Journal of Law, Policy and Globalization
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.79, 2018
www.iiste.org

Law Politics of Coal, Mineral and Mining Laws as the Embodiment of Environmental Justice

Hudriyah Mundzir[1*] Sudarsono[2] Rachmad Safa'at[3] Istislam[3]
1.Doctoral Program of Law Science, Faculty of Law, Universitas Brawijaya, Indonesia
2.Promoter, Faculty of Law, Universitas Brawijaya, Indonesia
3.Co-Promoter I, Faculty of Law, Universitas Brawijaya, Indonesia
4.Co-Promoter II, Faculty of Law, Universitas Brawijaya, Indonesia
Faculty of Law, Universitas Brawijaya, Indonesia
Jl. MT. Haryono 169 Malang 65145

Abstract
Law politics is a fundamental policy determining the goal of nation which will be implemented by constructing new act or by replacing the old ones. Law politics of coal, mineral and mining act supporting national interest might raise different legal interpretation on coal and mineral mining regulation. Concept of natural resources occupation by the state turns to be unclear. On the other side, article 3 of verse (3) states that natural resources occupation by the state should aim at people prosperity. Therefore, there should be proper reinterpretation on the concept of state occupation of natural resources which is in line with the development of law politics of coal, mineral and mining act. Furthermore, it should also be in line with on the spirit of Chapter 33 of Indonesian National Regulation of 1945 as philosophical foundation of law politics of coal, mineral and mining for environmental justice.
Keywords: Law Politics, coal and mineral mining, environmental justice

1. Introduction

Term and discourse on "green constitution" was an attracting phenomenon during 1970-s. It is used to describe the connection between certain concepts with natural protection. Green constitution is also used to refer to political party namely Green Party founded to give stronger political pressure for government in order to raise people's awareness on the significance role of nature. Green policy integrated in certain acts which are usually called as green legislation[1] and it is called green constitution if the norm of law is adopted in national constitution. Several academic reviews states that Portuguese Constitution of 1976, Spain constitution of 1978, Poland Constitution of 1997 and Ecuador constitution of 2008 are called green constitution. The latest green constitution is French constitution integrating the principle of natural preservation in 2006 by adopting Chapter of Environment of 2004 into the preamble of prevailing constitution in French. In addition, Ecuador constitution of 2008 is really "green" meaning that it shows strong emphasis on nature protection.

The aim of green constitution is shown in National Act no 32 of 2009 on The Protection and Management of Natural Environment functioning as reference for more specific act such as mining aact, natural resources act and other natural protection acts. Therefore, Act of Protection and Management of Natural Environment is termed as "umbrella act" or "umbrella provision"[2].

Protection and management of environment aims at ensuring fundamental right of environment to realize sustainable development of Indonesia. It is because Indonesia is one of countries with a lot of natural resources. There are two types of natural resources namely renewable and unrenewable resources. Gold, copper, silver, coal, diamond, nickel, manganese and others are unrenewable natural resources. In addition, water, plantation and others are renewable one[3] .

Unrenewable resources is one of the asset with commercial value for Indonesia. To improve the commercial value of unrenewable resources, Indonesian government conducts mining activities which is constructed as series of activities. Mining is some or all stages of activities to study, manage and mine mineral or coal including general study, exploration, feasibility study, construction, mining, processing, purifying, transporting, selling activities and other post mining activities. Thus, mining activities include (1) research, (2) Processing and (3) managing activities[4].

Mining activities are conducted to make use of natural resources to achieve economic development. In fact, the use of natural resources has neglected the principles of fairness, democracy and sustainability of natural

[1] Jimly Asshiddigie, *Green Constitution* Nuansa Hijau Undang-Undang Dasar Negara Republik Indonesia 1945, Jakarta: PT RajaGrafindo Persada, 2009, hlm. 4.
[2] M. Hadin Muhjad, Hukum Lingkungan Sebuah Pengantar untuk Konteks Indonesia, Yogyakarta: Genta Publishing, 2015, hlm. 5.
[3] Seperti yang ditulis dalam paper I Nyoman Nurjaya di The International Seminar in Environmental Law Development and Reform of Asian Countries, Canada, and Australia : A Comparative Perspective pada tanggal 25-27 Februari 2010 di Malang hlm 1.
[4] Salim HS, Hukum Pertambangan Mineral dan Batubara, Jakarta: Sinar Grafika, 2012, hlm. 15.

resources. Therefore, it will surely damage and degrade either quantity or quality of our natural resources[1].

We acknowledge that management system of mining in Indonesia is still pluralistic in nature due to various types of mining contracts or permits in mining activities. For instance, there is a prevailing contract based on national act no 11 of 1967 on Basic Requirements of Mining and there is also mining permit which is based on national act no 4 of 2009 on Mineral and Coal Mining.

One of the fundamental change in National Act no 4 of 2009 concerns with utilization system of mineral and coal mining. National Act no 11 of 1967 requires contract system in mineral and coal utilization mining either in the form of Contract of Work or Coal Mining Business Contract (PKP2B). Law no 4 of 2009 requires the use of mining license in the form of Mining Business License, Public Mining License and Special Mining Business License. Article 1 no 7 of Law No 4 of 2009 states that the aims of Mineral and Coal Mining Law is to give protection on Indonesia Natural Resources.

On January 2014, government declares government regulation no 1 of 2014 outlining that mining company with no smelter is forbidden to export their product. It results in domino effect in mining industry which is related to mining activities. Mining companies are forced to do massive lay off for their operators and other contract workers. Companies doing business in mining industries such as car rental companies, equipment rental companies, ship rental and others are also affected.

2. Objectives

The content of this journal aims at reviewing possible implications of policies concerning protection and management of environment and coal and mineral mining. It also tries to formulate law politics to realize green constitution.

3. Study Method

Study method used was normative research with constitutional and conceptual approaches. Legal analysis was done in prescriptive manner with deductive-inductive reasoning toward legal regulation using legal interpretation.

4. Study Results

4.1 Definition And General Characteristics Of Coal And Mineral Act

Indonesia is well-known for being rich in mineral content which is ready to be exploited. Thus, mining law is one of fast-developing object of law study in Indonesia. It is shown by various number of regulation on mining[2]. During 1960-s, prevailing regulation was Law no 11 of 1967 on Basic Principles of Mining and during 2000's or 2009, government of Indonesia declares Law no 4 of 2009 on Coal and Mineral Mining with the approval from People's Representatives.

In his book entitled "Coal and Mineral Mining Act", Salim states that the terms mining act was derived from english terms namely mining law. It is called *mijnreght* in Ducth and *bergrecht* in German. Johan Kuyek stated that "Mining law is: "to protect the interests of the mining industry and to minimize the conflicts between mining companies by giving clarity to who owns rights for mining mine. They were never intended to control mining or its impact on land or people. We have to look to other laws to protect these interest"

It means that mining law is a set of rules to protect nation interest related to mining industry and also to prevent conflict among mining industries as well as to give guidance for those having rights for mining business. The laws are not intended to control mining activities or their impact to people's land and right. We should view the law as a means to protect people's interest in mining business.

Based on the definition, we are able to analyse the goals of mining acts. The goals are to protect interest of mining stakeholders, to prevent or minimize conflict between mining industries and surrounding people. Salim HS provides other definition on mining acts[3]. They are "all law maxims regulating state authority in managing mining materials (mine) and to rule the relation between the state and people and/or legal entities in managing and making use of mining material (mine)".

The term coal and mineral mining law are derived from English translation. In Dutch, it is called mineraal-en kolenmijnen recht and in German, it is mineral und kohlebergbau gesetz. There are four aspects containing in Coal and Mineral Mining Law namely law, mining, mineral and coal. The law is a set of rules regulating the relation between the state and its people, between men and their fellows and mean with the environment. Mining is "some or all stages of activities to study, manage and utilize mineral or coal including general investigation, exploration, feasibility study, construction, mining, utilization and purification, transportation and sale and also after-mining activities".

[1] I Nyoman Nurjaya, Pengelolaan Sumber Daya Alam dalam Perspektif Antropologi Hukum, Malang: kerjasama Program Magister Ilmu Hukum Program Pascasarjana Unibraw, ARENA HUKUM Majalah Fakultas Hukum Universitas Brawijaya dengan PENERBIT UNIVERSITAS NEGERI MALANG, 2006, hlm. 47.
[2] Gatot Supramono, Hukum Pertambangan Mineral dan Batubara di Indonesia. Jakarta: Rineka Cipta, 2012, hlm. 1.
[3] Salim HS, Hukum Pertambangan di Indonesia, Jakarta: Rajawali Pers, 2010, hlm. 8.

Based on the definition, mining is viewed as series of activities. Those include (1) research, (2) management and (3) utilization. Mineral is inorganic compound formed in nature. Therefore, we may conclude that the definition of coal and mineral mining laws as follows:

"Law maxims on relation between state and mineral and coal and between state and legal subjects which are either individual or legal entities in utilizing coal and mineral".

There are two types of relation stated in coal and mineral mining laws. Those are

1. Laws on relation between the state and coal and mineral; and
2. Laws on relation between the states and legal subjects.

The first type of relation implies that the State has authority to manage the utilization of coal and mineral. Therefore, with the approval of People's representatives, the state composes and declares legislations on coal and mineral. One of them is Law no 4 of 2004 in Coal and Mineral Mining and all related legislation. The philosophical foundation or legal consideration for law no 4 of 2009 on Coal and Mineral Mining is as follows

"coal and mineral in mining jurisdiction of Indonesia is unrenewable natural resources given By Almighty God and they should be utilized for the prosperity of people. Therefore, they should be utilized by the state in order to create added value for national economy resulting in equal prosperity for all people of Indonesia".

There are three crucial elements contained in philosophical foundation or legal consideration of Law No 4 of 2009. Those are the existence of coal and mineral resources, state ownership, and the goal of state ownership. In Indonesia, the state has authority to own coal and mineral mining. The meaning of state ownership[1] is that :" the state is free or has full authority (vooldige bovoegdheid) to release regulation to manage (regelen), take care (besturen) and to monitor (toezichthouden) the utilization of national natural resources".

The formulation of state-ownership might be found in the decision of Constitutional Court no 002/PUU-1/2003 page 208-209, declaring that: "the definition of "owned by the state" should cover all possible meaning of state ownership that is based on and derived from people sovereignty for all "land and water and other natural resources" of Indonesia".

It also implies the definition of public ownership for all related natural resources. Based on Indonesian Constitution of 1945, people of Indonesia give mandate to the state to make policy (beleid) and to manage (bestuursdaad), regulate (regelendaad), utilize (beheersdaad) and monitor (toezichthoudensdaad) the Indonesian natural resources for the maximum prosperity of people of Indonesia. The state authority includes to make policy (beleid) and to manage (bestuursdaad), to regulate (regelendaad), to utilize (beheersdaad) and to minitor (toezichthoudensdaad).

The function of management by State is reflected from the authority of the state to release and withdraw license facilities (regelendaad), to license (lisentie) and to concess (consessie). Regulatory function of the state (regelendaad) is reflected from state authority to compose regulation together with People's Representatives. Utilization function is exerted through share-holding mechanism and/or direct involvement in State-Owned Enterprise or Legal entities through which the government make use of natural resources for the prosperity of Indonesian People. In addition, state monitoring function (toezichthoudensdaad) aims at ensuring that the utilization of natural resources is for the prosperity of people of Indonesia.

Essentially, the goal of state ownership for natural resources is to improve national economy in order to achieve equitable prosperity and welfare of Indonesia People. On the other side, the aims of coal and mineral utilization are to ensure the effectiveness of implementation and control of mining business which are efficient, competitive, effective and to ensure the sustainable and environmentally-sound benefit of coal and mineral mining, to ensure the availability of coal and mineral as raw material and/or as energy source for domestic need, to support and develop national capability to compete at national, regional and international level and to improve local, regional and national income level and to create massive job vacancies for people welfare and to make sure legal certainty in coal and mining business.

Counties such as Philippines, Ghana and China has crucial role in managing and utilizing natural resources because they are the owner of their natural resources. The second element is coal and mineral mining law regulating the relation between the state and legal subjects. Coal and mining activities are not only conducted by the state, but it might give license to legal subject to conduct coal and mineral mining activities. Legal subjects might be divided into two namely men and legal entities. Legal subjects granted right to conduct coal and mineral mining activities are (1) individual and (2) enterprises either legal or non-legal ones. Legal entities might be in the form of Limited Companies, Cooperatives, Foundation, State-Owned Enterprises and regionally-owned enterprises. Furthermore, non-legal entities are CV and firm.

Coal and mineral mining has specific legal maxims. It is due to that the objects are specific and related parties have administrative relation. The objects of law review on coal and mineral mining laws are aspects related to coal and mineral mining. Mineral mining is mineral quarry in the form of ores or rocks. Ores are "group of minerals from which one metal or more might be produced economically in line with existing

[1] Abrar Saleng, Hukum Pertambangan, Yogyakarta: UII Press, 2004, hlm. 219

technology and condition". Coal mining is carbon deposit quarry in earth including solid bitumen, peat and asphalt rock.

Law principles of coal and mineral mining are stated in chapter 2 of Law No 4 of 2009 on Coal and Mineral Mining. There are seven principles. Those are principles of benefit, fairness, equitability, partiality on nation interest, participatory, transparency and accountability, sustainability and environmentally-sound.

4.2 The Implications Of Law No. 4 Of 2009 On Coal And Mineral Mining

Indonesia is well-known for its rich natural resources. There are two types of natural resources, namely renewable and unrenewable ones. Unrenewable natural resources are gold, copper, silver, coal, diamond, nickel, manganese, and others. In addition, renewable natural resources are water, plantations and others. Unrenewable natural resources are national assets with high commercial value for Indonesian government. To improve commercial value of unrenewable natural resources, Indonesian Government conduct mining constructed as series of activities.

Each legislation is formulated to regulate related aspects to be better and well-managed. It applies to Law no 4 of 2004 on Coal and Mineral Mining. Its aim is to protect interest of those related to mining industries and to prevent or minimize conflict between mining business and local people around the business. Policy to forbid raw material export is based on the seven principles. It gives crucial benefit for related parties such as mining business and the state because the values of raw mining material are improved. Export values of raw mining material are much lower than that of intermediate mining material (intermediate mining material is mining product that has been purified and processed). The policy is also considered to be fair and equal based on the interest of related parties (stakeholder). Government also gets income due to the increasing value of exporting mining product. Mining business will be encouraged to purify and process raw mining material and turn them into "intermediate" product or ready-to-use product. The policy to forbid raw material export also takes partiality principles into serious account. It aims at protecting nation interest. The partiality principles requires that in conducting mineral and mining activities, either regional or central government should put more emphasis on nation interest. It means that nation interest should be prioritized than that of investors. However, government are still required to pay their attention on investors' interest.

The implementation of participatory principles in coal and mineral mining do not reside only on the bestowal and holder of license only but also on surrounding people. They should take active participation on mining activities for instance by working in mining business as distributor or others. Transparency principle requires that the implementation of coal and mining activities should be transparent. It means that each information such as stages of mining activities and employee needs, should be delivered and socialized clearly and openly to related people.

Coal and mineral mining should be accountable to public by taking fairness and proper aspect into consideration. The accountability principle is closely related to rights of either regional or central government from coal and mineral mining. For instance, the holder of Special Mining Business License gives 1% of their profit to regional government and it should be made accountable to their people; in this case People's Representatives at regional or provincial level. Environmentally-sound and sustainable principle requires that economics, environment and socio culture dimensions should be well planned and integrated in all aspects of coal and mineral mining in order to reach current and future welfare for people. Thus, basically restriction of raw mining product export refers to coal and mineral mining principles and government gives tolerance for mining industries in implementing law No 4 of 2009 on Coal and Mineral Mining. However, the policy gives crucial impacts.

The policy of central government to forbid raw mining material export actually aims at improving domestic industries. Forbidding raw material export will create higher profit than exporting raw product because the value of raw product is much lower than that of processed product (processed and purified by smelter). The aim of export ban is to protect national interest and to ensure the raw material supply for domestic industry and to protect unrenewable Indonesian natural resources such as mining product. Regarding the implication of Coal and Mineral Law, Ministry of Energy and Mineral Resources stated that 185 companies has proposed for permit to build processing and purifying facilities of mineral (smelter) in Indonesia. Rudi Rubiandini, vice Minister of Energy and Mineral Resources stated that the number of proposals of building smelters have increased after the implementation of Minister Regulation no 7 of 2012 on The Improvement of Added-Value of Mineral Through Mineral Processing and Purification since May 6[1].

Coal and Mineral Mining Law as the embodiment of State goal basically aims at providing concrete added value for national economy in order to reach equitable prosperity and welfare for all people of Indonesia and at ensuring sustainable environment management to reach environmental sovereignty.

Though the government aims at creating added-value for national economy by forbidding raw material

[1] http://www.satyayudha.com/185-perusahaan-ajukan-izin-bangun-smelter/, diunduh tanggal 21 September 2014)

export, it still gives significant impact to various related stakeholder. In South East Sulawesi, 19 mining industries quit their operation due to the implementation of Law No 4 of 2009 on Coal and Mineral Mining that forbid the export of raw material mining

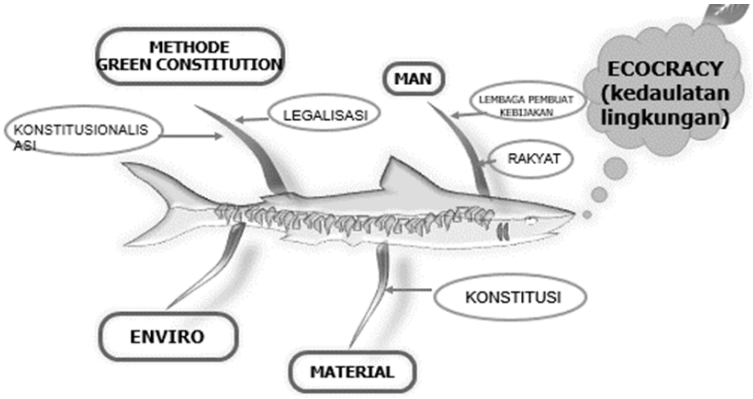
4.3 Politics Of Mining To Create Environmental Justice

The writer proposes the concept of ecocracy as environmental sovereignty to encourage green constitution. Ecocracy is an ecosystem in which a specific government bases their rule of governance based on principles of ecologically-sustainable development. Therefore, environmental law maxims are needed to strengthen prevailing democracy and state law and good governance.

Environmental Sustainable Development is proposed development paradigm in supporting ecocracy by emphasizing on three pillars for decision making for national development namely economic development, social development (especially for marginalized and vulnerable communities).

Therefore, strengthening constitutionalization of environmental law maxims is very crucial

Figur 1. Concept of Ecocracy Manifestation



Based on afore-mentioned discussion, constitutionalization of environmental law maxims is embodied in the form of state commitment. There are several levels of state commitment. Those are

1. Highest level category of commitment: acknowledgement of right for nature equipped by subjective rights and duty of the state in environment management. The proposed paradigm is ecocentrism.
2. High level category of commitment: acknowledgement of subjective right equipped by duty of the state in environment management as well as sustainable development namely environmental charter.
3. Adequate level category of commitment: acknowledgement of subjective right and duty of the state in environment management is stated in special chapter (it is not inserted or mixed with other fundamental rights) and it doesn't show the direction or pattern of development.
4. Moderate level category of commitment: it acknowledges the subjective rights without specifically acknowledges duty of state in environment management. However, it shows pattern and direction of sustainable development although they are not stated in special article and inserted in other fundamental rights.
5. Low level category of commitment. It refers to constitution which doesn't acknowledge environmental law maxims (subjective rights or duty of the state) or pattern and direction of development.

The conclusion that we might draw from the above discussion is that since the wide-spread of awareness on environmental protection, in many parts of the world, governmental policy on environment has undergone two stages of development, namely policy legislation stage and constitutionalization of environmental policy. Furthermore, upon the development of second generation or constitutionalization stage, three models or three developmental stages have come up. Those are (a) stage or model of formal constitutionalization such as French constitution and (c) third stage or structural model of constitutionalization such as in Ecuador. After reformation, Indonesian National Constitution of 1945 have also adopted principles of sustainable development and human rights on proper and healthy environment. Indonesian National Constitution has constitutionalized the policy of environment and sustainable development. Thus it might be termed as green constitution that should be taken into account and enacted in governance practice.

5. Conclusion

The export restriction of raw mining material gives positive and negative impacts. The positive impact is

improving commercial value of mining material. The negative one is that it creates economic turbulence because many mining industries quit their operation and lay off and others.

The recommendation proposed is by staging the development of environmental protection. They are policy legislation and constitutionalization stage, environmental policy stage, adoption of sustainable principle of development and guideline on human right for proper and healthy environment by Indonesian National Constitution of 1945 as well as constitutionalization of environment policy and sustainable development. Therefore, it might be referred to as green constitution that should be taken into account and enacted in governance practice.

References

Abrar Saleng, Hukum Pertambangan, Yogyakarta: UII Press, 2004.
Gatot Supramono. Hukum Pertambangan Mineral dan Batubara di Indonesia. Jakarta: Rineka Cipta, 2012.
Henry Campbell Black. Black's Law Dictionary Sixth Ed.. St. Paul Minn: West Publishing Co. 19900.
http://www.satyayudha.com/185-perusahaan-ajukan-izin-bangun-smelter/, diunduh tanggal 21 September 2014)
http://sinarharapan.co/news/read/32590/19-perusahaan-tambang-berhenti-beroperasi-di-sultra, diunduh 21 September 2014)Isnaini. (2014). Seberkas Diorama Hukum Kontrak. Surabaya: PT. Revika Petra Media.
Ismail Saleh. Hukum dan Ekonomi. Jakarta: Gramedia Pustaka Utama, 1990
Jimly Asshiddigie, Green Constitution Nuansa Hijau Undang-Undang Dasar Negara Republik Indonesia 1945, Jakarta: PT RajaGrafindo Persada, 2009.
Kamus Besar Bahasa Indonesia Edisi Kedua, Jakarta: Balai Pustaka, 1994.
Kamus Besar Bahasa Indonesia, Jakarta: Balai Pustaka, 1994
M. Hadin Muhjad, Hukum Lingkungan Sebuah Pengantar untuk Konteks Indonesia, Yogyakarta: Genta Publishing, 2015.
Paper I Nyoman Nurjaya di The International Seminar in Environmental Law Development and Reform of Asian Countries, Canada, and Australia : A Comparative Perspective pada tanggal 25-27 Februari 2010 di Malang.
Peter Mahmud Marzuki. Penelitian Hukum. Jakarta: Kencana, 2005.
Salim HS. Hukum Pertambangan Mineral dan Batubara. Jakarta : Sinar Grafika, 2012.
Salim HS, Hukum Pertambangan di Indonesia, Jakarta: Rajawali Pers, 2010.
Soerjono Soekanto & Sri Mamudji. Penelitian Hukum Normatif. Jakarta: Rajawali, 1985.