

THE INDONESIA LEGAL POLITICS ON MINING LAW IN REALIZING THE WELFARE

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ABSTRACT

Indonesia is a country rich in natural resources. Due to Dutch and Japanese occupation, Indonesia suffers from poverty. For that came the ideals of establishing an independent and prosperous country. The founding fathers and the framers of constitution formulate the ideals of an independent and prosperous country stated in Chapter XIV on Social Welfare in Articles 33 and 34 that adopt the welfare state ideology. In this concept the government controls the natural resources of mining for social welfare. So the legal politics of mining law should serve the people's welfare.

Key words: Legal Politics, Mining, Social welfare

Introduction

According to the Constitution, that the mandate of the natural riches contained in the belly of the Earth Indonesia "controlled" and are used by the State for most of the prosperity of the people. The sense of "controlled" and used is an order from the people to the State to manage the abundance of natural resources for greatest prosperity of the people. The concept of "controlled" includes the sense of set up and organized primarily to improve and increase the production. Controlled by the State does not constitute ownership, but the State may also authorize the Government to arrange and take care of everything to do with the riches of nature, nature resource utilization manage next to greatest prosperity of the people. The state is given the task to organize and animate natural resources and use it for social welfare for all the people.

Ideologically, the Founding Fathers and The Framers of The Constitution agreed: reject any form of system of capitalism, liberalism and individualism. This means rejecting the economic relationship on the basis of free market competition.¹ Then it is very clear that the meaning of mastered of Earth and water and natural resources contained therein constitute State authority.

Mining is an activity which includes the taking and preparation for further processing of solid, liquid and gas. Mining or excavation is the effort to dig out various potential contained in the body of the Earth. Mining is an activity attempt to optimize the utilization of natural resources in mining (minerals) found in the Earth.² The mining sector has distinctive features, such as requires a large capital, using modern technology, expert work, done at high risk, the slow return of capital and sensitive to the changes situation. All these requirements are owned by developed countries in both the availability of reliable human resources, high technology mastery and the availability of funds in running the mining business. With those characteristics, to manage mining yet can be handled because of the lack of resources. At the beginning of independence, Indonesia can not manage mining business incase the lack of resources. First, there are only few trained and experienced Indonesians to implement policies to encourage the development of a class of indigenous entrepreneurs and accelerate economic recovery. Secondly, foreign-owned companies and Chinese community groups still dominate modern economic sectors, while indigenous people lack the strong capital and entrepreneurial skills needed to compete economically with them.³

In the Indonesian history of mineral and coal mining, there are at least three laws regulating the Mining of minerals and coal. First, *Indische Mijn Wet* (IMW) enacted in 1899 by Staatblad 1899 Number 214. Secondly, law No. 11 of 1967 of Mining Principal provisions. And thirdly, law No. 4 of 2009 of Mineral and Coal Mining, enacted on January 12, 2009.

Due to the lack of capital, the government considers the importance of mining management as a foreign exchange earner through foreign investment. The reality is dilemmatic, the potential of natural resources need to be developed into a real wealth for the welfare of the community, but on the other hand the government does not have ability to work it. Then the choice of legal mining law taken is to open foreign investment with various facilities to overcome economic problems. The steps taken are to pass a mining law and investment law that attract investors.

However, investment by investors is so huge until 75 percent of the mines have foreign control and 25 percent national control. The extent of foreign domination is caused by government policies that are too wide open the door of investment for

¹ Manan, Bagir "Peranan Hukum Dalam Mewujudkan Cita - Cita Keadilan Sosial Menurut UUD 1945", orasi ilmiah dalam rangka *Dies Natalis* Fakultas Hukum Universitas Katolik Parahyangan ke-55, Bandung, 21 September 2013.

² S, Salim H., *Hukum Pertambangan di Indonesia*, ctk.ke-7, Rajawali Press, Jakarta, 2014, hlm. 53.

³ Sutedi, Andrian, *Hukum Pertambangan*, Sinar Grafika Offset, Jakarta, 2011, hlm 1.

foreign investors in the strategic sector.⁴ With abundant natural wealth, Indonesia has a prerequisite to be a developed country, prosperous and welfare. But in reality Indonesia is included into poor country (developing country) that struggles towards the prosperity of its people. In general, the welfare has not been fully created in Indonesia. The US business magazine, Global Finance, in 2010 released the ranking of 182 countries in the world based on the level of gross domestic product (GDP) per capita from the poorest countries to the most rich countries in the world. Based on the 182 ranking data, Indonesia ranks 122th with GDP per capita of US \$ 4,380 or Rp. 39.4 million per year. Indonesia is a country abundant of natural resources, ranging from plantations, mining, and energy. However, the country has a sizeable population of over 230 million.⁵

A survey of the RGI on 58 states, showed the profits from the extractive sector in these countries totaled \$ 2.6 trillion in 2010. However, in fact, many countries have missed the opportunity to benefit from wealth of natural resources due to mismanagement and corruption. The survey showed 26 nations failed to gain maximum benefit from natural resource wealth due to weak extractive sector governance. In these 26 countries, over 300 million people (or 50% of the total population of 26 countries) live on less than two dollars a day. Meanwhile, in resource-rich countries but with good governance performance, the very low income population figure is only an average of 10 million people (or 7% of the population).⁶

Exploitation of natural wealth of mining is not linear with the increase the social welfare. State revenues from the mining sector are very small as evidenced by the control of shares in mining companies that are below 10 percent while the divestment of shares does not go ahead. Upstream to downstream sectors are still dominated by foreigners so that the income of the country that is expected to create prosperity and prosperity is still not achieved. On the contrary, big profits are achieved by foreign investors. For that reason need to be investigated why this happens in order to formulate the legal concept of mining law.

Problems

How create ideal legal politics of mineral and coal mining in realizing social welfare in Indonesia?

Methods

1. Method of Approach.

The approach used in the research problem is normative approach. In this type of research, the law is conceived as what is written in the law in the book. In the study of normative law, library material is the basic legal material in research classified as secondary legal Material. The study documents consists of legislation and various policies relating to the subject matter studied

2. Types and Sources of Data

The data used in this study can be classified into two types:

a. Primary Data

Primary legal materials consist of legislation, official records or treatises in lawmaking and judgmental decisions.

b. Secondary Data

In addition to research resources in the form of legal materials, law researchers may also use non-legal materials when deemed necessary that have relevance to the research topic.

3. Methods of Data Collection

To analyze the legal material, first inventory / collection of primary and secondary legal materials used in this study. Collecting or inventorying of legal materials is first by clarifying the legal material on the subject matter discussed, namely the legal material on mineral and coal mining, and the development of the state administration.

4. Data Analysis

These steps are in accordance with the character of legal science as a prescriptive or applied science. As a prescriptive science, the science of law studies the objectives of law, the values of justice, the validity of the rule of law, the concepts of law and legal norms. In conducting legal research, steps are taken: Identifying legal facts, Collection of relevant legal materials, reviewing legal issues, drawing conclusions, providing prescriptions.

Analysis and Discussion

1. The 1945 Constitution

⁴Okezone.com, dalam <https://economy.okezone.com/read/2013/02/20/19/764574/75-sektor-pertambangan-ri-dikuasai-asing>

⁵ Susanto, Heri, “*Negara Terkaya-Termiskin di Dunia, Dimana Indonesia ?* “ Vivanews.com, 22 September 2010, dalam <http://bisnis.news.viva.co.id/news/read/178888-negara-terkaya---termiskin--dimana-indonesia->, diakses

⁶ Heller, Patrick dan Poppy Ismalina, “*Transparansi dan Akuntabilitas Migas dan Pertambangan : Pertimbangan Untuk Pemerintahan Jokowi – JK*”, dalam http://www.google.co.id/?gws_rd=cr&ei=756qV-6jG4vjvgsR-YT4CQ#q=Survei+

E.C.S. Wade in his Constitutional Law stated constitution as a document which sets out the framework and principal functions of the government organ of the state and declares the principle governing the operation of the organs. Political law in the constitution regulated in the state economy in the 1945 Constitution is contained in Chapter XIV SOCIAL WELFARE consisting of Articles 33 and 34 as follows:

Article 33

- (1) The economy shall be organized as a common endeavor based upon the principle of brotherhood system.
- (2) Production branches which are important for the state and which affect the livelihood of the people at large shall be controlled by the state.
- (3) The land and water and the natural resources contained therein shall be controlled by the state and shall be used for the greatest prosperity of the people.

Article 34

The poor and neglected children are kept by the state.

The chapter clearly states the Indonesian legal politics. In article 33 there is a foundation of economic democracy, where production is done by all, for all under the leadership or possession of members of society. The prosperity of society is preferred, not the prosperity of the individual. The economy is structured as a joint effort based on the principle of kinship. Therefore, the important production branches for the state and those who control the lives of the people must be controlled by the state. The production bowl should not be overpowered by one so as to oppress the people. Companies that do not control the livelihood of the public may be in the hands of individuals. The natural resources must be controlled by the state and used for the greatest prosperity of the people.

Development on a large scale is mastered by the state while small and medium scale organized gradually by cooperatives. Between the two can still be pursued by private / private initiatives on condition of adjusting to the government plans. If analyzed carefully, Indonesia's economic system in Articles 33 and 34 of the 1945 Constitution is unique, distinctively designed in accordance with the spirit of the nation. This system does not fully embrace the system of capitalism nor embrace the socialism system but combination of the two systems (mixed economy).

2. Law No. 4 of 2009 on Mineral and Coal Mining

The substance of Law No. 4 of 2009 on Mineral and Coal Mining adopting the system of neo liberalism, capitalism, and individualism by basing economic relations on the basis of free market competition which resulted in the mining sector of mineral and coal remain in the control of foreign investors. This can be seen in :

1. Article 38 stating that the Mining Business License is granted to:

- a. business entity;
- b. cooperative; and
- c. individual.

Article 38 c on individual may lead to debate in its interpretation, as it may also be granted to all persons including foreign private. If given to individuals, of course, contrary to the spirit of Article 33 of the 1945 Constitution because it leads to the interests of individuals (individuals) who are the soul of capitalism.

2. Article 90 which states:

"Holders of Mining Business License (IUP) and Special Mining Permit (IUPK) may perform part or all of the mining business stages, both exploration activities and production operations".

This Article provides the flexibility of concentration of power to the holder of a contract permit with a large investment to monopolize the entire mining process from upstream to downstream. This chapter is dangerous because it can remove the interference of the government and the people.

3 Article 105 paragraph (1) and (3) as follows:

- (1) A non-moving business entity in a mining business intending to sell the excavated minerals and / or coal shall first have a Production Operation IUP for sale.

(3) Mineral or coal excavated and to be sold as referred to in paragraph (1) shall be subject to production dues.

The provisions of this article state that mineral mining and Coal are commodities. Thus this chapter clearly carries the notion of individualism and abandons the interests of the masses. This article sells natural resources by anyone who can.

4. Article 169 states: At the time this Act comes into force:

- a. Contract of work and agreement of coal mining concession works that existed before the coming into effect of this Law shall remain in force until the expiry of the contract / agreement.

This provision is pro mining entrepreneurs because they do not need to revise the contract of work that had been held.

Consequently, mining production is still controlled by foreign investors and ignores the interests of the nation.

3. Decision of the Constitutional Court

The meaning of "controlled by the state" is also debated by many people, whether expressed in literature or seminars or discussions. The debate revolves around the keyword "state -controlled" vis a vis the free-market economy that dominates the world economy. The Constitutional Court's decision in the judicial review of the law number 22 of 2001 of Oil and Gas against the 1945 Constitution is also in line with Mohammed Hatta's concept and opinions.⁷ The Constitutional Court as the interpreter of the constitution, interpreted the notion of "controlled by the state" as stipulated in the Decision of the Constitutional Court of Case No. 01-21-22 / PUU-I / 2003 regarding the judicial review of Law no. 20 of 2002 and decision of the Constitutional Court. 002 / PUU -I / 2003 regarding the judicial review of Law no. 22 of 2001 on Oil and Natural Gas on December 1st, 2004 as published in the State Gazette of the Republic of Indonesia Number 01 Year 2005 on pages 125 - 126 as follows :⁸

That based on the description, the definition of "controlled by the state" must be interpreted to include the meaning of control by the state in the area derived and derived from the conception of the sovereignty of the people of Indonesia over all sources of wealth "earth, water and natural resources contained in it", the notion of public ownership by the collectivity of the people over such sources of wealth. The people collectively are constructed by the 1945 Constitution mandating the state to make policies (*beleid*) and the act of management (*bestuursdaad*), *regelendaad* (*regelendaad*), management (*beheersdaad*), and supervision (*toezichthoudensdaad*) for the greatest prosperity of the people. The state's *bestuursdaad* functions are exercised by the Government with the authority to issue and revoke the liciting facilities, licenses, and concessions. The regulatory function of the state (*regelendaad*) is carried out through the legislative authority by the People's Legislative Assembly with the Government, and the regulation by the Government. The management function (*beheersdaad*) is done through a share-holding mechanism and / or through direct involvement in the management of a State-owned Enterprise or a State-owned Legal Entity as an institutional instrument, through which the State, c.q. Government, utilize its control over the resources to be used for the greatest prosperity of the people. Similarly, the state's oversight function (*toezichthoudensdaad*) is carried out by the State, c.q. Government, in order to supervise and control for the implementation of the control by the state on the sources of wealth intended to be done for the greatest prosperity of all people.

That within the framework of such understanding, the control in the sense of private ownership derived from the conception of public ownership concerning the production branches which are important for the state and which affect the livelihood of the people which according to Article 33 paragraph (2) is controlled by the state, depending on the dynamics of the development of the wealth conditions of each branch of production. What the state must control is if: (i) the branches of production are important to the state and affect the livelihood of the people; or (ii) important to the State, but does not affect the livelihood of the public; or (iii) is not important to the State, but it affects the livelihood of the public. All three must be controlled by the State and used for the greatest prosperity of the people. With the Constitutional Court's decision, then the meaning of "controlled by the state" does not necessarily mean that the state itself directly manages the natural resources. the meaning of "controlled by the state" in the sense of the state's sovereignty over its natural resources lies in the actions of the state in making policies, arrangements, arrangements, management, and supervision of business activities in the natural resource field.

4. UN Resolutions

The concept of popular sovereignty over natural resources was also expressly stated by the United Nations through UN Resolution 1803 (XVIII) on 14 December 1962 on permanent sovereignty over natural resources. The United Nations recognizes that all the natural wealth of a nation must return to that country and the sovereign nation full of all its national wealth. In the declaration of the resolutions paragraphs 1, 5, 6 and 7 stated that :⁹

- (1) The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well being of the people of the state concerned.
- (5). The free and beneficial exercise of sovereignty of peoples and nations over their natural resources must be furthered by the natural respect of states based on their sovereign equality.
- (6). International co-operation for the economic development of developing countries, whether in the form of public or private capital investment, exchange of goods and services, technical assistance or exchange of scientific information, shall be such as to further their independent national development and shall be based upon respect for their sovereignty over their natural wealth and resources.
- (7). Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the charter of the United Nations and hinders the development of international co-operation and the maintenance of peace.

This principle recognizes the sovereignty of the state to manage, use and authorize freely all natural resources either on the surface or under the land throughout its territory. So the state is not only free to regulate its economy but also entitled to take over or nationalize the ownership of local and foreign citizens under international law. The resolution also states that the state is authorized to regulate foreign investment mechanisms, grant concessions for the exploitation of natural resources and the distribution of profits. All forms of cooperation in the acquisition of natural resources with foreign investors shall be protected by applicable international law and the settlement shall be made in accordance with the International Convention Settlement of Investment Disputes (ICSID) rules.

5. The Legal Politics on Mineral and Coal Mining in the future.

According to Satjipto Raharjo, legal politics is the activity of choosing and the means (methods) that will be used in seeking a certain social and legal objectives in society (state).¹⁰ The legal politics referred to here is the philosophical dimension in the study of the law of seeing the other side of the law as a set of abstract ideas and a further elaboration of philosophical thought, namely the so-called philosophy of law. In this analysis Legal politics emphasizes the interrelationship between political configuration and the character of legal products.

Richard Auty first introduced the term “natural resources curse” to illustrate confusing phenomenon. The natural resource curse is a paradoxical relationship between the abundance of natural resources and the worsening economic growth, due to the weakness of the state, the political institutions, resulted in a level of continuous conflict remains one of the most puzzling issues in international development although the literature has put forward many institutional solutions. The main cause is the failure of planning and implementation of development in developing countries due to weak state institutions in taking action and awareness of the guidelines as a bulwark against the policy of globalization. Some studies conducted by Auty (1993, 2001), Sachs and Warner (1995, 2001), Jeffrey A. Frankel (2012) prove that a country rich in natural resources into a poor country (developing), otherwise countries with minimal natural resources dashed become a developed country. Jeffrey A. Frankel, a researcher from Harvard University in his article entitled *The Natural Resource Curse : A Survey of Diagnoses and Some Prescriptions* stated :

“Oil, minerals, and agricultural resources can bring great riches to those who possess them. Yet countries that are abundantly endowed with such natural resources often encounter pitfalls that interfere with the expected superior economic performance. Possibly undesirable side effects include reallocation of production away from the manufacturing sector. Another interpretation is that it can be permanent: countries endowed with natural resources more often develop social structures in which autocratic or corrupt political elites finance themselves through physical control of the natural resources. Meanwhile those governments that lack these endowments have no choice but to develop decentralized, democratic and diversified economies with market incentives that are more conducive to the development of manufacturing. Examples of the Natural Resource Curse are plain to see. Japan, Korea, Taiwan, Singapore and Hong Kong are rocky islands (or peninsulas) that were endowed with very little in the way of exportable natural resources. Nevertheless, they achieved western-level standards of living. Many countries in Africa, the Middle East and Latin America are endowed with oil, minerals, or other natural resources, and yet have experienced much less satisfactory economic performance”.¹¹

Indonesia as a country with abundant natural resources must escape the curse of natural resources. Law No. 4 of 2009 on Mineral and Coal Mining that adopts neo liberal by providing convenience and freedom to foreigners to invest. The impact is domination of mining by foreign investors. This legal politics deviates from and contradicts the state's goals in the constitution. Ironically, the massive exploitation of mining has caused negative impacts such as disputes with indigenous peoples for seizing indigenous lands and customary forests, leaving behind environmental damage and pollution, human rights abuses.

E. Conclusion

1. Legal Politics of Law no. 4 of 2009 only pursued economic growth resulting in the exploitation of mineral resources on a large scale has no impact on social welfare. The benefits of the mineral and coal mining sector are enjoyed by foreign investors.
2. Indonesia must revised Law no. 4 year 2009 where the government controls the mining sector of mineral and coal through State owned enterprises for social welfare of all Indonesian people.

⁷ Sudrajat, Nandang. 2010. *Teori dan Praktik Pertambangan Indonesia Menurut Hukum*, Yogyakarta: Pustaka Yustisia, hlm 121.

⁸ Putusan Makmamah Konstitusi Nomor 002/PUU-I/2003, hlm 125-126.

⁹ Resvani, *Tambang Untuk Negri, Sebuah Inovasi Konsep*. Jakarta: Bhuana Ilmu populer, 2017.hlm. 78

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Sutedi, Andrian, *Hukum Pertambangan*, Sinar Grafika Offset, Jakarta, 2011.

¹⁰ Raharjo, Satjipto, *Ilmu Hukum*, Ctk. III, PT Citra Aditya Bhakti, Bandung, 2000, hlm. 352.

¹¹ Jeffrey A. Frankel, “*The Natural Resource Curse: A Survey of Diagnoses and Some Prescriptions*”, makalah, 2012, hlm. 2.

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