International Journal of Law, Humanities & Social Science ©
Volume 4, Issue 3 (April 2020), P.P. 88-96, ISSN: 2521-0793

# SHIFTING OF WORK CONTRACT SYSTEMS TO MINING BUSINESS LICENSES: BUREAUCRATIC EFFICIENCY AND CUSTOMARY LAW COMMUNITIES IN MINERAL AND COAL MINING IN INDONESIA

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**Abstract:** *This article seeks to describe the management of natural resources in the form of mineral and coal mining related to the rights of the Customary Law Community. With the enactment of Law Number 4 of 2009 concerning Mineral and Coal Mining, it has given a new face because the Contract of Work system has been changed with a Mining Business License. This change shows bureaucratic efficiency, emphasizes decentralization, and places the country as a regulator and oversight of the management of mineral and coal natural resources. This article is the result of doctrinal research using library materials as the main source of information. The legislative approach, historical approach, and approach are used to solve research problems. The research shows this law ignores the provisions concerning the resolution of dispute resolution. On the next side, the rights for the Customary Law Community have not received the most attention. In addition to regulating these entities which are scattered in various laws and regulations, the absence of a mechanism for fulfilling the rights to information on management and control of mineral and coal mining is a separate issue. This article has an important level of urgency in order to understand the new mining law policy in Indonesia. As a new policy, of course, the object of discussion in this article is something new and is expected to be a strong basis for further research.*

**Keywords:** Law and Public Policy, Investment, Dispute Resolution, Mineral and Coal, Customary Law Community.
**Research Area:** Law
**Paper Type:** Research Paper

## 1. INTRODUCTION

Indonesia is a country rich in world-class mining materials (McKay & Bhasin, 2001). Mining materials or minerals are controlled by the state and the state's control rights contain the authority to regulate (Ayisi, 2017), manage and supervise the management or exploitation of minerals, and contain the obligation to make the most use of the people's prosperity (Zilman et al., 2015). Mineral and coal mining business activities which are mining business activities outside of geothermal, oil and gas and groundwater, which have an important role in providing tangible added value to national economic growth and sustainable regional development (Romero et al., 2019).

The concept of state control over mineral and coal resources in Indonesia is based on the provisions in Article 33 paragraph (3) of the 1945 Constitution, which states, "The earth and water and natural resources contained therein are controlled by the state and are used to the greatest prosperity of the people." Article 33 paragraph (3) becomes the doctrine of state control and at the same time forms the philosophical and legal basis for the management of natural resources in Indonesia. Article 33 Paragraph (4) of the 1945 Constitution requires that economic development be built on the basis of independence, including independence relating to the source of development funding.

In addition to state control and management of natural resources, the state also recognizes and respects the existence of customary law communities along with their constitutional rights and traditional rights. Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution as a constitutional basis recognition and protection customary law communities of the rights of indigenous and tribal peoples. This article regulates the legal relationship between the and the state and serves as a constitutional basis for state administrators (Muhdar et al., 2019). Thus, the article is a

declaration of: (a) The constitutional obligation of the state to recognize and respect indigenous peoples, and (b) the constitutional rights of indigenous peoples to obtain recognition and respect for their traditional rights.

Since Mijnwet 1899 the Dutch colonial era and until Indonesia became an independent state, the laws and regulations in the mining sector have not experienced significant changes. Regulations at the end of the 20th century only changed 68 years later when Law No. 11 of 1967 concerning the Principles of General Mining. Since independence, especially after the New Order Government gave birth to Law no. 11 of 1967, slowly but surely mining became an attractive and sensitive sector for the public. Interesting because it contributes significantly to State Revenues and is increasingly highlighted when world commodity prices soar, but also sensitive because of negative excesses on the environment and the view that mining has not provided the maximum benefits for all stakeholders as expected, even many violating human rights (Soedarso, 2009).

During the 32 years of the authoritarian regime of General Soeharto (1966-1998), also known as the New Order regime, in fact, there was a desire to review the Basic Mining Law. The most important reason is how the dynamics of the world of mineral and coal mining in the country can no longer be accommodated by the Law that was born at the beginning of the New Order. Likewise, the challenges going forward, are increasingly dynamic and are no longer regulated by old regulations. Taking into account national and international developments, Law Number 11 of 1967 Concerning Basic Mining Provisions is no longer appropriate so that changes in laws and regulations in the field of mineral and coal mining can be managed and managed independently of the potential of minerals and coal, reliable, transparent, competitive, efficient and environmentally sound, in order to guarantee national development sustainably (Soedarso, 2009).

Based on the above considerations, the House of Representatives of the Republic of Indonesia and the President of the Republic of Indonesia, decided to replace Law Number 11 of 1967 concerning Basic Mining Provisions by Establishing Law Number 4 of 2009 concerning Mineral and Coal Mining where has a concept of Mining Business License, which is a permit to carry out a mining business, which replaces the Contract of Work system which has long been known in foreign investment arrangements in mineral and coal mining business activities. The change of a principle that replaces the Contract of Work system in mining law as stipulated in the Mineral and Coal Mining Law has a broad impact, especially influencing the decision of foreign parties to invest in Mineral and Coal mining, technical mining operations themselves, and on economic politics Indonesia, in general, is used to maximize the prosperity of the people. Many argue that contracts of work and regulations with licensing systems that replace them should be designed with incentives that encourage multinational and national mining companies to take actions that maximize the welfare of the nation. For this reason, investors are demanded to be willing to provide an opportunity for the state to obtain maximum economic benefits from the mining of mineral and coal mining in return for providing attractive commercial requirements and legal certainty (Devi & Prayogo, 2013).

Law Number 4 of 2009 concerning Mineral and Coal Mining as one of the laws relating to natural resource management. The system of control and management of minerals and coal refers to Article 33 paragraph (3) of the 1945 Constitution. Natural resources in the form of minerals and coal are controlled and managed by the state for the greatest prosperity of the people. However, not a single provision in the Law on Mineral and Coal Mining provides recognition and protection of the rights of indigenous and tribal peoples who inhabit areas rich in mineral and coal resources. New mineral and coal resource management principles, aside from being based on positive law as a constitutional basis, must also be based on moral considerations. The Customary Law Community should have access to justice for the abundant minerals and coal around them. Management of mineral and coal resources must provide maximum prosperity for the Customary Law Community (Praimbodo, 2018). Therefore, it is necessary to have a principle of management of mineral and stone resources that reflects the principle of partiality to the Customary Law Community.

## 2. THE NEED FOR MINING LEGISLATION

Many factors influence the decision to invest in mineral mining in developing countries (Wenbin & Wilkes, 2020) . Some of these factors include the consideration of tighter environmental protection in developing countries, increased community participation in mineral mining development (Dolphyne et al., 2013), participation of Non-Governmental Organizations (Owusu-Koranteng, 2020), demands of the people of developed countries, and competition in the use of land for other businesses which is more profitable than mining (Hodges, 1995).

Countries on average have specific laws and regulations governing mining by separating the laws governing land and underground ownership rights (Appiah & Osman, 2014), where the structure of the mining laws places the State as the owner of the minerals contained in the land (Jr, 1956) . This is a common structure for developing countries because the utilization and development of mineral resources is still a high priority. For developed countries, the legal structure of mining tends to reflect the role of mining for the country's diminishing economy (Oke, 2013), and more reflects the importance of other values of other land interests such as environmental values and social interests which are higher priorities for developed countries (Burke, 2006).

The importance of special laws and regulations for the mining of mineral mining include: *first*, the importance of mineral resources for the general public, so that it can be said that an area can provide a higher value if it is used for mining and its use should be prioritized for the public compared to other wishes of the owner private sector of a region. *Second*, the principle of public interest (the state) is the reason why ownership of minerals must be in the state rather than the land or landowner. *Third*, the allowance for land ownership and mineral ownership in the land must be clearly defined in law. *Fourth*, the separation between land ownership rights and ownership or who is entitled to mineral resources can lead to conflict. *Fifth*, as mentioned above that mining is a mineral extraction activity from the ground and is a destructive activity and has an impact on the environment and surrounding communities so it needs to be regulated in-laws and regulations. And the *sixth*, mining law is not only from the legal side but also from the policy side so that specific legislation for mining is important in regulating actions in the utilization of mineral resources (Oke, 2013).

Legal subjects with an interest in mineral and coal legislation include the State, which has the goal of getting the maximum benefit from the development of its mineral resources; Private investors or miners, who have an interest in making profits by managing mineral resources, landowners who receive compensation for the use of their land for mining operations; and third parties related to or affected by the environmental and social impacts of developing mineral resources. The question of how mining law can encompass, unite and resolve different interests between state/public and private interests, is strongly influenced by government/state choices or decisions, how to develop its mineral resource sector. The socio-economic and political environment and the environment in which the mineral mining business is located, is what determines mining policies and laws, whether it will be developed based on a private, public system, or a combination of the two systems.

The Security of Tenure principle in mineral mining laws which are oriented towards the private economy is very important (Natcher et al., 2009). One of the specific reasons that have been explored above is the characteristics of the mining business and phases starting from the time of exploration and development of the main project, regarding the number of costs incurred in pre-production activities, risks from mining and so on. Over time, mining law in countries with a market economy has a tendency to provide legal security for investments in mineral mining. An analysis conducted on mineral mining laws found that during the industrial revolution in the Nineteenth Century and developed countries now proved a more liberal action towards economic development.

Because mining activities have a character in which the time required for return capital is very long which involves long agreements and agreements, and a large risk of capital investment, investors when making a decision to invest their capital in a country require clarity of their rights over resources mineral (Ballard et al., 2012). In a narrow sense, security guarantees for mineral exploitation have been defined as the provision of reasonable rights after completing the exploration phase (Hicks et al.,

2020). For this reason, basically, security tenure results in the opinion that investors must be guaranteed to be able to develop successful mineral findings before entering into exploration commitments or the right to continue from the exploration phase to the next phase, namely the mining phase with the right to mine (Kemp, 2010). In practice, there are a number of issues relating to the principle of security of tenure that mining companies typically research before investing: *First*, mining companies will be hesitant to invest in expensive exploration unless there is a wise guarantee that once the company finds a deposit reserve, they will mine it. *Second*, the company expects a reasonable level of treatment from the ruling government in providing requirements, such as conducting an analysis of environmental impacts, before being granted the right to mine (Gonzalez-Vicente, 2012).

## 3. DEVELOPMENT OF LAW IN INDONESIA

After the transfer of sovereignty from the Dutch to Indonesia, the problem of supervision over tin and petroleum mining which was still controlled by Dutch capital and other foreign capital was a very sensitive political issue. Therefore, in July 1951 a member of the Provisional People's Representative Council (Dewan Perwakilan Rakyat Sementara, DPRS), Teuku Mr. Moh. Hassan and his friends form a motion urging the government to immediately take steps to fix the regulation and supervision of mining businesses in Indonesia. In response to this parliamentary motion, the State Committee formed by the government succeeded in preparing a draft of the Mining Draft Law in early 1952. However, due to the succession of the cabinet, the Draft Law was never submitted to the DPRS. However, the Government can issue Law No. 10 of 1959 concerning the Cancellation of Mining Rights. Regulations for implementing this law are contained in Government Regulation No. 25 of 1959.

Based on this law, all mining rights issued prior to 1949 that have not yet been upheld and tried again, or are still in the initial stage of exploitation and show no seriousness, are all cancelled. It is also stipulated in this law, that while waiting for the new mining law, the area resulting from the cancellation becomes free, meaning that new mining rights can be applied for and issued with the provision that the rights can only be granted to state and or regional companies. autonomous. The control of mining rights is the authority of the Minister of Industry (who was then in charge of the mining sector.) After the enactment of the Mining Act of 1960, the Government also issued a special government regulation regulating oil and gas mining, then promulgated as Government Regulation in lieu of Law which later became Law No. 44 Prp. 1960 concerning Oil and Gas mining which is better known as the Law on Oil and Gas Mining.

With the birth of the New Order regime, it became around in the economic policy and development of Indonesian mining. This round began with the stipulation of Provisional People's Consultative Assembly Decree No. XXIII/MPRS/1966 concerning Renewal of the Financial Economic and Development Platform Policy. Based on the MPRS decree, the draft law on Foreign Investment was drafted, then enacted into Law No. 1 of 1967 concerning Foreign Investment. In order to adjust new policies in the economy, especially regarding mining businesses, it would not be possible to do so without changing the mining law of 1960. Fully aware of the urgency of handling this, the Department of Mines immediately formed a Mining Law Drafting Committee. The results of the Committee's work were submitted to the House of Representatives near mid-1967. Following the issuance of Law Number 1 of 1967 concerning Foreign Investment, Law No. 11 of 1967 concerning the Basic Mining or UUPP 1967 was also published. In the period of the New Order regime, also known as the contract of work period. A work contract is a contract known in general mining. In Article 10 of Law Number 11 of 1967 concerning Basic Mining General Provisions, the term commonly used is a work agreement, but in its explanation, the term used is a contract of work. In this Era, the golden age of the mining industry has taken place. This is because mining law and investment law that use the contract of work system, as part of economic law have a role in the function of stability, namely how the legal potential can balance and accommodate competing interests in society. So that it can accommodate the interests of foreign capital and at the same time can also protect local mining entrepreneurs.

Investors who want to come to a country are strongly influenced by political stability. *First*, Foreign investors will come and develop their business if the country concerned is awakened by a process of political stability and a constitutional democratic process. *Second*, in the era of the Contract of Work, the need for a legal function to be able to predict (predictability) is fulfilled by proving that the contract law brings certainty. Investors will come to a country if he believes the law will protect investments made. Legal certainty will provide guarantees to investors to obtain economic opportunity so that investments can provide economic benefits for investors. *Third*, there is the aspect of fairness, such as equal treatment for all people or parties before the law, equal treatment for all people and the existence of standard patterns of government behaviour, by many experts emphasized as a condition for the course of maintaining market mechanisms and preventing excessive bureaucracy.

## 4. FROM CONTRACT OF WORK TO LICENSING SYSTEM

In the new Mineral and Coal Mining Law, the renewal that is felt is the contract system that is replaced with a permit. In the previous era, contracts made between the government and the contractor made the government position ambiguous, namely the regulator and partner. In the other side, the maker of the Mineral and Coal Mining Law considers that because the agreement is in the form of a contract, the legal implications that go with it are very heavy. If there is a dispute over the contents of the contract, the government can indeed sue the contractor, or vice versa the contractor demands the government. But the existence of state assets is also threatened in the vortex of arbitrated conflict. With the new Mineral and Coal Mining Law, there will be no contracting system between investors and the government. And if there is a dispute, there will be no state assets in the dispute.

According to the makers of the Mineral and Coal Mining Law, the profit point of the licensing system is that the Government of Indonesia positions itself higher than business operators. The Government is the Licensor. Thus, if the mining business permit holder makes a mistake, the government can immediately revoke the permit. Things like this cannot be done on a contract system. However, this law is also quite accommodating, where the settlement of disputes is settled through domestic courts and arbitration. CHAPTER IV will examine further settlement of disputes. In this new Mineral and Coal Mining Law, there is no mention of the contract at all, except for contracts that have been previously signed between the government and the contractor (Article 169 of the Mineral and Coal Mining Law). Even for contracts that have been signed, the contractor must adjust them to the new Mineral and Coal Mining Law. Regardless of the adjustment, the regime changes from contract to permit certainly no longer positions the alignment between the government and the contractor. In the contract regime, the position of the government seems to be in line with the contractor. Unlike the licensing system. The government has a role as regulator and licensor of the mining business.

Mining Business License is a permit to carry out a mining business. Furthermore, in the Mineral and Coal Mining Law Article 38 it is stated that a Mining Business License can be given to business entities, cooperatives and individuals who fulfil a number of requirements. For foreign investors who want to operate in Indonesia, the door is open for investment after the company first forms an Indonesian legal entity. The Mining Business License itself is divided into two according to the mining stages, namely exportation and exploitation/production. Exploration Mining Business License for metal minerals is valid for a maximum of 8 years. If the mining company wants to enter the exploitation/production period, it must again apply for a Production Operation licence again.

In terms of efficiency, the Mineral and Coal Mining Law with the Mining Business Licensing system has met the efficiency side because compared to the contract of work, deregulation of the contract management in a very simple permit occurs. In terms of the value and usefulness of a Mining Business License has a higher value compared to contracts of work which take longer and are more expensive. However, in terms of the use of a Mining Business License is very simple and does not regulate many provisions in it, where other provisions must again refer to the provisions of the applicable legislation from time to time.

The stipulation of the production restriction is intended so that the holder of a business license in producing minerals while maintaining a balance between the availability of mineral mining materials with market needs, especially the interests of the national economy. In addition, it also still considers the rights and interests of future generations, because unlimited mining production means waste as well as a form of deprivation of the rights of future generations. Such action is one form of violation of the values of justice between generations.

## 5. PROTECTION FOR THE CUSTOMARY LAW COMMUNITY

One of the legal principles in favour of the Customary Law Community is the principle of recognition. Therefore, the recognition principle is worthy of inclusion in the Mineral and Coal Mining Law as a principle of managing mineral and coal resources. In terminology, "recognition" means the process, method, act of confessing or acknowledging, while the word "acknowledging" means declaring the right. Recognition in the context of international law, for example, the existence of a country/ government usually refers to the term de facto and de jure recognition. Real recognition of certain entities to exercise effective power in an area is called de facto recognition. The recognition is temporary because this recognition is shown by the facts regarding the position of the new government. If then maintained and progressed further, de facto recognition will automatically change to de jure recognition which is permanent and is followed by other legal actions (Afiff & Lowe, 2007).

Article 18B paragraph (2) of the 1945 Constitution has affirmed the existence of indigenous peoples. "The State recognizes and respects the customary law community units and their traditional rights as long as they are still alive and in accordance with the development of the community and the principles of the Unitary State of the Republic of Indonesia, which are regulated in Constitution". Recognition of this existence needs to be complemented by recognition and protection of the rights that accompany the existence of the Customary Law Community. There is no existence without the fulfilment of basic rights and freedoms. Humans can only become humans if their basic rights and freedoms are fulfilled. Recognition of the existence and rights of the Customary Law Community is further elaborated in various laws and regulations, both the Law and its derivative regulations to the Regional Regulations. Although there is recognition in a number of laws and regulations, it needs to be emphasized that the nature of the recognition so far is conditional recognition, which can be seen from the phrase "as long as it still exists, in accordance with community development, in line with the principles of the Unitary State of the Republic of Indonesia, and regulated by law invite.

These conditions are related to one another and place the Customary Law Community in a dilemma. On the one hand, the existence of the Customary Law Community is determined by the recognition of the State where the decision to declare them still exist or not also rests with the State that sets these conditions; on the other hand, this recognition requires evidence that the Customary Law Community still exists; From a legal perspective, this means that as long as there are no laws that recognize the existence of indigenous peoples, indigenous peoples still do not exist, even though sociologically they are.

Based on the reference above, in relation to the understanding of legal recognition of mineral and coal resources leads to the understanding of recognition from the state/government both politically and legally, through regulating the rights and obligations of the government in providing respect, opportunity and protection for the development of the Customary Law Community along with customary rights to land owned including natural resources contained therein within the framework of the Unitary Republic of Indonesia.

The right to control the state according to the 1945 Constitution must be seen in the context of the rights and obligations of the state as the owner of power who has the task of creating people's welfare. The position of the state as a ruling body, the owner of that power is the embodiment of the understanding of the pattern of relations between individuals and the community in the conception of customary law whose crystallization of values is formulated in the Preamble of the 1945 Constitution so that the right to control the state contains within it to carry out its rights and obligations which give

birth to it power, authority and even forced power. Thus the definition of the right to control the state is the authority possessed by the state which contains the authority, regulates, plans, manages/manages and oversees the management, use and use of land both in the relationship between individuals, communities and the state with land as well as the relationship between individuals, communities and the state one with regard to the land.

Article 33 paragraph (3) of the 1945 Constitution regulates the scope of natural resources which includes the earth, water, space, and natural resources contained therein. This article also regulates the ideology of control and utilization of natural resources. The right to control the state does not mean the right to own, but an understanding that contains the obligations and legal authority of the public to the state as the powerful organization of the Indonesian people, where such authority must be used to achieve as much as great prosperity of the people. The ideology of the right to control the state is further emphasized in Article 2 paragraph (1) of the 1960 Basic Agrarian Law.

The Rights of Customary Law Community in the management of mineral and coal resources have a wide scope, not only the right to manage their natural resources, but also the right for Customary Law Community to obtain legal protection in enjoying these rights so that their survival will also be guaranteed. By making the issue of the rights of the Customary Law Community in the management of mineral resources an issue of justice, it can be claimed that the Customary Law Community has the right to manage natural resources or at least obtain benefits that can improve the standard of living of the Customary Law Community and the State is responsible for realizing the. But often the Customary Law Community is eliminated when dealing with the state. With their controlling rights, the state marginalized the rights of the Customary Law Community in managing mineral and coal resources on the grounds of national interest. They have difficulty defending their rights due to poverty and lack of education.

The politically weak position of the Customary Law Community compared to investors and the government has resulted in the easy expropriation of natural resources by the government without going through a fair legal process, or even without any compensation. The violations they experienced were violations of the right to ownership, the right to adequate food and nutrition, the right to an adequate standard of living, the right to take part in cultural life, the right to self-determination, the right to enjoy the highest standards attainable on physical health and mentally, as well as many other rights.

To realize the fulfilment of the rights of the Customary Law Community over mineral and coal resources, the government must provide space for the principles of justice, democracy, participation, transparency, approval, respect and recognition of local wisdom as reflected in the knowledge system, institutions, and traditions. traditions that are actually living and developing in the Customary Law Community. Mineral and coal resources as gifts from God are at the highest level controlled by the state. The right to control the country must be used to achieve the maximum welfare of the people. The concept of the right to control the state must not be interpreted narrowly and misused so that the state with that right regulates the management of natural resources and removes the existence of the rights of the Customary Law Community.

## 6. CONCLUSION

The new mining law in the Mineral and Coal Mining Law replaces the Contract of Work system with a Mining Business License. Mining Business Licenses are far more efficient in terms of the bureaucracy in its administrative management. In terms of legal structure, the Law on Mineral and Coal Mining has regulated the authorities involved in granting Mining Business Licenses but in the case of determining mining business areas, this law does not yet have a clear regulation so that government regulations that complement it clearly are urgently needed. The weakest side in ensuring the legal certainty of the structure and substance of the Mineral and Coal Mining Law is the absence of good dispute resolution arrangements. This law stipulates that every dispute must be resolved through domestic courts and arbitration, but licensing is a unilateral legal action from the government, so that dispute resolution through arbitration cannot be carried out in the licensing system. Mining

Business Licenses cannot regulate dispute resolution outside the court (alternative dispute resolution), and do not regulate the appointment of conciliation arbitrators and institutions that function equally in dispute resolution.

Article 18B Paragraph (2) and Article 28I Paragraph (3) of the 1945 Constitution constitutes recognition and protection of natural resources in unity with the territorial rights of customary communities. This is a consequence of the recognition of customary law as a "living law" that has been going on for a long time and continues until now. Therefore, the management of mineral and coal resources without the prior consent of the indigenous and tribal peoples is a neglect of the rights of customary communities. In addition, the principle of free, prior and informed consent is also the principle of managing mineral and coal resources in favour of indigenous and tribal peoples. This principle has positioned the indigenous and tribal peoples as the subject of development and not the object of development. This principle refers to the right of indigenous and tribal peoples to give or not give consent for actions that will affect them, especially actions that affect land, territories and natural resources. Bearing in mind that the recognition and protection of the rights of indigenous and tribal peoples in Indonesia are spread in various sectoral laws and regulations. Because of that, the recognition is sectoral as well. Therefore, the recognition and protection of the rights customary communities' peoples in Indonesia should be regulated in a single law.

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