

Legal Politics of Mineral and Coal Mining Permission Regulation in Protection Forest Area that Lies on the Conservation and Sustainable Principles in Indonesia

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ABSTRACT

Forest in its juridical conception formulated on article 1 paragraph (1) Law number 41 year 1999 on Forestry, "Forestry means a system of management pertaining to forests, forest area, forest products to be undertaken in an integrated way". As an ecosystem, Indonesia forest not only consists of natural resources like wood, but also it consists of non wood resources such as flora and fauna. Amazingly, in some part of the forest area, there are many high valuable mining material, and with this kind of various mining material and various volume in many area in the forest, has place forest in a strategic position in national development context. In its development, there is national development demand, where forest area not only use as forestry sector development, but it also uses for other forestry sector, such as mineral and coal mining

Keywords: Legal politic, regulation on mining permission regulation, protection forest area, conservation and sustainable principles

INTRODUCTION

Forest as a gift and mandate from God Almighty bestowed upon Indonesia must be consider as precious natural resources, yet within this embodiment of gift, must be use in a good purpose, in order to praise for God Almighty gift. In Indonesia, up to 2012 Indonesia forestry and water area width cover ±134.275.567,98 ha, with the width of forestry area as it os based on Landsat satellite imagery interpretation as 98.56 million ha or 52.4% from Indonesia entire territory.

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As an ecosystem, Indonesia forest not only consists of natural resources like wood, but also it consists of non wood resources such as flora and fauna. Amazingly, in some part of the forest area, there are many high valuable mining material, and with this kind of various mining material and various volume in many area in the forest, has place forest in a strategic position in national development context, so in it regulation refer to the ideological control of management and use of natural resources as reflected in Article 33 paragraph (3) 1945 Constitution : The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people.

Above regulation is goes along with article 4 paragraph (1) Law number 41 year 1999 on Forestry: "All forests within the territory of the Republic of Indonesia including all the richness contained therein are under the state's control for people's maximum welfare."

In its development, there is demand of national development, where forestry area not only use as forestry sector development, but also other non forestry sector that has strategic purpose that use to fulfill the demand of forestry area for the purpose of production and protection

function as it is regulates in article 38 paragraph 1 Law number 41 year 1999 on Forestry: “Use of forest area for development needs for non-forestry purposes can only be made in production and protection forest areas.”

The next issue regulates in article 4 paragraph 2 Ministry of Forestry Regulation number P.18/Menhut-II/2011 on Guidelines for forest use, including for the purpose of religion, defense, mining, electricity and installation of renewable energy technologies, the development of telecommunications networks and so on, in which the most dominant is currently mining activity. Conversion of the forest area is allowable by Law, since it is regulates in article 19 paragraph 1 Law number 41 year 1999 on Forestry: Government shall stipulate and maintain the adequacy of forest area and forest cover for each watershed and or island in order to optimise the environmental, social and economic benefits of local communities. But the conversion of the forest area must not conduct in uncontrollable way, if the conversion of the forest area has an important impact and may bring wide affect and has strategic value, it must assign government with the approval of House of Representatives.

What means by important impact, wide scope and strategic value are related to the changes that has impact on biofisic condition such as climate change; ecosystem and water flow disturbance and social society impact toward nowadays generation and future generation, yet in its fact there are lot of protection forest area use as mining activity.

Protection forest based on article 1 paragraph f Law number 41 on 1999 on Forestry said “Protection forest means a forest area having the main function of protecting life-supporting systems for hydrology, preventing floods, controlling erosion, preventing sea water intrusion and maintaining soil fertility.” Related with the use of protection forest, based on article 26 paragraph 1 Law number 41 year 1999 on forestry: Use of protection forest can be in the form of utilizing its area, environmental services, and collection of non-timber forest products

Along with the implementation of decentralization principle through local autonomy related with natural resources management, include also forest has show that some part of the management system is handle to the local government, as it is regulates in article 2 paragraph 2 Law number 32 year 2004 on Local Government “The regional administrations as meant in paragraph (1) shall govern and manage administrative affairs on their own in accordance with the principles of autonomy and assistance task”. Along with above regulation, related with local government authority in natural resources include also forest also regulates in article 66 Law number 41 of 1999 on Forestry: n implementing forest administration, Government shall delegate parts of authorities to local government. Delegation of part of authorities as referred to in paragraph (1) shall be intended to improve the efficiency of forest administration in the framework of local autonomy.

Handle of above authority is by implementing operational forest management. such as procedures and organizational structure, mechanisms of accountability, management and control system.

Forest damages are an unpleasant fact for Indonesia, since forest itself consider as an invaluable resources. Yet, mining is considered as the ringleader of environment damage includes also deforestation.

The applicative of article 38 paragraph 4 Law number 41 of 1999 on Forestry: Open-cast mining is prohibited in protection forest. Yet this regulation considers bringing loss for the mining investor in Indonesia. Some of the big mining factory has invest in protection forest before the establishment of Law number 41 of 1999 on forestry, such as PT Freeport Indonesia and International Nickel Indonesia (both of them belong to US private). This

condition has made legal uncertainty in mining area of forestry area, since many investors has permission or agreement before the establishment of Law number 41 of 1999 on Forestry. This condition has put government in a difficult situation to develop investment climate. Yet, to avoid excessive demand on international arbitration and to provide legal certainty to invest in Indonesia, the former president Megawati established Perpu No 1 of 2004 on the amendment of Law number 1 of 1999 on Forestry. This Perpu establish with Law number 19 year 2004 on the establishment of Perpu number 1 of 2004 on the amendment of Law number 1 of 1999 on Forestry.

The amendment that has made in Law number 41 of 1999 on forestry is by submitting new regulation on closing section. The new regulation is in article 83A and article 83B, which are:

Article 83A: All permits or agreements in the field of mining in forest areas which have existed prior to the enactment of Law No. 41 of 1999 on Forestry shall remain valid until the expiry of license or agreement granted.

Article 83B: Further implementation of the provisions referred to in Article 83 A determined by the Presidential Decree.

The Presidential Decree strengthened again with the establishment of the PerMen. P. 12 of 2004 as a implementation rule Law No. 19 Year 2004 concerning Stipulation of PP Law No.. 1 of 2004 on the Amendment of the Law No. 41 of 1999 on Forestry that only mention of “mining in protection forests allowed for (thirteen) 13 companies. So as if to 13 (thirteen) the company may conduct an open pattern mining in protection forests area, whereas according to Article 38 paragraph (4) of Law 41 of 1999 on Forestry clearly prohibits mining activities as an open pattern in protected forests . Supposedly, that provision reads 13 (thirteen) allowed the company to continue its mining operations in protected forests until the license expires.

Even with the establishment of Law number 19 year 2004 has been submitted for material exam to Court Tribunal by environmental protection actors. Yet, Court Tribunal in its Judicial Review verdict on Law number 19 year 2004 reject the submitted case and stated that Law number 19 of 2004 still remain in force and only set of 6 (six) of the 13 mining companies (thirteen) mining companies that may conduct open-pit mining in protected forests.

It is clear that Law number 41 of 1999 on Forestry jo Law number 19 of 2004 on the stipulation of PerPu number 1 of 2004 on the amendment of Law number 41 of 1999 on forestry should not applied in a retroactive related with mining restriction in protection forest area. Companies that have permission to mine in protection forest still allowed to continue mine until the pattern no longer open, but it must be closed

Legal Politics in the Management of Implementation of Permission in Welfare State Perspective

Legal state that adopted by Indonesia is substantive state law that also called the modern welfare state. Goals to be achieved by Indonesia is the realization of justice and prosperous society both spiritually and materially based on Pancasila , as well rule of law that has independent characteristics. Independent characteristic can be seen from the self reliance and state law pattern that adapted with Indonesia condition with Pancasila as the benchmark. In Pancasila state law, the purpose of government objective is broader, which is related with the obligation to participate in all sectors of living and livelihood.

The consequences of state liability on all sectors of life and livelihood show state responsibility for the welfare of the people. Muchsan who use the term modern legal state / material states, stated the functions or duties of Indonesia:

1. Defense, security, and protectional function. What means by this function is the function of protection of life , property and other rights in accordance with that stipulated in the legislation;
2. Welfare function, belong to social service and social welfare , which is obviously all activities aimed at the realization of welfare and social justice for all of Indonesian people .
3. Education function, including general illumination tasks , nation , and character building , cultural enhancement;
4. Peace and human welfare function in a broader sense

Based on the legal perspective, the implementation of licensing based on the theory of modern legal state (democratic legal state) which is a blend of the concept of rule of law (rechtstaat) and the concept of the welfare state. State law is simply the state that put the law as the highest reference in the administration of state or government (rule of law). According to Vesteden opinion, what means by supreme law implies:

1. An action is only valid if performed by or under the rules of a particular law (legality principle). Law provisions can only ruled out in terms, if public interest really ask for the application of a rule of law that may violate the principle of natural justice in society;
2. There is no guarantee that who protects the rights of every person both has human and non-human nature from government action or other parties.

In a State law any state or government activities shall be subject to the legal rules that guarantee and protect the rights of its citizens, both in the field of civil and political as well as in the fields of social, economic, and cultural. In other words, the rule of law is placed in the administration of state and government to organize a peaceful society, fair and meaningful. Therefore any state or government should be considered as a form of organization of public interest (public service) that emanated from their rights that must be served and protected, so the develop concept of rule of law are always associated with concept of welfare state.

The concept of the welfare state itself puts the role of the State not only confined merely to maintain order, but the state also possible to participate in all aspects of community life. The purpose of the State in the concept of the welfare state is nothing but the law is for the welfare of every citizen. Based on these objectives, State is required to participate in every aspect of community life. This is consistent with the basic idea of the purpose of the State, as outlined in the Preamble of the 1945 Constitution.

State Sovereignty above Mining Material

Article 33 paragraph 3 1945 Constitution mentioned “The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people. “State has absolute sovereign nation over natural resources wealth. Used to the greatest benefit of the people understood as the legitimate ownership rights over natural resources are the people of Indonesia. The second meaning is unity. State tenure is an instrument, while the greatest benefit of the people is the ultimate goal of the management of natural resources.

Indonesia's natural wealth belongs to the people who are authorized to state mandated managed to achieve the goal of the state of Indonesia. As a representation of the State Government granted the right to manage (rights management) of natural resource wealth that is enjoyed by many people who is equal and equitable. Furthermore, the prosperity of the people is the spirit and ideals of the welfare state and should be fulfilled by the Indonesian government. Natural resource management is one of the instruments to achieve.

In accordance with State development policy as stipulated in Law No. 17 of 2007 on the Long Term Development Plan (RPJP) from 2005 to 2025, it appears that the purpose of the construction of phase II (2010-2014) devoted to many matters related to environment and natural resources. Moreover, it should not set aside to relate with human resources, defense and state security, as well as law enforcement.

Brundtland identified several critical issues that need to be used as a basis for environmental policy concept of sustainable development, namely: (1) To encourage growth and improve the quality, (2) Obtain staples supply on jobs, energy food, water and sanitation, (3) Ensure the population growth rate that support sustainability; (4) Conducting conservation and resource capability, (5) orientation technology and managing risk oriented; (6) Integrate environmental considerations in economic decision-making process.

As it is rule , the use of protected forest areas for mining activities subject to the approval of the Minister of Forestry in the form of a license or permit activities protected forest area for the land use function with compensation . The goal is clear, which is to restrict and regulate the use of protected forest areas for mining activities. The ministerial approval applies only to the 13 licenses or agreements in the name of mining and locations which are listed in the annex to Presidential Decree. 41 of 2004 although later in the Decision of the Constitutional Court regarding No.003/PUU-III/2005 judicial review No. 19 Year 2004 on the Establishment of Regulations No. 1 of 2004 only 6 mining companies that are still in the stage of feasibility studies and exploration stage. However, when entering the stage of exploitation, it shall be subject to the provisions of Article 38 paragraph (4) of Law No. 41 of 1999 on Forestry, by the exploration and exploitation licenses do not constitute as a single regulation. In the licensing process, the Department of Forestry stick to the sustainability principle, and will tighten the possibilities of protected forest damage due to mining activities. Activities to be carried out in the field before the exploration are the assessment of the work area in accordance with the mineral deposits that are economical to mine. So after appraisal work area by the MoF, estimated allowable area to be explored and exploited will be much smaller than that which requested. This assessment work area to minimize the possibility of damage to protected areas as a result of mining activities.

Public Policy in Mining Field

The existence of mineral and energy resources in the earth center can only be used for the welfare of human life through mining activities. Exploration phase alone is the economic multiplier effect in the form of employment opportunities, poverty reduction and the new tax sources for infrastructure improvements. If mining is conduct in rural areas, automatically it will realize territorial development and infrastructure provision, especially for areas not covered by government development.

In general it can be said that the presence of the mining industry in Indonesia is still a priority for the national and regional economy. Mining has provided an impact to increase gross revenues, improve household incomes, job creation, and fiscal contribution to central and local government.

Granting mining license is often considered as a way to maintain investment. Funds invested in the mining industry in this value are very large, and believed open economic opportunities for community in mining site area. There is another lure of the mining industry which is a large funding source of income as well as various types of taxes to the country's development. Various reasons for foreign exchange earnings, substantial investment that will be planted, improved bilateral relations with the countries of investors, as well as the interest of national development is the main attraction owned by the mining sector. Basic public policy in the field of mining is Article 33 paragraph (3) of the Constitution of NRI 1945; the implementation may be considered the following matters:

1. We will not invite foreign companies if the Indonesian people do not dare to take risks or do not master the technology for the mining industry. The reason is if the funds are issued by foreign businessmen, of course, the funds will back to the country where the entrepreneurs come from, but it would be more profitable if conduct by Indonesian businessman;
2. If the risk is not great as well and the problem is only mastered the technology capital, the funds can collected;
3. Both aspect of physical and social environment must be considered in every mining contract mining and mining employers must provide costs for addressing environmental problems;
4. If the sharing contract production for general mining is more profitable than work contract (with the understanding also does not make the contractor a deterrent), then surely it will be more favorable for public need to be applied.

Yet, the mining operations are expected to boost economic activity in order to achieve the welfare of the community, as a function of economic activity which is to utilize the environment for the welfare of society.

Observing the fact that the demand for minerals continues to increase for the foreseeable future, then the predicted quantity of mining operations will increase as well. It departs from the fact that the world's electricity needs are supplied almost 65% of mining products such as oil, gas and coal. Need for electricity in the Indonesia supplied 80% of the mining products such as geothermal, oil, gas and coal.

Related with the licensing of the forestry sector, in order to obtain optimal benefits from forests for public welfare, principally all forests and forest areas can utilized with regard to the nature, characteristics, and its vulnerabilities, and not allowed to change the function anyway. That means uses of forest must be adapted to the shape of the function, for example protection functions.

Utilization of forest do with licensing, in addition to have the right to utilize therefore the permit holder have responsibility for all sorts of disturbances on forests and forest areas entrusted to the license holder. Use of forests for the benefit of the people's welfare should remain positive based on the applicable legal framework. Yet, it cannot conduct without the use of forests based on the applicable law and applies to anyone. Utilization of forest for outdoor activities such as mining forestry activities carried out by coordination between relevant agencies, without set aside the competence of forest area itself.

For the special purpose of forest areas for mining interests, principally, tLaw No. 41 of 1999 on Forestry regulate banning on mining activity in pattern open-pit mining except it is conduct on forest production and must meet specific requirements, as stipulated in Article 38

paragraph (4) of the Forestry Law. That is, beyond the interests of forestry development that can be implemented in the area of protection forests and production forests as defined selectively and prohibited from engaging in activities that could result in serious damage and loss of function of the forest itself.

CONCLUSION

Legal politic on the management of mining permit arrangements mining in protection forest areas has ignore conservation and sustainability principle, which are:

To assist and provide security or legal certainty toward mining companies to invest in Indonesia, considering the mineral and coal mining activities that have existed in the protection areas prior to the enactment of the provisions of Article 38 paragraph (4) of Law No. 41 of 1999 on Forestry Law jo Law no 19 Year 2004 concerning Stipulation of Government Regulation in Lieu of Law No. 1 of 2004 on the Amendment of the Law No.41 of 1999 on Forestry, as well as mining has important and strategic role in implementing sustainable development; Anticipating the economic burden the State related with the demands of the mining businessmen through international arbitration, and to gain the confidence from investors.

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REGULATION

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