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THE PRINCIPLES OF INVESTMENT LAW IN THE MANAGEMENT OF MINERAL AND COAL RESOURCES WITHIN COMMUNAL LAND

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Abstract

The legal forms of land tenure by communal society, known as communal, are varies in Indonesia. Communal title has been considered as a juridical and common term, although each of communal societies actually has their own different technical term. Making communal land as an investment place of managing mineral and coal resources might bring some legal issues for communal society. The first issue related to less optimal implementation of the principles of investment law by both government and investors. It would impact on the emerging conflicts between communal society and investors. Second, the position of communal land loaded by given-period mining permit would turn into the state property after the period ended.

Keywords

communal land, investment, mineral and coal

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Introduction

Land is fundamental for communal society. This importance could be seen from its nature as their only property for living, providing protection, the last place for people to die, and for taking worship. Based on communal law, individual freehold title was much appreciated. However, the salient value referred to the utilization of communal land as the benchmark of freehold appreciation, hence, both the head of custom and the local people hold an important role to preserve and maintain the land products and the stability between the control-holder and the utilization (Winahyu Erwiningsih, 2009).

Article 33 subsection (3) of Indonesia Constitution 1945 mentioned, "The land, water, and natural wealth contained within them are controlled by the State and shall be utilized to increase the prosperity of the people." This principle indicated the government's responsibility as the executives of national policies to manage and utilize the natural resources for as much as the people welfare.

In relation to the utilization of mineral and coal resources on communal land, it – based on the principle mentioned in the Constitution 1945 – should be sustainably and optimally implemented for the communal society's interests. Therefore, the government plays a key role to optimize the utilization of mineral and coal resources. The exploitation of mineral and coal resources on communal land should be conducted under the consideration of investment law as mentioned in article 3, Law No. 25 of 2007 on Capital Investment. It was important, given that the utilization of mineral and coal resources would become a sustainably real economic power in the form of the national income, the development of a region, human resource, and communal welfare, although it should still consider the commitment of corporate social responsibility, legitimation and appreciation on communal title, and living environment preservation and conservation.

In fact, the utilization of communal land in mining sector did not bring any positive effect on communal society. Instead, it brought serious issues for them. Mining companies ignored the principles of investment law. As the result, many disputes or conflicts emerged between the communal society and the mining companies.

Therefore, this study focused on the implementation of the principle of investment law related to the utilization of communal land for the importance of investment on

mineral and coal resources. In this case, utilization was defined as managing communal land by investors as the outsiders of societal members.

Research Method

This study is a normative law research using two approaches which included conceptual approach and statute approach. Furthermore, the techniques used for analyzing the gathered legal materials included a descriptive technique and qualitative interpretation.

The Principles of Investment Law in Managing Mineral and Coal Resources

Sudikno Mertokusumo argued that a legal principle referred to general basic ideas or concrete background of a legal system manifested in regulations and judges' decrees as positive law and it could be seen from the general nature of concrete rules (Sudikno Mertokusumo, 2003). Therefore, the implementation of the legal principle was conducted in collective manner.

A primary consideration for the state to optimize both domestic and foreign investment roles is turning the potential of economic into real economic power in order to develop its economic growth. Investment, compared with foreign loans, is not only identified as the best alternative resource for financing national development but also as the instrument to integrate the national economic with global economic (Dellisa Ridgway and Mariya Thalib, 2003). Furthermore, it can bring multiplayer effect on national economic growth, since investment activities is not merely transferring capital or goods but also transferring insights and human capital (Hans-Rimbert Hemmer, et.al., 2002), creating jobs, developing industries of import substitution in order to skimp the foreign exchange, encouraging non-mining export to increase foreign exchange, transferring technology, developing infrastructure and under-developed regions (Erman Rajagukguk, 2005). Thus, many countries, including Indonesia, involved investment as a part of their national economic enforcement.

The establishment of the Law No. 25 of 2007 on Capital Investment, subsequently known as UUPM, with a new paradigm is a significant progress in attracting investors. However, UUPM did not immediately resolve issues of capital investment emerged in Indonesia. Capital investment is complex and not solely related to one single rule. Regulation on capital investment was not only related to UUPM along with its implementation but also related to other regulations such as taxation, employment,

and affairs, trade, mining, and other related laws dealing with the management of mineral and coal resources.

Investment law is tightly related to land affairs since every investor, particularly foreign investors, is provided with a given rights over land prevailed in Indonesia. Those rights included Building Rights Title (HGB), Cultivation Rights Title (HGU), and Right to Use Title (HP). In particular, investors of mineral and coal resources hold a Mining License (IUP).

Regarding to investment of mineral and coal resources on communal land, it brings some issues. Communal title is a legal authority belonged to a communal society over particular region in which the benefits of the natural resources contained within can be used as much as for their living in generations. Communal title has both inside binding power which relates to the communal society, and the outside one which relates to any outsiders of customary people.

Article 3 UUPM imposed the principle of legal assurance in the top position in the enforcement of capital investment in Indonesia. The description of this article noted that "the principle of legal assurance" intended in the article referred to the legal principle which treated constitution and regulations as a base of each policy and activity related to capital investment.

An important matter in relation to the establishment of the Law No. 4 of 2009 on coal and mineral mining deals with the exertion of mineral and coal mining associated with investment in mineral and coal mining sector. UUPM sets open and closed businesses for capital investment which further regulation is set under the Presidential Regulation No. 39 of 2014 on Lists of Closed Businesses and Lists of Open Businesses. Drawing on that Presidential Regulation, investment can induce the mining sector which capital, location, and the special licensing were under particular terms of condition

There are several articles in Law No. 4 of 2009 as the form of implementation of legal assurance over communal land. First, article 135 mentioning that the licensee of Mining license (IUP) for exploration or of Special Mining License (IUPK) for exploration could do their activities after having license from the titleholder. Second, article 145 subsection (1) mentioning:

(1) People suffering due to direct negative impacts of mining business reserved the right to:

a. Have proper compensation from the fault of mining business under the provision of the Law.

b. Propose lawsuit to the Court dealing with the disadvantages emerged due to mining business that trespass the regulation.

The next principle is openness. In this case the description of article 3, section (b) UUPM mentioned that what it meant as "openness" was a principle to be open with people's rights in order to seek for honest, correct and indiscriminative information about capital investment activities.

However, the Law No. 4 of 2009 used the term "the principle of transparency." The principle of transparency is a base in which the implementation of mineral and coal mining should be conducted in transparent manner. It indicated that information from both the mining licenser and licensee had to be clearly and transparently socialized to the society (e.g., dealing with mining procedures, the requirement of human resource, etc.). The principle of transparency on open management is related to the information of mining management which could be generally accessed, hence, the state bodies and society (e.g., societal institutions) can control and monitor in effective manner.

If openness in investment on mineral and coal resources was well implemented, it would be beneficial for both investors and people surrounding the location of mining business. At least, it would prevent any conflict between them. In fact, such well implementation of that principle was still far from the expectation. The customary people knew nothing related to mining activities. Thus, it was not surprising that many conflict between the customary people and the mining companies frequently happened in Indonesia. It was due to the companies' ignorance on the principle of openness dealing with the utilization of mineral and coal resources.

The later principle is accountability. In this case, the description of article 3 subsection (c) UUPM noted that 'accountability' referred to a principle to decide that every activity and the final result of capital investment should concern on the society as the supreme power of the nation within the constitution.

The implementation of accountability in mineral and coal management relates to the responsibility of both the government – as a regulator establishing license - and businessmen conducting mining utilization, given that the primary target of such utilization should have significant contributions to the national economic growth in order to reach the welfare for the people of Indonesia. Therefore, accountability

referred to the implementation of the companies'/investors' responsibilities as mentioned in the regulations.

Article 17 UUPM deals with capital investors' responsibilities on non-renewable natural resources they utilized for business. It is a must for them to allocate some of their capital to location recovery in which their businesses operate in order to meet the living environment standard. This stipulation is consistent with environmental insights.

Overall, accountability is actually an obligation of both legal bodies and companies to address and explain their performance and actions dealing with their responsibility, as mandated in UUPM. Companies who broke this regulation would be sentenced, as mentioned in UUPM, as the manifestation of the companies' responsibility.

Less effective implementation of accountability toward surroundings in investment of mineral and coal resources management puts both people and company into disadvantageous position. In his study, Salim (Salim and Idrus Abdullah, 2012) suggested that the primary factor of conflict between Ropang villagers, Sumbawa, and PT. Newmont Nusa Tenggara was that the company did not fulfill the villagers' proposal value reaching IDR 10 billion. Such huge amount of money would be used for the development of infrastructure, agriculture, and employee training. As the result, the villagers committed to burn the company's basecamp located Elang Dodo, Ropang-Sumbawa on 19th March of 2006. Another factor creating the conflict was because the company did not meet the substance of social employment contract. The core of this contract mentioned that: 1) Ropang villagers could participate as employees in the exploration and exploitation conducted by the company; and 2) the fulfillment of proposal value reaching IDR 10 billion.

The later principle is fair treatment. In this case, the description of article 3 subsection (d) UUPM noted that 'fair treatment and no race discrimination' was a principle to provide treatment with no discrimination and it was set under the regulation. This prevailed to both domestic and foreign investors. If referring to article 2, the Law No. 4 of 2009, the implementation of this principle is not yet well-implemented. However, if referring to article 38, the Law No. 4 of 2009, IUP was provided to: corporation, cooperation, and individual company. Drawing on this regulation, it could be interpreted that investors in mineral and coal utilization followed the principle. Both domestic and foreign investors could have IUP and IUPK as long as they met the requirement set in investment law.

Moreover, the description of article 3 subsection (e) noted that 'togetherness' was a principle to encourage the roles of whole capital investors simultaneously in their business in order to reach the people welfare. Although in normative setting, the principle of togetherness, based on the Law No. 4 of 2009, is described in some articles, its implementation is still far from the expectation. For instance, the mandate of article 145 subsection (1) required the mining companies to provide compensation for all people who got impact from mining activity. This provision seems burdening for the people due to the complex procedures. Given that every mining activity, wherever it is, brings negative impacts on the people surrounding, such as water contamination, air pollution due to dust, and decreasing livelihood. However, since the compensation has been set under the regulation, the people take it loose as a reality that needs to face.

Dialing with efficient fairness, article 3 subsections (f) noted that what it meant for "efficient fairness" referred to an underlying principle of capital investment activities by prioritizing efficient fairness in business to reach a good, conducive, and competitive business climate.

The implementation of efficient fairness in the management of mineral and coal resources, as the Law No. 4 of 2009 mentioned that the Constitution 1945 on article 33 subsection (3) asserted that the land, water, and natural wealth contained within them are controlled by the State and shall be utilized to increase the prosperity of the people. Given that mineral and coal are identified as non-renewable resources, hence, the utilization should be optimal, efficient, transparent, sustainable, environmentally sound, and fair in order to reach as much as the sustainable welfare of the people.

Following such definition, mineral resources in communal land also rely on the principle of efficient fairness, thus, it can bring benefits for the customary people in particular and the whole people in general.

Based on the description of the article 3 subsection (g), what it meant with "sustainability" was a principle to strive for development process through capital investment in order to assure the welfare and the development in every aspect of life, both in this current day and in the future. Furthermore, subsection (h) noted that what it meant with "environmentally sound" was a principle through which the capital investment should concern on and prioritize the surrounding environmental preservation and conservation.

One article describing the principle of sustainability and environmentally sound under the Law of Mineral and Coal was the article 97 noting that the licensee of IUP and IUPK must ensure the implementation of basic standard and environmental quality run well and corresponded to the nature of the region. In addition, article 98 also noted that the licensee of IUP and IUPK should preserve the function and the carrying capacity of water resources as mentioned in under the constitution.

Although in normative setting, the principle of sustainability and environmentally sound was appropriately set in both UUPM and the Law No. 29 of 2009, those implementation was not well-run. Many conflicts emerged due to the ignorance of those principles. In addition, the responsibility to have reclamation for excavated mine was also ineffective. In fact, many excavated mining areas in Kalimantan were poisonous. This indicated that the implementation of investment principles in terms of management of mineral and coal resources was not optimal. As the result, it put the people surroundings into disadvantageous position.

The Position of Communal Title in the Management of Mineral and Coal Resources

Communal title as a technically juridical term is identified as a title naturally embedded as a prominent competence for customary people in the form of authority to maintain and control their land along with its natural resources contained within the land which bring internal and external benefits (Maria Sumardjono, 2008). In internal context, the customary people utilized this title in order to take benefits from their communal land and natural wealth contained within. Whereas, in external context, this type allowed the outsiders to take benefits from their communal land after they hold license from the customary people along with the licensing cost paid in advance and compensation paid in later.

The presence of communal title was mentioned in Law No. 5 of 1960 on Agrarian (UUPA), in which customary law was recognized as the "breath" of UUPA, as mentioned in article 3 UUPA:

> *Given the provision mentioned in article 1 and 2, the implementation of communal title along with similar titles from customary people, as long as it was in fact exist, should correspond to the national interests based on the unity of the nation and not in conflict with other regulation with higher position.*

Based on article 3 UUPA along with its description, it indicated that UUPA recognized the existence of customary law as the breath of this primary regulation, as long as it

was not in conflict with national interests. In other word, it was identified as thing complemented and adjusted by people's interests in a modern country and international setting, and it was adjusted by the Indonesia socialism. Therefore, national interests could also be defined as a ruler's interests to exploit the natural resources on behalf of the state governance. In other word, both customary law and custom land would finally be "defeated" by whether mining licenses or cultivation right title over the natural resources in communal land.

The utilization of communal land for mineral and coal mining should consider the principle of just in order to protect the customary people from any disadvantageous position. One universally fundamental principle of land implementation was known as *"no private property shall betaken for public use with out just and fair compensation"*. This principle was identified as a process of utilizing land was conducted with honest and fair compensation. In fact, however, this principle was ignored and the government only concerned on their own interest while acting as if it were for public interests.

Considered as human rights, there are some general doctrines attached to the communal title. Those involved the state responsibility to respect, to protect, and to fulfill the communal title for custom society. In addition, communal title also related to many instruments in International law of human resource dealing with economic, social, and cultural issues. Hence, the government should make positive actions such as respecting protecting and fulfilling the communal title and establishing regulations on title violations. Indonesia as one of the declaration initiators was responsible to adopt that declaration in its national constitution (Marchel Maramis, 2013).

The utilization of communal land for mineral and coal mining revealed many problems. Those mining problems could not be transferred into agrarian context, since the mineral processing was conducted under ground and they should have preceded license from authorized officials before running their mining business.

The philosophy of the Law No. 4 of 2009 was that the state, Indonesia, positioned itself higher than businessmen. It indicated that when the licensee of whether IUP, IPR, or IUPK did violation, the state could immediately cut their license off. This was inconsistent with COW (Contract of Work). Another philosophy stated that every mineral and coal resource was fully governed by the state and the utilization was prioritized to state-owned companies increasing additional values by requiring the mineral processing conducted in domestic, improving the local content, and considering social and environmental aspects (Adrian Sutedi, 2012).

The article 1 subsection (2) the Law of Mineral and Coal noted that mining was parts of or the entire procedures conducted to search for, to proceed, and to utilize mineral and coal sources. The procedures included general inquiry, exploration and study of feasibility, construction, mining activity, processing and purifying, transporting and selling, and post-mining activities.

It was noted that mining activities referred to national-scale activities which could create the people welfare and prosperity with fair manner. Maria SW Sumardjono suggested that the manifestation of social justice in land sector could be identified on the key principles of UUPA, including : the principle of the state control; the principle of respecting the communal title; the principle of social function of land rights, the principle of land reform, the principle of planning in land utilization and preservation, and the principle of nationality. The social justice should also be considered when it came to the conflict between communal title and the mining companies (Maria Sumardjono, 2008).

Moreover, the article in subsection (6) the Law of Mineral and Coal defined mining as activities to utilize mineral and coal resources. Such activities included general inquiry, exploration and study of feasibility, construction, mining activity, processing and purifying, transporting and selling, and post-mining activities.

Thus, the mineral activities are comprehensive and those need a wide space to operate. Mining activities are set under the article 134 to article 138 the Law of Mineral and Coal on the freehold title by mining companies during their mining activities, and it was a cultivation title, not the freehold title. Specifically, article 134 subsection (1) the Law of Mineral and Coal asserted that the rights of WIUP, WPR, and WIUPK did not include the freehold title. This indicated that communal title used for mining activities would remain belong to the customary people, not the investor. Furthermore, article 138 the Law of Mineral and Coal set the title over IUP IPR, or IUPK, not for the freehold title.

Article 135 the Law of Mineral and Coal asserted that the licensee of IUP or IUPK for exploration could only conduct their activities after they brought license over the land with them. In addition to this provision, article 136 noted that the licensee of IUP or IUPK had to bring the license over the land they would utilize for business before conducting mining and, as mentioned in the regulation, it could be conducted with procedural manner as what they needed.

In short, before running mining business, both customary people as the communal titleholder and investors should make an agreement. Without the customary people's agreement, mining activities could be conducted although the investors had IUP or IUPK with them. Communal agreement is absolute in its nature.

This article ascertained that the Law No. 4 of 2009 related to both UUPA and other related regulations dealing with land, although the consideration did not refer to UUPA.

In UUPA itself, several types of land titles were recognized as set in article 16 UUPA. Those included Freehold title, Cultivation Rights Title, Building Rights Title, Right to Use Title, Land Clearing Rights, and Forestry Rights. Moreover, article 3 included Communal Title and other similar titles from customary people.

The provision of those all articles asserted the mining companies to deal with the titleholders. When it was a freehold title, it would not be difficult for the companies to deal with the administration. On the contrary, when it was a communal tittle with no administrative evidence, it would follow the Regulation of Agrarian Minister/Head of National Land No. 5 of 1999 on the Guidelines of Communal Title Problem Solving with title waiver.

When a mining business had ended, the governance and the freehold would be returned to its origin. However, it rarely happened. The communal land which cultivation contract had ended typically turned the status and belonged to the state. Thus, as often happened, the customary people would lose their freehold tittle. They were no longer can sue the investors due to evidence absence. There was no contract to submit and the customary people could not stand their land up. Other parties playing the role in utilizing the communal land were the government and investors. They had to meet all the requirements contained in the contract and the freehold would be returned to the customary people when the contract had ended, since the contract was considered as the regulation for parties involved.

In addition, in order to protect the interest of the customary people (in this case, they was identified as titleholders), the expropriation of the land by the government or the companies/investors typically mentioned clauses dealing with the time period for the contract to end, hence, the freehold title could be returned to the original owner. The awareness of the customary people for the relationship between them and their communal land could be seen from several ceremonial meals they held led by the

custom leader before cultivating their land. Furthermore, a belief on a living bond between them and their communal land was apparent in such a cleaning-up hamlet ceremonial party after having harvest and other custom ceremonial rituals (Soepomo, 1977). In order to manifest the unity and simplify the national land law, UUPA was established by mentioning *adat*/customary law as one element to regulate the communal title of customary people.

The general explanation of the National Constitution 1945 stated that the customary people's interests should submit to the national interests. The communal title of customary people inhibiting the government interests could be put aside as long as for the national purposes, since the communal title should correspond to the broader interest (Sudargo Gautama, 1981). Such attitude was considered inconsistent with the legal principles mentioned in article 1 and 2 UUPA.

A land waiver for commercial purposes on customary law recognized a commercial utilization pattern by establishing retribution and particular restrictions. Some provisions of customary law on the utilization of forestry or land, derived from communal land, for commercial purposes were established for environmental preservation. Retribution gathered was used for the interest of the communal people in order to increase their living standard (Sudargo Gautama, 1981).

An optimal management of mineral and coal would make the pattern of land utilization directly change. As the result, the legal system on land sector would change as well (Simarmata, 1997). Therefore, the government should seriously concern on such land issue, given that land is vital for national economic growth purposes (Simarmata, 1997).

When Land Law could not provide a legal assurance for the customary people, who was considered as the weakest party, it would put those people into a very disadvantageous position due to industrialization of mineral and coal exploitation, the compensation issue, and the area planning, particularly dealing with freehold title, the extension of due time period, the maximum and minimum limits, and the land governance based on regulations, strengthened by the Law to attract investors to join (Salim and Budi Surisno, 2007). To be a developed country, it is a must to have land policies in order to assure that the land was utilized for investment purposes to optimally increase the prosperity of the people (Soemitro Djojohadikusumo, 1977).

Mining business on communal land of customary people was considered unwell-run when it was seen from the context of a prosperity country. A prosperity country expected a higher responsibility from the state to create prosperity for their people. However, the stated had nothing to do with a process of land waiver for mining business, even in juridical manner.

Mineral and coal mining is exclusive and tended to be destructive, since the sources is non-renewable. Therefore, the government's control over such mining business should consider the possible negative impacts on the people surroundings. Mining utilization by the government should consider the benefits brought to the people, particularly for those whose land was used for mining activities and for the customary people surrounding. This referred to the implementation of the principle of people sovereignty.

Conclusion

a. The implementation of the principles of Investment Law on the management of mineral and coal resources over the communal land is still unwell-conducted by both the government and investors, and it brought the customary people into a disadvantageous position. Thus, many conflicts happened between the customary people and the investor, even and the government itself.

b. The status of communal title in mineral and coal mining remained in top. However, it was burdened by investors' licenses in particular period of time. In this case, when the mining contract had ended, the people could take their freehold title back.

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