
MINERAL AND COAL MINING BUSINESS AND MANAGEMENT IN INDONESIA FROM THE INDONESIAN CONSTITUTIONAL VIEWPOINT

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ABSTRACT

Mineral and coal wealth in Indonesia has long been exploited and exploited since before Indonesia's independence. The mineral and coal management and exploitation scheme has undergone changes starting from using the Contract of Work/Agreement of Work scheme to using the Mining Business Permit scheme, all of which are claimed in accordance with Article 33 paragraph (3) of the NRI Constitution as the Indonesian constitution. The research aims to look at the management and exploitation of mineral and coal mining in Indonesia from the point of view of the 1945 Constitution of the Republic of Indonesia. The research method used in this paper is a normative research method, emphasizing the use of secondary data, namely examining the principles of law and legislation. invitations, which are sourced from primary legal materials, secondary legal materials and tertiary legal materials. In this study, it was concluded that the 1945 Constitution of the Republic of Indonesia mandates that the management and exploitation of mineral and coal mining by the Government must have a dominant role, the role of the government is not only to regulate, manage and supervise but also plays a role in its management as interpreted by the Constitutional Court's decision. Number 111/PUU- XIII/2015 and the ideas of Moh. Hatta, it does not mean that the Indonesian people reject foreign investment, but that there is a need for a new scheme, one of which is a Joint Venture where 51% or more of the shares are owned by the government or its representatives.

Keyword: Mining, New Energy and Renewable Energy, Constitution.

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INTRODUCTION

Indonesia is one of the mineral and coal producing countries which is quite abundant, gold reserves in the Gresberg mine even though it has been excavated since 1990-2017, PT. Inalum estimates that it still has gold reserves of around 1,187 tons with a value of US\$ 50.5 billion or around Rp. 722 trillion, while proven copper reserves are estimated at 19.4 million tons with a value of US\$ 129.5 billion or Rp. 1.851 trillion (Semibiring, 2019), besides that Indonesia's nickel resources are abundant, about 11% of the world's nickel resources or about 33.3 million tons and Indonesia's nickel reserves of around 21 million tons or about 23.7% of the world's nickel reserves (Mohammad Dian Revindo, Denny Irawan, 2021).

Mining business and management continues to grow until now. Various forms of exploitation and management of mineral and coal mining ranging from concessions, Contracts of Work and Mining Business Permits are expected to contribute as much as possible to development and are in line with the 1945 Constitution of the Republic of Indonesia. Along with the

development of mining exploitation and management, this is of course did not run smoothly, but caused conflicts from various aspects ranging from conflicts between the government and businessmen, disputes through judicial institutions and disputes outside the court, problems that arise in social and environmental aspects. Dispute between the Government of Indonesia and Churchill Mining through the International Center for The Settlement of Investment Disputes (ICSID), the dispute between the Government of Indonesia and PT. Newmont Nusa Tenggara which will be submitted through ICSID although the settlement has not reached the Tribunal hearing.

In addition to social and environmental problems, disputes over laws and regulations, the lack of government contracts for coal exploitation which is dominated by private parties, both foreign and domestic, there was also a lack of coal supply for PLN, this is suspected to be due to the increase in coal exports caused by rising prices. coal, based on data compiled by the Directorate General of Mineral and Coal, the reference price of coal in November 2021 was the highest in the last two years reaching U\$D 205.01 per tonne or a double increase compared to June 2021, increasing coal exports to various countries. The fulfillment of domestic coal needs has actually been regulated in Law Number 3 of 2020 concerning Amendments to Law Number 4 of 2019 concerning Mineral and Coal Mining and Government Regulation Number 96 of 2021 concerning the Implementation of Mining Concession Activities, both IUP and IUPK holders must prioritize the needs domestic mineral and coal, which then determines the amount for domestic needs through the Decree of the Minister of Energy and Mineral Resources (ESDM) Number 139.K/HK.02/MEM.B/2021 concerning Fulfillment of Domestic Coal Needs determines the amount of Domestic Market Obligation (DMO) of 25% for holders of Work Agreements at the Production Operation stage, Special Mining Business Permits at the Production Operation stage, apart from the stimulation of high coal prices in the international market, sanctions given to violators of the DMO provisions are in the form of fines so that they are not firm because give opportunity to entrepreneurs to repeat it again. The significant export of coal has resulted in Mining Business Permit (IUP) holders no longer paying attention to their obligations to fulfill the Domestic Market Obligation (DMO). IUP holders only fulfill 35 thousand MT or less than 1% of their obligations of 5.1 million MT. Lack of domestic coal supply resulting in a lack of coal supply to PLN so that it is estimated that 20 Steam Power Plants (PLTU) with a power of 10,850 Mega Watt (MW) will be turned off so that it can disrupt the national economy and result in more than 10 million PLN customers in the region. Java, Madura and Bali (Jamali) as well as non Jamali. The absence of a dominant government role in the management of mineral resources eliminates government control in the fulfillment of natural resources that should be controlled by the state. The role of BUMN in the coal mining sector such as PT. Bukit Asam is not only looking for profit but should also provide high-quality goods to meet the needs of many people, including the need for coal for power generation, but the mining SOEs cannot do much because PT. Bukit Asam is only about 28 million tons of coal, so the threat of a coal deficit to meet PLN's needs cannot be avoided.

METHOD

The research method used in this paper is a normative research method, emphasizing the use of secondary data, which examines legal principles and statutory regulations, which are

sourced from primary legal materials, secondary legal materials and tertiary legal materials, research specifications with more prescriptive dominant.

RESULTS AND DISCUSSION

1. Indonesia and the Welfare State

According to the Welfare State (Parton, 2002) doctrine the state is idealized to deal with things that were not previously handled. Until the middle of the twentieth century, humanity witnessed a tendency to expand state responsibility which justified state intervention in the affairs of the wider community (Asshiddiqie, 1993). Black's Law Dictionary defines the Welfare state as:

"A Nation in Which the Government undertakes various sosial insurance programs such unemployment compensation, old-age pensions, family Allowence, food stamps, and aid to the blind or deaf.-Also termed, welfare regulatory state " (Garner, 2009).

Views on the welfare state continue to grow Syafri Nugraha quotes Collin Colbuid's view on the definition of the Welfare State, namely, the welfare state is a government system that provides free social services in terms of health, education and financial assistance for those who are unable to work due to old age, unemployed or sick. In many countries, the essence of the welfare state is imposed on the minimum standards guaranteed by the state, namely: social protection (Spicker, 2000), income, food, health, housing, and education (Nugraha, 2002).

Welfare State as a state responsibility for the welfare of its citizens in this broad scope to reach market intervention as well as to banking, telecommunications and transportation (Friedman, 2019). With this broad scope, the responsibility of the state includes legal means and institutions to realize the welfare of citizens as an obligation of the state (Djauhari, 2006).

Therefore, it can be concluded that the theory of the welfare state provides the view that the government must play an active role in the welfare of its people, not only as a night watchman (wacht dog). As a country, the welfare of the Indonesian people is one of the goals of the Indonesian nation, this can be seen in the Indonesian Constitution (Loveland, 2018), especially the fourth paragraph of the opening of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) which mandates that the goals of the Indonesian nation are:

"To protect the entire Indonesian nation and the entire homeland of Indonesia and to promote public welfare, educate the nation's life and participate in carrying out world order based on independence, eternal peace and social justice".

Therefore, the mandate from paragraph IV of the Preamble to the 1945 Constitution of the Republic of Indonesia is that state administrators should as much as possible promote the welfare of the Indonesian nation, which is then outlined in the body of the 1945 Constitution of the Republic of Indonesia (Hadiyono, 2020).

The 1945 Constitution of the Republic of Indonesia, which contains the main points of policies and laws and regulations, should be a guide in forming laws and regulations or Staatsgrundgesetz. According to Hans Nawiaski, there are at least four (4) legal norms, which are arranged in layers and tiers, including:

- a. Staatsfundamentalnorm, or State Fundamental Norms is the highest legal norm and is the first group in the hierarchy of state legal norms (Arifin, 2015).
- b. Staatsgrundgesetz, is a legal norm under Pancasila, which is a written basic law source that regulates the outlines or main points of state policy.
- c. Formell Gesetz, or the Act in this case is a group of legal norms under Staatsgrundgesetz.
- d. Verordnung is implementing regulations & Autonome Satzung According to Maria Farida, implementing regulations and autonomous regulations are located under the law which functions to implement the provisions of the law, where implementing regulations are sourced from delegation authority and autonomous regulations are sourced from attribution authority (Arifin, 2015).

In terms of mining management and exploitation, it refers to Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia which reads:

"Earth and water and the natural resources contained therein are controlled by the State and used for the greatest prosperity of the people".

In its Decision of the Constitutional Court Case Number 001-021-022/PUU-I/2003, translating state functions in the form of policies (beleid) and management actions (bestuursdaad), regulation (regelendaad), management (beheersdaad) and supervision (toezichthoudensdaad) must be carried out as a whole. Not only one, two or part of the functions of the state in question, therefore the management of natural resources including mineral and coal mining is not only regulated, managed and supervised by the state but should be managed by the state. This is in line with the drafter of Article 33 paragraph (3) of the NRI Constitution, Moh. Hatta who revealed:

"Mohammad Hatta as one of the founding fathers of the state stated about the notion of being controlled by the state as follows, "The ideals embedded in Article 33 of the 1945 Constitution of the Republic of Indonesia are large-scale production as far as possible carried out by the Government with the help of foreign loan capital. country. If this tactic doesn't work, it is also necessary to give foreign entrepreneurs the opportunity to invest in Indonesia with conditions determined by the government... That's how we first thought about how to carry out economic development on the basis of Article 33 of the 1945 Constitution of the Republic of Indonesia... If national energy and national capital are not sufficient, borrow a loan. Foreign workers and foreign capital to launch production. If foreign nations are not willing to lend their capital, they are given the opportunity to invest their capital in our homeland under conditions determined by the Indonesian government itself (Widjaya & Mutia, 2002)".

In this case, it can be concluded that the management of mineral and coal mining should be managed as much as possible by the state or its representative.

2. The Middle Way for Investment in Mineral and Coal Mining Management in Indonesia

Of course, the management and exploitation of mineral and coal resources cannot be fully managed by the state or the government as state administrators, learning from the era before 1967 where all exploitation and management was carried out by the government this became one of the causes of the economic crisis and slowed development, so that we cannot escape foreign or private investment. In terms of foreign investment, Sornarajah put forward the Middle Path Theory. The Middle Path Theory is motivated by the conflicting economic theory of foreign investment. Theoretical conflicts have had an impact on the formation of legal attitudes towards foreign investment. The conflict between two very extreme theories on foreign investment on the one hand argues that foreign investment will have a positive impact on the host country while on the other hand there is a theory that argues that foreign investment will cause dependence on the host country so that the host country Host Country cannot expand (Sornarajah, 2021). A study on Multinational Corporations (MNCs), Sornarajah concluded that MNCs can become engines of world growth and development and also bring fortune to local economies through capital and technology flows, new generation of labor and new creation of export earnings. This is a refutation of the opinion which states that investment through MNCs must lead to dangerous conditions, however, this study also identified damaging or disruptive conditions rather than foreign investment (Zaidun, 2008).

Sornarajah stated that he did not reject foreign investment but it needed to be done carefully so that no party was harmed, in this case Sornarajah offered two (2) forms of agreement in terms of foreign investment, unlike the previous contract form which was more profitable for foreign or private investors, Modern contracts must ensure the benefit of both parties. Both the state and foreign/private investors. The philosophy that foreign investment can help the development of the Host Country is the basis that the arrangements must be regulated in detail and carefully for the investment. These principles are represented in the form of a Joint Venture and a Production-Sharing Agreement, both of which will be explained later (Byrne & Popoff, 2008). Such agreements are supported by management agreements, technology transfer agreements, and the like where the state must ensure to be able to control the project and get bigger profits (Byrne & Popoff, 2008).

a. The joint venture

Joint Venture, Sornarajah further explained that Joint Venture is a collaborative arrangement between two or more businesses to achieve certain goals or to participate in a new project that may be more successful by pooling technology or resources (Byrne & Popoff, 2008).

The discussion on forms of foreign investment and according to the author, including the private sector, has been explained above which of course must continue to prioritize Article 33 paragraph (3) of the 1945 Constitution as the basic foundation of the applicable laws and regulations.

1) BUMN as an extension of the government

State-Owned Enterprises (BUMN) are business entities whose capital is wholly or most of the capital owned by the state through direct participation originating from separated state assets, SOEs in the form of Limited Liability Companies whose capital is divided into shares which are wholly or at least 51% (five percent) twenty one percent) of its shares are owned by the Republic of Indonesia whose main purpose is to pursue profit.

BUMN as a business entity which all or at least 51% of its shares are controlled by the Republic of Indonesia is a manifestation of how the domination of the State in the management of BUMN, especially regarding policies in conducting their business in their respective sectors. Therefore, it can be said that BUMN is not only a business entity but can also represent the interests of the State.

In considering Law Number 19 of 2003 concerning State-Owned Enterprises (BUMN) there are 3 (three) important things related to the existence of State-Owned Enterprises (BUMN), namely: First, BUMN is one of the actors in economic activities in the economy. National economy based on democracy. Second, SOEs have an important role in the implementation of the national economy in order to realize the welfare of the community. Third, the implementation of the role of State-Owned Enterprises in the national economy to realize public welfare has not been optimal (Ansari, 2019).

2) SOE Joint Venture with Foreign/Private Companies in Mineral and Coal Management

As previously reviewed, the role of SOEs is not only for profit-oriented businesses, but also for representing the interests of the State, including the management of minerals and coal, it is proper that every mineral and coal mining business must conduct a Joint Venture with BUMN with the dominance of share ownership in the Joint Venture company. (51% or more) owned by BUMN, in addition to implementing article 33 paragraph (3) of the 1945 Constitution with the dominance of shares by BUMN on the basis of maintaining control over mineral and coal management and also prioritizing the principles of sustainable natural resource management . If we quote Sornarajah's thoughts as explained above, namely:

“The principal representative forms of foreign investment are the joint venture and the production-sharing agreement, both of which are briefly described below. They are supported by agreements such as the management agreement (which is based on the separation of ownership and control so that the manager controls a project in return for a fixed sum whereas the profits of the project go to the state), the transfer of technology agreement (where the technology required for the project is supplied by the foreigner) and similar devices through which the state is able to ensure that it controls the project and has a larger share of the profits. These new types of foreign investment contract have been described in the literature.”

Based on Sornarajah's explanation above, the Joint Venture Agreement is not only a joint venture agreement between two companies but is supported by additional agreements including Patent Licensing Agreements, Know-How Agreements, Management Agreements, Technical Assistance Agreements, Technical Assistance Agreements.

b. The Production-Sharing Agreement

Production-Sharing Agreements are generally used in the petroleum industry, previously concession agreements used in oil-exporting countries. In the concession agreement, the host country is passive, only receiving royalties from the exported oil. Concession agreements are no longer in use as oil-producing countries have sought greater control over the oil industry. The new agreement that has replaced the concession agreement has reflected the fact that there has been a shift in power from oil companies to oil producers. The Production-Sharing Agreement also places the risk of oil exploration given to foreign companies given the prospect of finding oil.

3. Law and Business and Management of Mineral and Coal Mining

Law is a tool for social engineering, this view was put forward by Roscoe Pound "Law as a tool of Social Engineering" for Roscoe Pounds law aims to create peace in society, regulations as agents to regulate society where the State itself as social control which then was developed in Indonesia by Mochtar Kusumaatmaja who was later known as the Legal Development Theory (Verhelle, 1958). If studied historically, the Legal Development Theory is a modification of the thought. In addition, the legal theory of development is also influenced by the thoughts of Herold D. Laswell and Myres S. Mc Dougal (Policy Approach) (Mulyadi, 2019).

Mochtar Kusumaatmaja is of the view that the law has a function to maintain the achievements that have been obtained and the law must also be able to encourage change, especially in developing countries. There are two aspects that form the background of the Legal Development Theory, namely, first, the assumption that the law is only an obstacle to development, second, in reality if there has been a change in the mindset of the Indonesian people towards modern law. If it is reduced to just one, the purpose of law is to maintain order in society (Atmadja, 1996). According to Mochtar Kusumaatmaja, the function of law is that law is expected to be more than maintaining order in society but also as a tool for reforming society. Main idea as follows:

"Saying that law is a "means of community renewal" is based on the assumption that there is order or order in development and reform efforts is something that is desired or deemed absolutely necessary. Another assumption contained in the conception of law as a means of renewal is that law in the sense of legal rules or regulations does indeed function as a tool (regulator) or a means of development in the sense of channeling the direction of human activity in the direction desired by development and renewal (Kusumaatmadja, 1976)."

To realize the views above, the law as a social engineering tool in terms of the management and exploitation of mineral and coal mining can be implemented by:

a. Harmonization of laws and regulations

Harmonization of laws and regulations, especially those relating to mining investment, mining exploitation and industrialization of mining products as regulated in various laws and regulations, needs to be carried out so as to encourage industrialization or downstream mining so that the Indonesian people can benefit from each phase of increasing added value instead of only purification. Harmonization of laws and regulations is an effort to harmonize a statutory regulation with other laws and regulations, both higher, equal and lower and other matters outside the legislation (Widyantari & Sulistiyono, 2020).

b. Mineral and coal mining downstream incentives

To stimulate the downstreaming of mineral and coal mining, one of which can be encouraged through incentives, especially those related to technology transfer and tiered according to the value channel phase, the further downstream the better the incentives can be, in the form of tax incentives and ease of doing business.

c. Accelerating the Transition of Coal Energy to Renewable and Renewable Energy

Indonesia has a large potential for new energy and renewable energy. Based on data from the Ministry of Energy and Mineral Resources, Indonesia has new and renewable potential, namely solar energy which has a potential of 3,295 GW, hydro energy has a potential of 95 GW, bioenergy energy has a potential of 57 MW, wind/wind energy has a potential of 155 MW, Geothermal energy has a potential of 24 MW, seawater energy has a potential of 60 MW while the amount that has been utilized is 0.3% of the total potential. The potential for new and renewable energy in Indonesia can certainly be maximized in its utilization by reducing the exploitation of mineral and coal mining and controlling it. The acceleration of energy transition from fossil energy to new and renewable energy is a consequence to cover the lack of energy use from fossils.

d. Fossil Energy Charges and the development of New Energy and Renewable Energy

One of the main energy sources in Indonesia is coal which controls more than 50% of the raw materials for energy consumption, especially for Steam Power Plants (PLTU). Coal as fossil energy is of course limited and is a must to make the energy transition from fossil energy to rock and renewable energy. Energy transition from fossil energy to renewable energy is still slow, in detail the national energy mix in 2021 consists of coal with a share of 38.0%, oil 31.2%, natural gas 19.3% and NRE 11.5% This is still below the target for the renewable energy mix in 2021, which is 14.5%. To encourage the energy transition from fossil energy to new energy and renewable energy, it is necessary to have incentives sourced from levies on mineral and coal exploitation.

CONCLUSION

The decision of the Constitutional Court Number 111/PUU-XIII/2015 and the ideas of Moh. Hatta regarding Article 33 paragraph (3) of the Constitution of the Republic of Indonesia interprets if "controlled by the state" the state functions to carry out policies (beleid) and management

actions (bestuursdaad), regulation (regelendaad), supervision (toezichthoudensdaad) but also management (beheersdaad) and all of them are carried out in an integrated manner. The whole is not only partial, therefore the mandate of the state constitution must be dominant, including in the management of mineral and coal mining, in this case it does not mean that the Indonesian people reject foreign investment, but there is a need for a new scheme, one of which is a Joint Venture where the shareholder is 51% or more. Owned by the government or its representative, in addition to carrying out the mandate of the Constitution, this is to regulate and optimize mining results by downstreaming and reducing the exploitation of mineral and coal mining which has an impact on many aspects, including the environment.

One of the consequences of this policy is the reduction in energy supply sources from coal. Therefore, it is necessary to accelerate the energy transition from fossil fuels to new and renewable energy, to encourage things that lead to the main policies, namely 1). The policy of domination by the government or its representatives in the upstream mineral and coal mining sector, 2). Establishing a new scheme for the management and exploitation of mineral and coal mining through a Joint Venture agreement between entrepreneurs and BUMN, 3). Acceleration of energy transition from energy sourced from fossils to new and renewable energy, 4). Establishing a levy management agency to encourage the acceleration of the energy transition, 5). Encouraging the downstreaming of mineral and coal mining by providing incentives and facilities for investment.

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