

LEGAL RECONSTRUCTION AGAINST *ILLEGAL FISHING* BY PROHIBITED MEANS AND IN PROHIBITED AREAS

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Abstract

Reconstruction of laws against *illegal fishing* by prohibited means and in prohibited areas. The purpose of this study is to analyze: 1) How is the practice of catching *illegal fishing*? 2) Marine and Fisheries Law Regulation Against *Illegal Fishing*? 3) Marine and Fisheries Law Enforcement Against fishing by illicit means and in restricted areas? The research method used is empirical juridical with a statutory approach, concept approach, and case studies. The results showed that: 1) Illegal fishing practices *are* varied, such as manipulation of administrative requirements, use of fishing gear that is not permitted, nets that are not in accordance with laws and regulations, and others. 2) One of the backgrounds in the proposer's explanation of the draft Law on fisheries which will replace Law Number 9 of 1985 concerning fisheries proposed by the DPR-RI, is to view the Unitary State of the Republic of Indonesia as an independent and sovereign state based on Pancasila and the 1945 Constitution, has a vast territorial waters and land, and 2/3 of its territory is sea with a coastline of 81,000 km² consisting of about 17,508 islands. 3) Fisheries law applies to everyone, both Indonesian citizens and foreign nationals; Indonesian legal entities and foreign legal entities, as well as Indonesian-flagged fishing vessels that cooperate with foreign parties carrying out fisheries activities in fisheries management areas and outside the fisheries management areas of the Republic of Indonesia.

Keywords: Reconstruction, Law, Illegal Fishing, Forbidden Means, Forbidden Areas.

INTRODUCTION

Background

Fish resources (hereinafter referred to as SDI) on the high seas are one of the most important sources of food and marine industry commodities in the world. According to *the report of the Food and Agriculture Organizations* (hereinafter referred to as FAO) in *The State of World Fisheries and Aquaculture (hereinafter referred to as SOFIA)* in 2012, the fisheries sector supports the livelihoods of around 540 million people in the world and world fisheries production reaches 128 million tons of fish¹⁸. Furthermore, SOFIA 2012 states, that the world's fish stock has decreased due to overexploitation (overexploited), *namely 85% of the world's SDI is overexploited and fully exploited.*¹

Overfishing of SDI has actually occurred since the late 1970s, the number of *distant-water fishing vessels* operating on the high seas has increased and their presence threatens vessels and the availability of fish in coastal countries adjacent to the high seas. If overfishing conditions on the high seas occur continuously and are not controlled, it will threaten the reproduction of several species of fish in coastal countries.²

In 1995 the problem of *Illegal Fishing* was made a major issue at the global level by FAO, arguing that world fish stocks were declining and one of the contributing factors was Illegal Fishing.³ Some fishing practices that are classified as illegal and cause overfishing include, a fleet of fishing vessels that deliberately enter the waters of the Exclusive Economic Zone (hereinafter referred to as EEZ) of a State without a permit and overfish, a fleet of fishing vessels that have obtained legal permits but commit illegal actions by moving from a designated fishing area (fishing ground violations), by using dangerous fishing gear (chemical, explosive and biological). There is no difference from what happens in Indonesian waters, the form of *Illegal Fishing* practices includes cases of not having a SIUP.⁴

Indonesia is recognized as the largest archipelagic country in the world. With ownership of 17,504 islands, which are divided into 13,446 registered, named and coordinated islands, and unnamed islands as many as 4,038 islands (Geospatial Information Agency, 2015). Not only known as an archipelagic country, Indonesia also has a coastline length of up to 99,093 km. It is the second longest coastline in the world after Canada. However, because of Canada's condition dominated by ice islands (*green island*), Indonesia is a country with the longest productive coastline in the world. The total area of Indonesia is 7.81 million km², divided into water areas of 6,315,222 km² and land areas of 1,913,578.68 km². By land area, Indonesia is the 15th largest country in the world.⁵ Fisheries management is one of the national development so that it is carried out in a planned manner and is able to increase the prosperity and welfare of the people with environmental sustainability for the present and the future.⁶

Indonesia has more than 2.6 million fishermen, and 140 million people who depend on marine and coastal ecosystems for their livelihoods. *Illegal fishing* costs Indonesia \$±20 billion annually, threatening 65% of Indonesia's coral reefs from overfishing and killing Indonesian fishermen's chances of getting 1 million tons of fish annually⁷. Seeing violations and crimes in the field of fisheries, especially illegal, unreported, and unregulated (IUU) fishing activities in Indonesian waters is very concerning, therefore it is necessary to take firm and integrated steps immediately by all relevant government agencies to eradicate it.⁸

Problem Statement

- 1) What is the practice of catching *illegal fishing*?
- 2) Marine and Fisheries Law Regulation against *Illegal Fishing*?
- 3) Marine and Fisheries Law Enforcement Against fishing by illicit means and in restricted areas?

THEORETICAL FRAMEWORK

Welfare Theory is used as a Grand Theory in this study. According to Pigou, the economic theory of welfare is a part of social welfare that can be linked directly or indirectly to the measurement of money. Well-being can be approached based on two things, namely: 1) subjective well-being and 2) objective well-being. Well-being is addressed at the individual, family, and community levels.⁹

Fergusson and Martin state that the terminology often used in research discussing well-being is *standard living*, *well-being*, *welfare*, and *quality of life*. According to Just in the study of welfare economics which aims to help people make better choices, a person's welfare is seen from the *willingness to pay* when individuals or communities play a role as consumers. Welfare is a certain amount of satisfaction obtained by a person from the results of consuming the income received. However, the level of welfare itself is something relative because it depends on the amount of satisfaction obtained from the results of consuming the income. The level of satisfaction related to emotions will influence aspects of individual behavior to assess satisfaction on other variables such as satisfaction with quality of life. The value of emotional satisfaction will also improve the performance and contribution of the individual to his environment.¹⁰

Then Law Enforcement Theory as Middle Theory, law enforcement in Dutch is called *rechtstoepassing* or *rechtshandhaving* and in English law enforcement, includes 30 notions that are macro and micro. Macro covers all aspects of community life, nation and state, while in the micro sense it is limited in the process of examination in court including the process of investigation, investigation, and prosecution to the implementation of criminal verdicts that have permanent legal force.¹¹

The purpose of law enforcement in line with the purpose of the law itself, is to achieve certain desired results and the purpose of law is an effort to realize the achievement of order and justice. An order cannot be established, if the law is ignored. Community awareness and compliance with the law, not only affect order and justice, but play a role in shaping the legal culture (culture) of a society because it regulates behavior.¹² Law enforcement is a process of making legal wishes a reality. The so-called legal desires here are none other than the thoughts of the law-making body formulated in legal regulations. That legal regulation. The formulation of lawmakers' thoughts as outlined in legal regulations will also determine how law enforcement is carried out.¹³

Furthermore, the theory of Progressive Law as *an Applied Theory*, according to Satjipto Rahardjo, progressive law enforcement is to carry out the law not just black-and-white words from regulations (*according to the letter*), but according to the spirit and deeper meaning (*to very meaning*) of the law or law. Law enforcement is not only intellectual intelligence, but rather spiritual intelligence. In other words, law enforcement is carried out with determination, empathy, dedication, commitment to the suffering of the nation and accompanied by the courage to find another way than usual.¹⁴ Basically, human life is inseparable from the law. Throughout the history of human civilization, the central role

of law in creating an atmosphere that allows humans to feel protected, coexist peacefully and maintain their existence in the world has been recognized.¹⁵

RESEARCH METHODOLOGY

This research is included in the type of doctrinal research, where the approach method used is normative juridical. The normative juridical approach is to understand the problem using the approach of legal regulations or applicable laws and regulations.¹⁶

The normative legal research method is also called positive law science referred to here is a law that applies at a certain time and place, namely a written rule and norm that is officially formed and promulgated by the ruler, in addition to written laws that regulate the behavior of community members.¹⁷

In this study, a statutory approach and a comparative approach were used.¹⁸ Legal research conducted by examining library materials or secondary data.¹⁹ Statute approach: an approach taken by examining laws and regulations related to the focus of research.

Then the conceptual *approach* is an approach that departs from the views and doctrines that develop in legal science. A concept is a mental integration of two or more units isolated according to characteristics and united by a distinctive definition.²⁰ The concept approach is used with regard to the concepts in Withdrawal of Fiduciary Guarantee Objects as well as Continuous Action against Debtor Default.

RESEARCH RESULTS

Illegal Fishing *Practices*

Indonesia as the largest archipelagic country in the world with abundant potential and natural wealth. With two-thirds of its territory is sea and it is one of the countries that has the longest coastline in the world. With this strategic geographical location, Indonesia has advantages and at the same time high dependence on the marine sector.

In addition to comparative advantages based on geographical location and potential natural resources in marine areas contain biological or non-biological resources that are very beneficial for the survival of the community.

This potential can be obtained from the seabed and land below, in water and sea level, including coastal areas and small islands, it is very logical if the marine economy is used as a fulcrum for national economic development. In accordance with what is mandated in Article 33 of the Constitution of the Republic of Indonesia Year 1945.²¹

According to Lackey, the definition of fisheries is a system consisting of three components, namely aquatic biota, biota habitats and humans as users of these resources.

According to Lackey, fisheries can be grouped based on several traits, including:

- 1) Fisheries by environmental type, for example; freshwater fisheries, seas, lakes, rivers and dams.
- 2) Fisheries based on harvesting methods, for example; *trawl* fisheries, *dipnets*, and *purse seine* and so on.
- 3) Fisheries based on the type of access permitted, for example; open access fisheries, open access fisheries with regulations and fisheries with limited access.
- 4) Fisheries based on *concern organisms*, for example; fisheries of salmon, shrimp, crab, tuna.
- 5) Fisheries based on the purpose of catching, for example; commercial fisheries, subsistence, recreational fisheries.
- 6) Fisheries based on the degree of naturalness of the target animal, total from nature, semi-cultivation or total cultivation.

In Law Number 31 of 2004 concerning fisheries as amended by Law Number 45 of 2009 concerning fisheries reads as²² follows:

"Article 1 In this law, what is meant by fisheries is all activities related to the management and utilization of fish resources and their environment starting from preproduction, production, processing to marketing carried out in a fishery business system".

There are many kinds of illegal *fishing practices*, such as manipulation of administrative requirements, the use of fishing gear that is not permitted, nets that are not in accordance with laws and regulations, and others. Illegal ²³ *fishing* is known as *Illegal Unreported and Unregulated Fishing* (IUU).

Fishery activities that are considered illegal *fishing* are referred to as follows:

- a) Fishery activities by foreign persons or vessels in waters under the jurisdiction of a State, without permission from that State, or contrary to laws and regulations;
- b) Fisheries activities carried out by vessels flying the flag of a State that is a member of a regional fisheries management organization, but carried out in a manner contrary to the resource management and conservation arrangements adopted by that organization, where such provisions are binding on the State that is a member of it, or contrary to other relevant international law;
- c) fisheries activities contrary to national law or international obligations, including the obligations of member states of regional fisheries management organizations to such organizations;
- d) The most common unlawful fishing activity in WPP-NRI is the theft of fish by foreign-flagged fishing vessels, particularly from some neighboring countries.

The types of violations committed by Indonesian-flagged fishing vessels include:

- 1) Fishing vessels in operation are not equipped with a Fishing License (SIPI);
- 2) Fish transport vessels in their operation are not equipped with a Fish Transport Vessel License (SIKPI);
- 3) The fishing grounds and areas are not in accordance with those stated in the permit;
- 4) Use of hazardous fishing materials or equipment or prohibited fishing gear;
- 5) Forgery of fishing licenses;
- 6) manipulation of ship documents, including the size, location of manufacture, and ship ownership documents;
- 7) The vessel name, vessel size and/or brand, serial number, and engine power do not match those stated in the permit;
- 8) The type, size and number of fishing gear and/or fishing aids are not in accordance with those stated in the permit;
- 9) The ship operates without a Sailing Approval Letter (SPB);
- 10) Not installing or not activating designated fishing vessel and fish carrier monitoring devices (including VMS transmitters);
- 11) Fishing vessels and fish carriers carry out loading and unloading in the middle of the sea without permission;
- 12) Fishing vessels transport catches directly abroad without reporting at designated ports;
- 13) Indonesian-flagged fishing vessels and fish carriers catch/transport fish in the jurisdiction of other countries without permission from the country concerned and without approval from the Government of the Republic of Indonesia.

Based on the *International Plan of Action to Prevent, Deter and Eliminate IUU Fishing (IPOA-IUU Fishing)*²⁴ in 2001, fishery activities that are considered Unreported Fishing are:

- 1) fishery activities that are not reported or reported incorrectly, to the competent national authorities, contrary to laws and regulations;
- 2) fisheries activities conducted in RFMO competence areas that have not been reported or reported incorrectly, contrary to the reporting procedures of that organization

The types of fisheries activities that are not reported include:

- a) Reporting of inappropriate catch data
- b) Transfer of catches in the middle of the sea or sea transshipment without being recorded / reported to the competent authorities;
- c) the perpetrators do not report their catch, in order to avoid paying levies on the work done;
- d) fishing vessels and fishing vessels do not report at the port of the ship base according to the permission granted;
- e) Fishing boats directly from the sea carry caught fish abroad.

Fisheries activities are not regulated *Unregulated Fishing based on the International Plan of Action to Prevent, Deter and Eliminate IUU Fishing (IPOA-IUU Fishing) in 2001, what is meant by fishery activities that are considered to be Unregulated Fishing are:*²⁵

- 1) Fisheries activities carried out in relevant RFMO areas of competence carried out by vessels without nationality, or by vessels flying the flag of a country that is not a member of such organization, or by fishing companies, conducted in a manner contrary to the conservation and management arrangements of that organization;
- 2) Fisheries activities carried out in territorial waters or for fish stocks where no conservation and management arrangements can be applied, carried out in a manner contrary to the State's responsibility to conserve and manage marine living natural resources in accordance with the provisions of international law.

Marine and Fisheries Law Regulation against *Illegal Fishing*

Fishing activities include violations related to the management and preservation of fishery resources in national and international waters. Fish-producing countries enter into bilateral and multilateral cooperation agreements so that they are bound by the rules of fisheries organizations that are followed.²⁶ In general, it can be said that the rules regarding fisheries must solve five main problems as contained in Albert W. Koers's book quoted by Frans E. Likadja and Daniel F. Bessie as follows:²⁷

- 1) How can it be convinced that marine biological resources are indeed fully utilized?
- 2) How to prevent overexploitation of these biological resources?
- 3) How to allocate the capture and sustainability of the marine environment among the nations of the world?
- 4) How can it be convinced that marine fisheries can be obtained in a more economical and efficient way?
- 5) How to prepare an adequate knowledge so that the decisions to be made regarding that matter, are based on that knowledge.

Fisheries is an activity related to the management and utilization of fish resources, and as an economic activity, the fishery business will place motivation as a commander in its implementation.²⁸

Fisheries management areas in Indonesia that are prone to IUU fishing in Indonesia's exclusive economic zone (EEZ) are:²⁹ South China Sea; Sulawesi Sea and Pacific Ocean; Arafura Sea. While state losses due to *illegal fishing* can be described as follows: (1) It is estimated that per year the country experiences a loss of 30 T. (2) The occurrence of *overfishing* and *overcapacity*. (3) Damage to the sustainability of fish resources as a result of declining fish stocks.

- 1) The unit catch (CPUE) of fishermen and national companies decreased.
- 2) Fisheries business is not conducive.
- 3) Weak competitiveness of Indonesian companies.
- 4) Indonesian fishermen do not become hosts in their own country (marginalized).

On June 13, 2002 Commission III of the House of Representatives of the Republic of Indonesia (DPR-RI), submitted a proposal for the initiative of the draft Law on fisheries as an amendment to Law Number 9 of 1985 concerning fisheries. The proposal letter was submitted to the leadership of the DPR-RI. Some of the points that became the basis for submitting the draft law on the DPR-RI initiative proposal regarding changes to Law Number 9 of 1985 concerning fisheries are:³⁰

- a) Some provisions in Law Number 9 of 1985 concerning fisheries, are no longer in accordance with the current situation, especially in terms of limited regulation of aquaculture fisheries, no regulation of fishing on the high seas, no regulation of law enforcement in the field of fisheries, and low / light criminal sanctions;
- b) The law on fisheries should accommodate the development of modern fisheries management, as well as the principles of responsible *fisheries management (Code of Conduct for Responsible Fisheries)*, the development of international law of the sea, zoning systems, fish resource monitoring and control systems, and others;
- c) It is necessary to provide an adequate regulatory basis for strengthening and empowering institutions and human resources related to fisheries management, such as supervisory institutions (structural and community), customary/traditional institutions, and others.

One of the backgrounds in the proposer's explanation of the draft Law on fisheries which will replace Law Number 9 of 1985 concerning fisheries proposed by the DPR-RI, is to view the Unitary State of the Republic of Indonesia as an independent and sovereign state based on Pancasila and the 1945 Constitution, has a vast water and land area, and 2/3 of its territory is in the form of sea with a coastline of 81,000 km² consisting of about 17,508 islands.³¹

Marine and Fisheries Law Enforcement Against fishing by illicit means and in restricted areas

One of the *concepts that needs to be included in the fisheries law regarding* illegal fishing is because illegal *fishing is not* only fishing without a permit but also fishing by prohibited means or even in prohibited areas. There are many violations of foreign fishing vessels such as Thailand, Vietnam, China and others. Proving that the surveillance and law enforcement system in Indonesian waters is still very weak.

The government's statement before the plenary session of the DPR-RI regarding the draft law on Indonesia's exclusive economic zone stated that the government's consideration for issuing a government announcement was because the exclusive economic zone regime had been recognized and accepted as customary international law. The government said the factors that prompted the government to issue a government announcement about Indonesia's exclusive economic zone were:

- 1) The rapid increase in Indonesia's population has led to an increasing need for animal protein, most of which is produced from fisheries.
- 2) World demand for fish is increasing which has led to the development of fishing industries on a large scale by developed countries.
- 3) Several neighboring countries such as Australia, Papua New Guinea, the Philippines, Vietnam and Malaysia have declared their Exclusive Economic Zones, even in their national legislation.

With the promulgation of the Exclusive Economic Zone by neighboring countries, the following problems arise:

- a) Determination of the boundaries of the Exclusive Economic Zone between the Republic of Indonesia and neighboring countries.
- b) The promulgation and promulgation of Exclusive Economic Zones by neighboring countries has limited the space for fishing activities by developed countries in the Exclusive Economic Zones of these countries.

In accordance with the focus of discussion in this research study is the provision of criminal acts of theft of *illegal fishing* fish that occur in Indonesia's exclusive economic zone. In the first fisheries law, Number 9 of 1985, the threat of sanctions for *illegal fishing* crimes that occur in the territory of the Indonesian exclusive economic zone must be in accordance with the criminal provisions in Law Number 5 of 1983 concerning the exclusive economic zone of Indonesia. This provision is based on the order of Article 30 of Law Number 9 of 1985 concerning fisheries according to Article 30 of Law Number 9 of 1985, namely:

Whoever violates the provisions of this Law in the Exclusive Economic Zone of Indonesia shall be punished in accordance with the criminal provisions in Law Number 5 of 1983 concerning the Exclusive Economic Zone of Indonesia.³² The provisions for the threat of

sanctions in Law Number 5 of 1983 concerning the Exclusive Economic Zone of Indonesia are only in the form of fines. This is in accordance with Articles 16 and 17 of the criminal provisions of Law Number 5 of 1983. Articles 16 and 17 read:³³

Article 16

- 1) Whoever commits acts contrary to the provisions of Article 5 paragraph (1), Article 6, and Article 7 shall be punished with a maximum fine of IDR 225,000,000 (two hundred twenty-five million rupiah).
- 2) The judge in his decision may determine the seizure of the results of activities, ships and/or other equipment used to commit the crime in paragraph (1).
- 3) Whoever intentionally commits actions that cause environmental damage and/or environmental pollution in the Indonesian Exclusive Economic Zone shall be threatened with criminal charges in accordance with applicable laws and regulations in the field of environment.

Article 17

Whoever damages or destroys evidence used to commit a criminal act as referred to in Article 16 paragraph (1), with the intention of avoiding acts of confiscation of these items at the time of inspection, shall be punished with a maximum fine of IDR 75,000,000 (seventy-five million rupiah).

At the discussion stage of the draft law on Indonesia's exclusive economic zone, the Government explained that the criminal threat imposed under this law was only a criminal fine and confiscation of ships and other equipment and the results of their activities. This is in accordance with the provisions of article 73 of the Law of the Sea Convention which does not allow the imposition of corporal crime for violations of fisheries regulations in Indonesia's exclusive economic zone (EEZ).³⁴

As described above, that in the exclusive economic zone (EEZ) is part of the waters that are under the sovereign rights of the state. In Law No. 5 of 1983 concerning EEZ, acts or actions that fall into the category of crimes have been determined, namely:

- 1) Conduct exploration and/or exploitation of natural resources or other activities for exploration and/or economic exploitation such as power generation from water, currents and wind in the exclusive economic zone (EEZ), without permission from the government or based on international agreements with the government and carried out in accordance with the terms of international licensing or approval.³⁵
- 2) Create and/or use artificial islands or other installations or buildings in the exclusive economic zone (EEZ) without permission from the government.³⁶
- 3) Conducting scientific research activities in the exclusive economic zone (EEZ) does not obtain prior approval from and is carried out based on the conditions set by the government.

- 4) Carry out actions that cause environmental damage and/or environmental pollution within the exclusive economic zone.³⁷ such actions are threatened with criminal penalties in accordance with applicable laws and regulations in the field of environment.

Regarding law enforcement in the region (EEZ), Law No. 5 of 1983 Article 13 stipulates, that in order to carry out sovereign rights, other rights, jurisdiction and obligations of the competent government law enforcement apparatus, law enforcement actions may be taken in accordance with Law Number 8 of 1981 concerning the Code of Criminal Procedure, with the following exceptions:

- a) Arrest of vessels and/or persons suspected of violations in the exclusive economic zone (EEZ) includes stopping the ship until the delivery of the ship and/or persons at the port where the case can be processed further;
- b) The delivery of the ship and/or persons must be carried out as soon as possible and must not exceed a period of 7 (seven) days, unless there are force majeure circumstances;
- c) For the purposes of detention, criminal acts regulated in Article 16 and Article 17 are included in the category of criminal acts as referred to in Article 21 paragraph (4) point b of Law Number 8 of 1981 concerning the Code of Law.

Other provisions relating to the exploitation of biological resources in the EEZ are regulated in Law No. 31 of 2004 and Law No. 45 of 2009 concerning Fisheries. According to this Fisheries Law, the fisheries management area of the Republic of Indonesia for fishing and/or fish farming includes:³⁸

- a. Indonesian waters; b. Indonesia's exclusive economic zone; and c. Rivers, lakes, reservoirs, swamps, and other puddles that can be cultivated, as well as potential fish farming land in the territory of the Republic of Indonesia.

Please note that this fisheries law applies to everyone, both Indonesian citizens and foreign nationals; Indonesian legal entities as well as foreign legal entities, as well as Indonesian-flagged fishing vessels that cooperate with foreign parties carrying out fisheries activities in fisheries management areas and outside the fisheries management areas of the Republic of Indonesia.³⁹

CONCLUSION

The results showed that;

- 1) There are many kinds of illegal *fishing practices*, such as manipulation of administrative requirements, use of fishing gear that is not permitted, nets that are not in accordance with laws and regulations, and others
- 2) One of the backgrounds in the proposer's explanation of the draft Law on fisheries which will replace Law Number 9 of 1985 concerning fisheries proposed by the DPR-

RI, is to view the Unitary State of the Republic of Indonesia as an independent and sovereign state based on Pancasila and the 1945 Constitution, has a vast water and land area, and 2/3 of its territory is in the form of sea with a coastline of 81,000 km² consisting of about 17,508 islands...

- 3) The fisheries law applies to everyone, both Indonesian and foreign; Indonesian legal entities as well as foreign legal entities, as well as Indonesian-flagged fishing vessels that cooperate with foreign parties carrying out fisheries activities in fisheries management areas and outside fisheries management areas of the Republic of Indonesia

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