

Legal Certainty Of Mining Management After The Enactment Of Indonesian Law On Local Government No. 23 Of 2014

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Abstract: The purpose of this research is to find out and analyze the legal certainty of mining management after the statement of Indonesian law on local government No. 23 of 2014 in East Kalimantan. The research process used several steps called the normative legal research with descriptive analytic approach. The study was conducted in East Kalimantan Province in three research locations in the Kutai Kartanegara Regency represented by the PT. Anugera Bara Kaltim, PT. Indominco (East Kutai), PT. Nuansa Cipta Coal (Samarinda), Department of Mining and Energy of the Province of East Kalimantan (this was the term they used in 2017, now it is called the Department of Energy and Mineral Resources) as respondents to the Head of Department and Mining Inspector. The approach the researcher had taken was Purposive Sampling, with the following considerations: that the Head of Department understands the policies that should be implemented as a form of implementing regulations, and is implementing the policies from the center to the regions. The variables in this study which included indicators as part of scientific tracking efforts that would be described and analyzed by using the philosophical approach to determine the impact of government policies on the mining sector. The conceptual approach is an approach which moved by views and doctrines that have been developed in the science of law so that new ideas and principles that are relevant to the problem in a study can be found.

The result of this research showed the effect of the legal certainty in mining management in East Kalimantan which was to revoke the role of district and city governments in mining management. The revocation of the role of local government had a negative impact, especially in good mining management. Good mining is certainly based on the principles of *good mining practice*, this condition was greatly influenced by a Good Governance system. In addition, many illegal mines were found in regencies and cities because the regulatory conditions that organized the authority of district / city governments had shifted to the Central Government and was implemented in the Provincial Government. As a result, illegal mining increased and the impact of not giving the authority to the local government seemingly viewed as an omission because the central and provincial governments were not aware of the incident immediately.

Keyword: *Legal Certainty, Mining Management, Regulation, Policy*

I. INTRODUCTION

The Republic of Indonesia is a unitary state in the form of a Republic that is a mandate stated in Article 1 of the 1945 Constitution of the Republic of Indonesia. Indonesia as a unitary state through the Government of the Republic of Indonesia as the first national government and then establishes the Local Government in accordance with statutory provisions. The Local Government subsequently has the authority to regulate and manage its own Government Affairs in the region according to the Principle of Autonomy and Co-Administration Task and is given the autonomy as broadest as possible.

The formulation of broad autonomy is reflected in the division of tasks and authority between the Central and Local Governments. The implementation of authority either by the Central Government or the Local Government requires financial support. For the autonomous region, in regulating and managing the interests of the local community, it has meaning to spend on oneself. This means that the region must have its own source of income, one of which is derived from the original regional income, namely local taxes. The regulation to impose levies is not merely a source of income, but also symbolizes the freedom to determine oneself in managing and organizing the household of the said region.²

Then, in the mandate of the 1945 Constitution of the Republic of Indonesia, there is a Government Affairs which is fully become the authority of the Central Government, hereinafter referred to as absolute government affairs and there are concurrent government affairs. Concurrent government affairs consist of Obligatory Affairs and Preferred Affairs which are divided between the Central Government, Provincial Governments, and Regency/City Governments. Obligatory Affairs are divided into Obligatory Affairs related to Basic Services and Obligatory Affairs that are not related to Basic Services.³

There is a difference in the scale or scope of Government Affairs, the division of concurrent government affairs between the Provinces and the Regencies / Cities even though the Government Affairs are the same. Therefore, there will still be a relationship between the Central Government, Provincial Regions and Regency/City Regions in the implementation because it refers to norms, standards, procedures, and criteria (NSPK) made by the Central Government even though the provincial and regency/city by written have their own Government Affairs of which are not hierarchical in nature.⁴

Energy and mineral resources are one of the preferred government affairs.⁵ Therefore, the division of local government affairs in the energy and mineral resources in sub-affairs of minerals and coal regarding the issuance of metal mineral and coal mining business licenses is authorized by the provincial government. As regulated in Indonesian Law of Local Government No. 23 of 2014 that the regency / city government has no authority at all in the field of mineral and coal management.

Empirically, it eventually raises legal issues, the reason is the provision of functional assignment is contrary to local authority in the field of mineral and coal management as

stipulated in Indonesian Law on Mineral and Coal Mining No. 4 of 2009 which gives the management authority to Regency / City Governments.

Article 4 paragraph (1) of the 1945 Constitution of the Republic of Indonesia explained that a Unitary State of the Republic of Indonesia is led by a President who will act as the head of the state and head of government. To run the public administration system, the President is assisted by state ministers. Then, each minister in charge of certain affairs in government.

The division of provinces in the Unitary State of the Republic of Indonesia as a mandate in the constitution. Furthermore, provincial regions are divided into districts and cities, having local government based on the principle of regional autonomy. The principle of regional autonomy stipulates that the central government and local governments are given the authority to determine attitudes in every decision making and policy.

Article 9-26 Chapter IV of Indonesian Law on Local Government No. 23 of 2014 establishes the relationship between the central government and local governments. Hence, to achieve the goals of the country, local governments are given authority in accordance with the provisions of Indonesian Law on Local Government No. 23 of 2014 as amended by Indonesian Law on Local Government No. 9 of 2015. "To protect all Indonesian people and motherland, to advance public welfare, educate the nation's life and participate in carrying out world order based on independence, eternal peace and social justice" is the conceptual formulation of the goals of the Republic of Indonesia written in paragraph IV of the 1945 Constitution of the Republic Indonesia.

Every mining activity always has a negative impact to the environment. It is stated that the environment is not only the responsibility of the central and local governments but also companies and communities. The characteristics of mining management will have a negative and positive impact on the environment and the people of the regency / city. Therefore, every management of the utilization of natural resources cannot be separated from risk as an impact that will follow.

The problems in the local area, the ones who actually really understands the situation and conditions is the Community and District and City Government. Because the nature of regional ownership is the local community. So that the problem of benefits or negative impacts that may arise due to the choice of government affairs, including energy and mineral resources, the district and city governments are given the authority to resolve the conflicts. However, in terms of participating in determining whether the Mining Business Permit (IUP) and the People's Mining Permit (IPR) can be issued or not, the district and city governments do not have the authority to issue mining permits. In summary, according to Indonesian Law on Local Government No. 23 of 2014, district / city governments are ignored. This condition shows that the role of local government does not have authority to prohibit and takes action to protect the environment from damages caused by mining activities considering mining activities generally take place in their governed area.

In response to these conditions there has been a tendency that with the enactment of Indonesian Law on Local Government No. 23 of 2014 as amended by Indonesian Law on Local government No. 9 of 2015, the field of mineral and coal mining, the local government should still be given authority in the licensing of mineral and coal mining. Because the absence of the role of local governments has resulted in ineffective monitoring, guidance and control functions of negative post-mining impacts such as the destruction of the ecosystem around the mining site and it can increase the value of tax revenues that have positive implications in improving people's welfare.

II. METHOD

This research used normative legal research method with analytic descriptive type. The study was conducted in East Kalimantan Province in three research locations in the Kutai Kartanegara Regency represented by the PT. Anugera Bara Kaltim, PT. Indominco (East Kutai), PT. Nuansa Cipta Coal (Samarinda), Department of Mining and Energy of the Province of East Kalimantan (this was the term they used in 2017, now it is called the Department of Energy and Mineral Resources) as respondents to the Head of Department and Mining Inspector. Sampling was carried out by implementing the Purposive Sampling method by taking into account the following categories: The Head of Department approves policies that require the implementation of regulations, and is implementing the policy from the center to the regions. The variables in this study included indicators as part of scientific tracking assistance will be explained and analyzed by using the philosophical approach to find out the effect of government policy in the mining sector. Conceptual approach is an approach in which we move on to the views and doctrines that have been developed in the science of law so that new ideas and principles that are relevant to this study can be found.

III. RESULT AND DISCUSSION

A. Legal Certainty

Based on the results of the study, the researcher found several things that are very inconvenient that is if in the world of law, in this case, studying the policy and regulations (*beleidsregel*), the public administration legal studies formula should be the main measure. But what happened in reality is the use of the public administration legal studies formulas, especially from the aspect of policy making (*beleidsregel*) has turned into something very rigid to be implemented. This leads to a question of whether the policy (*beleidsregel*) is not suitable to be applied in Indonesian government system? Considering the policy issue (*beleidsregel*) is only appropriate in the country of where it comes from, the Netherlands. Whereas other instruments in the public administration legal studies take place continuously, namely to make provisions (*beschikking*) and make regulations.

Even though the actual policy action (*beleidsregel*), becomes a reflection that if in a statutory regulation does not regulate a particular problem then the government is still given the freedom to take policy in overcoming an urgent problem. The government action is referred

to as *freemen ermessen*. The existence of policy regulations cannot be released with free authority from the government. Since the authority of a public administration agency or authority to issue policy regulations is based on the principle of freedom of action it has (*beleidsvrijheid* or *beorde lingsvrijheid*).

As matter of fact, the chronology of the birth of a policy began in the Netherlands, at that time there was a tendency for the state body as a form of public administration to deviate from what was under its authority. Whereas by carrying out the policy regulations (*beleidsregel*) it is said to have deviated from the authority of state administration, even though the Dutch administrative law experts themselves cited the danger of "clandestine wetgeving" which van Vollenhoven pointed out as a symptom of the appearance of legislation products which were actually made by public administration officials (hat verschijnsel doelt van wetgeving in concreto door de administratie).

Furthermore, according to J. Mannoury (Laica Marzuki, 1996: 2), in studying the policy regulations (*beleidsregel*) is like "*speiegelrecht*": (mirror law), which means that the law that comes from the reflection of the mirror. In fact, "*speiegelrecht*" is not law but just a dream of law (... *intend als recht, maar als spiegeling van recht-op recht galijked-beschou*) J Van Der Hovven views policy regulations (*beleidsregel*) as "*pseudowetgeving*") because the making is not supported by statutory authority.

While on the other hand the citizens can hardly distinguish the policy regulations (*beleidsregel*) from the laws and regulations. Therefore, this foregoing view seems easier to accept if policy regulations are seen as law rather than statutory regulations.

The term *beleidsregel* was used in 1982, in the treatise compiled by the committee *wetgevingsvraagstukken*, although it is used together with the terms "pseudo-wetgeving", "*cupping van voorgenomen beleid*," *algemene beleidsregels* ". Also in 1982, the working group (*staartwerkgroep wet algemene regels van bestrecht* (Wet ARB) also used the term *beleidsregels* in their design (J.H. van Kreveld, 1983: 3-5).

According to Willem Koninjbelt (Laica Marzuki, 1996: 4) not only the body in the associated public administration official has the authority in making policy regulations (*beleidsregel*), but also the higher ups in the agency. The condition indicates that the supervisory body or administrative officer of the public policy making (*belidsregel*) also does not have the authority of legislation (*wetgeving bevoegheiden*). Then, in the development of the policy regulation (*belidsregel*), it has been accepted as a need in filling the public administrative practices where the actions are not guided completely by an existing statutory regulation.

Ermessen Freies in German comes from the word *frei* which means free, loose, not bound, and independent. *Freies* means free people, not bound according to Markus Lukman (1997: 205). While *ermessen* means to consider, judge, guess and estimate. So, literally, *Freies ermessen* means people who have the freedom to judge, guess and consider something. This term is typically used in the field of government, so that the *ermessen freies* is interpreted as one of the means that provides a space for officials or public administrative bodies to take action without having to be demanded fully by statutory regulations.

Policy regulations grow and start from the existence of public administrative products on the basis of the use of Germany's *freies* which become an absolute type of welfare state. So, this *freis ermessen* departs from the government's obligations in the welfare state, which

emphasizes that the main task of government is to provide public services or seek welfare for citizens, in addition to provide protection for citizens in carrying out their functions.

When it is linked to the Unitary State of the Republic of Indonesia, *freis ermessen* appears together with the assignment of duties to the government to realize the objectives of the state as stated in the fourth paragraph of the opening of the 1945 Constitution, which emphasizes "to form an Indonesian state government, which protects all Indonesians and motherland, and to advance state welfare, educate the national life and take part in carrying out world order based on freedom, eternal peace and social justice".

Therefore, the main task of the government in the conception of welfare state is to provide services for citizens, then the principle "the government must not refuse to provide services to the public on the grounds that there are no laws and regulations that govern it". Instead, the government is required to find and provide a solution according to the principle of the German *freiever* given to them. Even though the government is granted free authority or *freies ermesssen* , but in the state law, the use of *freies ermesssen* must be within the limits allowed by applicable law.

Restrictions on the use of *freies ermesssen* according to Muchsan (1981: 27) are:

1. Must not be contrary to the applicable legal system (positive legal norms).
2. Only intended in the public interest.

Freies ermesssen in implementation must be morally accountable to God, uphold the dignity and level of human dignity and the values of truth and justice, prioritizing divinity and unity, for the sake of common interest, according to Sajhran Basah (1985: 151).

The policy regulation and *freies ermesssen* are described as the relationship between child and mother. The policy regulation is a form of the realization of *freies ermesssen*. The real reason is that *freies ermesssen* themselves were born consciously by legislators because they could not regulate them thoroughly and precisely, and then were given room for freedom in the public administration to determine what action should be done for themselves. Furthermore, *freessen ermesssen* still cannot be categorized as a statutory regulation, moreover, policy regulations cannot really be called a part of the statutory form.

In accordance to the current situation that there are policy regulations that are pure and generally applicable and some are not in the form of pure and not too general rules, but only institutional and inwardly applicable. J.H. Van Kreveld (1997: 121) argues, the main characteristic of policy regulation is:

1. Not based on explicit provisions sourced from attribution or delegation of laws in the process of establishing policy regulations.
2. Can be written and unwritten which derives from free authority to act by government agencies or is only based on the provisions of general laws and regulations that provide a space of discretion to administrative bodies or officials for their own initiatives to take public legal actions that are both regulatory and stipulating in the process of forming the policy regulation.
3. In general, without explaining to citizens about how government agencies should exercise their free authority over citizens in a given situation (or subjected) a regulation and the editorial of the contents of the regulation is flexible.

4. Even though in the preamble, it does not refer to the law which authorizes its formation to the relevant government agency, editors of the jurisdiction of the policy in the Netherlands are formed following the format of ordinary laws and regulations, and are announced officially in the government newsletters.

5. Officials or state administrative bodies that have space in policy making, can determine the juridical format.

Policy regulations with pure statutory regulations are clearly, explicitly, and clearly ordered the formation of legislation at the superior level (attributions and delegations), according to Marcus Lukman (1997: 19). Policy regulations are indeed different from purely statutory regulations, but in practice they are legally enforced and implemented in the same manner as ordinary laws and regulations. Policy regulations are not statutory regulations, but in many cases policy regulations are also statutory regulations such as binding generally in which society has no choice but to obey according to Belifante (1985: 84).

The form and format of the policy regulations resembles complete legislation with an opening in the form of considerations "weighing" and the legal basis "remembering", the body in the form of articles, parts of the chapter and closing according to Hammid Attamini (1993: 13). A difference in the implementation of the rules for a judge absolutely can only apply the laws and regulations. This means that judges are required to apply these laws and regulations. In the development of the world of law studies, there is still controversy in understanding between policy regulations and legislation. The reason for making policy is by referring to the principle of *freies ermessen* and the general principle of proper governance, administrative habits, or constitutional conventions and can be justified. Although policy regulations are only limited to state administration.

The efforts to realize the goals of the country, as all the people of Indonesia hope for, is through a tool called the law, which is manifested in the form of legislation. Then, through power, it can be run as a guide to realize the expected goals. Hierarchically, statutory regulation regulated in Indonesian Law No. 12 of 2011 which can be used as a basis for determining a space for law outside of the hierarchy of laws and regulations, and in the end, it is classified as a pure statutory regulation or classified as a policy regulation (*beleidsregel*). In tracing the legal certainty of the local government in managing mining policies related to *freies ermessen* and laws and regulations, it seems that they have ambivalence. On the one hand, policy regulations cannot be seen as statutory regulations. But on the other hand, in practice, there is a statutory character in the sense of binding in general. Therefore, in reality, the local government does not have the role as regulated in Indonesian Law on Local Government No. 23 of 2014.

The reason is that the policy regulations are sourced from *freies ermessen* which core actions are free administration of the state and are needed according to the demands of life and the needs of the community. However, on the other hand, it is very dangerous for the sustainability of state of law if its use is excessive and does not supervised and controlled in its application. It is this condition that is intended to be maintained so that the existence of the

Indonesian law is not threatened by the presence of policy regulations, although, practically, is really needed for the current conditions in Indonesia.

Besides, in a government system based on the principle of good governance as a government official in carrying out their governmental tasks, certainly, it cannot be avoided that legal and administrative problems arise because the government should also be monitored by the public and organizations. The same thing happened with the enactment of legislation No. 23 of 2014 as amended by Indonesian Law on Local Government No. 9 of 2015 about the Local Government should be given authority in the field of mineral and coal mining in terms of licensing mineral and coal mining in the regency / city area. The absence of the role of the local government resulted in the absence of a function of supervision, guidance and control of negative post-mining impacts such as the destruction of the mining area's ecosystem and can increase the value of the district / city tax revenue to realize community welfare.

Observing the conditions of regulating the authority of granting people's mining licenses for metal mineral commodities, coal, non-metal minerals and rocks in the mining area of the people's mining will have an impact on economic actors in the mining sector. Hence, it tends to weaken the economic aspects that can support local development. The discussion on the relationship between law and development cannot be separated from legal, economic and institutional aspects.

As the chart shows, law and development doctrine emerges from the inter-section of economics, law, and institutional practice. Economics influences the practices and policies of the development agencies but these policies and practices may also be taken into account in shaping economic theory. So there is an area of overlap between institutional practice and economic theory. But the shape of this space is also constituted by the world of legal ideas: when economic theory and institutional practice turn to law, they must take their ideas about law from the realm of legal thought. Law and development doctrine, then, crystallizes when all three of these sources come together.

The opinion of Trubek and Santos in the first stage shows that the doctrine of law and development is a result of three aspects; economics, law, and the character of the institution. The economic aspect influences the practices and policies of policy-making institutions, but the policies and practices are also adopted as part of economic theory. So, there is an overlapping area between the practice of policy making institutions and economic theory. Through understanding the legal doctrine and development, ideally, law can become an instrument that provides a level of development ideas and at the same time, becomes an instrument for creating a strong structure.

Based on the legal ideal of being able to become an instrument that provides development ideas and at the same time become an instrument for creating a strong structure, the regulation of the authority to grant mining permits for metal mineral commodities, coal, non-metal minerals and rocks in the people's mining areas should be able to see aspects of efficiency (*doelmatigheid*) and usability (*doelfrentheid*) in terms of formulation.

In simple term, it can be said that it is formulated with the consequence of giving the authority to grant people's mining licenses for metal mineral commodities, coal, non-metal minerals and rocks in the people's mining area to the provincial regions. Will it be relevant to the supervisory obligations attached to the permit? Will the provincial government with the available resources be able to conduct oversight in all regions related to the permits that have been given? Is it effective and efficient if people who needs the permit have to go through a long bureaucratic chain? While the non-metal mineral and rock mining actors are usually only small business actors.

Based on this fact, it is necessary to review the authority to grant community mining permits, by returning the authority from the perspective of the legal regime of the local government to the district / city government whose span of control is short of mining actors and areas, so that aspects of issuing permits, supervision and tax collection become closer therefore it can be more efficient and effective.

Various regulations at the local level both in the form of local regulations and regulations of the head of the regency/city, which regulate the management of natural resources that were originally under their authority, must be reviewed or even revoked or declared invalid. This is necessary in order to create order and provide legal certainty. On the other hand, the provincial and/or central government need to make new regulations as a basis or legal umbrella in the implementation of what is their authority in managing natural resources.

Legal certainty is very much needed by the company because in conducting mining activities, in addition to being a subject to legal provisions, it is also related to other provisions and cannot be released just like that. Legal certainty is the consistency of regulations shown by the existence of regulations that do not clash with another regulation and can be used as a guideline for a sufficient period of time so that it would not give an impression that in every change of official is always followed by changes in regulations that can conflict with existed regulation.

The response of the company in the licensing arrangement there was some policies of the director general and the East Kalimantan ESDN Ministry that were not in sync, for example: when handling shipping licenses, the company was charged and the amount were varied even though the company knew that the director general's policies did not regulate the charges, due to a policy, the company still paid for it even though it is not clear and until now the charges has caused uncertainty.

To respond the conditions above, the legal certainty or rule of law is very important to realize the real law and equitable justice. Thus, the manifestation of legal certainty according to Soerjono Soekanto is as follows: legal certainty is the regulations of the central government generally accepted in all regions of the country. Another possibility is that the regulation applies generally, but only for certain groups. In addition, local regulations can also be made by local authorities that is only applied in the area, for example the municipal regulations.

Based on the description above, it is clear that the role of law in creating a conducive investment climate is an absolute requirement, bearing in mind that investors will not invest in places that do not have legal certainty, this can pose a very high legal risk.

As revealed by PT. Indominco Mandiri in East Kutai Regency, that the people held a demonstration because they wanted to use the Indominco Mandiri road for public truck to transport to other area. As well as various community demands against companies, in this condition, the company felt uncomfortable and needed government legal certainty.

Basically, the obligation of local governments is to guarantee business certainty and security for the implementation of development. To guarantee business certainty and security, it is necessary to regulate the authority of the government, provinces and districts / cities in a clear implementation of mining. The current condition of the East Kalimantan province is that the local government has not been able to provide security guarantees for investors, both foreign and domestic investors, to develop businesses in the regions. Some things that haunted the miners in East Kalimantan have not been answered, such as legal certainty and security guarantees, supporting infrastructure conditions, and customary land rights. Whereas a conducive investment climate can increase economic activity, both on a large scale and popular economic activities.

The existence of legal certainty is a hope for justice seekers of the arbitrary actions of law enforcement officers who sometimes are always arrogant in carrying out their duties as law enforcers. Because with the existence of legal certainty, the company will know the clarity of their rights and obligations according to law. Without legal certainty, everyone will not know what to do, it will not be easy to know whether their act is in accordance to the law or not, prohibited or allowed by law. This legal certainty can be implemented through good and clear norms in a regulation and its implementation will be clear. In other words, legal certainty means that clear in terms of regulation, subject and object and the legal threat.

However, legal certainty might not be considered as an absolute element at all times, but the means used in accordance with the situation and conditions by taking into account the principles of benefit and efficiency. This is in line with the theory of good governance put forward by G.H Addink, in relation with the activities of carrying out functions to carry out public interests. Good governance in regards to the administration of three basic tasks of government.

First, to guarantee the security of all people and society itself. Second, to manage an effective framework for the public sector, the private sector, and civil society (managing an effective structure for the public sector, private sector, and society). The third, to promote economic, social and other aims in accordance with the wishes of the population (advancing economic, social and other fields with the will of the people). In implementing the G.H Addink theory, it needs to be sync with the efforts of the principle of certainty (the principle of legal certainty, which is the main principle in implementing good governance).

Explanation of government policies on the management aspects of mineral and coal mining after the enactment of Indonesian Law on Local Government No. 23 of 2014 is that aspects of Licensing, Guidance and Supervision, Facilities, and Certainty are urgently needed for National stability. Mineral Mining Management is a National Strategy that has an impact on

national revenues and also has implications for the welfare and prosperity of the people. According to Carl I. Friedrich, policy as a series of actions proposed by a person, group or government in a particular environment, with the existing threats and opportunities. The proposed policy is intended to exploit the potential while overcoming existing obstacles in order to achieve certain goals.

This is where the role of the government is able to act decisively towards aspects of mineral mining, as the main potential of national revenue. Regulations and policies as stated in the Article 33 paragraph 3 of the 1945 Constitution of the Republic of Indonesia set forth that: "The earth and water and the natural resources contained therein must be controlled by the state and used for the greatest prosperity of the people".

It is very clear that if mineral and coal management takes place based on applicable regulations, there is a strict policy from the government, good and correct management, properly managed through a licensing system accompanied by continuous guidance and supervision, so the aim to create the greatest prosperity of the people can be implemented. This is in line with the theory of justice according to Theory Mixed Economic System stated by W. Friedman. "Mixed economy" is a variety of ways in which state power is used to control or oversee the country's economic system, even though the economy is run by private companies. W. Friedman argues that the four functions of the state are in a mixed economic system, such as:

- a. State as *"Provider"*
- b. State as *"Regulator"*
- c. State as *"Entrepreneur"*
- d. State as *"Umpire"*

The conditions in Indonesia, if it refers to the provider principle that the one who guarantees the sustainability of the people in a country is the state, so that the concept of welfare state can be implemented in the form that the state does not only act as a night watchman or security guard, but also able to provide guarantees of the sustainability of the people substantially. Therefore, people can get a stable life without feeling any anxiety.

Regulator's condition means the role of government is to make regulations to create regularity, in-laws, and security in state life. Regulation can be made with mutual coordination, synergy and harmonization between the government and the people, government responsibility in the management of mineral resources and coal for the welfare of its people.

Entrepreneur Conditions, which means that the state as the ruler. The government should act as entrepreneurs. Business actors for the management of mineral and coal resources which are in a power state. However, empirically, it is necessary to understand that mining has the following characteristics, has high risks, high technology, and large capital. For conditions like in Indonesia, its capital capability to run the business is still very far, considering that capital in mining management is like building a country that needs a large capital. It is closely related to high risk character, which means that in coal and mineral mining activities and mining management is equivalent to pig in a poke, which is unclear whether the outcomes will be good or bad. This means that, at the beginning, the work itself has cost a

large capital that is unnecessarily successful, so losses are absolutely inevitable. Conditions like this, for Indonesia, clearly they are not able to fund it, so that the effort that can be done in the aspect of business is to open up large-scale investment. Therefore, this effort should be accompanied by strong regulations and place the role of government higher than entrepreneurs.

High technology in the management of mineral and coal mining means that they are very much in need of human resources who have specific knowledge in the management of minerals mining, and in addition, it also requires infrastructure facilities with high technology.

Umpire Conditions, the government is the arbiter or mediator, in the management of minerals mining, as an effort to get the maximum outcomes for the welfare of the people.

The importance of understanding a mixed economic system as stated by W. Friedmant, the government has three important roles in overcoming problems in the (free) market economy system, such as:

1. Overcome the inefficient allocation of resources, such as: monopolies, externalities, and public goods.
2. Overcome the unequal distribution of income.
3. Overcome the macroeconomic problems, such as: inflation, unemployment, and economic growth.

In an effort to overcome monopoly, the government issued regulations of prohibiting companies from engaging in monopolies and unfair business competition. In Indonesia, this regulation is written in Indonesian Law on the Prohibition of Monopolistic Practices and Unfair Business Competition No. 5 of 1999.

- To overcome external costs, the government issues regulations that prohibit pollution and environmental pollution. In Indonesia, this regulation is found in Article 21 of Indonesian Law on Industry No. 5 of 1984.
- To address the commercialization of public goods, the government provides education, transportation, and health facilities.
- To address the unequal distribution of income, the government imposes progressive tax rates, subsidies and minimum wages.
- To overcome macroeconomic problems, the government provides stability by issuing macroeconomic (fiscal and monetary) policies, and providing stimulus.

The socioeconomic system is an economic system aimed at realizing the sovereignty of the people in the economic field. This system is an economic system applied in Indonesia. The role of the state in the nation's economic system is as follows:

- Arranging the economy as a joint venture based on the principle of kinship; develop cooperation (Article 33 paragraph 1).
- Control the branches of production that are important for the country and that control the livelihoods of many people; developing BUMN (Article 33 paragraph 2).
- Control and ensure the use of the land, water and all the resources therein for the greatest prosperity of the people (Article 33 paragraph 3).
- Manage the state budget for the welfare of the people; impose progressive taxes and provide subsidies.

- Maintaining monetary stability.
- Ensure that every citizen has their right to get a job and a decent living for humanity (Article 27 paragraph 2).
- Caring for the poor and neglected children (Article 34).

Merely comparing with the economic system of capitalism, that the state is generally interpreted as an economic system in which commercial economic activity (for profit) is carried out by the state. Production factors are regulated and managed as a state owned enterprise (SOE), or a publicly listed company whose controlling shareholder is the state (en: State Holding Enterprise). Many people argue that the modern Chinese economic system is another form of this system, also the Soviet Union used to unconsciously also use this system.

A socialist market economic system is an economic system based on the dominance of sectors owned by the state in an open market economy. This system is a system used by the Chinese state and is widely known as another form of state capitalist system. Slightly different from the economic system of state capitalism, the factors of production are regulated and managed not only by state-owned enterprises (SOE) and publicly traded companies whose controlling shareholders are owned by the state (SHE), but also private companies.

The Nordic Model System or also called the Nordic Capitalism is an economic system which is a combination of free market capitalism with comprehensive state welfare and collective bargaining at the national level. This system is used in the Nordic countries, such as: Denmark, Finland, Norway, Iceland, and Sweden. The characteristics of this system include:

- Detailed social safety nets, coupled with public services such as free education and universal health services.
- Strong property rights, contract enforcement, and ease of doing business.
- Public pension plans.
- Low barriers to free trade.
- Small regulation of products in the market, etc.

The advantages of a mixed economic system include:

- Most business and industry can be entrusted to private companies that tend to be more efficient than state-controlled companies.
- Individual / private rights are clearly recognized.
- Mixed economic systems allow government intervention to overcome problems in a free market economic system, such as: monopolies, externalities, and public goods.
- Mixed economic systems can create equity and provide a "safety net" to prevent people from very poor living condition. At the same time, this system can also make people enjoy financial rewards from hard work and entrepreneurship.
- The government can create macroeconomic stability with fiscal and monetary policies.

Weaknesses of mixed economic systems, such as:

- It is difficult to know how far governments should intervene in markets and macroeconomics.
- Mixed economic systems are considered by experts in the socialist system to allow too much market power, this leads to differences in welfare (inequality) and inefficient

allocation of resources. Whereas by free market system experts, mixed systems are considered too much to intervene in the market.

- The government is generally a poor manager of the economy and business, because the government is influenced by political interests and other short-term factors. As a result, state enterprises have become inefficient and the emergence of corruption, collusion, and nepotism.

The role of Guidance and Supervision by the Mining Inspector is very big in the management of mineral and coal resources, both in terms of work safety, socialization of regulations, after the enactment of Indonesian Law No.23 of 2014, the role was not carried out properly and became hiatus due to the devisit of the government budget. Budget devisit conditions that occur in government, the companies do not want to think about it, if it has become a rule and written in the legislation then it should be implemented. This opinion is true if it is viewed from the aspect of legal benefits including the rule of law. The law will not be supreme if it is not enforced by people who have power (the government) and Indonesian people.

B. Forms of Policy

SOP, Implementation Procedure, Norms, and Criteria

The legal basis for establishing a policy carried out by government officials is Article 5 and Article 20 of the 1945 Constitution of the Republic of Indonesia. Then Indonesian Law on Government Administration No. 30 of 2014 is aimed at:

- a) Improving the quality of government administration, agencies and / or government officials in using authority must refer to general principles of good governance and based on statutory provisions.
- b) Resolving problems in the administration of government, arrangements regarding government administration are expected to be a solution in providing legal protection, both for citizens, society and government officials; and
- c) Realizing good governance, especially for government officials, the law on government administration becomes the legal basis needed to base the decisions and / or actions of government officials to meet the legal needs of the community in administering government. State control over mineral and coal resources according to the policy function is a series of government decisions or activities are designed to address public problems, whether the problem is real or being planned, as stated in the official documents, even in the form of legal regulations directed at the realization of national objectives, such as;
 - 1) Protecting all Indonesian people and motherland;
 - 2) Promote public welfare
 - 3) Educating the life of the nation, and
 - 4) Participate in carrying out world order based on freedom, eternal peace and social justice.

In order to make the management of mineral and coal resources can be managed properly and correctly, the government has enacted legislation No. 4 of 2009 as a form of implementation of the said legislation.

The Government Regulations meant are: 1) Government Regulation on Implementation of Mineral and Coal Mining Business Activities No.23 of 2010, has been revised by several articles, such as Government Regulation on Implementation of Mineral Mining Business Activities and Coal No. 24 of 2012 concerning. 2) Government Regulation on Mining Areas No. 22 Year 2010. 3) Government Regulation on the Development and Supervision of the Management and Implementation of Mineral and Coal Mining Businesses No 55 of 2010; and 4) Government Regulation on Reclamation and Post-Mining No. 78 of 2010. 5) Government Regulation Mineral Processing and Refining No. 1 of 2014.

The five Government Regulations as a form of technic implementation of Indonesian Law No. 4 of 2009 which then by the Minister of Energy and Mineral Resources issued the Decree on the Implementation of Mineral and Coal Mining Service Business No. 28 of 2009. Regulation of the Minister of Energy and Mineral Resources on Increasing Mineral Value Added through Mineral Processing and Refining Activities No. 07 of 2012, then revised to Energy and Mineral Resources Regulation No. 11 of 2012.

In addition to concrete policies through legislation that have been described above, the government or state officials who are authorized to make efforts to realize the people's welfare and the maximum welfare of the people as mandated by Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, coal priority policy set for domestic needs (Domestic Market Obligation). This means that coal can still be exported if the domestic coal needs have been met first so that coal increasingly acts as an energy source for electricity needs or called (PLTU), cement, fertilizer, textiles and domestic industries.

The policy of prioritizing the fulfillment of coal and minerals for domestic needs has the main objective of which is national energy security. Energy is a basic human need that cannot be avoided, and influences very significantly on the sustainability of a nation in the present and the future. Therefore, national energy security must be achieved, especially those from coal.

Furthermore, based on government regulation number 1 of 2014 which requires companies to process and refine minerals domestically. It is necessary to ensure the supply of raw materials for processing and refining facilities to be built, because considering the cost of processing and refining machines that are quite expensive. In order to overcome and prevent the scarcity of mineral and coal supply, as well as guarantee the supply of minerals and coal in the country, it is necessary to prioritize the supply of mineral and coal needs for domestic interests.

Increasing domestic additional value cannot be separated from the basic characteristics of minerals, called non-renewable resources. In fact, it belongs to all the people of Indonesia, therefore, its management and utilization must be aimed at increasing additional value for the national economy. So, the government is trying to implement an increase in the additional value of minerals. In terms of government policy, the Presidential Instruction No. 3 of 2013 has been established regarding the acceleration of the increase in additional value of minerals through domestic processing and refining.

Based on the description above, to increase the contribution of the mineral and coal sub-sector to the national economy, the Directorate General of Mineral and Coal has set several policy directions in the development of the mining sector. The policy direction becomes the

foothold in determining programs and sharing activities in order to encourage the optimization of mineral benefits within the framework of national development, such as:

- a) implement priority fulfillment of minerals and coal for domestic needs;
- b) provide certainty of transparency in mining activities;
- c) carry out increased supervision and guidance;
- d) encourage increased investment and state revenue;
- e) encourage the development of added value of the mining commodity products; and
- f) maintaining environmental sustainability through environmental management and monitoring including reclamation and post-mining.

The implementation of mineral and coal management policies in 2013 was carried out through:

1. Encouraging the development of added value of commodity products;
2. Carrying out guidance enhancement and supervision of mining activities;
3. Completion of the reconciliation of Mining Business Permits;
4. Completion of the renegotiation of amendments to the Work Contract and the Coal Mining Mastery Work Agreement;
5. Encouraging investment enhancement and optimizing state revenue through collaboration enhancement with relevant agencies (PEMDA, BPK, BPKP, KEMENKEU and KPK);
6. Provide certainty and transparency in mining business activities with supporting regulations of Indonesian Law No. 4 of 2009; and
7. Guarantee domestic coal supply through the Domestic Market Obligation.

After the enactment of Indonesian Law on Local Government No. 23 of 2014, there was a change of authority of regency and city governments to the provincial government, in this case the office of the Ministry of Energy and Mineral Resources and Coal (KESDM). At the same time, the management of mineral and coal mining by the provincial government (the Governor) followed up by issuing a moratorium on temporary cessation and immediately carrying out the arrangement of problematic permits. Permits that already met the requirements were given the symbol Clean and Clear, for those who meet the operational requirements if they have not been given the opportunity to complete the permit and temporarily fall into the category of Non-Clean and Clear.

The actions taken by the governor were in sync with ESDM Minister Circular Letter No. 04.E/30/DJB/2015, which enacted that the Regent/City immediately submits the permit file to the Governor.

Furthermore the Minister of Internal Affairs also issued Circular Letter (SE) of Minister of the Internal Affairs No. 120/253/SJ that was set on January 16, 2015. This Circular is a reference from article 404 of Indonesian Law No. 23 of 2014, which recommends that the immediate handover of Personnel-Funding-Infrastructure and Facilities-Documents (P3D), as a result of the division of governmental affairs between the central, provincial and district/city governments regulated under this law is carried out in the span of 2 (two) years since this law was promulgated. By observing the provisions of Article 404 above, the budget cycle in the State Expenditure Budget and the Regional Expenditure Budget, as well as to avoid stagnation in the implementation of regional government resulting in the cessation of

services to the public, the implementation of concurrent government affairs that are of service to the wider and massive public, which its implementation cannot be postponed and cannot be carried out without the support of Personnel-Funding-Infrastructure and Facilities-Documents (P3D), continues to be carried out by the level/composition of the government which currently organizes concurrent governmental affairs until the submission of Personnel-Funding-Infrastructure and Facilities-Documents (P3D).

With the transfer of authority, districts/cities are urged that all documents are also transferred to the provincial government. The file that has been transferred to the province is then followed up with:

1. Inventory of Licenses that are still valid, are in the process of filing and or expiring;
2. Inventory regulations and policies related to the field of Energy and Mineral Resources;
3. Preparing Energy and Mineral Resources;
4. Technical coordination with the Ministry of Energy and Mineral Resources

Mineral and coal mining must be managed properly, because it is a national strategy, if the government does not take part in the management, it will have a negative impact on the Republic of Indonesia. Therefore, the programs and activities of the Directorate General of Mineral and Coal should be carried out based on the mandate of the 1945 Constitution, regarding Mineral and Coal subsector Strategic Plan.

Findings in the field, through interviews with companies, especially at PT. Indominco Mandiri, located in East Bontang, Kutai, said that the fulfillment of the DMO (Domestic Market Obligation), had been carried out, and for the coal condition of PT. Indominco Mandiri had a very satisfying quality and a high selling value to be sent abroad, so, the efforts made to improve the revenue of the state treasury is to sell coal abroad then the profits were used to buy coal in order to meet the DMO for domestic needs. Considering that the type of coal needed is Domestic, it does not need high quality coal.

Talking about mining which is a National Strategy, the involvement of PT. Indominco Mandiri is very big, such as having the obligation to build a sustainable environment by planting trees throughout East Kalimantan and not only the area around PT Indominco Mandiri's mining in Bontang alone. Likewise, if a national disaster occurs, PT. Indominco Mandiri also contributed in providing humanitarian assistance, such as in the 2004 tsunami disaster in Aceh, Lapindo mud, and others, especially in the Bontang region.

The National Strategic Efforts carried out by PT.Indominco Mandiri were certainly in line with the policy direction of the Mineral and Coal Subsector. In its implementation, the East Kalimantan provincial government made a policy by establishing governor regulation on the arrangement of permits and non-permits as well as Improving Licensing Governance in the Mining No. 17 of 2015, forestry and oil palm plantation sectors. Until now, the East Kalimantan provincial government has not issued a new Mining Business License (IUP) for the coal and mineral mining business activities. The authority of the issuance of such permits is in the provincial government of East Kalimantan considering many problems in the district/city that must be resolved.

The existing problems were not only related to authority but also related to work problems that are also problematic. This was in accordance with Government Regulation on the

Implementation of Mining and Mineral Business Activities No. 23 of 2010. In relation with the governor regulation above which is a policy or step taken by the Provincial Government to overcome the problems that have accumulated.

The nature of the policy carried out by the Government is:

- 1) The existence of a reality or problem that needs to be solved;
- 2) There is a reason for an action chosen by the government in solving the problem; and
- 3) There is a correlation between actions and goals to be achieved.

In relation with the state's mastery of the management and exploitation of mineral and coal resources, the government policy is public and its implementation is public, so that the role of the community in deciding whether or not to do it is necessary. This role can be given directly to the government or through representative institutions to be channeled to policy makers.

A policy that applies and is characterized by consistent and recurring actors, both those who make it and those who obey it. Public policy is a series of choices that are more or less interconnected, including inactive decisions made by government agencies and officials. The issue of policy is an urgent matter which is currently hotly discussed, especially in industrial countries such as Indonesia.

Policy implementation is not just a mechanism for translating policy objectives into technical and routine procedures but also involves various other factors, especially regarding resources, relationships between institutional units, levels of government, which may not agree with established policies. This is in line with the opinion of Rondinell and Cheema which states that the relationship of factors that influence policy implementation is:

- 1) *the compliance approach*, i.e. implementation is only considered to be a technical and routine matter so that the implementation process has been predetermined by political leaders; and
- 2) *The political approach*, which is a political approach, views administration as an integral part that is inseparable from the policy-making process whereby policies are changed, reformulated and even a heavy burden in the implementation process.

The researcher agreed with Rondinell and Cheema's view, that policy is only seen as a technique and routine and solely an administration will place the policy only within the limits of government decisions that are determined and announced without seeing to what extent the policy can achieve the desired goals when the policy will be taken by the government. The policy that is taken by the government is only a formality which in the end causes the policy to be vulnerable to mistakes and uncertainties for the community, so that improvements or replacements are made.

The researcher believed that an ideal policy is a policy that is preceded by community participation so that its implementation is in line with the interests of the community and will receive public support. In connection with the management and exploitation of mineral and coal resources, it should be carried out with caution because the policy will affect state revenues for community development. This, is a picture of government that is responsive to the various aspirations and needs of community development. Besides that, it gives direction to the achievement of the state's goal which is to aspire to people's welfare.

IV. CONCLUSION

Management of mineral and coal resources after the enactment of Indonesian Law on Local Government No. 23 of 2014 which is the legal umbrella for horizontal regulations relating to energy and mineral resources, environment, forestry and marine. Legal certainty towards the Local Government in giving a role in managing mining business has been transferred to the central government through the provincial government also to the investors so that they cannot exploit the benefits only to the entrepreneur. In legal certainty, the role of the local government is abolished even though in reality it is precisely the local government who understands the regional problems.

Continuity of good and correct management of mining needs to be established in the Guidance and Supervision by Mining Inspector. Guidance and Supervision by the Mining Inspector (as a functional official) has been handed over to the Central Government, which then is not fully authorized to carry out the function in the field that there was no budget as a means of carrying out supervision and monitoring. This condition, is expected to last for a long time until 2018. Management of mineral and coal mining, although very risky, regulations need to be clear with proper interpretation so that policy makers can carry out management properly and also in managing the negative impacts of mining management can be overcome. Commitment to effective and optimal mining management becomes a priority scale because it affects national revenues for the welfare of society.

V. RECOMMENDATION

The government will immediately review the regulations, especially aspects of local government authority in the form of discretion through *freies ermessen* for the interests of the regions, considering the management of mineral and coal resources is a national strategy because after the enactment of Indonesian Law on Local Government No. 23 of 2014. Besides that, the Guidance and Supervision by the Mining Inspector (as a functional official) has been handed over to the Central Government, which then is not fully authorized to carry out the function in the field that there was no budget as a means of carrying out supervision and monitoring. Management of mineral and coal mining, although very risky, regulations need to be clear with proper interpretation so that policy makers can carry out management properly and also in managing the negative impacts of mining management can be overcome. Commitment to effective and optimal mining management becomes a priority scale because it affects national revenues for the welfare of society.

REFERENCE

- [1] Asshiddiqie, Jimly, *Konstitusi Ekonomi* (Penerbit Buku Kompas, 2010)
- [2] Browning, Christopher S, 'Branding Nordicity: Models, Identity and the Decline of Exceptionalism', *Cooperation and Conflict*, 42.1 (2007), 27–51
- [3] Islahiha, Nur Azmil, Nur Frita, and Reza Maulana, 'Penerapan Sistem Perekonomian Syariah Dalam Mengatasi Kesenjangan Sosial Ekonomi Di Indonesia', *PKM-P*, 3.2

(2019)

- [4] Li, Xi, Xuewen Liu, and Yong Wang, 'A Model of China's State Capitalism', *Available at SSRN 2061521*, 2015
- [5] Marzuki, Mahmud, *Penelitian Hukum: Edisi Revisi* (Prenada Media, 2017)
- [6] Marzuki, Peter Mahmud, 'Penelitian Hukum Normatif', *Jakarta: Kencana Prenada Media Group*, 2010
- [7] McConnell, Campbell R, Stanley L Brue, and Sean Masaki Flynn, *Economics: Principles, Problems, and Policies* (Boston McGraw-Hill/Irwin, 2009)
- [8] Murphy, John, 'The Other Welfare State Non-Government Agencies and the Mixed Economy of Welfare in Australia', *History Australia*, 3.2 (2006), 41–44
- [9] Sami Shubber, *The Law of Investment*, ed. by Martinus Nijhoef (Iraq)
- [10] Sigley, Gary, 'Chinese Governmentalities: Government, Governance and the Socialist Market Economy', *Economy and Society*, 35.4 (2006), 487–508
- [11] Suryaningsi, Abrar Saleng, Marthen Arie, and Irwansyah, 'The Essence Of State-Control Over Management And Utilization Of Mineral And Coal Resources', *International Journal of Scientific & Technology Research*, 4.11 (2015), 276–80
- [12] Suryaningsi, Suryaningsi, 'Fungsi Kebijakan Pemerintah Atas Pengelolaan Sumber Daya Mineral Dan Energi Pasca Di Tetapkan UU. No. 23 Tahun 2014 Tentang Pemerintahan Daerah', *Gerbang Etam*, 11.2 (2017)
- [13] Trubek, David M, and Alvaro Santos, 'The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice (Introduction)', *Introduction in The New Law and Economic Development: A Critical Appraisal* (Alvaro Santos & David M. Trubek Eds., Cambridge University Press 2006), 2006
- [14] Tutik, Titik Triwulan, and M H SH, *Konstruksi Hukum Tata Negara Indonesia Pasca Amandemen UUD 1945* (Prenada Media, 2016)