

4-30-2016

IN THE LIGHT OF ASEAN ECONOMIC COMMUNITY: THE PROTECTION OF MINING RESOURCES IN INDONESIA, DECENTRALIZATION SYSTEM AND THE ROLE OF GOVERNMENT POLICY

Indria Wahyuni

Follow this and additional works at: <https://scholarhub.ui.ac.id/ijil>

Recommended Citation

Wahyuni, Indria (2016) "IN THE LIGHT OF ASEAN ECONOMIC COMMUNITY: THE PROTECTION OF MINING RESOURCES IN INDONESIA, DECENTRALIZATION SYSTEM AND THE ROLE OF GOVERNMENT POLICY," *Indonesian Journal of International Law*: Vol. 13 : No. 3 , Article 5.

DOI: 10.17304/ijil.vol13.3.658

Available at: <https://scholarhub.ui.ac.id/ijil/vol13/iss3/5>

This Article is brought to you for free and open access by UI Scholars Hub. It has been accepted for inclusion in Indonesian Journal of International Law by an authorized editor of UI Scholars Hub.

IN THE LIGHT OF ASEAN ECONOMIC COMMUNITY: THE PROTECTION OF MINING RESOURCES IN INDONESIA, DECENTRALIZATION SYSTEM AND THE ROLE OF GOVERNMENT POLICY

Indria Wahyuni and Wilda Prihatiningtyas

Abstract

In 2015 Indonesia will facing Asean Economic Community (AEC) which open thekey for free trade among the Asean Countries. In response to this phase, Indonesia need to be prepared in many fields, one of them is the miningfield. As a country rich of natural resources, miningfield managementurgently need to have attention. With AEC there will be potential investment and flow of human resources, Indonesia must prepare themselveswithsufficient human resources, infrastructure and legal policy. Recent, thereare significant problems in mining field that comes from regulations,miningthat should be able to support and escalates the Indonesian prosperiety loosetheir function due to corruption. The ground of such condition is the overlapping regulations in the field, no harmonized regulation that ended tono accountable mining system in Indonesia. Different natural resources hasdifferent regulation that often does not correlate each other. Mining activities at least observed by three ministries namely Ministry of Energy and Mineral Resources of Republic Indonesia, the Ministry of Forestry, National Land Agency, it is become a big problem while issuing regulations related to mining. With implementation of decentralization system, local government also has authority in terms of managing mining activity in their area. The paper, furthermore, highlited aspects that need to improve intermsofuildinggoodmining system in Indonesia. This paper will ended with discussion and solution for aspects that the Local Government can take part and what kind of policy that they can made in order to protect the environment in their area, as well as to create sustainability mining for futher generation.

Keywords: ASEAN economic community, mining, descentralization.

I. INTRODUCTION

As a country rich in natural resources, the comprehensive management policy in this field is essential in order to maximize its potential to bring benefit for the Indonesian people. Such management policy is implemented through legal instruments. The government has the authority to manage resources and use them for the greatest benefit of the Indonesian people, as stated in article 33 paragraph 3 of Indonesia Constitution which states that:

* Indra Wahyuni, SH, LL.M. and Wilda Prihatiningtyas, SH, are lecturers of Airlangga University.

The land, water and natural resources within shall be under the power of the state and shall be used for the greatest benefit of the people.

Indonesia is rich in natural resources, one of those resources is minerals. This research aims to explore the subject of natural resources in terms of mining. In order to create an accountable mining system, the government needs to regulate it start from planning to evaluation through a comprehensive mining law.

There are many problems related to mining, one of those is the problem of accountability and the overlapping authority between ministers. The mining field straddles at least four ministries: namely, the Ministry of Natural Resources; Ministry of Land; Ministry of Environment; and Ministry of Forest; in which each of those ministries has issued different regulations in the mining field. Such conditions leads to overlapping regulation and a complex mining system.

The problem of synchronization of regulations also arise due to the implementation of decentralization in Indonesia. Decentralization has been implemented since 1903 with (*decentralization wet*) and has changed many times following the development of government and social conditions. Indonesia applies regional autonomy in which each of regional government (provincial and municipal) conduct their own domestic matters. This authority comes from distribution of authority between central and regional government that is based on decentralization principle. The regional autonomy regulated most recently by Law Number 23 year 2014 regarding Regional Government which was promulgated on November 2014 and which replaced its predecessor Law Number 32 year 2004. In terms of natural resources management there are significant changes between these laws. Law Number 32 year 2004 gave power to Regional Government to manage natural resources within their area by using the legal instrument of a Licence. This condition had a mostly negative result due to Government maladministration and the issuance of licences without any proper consideration. As the result of this condition, many regulations created by Local Government only focus on financial benefit without giving attention to the sustainable environment principle and the impact of their regulation on climate change¹.

¹ The issue of climate change has been substantial since, as developing countries as well as part of the world community, Indonesia faces the threat of climate change and

Each local government regulation created a different position regarding the division of power between local and central government in terms of mining policy. The problem became more complex due to this issue related to other field as well, such as land, forestry, and environment. The mining policy keeps changing following the changes of the government and no parameter has been sets to regulate the position of local and central government in relation to mining.

These conditions resulted in a dispute between local and central government about the authority to manage the mining activity in their area. A clear example of this is the case of Freeport in Papua, where local community could not gain many benefits from the mining activity in their areas and yet environmental damage occurred. In the light of implementation of Asean Economic Community in 2015 (AEC), this issue of creation good mining policy is an important one, AEC will open the key for free trade in Asean region including the flow of foreign investment as well as human resources. It requires, therefore, comprehensive mining law regime in Indonesia to protect and uphold the rights of the Indonesian people to get benefit from mining results and to create sustainability mining for future generations.

Looking at the problem of mining law arising in Indonesia, this research is significant in addressing a problem of the implementation of an accountable, and synchronized mining system in Indonesia. The strength of this research it will be to integrate two main perspectives, namely decentralization and mining law it self. To date, there is lack of research looking at mining law, from the perspective of the decentralization system implemented in Indonesia. Another strong character of this research will be to discuss the root of mining problem in Indonesia, which is complexity as a result of overlapping regulations. This is the source of other related problems. By having good and harmonious regulations may be possible to create good and accountable mining systems as well as protection from other negative factors such as corruption. This paper rose from the idea of doctoral research that will be conducted, it will discuss about the authority in mining field that owned by the local government.

already feels its impact.

II. DECENTRALIZATION

Indonesia Constitution has lined the unitary system in Indonesia and how the power should be divided. According to article 18 paragraph (1), stated that “Indonesia, as unitary state, divide into province, in which those province divide into province and municipal”. This article reflect the system of “tiers of government”, that in Indonesia there are three type of government levels, namely the central Government, the provincial government and the municipal government.

According to article 1 point 8 Law Number 23 year 2014 defines decentralization as “the transfer of power (in terms of government affairs) from the central government to autonomous area based on autonomy principle”. The meaning of autonomous area in that article is the local government that has been given power (by attribution principle) in order to manage their area. Autonomy in this context it does not means the freedom power without limitation, but it limits by the regulation. The supervision mechanism conducted from the government one level above (supervision of municipal by the province government and supervision of the province government by the central government. Along with this system there are several affairs that given by the government to the local government.

III. THE DISTRIBUTION OF POWER IN MINING MANAGEMENT ACCORDING LAW NUMBER 22 YEAR 1999 REGARDING LOCAL GOVERNMENT

Law Number 22 year 1999 regarding Local Government was stipulated at the era of former President Megawati. The legal politics of this law is freedom after the President Suharto’s time. In the President Suharto’s era of 32 years his leadership, the local government ruled by centralistic system. The spirit of this law is “freedom”. Like water tap that closed so many years and finally opened by the fall of President Suharto. The distribution of power based on this regulation is stipulated in Article 7, stated that “the authority of local government includes the authority in all government fields, exclude authority in foreign policy, defense, security, court, monetary, fiscal, religion and the authority in

other fields. The meaning of other fields includes the use of natural resources². This concept has been derived in the Government Regulation Number 25 year 2000 regarding the government authority and the authority of province as autonomy area. In detail, the Government authority based on this regulation, consist, namely:

- A. Policy set up in intensification, diversification, conservation, and energy price
- B. Policy set up in national /regional transmission line for electricity, and natural gas;
- C. Policy set up the supervision standard of geological natural disaster;
- D. Policy set up the standard of general research and management of natural resources, mineral, and natural gas, as well underground water;
- E. Policy set up the criteria of working area , includes electricity distribution and mining;
- F. Policy set up the availability of electricity based fare , oil fuel, gas fuel, and natural gas within the country;
- G. Policy set up of basic geological survey and underground water, thematically map, and mineral and energy resources inventory as well as mitigation of geological disaster;
- H. Regulation in electricity generator;
- I. Giving main business license of oil and gas, start from exploration to the distribution of oil and natural resources with within cross province line
- J. Giving the main business license for electricity generator as well as nuclear electricity generator which in the national list; from this regulation, the power to issue license on the central government in the form of main license,

IV. THE DISTRIBUTION OF POWER IN MINING MANAGEMENT ACCORDING LAW NUMBER 32 YEAR 2004 REGARDING LOCAL GOVERNMENT

Law number 32 year 2004 was promulgated in 2004 when President Susilo Bambang Yudhoyono has been elected. This law substance

² Indonesia. Law regarding Local Government. Law number 22 year 1999, Article 7 paragraph (2)

refers to the amendment of Indonesian Constitution, in article 18 paragraph (1) of Constitution stated:

Negara Kesatuan Republik Indonesia dibagi atas daerah-daerah propinsi dan daerah propinsi itu dibagi atas kabupaten dan kota, yang tiap-tiap propinsi, kabupaten, dan kota itu mempunyai pemerintahan daerah, yang diatur dengan undang-undang. (Unitary state Republic of Indonesia divides as province areas and those province divides as municipal and cities. In which every province, municipal and cities has their own Local Government and regulates by the Law.)

Article 18 paragraph (1) of Indonesia Constitution above shows the tiers of government. That Indonesia as unitary state divides into Central Government, Province government and Municipal/city government. This article also shows the supervision mechanism in Indonesia. It reflected the coordination structure between central government, province and municipal/city governments. Law Number 32 year 2004 is the implementation of constitution wants of a law that regulate about the autonomy in Local Government. Therefore in article 2 of Law number 32 year 2004 re-stated the concept in article 18 of Indonesia constitution.

Regarding the relationship between central and local government, there are 4 concepts of relationship, namely:

- A. Authority relationship concept;
- B. Financial relationship concept;
- C. Organization structure relationship concept;
- D. Supervision relationship concept.

In terms of authority relationship, it also includes the authority to manage the mining resources. There is division of power between the central government and local governments (province and municipal/city) regarding the division of power. Article 160 paragraph (2) and (3) states the rights of local government in terms of mining management, that the local government gets the revenue sharing from mining taxes, fix fees and exploration fees (royalty); revenue from mining within their area.

Law number 32 year 2004 has given quite wide authority regarding mining management in Indonesia. The local government has the right to

issue license in mining activity in their area with limitation to amount of investment. In big investment, the license issued by the central government, but for medium and low investment in mining issued by the Local Government. This authority often creates problem in implementation of accountable mining management. As the result of this condition, many regulations created by Local Government only focus on financial benefit without give attention to the sustainable environment principle and the impact of their regulation to climate change³. It shows from cases the issue of regulation, particularly in license and levies, that leads to environmental damage. For example the case of environmental damage in Provincial Bangka Belitung archipelago, when the Local Government issue Local Regulation that give no limitation to mining license. Other example is the case of PT ANTAM (State own enterprise) with PT Duta Inti Perkasa Mineral (PT. DIPM) in North Konawe residence, Southeast Sulawesi for nikel mining. In this case the Central Government has give permit to consession land to PT. ANTAM, however in similar time the Local Government also isse license in the same area on the name of PT. DIPM.

According to those two cases, shows phenomena that the authority that owned by Local Government in mining filed often conduct without giving any notice to the sustainable environment. No parameter has sets yet for the implementation of such power. Due to such condition, there is highly ned for Indonesia to develop mining policy that gives parameter for Local Government's regulation and able to address the creation of sustainable mining policy.

V. THE DISTRIBUTION OF POWER IN MINING MANAGEMENT ACCORDING LAW NUMBER 23 YEAR 2014 REGARDING LOCAL GOVERNMENT

Law number 23 year 2014 is promulgated in year 2014, at the first time President Joko Widodo as Indonesia seventh president. The law bring new political and law atmosphere in terms of the existence local government in Indonesia. The law still brings the concept of *otonomi*

³ The issue of climate change has been substantial since as developing countries as well as part of the world community, Indonesia facing the treat of climate change and already feels the impact of it recently.

seluas-luasnya (wide autonomy with certain limitative). It also stipulated the concept as stated in article 18 of Indonesia Constitution, which acknowledge the division of Indonesia government into central government, province government and municipal/city government. The attribution authority in managing Indonesia located at President as it stipulated in article 4 paragraph (1) of Constitution, and those authority is divides into provincial, municipal/city government to deal with certain matters. The purpose of this concept is triggered and escalates the prosperity of the people.

Related to government affairs, article 9 paragraph (1) of law number 23 year 2014 draws three classification of government affairs, namely:

- A. Absolute affairs;
- B. Concurrent affairs (compulsory and optional affairs);
- C. Government administrative affairs;

Absolute affairs as it stated in this law covers:

- A. Foreign policy;
- B. Defense;
- C. Security;
- D. Judicial;
- E. Monetary and national fiscal;
- F. Religion.

In conducting those affairs, the central government can do by themselves or given those powers to vertical institution in the local area or to Governor as the representative of central government based on deconcentration principle.

Moreover, concurrent affairs consist of compulsory and optional affairs. Compulsory affairs cover government affairs that related to basic services and not related to basic services⁴. The government affairs that related to basic services regulated in article 12 paragraph (1) of this law, contains:

- A. education;

⁴ Article 11 paragraph (2) Law number 23 year 2014

- B. health;
- C. public work and spatial land;
- D. people housing;
- E. tranquility, public order and people protection; and
- F. sosial.

Meanwhile the compulsory affairs that not related to basic services, consist of:

- A. labor;
- B. woman empowerment and child protection;
- C. food;
- D. land;
- E. environment;
- F. population administration;
- G. communication and informatics;
- H. *koperasi*, small and medium business;
- I. investment;
- J. young generation and sport;
- K. statistics;
- L. coding;
- M. culture;
- N. library; and
- O. archives⁵.

In terms of Energy and natural resources is classify as optional affairs together with other affairs, namely ocean and fishery; tourism; farming; forestry; trading; industry; and transmigration⁶. Indonesia consist of diversity types area, the consequences of placement energy and natural resources in the classification of optional affairs means that the local government can choose to conduct that affairs by looking at the characteristic and potential in their area.

The division of power between central and local governments (concurrent affairs) is based on criteria that have been regulated in the Law number 23 year 2014. Criteria authority that given to central govern-

⁵ Article 12 paragraph (2) of Law Number 23 year 2014

⁶ Article 12 paragraph (3) of Law Number 23 year 2014

ment are:

- A. The Government affairs which located cross province or cross countries.
- B. The Government affairs that its user from cross province or cross countries
- C. The Government affairs which its advantage or negative impact cross province or cross countries
- D. The Government affairs that the use of its resources more efficient while conducted by the central government; and/or
- E. The government affairs which strategic for national interest.

While, the criteria authority that given to province government, namely:

- A. The government affairs that its locaton cross munical/city territories;
- B. The government affairs that it use from cross municipal/city territories;
- C. The government affairs that the benefit or negative impact of the activity corss munipal/city; or
- D. The government affairs that the use of its resources more efficient while conducted by the municipal/city government;

Finally, the criteria of authority that given to municipal/city are below:

- A. The Government affairs which located within municipal/city areas.
- B. The Government affairs that its user from municipal/city areas.
- C. The Government affairs which its advantage or negative impact only for municipal/city areas
- D. The Government affairs that the use of its resources more efficient while conducted by the Municipal/City government.

In conducting mining management affairs, the Local government must fulfill the principle of accountability, efficient, and externality, as well as strategic national interest. Based on article 14 Law Number 23 year 2014, there are division of power between Central Government and Local Government in terms of energy and natural resources field,

namely:

1. The implementation of government affairs in the energy and mineral resources field which related to the management of oil and natural gas are the Central Government authority
2. The implementation of government affairs in the energy and mineral resources, in particularly the use of geothermal, in the municipal/city areas become the authority of municipal/city government.

Therefore, for the explanation above shows that Law number 23 year 2014 has re-taken the authority that usually stays on the Local Government. The province and central government authority in terms of mining management has widely compare to authority that possess by the municipal/city government. We can see that this condition inline with the legal politics of promulgation of this law, that regulation maker want to empower position of central and province government as well as implies control and supervision mechanism from central and province for the policy that made by the municipal/city government.

VI. ASEAN ECONOMIC COMMUNITY: WHAT NEXT

In the end of 2015 or at least beginning of 2016, Indonesia as the part of ASEAN community will face ASEAN Economic Community. This era will open the borderless for the citizen ASEAN countries. Citizen of ASEAN countries allowed to work and move in ASEAN region without restriction. In terms of mining management, Indonesia as a country rich in natural resources become interesting area for the investors to conduct their business in mining. Such condition can be either positive benefit or negative. It will be positive when central government can work together with the local government (provincial and municipal/city). The Central governments need to simplify the regulation in mining area and strengthen the coordination among ministries. The local government on the other hand, should take an active role in terms of supervision the condition of mining in their area. However, if those two keys failed to conduct together by central and local government, than the AEC can bring negative impact for mining in Indonesia. The central government issued mining license with ignorance the input from local government, and the local government did not maximally do supervi-

sion, than the mining activity will growth without any strong supervision and it potentially destroy the environment ecosystem and not perform the principle of sustainability mining. If this conditions keep exist it is likely our next generation will not taste the great things from mining activity in Indonesia.

VII. CONCLUSION

1. Looking from the Local government regulation between the Law Number 22 year a1999, Law Number 32 year 2004 and Law Number 23 year 2014, there are changes in the form of division of power between central and local government in terms of mining management. While in 1999, most of the power owned by local government an mining power more lays on the local government. This condition was changed in year 2004, while the local government can also issue a license for the mining activity. In 2014, there is division of power between Central and Local government based on the mining field.
2. The government should simplify the regulation and strengthen coordination among ministries. The local government should given huge part to control the mining in their area, the supervision role of local government are extremely important.

REFERENCES

Books

- Cohen, Morris L and Kent C. Olson, *Legal Research In A Nutshell*, West Publishing Company, St. Paul Minnesota, 1992
- Djatmiati, Tatiek S., *Maladministrasi dalam Konteks Kesalahan Pribadi dan Kesalahan Jabatan, Tanggung Jawab Pribadi dan Tanggung jawab Jabatan*, Universitas Trisakti, Jakarta, 2010.
- Enid Campbell (et.all), *Legal Research (Materials and Methods)*, The Law Book Company Ltd., Forth Edition, Sydney, 1996.
- Hadjon, P. M.(I), *Perlindungan Hukum Bagi Rakyat di Indonesia*, Peradaban, Surabaya, 2007.
- Hutchinson, Terry, *Researching and Writing in Law*, Lawbook Co. Australia, 2002.
- Jacobini HB, *An Introduction to Comparative Administrative Law*, Oceana Publication Inc, New York, 1991
- P.P. Craig, *Administrative Law*, Thomson, Sweet and Maxwell, fifth edition, 2003.

Richard K. Neumann Jr., *Legal Reasoning and Legal Writing (Structure, strategy, an Style)*, Aspen Law and Business, New York, 2001

Rene Seerden and Frits Stroink (eds), *Administrative aw of the European Union, its Member States and United States: a comparative analysis*, Intersentia Uitgevers Antwerpen – Groningen, 2002

Journal Articles

Bedner, A. and Stijn Van Huis, 'The Return of the native in Indonesian law, Indigenous communities in Indonesia legislation' (2008) (164) 2/3, *Bijdragen tot de Taal-, Land-en Volkenkunde (BKI)*, 165, 174.

Butt, S. 'Regional Autonomy and Legal Disorder: the Proliferation of Local Laws in Indonesia' (Legal Studies research paper No 10/71, Sydney Law School, July 2010).

Daryono, 'The Transformation of Land Law in Indonesia: The persistence of Pluralism' (2010) 5 (1) *Asian Journal of Comparative Law*, 1-32.

Duncan, C.R., 'Regional Autonomy and Decentralization in Indonesia' (2007) 38 (4) *Institute of Social Studies-Balckwell publishing*, 711-33.

Febrian, 'Pembangunan Hukum dan Konflik Undang-Undang Bidang Sektoral' [the Development Law and Conflict of Sectoral Laws] (Research report, Law Faculty - Sriwijaya University, Palembang- Indonesia, 2009)

Firman, T., 'Decentralization reform and Local-Government proliferation in Indonesia: Towards a fragmentation of regional Development' (2009) 21 (2) *Journal of Review of urban and regional development studies*, 143-57.

Hasan, P.A. Rifai, 'Development, Power, and the Mining Industry in Papua: A Study of Freeport Indonesia' (2010) 89 *Journal of Business Ethics*, 129-43.

Kristiansen, S. and L. Trijono, 'Authority and Law Enforcement: Local Government reforms and Security Systems in Indonesia' (2005) 27 (2) *Journal of Contemporary Southeast Asia*, 236-54.

Leith, D., 'Freeport and the Suharto Regime, 1965-1998' (2002) 14 (1) *The Contemporary Pacific*, 69-100.

OCallaghan, T., 'Patience in Virtue: Problems of Regulatory Governance in the Indonesian Mining Sector' (2010) 35, *Elsevier journal*, 718, 220.

Cases:

The case of The Freeport-McMoRan Copper and Gold mining project in Mount Etsberg and Grasberg, Papua

The case of PT. Indo Muro Kencana mining project in Mount Muro, Central Kalimantan

The case of PT. International Nickel Indonesia in East Luwu, Soroako

Legislation:

Undang-Undang Dasar Republik Indonesia 1945 [Constitution of the Republic of Indonesia 1945] (amendment)

Undang-Undang Nomor 5 Tahun 1960 tentang Peraturan Dasar Pokok-pokok Agrar-

- ia [Law No 5 of 1960 on Basic Agrarian Law]' (Indonesia)
- Undang-Undang Nomor 11 Tahun 1967 tentang Ketentuan-ketentuan Pokok Pertambangan* [Law No 11 of 1967 on Basic Mining law] (Indonesia)
- Undang-Undang Nomor 22 Tahun 1999 tentang Pemerintahan Daerah* [Law No 22 of 1999 on Local Government] (Indonesia)
- Undang-Undang Nomor 32 Tahun 2004 tentang Pemerintahan Daerah* [Law No 32 of 2004 on Local Government] (Indonesia)
- Undang-Undang Nomor 4 Tahun 2009 tentang Pertambangan Mineral dan Batubara* [Law No 4 of 2009 on Mineral and Coal Mining] (Indonesia)
- Undang-Undang Nomor 32 Tahun 2009 tentang Perlindungan dan Pengelolaan Lingkungan Hidup* [Law No 32 of 2009 on Environment Protection and Management] (Indonesia)
- Undang-Undang Nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-Undangan* [Law No 10 of 2004 on Establishment of the Legislation] (Indonesia)
- Undang-Undang Nomor 23 Tahun 2014 tentang Pemerintahan Daerah* [Law No 23 of 2014 on Local Government] (Indonesia)

Internet References

- [...], Mining Advocacy Network (Jaringan Masyarakat Tambang: JATAM), available at "<http://www.jatam.org/content/view/32/1/>"
- [...], Aliansi Masyarakat Adat Nusantara (AMAN) <<http://aman.or.id/en/indigenous-peoples-archipelago.html>>.
- [...], United Nation website, available at http://www.un.org/esa/socdev/unpfi/documents/workshop_data_background.doc
- [...], Australasian Legal Information Institute (Austlii), available at <http://www.austlii.edu.au/au/journals/MULR/2005/1.html>.
- [...], Ministry of Mineral and Energy of Indonesia, available at http://dtwh2.esdm.go.id/dtwh3/mod_lain/index.php?page=investasi.
- [...], PT Freeport Indonesia, available at <http://www.ptfi.com/komitmen.asp> and <http://www.fcx.com/envir/soc.htm>.
- [...], PT Newmont Nusa Tenggara, available at http://www.newmont.co.id/EN/social_responsibility_programs.htm.

Free Articles:

- Oka Simanjuntak, 'Indonesia Mining brief and the Mining sector' (Presentation presented at Trade and Investment Forum, Queensland, October 2010).
- Musa Y. Sambuk, 'Democratisation and Decentralization effect on the Natural Resources Management in West Papua' (Presentation presented at West Papua Update conference, University of Sydney, 29 November 2010).