coastal water management authority has an implication to the need for the revocation of Bangkalan Regency local government about coastal area reclamation. For that reason, Bangkalan Regency Local Government obligatorily implements the Law Number 23 of 2014 and Law Number 27 of 2007 jo Law Number 1 of 2014.

A juridical study on the revocation of Bangkalan Regency Local Regulation Number 13 of 2015 about Coastal Area Reclamation in Bangkalan Regency Area is intended to formulate the regulation in the form of Local Regulation as the basis to revoke the previous local regulation in contradiction with the new legislation. In addition, this Academic Information is also intended to prevent legislation disharmonization from occurring, either vertically or horizontally related to the management of coastal areas.

## 2. Objective of the study

Considering the background aforementioned, there are several problems related to coastal area reclamation becoming urgency for the Revocation of Local Regulation Number 15 of 2013 about Coastal Area Reclamation in Bangkalan Regency:

- a. That considering the Local Regulation Number 1 of 2018 about Zoning Plan for Coastal Areas and Small Islands (*Indonesian: Rencana Zonasi Wilayah Pesisir dan Pulau-Pulau Kecil*, thereafter called RZWP3K) in East Java, there is a fundamental change in the government’s authority governed in Local Government Law, no longer authorizing Regency/City to deal with marine affairs; therefore Regency/City no longer has authority of arranging RZWP3K. Therefore, coastal space utilization activity becomes the authority of East Java Province Government.
- b. That with the change of government’s authority as governed in Law Number 23 of 2014 about Local Government, particularly in marine sector, all licensing affairs in marine sector becomes the provincial government’s authority, including the license of location in utilizing/managing resource in Coastal Area and Small Islands (WP3K).

## 3. Discussion

Article 18 clause (6) of 1945 Constitution states “(6) *The regional authorities shall have the authority to adopt*

<sup>1</sup>Maria Farida Indrati Soeprapto, 1998 *Ilmu Perundang-undangan Dasar-Dasar dan Pembentukannya*, (Yogyakarta:Kanisius), pp 1-2

<sup>2</sup> *Ibid*, p 2

<sup>3</sup>Moh. Hasan Wargakusumah, *Op.Cit.*, p. 30.

<sup>4</sup>A.A. Oka Mahendra, *Harmonisasi Dan Sikronisasi Rancangan Undang-Undang Dalam Rangka Pemantapan dan Pembedakan Konsep*, in <http://www.dipp.ore/inc/buka.php?d=ar-fl&f=harmonisasi-ruu.htm>. accessed on August 13, 2015

*regional regulations and other regulations to implement autonomy and the duty of assistance*". The provision of constitution is confirmed in the Law Number 12 of 2011 stating the type of national legislation in the bottom hierarchy as stipulated in Article 7, completely reading as follows:

- (1) Type and hierarchy of Legislation are as follows:
  1. Republic of Indonesia's 1945 Constitution;
  2. Republic of Indonesia House of Representatives' Stipulation;
  3. Law or Government Regulation substituting Law;
  4. Government Regulation;
  5. President Regulation;
  6. Local Regulation.
- (2) Local Regulation as mentioned in clause (1) letter e includes:
  1. Provincial Local Regulation developed by Local Legislative Assembly (DPRD) at province level along with the governor;
  2. Regency Local Regulation developed by Local Legislative Assembly (DPRD) at regency level along with the regency/mayor;
  3. Village Regulation/equivalent regulation, developed by Village Representatives Council or in other names along with village head or other name.
- (3) Further provision about the procedure of developing Local Regulation/equivalent regulation is governed in corresponding Regency/City Local Regulation.
- (4) Types of legislation other than those mentioned in clause (1) are recognized for their presence and have a binding legal power as long as it is instructed by Higher Legislation.
- (5) The legal power of Legislation is consistent with the hierarchy as mentioned in clause (1).

Considering the provision of clauses (3), (4), and (5), PUU (Legislation) is subjected to hierarchical principle, meaning that the lower legislation may not be in contradiction with the higher one. In accordance with hierarchical principle, legislation is defined as a system unit with interdependency and interrelation. For that reason, local regulation is prohibited from being contradicted with the higher legislation. Local regulation should be based on Pancasila constituting the source of any state law sources (Article 2 of Law Number 12 of 2011) and 1945 Constitution, constituting the basic law in legislation (Article 4 clause (1) of Law Number 12 of 2011).

The position of Local Regulation can also be viewed from the aspect of Local Regulation developing authority. Article 1 number 1 of Law Number 12 of 2011 states that: "Legislation is a written regulation developed by state institution or authorized officials and binding in general". The authority of developing Local Regulation falls down to Local Head and DPRD:

Hans Kelsen with his *stufenbau des recht theorie* suggests that:

*"The relation between the norm regulation the creation of another norm and this other norm may be presented as a relationship of super and sub-ordination, which is a spatial figure of speech. The norm determining the creation of another norm is the superior, the norm created according to this regulation, the inferior norm. the legal order, especially the legal order the personification of which is State, is therefore not a system of norms coordinated to each other, standing, so to speak, side by side on the same level, but a hierarchy of different levels of norms"*<sup>1</sup>

Hans Kelsen also suggests that a norm law should always build on and originate from the higher norm, but it should be the source and basis for the lower one.

Furthermore, it is stated that positive law is the manifestation of norms only in the attempt of expressing legal norm. The manifestation of norm seems to be a multilevel structure, from the highest positive norm to individual norm (the lowest manifestation).

In the term of norm system structure/hierarchy, the highest norm (basic norm) is the one on which the lower norms depend, so that when the basic norm changes, the norm system below will be damaged.

Finally, even the norms highly dependent on positive law should be retraced down to the most basic norm, *Grundnorm*. Therefore, in the law norm hierarchy, the contradiction between higher and lower law norms is not justified. For the existence of law as a system to be maintained, it should be able to realize its efficacies minimally.

In accordance with Kelsen's *Stufenboutheorie*, the order of Republic of Indonesia's legislations as included in the House of Representatives (MPR)'s Stipulation Number III/MPR/2000 and Law Number 10 of 2004 as amended with the Law Number 12 of 2011 has hierarchical position, meaning that the legislation mentioned first has higher position than the one mentioned later or in other words, legislation with higher position becomes the law source of lower legislations. The lower legislations serve as the implementation regulation of the higher legislations.

The lower legislation will get juridical power when it is consistent with the higher one. Lower legislation

<sup>1</sup>Hans Kelsen, *General Theory of Law and State; Teori Umum Tentang Negara dan Hukum*, Bandung: Nusamedia, 2006, p. 36

will lose its juridical power when it is in contradiction with higher legislation. Positioning Bangkalan Regulation's Local Regulation as mentioned in Article 7 clause (1) of Law Number 12 of 2011 about the Legislation Development requires an analysis on various legislations related directly to Draft Local Regulation about the Revocation of Local Regulation Number 15 of 2013 about Reclamation in Coastal Area in Bangkalan Regency. It becomes important to make the Draft Local Regulation about the Revocation of Local Regulation Number 15 of 2013 about Reclamation in Coastal Area of Bangkalan Regency not in contradiction with the higher legislations.

The newest Local Government Law has altered the authority of coastal area management. For that reason, this consultation is important to determine the regulation existing at regency local level. Article 9 of Law Number 23/2014 about Local Government, as amended lastly with Law Number 9/2015 about the Second Amendment to Law No.23 of 2014 about Local Government mentions that governmental affairs are divided into 3 (three): absolute, concurrent, and general governmental affairs.

Absolute governmental affairs are those completely under Central Government's authority. General governmental affairs are those under the authority of President as the governmental head. Meanwhile concurrent governmental affairs are those divided between Central, and Local Provincial and Regency/City Governments. Meanwhile the concurrent governmental affairs under local authority consist of Compulsory and Optional Governmental Affairs. Compulsory Governmental Affairs consist of Governmental Affairs related to Primary Service and Governmental Affairs no related to Primary Service. Compulsory Governmental Affairs related to Basic Service are those some substances of which are Basic Service.

Article 12 of Law No.23/2014 mentions that Compulsory Governmental Affairs related to Primary Service include:

- a. education;
- b. health;
- c. public work and spatial layout;
- d. people house and settlement area;
- e. composure, public orderliness, and community protection; and
- f. social.

Compulsory Governmental Affairs related to Primary Service include:

- a. labor;
- b. community empowerment and child protection;
- c. food;
- d. land affairs;
- e. living environment;
- f. demographic administration and civil registration;
- g. community and village empowerment;
- h. population control and family planning;
- i. transportation;
- j. communication and informatics;
- k. cooperatives, small- and medium-scale enterprises;
- l. investment;
- m. youths and sports;
- n. statistics;
- o. coding;
- p. culture;
- q. library; and
- r. archiving.

The Optional Governmental affairs under local authority include:

- a. marine and fishery;
- b. tourism;
- c. farming;
- d. forestry;
- e. energy and mineral resource;
- f. trading;
- g. industry; and
- h. transmigration.

Marine and fishery sector affair is the governmental affair that is optional in nature decentralized by Central Government to Local Government. Considering Article 13 clause (1) of Law Number 23/2014, the regulation and the handling of concurrent affairs by the government unit is divided by externality, efficiency and national strategic interest accountability principles, as explained as follows:

1. Accountability principle is that the one responsible for organizing some Governmental affairs is determined based on its closeness to breadth, size, and coverage of effect resulting from the organization of some governmental affairs.
2. Efficiency principle is that the organizer of governmental affairs is determined by the highest ratio of expediency obtained.
3. External efficiency is that the organizer of governmental affairs is determined based on breadth, size, and coverage of effect resulting from the organization of some governmental affairs.
4. Meanwhile national strategic interest principle in this provision is that the organizer of Governmental affairs is determined based on a consideration in the attempt of maintaining nation's unity and integrity, maintaining the State's sovereignty, implementing the foreign relation, achieving the national strategic program, and other considerations as governed in the provision of legislation.

Article 13 clause (1) of Law Number 23 of 2014 mentions that the distribution of authority in governing and dealing with concurrent affairs is determined based on externality, efficiency and national strategic interest accountability principles, but the provision of Article 14 clause (1) mentions an exception in which the affairs governed in 14<sup>1</sup> (1) UU 23/2014 are not under the authority of all governments, meaning that they are governed and dealt with by central government and provincial government units, including:

1. Energy and mineral resource sector related to oil and petroleum management under the central government's authority/
2. Forestry sector related to the management of regency/city great forest park under regency/city's local authority.
3. Energy and mineral resource sector related to the direct utilization of geothermal energy in regency/city area under regency/city's authority

Article 14 clause (1) of Law Number 23/2014 is a specific limitation to the provision of Article 13 clauses (2), (3), and (4) of Law Number 23/2014. Such affairs as governmental affairs in forestry, marine, and energy and mineral resource sectors is not distributed between the governmental units existing, but only between central and provincial governments. It is this special clause that results in fundamental change in Law 23 of 2014 because provincial government has a very strategic authority in managing natural resource. The regency/city authorities in managing natural resource are transferred to the provincial ones, so that regency/city does not have an authority in managing natural resource.

The change of authority in turn has an implication to the important revocation of Local Government Number 15 of 2013 about Coastal Area Reclamation in Bangkalan Regency Area.

#### 4. Conclusion

The change of coastal area management authority with the revocation of local regulation that is in contradiction with the higher regulation is important to provide law certainty.

Local Regulation of Bangkalan Regency should be developed or arranged about the Revocation of Local Regulation Number 15 of 2013 about Reclamation in Bangkalan Regency Coastal Area by considering the aspects of legislation synchronization and harmonization.

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- [8] The organization of Governmental Affairs, in forestry, marine, and energy and mineral resource sector is distributed to Central and Provincial Local Governments.

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<sup>1</sup>The organization of Governmental Affairs, in forestry, marine, and energy and mineral resource sector is distributed to Central and Provincial Local Governments.