

# **Government Regulation No. 27 of 2021 on Management of the Marine and Fisheries Affairs: Buildings and Installations at Sea**

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## **I. INTRODUCTION**

As a State party to the United Nations Convention on the Law of the Sea 1982 (UNCLOS 1982), Indonesia must implement the provisions of UNCLOS 1982. One of the implementations is related to the buildings and installations at sea, which is the focus of this legislative review. Various terminology can be found in the provisions of UNCLOS 1982 relating to buildings and installation at sea, such as ‘artificial islands’, ‘off-shore installations’, ‘installations’ and/or ‘structures.’ Unfortunately, nowhere in the Convention defines the meaning or scope of such terminologies. It is submitted that an ‘artificial island’ or other ‘off-shore installations’ can be defined as a human-made edifice in the territorial sea, in archipelagic waters, in an exclusive economic zone (EEZ), on the continental shelf of an ocean space governed under the maritime zone regimes provided by UNCLOS 1982.<sup>1</sup> The discussion on ‘installations’ at sea emerged while drawing straight baselines.<sup>2</sup> In its development, many off-shore

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<sup>1</sup>International Institute for Law of the Sea Studies, “What is the meaning of “Artificial Island, Off-shore Installation, Installation (off-shore)” in the law of the sea (LOSC and Customary International Law”, accessed on 7 July 2022, <http://iilss.net/what-is-the-meaning-of-artificial-island-offshore-installation-installation-offshore-in-law-of-the-sea-losc-and-customary-international-law/>.

<sup>2</sup>Unlike normal baselines, straight baselines, which usually be applied in a coastal archipelago, connect basepoints drawn from the outermost points of the outermost islands of

installations and structures are built for various purposes, such as resorts and residences, air terminals, transportation centres and traffic control. UNCLOS 1982 allows the building and installations to be built in any maritime zone provided by UNCLOS 1982, which refers to each of their juridical regimes.<sup>3</sup>

In implementing the provisions of UNCLOS 1982, Indonesia has enacted various domestic laws in accordance with UNCLOS 1982. One of them was the enactment of Law No. 32 of 2014 on Ocean Affairs (Law 32/2014). Article 32 of this Law provides that installation at sea should not interrupt navigation and should consider the conservation of coastal areas. Such installation further should be within security areas that have been determined. Using buildings and installations at sea exceeding the security areas should require permission from authorised institutions. While this article is silent on the definition of ‘installation’ at sea, the explanatory section of this Law envisages that “buildings and installations at sea” means any construction, both above and/or below the sea level, attached to land, or not attached to land, including reclamation construction, marine tourism infrastructure, and transportation infrastructure.”<sup>4</sup> This definition, however, raises ambiguity as it is silent on which areas of the sea the installations might take place. Article 32, paragraph (5) envisages that further provisions relating to requirements, building mechanisms, and placement will be provided in Government Regulation.<sup>5</sup>

This legislative review analyses the Government Regulations relating to the building and installation at sea. Firstly, this review highlights the historical development of government regulation and provides a general scope. Secondly, this review discusses provisions on the building and installation at sea and whether they meet the juridical regimes of the maritime zone provided within the UNCLOS 1982. Thirdly, it describes the current implementation. This review ends with brief conclusions.

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a coastal archipelago. Hence, to prevent states from drawing too far from basepoints, UNCLOS 1982 provides that such basepoints should only be drawn to and from a low-tide elevation if lighthouses or similar installations above the sea level have been built on them. See Article 7, paragraph (4) of UNCLOS 1982.

<sup>3</sup>For detailed elaboration of maritime zones provided by UNCLOS 1982, complete with the rights and obligations of coastal State as well as User Maritime State, see further Dhiana Puspitawati, *Hukum Laut Internasional*, 2<sup>nd</sup> ed, (Jakarta: Prenada Media, 2021).

<sup>4</sup>Explanation of Article 32 of Law Number 32 of 2014, Additional State Gazette Number 5603.

<sup>5</sup>Article 32 paragraph (5) of Law Number 32 of 2014 on Ocean Affairs

## II. HISTORICAL DEVELOPMENT AND GENERAL SCOPE

As mandated by Article 32, paragraph (5) Law 32/2014, in 2020, the Indonesian government enacted Government Regulation Number 6 of 2020 on Buildings and Installation at Sea (GovReg 6/2020). In filling the ambiguity posed by the definition of buildings and installations at sea as explained in the explanatory section of Article 32 Law 32/2014, Article 1 paragraph (4) GovReg 6/2020 defines buildings and installation at sea as “...every construction, both above and/or below the sea level, both attached to the land and not attached to the land established in ocean territory and jurisdiction.”<sup>6</sup> This way, it confirms the provisions of UNCLOS 1982,<sup>7</sup> which allow the buildings and installation at sea to be built in territorial waters, archipelagic waters, EEZ, and on the continental shelf of a coastal and/or archipelagic State.

In 2020, the Indonesian Government enacted Indonesian Law No. 11 of 2020 on Job Creation Law (Law 11/2020). This Law aims to amend 76 laws to facilitate business, cut bureaucracy, increase investments and create jobs. Law 32/2014 was included as one of the laws amended by Law 11/2020. One of the amendments was on the buildings and installation at sea. This amendment has made the enactment of Government Regulation No. 27 of 2021 on the Management of the Marine and Fisheries Sector (GovReg 27/2021) and thus nullify GovReg 6/ 2020, as envisaged in Article 297 of GovReg 27/2021 as follows: “When this Government Regulation comes into force, Government Regulation Number 6 of 2020 on Buildings and Installations at Sea is revoked and declared invalid.”

Unlike GovReg 6/2020, which explicitly regulates the buildings and installations at sea, GovReg 27/ 2021 includes a broader scope as envisaged in Article 2. According to this Article, GovReg 27/ 2021 regulates (i) core zone status change, (ii) criteria and establishment requirement, placement and/or removal of buildings and installations at sea, (iii) fisheries resources management, (iv) fishery product quality standard, (v) Fisheries and/or fisheries conservation in Indonesian fisheries management area not for commercial purposes, (vi) Fisheries vessels, (vii) operating standard for ships and (vii)

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<sup>6</sup>Article 1 paragraph (4) of Government Regulation Number 6 of 2020 on Buildings and Installation at Sea

<sup>7</sup>Article 7, 47, 56, 60 and 79 of UNCLOS 1982

controlling import of fishery and salt commodities. Since this GovReg 27/ 2021 encompasses various scopes, only the second scope, which relates to buildings and installations at sea, will be reviewed.

### **III. BUILDINGS AND INSTALLATIONS AT SEA**

The definition of buildings and installations at sea in GovReg 27/2021 remains the same as that provided in GovReg 6/2020. It mentions that it includes those that are established in ocean territory as well as ocean jurisdiction. Most provisions relating to buildings and installations at sea between GovReg 6/2020 and GovReg 27/2021 remain the same. While GovReg 6/2020 consists of 36 articles, GovReg 27/2021 consists of 298 articles and provides provisions for buildings and installations at sea in Articles 8 to 38. Concerning buildings and installations at sea, GovReg 27/2021 regulates types of buildings and installations according to the functional scope determined in this regulation, the technical process in establishing such buildings and installations, environmental, security as well as safety considerations and other technical aspects.

Both Government Regulations set up criteria for buildings and installation at sea to include: (a) the physical form of the construction work; (b) is permanently above and/or below the sea level; (c) attached or not attached to the land; and (d) has a specific function. The fourth criterion is then listed in detail about the actual function that can build or install certain buildings and installations. The list of actual functions takes place in the form of: (a) residential, religious, social and cultural; (b) fishery; (c) salt; (d) marine tourism; (e) shipping; (f) land transportation; (g) telecommunication; (h) coastal security; (i) oil and gas business activities; (j) mineral and coal mining activities; (k) electricity installation; (l) data collection and research; (m) defence and security; (n) water resources availability; and (o) the use of ocean waters for the purpose other than energy.<sup>8</sup> Each of these functions is a further detailed breakdown in the form of the building and installation itself, such as residential building for residency function and tourist harbour for marine tourism function.<sup>9</sup> While the detailed list answers the questions of the actual building of certain functions,

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<sup>8</sup>Article 8 paragraph (5) of GovReg 27/2021 on the Management of the Marine and Fisheries Sector

<sup>9</sup>See further Article 9 of GovReg 27/ 2021

unfortunately, the list does not come with the division of where such buildings and installations can be established. For instance, military installations cannot be built in jurisdictional areas like EEZs.

Article 10 of GovReg 27/2021 further envisages that the establishment and/or placement of buildings and installations at sea should consider (a) the suitability/ conformity of marine spatial utilisation activities, (b) the protection and preservation of marine resources, (c) security towards disaster at sea; (d) safety of navigation; (e) marine environmental protection; (f) community protection; and (g) national defence areas. However, none of those considerations refers to international laws, especially maritime zone ones. About point (a), the explanatory section of GovReg 27/ 2021 states that marine spatial utilisation refers to national marine spatial planning. It is submitted that internationally, as a ratifying state to UNCLOS 1982, Indonesia must obey the rules relating to coastal State's rights and obligations relating to maritime zones. It is argued that the establishment of buildings and installation at sea, while conducted according to national marine spatial planning, should allow the rights of foreign vessels within 12 (twelve) nautical miles. Furthermore, what if the buildings and installations at sea were established beyond 12 nautical miles, that is, in the jurisdictional areas over which other State's rights exist? Should not those rights be considered as well?

The consideration to protect community interests is provided in Article 10, paragraph (6) of GovReg 27/2021, which further refers to the acknowledgement of the Adat community (indigenous community). The GovReg 27/2021 further details technical requirements while simplifying or removing administration requirements such as government permits relating to location permission. While this is an excellent intention from the government, the absence of permit provision (location permission) might lead to potential conflict between the interests of the Adat community and the buildings and installations at sea. As seen from the GovReg 27/2021, the provisions on permits, primarily related to location permission, which was regulated in GovReg 6/2020, were removed from GovReg 27/2021.<sup>10</sup> While removing this provision aimed to cut down

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<sup>10</sup>The provisions on government permits, as the requirement for establishing buildings and installation at sea, were provided in Article 7 of GovReg 6/ 2020, and this provision was removed and replaced by Article 12 of GovReg 27/2021.

administrative procedures and bureaucracy, resistance from the local community towards the buildings and installations at sea often occurs.

Other differences between GovReg 6/2020 and GovReg 27/2021 are related to the application procedures for establishing buildings and installation at sea. Article 6 of GovReg 6/2020 envisages that the initiators who wish to establish buildings or installations at sea should submit their application to the minister relevant to the function and type of such buildings and installations or the governor based on their authorities. This provision is revised by GovReg 27/2021, which provides that the application should only be submitted to the minister. While this might cut off the bureaucracy, the process was even more complicated since the regional government involvement was removed. This is because, compared to the central government, the regional government knows more about the empirical conditions of the location and other technical measures in which the building and installations will take place. In addition to this, Law No. 23 of 2014 on Regional Government (Law 23/2014) acknowledges the authority of the provincial government within 12 (twelve) nautical miles of water areas, except related to oil and natural gas.<sup>11</sup> In line with this acknowledgement, GovReg 27/2021 should involve the regional government, in this matter, the provincial government.<sup>12</sup>

Furthermore, concerning the establishment of sea tunnels and bridges connecting the islands of Indonesia, Article 21 GovReg 27/2021 provides that besides technical considerations, as envisaged in Article 20, the establishment of sea tunnels and bridges should meet specific requirements. These requirements include (i) carrying out technical feasibility studies and socio-economic feasibility studies; (ii) carrying out a risk assessment; (iii) having a contingency plan; (iv) performing analysis on conductivity, temperature and depth data; (v) based on the results of a soil condition survey or geotechnical survey which includes the physical and mechanical properties of the soil layer; (vi) perform seabed profile analyses; and (vii) meet the requirements of a safe space for shipping safety in the form of free space (clearance) for the construction of bridges; or ship draft

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<sup>11</sup>See the division fisheries and ocean affairs matter between the central and regional governments as an appendix of Indonesian Law Number 23 of 2014 on Regional Government

<sup>12</sup>For detailed analyses of the decentralisation of coastal management within the framework of the archipelagic State principle, read further Dhiana Puspitawati, "Desentralisasi Wilayah Pesisir dan Lautan dalam Kerangka Prinsip Negara Kepulauan," *Arena Hukum* 7, no. 2 (2014): 210-224.

(draught and free space under keel clearance for underwater tunnels dan (viii) fulfil other technical requirements in accordance with the provisions of laws and regulations in the field of shipping, in the marine and fishery sector, as well as in the field of public works.<sup>13</sup> While all requirements fulfil safety and technical standards, no consideration is made to international law, in this case, the law of the sea.

Nevertheless, the standards under the Government Regulation consider elements embodied in international law, such as contingency plans and shipping safety. As the largest archipelagic State in the world and one of the ratifying States to UNCLOS 1982, Indonesia is bound to the provisions of UNCLOS 1982. The bridges are meant to connect the islands of Indonesia. What if the bridges are built above ocean areas over which other States' rights exist? An example is the bridge of the Sunda Straits connecting Java and Sumatra. It is questionable whether establishing such a bridge would impede the rights of archipelagic sea lanes passage on the Sunda Strait. The bridge should be more than the tallest ship ever passed the Sunda Strait. Will that be a tower bridge? If so, the bridge's opening takes time, and the passage of foreign ships under the right of archipelagic sea lanes would not be continuous, expeditious and unobstructed; in other words, the passage would be impeded. This would violate Article 53 of UNCLOS 1982.

However, despite its ambiguity and incompleteness, this GovReg 27/2021 can be seen as an excellent start in managing ocean space, especially in coastal areas. For Indonesia, caution should be taken in the coastal areas bordering the territorial sea where other States' rights should be respected.

#### **IV. CURRENT IMPLEMENTATION**

In its implementation, GovReg 27/ 2021 received various responses, especially the pros and cons of the permit regulations.<sup>14</sup> Indonesian Defence Ministry

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<sup>13</sup>Article 21 of GovReg 27/2021.

<sup>14</sup>Kementrian Hukum dan HAM, "PP tentang Bangunan dan Instalasi di Laut di Harmonisasi," accessed on 10 September 2022, [https://ditjenpp.kemenkumham.go.id/index.php?option=com\\_content&view=article&id=3373:pp-tentang-bangunan-dan-instalasi-di-laut-mulai-diharmonisasi&catid=268:kegiatan-djpp&Itemid=73](https://ditjenpp.kemenkumham.go.id/index.php?option=com_content&view=article&id=3373:pp-tentang-bangunan-dan-instalasi-di-laut-mulai-diharmonisasi&catid=268:kegiatan-djpp&Itemid=73); Kementrian Koordinator Bidang Kemaritiman dan Investasi, "Kajian Pengalihfungsian Bangunan dan Instalasi di Laut," accessed on 17 September 2022, <https://jdih.maritim.go.id/en/kajian-pengalihfungsian-bangunan-dan-instalasi-di-laut>,

supports the clearance requirements of the buildings and installations at sea since this way, the sovereignty of Indonesia can be guarded.<sup>15</sup> However, Indonesia should also consider the existing rights of other states in various maritime zones. Both the sovereignty of Indonesia and other states' rights should be accommodated.

As mentioned in this review, at least 15 clusters are related to the actual function of buildings and installations at sea. With no proper coordination between those 15 functional clusters, the overlapping establishment of buildings and installation is imminent. In addition to this, specific processes and mechanisms should be clarified. While an integrated approach is too early to be proposed, proper coordination and communication between authorities having different functional clusters is urgent.<sup>16</sup> If the integrated approach is taken, is establishing a new institution needed?<sup>17</sup>

## V. CONCLUSIONS

Despite ambiguity and incompleteness, national regulation on buildings and installations at sea is prominent. While most technical aspects related to establishing buildings and installations at sea are covered in this GovReg 27/ 2021, it is argued that other aspects, such as international legal aspects, should also be considered for archipelagic States like Indonesia, buildings and installations at sea should consider the ocean areas where the buildings and installations are built, whether on ocean territory or jurisdictional territory. While Indonesia's sovereignty is necessary, the existence of other States' rights should also be respected.

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<sup>15</sup>Kementerian Koordinator Bidang Kemaritiman dan Investasi, "Koordinasi Menata Bangunan dan Instalasi di Laut melalui bincang Bahari," accessed on 3 September 2022 <https://dev.maritim.go.id/koordinasi-menata-bangunan-instalasi-laut-melalui-bincang-bahari>.

<sup>16</sup>Grahadyarini, Lukita BM, "Koordinasi Untuk Penataan Bangunan Laut Dibutuhkan", accessed on 1 September 2022, <https://www.kompas.id/baca/ekonomi/2022/07/18/koordinasi-untuk-penataan-bangunan-laut>.

<sup>17</sup>For further analyses on institutional issues on the buildings and installation at sea read further Djunarsjah, eka, Nadzir, Zulfikar Adlan and Golda Beauty, "Tinjauan Aspek Hukum tentang Bangunan dan Instalasi Laut di Indonesia kaitannya dengan SDGS Nomor 14" (Review of Legal Aspects of Indonesia's Marine Buildings and Installations in Relation to SDGS Number 14), *Proceeding of Seminar Nasional Geomatika: Informasi Geospasial untuk Inovasi Percepatan Pembangunan Berkelanjutan (Proceeding of National Seminar on Geomathic: Geospasial Information for Innovation and Acceleration of Sustainable Development)*, 2020, 67-74



It is submitted that for a country with mass water areas, monitoring and evaluation of buildings and installation at sea will be more difficult if centralised. That is why the regional government's role is also essential in analysing the suitability of installing, monitoring, and evaluating such buildings.

Furthermore, coordination and communication between different institutions according to functional clusters are important. This GovReg 27/2021 should also consider other relevant regulations. Indonesia has done much in regulating buildings and installations at sea, but much still needs to be done.

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