

Beyond Paper

The annulment of inequitable provisions in an Indonesian coastal area management act spells victory for fishers

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At its plenary session on 26 June 2007, Indonesia's House of Representatives (DPR) passed the Management of Coastal Areas and Small Islands (PWP-PPK) Act, 2007 (No. 27). It was meant to make a breakthrough in resolving the conflicts that resulted from sectoral regulations in coastal areas and small islands. Another aim was to ensure that the State protects the interests of families of fishers and indigenous peoples. It was assumed that this legislation would lead to

Development Bank (ADB) and the World Bank.

Though there was a prolonged process involving discussions with different experts, it is unfortunate that the final legislation passed did not have an integrated coastal management approach. The legislation, as adopted in 2007, did not correct the inequality of control of coastal and small island resources, nor did it address the growing complexity of overlapping pieces of legislation governing the areas (as there are over 20 laws governing coastal areas and small islands). Instead, the legislation puts more emphasis on the investment aspect and is pro-business in approach, not leaving much space for communities, especially traditional fisherfolk and indigenous peoples, to participate and propose management plans.

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maximum development of coastal areas and small islands.

It is essential to note that the process for drafting the legislation took a long time, and involved a number of stakeholders, and it was more than seven years before the process was complete. The process, initiated in 2000, involved academics, legal practitioners, non-governmental organizations (NGOs), as well as a number of foreign experts, especially from the University of Rhode Island, United States (US), besides public policy activists from the US. There was also foreign funding involved, either directly or indirectly, in the form of funds from organizations such as the United States Agency for International Development (USAID), and banks such as the Asian

The legislation (as adopted in 2007) had provisions whereby concessions could be granted to coastal waters. The PWP-PPK Act legally promoted the granting of concessions (HP-3) to the private sector, including from other countries, for aquaculture, tourism and mining in coastal waters and small islands.

Concessions

More specifically, the concessions can be granted for the sea surface, and the water columns down to the seabed valid for a cumulative period of 60 years. Moreover, the concessions can be transferred, routed and used as collateral for bank loans. This kind of commercialization and privatization model has been applied earlier for the management

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of forests and mineral resources over the last four decades, and have proved a failure, resulting in increased poverty and ecological disasters in Indonesia.

The access to coastal and small-island resources are then open to be controlled by investors with financial muscle since only such investors can meet all the requirements stipulated in the law to obtain the HP-3 certificate, namely, administrative, technical and operational qualifications. Often, coastal communities do not have the capacity (financial, technical, access to information and technology) to compete with the investors and local government, thus leaving no space for the coastal communities, especially the fisherfolk. The social, economic and cultural activities of fisherfolk, and coastal cultivators will be drastically affected by such investments, leading to further exacerbation of their poverty.

In essence, HP-3 legalizes the revocation of the rights of families of fishers, indigenous and coastal communities to access resources in coastal and marine areas, and small islands.

The degradation of the ecosystems of the islands, the allotment of marine areas, and the eviction of fishers from their traditional spaces are continuing. The People's Coalition for Fisheries Justice (KIARA) notes that during the span of four years, no less than 42 ecologically important areas along the coast and in small islands have been 'excavated' by the mining industry for the extraction of coal, oil and gas.

Furthermore, over 20 islands, including in Nusa Tenggara Barat, Kalimantan Timur, Kalimantan Selatan, North Maluku, South Sulawesi, Papua and Nusa Tenggara Timur (NTT), have been earmarked by foreign parties for the industry; around 50,000 ha of aquaculture area have been handed over as concession for foreign exploitation, and are being 'adopted' by oil, gas and mining companies.

Around one million ha of coastal area have been converted to facilitate the expansion of palm oil plantations

and beach reclamation. All these developments potentially increase the pressure of poverty on the families of fishers.

Based on these considerations, a civil society grouping, called the "Reject HP-3 Coalition", filed a petition with the Constitutional Court on 13 January 2010 for the judicial review of the articles related to HP-3 in Act No. 27 of 2007. The coalition, consisting of nine civil society organizations (CSOs) and 27 leaders of fisherfolk organizations, was also supported by various experts from the academic community, as well as three representatives from among artisanal fisherfolk and indigenous peoples.

While the practice of privatization of the management and exploitation of natural resources in Indonesia is shifting from land to marine areas, the Constitutional Court of Indonesia annulled, on 16 June 2011, the provisions of the HP-3 concessions as stipulated in the PWP-PPK Act of 2007. On paper, the policy of privatizing the living spaces of traditional fishers and indigenous peoples in coastal waters and small islands has been revoked.

The review procedure of the Constitutional Court focused on two major questions:

1. Does the granting of the HP-3 concession regulation contravene the principle of



The Reject HP-3 Coalition in front of the Constitutional Court of Indonesia, campaigning for the rights of communities to access resources

KIARA



The Constitutional Court of Indonesia in session to discuss the annulment of HP-3 concessions

State power/ownership over natural resources for the greatest welfare of its people; is it in conflict with the constitutional guarantee regarding the right to life and livelihood for the coastal community (socioeconomic rights), and with the principle of non-discrimination and the principle of legal certainty and justice?

2. Is the design/development of the Strategic Plan for Coastal Regions and Small Islands (RSWP-3-K), Zonal Plan for CR & SI (RPWP-3-K), Management Plan for CR & SI (RPWP-3-K) and the Action Plan for CR & SI (RAPWP-3-K) not in contravention with the constitutional rights of the petitioners (Reject HP-3 Coalition) since no representative of the people participated in the consultation procedures?

The Constitutional Court discourse resulted in several interesting elaborations.

First, the sentence “to be used for the greatest welfare of the people”, as mentioned in the Constitution (UUD 1945, Article 33/3), implies that the greatest welfare of the people is the main criterion for the government to determine the policies, regulations and management regarding land and water resources and the natural richness that is part of them.

Second, the State power over land and water resources and their natural richness has to consider the already

existing rights, be it individual rights or collective rights of traditional groups, communal rights and other constitutionally granted rights of the people, such as the rights of passage for access and right to a healthy and clean (aquatic) environment.

Third, the HP-3 concession regulation will result in a loss of the rights of traditional communities that have been handed down over generations. These traditional community rights have a specific characteristic, that is, they cannot be revoked as long as the traditional community still exists.

Fourth, HP-3 will lead to an exclusion of traditional communities as HP-3 concession holders, due to their lack of working capital, technology and knowledge. However, the State—in this case, the government—has the duty to promote the general welfare and social justice of all its people (UUD 1945, Intro. And Para. 34/2).

Fifth, the purpose of Act 27 of 2007 is the legalization of concessions in coastal areas and small islands, that is, to establish private ownership and closed ownership for individuals, legal entities or certain communities, so that a major part of the coastal areas and small islands can be managed by the above mentioned entities through concessions as regulated by HP-3. Thus, the aim is to promote the privatization of management and exploitation of the coastal waters and small islands by private companies and businessmen.

Last, the design/development of the Strategic, Zonal, Management and Action Plans, which only includes regional governments and the business community, constitutes unequal treatment, and neglects the rights of individuals for personal advancement and the collective development of the community, the people and the State.

Small-island resources

Based on the abovementioned elaborations, the means to privatize and commercialize the coastal areas and small-island resources are proven to be in contravention of the provisions of the Constitution. The relevant paragraphs of the HP-3

concession regulation does not have any legal sanctity.

In examining the ruling document, which is 169 pages long, at least three breakthroughs by the Constitutional Court can be discerned, which strengthen the essence of the struggle of fisher communities and indigenous peoples.

First, in assessing how far HP-3 benefits the greatest welfare of the people, the Constitutional Court used the following benchmarks: (i) the benefit of natural resources for the people; (ii) the level of distribution of the benefits of natural resources for the people; (iii), the level of public participation in determining the benefits of natural resources, and; (iv) the respect for people's rights in utilizing natural resources from generation to generation.

Thus, the Constitutional Court, in its ruling on HP-3, has provided and defined a constitutional instrument to measure the operational meaning of "for the greatest welfare of the people" regarding the often-debated management of natural resources.

Second, the Constitutional Court contributed to the awareness and articulation of the existence of constitutional rights, which also apply for traditional fisherfolk, among which are the rights of passage (access); the right to manage resources in accordance with cultural principles and traditional wisdom handed down over generations; and the right to exploit resources, including the right to a healthy and clean aquatic environment. All these rights of the traditional fisherfolk are inherent individually and collectively, and cannot be exchanged (read sold). In areas where the fishers are not dominant, it depends on their customary rights, not on the number of people.

There is no need to wait. Technically, the government and parliament need to revise all rules, both national and regional, that still foster the spirit of privatization reflected in HP-3, and 'clean' the coastal, marine and small-island areas of various forms of impoverishing commercialization. In North Sumatra,

for example, a Local Regulation No. 5 of 2008 on the Management of Coastal Areas and Small Islands clearly holds commercial provisions regarding coastal water concessions.

In line with the annulment of HP-3 by the Constitutional Court, the State has the duty to reinstate the constitutional rights of the fisherfolk, including the guarantee not to pollute the sea (read living environment and livelihood of the fishers). For the fisher families who have been 'driven out' from their marine environment, the annulment of HP-3 is a conscious effort to strengthen their living as

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traditional fisherfolk and also to seize their rights in a constitutional way. At the same time, the dignity of the State must be upheld by preventing its apparatus from exercising misguided policies that are contradictory to the Constitution.

Furthermore, the decision of the House of Representatives to insert a bill on the protection of fishers into the National Legislation Programme (Prolegnas) for the period 2009 to 2014 should be followed up by ensuring the involvement and participation of organizations of fishers and indigenous peoples in its formulation process.

If this can be achieved, the constitutional victory of fishers, indigenous peoples and their families will not remain on paper. 

For more



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Koalisi Rakyat Untuk Keadilan Perikanan

www.un.org/Depts/los/nippon/unff_programme_home/fellows_pages/fellows_papers/nurhidayah_0910_indonesia_PPT.pdf

Towards Integrated Coastal Zone Management in Indonesia: Framework Assessment and Comparative Analysis