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Development of Maritime Law in Line with 1982 UNCLOS to Protect Sea Transport Service

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Abstract

The Indonesia's sea area that is wider than its land area represents a strong foundation that Indonesia is a Maritime Country. Therefore, to establish the Sea Transport business to connect inter-island activities, it is necessary to develop national maritime law in line with the United Nations Convention on the Law of the Sea (1982 UNCLOS) thus creating the harmonious national and international legal norms. The study used normative juridical method by exploring primary and secondary sources of law. The results of this study showed that in order to achieve national goals, a strong national Sea Transport system is required to encourage the achievement of the ideals of the Country as set forth in Article 1 paragraph (3) of the Constitution of Indonesia, that is to make people live fairly and prosperously due to creation of the legal certainty, order, and benefits in sea transport business activities, which is supported by Admiralty Court that can carry out further investigation on ship accident and can impose Administrative, Civil and Criminal sanctions in the enforcement of maritime law.

Keywords: Development, maritime law, 1982 UNCLOS, sea transport

1. Introduction

The Indonesia's sea area that is wider than its land area represents a strong foundation that Indonesia is a Maritime Country. However, as a country that has large sea area, it also means that it has a huge responsibility to protect its sea area. Therefore as an archipelagic country where most of its territory consists of the sea, Indonesia needs sea transportation as crucial thing to develop the economy and to protect the country's sovereignty. According to the Ministry of Maritime Affairs and Fisheries (Roza, 2017), as the largest archipelagic country in the world, Indonesia has 17,499 islands stretching from Sabang to Merauke with a total area of 7.81 million km consisting of 2.55 million km of the Exclusive Economic Zone (EEZ).

In addition, the Indonesia has extremely strategic geographical position located on the equator and exists on the world cross position between the Asian – Australian continents and the Indian – Pacific Oceans thus making Indonesia more strategic as the world's maritime axis especially in sea transport service sector.

Soegijatna Tjakranegara (Sembiring, 2019) said that transportation activity means a transport of goods and passengers from one place to another or the Destination Port so the carrier can provide transport service. In line with the conditions of Indonesia as referred to above, the existence of sea transport service is increasingly necessary to connect the transport of goods and people from one island to another which then results in new business activity in the field of inter-island sea transport service.

Article 1 point 1 of Law Number 43 of 2008 concerning State Territory explained that the territory of the Unitary State of the Republic of Indonesia hereinafter referred to as the state territory is one of the state elements constituting the unity of land area, inland waters, archipelagic waters and territorial sea along with the seabed and the land beneath it, as well as the air space above it, including all the resources contained therein. This definition has a really broad meaning so that it clearly means that there is complete unity between land and sea within the Indonesia.

If we further examine the development of sea transport service as well as various obstacles and problems that arise in the Indonesia's sea transport sector, there is an urgency to develop the Indonesian Maritime Law in line with International Maritime Law that has been ratified by Indonesia namely the United Nations Convention on the Law of the Sea (1982 UNCLOS).

1.1. Statement of Problem

Based on the description above, the problem of study is as follows:

- How are the development concept and enforcement of Indonesian maritime law associated with sea transport service activities in line with the United Nations Convention on the Law of the Sea (1982 UNCLOS)?

1.2. Objective of Study

The objective of study was to find out more deeply about how the Indonesia's position as archipelagic country provides sea transport service business activities so that it requires the independent and effective maritime law that is enforced in line with 1982 UNCLOS.

1.3. Method of Study

The study used normative juridical method by exploring primary and secondary sources of law with literature study of national and international laws and regulations as well as a variety of legal literatures that can support and answer the statement of problem raised in this study.

2. Discussion

Indonesia is a Nation of Laws in the form of archipelagic country united by the extremely large water area with boundaries, rights and sovereignty set forth by the Law. A nation of laws in simple terms is defined as a country that exercises its governing power based on the law. Article 1 Paragraph (3) of the 1945 Constitution stated that 'the state of Indonesia is a state based on the rule of law', furthermore the elucidation of the 1945 Constitution declared that 'the state of Indonesia is a state based on law (*rechtsstaat*) not based on power (*machtsstaat*), therefore the state may not carry out its activities on the basis of power but must be based on law (Kansil, 2002). Hence even though in fact the territorial owner is Indonesia, because the Constitution says that Indonesia is a Nation of Laws, then every business activity established in this territorial condition must be guided by national laws and regulations. However in order to avoid international problems, then it must be in line with International Maritime Law.

Even though the development of law is not the same as the development of laws and regulations and developing the laws and regulations as much as possible does not mean the same as developing the law, hence the nation of laws means not only a constitutional state. Politics of law in developing the laws and regulations only mean the developing of legal norms that must have an impact on improvements in the social, economic, cultural and political orders.

This is also supported by the opinion of Mahfud (1999) who mentioned that '... the development of National Law cannot be separated from politics of law. Based on the framework of thinking of the politics of law, the law is a political product thus the character for product of law will be very determined by the political power or configuration balance that produced it. In connection with this opinion, according to Tetley (Tjitrawati, 2010) '... the uniformity of international maritime law has not been carried out to date. This is because only a few countries have adopted the provisions of international maritime conventions that are important to the maritime sector. Only major countries of maritime actors including Britain, Canada, France, China and United States have implemented these provisions. Among the reasons for the difficulty of implementing uniformity is the difference in legal system traditions that underlie the national law of the countries of maritime actors.

Meanwhile in Indonesia, the efforts to achieve national goals in realizing national defense with archipelago perspective need strong national sea transport system in order to support economic growth, local development, and strengthen the state sovereignty. Sea Transport consisting of transportation in waters, ports, maritime safety and security, and maritime environmental protection is part of national sea transport system that has to develop its potential and role so that resulting in the effective and efficient transport system and stable and dynamic national distribution pattern for the sake of people welfare.

Based on the situation as represented by Tetley above, Indonesia needs to consider and determine the actions to be taken by the Government of how to develop its maritime law by conformity and uniformity with the United Nations Convention on the Law of the Sea (1982 UNCLOS). If viewed from the aspect of substance of the Indonesian maritime law, there are legal materials that are inconsistent and overlapping both vertically and horizontally in various laws and regulations. Consideration and determination of the actions must be carried out properly because the government must analyze the advantages and disadvantages of adopting the UNCLOS, or with all the consequences it can also make independent regulations that are free from the international law provisions.

The development of law that is more oriented towards the mindset of the regulations requires to be supported by an appropriate legal development strategy so that the objectives of national development planning system can be reached as stated in Article 2 paragraph (4) of Law No. 25 of 2004 concerning the National Development System:

- Support the coordination among development actors;
- Ensure the integration, synchronization and synergy between regions, spaces, times, government functions, as well as central and local governments;
- Ensure the linkage and consistency between planning, budgeting, implementation and supervision;
- Optimize the public participation, and
- Ensure the achievement of efficient, effective, equitable and sustainable use of resources.

The development of Indonesian Maritime Law is a consequence of 1982 UNCLOS ratification in Law Number 17 of 1985 concerning the Ratification of the United Nations Convention on the Law of the Sea (1982 UNCLOS) whose contents comprising of Part One is partly a codification of the rules of law on the high seas and the right of innocent passage of international sea. Part two is partly in the form of developing the existing law of the sea such as provisions regarding the breadth of territorial sea to a maximum of 12 nautical miles with the criteria for continental shelf. Part Three is partly new legal terminologies or regimes such as archipelagic country principle, exclusive economic zone, and mining on the international seabed.

Article 1 of Law Number 17 of 2008 concerning Shipping declared that the term of sea transport in waters means the activity of transporting passengers and/or goods by ship. In addition to the meaning of sea transport in waters, there are also several important terms in the sea transport, among others:

- Sea Transport is a transportation activity which according to the activity serves sea transport activities.
- River and Lake Transport is a transportation activity that includes reservoir, swamp, riverbank, and canal.
- Crossing Transport is a transportation that functions as movable bridge that connects road and/or railway networks that are cut off due to waters.

According to R. Soekardono (1981), transportation means the transport of goods and people from one place to another because the transport is absolutely necessary to achieve and increase the benefit and efficiency. The transportation process is a transport from the place of origin from which the transportation activity begins to the destination where the transportation ends.

2.1. Benefits of Conforming Indonesian Maritime Law

Development as a process certainly will not stop at intermediate objectives but intends to realize the national goals constituting its final goals. In this position, law must be able to make itself an integrating factor of the existing sub-systems, among others, political, social, cultural, economic, and legal sub-systems (Halim, 2004). Thus, the development of law by conforming national law with international law must also have clear impacts and benefits.

Uniformity and conformity of international maritime law in the development of Indonesia's national maritime law in line with the United Nations Convention on the Law of the Sea (1982 UNCLOS) will be useful to encourage the implementation of legal certainty and order as the most important principles in carrying out sea transport service business activities. This will ensure the safety and security aspects in sea transport service business activities, then the safety and security of people that use the sea transport services will also be guaranteed due to the decreased number of accidents that occurred arising from the application of international standards for safety and security at the sea.

2.2. Development of International Law of the Sea and Capacity of Admiralty Court in Enforcement There of

The use of term law of the sea nationally and internationally without explanation will raise doubts because in the Dutch law library the term *Zeerecht* law of the sea is usually used in a narrower sense. W.L.P.A Molengraaf, H.F.A Vollmar, and F.G Schelte main *Het Nieuwe Zeerecht* studied the law of the sea in the field of the rules of law related to shipping at the sea especially regarding the transport of goods or people by ship. Many experts studied law of the sea in civil law environment not covering the public law (Wirjono, 1991).

According to Victor Situmorang (1987), law of the sea is defined as a set of rules and regulations that govern traffic of the sea. This is unclear because traffic of the sea not only identifies the relation between citizens and the country but also the relation of various countries with one another.

Meanwhile according to Mochtar Kusumaatmadja, international law of the sea is a set of principles or rules that regulate relations or problems across the borders of countries regarding the sea both inside and outside the territory or the high seas within the utilization activities as well as the negative consequences of the utilization (Victor Situmorang, 1987). The principles of international law of the sea have now developed and are still used in the international law principles. For example, the use of *res communis omnium* principle that is defined as common heritage of mankind to use the sea as a means of shipping free from pirates but the use of the sea is increasingly developing such as fishing so that this principle is also used as the basis for freedom in fishing. In addition, during the Roman period, there was *res nullius* assumed that the sea can be owned by anyone hence anyone could control, occupy and own the sea (Kusumaatmadja, 1983).

According to Dimiyati Hartono (1977), the 1982 Conference on the Law of the Sea was held in Chile in 1973 but implemented in 1972 at the capital of Venezuela, Caracas. The Conference on the Law of the Sea was the largest conference during the XX century because it was attended by 160 participating countries and around 5000 delegates with disciplinary backgrounds, and took the longest period of time for 9 years (from 1973 to 1982). The 1982 Conference on the Law of the Sea produced the 1982 United Nations Convention on the Law of the Sea (UNCLOS) known as the 1982 Convention on the Law of the Sea (1982 CLOS). The convention had the most complete arrangements and successfully agreed upon by the countries. It came into force in 1994 and was ratified in 1999 by 130 countries that later became the source of international law of the sea (Heryandi, 2013).

Since the Dutch era, there was special institution that functioned to examine the ship accident occurred. In this era, the Dutch colonial government had published the *Book II – Wetboek Van Koophandel* (WvK) about the sea transport that was then regulated by the Orders of *Raad voor de Scheepvaart* or the Admiralty Court through State Gazette Number 2 of 1934 that was stated in the *Indische Scheepvaartwet* known as 1936 Dutch East Indies Shipping Act that came in effect until Indonesian independence. This was because at the beginning of the 1930s, the marine safety regulations were continued to develop internationally.

After Indonesian independence in 1945, the shipping regulations in Indonesian territorial waters were based on the Indonesian Shipping Ordinance/*Indische Scheepvaartwet* (State Gazette Number 700 of 1936). Although the regulations did not explain the Admiralty Court in detail but they became legal protection for shipping and shipbuilding regulations in Indonesia (Siswanto, 2018).

After conforming International Maritime Law and Indonesian Maritime Law, the effectiveness can be seen in its enforcement. According to Arief (2002), law enforcement is an effort to cope with crime rationally, fulfill a sense of justice and useful. To overcome the crimes, the perpetrators may be given criminal and non-criminal penalties that can be

integrated with one another. However, law enforcement in the criminal context also needs to be extended to enforce civil law in sea transport business activities through judiciary called as the Admiralty Court that can examine and adjudicate ship accidents at the sea.

The functions and duties of Admiralty Court are currently regulated in several regulations including Law No. 17 of 2008 concerning Shipping, Government Regulation No. 51 of 2002 concerning Shipping, and Government Regulation No. 1 of 1998 concerning Ship Accident Examination in line with Government Regulation No. 8 of 2004 concerning Amendments to Government Regulation No. 1 of 1998.

Therefore, it is necessary to optimize the roles of Admiralty Court as an institution that carries out proceeding against the ship master that experienced the accident. This effort can be done by conforming the perceptions of stakeholders and the laws and regulations that can improve the proceeding examination system. The roles of Admiralty Court in the ship accident case has great authority including to be able to cause all parties related to the ship operation to be present at the proceeding because so far the same authority also owned by agencies other than the Admiralty Court, consequently the ship accident case can be adjudicated to the general court first.

This needs to be done so that the case can be examined quickly and to discover the exact causes of the accident to decide the case thus there are no similar accidents in the future. The further examination results can indicate other matters relating to criminal elements and processed in the general court.

Regulation of the Minister of Transportation Number 76 of 2017 concerning Organization and Working Procedures of Admiralty Court intends to restructure the Organization and Working Procedures of Admiralty Court and Article 2 of this Ministerial Regulation stated that the Admiralty Court has the task of carrying out further examination of ship accident. Its duties and functions include:

- Coordination and preparation of plan, program and budget, data management, activity evaluation, and technology and information system management;
- Preparation of financing and payroll administration, preparation of budget implementation report, management of state property (bmn), and equipment affairs;
- Preparation of personnel management, organizational structuring, administrative management, domestic affairs, public relation, management of bureaucratic reform;
- Carryout verification of ship accident examination case file, proceeding administration, provide substantive support for the proceeding, typing and duplicating the draft decision;
- Investigation on the causes of ship accident and the determination in case of mistake and/or negligence in the application of maritime professional standards carried out by the ship master or captain and/or officer for the occurrence of ship accident; and
- Imposition of administrative sanction to the ship master or captain and/or officer with seafarer expertise certificate issued by the government of the republic of indonesia that committed the mistake and/or negligence in the application of maritime professional standards.

3. Conclusion

The descriptions above conclude that the development concept of Indonesia's national maritime law in relation to sea transport service activities must be in line with the United Nations Convention on the Law of the Sea (1982 UNCLOS) that is expected to encourage the achievement of the ideals of the Country as set forth in Article 1 paragraph (3) of the Constitution of Indonesia that are realizing the people to have fair and prosperous live due to the existence of legal certainty, order, and benefits in sea transport business activities. Furthermore, the development of national maritime law is also supported by the Admiralty Court that has great authority in the enforcement of national maritime law and can carry out further investigation on ship accident as well as impose Administrative, Civil and Criminal sanctions to the Ship Master or Captain and/or Officer in performing the sea transport business activities in Indonesia.

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