

## THE REGIME OF ARCHIPELAGIC STATES IN HISTORICAL PERSPECTIVE\*

by Prof. Dr. Hasjim Djalal, MA

For more than 100 years Indonesia has been preoccupied with the problems of **national unity** and **making use of its enormous natural resources**, either on land or at sea, for the benefit of economic development for its population. For a number of centuries its natural resources had been used mainly for the benefit of invaders. In order to do this, foreign occupiers, in most cases, had been antagonizing one component of Indonesia with another following the maxim of “*divide et impera*”, meaning “**divide and rule**”. Indonesian social fabrics themselves provided opportunities to this foreign strategic policy in the sense that Indonesia consists of thousands of islands having hundreds of ethnic groups separated by wide bodies of water, different religions, and different conditions of economic development, with demographic as well as geographic differences. Therefore, from the very beginning of its efforts to free itself from foreign occupation, domination and yoke, the achievement and actualization of the **principle of national unity through diversity, or *Bhinneka Tunggal Ika*** has been one of its fundamental struggles within the last hundred years or so.

The struggle gained its momentum during the birth of “**National Awareness**” in **1908**, reaching its bloom around 1917 with the birth of “**Political Consciousness**” through the establishment of numerous political parties, either with religious color, nationalist or even socialist orientation. The political awareness came to fruition with the **Youth Oath in 1928** when the Youth Congress in Jakarta, attended by youth organizations from all over Indonesia, pledged their loyalty to **One Nation**, namely the **Indonesian Nation**, **one Country**, namely **Indonesia**, and **one Language**, namely **Bahasa Indonesia**. Despite the existing multi-groups, religions, ethnics, and ideologies in the country of thousands of islands, through that oath, the **nationhood and the national unity of Indonesia was born and strengthened**, 20 years after the ‘national awakening’ or ‘national awareness’ in 1908.

Yet, it took the Second World War and 17 years later for the Youth Oath to achieve independence in **one state** through the Declaration of Independence on August 17, 1945. After more than four years of war for independence and thousands of Indonesians sacrificing their lives for the National Independence and the establishment of a Unitary State of the Republic of Indonesia, Indonesia was recognized by the Dutch and the International Community as an independent country in the form of a Federal State in **1949** and was admitted to the United Nations in **1950**, having **sovereignty over all parts of Indonesia** which covered all the territories formerly under the administration of the Dutch East Indies (Hindia Belanda).

However, even before the recognition of Independence, the problems of **national unity** had not been completely solved. The radical Islamic groups (*Darul Islam*) launched a rebellion against the government in West Java, South Sulawesi and Aceh, basically demanding the creation of an **Islamic state** in Indonesia. At about the same time, the Indonesian Communist party launched a rebellion in Madiun, East Java, in 1948 demanding the establishment of a **communist state** in Indonesia. Even after Indonesia became an established and recognized state, rebellion also took place in the various regions of Indonesia, such as in Central Sumatra, North Sulawesi, and Maluku (Moluccas), demanding various rights, basically based on the idea of “**provincialism**”. At the same time, Indonesia adopted the multiparty political system which resulted in some kind of paralysis of the Government. During this period Indonesia experienced three Constitutions, namely the **1945 Constitution**, the **Federal Constitution in 1949**, and the **1950 Constitution**. Later, Indonesia **returned to 1945 Constitution in 1959**, reaffirming the **Unitary State of Indonesia with Presidential System of Government**.

The **maritime resources** of Indonesia at that time still did not bring much benefit to the Indonesian people as they should. The **fisheries** in Indonesian waters were used and exploited by far-distant fishing nations, primarily Japan, with no benefit to the Indonesian people. The **maritime space** of Indonesia that lies between and surrounding Indonesian islands were not used for the benefit of Indonesian national unity and economic development, but had generally been used by foreign powers, especially the maritime powers, which had been developing global maritime policy and strategy for their own national interest and development. In many cases, the maritime space between Indonesian islands had been used to subvert Indonesian National Unity and as avenues for smuggling and various maritime crimes.

It was during this period that Indonesia began to look into the possible roles of the sea for its development and national unity. Indonesia began to realize that one of the strengths of the colonial power vis-à-vis Indonesia during the colonial days was controlling and using the sea as a separating factor for the Indonesian people and their country, rather than as a factor for unity of the Indonesian peoples. Indonesia began to realize that the sea can become a strong factor for national development as well as for national unity.

It was during this period that the Government under **Prime Minister Djuanda** declared on **December 13, 1957**, that all waters around, between and connecting islands within the Republic of Indonesia, regardless of their width, depth, or size, are pertinent parts of Indonesian territory and therefore form parts of Indonesian national waters under the **sovereignty** of the Republic of Indonesia. The determination of 12 miles territorial sea would be measured from **straight baselines connecting the outermost points of the outermost islands** of the Republic of Indonesia and shall be determined by Law. The Law No. 4/1960 later established the archipelagic straight baselines and recognized the **rights of “innocent passage”** of foreign vessels to pass through the Indonesian “archipelagic waters” and no more “freedom of navigation” in those waters as practiced during the colonial period.

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**The Djuanda Declaration was very strategic for Indonesia.** While the 1928 Youth Pledge or Oath could be regarded as the “**spiritual unity**” of Indonesia as being **one nation, one country and one language**; and **the 1945 Proclamation of Independence** established the constitutional framework for Indonesia as a Unitary States, **namely one Nation in one State**, the 1957 Djuanda Declaration was the **declaration of Territorial Unity** of Indonesia that comprised the unity between the **land**, the **water/the sea** and its **seabed and subsoil** area, the **airspace** and **all the resources contained therein**. In my mind, these are the **three main pillars** of Indonesia that should not and could not be undermined. In the meantime, the Indonesian Unitary State of Indonesia as proclaimed in 1945 also has its four specific pillars, namely **Pancasila** (the Five Principles of State: Believe in God, civilized humanity, democracy, national unity, and social justice), the **1945 Constitution**, the **Unitary State** of Indonesia and **Unity through Diversity**.

The Djuanda Declaration immediately drew protests from maritime powers as something against International Law at that time which was believed to recognize only three miles territorial sea measured from low water marks on the coastlines of every islands, and only in very specific cases straight base lines were admitted along the coastlines.

The Djuanda Declaration, which later on was known as the **Archipelagic States Principles**, was proposed during the first United Nations Conference on the Law of the Sea in **Geneva in 1958**. There were many objections and criticisms raised to the concept, however, and before the decision was made on the proposal, Indonesia withdrew it from the UN Conference, primarily because it was not yet mature for international consideration and recognition.

In preparing for the **second UN Conference on the Law of the Sea in 1960**, Indonesia enacted the Djuanda Declaration into **Law no. 4/1960**. This legislation was also heavily criticized by maritime powers. The Second UN Conference on the Law of the Sea, however, was unsuccessful in reaching agreement on the limit of territorial waters and **did no longer discuss the archipelagic principles**.

After the failure of the Second UN Law of the Sea Conference in 1960, Indonesia began to concentrate on its implementation domestically. The Government later issued Government Regulation No. 8/1962 regulating “innocent passage” through Indonesian waters; the President also issued the Presidential Decision No. 103/1963, authorizing the Navy to protect Indonesian waters as a single “maritime circle” subject to Indonesian law. At about the same time, in 1960, Indonesia established the Indonesian Maritime Council to consider and coordinate activities dealing with various maritime issues, including fishing, navigation, seabed resources, and others.

**By mid-1960’s**, new impetus for the Law of the Sea Conference had come again into the picture. Some of the reasons for this new initiative were:

- (1) **The emergence of many new states in Africa after 1958** which, like Indonesia, also felt neglected and exploited by the traditional concept of the freedom of the sea which benefited mostly European and maritime powers;
- (2) **The incidence of a giant oil tanker, the Torrey Canyon**, near the coasts of France and England in 1967 which aroused the consciousness of the world community toward the danger of pollution to the marine environment and the need for some legal regimes to handle the protection of the marine environment;
- (3) **The increasing intensity of the Cold War** between the socialist communist world under the leadership of the Soviet Union and the liberal capitalistic states under the leadership of the United States, which emphasized the significance of maritime strategy, particularly the right of passage through straits and archipelagos;

**The increasing discovery of mineral resources in the deep ocean floors**, especially after the discovery by the Glomar Challenger expedition to the bottom of ocean in 1965, which raised questions as to the right of exploration and exploitation of those resources.

All these factors led to the decision of the UN to call on the need for a **Third UN Law of the Sea Conference**, originally intended to deal with mineral resources in the deep oceans, but later on it was agreed to cover all the subjects and issues under International Law of the sea at that time.

The decision of the UN General Assembly in 1967 resulted in the formation of the **UN Seabed Committee** to prepare for the Conference which was slated to start in 1973. Indonesia looked into this opportunity to revive its struggle to gain international recognition to its archipelagic states principles. Although Indonesia was not originally a member of the UN Seabed Committee, it sent observers (including myself and Prof. Mochtar Kusumaatmadja) to the Committee meeting in Geneva in 1969. Indonesia began to be a full member of the Committee in 1970 until the beginning of the procedural conference in New York in 1973 and followed by the substantive Conference started in Caracas, Venezuela, in 1974, and lasted until 1982.

During the **UN Seabed Committee** meetings, Indonesia:

- (1) Began again making preparations for the Conference, primarily by **concluding Agreements with many of its neighbors on maritime boundaries**, particularly on **continental shelves** and territorial seas. So far, since 1969 Indonesia has concluded some 21 agreements with its neighbors on maritime delimitation, the last one was with the Philippines for EEZ boundaries in the Celebes Sea and the Pacific Ocean, signed in Manila in May 23, 2014 and with Singapore for **territorial sea delimitation** in the eastern part of Singapore Straits, signed in Singapore on September 3, 2014;
- (2) Began the attempt to **formulate common positions and principles** with other “archipelagic countries” such as the Philippines, Fiji, Mauritius, and others in the meetings in New York and in Manila in 1972; and

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- (3) Began to **consult various interested parties on the “definition”** of an archipelagic state as well as on the **“legitimate interest of other states”** in the Archipelagic waters as well as the **“rights of the archipelagic state towards the open seas and oceans”** beyond its sovereignty over archipelagic waters and territorial seas.
- (4) Began to **explain the principles of the archipelagic states to the various meetings** of the Asian African Legal Consultative Committee (**AALCC**) meetings in various capitals of the AALCC countries, and to **other regional and international fora**, such as to the meetings of **Non-Aligned Countries** and the **Group of 77** developing countries.

Indonesia also actively propagated the idea and the principles of archipelagic states to the **various academic groups and think-tanks** around the world, particularly in the meetings of the **Law of the Sea Institute (LSI)**, **International Ocean Institute (IOI)**, **Southeast Asian Policy on Ocean and Law (SEAPOL)**. All these forums and activities have contributed significantly to the understanding and acceptance of the concept of the Djuanda Declaration. Indonesia was ready to go to the Third UN Law of the Sea Conference beginning in Caracas 1974, which was preceded by the Procedural Conference in New York in 1973.

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In the meantime, **domestically, Indonesia also continued to implement the archipelagic states principles** by announcing the Government Declaration on the Continental Shelf in 1969 which was later on enacted into Law No. 1/1973 on the Continental Shelf.

Indonesia, together with other archipelagic countries, submitted and developed the proposals during the Third UN Law of the Sea Conference. It continued its efforts to approach various countries and institutions around the world to gain support.

- (1) The main support later on came from the **meetings of the Developing Countries** on the Law of the Sea, particularly in Nairobi, Kenya in 1974.
- (2) The **Organization of African Unity** supported the archipelagic states principles in its meeting in Addis Ababa in 1974 and in Mogadishu in 1975.
- (3) Indonesia in fact formed a certain kind of “alliance” with the African Countries which mostly sought the recognition of the concept of **200 miles Exclusive Economic Zones (EEZ)** around their coastlines (the so-called **“economist”** countries or group).
- (4) Indonesia reached a certain informal understanding with several Latin American countries which sought the recognition of their **200 miles Territorial Sea concept** (the so-called **“territorialist”** countries or group).
- (5) Indonesia also cooperated with the so called **“straits countries”** or group, particularly Malaysia, Oman, Egypt, Greece, Tanzania and Spain, to seek an acceptable maritime regime of navigation through **straits used for international navigation**. In fact, Indonesia already reached an understanding with Malaysia and Singapore on the management of the safety of navigation and environmental protection of the Straits of Malacca and Singapore in 1971.
- (6) Indonesia also cooperated very actively with the so called **“marginist group”** who claimed the extension of the continental shelf beyond the depth of 200 meters of water as stated in the 1958 Geneva Convention on Continental Shelf, to 100 miles beyond the depth of 2,500 meters of water, and to **200 miles beyond the baselines** for measuring the territorial seas, and even beyond 200 miles **throughout the “natural prolongation” of the land territory** of the states all the way to the outer edge of **“continental margin”** (the so called **“marginist countries”** or group like **Australia, New Zealand, India, Norway, Canada, United States, the Soviet Union**, and others).
- (7) At the same time Indonesia maintained a **non-confrontational attitude with regard to the Land-Locked and Geographically Disadvantaged States (LLGDS)**, including Singapore, which originally opposed both EEZ and Continental Margin claims, thus minimizing the opposition of the LLGDS countries to archipelagic states principles.

Indonesia also maintained intensive consultation with maritime powers, especially the **United States**, the **Soviet Union** (at that time), **Japan**, the **United Kingdom**, and others, as well as with **China**, **India**, **Canada** and **Latin American and Caribbean Countries**. In fact, **Japan**, at the end of the visit of President Soeharto in 1974 to Japan, was persuaded and was willing to make a joint statement with Indonesia recognizing the principles of the archipelagic states. The **United States** and **other maritime powers** slowly and gradually showed understanding and willingness to support the concept if the definition of an “archipelagic state” and the nature of the legal regime of the “archipelagic waters” could be agreed upon and the problems of navigation and transit through the archipelagic waters and other issues could be solved.

All these strategies in advancing the concept of Archipelagic States bore fruit. The UNCLOS was adopted in Montego Bay in Jamaica on December 10, 1982, **25 years minus three days after the Djuanda Declaration was announced on December 13, 1957**. In addition to the recognition of Indonesia as an “archipelagic state” and the **recognition of Indonesian sovereignty over the “archipelagic waters”**, the Convention also recognizes **Indonesian sovereignty over 12 miles territorial seas** surrounding the “archipelagic waters” and the recognition of its rights to have “**contiguous zone**” up to 24 miles from its archipelagic baselines, sovereign rights and other jurisdictions over the **Exclusive Economic Zone** up to 200 miles from the archipelagic baselines, and the sovereign rights over Continental Shelf all the way to the outer edge of its “**continental margin**”. In addition, archipelagic states were also allowed to draw “**closing lines**” for the delimitation of **internal waters within its archipelagic waters**. All these rights were assured without prejudicing the rights of an archipelagic state to participate in the management of the high seas beyond its EEZ and international seabed area beyond its continental shelf/continental margin.

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While recognizing the sovereignty of Indonesia over its archipelagic waters, the UNCLOS also stipulates certain rights of other countries in certain parts of its archipelagic waters such as the “**traditional fishing rights and other legitimate activities of the immediately adjacent neighboring states in certain areas** falling within archipelagic waters”. But the terms and conditions for the exercise for such rights and activities, including the nature, the extent and the areas to which they apply, shall be regulated by **bilateral agreements**. So far, Indonesia has concluded an agreement with Malaysia in 1982, ratified by Indonesia by Law No. 1/1983 on the Malaysian legitimate rights to pass through a specifically identified area in the Indonesian Archipelagic waters between west and east Malaysia and the “**Malaysian traditional fishing rights**” in certain parts of the Indonesian archipelagic waters around Anambas Island. The Convention also stipulated and regulated the need for passages and transit through the archipelagic waters under the regime of **innocent passage** in general and under the regime of “**archipelagic sea lanes passage**” through “archipelagic sea lanes and air routes thereabove” for the benefit of international communication. So far, Indonesia, in cooperation with IMO has established and legislated three north-south archipelagic sealanes through Indonesian archipelagic waters, together with their relevant spurs or branches, namely:

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- (1) from the South China Sea through the Natuna, Karimata and Java Seas and Sunda Strait to the Indian Ocean;
- (2) from Sulawesi/Celebes Sea to the Indian Ocean through the Straits of Makassar, Flores Sea, and the Lombok Strait;
- (3) from the Pacific Ocean to Australia and Indian Ocean through the Moluccas Sea, Seram Sea, and Banda Sea together with their branches to Arafura Sea, Timor Sea and Sawu Sea.

In this context, it is essential to understand the significance and the differences between the two rights of navigation, namely the right of “**innocent passage**” and the right of “**archipelagic sealanes passage**”. There are several differences between the two rights of navigation:

- (1) In innocent passage “submarine and other underwater vehicles are required to navigate on the surface and to show their flag”, while in ASLP they are allowed to navigate in “normal mode”, thus there is the possibility for underwater passage;
- (2) In innocent passage there is no rights of overflight while in ASLP such right of overflight is permitted over the sea lanes;
- (3) The right of innocent passage can be “suspended” while the right of ASLP cannot be suspended, although the sea lanes can be “substituted”.
- (4) In innocent passage an archipelagic state has more power to regulate and to exercise control while in ASLP the right is more limited.

There are no precise rules of International law with regard to the requirement of prior notification or prior authorization for warships navigating in innocent passage in territorial sea. Some countries require prior notification, some require prior authorization and some strongly oppose these requirements. UNCLOS, after years of debate at LOSC III, remains silent on this issue. In “transit passage” and ASLP, there is no requirement for prior notification or prior authorization for the passage of warships, although some countries would like to have these requirements.

Indonesia, after conducting intensive consultations with maritime powers, has adopted and enacted **19 rules for navigation in the Indonesian archipelagic sea lanes**. The Convention, which was adopted in 1982 and entered into force on November 16, 1994, ratified by Indonesia by law No. 17/1985 has now been ratified by more than 160 countries and the European Union. In Southeast Asia, only Cambodia and Timor Leste that have not ratified it. Among the maritime powers, the United States is still not yet ratifying or acceding to the Convention. The UNCLOS 1982 represents a **New Order in Ocean and maritime management**. The wide participation in the Conference and the intensive negotiating process by the various interests around the world represented serious efforts by the International Community to develop and achieve **law and order in the ocean space and in the use of its resources**, thus would contribute toward the establishment of maritime security, law and order, and sustainable development of its resources.

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Several years after the adoption of the Convention in 1982, it appeared that the ratification of the Convention by developed and maritime powers indicated a number of difficulties, particularly by the US, with regard to the seabed mining issues. By 1990 it appeared that the Convention may become “the Convention of the developing countries”, because the ratifiers mostly came from the developing countries, except one (Iceland).

For this reason, a number of countries, including Indonesia, took the initiative to work out an “**Implementing Agreement**” with regard to the provisions of the Convention dealing with the seabed mining issues. After several years of additional negotiation, the “Implementing Agreement” was agreed in 1994, thus enabling many industrialized countries to ratify the Convention, such as Germany, France, Canada, Norway and others, except the US. At the same time, several countries, including Indonesia, also started negotiations to formulate rules and regulations with regard to the highly migratory fish species and those fish species that “straddle” or move between two or more ‘economic zones’ or between ‘economic zones’ and the High Seas beyond, such as tuna. The negotiation on these highly migratory species issues also resulted in the **Implementing Agreement** in 1995. Indonesia has ratified these two Implementing Agreements which have already entered into force. Indonesia has also participated and ratified the **Honolulu Convention 2000**, which established the WCPFC (West and Central Pacific Fisheries Commission), headquartered in Ponape, FSM. The two Implementing Agreements and the Honolulu Convention, in a sense, also strengthen the status of Indonesia as an archipelagic state. Through these processes, the UNCLOS 1982 itself has entered into force after being ratified by 60 countries in November 1994. In the process, **Indonesia has also revised its own archipelagic baselines of 1960** in order to conform to the UNCLOS rules on baselines, and the revised baselines had been submitted

to the UN Secretariat on 4 March 2009, and the UN had circulated them in the Maritime Zone Notification of 25 March 2009.

The long struggle of Indonesia to achieve recognition of its archipelagic state status in cooperation with other archipelagic countries, like the Philippines, thus its **territorial unity** and the **use of its maritime resources and space for the benefits of its people**, had come to full fruition after 25 years of struggle (from 1957-1982). As a result of this struggle, Indonesian territorial sovereignty over maritime space has expanded from about 100,000 km<sup>2</sup> in 1945 to about 3 million km<sup>2</sup> in 1957, and the territorial sovereignty as a whole, including land, the sea, and airspace, has in fact expanded from about 2 million km<sup>2</sup> in 1945 to about 5 million square kilometers by the Djuanda Declaration in 1957. Such sovereignty covers the **land** area, the **maritime** and their **seabed and subsoil**, the **airspace** and **all the resources** therein. After the long struggle **thereafter** in the Law of the Sea Conference, the Indonesian natural resources base that could be used for its economic development has also extended to its EEZ and Continental Shelf that amount to about another three million square kilometers, thus extending the natural resources base of Indonesia to about eight million kilometers square of the earth surface, about six million kilometer square of them lie at sea. This is all without prejudice to the participation of Indonesia in exploring, exploiting and managing the natural resources beyond its EEZ to the open high seas and oceans, as well as to the resources of the International Seabed Area beyond its continental shelf and continental margin in cooperation with International Seabed Authority, headquartered in Kingston, Jamaica.

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The results of this long struggle are testimony to the serious efforts, consistencies, and tenacity of the Indonesian People and their succeeding Governments to assure their national unity and to legally expand the natural resources base for their economic and social development. This is also a tribute to the Indonesian diplomacy and foreign policy in regional and international arena in order to contribute to the achievement of world order based on freedom, lasting peace and social justice, as stipulated in the Preamble of its 1945 Constitution.

Finally, after 106 years since the National Awakening in 1908, 86 years since the Youth Pledge in 1928, 69 years since the Proclamation of Independence in 1945, 57 years since the Djuanda Declaration in 1957, and 32 years after the adoption and recognition of Indonesia as one united archipelagic state by the world community in 1982, I hope that the people of Indonesia, their leaders and the younger generations, will be able to manage and make use of those achievements for the benefits of the Indonesian people as a whole as **one nation**, living in **one united country**, and managing **one territorial integrity** consisting of all its lands, the seas, the seabed and subsoils, the airspace, as well as all the resources contained therein as stipulated in Article 49 of UNCLOS 1982. In historical perspective, the Indonesian people should not lose their far-sighted views from 1908 and 1928 in looking into the future for the country, for prosperity and peace of their people, their maritime country, the region and the world at large. 🌸

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