

Model of Mining and Mineral Mining Exploitation in the Pancasila Perspective and Indonesian Constitution UUD 1945

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Abstract — Indonesia has a model of the mineral and coal mining system before independence until now. The arrangement of the mineral and coal mining concession system model was regulated prior to independence with the issuance of *Indische Mijnewet Staatsblad* of 1899 Number 214 with a concession / permit concession system model. After independence, regulation of minerals and coal is regulated through Law No. 11 of 1969 with the KK / PK2B business model. The KK / PK2B business model is considered detrimental to the Indonesian economy, social welfare and social justice. To face the challenges and answer a number of problems, the paradigm of the business concept of Law No. 11 of 1967 was changed to Law No. 4 of 2009 with the concession system model permits. To strengthen the model of the mineral and coal mining system, the Government issued Law No. 27 of 2007 in conjunction with Law No. 1 of 2014 with the concession model. If viewed in terms of position, environmental aspects, economic aspects, and social aspects, the existence of Law No. 4 of 2009 and Law No. 27 of 2007 in conjunction with Law No. 1 of 2014 concerning the licensing and rights exploitation system model has not been able to create the fifth Sila "Social Justice for the entire Indonesian people" and Article 33 paragraph (3) Indonesia Constitution UUD 1945 concerning the substance "earth, water, and natural wealth controlled by the state the greatest prosperity of the people ". Through this research will be examined how the model of mining mineral and coal exploitation in the perspective of the Pancasila and Indonesia Constitution UUD 1945? The method used is normative juridical. Based on the analysis of the author, the KK / PK2B concession system, permits and rights contradicted Pancasila and Indonesia Constitution UUD 1945. In the final part of the study, there were suggestions that the legislative body, especially The Ministry of Energy and Mineral

Resources the Republic of Indonesia, apply a licesing system for companies toact directly as operator, with the strengthening of State-Owned Enterprises

Keywords: *model of concession of mineral and coal mining, Pancasila, Indonesia Constitution UUD 1945*

I. INTRODUCTION

The nomenclature of the mining concession arrangement is divided into several mineral and coal mining concessions. Regulation in the mining sector in general, is divided into 2 (two) periods of regulation, namely the period of regulation before independence and the period after independence [1]. The pre-independence regime was marked by the existence of a model of mineral and coal mining concession instruments with a concession scheme. While the regime after independence uses the KK / PKP2B scheme with the issuance of Article 10 of Law No. 11 of 1967 concerning the Basic Provisions of Mining (Law No.11 of 1967). Issuance of Article 10 of Law No. 11 of 1967 was considered detrimental to the Indonesian economy and social welfare [2].

To face challenges and answer a number of problems Law No. 11 of 1967 published Law No. 4 of 2009 concerning Mineral and Coal Mining (Law No. 4 of 2014). Issuance of Law No. 4 In 2009 the momentum of the paradigm model for reforming Indonesian mining law from the KK / PKP2B regime became a licensing regime. But the mining system in Indonesia after the birth of Law No. 4 of 2009 still has various problems. Problems present can be categorized into two types

of root causes. First, the issue of regulatory substance and secondly, the issue of implementation, both the implementation of regulations, and the implementation of delegated authority. The following are problems that arise due to the application of licensing models in minerals and coal:

First, Article 1 number 20 of Law No. 30 of 2014 concerning Government Administration states that the Concession is an authorized Government Official Decision as a form of agreement of the agreement of the Agency and / or Government Officials with other than the Agency and / or Government Officials in the management of public facilities and / or resources natural resources and other management in accordance with the provisions of legislation. By referring to various doctrines, the definition of Article 1 number 20 of Law No. 30 of 2014 the manifestation of management of public facilities and / or natural resources and other management uses a system of concessions which are expressed in the form of "concession permits" and in the form of "concession contracts". Thus the issuance of Article 1 number 20 of Law No. 30 of 2014 does not provide legal certainty for mining entrepreneurs, which at this time the mining concession system uses the licensing system as stated in Article 6, Article 7, Article 8, Article 36 to Article 85 of Law No. 4 of 2009.

1. Second, one of the policies considered counterproductive of the licensing business system is the issuance of Law No. 41 of 1999 concerning Forestry, which prohibits the operation of public mining in protected forest areas. The cause of the collision between the mining area and forestry area is an environmental problem.
2. Third year 2019 as many as 8,524 (eight thousand five hundred and twenty four) mining permits that have been issued, 30% (thirty per hundred) or equivalent to 2,522 (two thousand five hundred twenty two) non clear and clean mining permits still having problems and 70% (seventy percent) or equivalent to 6,002 CNC mine permits [3]. The Ministry of Mineral and Coal of the Directorate General of Mineral and Coal noted that there were 1,569 (one million five hundred and sixty nine) holders of Mining

Business Permits (IUP) or 60% (sixty per hundred) of a total of 2,579 (two thousand five hundred seventy nine) holders of Domestic Investment IUP (PMDN) do not place reclamation guarantee funds [4]

Furthermore, in the mining and coal mining concession system known as the "Rights" system. The rights management system is not specifically explained in, but the existence of a concession system can be seen in Article 1 number (4), Article 1 number (7), Article 1 number (18),

Article 16 paragraph (1), Article 23 paragraph (2),

Article 23 paragraph (4) of Law Number 27 of 2007 concerning Understanding Coastal Areas and Small Islands as amended into Law No. 1 of 2014. However if referring to in the provisions of Article 7, Article 8, Article 36-Article 85 of Law No. 4 of 2009 with the existence of this rights exploitation system does not have a strong foundation to be applied in the mineral and coal mining exploitation system, this is because the system of managing rights in the mining of minerals and coal is not saved in the legal umbrella of Law No. 4 of 2009.

Based on the aforementioned considerations, both in the mineral and coal mining concession model prior to independence, it still has obstacles in its implementation. In this regard the authors are interested in conducting an assessment of the mining of mineral and coal models in the Pancasila and Indonesia Constitution UUD 1945.

II. DISCUSSION

The fifth principle contained in Pancasila namely "Social Justice for All Indonesian" is a philosophical foundation for regulating natural resource management which is intended for the greatest prosperity of the people. Social justice in the theoretical dimension as described and presented by John Rawls is understood as justice relating to how good things should be obtained and according to sacrifice, benefits (burdens) and burdens (burders) in social life divided by justice to all members of society [5].

Regarding the meaning of justice as mandated in the 5th Sila Pancasila, it also regulates the allocation of mining for minerals and coal in Article

33 (3) of Indonesia Constitution UUD 1945. The phrase "State control" in the context of Article 33 (3) Indonesia Constitution UUD 1945, interpreted by Decision The Constitutional Court Number 001-021-022 / PUU-I / 2003 is a mandate given to the state to make policies (beleid) and management actions (bestuursdaad), arrangements (regelendaad), management (beheersdaad) and supervision (toezichthoudensdaad) for the purpose as much as possible the prosperity of the people ". Based on this, referring to the fifth Sila of the Pancasila "Social Justice for the entire Indonesian people" and Indonesia Constitution UUD 1945, the business concept is as follows:

A. Overview of Justice

a. KK/PKP2B

State revenues generated from minerals and coal in the KK / PKP2B model often create various kinds of problems in the economy [2]. for example PT Freeport McMoran Indonesia (PT FTI). Related to PT FTI's royalty payment given to the state amounted to 3.75% (three point seventy five percent) from the previous one of 1% (one percent). In 1967-2014 PT FTI did not provide egalitarian benefits, it was supported by the presence of government share ownership of 9.36% (nine point thirty six percent) of what was supposed to be 51% (fifty one) percent. According to the records of the Ministry of Energy and Mineral Resources (ESDM), in 1991-2004 PT FTI produced a total of 6.6 million tons of copper, 706 tons of gold, and 1.3 million tons of silver. From the same data source, PT FTI's gold, copper and silver production for 11 years will be equivalent to US \$ 8 billion. While the rough calculation of copper and gold production in 2001-2004 from Grashberg land was equivalent to 380 million US \$ (around 3.8 trillion rupiah). Of these, during the 2001- 2004 period the Indonesian nation only received 10-13% of the tax or around 46 million dollars (460 billion rupiah) [6]. Thus, the position of the state does not get justice in accordance with what is loved and reported by the Indonesian people in the fifth Pancasila sila. In the context of justice, John Rawls explains justice is the procedure for determining the just results that are not independent criterion by reference to which the outcome can be known to be just. Clearly we cannot say that a particular state of affairs is just because it has

been reached by following a fair procedure. This would permit far too much and would lead to absurd consequences. With the loss suffered by the Indonesian Nation, based on Darmodihardjo's opinion that "social justice for all Indonesians" means that everyone has the right to fair treatment in the legal, political, social, economic and cultural fields, but to the model of the mineral mining system and coal through the KK / PKP2B exploitation system the fair treatment has not been achieved until now. Even though in reality Indonesia's natural resources, especially minerals and coal, are important capital in the implementation of the national economy which must be used as much as possible for the prosperity of the people.

b. License

The state revenue generated from the business of the licensing system generated from the concession system for mineral and coal licensing in 2018 reached Rp.41.02 trillion, from the targeted results of Rp.32.2 trillion. The composition targeted by the 2018 mineral and coal licensing system comes from royalties, sales of mining products and fixed fees. Royalty amounts to around Rp. 24.5 trillion, mining sales are around Rp. 16 trillion and fixed contributions are around Rp. 0.5 trillion. When examined in previous years, the composition of PNBP for mining and coal permits from year to year continues to increase. At the end of 2017 it was at Rp. 40.6 trillion, while in 2016 it only reached Rp. 27.2 trillion and in 2015 it was Rp. 29.6 trillion (Bunga Adi Miryanti, 2018). Based on these data, with the existence of a model of the mineral and coal mining exploitation system through a state permit exploitation system, the income was also quite significant compared to previous years. This is also in line with the Pancasila philosophy of the fifth paragraph of the Indonesia Constitution UUD 1945 which requires a balance or harmonization between birth and inner well-being for many people. The importance of the concept of human welfare is discussed in the welfare state theory. The state welfare / welfare state theory was built with the aim of realizing the birth and inner well-being of the people for all countries [7] F. Isjwara said that all countries basically have the same goal, both in the past, now and in the future, the goal of which is to create welfare for their citizens. In the context of Article 33 paragraph (3) Indonesia Constitution UUD 1945, which is the test stone for permit

concession systems in the phrase "owned by the state", indirectly with an increase in state revenue, the permit concession system is in accordance with the positive characteristics of economic democracy Pancasila [8]

c. Exploitation of Mining Rights

The model of exploiting minerals and coal mining related to the economic sector through the concession system is indeed not explained how the profits generated by the state but in the economic field can be seen in terms of the social benefits of the local community. According to residents around the coast with the issuance of a mineral and coal mining concession model related to the economy through a concession system, the income of fishermen around the coast has dropped dramatically by reducing 50% of previous income. With the injustice in the previous process of sharing the results to date and welfare resulting from the mineral and coal mining system exploitation model through the rights exploitation system, the concept of the company does not reflect the foundation of the Pancasila philosophy, the fifth principle [9]. The philosophy foundation behind the *fifth Sila* in Pancasila, had two important meaning. First, the principle of economic growth and fair distribution of income. The importance of economic growth is reflected in the sentence, "the principle of justice requires prosperity that is evenly distributed among all people, not statically distributed but dynamic and increasing evenly", while fair income distribution is reflected in the phrase "all forms of social inequality and imbalances in the distribution of national wealth we must go away". Secondly, the principle of economic democracy expressed in the sentence "all natural resources of Indonesia, all national capacities are processed together according to their respective capabilities and fields, to be utilized for happiness as much as possible for all people as outlined in Article 33 paragraph 3 Indonesia Constitution UUD 1945"[10]

A. Overview of Welfare Countries

a. KK/PKP2B

If reviewed in the form of PT FTI's CSR, PT FTI's employees in 2013 reached 17,539 workers. With many workers, in the same year PT FTI workers called for a strike. The strike action was triggered, because there was no response from PT FTI regarding the demand for salary

increases by referring to PT FTI's salary standards in other countries. The amount of royalties received by PT FTI for workers is US \$ 1.5 per hour. PT FTI workers demand wages to be US \$ 3 per hour, or up 100%. Workers compare with Freeport McMoran employees in other countries who receive wages of up to US \$ 15 per hour

If the model of the mineral and coal mining system through the PT FTI KK / PKP2B exploitation system becomes a test rock that collides with the concept of a welfare state, then the model of the mineral and coal mining exploitation system through the KK / PKP2B business system does not reflect the concept of a welfare state. The concept of the welfare state felt by PT FTI workers should reflect the concept of wealth as expressed by Plato. The welfare meant by Plato is that: "*the state comes into existence originating in the bare needs of life and continuing in existence for the sake of good life.*" While according to John Locke, the purpose of the state is "the good of humanity" (*the end of government is the good of mankind*)[11] If the model of the mineral and coal mining system through PT FTI's KK / PKP2B exploitation system becomes a test stone that collides with the fifth Sila "Justice for All Indonesian People", with a comparison of wages of PT FTI employees in other countries that receive up to US \$ 15 wages per hour, there is no justice felt by PT FTI workers. Even though the fifth Precept "Justice for All Indonesian People" contains the meaning of individual interests and the interests of the fulfilling community, it must be done proportionally in an equitable manner and not discriminating according to their rights [12] thus, the model of the mining system for mineral and coal mining through the PT FTI KK / PKP2B exploitation system has contradicted the fifth precept Pancasila.

b. License

If viewed from the concept of welfare state that will be reviewed with employment indicators for example PT FTI, the mining and coal mining concession system model through a permit concession system, in 2018 PT FTI is able to absorb 30,542 workers from PT FTI direct workers and contractors, while the indicator consisted of 4,061 from non-Papuan workers, 2,890

native Papuan workers, 154 foreign workers. However, with the large number of PT FTI workers on March 29, 2018 (Tony Firman, 2018) a number of PT FTI employees took action. A number of its actions claimed that their rights were not fulfilled in accordance with the law. Starting from the termination of employment as many as 8,300 workers unilaterally [4] violation of IPR, blocking BPJS, resulting in nine employees dying[13]

2 If the model of the mineral and coal mining system through the licensing business system becomes a test stone that collides with the concept of a welfare state, then the model of the mineral and coal mining exploitation system through the licensing business system does not reflect the concept of a welfare state [14]

d. Exploitation of Mining Rights

The adoption of a mineral and coal mining system exploitation model through a concession system the right to sea mining is a business system that is dangerous for workers around the mine. The pressure of the marine environment and working conditions like this often make household life tend to be different from the standards of the community and other jobs. The time of workers who are often not in line with other world activities, for example working at night while the afternoon is used for rest, often makes the interests of fishermen not represented in politics.

In this case the responsibility of the state in developing capacity also requires facilitation and capacity building, known as the welfare state or welfare state. Therefore, with the existence of a model of the system of exploiting minerals and coal through a system of exploitation of rights in the perspective of employment, it has contradicted the concept of a welfare state. Even though the state of welfare / welfare state is actually built with the aim of realizing the welfare of the people physically and mentally for all countries [7]

B. The Right to control the country

a. KK/PKP2B

Policies that are considered counterproductive when the KK / PKP2B concession system is issued by Law No. 41 of 1999, which prohibits the operation of general mining in protected forest areas. In the case of the KK / PKP2B business

position, the relationship between the Government of Indonesia and foreign investors is a relationship that is civil in nature that occupies the position of the state and foreign investors in an equal position[15].

Even though the mandate stated in the constitution actually requires that minerals and coal are important branches of production for the state and control the livelihood of many people and constitute natural wealth contained in Indonesian earth and water that must be "controlled by the state" and used for the greatest possible prosperity the people as referred to in Article 33 paragraph (2) and paragraph (3) Indonesia Constitution UUD 1945. Thus, the model of the mineral and coal mining system through the KK / PKP2B concession system has contravened Article 33 (2) Indonesia Constitution UUD 1945 which was interpreted through Decision The Constitutional Court Number 002 / PUU- 1/2003, December 21, 2004 in terms of management functions (bestuursdaad), arrangements (regelendaad), management (beheersdaad), and supervision (toezichthouwsdaad) for the purpose of maximizing the prosperity of the people. Based on this discussion the model of the mineral and coal mining system through the KK / PKP2B concession system has contravened Article 33 paragraph (2) Indonesia Constitution UUD 1945.

c. License

The norm conflict between Law No. 4 of 2009 and Law No. 23 of 2014 resulted in problematic legal practices. Even though in Law No. 23 of 2014 stipulates that at the time Law No. 23 of 2014 comes into force, all laws and regulations relating directly to the regions must base and adjust their arrangements in Law No. 23 of 2014. However, in practice, changes in the authority of licensing, guidance, and supervision have the potential of PETI [16]. In terms of the position of the mining and coal mining exploitation system model through the permit concession system, it is strongly recommended according to the Constitutional Court Institution. The implementation of the mineral and coal licensing business model, the state has full authority to regulate mineral and coal management. With the existence of a mineral and coal mining exploitation system model through a permit exploitation system, the position of the state with mining companies is parallel, as in

accordance with Article 33 paragraph 3 Indonesia Constitution UUD 1945. In the context of Article 33 paragraph (3) Indonesia Constitution UUD 1945, test stone for the permit concession system with several Constitutional Court Decisions that provide an interpretation of the phrase 'controlled by the state' in Article 33 paragraph

(3) Indonesia Constitution UUD 1945, among others as in Decision of the Constitutional Court No.022 / PUU-1/2003 December 21 2004 concerning the testing of the Oil and Gas Law. Based on the interpretation of the Constitutional Court Decision No.022 / PUU-1/2003, it is clear that the form of the mineral and coal mining exploitation system model through the permit, concession and licensing business system is a manifestation of the state's right to control according to *bestuurdaad* [17].

d. Rights

The concept of HP3 is not in line with the definition of Article 33 paragraph (3) Indonesia Constitution UUD 1945. In the discourse on legal relations between people (including individuals and legal entities) and objects known as the concept of property rights (*zakelijk recht*) and individual rights (*persoonlijk recht*) [18]. The criteria for distinguishing rights can be seen from the nature of the legal relationship between the subject and object, the contents of the authority, the inherent power of the legal relationship with the object, and the difference with other rights. In other words, it can be said that "rights" are "material rights, while permits are" individual rights ". Based on these distinguishing benchmarks, it can be said that based on HP-3 characteristics in the mining system of mineral and coal mining are more likely to be categorized as individual rights. The legal implications of the mention of HP-3 as "rights" are not right. It is more appropriate to use the term "permit" to use (in this case) the mining of coastal areas. In the context of Article 33 paragraph (3) Indonesia Constitution UUD 1945, which is the test stone for the concession system, with the implementation of the rights system model that prioritizes individual rights, it is contrary to Article 33 (3) Indonesia Constitution UUD 1945 [19].

From the explanation above, according to the author, the author of the mineral and coal mining business model that is appropriate and in accordance

with the Pancasila perspective and Indonesia Constitution UUD 1945 is a concession system. This was also reinforced by the interpretation of the Constitutional Court Decision No. 022 / PUU-1/2003 which requires the form of mining of minerals and coal through permits which is very appropriate as a manifestation of the right to control the state through *bestuurdaad*.

The ideal concept of the licensing model for mineral and coal mining in the Pancasila perspective and the Indonesia Constitution UUD 1945 is indeed not found in the Indonesia Constitution UUD 1945, but it can be understood implicitly in it. Explicitly the meaning of licensing can be interpreted in the opening of the 1945 Constitution of 1945 paragraph IV mentions the purpose of the Republic of Indonesia, namely:

a. Protecting all Indonesian bloodshed: from the word "protect" it can be concluded that in order to achieve this goal, arrangements need to be made to protect the work of the Indonesian people.

b. Promoting public welfare: from the word "advancing public welfare" it can be concluded that to achieve the need for regulations to improve the welfare of all nations and countries and prevent things that can reduce the level of welfare.

c. Educating the life of the nation; From the word "educating the life of the nation", a regulation must be made, for example, to protect the book trade system.

d. Participate in maintaining world order based on peace and the word "participate ..." Can be done for example by establishing export import procedures and trade procedures between each country so that they are orderly.

The licensing model for mining minerals and coal when viewed from the four objectives of the country, indirectly the Government is given the right to regulate it in detail and concretely, which among others can be through licensing. The concept of the licensing model for mineral and coal mining has the full public nature mandated by the Government to regulate it. In the context of government administration, what is meant by the author is public licensing, in line with the opinion of Guy Peters who states that the main function of the Government is to implement or implement rules (rules application)[20] This is also reinforced by the opinion of Prajudi Atmosudirdjo, that the function of the

government is to implement laws in a concrete, casual and individual manner [21].

Implementation of mineral and coal exploitation systems, in other countries permit is the most widely used instrument in state administrative law to provide certainty [22]. If the concept of licensing is contested in administrative law, granting permission is a means of direct government intervention. Interference in "direct control" is realized by the Government by providing various forms of licensing, which are considered to be directly able to control various government activities.

Even if we refer to the opinion of Irving Swedlow, the issuance of permits in the mineral and coal mining concession system can be made at all levels of government and permits have three functions, namely To limit the number of recipients, To ensure that recipients meet minimum standards, and To Collect funds (**Irving Swedlow, 1975**).

Lemaire in his book *Het Recht in Indonesie*, stated that the state organizes *bestuurszorg*, namely the implementation of public welfare carried out by the Government. *Bestuurszorg* is the duty of the government in the welfare state, namely a modern legal state that pays attention to the interests of all the people around the mine but also for the welfare of the Indonesian people. It can be said that the existence of a *Bestuurszorg* is a sign that states the existence of a welfare state in the mineral and coal mining exploitation system in the licensing model [17].

III. CONCLUSIONS

Of the three explanations above the mineral and coal mining concession model that is appropriate in the Pancasila perspective and Indonesia Constitution UUD 1945 is a licensing business model. In addition to having a higher position in the licensing business model, the licensing business model is in accordance with the Constitution. According to the interpretation of the Constitutional Court Decision No. 022 / PUU-1/2003 through the licensing business system, it is a manifestation of the right of interpretation of the state's right to control. The ideal concept of licensing models for mineral and coal mining in the Pancasila and Indonesia Constitution UUD

1945 perspectives is indeed not found in the Indonesia Constitution UUD 1945, but it can be understood implicitly in Article 33 paragraph (3) of the Indonesia Constitution UUD 1945 through the phrase "protect", "advance public welfare", "educate the life of the nation" and participate ... ". Thus the model of mineral and coal exploitation which is in accordance with the Pancasila perspective and Indonesia Constitution UUD 1945 is a licensing business model. Considering that minerals and coal as natural resources contained in the earth are non-renewable natural resources, their management needs to be carried out as optimal as possible, efficient, transparent, sustainable and environmentally sound, and justice so that the Indonesian people can obtain the greatest possible prosperity for the people in a sustainable manner.

Also in terms of managing mineral and coal mining in the business of licensing state companies must actively act directly to become the driving operator in the field of mineral and coal mining. In the exploration and exploitation sector, the state is able to act not only as a regulator but also an operator, with the strengthening of BUMN in its management process. In addition, there needs to be an adjustment between Law No. 4 of 2009, Law 23 of 2014 and Law No. 41 of 1999 so that there is no clash of laws and regulations and avoid legal uncertainty in the business sector in the mining of minerals and coal.

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