



## Philosophical Analysis of Implementation of Acceleration of the National Strategic Project of Obi Island, Halmahera Selatan District

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### **Abstract**

Amendments to Law Number 26 of 2007 concerning Spatial Planning as contained in the Law of the Republic of Indonesia Number 11 of 2020 concerning Job Creation. Article 34A paragraph (1) Law Number 26 of 2007 concerning Spatial Planning regulates; in the event that there is a strategic change in national policy as referred to in Article 20 paragraph (5) letter d, Article 23 paragraph (5) letter d, and Article 26 paragraph (6) letter d it has not been included in the spatial layout plan and/or zoning plan, the use of space for various purposes can still be implemented. The normative provisions which read "can still be implemented" are philosophically contrary to the contents of the law which should contain the nation's moral values. Norms of legislation should ideally be able to achieve legal objectives, one of which is justice.

**Keywords:** *Norms; Moral Values and Justice*

### **Introduction**

The stipulation of Law of the Republic of Indonesia Number 11 of 2020 concerning Job Creation (hereinafter abbreviated as the Job Creation Law), in Article 17 regulates; Several provisions in Law Number 26 of 2007 concerning Spatial Planning (State Gazette of the Republic of Indonesia of 2007 Number 68 (hereinafter abbreviated as the Spatial Planning Law), amended as follows: In the event that there is a strategic change in national policy as referred to in Article 20 paragraph (5) letter d, Article 23 paragraph (5) letter d, and Article 26 paragraph (6) letter d have not been included in the spatial layout plan and/or zoning planspace utilization can still be implemented.

Based on the provisions of Article 34A paragraph (1) of the Law on Spatial Planning, there are juridical consequences to the amendment to the Regional Regulation of South Halmahera Regency Number 20 of 2012 concerning Spatial Planning (hereinafter abbreviated as Perda RTRW). The Regional Regulation on RTRW is no longer in accordance with developments in changes in the external

environment related to the Government's policy regarding the designation of Obi Island as a national strategic project.

Empirical facts show that until now (over a period of approximately 6 years) the Regional Government of South Halmahera Regency has not made changes to the Regional Regulations on the RTRW. The changes to the RTRW Regional Regulations that have not been enacted have the potential to give birth to injustice and not useful for both the community and the Regional Government of South Halmahera Regency. Based on the background of this phenomenon, the researcher formulated the main problems that were analyzed; Can the formulation of the legal norm "the use of space can still be implemented" qualify as a fair legal norm?

### ***Results and Discussion***

The formulation of the norms of Article 34A paragraph (1) of the Spatial Planning Law, the formulation of which reads; in the event that there is a strategic change in national policy as referred to in Article 20 paragraph (5) letter d, Article 23 paragraph (5) letter d, and Article 26 paragraph (6) letter d it has not been included in the spatial layout plan and/or zoning plan space utilization can still be implemented.

Predating the Job Creation Law, previously, the Government had issued several Presidential Regulations, including: first, Presidential Regulation of the Republic of Indonesia Number 58 of 2017 concerning Amendments to Regulations President Number 3 of 2016 concerning the Acceleration of Implementation of National Strategic Projects. The fundamental problem from a legal perspective that arises from the enactment of the Presidential Regulation in question is with regard to the substance of the amendment resulting from the adoption of the additional provisions of Article 20 paragraph (3) of Presidential Decree No. 3 of 2016 which provide legitimacy for national strategic projects to deviate from spatial planning at the District/City, Provincial and National levels. The possibility of changing the existing spatial plan is legal, it is also strengthened by granting the attribution of authority to the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency who provides recommendations for spatial adjustments to national strategic project locations.

*Second*, Presidential Regulation Number 109 of 2020 concerning the Third Amendment to Presidential Regulation Number 3 of 2016 concerning the Acceleration of Implementation of National Strategy Projects. Article 2 paragraph (2) regulates; The national strategic projects referred to in paragraph (1) are listed in the attachment, where Obi Island is designated as a national strategic project industrial area. Presidential Regulation Number 3 of 2016 concerning National Strategic Projects, in article 20 paragraph (3) regulates; in the event that the national strategic project location is not in accordance with the Regional Spatial Plan, Detailed Regional Spatial Plan, or the Zoning Plan for Coastal Areas and Small Islands and technically it is not possible to move it from the planned location, spatial adjustments may be made in accordance with the provisions laws and regulations in the field of spatial planning.

Based on the several Presidential Regulations mentioned above, it is clear that since 2016 the government has had a strong desire to get out of various regulatory provisions that shackle the rapid implementation of national strategic projects. Various efforts to cut regulations that are considered to be an obstacle have been carried out, the latest but not the last is the enactment of the Job Creation Law.

Presidential Regulation Number 58 of 2017 concerning Changes Presidential Regulation Number 3 of 2016 concerning Acceleration of Implementation of National Strategy Projects. The formulation of the norms of Article 20 paragraph (3) provides legitimacy for national strategic projects to deviate from spatial planning at the district/city, provincial and national levels.

The government is not satisfied with the way of trimming partial regulations (one by one), the next policy the government takes is changing several laws using the omnibus law method. The Omnibus law is an amendment concept that combines several laws and regulations into a new form of law, in this case the Job Creation Law. In the course of time the said law underwent a formal test at the Constitutional Court, on November 25 2020 through the Constitutional Court decision Number 91//PPU-XVIII/2020 stated that the Job Creation Law is a Conditional Unconstitutional law. This means that the Job Creation Law must be corrected within two years. Learning from the decision of the Constitutional Court, it turns out that more than half a century of legal state development has not been completed properly. In fact what happened was the other way around. Indonesia became known in the world as a country with a bad legal system.<sup>1</sup>

Regarding strategic changes in national policies that have not yet been regulated in spatial planning and/or zoning plans or have been regulated but are not in accordance with the spirit of accelerating the implementation of national strategic projects desired by the government, the legal norms in these various laws and regulations can be ignored and /or changed. In other words, the implementation of national strategic projects can still be carried out without having to wait for the completion of changes to laws and regulations. Nickel mining and processing activities on Obi Island, even though the regional government of South Halmahera Regency has not made changes to the RTRW Regional Regulation, Nickel mining and processing production activities on Obi Island can still run.

The Regional Government of South Halmahera Regency, which is a place where Nickel mines are produced, is not properly appreciated by the Central Government in Jakarta. Such an attitude is actually immoral as well as uncivilized. The approach of power over the implementation of national strategic projects carried out by the government has actually been anticipated by the customary law of the people of North Maluku as follows:

*Fola to mataka-taka, dego-dego to rurako* (The house or place I just entered, I'm embarrassed to sit in the chair, before the host allows it).

*Tonaka akere wongana manege dema duhutu* (Land, water and forests have owners and are protected from irresponsible outsiders).

The provisions of the norm as referred to in Article 34A paragraph (1) of the Spatial Planning Law are legal norms that are inconsistent with the moral principles of the people of North Maluku. Even though long before the Republic of Indonesia was proclaimed on August 17, 1945, in the North Maluku Province there were customary law norms that lived and developed and were well maintained by the Sultans and the indigenous people of Moloko Kie Raha. The formulation of the customary law norms of the people of North Maluku reads:

*Toma ua hang moju, toma limau gapi matubu jou se ngofa ngare*(when the time has not passed, the sun has not yet reached the highest hill, in the Moloko Kie Raha area there are already leaders and there are already people who are used to carrying out customary norms to regulate the behavior of residents so that their lives are peaceful and peaceful).

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<sup>1</sup> Satjipto Rahardjo, *Membedah Hukum Progresif*, PT Kompas Media Nusantara, Jakarta, 2006, hlm. 46.

If the government understands and is consistent with the contents of the law which must contain the moral values of the Indonesian nation, the spirit of Unity in Diversity, the principle of legality and the principle of decentralization, then the formulation of article 34A paragraph (1) of the Law on Spatial Planning, researchers believe there will be no formulation of legal norms that reads "utilization of space can still be carried out". Such a formulation of legal norms gives a strong impression that the government acts only on the basis of power packaged in the form of legislation.

In other words, the government in managing state power prefers the path of state power (*machtstaat*) rather than choosing the path of state law (*rechtstaat*). In fact, Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia clearly stipulates that Indonesia is a state based on law. The current legal situation in Indonesia is already in an "emergency location", requiring treatment by a number of selected legal scholars, expertly, professionally and carefully.<sup>2</sup>

According to Theo Huijbers, legal principles are principles that are considered or can be used as a basis/legal foundations and are the notions that become the starting point for thinking about law and the starting point for the formation of laws and their interpretation against the law itself. Huijbers classifies legal principles into three types: 1. Objective legal principles which are moral in nature; 2. The principle of rational objective law; 3. The principle of objective law which is moral and rational.<sup>3</sup> In the scope of legal moral principles it is emphasized that basically law must have an essential relationship with moral principles.

The formulation of legal norms which reads "can still be implemented" shows that the formation of these legal norms does not have an intrinsic relationship with moral principles. According to Emil Brunner, laws that are not according to natural law or moral principles cannot be recognized as law.<sup>4</sup> HLAH art, an adherent of legal positivism believes that laws must be made guided by moral principles. However, this principle is only regulative, meaning that even though the law violates moral principles, the law is still law.<sup>5</sup>

The formulation of the norms of Article 34A paragraph (1) of the Spatial Planning Law which reads "utilization of space can still be carried out", for the sake of accelerating the implementation of national strategic projects when viewed from the point of view of the contents of the norms as stated by Shidarta, this is contrary to the contents of the norms or the substance of the norms. According to Shidarta, legal norms contain values, namely morality used by an individual or community group in two ways; 1 as normative standards of evaluation, and 2. as normative rules of conduct.<sup>6</sup>

The question that arises is whether the formulation of legal norms which reads "the use of space can still be carried out" is in accordance with the moral values of the people of North Maluku? According to researchers, such legal norms are inconsistent with the moral values of the people of North Maluku as regulated in customary law as follows:

*Tonaka akere wongana manege dema duhutu* (Land, water and forests have owners and are protected from irresponsible outsiders).

*Fola to mataka-taka, dego-dego to rurako* (The house or place I just entered, I'm embarrassed to sit in the chair before the host allows it).

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<sup>2</sup> Mochtar Kusumaatmadja, *Perkembangan Hukum Di Indonesia, Tinjauan Retrospektif Dan Prospektif (Reformasi Hukum Belum selesai)*, PT. Remaja Rosdakarya, Bandung, 2012, hlm.413

<sup>3</sup> Theo Huijbers, *Filsafat Hukum*, Kanisius, Yogyakarta, 1990, hlm. 79

<sup>4</sup> Abdul Ghofur Anshori, *filsafat Hukum*, Gajah Mada University Press, Yogyakarta, 2006, 109

<sup>5</sup> *Ibid*, hal. 87.

<sup>6</sup> Shidarta dkk, *Pokok-Poko Filsafat Hukum (Apa dan Bagaimana Filsafat Hukum Indonesia)*, Gramedia Pustaka Utama, Jakarta, 1995, hlm 78.

The formulation of the norms of article 34A paragraph (1) of the Law on Spatial Planning which reads "utilization of space can still be carried out", is also contrary to the spirit of a rule of law as stated in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, Indonesia is a country based on law. A rule of law country is a country whose government is always based on law that fulfills the formal requirements and substantial requirements in establishing and/or implementing policies. Substantial requirements are that legal norms that are made must be able to realize the goals of law, namely balanced justice, certainty for accuracy, and benefit for happiness.

Each rule of law must be rooted or based on a legal principle, namely a value that is believed to be related to the proper and fair management of society. The principle of law is a meta-rule that is behind the rules, contains value criteria that can be used as guidelines for behavior that require elaboration or concretization into legal rules.<sup>7</sup>

G. Radbruch: einfuhrung indie rechtswissenschaft (something that is made must have a purpose). So the law is made also has a purpose. This goal is the value that humans want to embody. There are three main legal purposes: 1. Justice for balance, 2. Certainty for accuracy, and 3. Benefit for happiness.<sup>8</sup>

For the purpose of accelerating the national strategic project for Obi Island "the use of space can still be implemented", is a formulation of legal norms that are in favor of the government and investors. In other words, the legal norms regulated in Article 34A paragraph (1) of the Spatial Planning Law are unfair and unhelpful because they ignore the balance of interests of the North Maluku people.

The meaning of the fair element can be summarized as follows: 1. It is legal, 2. It is lawful, 3. It is impartial, 4. It is morally correct.<sup>9</sup>Legal norms can be said to be fair if they fulfill these four elements. So the legal norm which reads "the use of space can still be implemented" is an unfair legal norm because the impartial element and the morally appropriate element are not fulfilled.

The formulation of the legal norms of Article 34A paragraph (1) of the Spatial Planning Law, the scent of its alignment with the interests of the authorities/government and investors is very, very strong. The interests of the Regional Government of South Halmahera Regency and its people are not being considered. The word fair essentially requires a balance between the interests of the government and the interests of society. The utilitarianism school argues that justice is measured by the happiness felt by as many people as possible. The source of justice lies in utility. The purpose of law is to realize justice, justice aims for happiness (the greatest happiness of the greatest number). Good law is law that fulfills the principle of maximizing happiness and minimizing pain in society.<sup>10</sup>

According to Luypen, what is called a legal system may not necessarily qualify as law. This is because there may be a legal system that is not obligatory/non-binding if the legal system is not according to the norms of justice. So it is a big mistake for the adherents of positivism to think that law is just "a mere legal fact/statutory regulation. They have neglected something essential in law, namely the realization of justice that lives in the human heart."<sup>11</sup>

<sup>7</sup> B. Arif Sidharta, *Negara Hukum Berkeadilan (Asas Hukum, Kaidah Hukum, Sistem Hukum Dan Penemuan Hukum )*, PusatStudi Kebijakan Negara Fakultas Hukum Universitas Pajajaran, Bandung, 2011, hlm. 10.

<sup>8</sup> Frans Magnis Suseno, *Etika Politik (Prinsip-Prinsip Moral Dasar Kenegaraan Modern)*, PT. Gramedia Pustaka Utama, Jakarta, 1999, hlm.76-78.

<sup>9</sup> Bismar Siregar, *Rasa Keadilan*, PT Bina Ilmu, Surabaya, 1996, hlm. 7.

<sup>10</sup> Antonius Cahyadi dkk, *engantar Kefilsafatan Hukum*, Kencana, Jakarta, 2007, hlm. 62.

<sup>11</sup> Bernard L. Tanya dkk, *Teori Hukum, Strategi Tertib Manusia Lintas Ruang Dan Waktu*, CV Kita, Surabaya, 2007, hlm.223

### **Conclusion**

Based on the philosophical analysis that does not deserve to be qualified as a universal and radical analysis as described above, it can be concluded that the implementation of the Obi Island national strategic project which is based on the provisions of the norms of Article 34A paragraph (1) of Law no. 26 of 2007 concerning Spatial Planning is an unfair regulatory policy because it does not reflect the balance between the interests of the government and the interests of the people of South Halmahera Regency.

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