

Implementation Article 33 Paragraph (3) of UUD NRI 1945 in Law of Coastal Areas and Small Islands Management

Fenty Puluhulawa^{1*} Amanda Adelina Harun²

1.Faculty of Law, State University of Gorontalo, PO box 96129, Gorontalo, Indonesia

2.Student of Postgraduate, Islamic University of Indonesia, PO box 96129, Gorontalo, Indonesia

Abstract

This article is intended to describe the substance of state control over natural resource for the greatest prosperity of the people as stated in Article 33 paragraph (3) Undang-Undang Dasar Negara Republik Indonesia of 1945 and implementation of that Article 33 paragraph (3) in the Laws of Management of Coastal Areas and Small Islands. The approach used is the statute approach. The result of the study showed that substantially Article 33 paragraph (3) of UUD NRI of 1945 has established that the state controls the natural wealth that exist in the territory of Indonesia and used to the greatest prosperity of people. In the Law on the Management of Coastal Areas and Small Islands there are still provisions that are considered less in harmony with the substance of Article 33 Paragraph (3) UUD NRI of 1945. So it still makes a difference in interpretation.

Keywords: implementation, Management, Coastal Areas and Small Islands

1. Introduction

Indonesia has great potential of natural resources, especially in the field of Marine. Considering Indonesia as an archipelago and tropical climate country is not surprising if Indonesia has great potential in the field of Marine. Marine resources include natural resources contained in the sea such as coral reefs, fish and other marine plants. Nature resources mentioned above are renewable, but this does not mean that the natural resources above need not be preserved. If the exploitation of marine resources is carried out continuously without control, then this condition will have a negative impact on marine resources, which they will be damaged, famous, can even cause the extinction to some species of living creatures in the sea.

Indonesia as a country that stated itself as the state of law, in Article 1 paragraph (3) Undang-Undang Dasar Negara Republik Indonesia of 1945 (hereafter called UUD NRI 1945) as written constitution of Indonesia. The law goes into every joint of the life of the state, including in the field of nature resources management. UUD NRI 1945 as the written constitution of Indonesia has been set up the exploitation of nature resources in Indonesia. In rticle 33 aragraph 3) of UUD NRI 1945:

“Earth, water, and natural resources contained are controlled by the state and used for the biggest prosperity of people”

The important points at need to be underlining are “controlled by the state” and “used for the biggest prosperity of people”

Right to control by the state in Article 33 of UUD NRI 1945 is used in management of nature resources and important production branches that affect the livelihood of many people. Needed to be explain that right of control is different with ownership right. The ownership right has the same consequence as the meaning of domein principle in the Dutch colonial era, so that the society in this concept no one can have property rights, but only the right to use (Kunu, 2012). Different with the ownership right, right to control by the state according to Undang-Undang Pokok Agraria (Law of Land), are the state’s right to rule and manage (Kusumadara, 2013). Can be concluded that management of nature resources in Indonesia is done by the state.

People’s prosperity oriented of nature resources utilization is in harmony with Article 1 paragreph (2) of UUD NRI 1945 which states “the highest sovereignty is in the hands of people”. The provision of sovereignty to the people also applies in the management and utilization of natural resources that should be oriented to the welfare of the people. The Article 33 paragraph (3) of UUD NRI 1945 brings the consequences to every Law below the constitution to adopt the values and norms which are set up in UUD NRI 1945 as the constitution. Those conditions are also implemented in the management and utilization of natural resources, include marine resources to adopt the substance of norms which has been stated in Article 33 paragraph 3 of UUD NRI 1945. Article 33 paragraph 3 of UUD NRI 1945 is made as the basic norm of every laws bellow it according to hierarchy of law. The same thing in its implementation of management and utilization of nature resources. According to previous research, in field of practice, some Laws are more accommodate the pressures of political and economic interests of market economy advocates (Magnar, Kuntana. Junaenah, Inna. Taufik, 2010). It is certainly necessary to get attention in order to remain consistent with the value of the substance set forth in the constitution.

Marine resources, coastal areas and small islands are one of nature resources, therefore , the management and utilization of them should reflect the norms of Article 33 paragraph (3) of UUD NRI 1945. The Laws related to the management of marine resources in Indonesia are regulated in several laws and regulations

such as Law no. 45 of 2009 concerning Amendment of Law Number 31 Year 2009 and Law No. 31 of 2004 on Fisheries, Law no. 32 years 2014 on Marine, Law No.1 of 2014 and Law no. 27 of 2007 on the Management of Coastal Areas and Small Islands. Coastal areas and small islands are part of Indonesian nature resources. Management and utilization of coastal areas and small islands have been set up in Law No. 27 of 2007, as amended in Law No. 1 of 2014 on Amanadement of Law No. 27 of 2007 on the Management of Coastal Areas and Small Islands. This article will describe the implementation of Article 33 paragraph 3 of UUD NRI 1945, especially for “right to control by the state” and “for the biggest prosperity of the people” which are contained in Law No. 27 of 2007, and Law No. 1 of 2014 on Amanadement of Law No. 27 of 2007 on the Management of Coastal Areas and Small Islands.

1.1 Problem

How much "the right to control by state" and "used for the greatest prosperity of the people" in Article 33 paragraph (3) UUD NRI of 1945 contained in Law no. 27 of 2007 as amended by Law no. 1 of 2014 on the Amendment of Law No. 27 of 2007 on the Management of Coastal Areas and Small Islands?

2. Discussion

2.1 Substance of Article 33 Paragraph (3) of UUD NRI 1945

The right to control by the state is the right which stated in the written constitution of Indonesia, in Article 33 paragraph (2) and (3) of UUD NRI 1945. In the other words, right to control by the state is a constitutional right. The article explained the aim of Indonesian Economic Development. The right to control by the state has been stated in UUD NRI of 1945:

Article 33 paragraph (2) UUD NRI of 1945:

“Important production branches that affect the livelihood of many people are controlled by the state”

Article 33 paragraph (3) UUD NRI of 1945:

“Earth, water, and natural resources contained are controlled by the state and used for the greatest prosperity of the people”.

The right to control by the state which is stated in Article 33 paragraph (2) and (3) UUD NRI of 1945 is the state’s right to control the important production branches that affect the livehood of many people and to control the management and utilization of nature reources.

On the basis of philosophical considerations (basic spirit of the economy is a joint effort and kinship), strategic (public interest), politics (preventing monopoly and oligopoly that harm the state economy), economy (efficiency and effectiveness), and for the welfare of the general and maximize prosperity people (Mawuntu, 2012). The purpose of right to control by the state is to defense the sovereignty of Indonesia. In Article 33 paragraph (2) of UUD NRI 1945, right to control purposed to control the important production branches that affect the livehood of many people, so those important production branches operated with orientated to people and not oriented to other interests.

Important production branches have big affect to people’s livehood. When those important production branches do not control by the state, it is feared that those important production branches would not put people as its priority. In management and utilization of nature resource especially in marine resources, it is important to be control by the state. The control by the state is supposed to prevent liberalization towards nature resources. The liberalization itself is feared to increase the economic imbalance in people. Thi liberalization is also in contradiction of social justice in Indonesia’s ideology, Pancasila.

The right to control by the state is also stated in Article 33 paragraph (3) of UUD NRI 1945. It is related with right to control toward nature resources in Indonesia. Mohammad Hatta, as the founding father and first vice-president of Indonesia described the right to control by the state which is control by the state does not mean the state being the corporate, or ordener, more precisely said that right to control by the state is in mean to make regulations to strengthen the economic, and the regulation itself banned exploitation the weak by the capital (Ahmad Redi, 2015). Moh. Hatta’s opinion is different with Bagir Manan’s (former Chief Justice of the Supremen Court) opinion (Ahmad Redi, 2015):

“(1) right to control by the state is likely ownership by the state, that mean the state by the government as the only authority holder to determine its right and authority, include earth, water, and natural resources inside;

(2) to rule and control the managemend and utilization;

(3) equity participation and in form of a state enterprise for a particular undertaking”

Control by the steta towards important production branches and nature resources is not out of concept of people sovereignty which is embraced by UUD NRO of 1945. Concept of people’s sovereignty is also called democracy. This concept is put the highest sovereignty in the hands of people, so in process of organizing the life of the state is always putting forward people’s interests. Relevant with explanation above, can be concluded that the right to control by the state is supposed to guarantee the importan6 production branches

that affect the livelihood of many people will be operating based on people's sovereignty concept. The same thing also apply to right to control by the state towards the management and utilization of nature resources, especially marine resources in Indonesia.

The control by the state and for the greatest prosperity of the people contained in Article 33 paragraph (3) of the 1945 Constitution of 1945 is related to management and utilization of natural resources. Meaning of control by the state has multi meanings. Right to control by the state in terms of ground, in its development has been extension of meaning, from the state as the "right to control holder" become the "right to owning the ground", especially the grounds that have no evidences of their rights, including the indigenous people's lands (Kusumadara, 2013). Right to control by the state in terms of water, state's role showed in (1) formulate the policies (beleid), (2) take care the action (bestuursdaad), (3) do regulation (regelendaad), (4) do the management (beheersdaad), and (5) do the supervision (toezichhoudendaad) (Magnar, Kuntana. Junaenah, Inna. Taufik, 2010), so the right to control by the state toward water is different with the right of ownership. In management of minerals and coal, right to control by the state in Article 33 paragraph (3) of UUD NRI of 1945 means that the state has sovereignty to its nature resources, therefore, foreign investment which has the intent to manage the natural resources must be in line with the laws and regulations stipulated by the regulator (Nalle, 2012).

The concept of right to control by the state itself became the norm to examine the Laws related to nature resources management. Ahmad Redi reviewed the meaning of state control by various decisions of the Constitutional Court which examined several laws with Article 33 Paragraph (3) of UUD NRI of 1945. According to Ahmad Redi there has not been the same standard of norms relating to the form of state control over natural resources, they are seen in (Ahmad Redi, 2015):

1. The diversity of natural resource exploitation concepts in various sectors of natural resources, such as business licenses (mining permits, forest use permits, plantation business permits), contracts (production sharing contracts), contracts of work, coal mining concessions, Customary forest management);
2. In lawmaking process, the design of Law in nature resources sector, there is no general guidance on the conception of the state's right to control over natural resources which will become the concrete norm in a law to be established;
3. The number of laws in the natural resource sector submitted by the judicial review to the Constitutional Court to examine whether the arrangements in the law are in accordance with the conception of the right to control the state in Article 33 Paragraph (3) of the 1945 Constitution.

Although there are no general guidance and the norm standards, it is clear that control of the state towards nature resources that stated in Article 33 paragraph 3) of UUD NRI 1945, but in essence the control of natural resources by the state aimed at avoiding the existence of liberalization of natural resources. Liberalization of natural resources is not in harmony with the social justice as it is stated in the fifth point of Pancasila, "Social justice for all people in Indonesia".

Besides the right to control by the state, Article 33 paragraph (3) of UUD NRI 1945 has been set up the management and utilization of nature resources is "used for the greatest prosperity of the people". Simply put, it can be interpreted that all utilization of natural resources in Indonesia is intended to create prosperity of the people. As it is explain before that people's sovereignty which embraced by Indonesia gives consequence to priority the people, so in decision making related to management and utilization of natural resources obviously should consider the people's interests. The purpose to give the greatest prosperity of the people is one of the reason to give the control right to management and utilization of natural resources in Indonesia. Not surprisingly if some types of natural resources, the management is done directly by the state considered as the better choice.

There is an opinion that the direct management toward natural resources by State-Owned Enterprises is the best way to ensure that all the profits gained will go to the state treasury, which will ultimately provide benefits and prosperity for many people (Butt, Simon. Siregar, 2012). Otherwise, providing the management of natural resources to the private sector means the sharing of profits between the state and the private sector (Butt, Simon. Siregar, 2012). So that the management and utilization of natural resources considered as not maximal in giving the greatest prosperity for the people.

According to the explanation above, can be concluded that the meaning of "for the greatest prosperity of the people" is not always refer to management and utilization of nature resource by the state or State-Owned-Enterprises. In some types of nature resources, the management are done by the foreign company. A form of people prosperity in context of nature resources management which are managing by foreign companies is taken from the taxes. Foreign companies which are managing nature resources in Indonesia will taxes-bound, and those taxes will become state's income. State's income will use for built public facilities and use for increase prosperity of the people. According to Manan, the norm of "control by the state" and "used fot hthe greatest prosperity for the people" could not being separated each other, because both of norms are a systemic unit, :right to control by the state" is the instrument, whreas "used for the greatest prosperity of the people" is the purpose

(Basri, Yahya, & Artikel, 2012).

2.2 Substance of Article 33 paragraph (3) of UUD NRI of 1945 in Context of Management of Coastal Areas and Small Islands

Indonesia is an archipelago country which consists of small and big islands. Geographical condition of Indonesia which consists of more than 17.000 (seventeen thousands) small and big islands that extends from Sabang to Merauke (Yuba, 2004). From 17.000 small and big islands in Indonesia, there are 5 (five) big islands, they are Sumatera, Java (Jawa), Kalimantan, Sulawesi, and Papua, meanwhile the rest of them are small islands. Small islands in Indonesia have been regulated in Law No. 27 of 2007 on Management of Coastal Areas and Small Islands, which is amended by Law No. 1 of 2014 on Amendment of Law No. 27 of 2007 on Management of Coastal Areas and Small Islands. It is necessary to explain that the amendment of Law No. 27 of 2007 does not mean Law No. 27 of 2007 is no longer valid. All the provisions/articles in Law No. 27 of 2007 are valid, except the provisions which are changed in Law No. 1 of 2014. In other words, the Law No. 1 of 2014 does not consist of the whole things about the management of coastal areas and small islands, but only certain articles that have been changed.

There are certain provisions from both of Law which regulate about the management of coastal areas and small islands. In 2010 the Law No. 27 of 2007 has been judicially reviewed toward Article 33 paragraph (3) of UUD NRI of 1945 by Constitutional Court. The Constitutional Court itself is a judicial institution as high as the Supreme Court. The Supreme Court can be described as the culmination of a judiciary relating to the demands of the justice struggle for individual persons or other legal subjects, whereas the Constitutional Court does not deal with people per person but with broader public interests (Asshiddiqie, 2004). The Constitutional Court has the authority to judge on the first and final level of which the decision is final and bound to; judicially review the Law towards the constitution; decide upon dispute the authority of the institution countries whose powers are granted by the Constitution; decide upon the dissolution of political parties; and decide upon disputes concerning election results; and not final and bound to judge the Legislative's alleged violations by the President and / or Vice President according to the Constitution (Article 24A of UUD NRI of 1945).

The result of judicial review of Law No. 27 of 2007 towards Article 33 paragraph (3) of UUD NRI of 1945 is Constitutional Court Decision No. 3/PUU-VIII/2010. Constitutional Court Decision No. 3/PUU-VIII/2010 stated that Article 1 point 18, Article 16, Article 17, Article 18, Article 19, Article 20, Article 21, Article 22, Article 23 paragraph (4) and (5), Article 50, Article 51, Article 60 paragraph (1), Article 71, and Article 75 are in disharmony with UUD NRI of 1945 ("Putusan MK No. 3/PUU-VIII/2010," 2010). Thereby, those articles are invalid and have no binding legal force. Those Constitutional Court Decision as mentioned before give an impact to the need of new norms to fill the legal vacuum. Law No. 1 of 2014 on Amendment of Law No. 27 of 2007 on Management of Coastal Areas and Small Islands is deemed as the response toward Constitutional Court Decision No. 3/PUU-VIII/2010.

Law No. 1 of 2014 is the amendment of Law No. 27 of 2007. One of the amendments is on Article 14 paragraph (1) Law No. 27 of 2007. The article stated "The proposed drafting of RSWP-3-K, RZWP-3-K, RPWP-3-K, and RAPWP-3K was undertaken by the Regional Government and the business community", has been changed in Law No. 1 of 2014 to "The proposed draft of RSWP-3-K, RZWP-3-K, RPWP-3-K, and RAPWP-3K was undertaken by the Regional Government, people and the business community". RSWP-3-K, RZWP-3-K, RPWP-3-K, and RAPWP-3K which are the proposed drafts plan of management of coastal areas and small islands. RSWP-3-K is a Strategic Plan for Coastal Zone and Small Islands; RZWP-3-K is the Zoning Plan of Coastal Zone and Small Islands; RPWP-3-K is the Management Plan of Coastal Zone and Small Islands; And RAPWP-3K is the Action Plan for the Management of Coastal Areas and Small Islands. The difference between article 14 paragraph (1) in Law No. 27 of 2007 and Law No. 1 of 2014 is in addition of "people" in Law No. 1 of 2014. Even it is only one word, the addition of word "people" means of the recognition of people as the stakeholder of the proposed draft plan of coastal areas and small island management.

According to my opinion, the effort to engage people in process of proposed draft plan of management of coastal areas and small islands (RSWP-3-K, RZWP-3-K, RPWP-3-K, and RAPWP-3K), besides as the recognition to people as the stakeholder, but also as the attention to people. Engaging people in this context expected to minimize the possibility of unfulfilled of people's rights in process of the proposed draft plan of coastal areas and small island management. In the process of the proposed draft plan of coastal areas and small island management could also accommodate people's interests, not also government's and business people's interests. This thing proves that Law No. 1 of 2014 has been adopted the spirit of Article 3 paragraph (3) of UUD NRI 1945, especially the spirit of "for the greatest prosperity of the people".

Beside the amendment of Article 14 paragraph (1), according to Constitutional Court Decision No. 3/PUU-VIII/2010, that Article 1 point 18, Article 16, Article 17, Article 18, Article 19, Article 20, Article 21, Article 22, Article 23 paragraph (4) and (5), Article 50, Article 51, Article 60 paragraph (1), Article 71, and Article 75 are in disharmony with UUD NRI of 1945 and those articles above have lost their validity and no

longer have legal binding force. Those articles above are regulating about HP-3 (Hak Pengusahaan Perairan Pesisir) or right of water and coal areas business. The existence of HP-3 can result in the control of coastal areas and small islands by large capital owners, and it is feared that traditional fishermen who mostly live in coastal areas and small islands and rely on life and life on coastal resources will be eliminated (Constitutional Court Decision No. 3/PUU-VII/2010). HP-3 is considered disharmony with the value of social justice and the utilization of natural resources oriented to the greatest prosperity of the people.

Responds the Constitutional Court Decision No. 3/PUU-VIII/2010 which invalidate the articles about H-3, then the Law No. 27 of 2007 has been amended to Law No. 1 of 2014 on Amendment of Law No. 27 of 2007. As explained before, the Law No. 7 of 2007 is still valid has the legal binding force, Law No. 1 of 2014 only amended certain articles. Certain articles about HP-3 in Law No. 27 of 2007 has been amended to License in Law no. 1 of 2014. Law no. 1 year 2014 is no longer familiar with HP-3, but uses a licensing system. Provisions relating to the licensing system in Law no. 1 of 2014 is considered a form of exploitation of the weakness of the Coastal and Small Islands Management Law (“Pemerintah Dianggap Eksploitasi Kelemahan UU,” n.d.). Those provisions could be analyze in Article 26A Law No. 1 of 2014. This article also gives chance to foreign investment.

Management of small islands by foreign investment is considered less précised, because this condition feared will give negative impacts like, decrease or limit the right to control by the state toward the small islands. Beside it, if we see backward, the invalidity of HP-3 in Law No. 27 of 2007 is caused by feared that the coastal areas and small islands could governance by the capital and does not to reflect social justice and the management of natural resources oriented to the greatest prosperity of the people. Management of small islands by foreigners and also accompanied by the granting of authority to give names for the island (“Pemerintah Dianggap Eksploitasi Kelemahan UU,” n.d.). Though in Article 26 paragraph (4) of Law No. 1 of 2014 mentioned that the small island which is could invest by foreign investment is a unpopulated small islands, and does not use/utilize by the people, but this provision is feared will give impact of decrease and limitation on the opportunities of people who want to utilize and use the island because it has been managed by foreign parties.

The articles those give chance to manage and utilize of small islands by foreign parties in Law No. 1 of 2014 are not relevant with Constitutional Court Decision No. 3/PUU-VIII/2010 which invalidity the provisions on HP-3. Invalidity of articles on HP-3 in Law No. 27 of 2007 was supposed to avoid the control of coastal areas and small islands by capitals. Law No. 1 of 2014 as the Law that should responds the Constitutional Court Decision (Yurista, 2016). Law No. 1 of 2014 properly responds relevant and strengthen the Constitutional Court Decision. The existence of license to management of small islands by foreign parties which stated in Law no. 1 of 2014 is considered in disharmony with the purposed of HP-3 invalidity in the Constitutional Court Decision. The constitutional court decision was purposed to invalidity the HP-3 because it was considered capitalism. But the provisions in Law No.1 of 2014 is considered are capitalist than the HP-3 in Law No. 27 of 2007.

3. Conclusion and Recommendations

3.1 Conclusion

Right to control by the state for management of natural resource which is mentioned in article 33 paragraph (3) of UUD NRI of 1945 still interpreted differently. In certain kinds of natural resource, right to control by the state means the right to make regulate, do the management, and do the supervision, but for the other certain type of natural resources, the right to control by the state has been extended to the right of ownership. Right to control by the state could not be separated from the term of “for the greatest prosperity of the people”. As explained before, the right to control by the state is the instrument, whereas the “for the greatest prosperity of the people” is the purposed.

In Law No. 1 of 2014, the substance of the right to control by the state for the greatest prosperity of the people are the implementation of Article 33 paragraph (3) of UUD NRI of 1945 can be seen in partiality to increase the people’s prosperity. Like mentioned in article 14 paragraph (1) which is regulated that the people is one of the stakeholders in the management and utilization of coastal areas and small islands. But, related to the license, Law No. 1 of 2014 is considered not reflect the spirit of right to control by the state and for the greatest prosperity of the people. Law No. 1 of 2014 gives chance and license to foreign party to invest and manage the small islands overall.

3.2 Recommendation

Article 33 paragraph (3) of UUD NRI of 1945 means that the right to control by the state over the natural resource could utilize for the greatest prosperity of the people. Relevant to these provisions, the management of natural resource, especially for coastal areas and small islands should adopt the norms and substance inside the written constitution, UUD NRI of 1945. The provisions in Law No 1 of 2014 is needed to amendment to reflect the substance and norms in UUD NRI of 1945, so the Law on coastal areas and small islands would be in harmony with the constitution.

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