Indonesia and the Development of the Law of the Sea: Reflections on History, Scholarship, and Teachings

By:

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September 19, 2020

Indonesia and the development of international legal scholarship

It is commonly known that European and American scholars and practitioners mostly dominate history and scholarship in international law. Professor Martti Koskenniemi, one of the most profound international legal historians wrote a phenomenal book clearly establishing the Eurocentric character of international law. In his work he argued that most of the development of international law has dominantly happened and developed in western countries.

Throughout history, the most influential scholars in international law, such as Christian Baronde Wolff, Emeric de Vattel, Cornelius Van Bynkershoek, Baron de Montesquieu, Thomas Rutherforth, and Hugo Grotius, were based in Europe.

Therefore books, doctrines, and articles that shape the practice of international law were mostly developed by western scholars seeking to advance the interests of western nations.

Indeed, one could not resist the conclusion that the early scholarship and practice in international law including the law of the sea have emerged in the western countries. However, there were also Indonesian, or at that time Nusantara, practices relevant to what might be broadly termed 'the law of the sea', and this is part of the history of international law which is missing or rarely discussed in most of the scholarships on the subject. For instance, Professor G.J. Resink, in his article "The Significance of the History of International Law in Indonesia", pointed out that in the end of sixteenth century, Nusantara had been practicing what is called nowadays "territorial sea". For instance, on Banda, before foreign vessels anchoring in waters which under communal right, it was necessary to approach the *shahbandars* for permission to trade in return for payment in specified duties.

Hugo Grotius, also well known as the father of modern international law wrote a monumental book entitled Mare Liberum*,* 'The Free Sea' in 1609. The book is regarded as one of the most important works of scholarships in international law and has shaped the law of the sea for hundreds of years. In his book, he argued that the ocean is free and cannot be possessed by any countries, therefore, any state is free to sail the ocean. This argument became a legal justification for the successful exploration of the oceans, which in turn laid the seeds of colonialism and imperialism in the Global South, including Indonesia.

Hugo Grotius initially wrote the Mare Liberum when he was the advisor of the 'Advocaat-Fiscaal' (public prosecutor) at the 'Hof van Holland en Zeeland' (Court of Appeal) in The Hague (see Porras, 2006). Because of his book, the actions of the Vereenigde Oostindische Compagnie (VOC) a Dutch company in sailing to Southeast Asia and colonizing Indonesia were provided with a stronger legal support.

Even though the story shows the 'dark side' of international law in justifying colonialism in Indonesia, the story became very important to introduce the relevance of studying international law in Indonesia. As suggested earlier,

international law is always associated with western countries. As a result, students often do not regard it as having a lot of relevance or significance in Indonesia. To overcome this challenge, I suggest that outlining the relationship between Indonesia and the international law of the sea at the very beginning of their engagement with international law, so that students will get some idea of how important Indonesia is in the development of international law of the sea.

Early Indonesian scholars on the law of the sea

After its independence in 1945, Indonesia began to realize its geographical nature as a country that consists of thousands of islands. Notwithstanding its importance, this history has been forgotten by Indonesians during the many years of colonization. It is therefore necessary for Indonesia to maximize the advantage of the sea to assure the sovereignty and welfare of Indonesian citizens.

In early years following independence, even though Indonesia consists of thousands of islands, it was uncertain whether Indonesia owned the resources of the sea between all these islands. Moreover, foreign warships could freely enter and cross the waters of the sea between Indonesia’s islands. This made the Indonesian Prime Minister at that time, Djuanda, insecure that he began thinking of how to create a legal regime that would allow Indonesia to claim all the waters between all islands.

In response to this urgent situation, in 1957, Chaerul Saleh, Minister of Veteran Affairs, ordered Mochtar Kusumaatmadja to create the foundation for a legal basis for the claim that all the seas between Indonesia’s archipelagic islands belonged to Indonesia. Mochtar Kusumaatmadja at that time was a young bright legal scholar who just graduated from Yale Law School in the United States. He began teaching international law at Padjadjaran University in Bandung. He was astonished when Chaerul Saleh ordered him to create such a new legal regime. Part of his response was in favor of creating a law that would close access to Indonesia Sea with the attendant claim that the violation of such a norm would be an unlawful breach of international law. Indeed, since Hugo Grotius’ *mare liberum* doctrine, states could not possess the ocean; rather states may only claim territorial rights three miles from the baseline.

After a long discourse, Mochtar Kusumaatmadja came up with the idea of a unilateral declaration which then became known as the Djuanda Declaration. The Declaration stipulated unilaterally that all seas between Indonesia islands were to be considered as completely within Indonesia's sovereignty, and that they were part of Indonesia's internal waters. Therefore, no foreign vessels could enter these waters. The Declaration then triggered a lot of protests from many maritime countries, such as the United States, United Kingdom, The Netherlands, and Japan. Even though it provoked a lot of protests, the Declaration became a symbol of Indonesia's spirit in fighting for the recognition of the archipelagic states regime in the United Nations Conference on the Law of the Sea.

Professor Mochtar Kusumaatmadja is the first Indonesian scholar who studied and specialized in the law of the sea. He wrote several books on international law and law of the sea (in Bahasa Indonesia), which then become the main textbooks in studying international law and international law of the sea in many Indonesian law schools even until today. He became a full professor at the Faculty of the Law University of Padjadjaran and taught international law before and after his tenure as Minister of Justice and Minister of Foreign Affairs. His assistant, Professor Etty Agoes, also become a prominent law of the sea scholar in Indonesia.

Another early Indonesian diplomat-scholar who specialized in the law of the sea is Professor Hasjim Djalal. He earned his master and doctoral degrees in the law of the sea from the University of Virginia in the United States. He represented Indonesia in the law of the sea conference. Then, he became the first President of the International Sea Bed Authorities (ISBA). Professor Hasjim Djalal wrote extensively on the law of the sea topics and published in many international edited books. His major works include a book entitled Indonesia and the Law of the Sea, published by the Center for Strategic and International Studies (in English), which discusses Indonesia's struggle during the United Nations Conference on the Law of the Sea. His book became a major source for the study of the law of the sea and Indonesia.

Another more recent eminent scholar of the law of the sea is the late Professor Melda Kamil Ariadno, who focused on fisheries law. She earned her master and

doctoral degrees on Indonesia's responsibility in high sea fisheries under the supervision of Professor William T. Burke from the University of Washington in the United States. She established the Center for Sustainable Ocean Policy at the University of Indonesia.

The law of the sea at the University of Indonesia

As the oldest and most prominent law school in Indonesia, the University of Indonesia has offered the law of the sea course for a very long time. Before moving to Padjadjaran University in Bandung, Professor Mochtar Kusumaatmadja was a Professor at the University of Indonesia. Throughout the time, teaching methodology and textbooks have changed. For example, the law of the sea became a mandatory course for students who took Public International Law major.

Currently, there are three main textbooks for the law of the sea course at University of Indonesia, which are The law of the sea written by Churchill and Lowe (Manchester University Press), The International Law of the Sea written by Donald Rothwell and Tim Stephens (Hart Publishing, 2016), and The International Law of the Sea written by Yoshifumi Tanaka (Cambridge University Press, 2015).

Even though the major textbooks are written by foreign scholars and rarely mention Indonesia as a case study in discussing the law of the sea, throughout the course, we always give supplementary readings with more Indonesian examples and cases. Yet, Indonesia is one of the few countries that have nearly all-maritime zone under the United Nations Convention on the Law of the Sea, ranging from internal waters, territorial sea, contiguous zone, and exclusive economic zone. Therefore, in each session when this course is taught in Indonesia, when discussing each maritime zone, there are always additional readings from any recent or landmark cases that happened in each maritime zone, either from a news article or national judicial decisions. This is necessary so that students can understand the different maritime zones when it comes to law enforcement in the Indonesian context. Furthermore, by giving actual cases that happened in Indonesia, students will understand how significant and important the law of the sea is for Indonesia. For instance, the case study that

was given last year is the controversy of Indonesia's policy in sinking of illegal fishing vessels in the Indonesian exclusive economic zone.

The methodology also has changed in the last several years. Before, the law of the sea courses were given in an old fashion one-way lecture. However, in the recent years, it has changed and become a seminar class, where the students will give a presentation on a particular topic. After the student presentation, there will be a class discussion on the cases that have been assigned about the topic. By having more involvement through presentations, students also have more opportunities in studying and researching the topic as well as presenting to their colleagues.

Aside from the teaching of international law of the sea, the Faculty of Law of the University of Indonesia also runs a research center dedicated to the development of the law of the sea in Indonesia through research and publications. The research center has been conducting joint researches with foreign universities and international institutions in researching topics related to Indonesia. For instance, the center has been conducting extensive research on the Indonesian policy relating to law enforcement in the Indonesian exclusive economic zone.

That being said, conducting research and teaching international law in Indonesia has its characteristic that has been adjusted to the current academic conditions in Indonesia.

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