

Implications of Entry Juridical Law Number 4 of 2009 Concerning Mineral and Coal Mining on Contract for Works

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Abstrak

The birth of the idea of the government to change the system management and operation of the system of mining in Indonesia Contract of Work (COW) into a Mining Business License (IUP) as mandated in the Act No. 4 of 2009 on Mineral and Coal is one effort to increase the acceptance of the state of the sector mining. Under the provisions of Article 169 Mining Law, that the COW that existed before the birth of this Act remains 'recognized', but not later than 1 (one) year should be 'adjusted', except for state revenue. The meaning of 'recognized' in that provision is related to the subject of the law and the period of validity, whereas the meaning of 'customized' associated with the substance or agreement clauses. With the exception of the State revenues to be adjusted norms would lead to ambiguity, because the provision does not coincide with the birth of the spirit of the Mining Law is one to increase people's income, Mandated state region and in Article 2 as Mining Law. KK one substance directly related to State revenues are royalties that amount between 1 % to 2 %, in proportion to such obligations are not comparable with the social and ecological risks to be borne by the government of the Republic of Indonesia. Despite the Government Regulation No. 45 Year 2003 on State revenues Non- tax rates prevailing in the ministry of energy and mineral resources which determine the amount of the royalty rates between 3.25 % to 4 %, however, due to hit the provisions of Article 169 Mining Law, the provision cannot be applied to KK, as an exception in the adjustment. Thus the constitutional provisions contrary to the principle of justice as mandated in Article 33 of the Constitution 45 which is a manifestation of a grain of Pancasila 5 precepts of social justice for all Indonesian people that maintain a balance between the rights and obligations and is able to do justice. Therefore, to provide legal certainty on whether or not the Contract of Work adapted as an effort to maximize the utilization of natural resources (SDA) is reserved for the greatest welfare of the people as mandated in Article 33 (3) 45 Constitution, there should be a judicial review of the provisions of article 169 b Mining Law to the Constitutional Court.

Keywords: Contract of Work, State Revenue

1. Introduction

State of Indonesia is one country in the world that has abundant natural resources, both renewable (renewable) and non-renewable (un-renewable). Types of natural resources that cannot be renewed one of them is the natural resources in the form of mine.

Based on the mandate contained in Article 33 of the Constitution of 1945 specify:

- a. The economy is structured as a joint venture based on a family basis.
- b. Branches of production which are important for the control of the State and the welfare of the majority controlled by the State.
- c. Land and water and the natural riches contained therein shall be controlled by the State and shall be used for public welfare.
- d. The national economy based on democracy organized with the principles of economy, efficiency equitable, sustainable, environmentally sound, self-reliance, and to maintain sustainable economic progress and national unity..
- e. Further provisions on the implementation of this Article shall be regulated by law.

As a follow up of the provision of Article 33 UUD 1945, then the birth of Act No. 1 of 1967 on Provisions Principal Foreign Investment (State Gazette of the Republic of Indonesia Number 2818), hereinafter referred to Law and Foreign Investment Law No. 11 Year 1967 About Basic Provisions mining (State Gazette of the Republic of Indonesia No. 22 of 1967) hereinafter referred to as the Mining Act.

Through the introduction of this legal instrument COW system as an alternative in the management and utilization of natural resources in Indonesia, particularly in the form of the mineral wealth of the mine.

Work contract is an agreement between the Government of the Republic of Indonesia works with Indonesian corporation that aims to carry out exploration, feasibility study, construction, production and sale of mineral excavation results in Indonesia. Work contract signed in 1986 between the Government of the Republic of Indonesia and PT. NNT is a document that is substantially more dominant accommodates the interests of investors as owners of capital.

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One example is related to the receipt of state or royalty. Hatta emphasized that state revenue is the main part that fought for revision. Currently, according to him there is a significant imbalance between the contracts of work is only picking up 1-3 per cent and coal concession agreements, which set royalties of 13.5 percent. This disparity, according to Hatta, must be repaired. Instead of imposing the will, but for the sake of justice”.

Along with the development of the life of the nation state , the alternation of the New Order regime (centralized) regime to reform (decentralization) in Indonesia has given rise to important ideas about the rights of local communities better. In the world of mining investment, especially in the area of public demand pushed mining companies in the uniform theme welfare improvement. Regulation is the legal umbrella of business investment continues to be encouraged in order to provide the right setting for a more equitable society.

With the enactment of Law No. 4 of 2009 on Mineral and Coal (State Gazette of the Republic of Indonesia Number 4959) hereinafter referred to as the Mining Law , then there has been a significant change in the management of mineral wealth in Indonesia . In the new legislation the contract of work system is removed and replaced with a Mining Business Permit (IUP). Contract work in progress, no later than one (1) year shall be adjusted to the new Act. Furthermore, the results for the raw minerals are almost entirely exported overseas, not later than 5 (five) years should be processed and refined locally.

As business activities, mineral and coal mining industry is capital-intensive industries (high capital), solid risk (high risk), and solid tech (high technology). Moreover, mining is also dependent on natural factors that will affect the location where the mineral reserves.

With the business characteristics of the mineral and coal mining business certainty and the necessary legal certainty in the world of mineral and coal mining. In 2009 a new chapter for the mineral and coal mining in Indonesia and the ratification of the Mining Law, a fundamental change that occurred was the change of system works contracts and agreements into a licensing system, so that the Government no longer be in a position aligned with the business and become a donor permits to businesses in the mineral and coal mining industries.

In accordance with the provisions of Article 2 of the Mining Law of mineral and coal mining that are managed based on the principle:

- a. Benefits, fairness, and balance;
- b. Alignments to the interests of the nation ;
- c. Participation, transparency, and accountability;
- d. Sustainable and environmentally friendly.

Furthermore, Article 3 Mining Law determines that in order to support sustainable national development, mineral and coal management objectives are:

- a. Ensuring the implementation and control of mining operations are efficient, effective, and competitive;
- b. Ensuring the benefits of mineral and coal mining in a sustainable and environmentally;
- c. Ensuring availability of minerals and coal as raw material and/or as a source of energy for domestic needs;
- d. Supporting and promoting the national capacity in order to better compete nationally, regionally and internationally;
- e. Increase incomes of local, regional, and State, as well as creating jobs for the greatest livelihoods of our people; and
- f. Ensure legal certainty in the administration of business activities and mineral mining coal.

Then based on the provisions of the Mining Law Article 169 provides that at the time this Act comes into force:

- a. Contract work and the work of coal mining agreements that existed prior to the enactment of this Act remain in effect until the expiration of the contract/agreement;
- b. Provisions contained in Article contract work and the work of coal mining agreements referred to in paragraph a customized later than 1 (one) year from the promulgation of this Act except on state revenue .
- c. Exceptions to acceptance as referred to in point b is an effort to increase state revenue .

Therefore, the exception set forth in section 169b Mining Law would create a conflict of norms, because on the one hand the birth of one of its objectives the Mining Law as set forth in article 3 of the Mining Law is to increase people’s income, region and country, while on the other hand, if associated with acceptance countries which cannot be adjusted.

Contractual principles used in the COW is nail down is not bound by the rules that appear later in the day after the contract was signed. Therefore, adjustment commands mandated by the Mining Law are considered incompatible with the principles applied in the Contract of Work. So that changes to the contract renegotiation process works done during this seemed the way place, since up to this time (3 years) no one has agreed to contract work performed changes (particularly with respect to the substance of the contract).

On the basis of the above facts, it becomes relevant to assess the implications of judicial enactment of Law No. 4 of 2009 on mineral and coal mining contract to work with the formulation of the problem as follows: Is an exception to the state revenue over the contract for adjustment does not work against the principle of justice as defined in Article 33 paragraph (3) of the 1945 Constitution?

2. Methods

This research is normative, i.e. a study of the principles of law, rules-the rules of law in the sense of value (norm) of concrete laws and legal system.

In this paper the problem approaches used are: Approach legislation (statute approach) is an approach taken by reviewing the Constitution, legislation, government regulation, and local regulations relating to the mining sector. approach to the analysis of legal concepts (analytical and conceptual approach) is to approach the understanding of the concept of the Mining Permit and Contract of Work , an approach legal history (historical approach) , conducted by reviewing legislation ever enacted, related to the COW system in the field mining in general .

The entire legal materials obtained from the research literature, was then analyzed by building descriptive - qualitative arguments based on logic deductive reasoning. With descriptive-qualitative method, the author will present and elaborate on and connects all the material relevant to this study systematically, comprehensively and accurately, in order to obtain answers to the problems posed.

3. Results and Discussion

Indonesia is a State based on law (*rechst aat*) is not based on power alone (*machstaat*). This is as stated in Article 1 (3) changes to three (3) of the Law of the Republic of Indonesia, which states that “Indonesia is a State of Law”. Under this provision, then the consequences are all acts of government, including in the management and operation of the mining sector and the people shall be in accordance with applicable law. Law embodied in legislation to provide basic functions, determine the direction and goals to be achieved, and how to act for the State and its agents.

According to Julius Stahl Friderich State law in the sense that Rechtsaat have basic elements , namely : (1) Recognition and protection of human rights , (2) Separation of the State based on the principles *Trias Politica*, (3) Government organized under the laws of (*Wetmatig bestuur*) , (4) the existence of the State judicial administration in charge of the case against the law by the government (*Onrechmatige overheidaad*) .

In line with the development of State and Government, State law doctrine currently upheld by countries in the world especially after the Second World War is the concept of welfare state (welfare state). The importance of dispersal and separation of governmental powers is what gave birth to the theory of separation of powers or the power dispersal (*spreading van machten of machtenss cheiding*).

John Locke was first considered introducing the doctrine of separation of powers by dividing the State into legislative power (making the Act), the executive (implementing legislation), and the power of the Federative (Security and Foreign relations).

Doctrine of separation of power is becoming increasingly popular after the French jurist Montesquieu, *Esprit des Lois* published book (the spirit of the law) which suggests that “in a country there are three main organs and functions of Government, namely the Legislative, Executive, and Judicial. Each of these organs should be separated because the focus of more than one function in one organ or organ administration of individual freedom is a threat (a threat to individual liberty).

According Sunaryati Hartono, meaning the law covers four business developments, as follows:

- a. Improve (make something better);
- b. Changing for the better and modern;
- c. Hold something that did not previously exist; and
- d. Negate anything contained in the old system, because it is not needed and is not compatible with the new system.

Basing on the fourth attempt, the development of the law is therefore a dynamic process, which must be done continuously and even a process that will never be finished, because any progress will demand changes ahead in a constantly changing society.

Associated with this dissertation, the development of legal theory is used to analyze and answer the problems associated with adjustments (changes) to the contract work in an effort to adjust to the dynamics of public life today as mandated by the Mining Law.

Under the provisions of the Mining Law Article 169 provides that:

- a. Contract work and the work of coal mining agreements that existed prior to the enactment of this Act remain in effect until the expiration of the contract/agreement;
- b. Provisions contained in Article contract work and the work of coal mining agreements referred to in paragraph a customized later than 1 (one) year from the promulgation of this Act except on state revenue.
- c. Exceptions to acceptance as referred to in point b is an effort to increase state revenue .

Under the provisions of Article 128 Mining Law provides that:

- a. IUP holder is obliged to pay income IUPK State and local revenue;
- b. Revenue as referred to in paragraph (1) shall consist of tax revenues and non-tax state revenue .
- c. Receipts taxes referred to in paragraph (2) shall consist of:

- 1) The taxes that the authority of the Government in accordance with the provisions of the legislation in the field of taxation; and
- 2) Customs duties and excise.
- 3) State Income Tax is not referred to in paragraph (2) shall consist of:
 - a) dues remain
 - b) dues exploration
 - c) dues production
 - d) Compensation data and information .
 - e) Income areas referred to in paragraph (1) shall consist of:
 - ✓ Local taxes;
 - ✓ levies
 - ✓ Other legitimate income under the provisions of the legislation.

Then based on the provisions of Article 13 of the Contract of Work clearly mentioned several obligations that must be implemented by the Company (PT Newmont Nusa Tenggara) to the government as a source of revenue that is determined as follows:

- a. Contribution to fixed contract of work area or mining area ;
- b. Contribution exploration/production (royalty) for mineral production company ;
- c. Contribution exploration/production in addition to the minerals are exported ;
- d. Income taxes for any kind of profit earned or acquired company ;
- e. the individual income tax ;
- f. The tax on interest , dividends or royalties
- g. Value added tax (VAT) on the purchase and sale of taxable goods;
- h. Stamp duty on documents valid
- i. Import duties on those imported into Indonesia
- j. Land and building tax (PBB):
 - 1) Contract of work area or mining area, and;
 - 2) The use of land and space in which the company builds mining operations facility .
- k. Charges-fees, taxes, loading-loading and duties imposed by local governments in Indonesia, which has been approved by the Central Government .
- l. Levy-general administrative fees and charging-charging for services and facilities or special rights granted by the Government during the imposition of levies and it has been approved by the central government .
- m. The tax on the transfer of the ownership of motor vehicles and boats in Indonesia .

Thus if the reference to the provisions of Article 169b Mining Law , because all liabilities are a burden PT.NNT as defined in article 13 of the families, including the category of state revenue is normative to taxes and royalties cannot be adjusted because excluded by Law legislation. While the demands of the legislation will need to be a change or adjustment to the Contract of Work, one of which was associated with taxes and royalties which have been considered no longer comparable with the dynamics of development and the needs of today's society, especially in the area of the mine producing region. This is consistent with the commitments of the parties agreed to in the Contract of Work Article 23 point (3) which determines “ that at any time during the application of this Agreement at the request of either party , the Government and the Company can consult to determine whether the financial provisions or provisions the other provisions of this Agreement require changes) in relation to all circumstances related to it , to ensure that adequate implementation of this Agreement and without prejudice to the interests of either party”.

Based on data from the Director General of Mineral and Coal Ministry of Energy and Mineral Resources, as of August 29, 2012, large mining contracts totaled 111 which consist of 37 contract of work (COW) for 74 mineral commodities and coal mining works agreement (PKP2B). Of these, five families and 60 PKP2B already approved some renegotiation points, 27 families and 14 PKP2B which partially accepted the renegotiation points, and still five families who have not agreed to all points renegotiation.

In this negotiation process, the government carries six strategic issues. Issues to be discussed include the area of re- employment, contract extension rules, state revenue and royalties, processing and refining obligation, the obligation to divest, as well as the mandatory use of goods and services in the domestic mining.

Enactment of the sixth issue as the issue will be revisited (renegotiation) due to make adjustments to these problems will be able to economically increase state revenue as one goal the enactment of the Mining Law.

This is in accordance with the opinion of a mining analyst Kurtubi, in fact renegotiation particulars depend on the firmness of government. He asserted, natural resource management is the business of the State sovereignty. During the mining companies seems large deposit. But it is actually very small when compared with the volume of production or mining products are exported. So, said Kurtubi, renegotiation is logical for income greater gain State.

If the State is the only form of tax receipts it is quite reasonable to state revenue is excluded for any adjustment to the contract work, because there is some kind of percentage that decreased tax payments if adjustment. One of them, for example relating to corporation tax and business entities. Under the provisions of Article 17 of Law No. 7 of 1983 determine that income tax rates are:

- a. up to 10 million of income : 15 %
- b. 10 million - 50 million : 25 %
- c. Above 50 million : 35 %

Then based on Article 17 of Law No. . 36 In 2008 the fourth amendment to Law No. 7 of 1983 on income tax that income tax rates are:

- a. d . 0-50 million : 5 %
- b. e . 50-250 million : 15 %
- c. f . 250-500 million : 25 %
- d. g . Above 500 million : 30 %

While the corporate tax payer in the country and is a permanent establishment by 28 %. Thus if the adjustment is done, there will be reduction in the state's revenues by 7 % from the previous admission, because PT.NNT in income tax payments are subject to Law No. 7 of 1983 on income tax (in accordance with the contents of the Contract of Work).

Thus it can be concluded that the restrictive exceptions referred to in Article 169b Mining Law specifically directed only against the tax, it is consistent with the provisions of Article 169 paragraph (c) which determines that the exemption referred to in point (b) is intended to increase state revenue. So that argumentum a contra can be interpreted to non- tax state revenue obliged to be adjusted.

Although the logic of thought as described above is consistent with the spirit of the birth of the Mining Law, as mandated in Article 3 of the Mining Law, but remains philosophically opposed to the principle of justice in particular precepts of Pancasila - 5 social justice for all Indonesian people mention that one egg respect the rights and obligations balanced manner. By limiting the exception only of the State revenues related to taxes, it has ignored the rights of a party to the Contract of Work in these party companies (contractors). This means that when associated with a state tax receipts cannot be adjusted due to decreased. Meanwhile, if related to non- tax state revenue should be adjusted because they may increase the acceptance of the State, though of course there are proportionately unfair treatments.

Related to the principles of justice, fairness philosophically has had a major role in all studies of the human body. In order to understand the justice from a philosophical perspective, worth exploring ideas of the philosophers of the past as a force in the organization of law enforcement in the present after continuously through a very long struggle.

Jeremy Bentham defines justice as equality, if two conflicting interests, the correct decision is based on which one can produce a totality greater happiness, regardless of which side of the two men who would enjoy it or how happiness was divided among them.

According to John Rawls a good society is said to be based on two principles, namely fairness and veil ignorance. Fairness, which guarantees to all members of any beliefs and values, freedom as possible, while the veil ignorance, which only justify social inequality and economic inequality when it is viewed in the long run it benefits those who are less fortunate. Rawls thought about real fairness is a critique of previous theories of justice which are substantially influenced by utilitarianism or by intuitionism has become a very dominant moral view on the whole period of modern moral philosophy.

In general utilitarianism teaches that truth or falsity of the rules or human action depends on the direct consequences of regulation or specific actions performed. Thus the good and bad human actions are morally highly dependent on the good and bad consequences of such action for humans. Strictly speaking, if the result is good, then a regulation or action by itself would be good. Vice versa, if the bad consequences, then a regulation or action to be bad. While not a member intuitionism adequate place on the ratio or reason, but rather rely on the ability of human intuition, so inadequate when used as a handle to make decisions, especially in times of conflict between moral norms.

Departing from the John Rawls wants to build a theory of justice that is able to enforce social justice and at the same time be objectively justifiable, especially in the perspective of democracy. Theory of justice is considered sufficient if the contract is formed with the approach, in which the principles of justice are chosen as a handle with a mutual agreement of all parties are free, rational and equal is referred to as Justice as Fairness. Thus John Rawls emphasizes the importance of seeing justice as "the main virtue" that must be adhered to as well as a basic spirit of the various basic social institutions of a society. John Rawls also is referred to as one of the supporters of the formal justice. Consistency in putting the constitution and the law as the basis of the rights and obligations of individuals in social interaction can be a signal, based on the rules of justice, even though the formal administrative nature is nonetheless important because it basically gives a minimum guarantee that every person in the same case must be applied equally.

Indonesia as a sovereign country has its own view of justice which is different than other countries. Justice is meant by Pancasila (Mono-dualistic). Perspective of justice for the people of Indonesia inspired by Pancasila values that underlie philosophical outlook on life and the people and the State of Indonesia. Pancasila is the principle Recognizes and adopts ideas and streams that naturally both with regard to the position of human and streams in the social, economic, and cultural. It's possible because of Pancasila acknowledges the advantages and disadvantages of each school of thought that there is basically no one is perfect, without flaws. Pancasila concocting various schools of thought that exist to lay the foundation in the life of the nation both in the political, social, economic, cultural and in particular is in the field of law.

Pancasila values can be examined from two perspectives, namely the objective and subjective viewpoints. Pancasila values that are objective means in accordance with the object, it is subjective in the sense of the existence of those values depend on the Indonesian people themselves. Some of the concepts embodied in the value of the principles of Pancasila are:

- a. Godhead Value
- b. Rated Humanity
- c. Value of Social Justice

Value can be found in the divinity of the first principle is "Belief in God Almighty" which is expressly stated in the subject matter of the opening of the fourth Act of 1945 as follows:

"Over the grace of Almighty God ... "Thought is then translated into the body of the Act of 1945 which in Article 29 paragraph (1). First principle reflects the nation Indonesia faith and devotion to God Almighty. It also includes the precepts and animates the other precepts for example in realizing the values of a just and civilized humanity. In addition contained also the values of freedom (independence) for Indonesia to embrace and execute commands religion / belief, respectively. It also carries consequences, namely the obligation for each person/group of the Indonesian nation to preserve harmony between followers or adherents of the religion/belief it. These include the first principle and animating to the next four precepts.

Human values are reflected in the two precepts that reads "just and civilized humanity". *Sila* just and civilized humanity contained in the four key points to Opening Act of 1945 which was then elaborated in Article 27 through Article 34.

These *sila* overwhelmed and inspired by the first principle, as well as animating and precepts include three and so on. Humanity is fair and civilized human consciousness attitudes and behavior based on the cultivation potential of the human conscience in relation to the norms and culture in general, both on the personal self, fellow human beings and the natural surroundings. In principle, just and civilized humanity is human attitudes and behavior in accordance with the nature of human nature is conscious, aware of the value and culture. The realization of the value of just and civilized humanity, among others, participate in the establishment of a world order based on freedom, lasting peace and social justice; uphold human rights with the base idea of harmony between the individual and society (*monodualisme*); recognition of the dignity of man as a creature of God.

Social Justice in value reflected in the five precepts of "social justice for all Indonesian people" are explicitly stated in the two main ideas in the Preamble to the Constitution of 1945, which are then presented in Section 23, 27, 31, 33, and 34.

The five precepts overwhelmed and inspired by the first principle to the four precepts of Pancasila. Social justice for all Indonesian people implies that every Indonesian people receive fair treatment in all fields such as legal, political, social, economic and cultural. The significance of this fairness notion extends to fair and prosperous.

In the context of this dissertation, the theory of justice will be used to assess and analyze the values contained within the contract of work as one of the instruments used by the government in the business of mining activities in Indonesia to meet the mandate set out Article 33 paragraph 3 of the Constitution of Republic of Indonesia Year 1945.

In the perspective of public law is the organization's state office. Among state positions no government posts. Therefore, if the state acts as a representative office (*ambt*) then it is subject to public law. However, when acting on behalf of a legal entity (*rechtsperson*) then its actions are subject to civil law.

Public entity has a function in carrying out public functions and performs the functions of government, because it is tied to the state budget. Having regard to the function of the public legal entity, it is clear that the public entity principally directed at the government administration and public services within the framework of state goals that the public welfare.

In the acts of government, in addition to acting as a principal government public law, that such actions will be subject to and governed by public law, the government can also be perpetrators of private law. This is because sometimes the government in his capacity as a legal entity that can be perpetrators of private law can hold a legal relationship (*recht handeling*) with another legal subject (person or private legal entities). In undertaking legal relations, the government can use private law in carrying out their duties, in this case the deeds of private law.

Thus, it appears that if the government running role as perpetrators of private law, the legal actions undertaken by the government are not governed by public law, but based on the laws and regulations of the underlying civil action.

From the above descriptions it is clear that the government which is basically a public entity to immerse them in agreement or transaction that is private, so it applies to her private law.

Following the understanding that the author is trying to give the above, it can be seen that the real rulers (government) in a legal relationship with individuals or private legal entities, in his capacity as a private legal actors, it can be submit to the rules of law applicable in the private as well as individual or other private legal entities.

Therefore the government as a party who feels aggrieved by the birth of the Mining Law may file a judicial review with the Constitutional Court.

Generally it can be described briefly associated with the authority of the Constitution and the legal status of the Court Petitioner in filing the judicial review.

3.1 Authority of the Constitutional Court

- a. Article 24C (1) of the 1945 Constitution states that the Constitutional Court has the authority to hear at the first and last decision is final to Shrimp laws against the Constitution, the authority to decide disputes state institutions the authority granted by the Constitution, dissolution of political parties, and decide disputes concerning the election results .
- b. Whereas under the provisions of Article 10 paragraph (1) letter a of Law No. 24 of 2003 on the Constitutional Court, hereinafter referred to as Act 24/2003 menyatakan that the Constitutional Court is authorized to hear at the first and last decision is final for:
 - 1) testing legislation against the Constitution of the Republic of Indonesia Year 1945;
 - 2) Decide disputes the authority of state institutions the authority granted by the Constitution of the Republic of Indonesia Year 1945;
 - 3)
- c. Article 1 paragraph 3 letter a of Law 24/2003 states that “ the petition is a written request submitted to the Constitutional Court regarding testing legislation against the Constitution of the Republic of Indonesia Year 1945”.
- d. Article 50 of Law 24/2003 states that “ legislation can petitioned for legislation that is enacted after the amendment of the Constitution of the Republic of Indonesia Year 1945 ...”
- e. Whereas legislation petitioned for by the applicant is law 4/2009 in particular Article 169b .
- f. Whereas, based on the description above, the Constitutional Court has the authority to hear the testing provisions of Article 169b of Law 4/2009 of the provisions of Article 33 paragraph (4) of the 1945 Constitution.

3.2 The Status Law (Legal Standing) Applicant

- a. That the District Government of West Sumbawa, West Nusa Tenggara formed by
- b. Whereas Article 51 paragraph (a) of Law 24/2003 states that the Applicant is considered right and / or authority aggrieved by the enactment of legislation, namely :
 - 1) individual Indonesian citizens;
 - 2) the unity of indigenou communities along the still alive and in accordance with the development of society and perinsip the Republic of Indonesia which is regulated by law;
 - 3) public or private legal entity; or
 - 4) state agencies.
- c. That under the provisions of Article 25 of Law No. 32 Year 2004 on Regional Government, hereinafter referred to as Law 32 /2004, last amended by Act 12 of 2008 , states that the Regional Head has the duty and authority to:
 - 1) led the organization of local governments with policies established by the legislature;
 - 2) submit the draft law;
 - 3) establish legislation that was approved with the legislature;
 - 4) prepare and submit the draft law on the budget to the Parliament for discussion and set together;
 - 5) pursue the implementation of regional obligations;
 - 6) represent the area inside and outside the court, and may appoint legal counsel to represent him in accordance with laws and regulations; and
 - 7)
- d. Furthermore that Article 27 of Law 32/2004 last amended by Act 12 of 2008 states that in carrying out the duties and authority as mentioned in item 3 above the head of the region have an obligation:
 - 1) and uphold the Pancasila, implementing the Constitution of the Republic of Indonesia Year 1945 and keep growing and maintain the integrity of the Unitary Republic of Indonesia;

- 2) improve the welfare of the people;
- 3)
- e. Under the provisions of Article 169 of Law No. 4 of 2009 on Mineral and Coal Mining, determine:
 - 1) Contract work and the work of coal mining agreements that existed prior to the enactment of this Act remain in effect until the period of validity of the contract/agreement .
 - 2) Provisions contained in Article contract work and the work of coal mining agreements referred to in paragraph a customized later than 1 (one) year from the promulgation of this Act except on state revenues .
 - 3) Exceptions to state income referred to in point b is an effort to increase state revenue .
- f. The definition of state revenue is derived from state income taxes and non-tax. It is expressly provided in Article 128 of Law No. 4 of 2009 which determines, among others:
 - 1)
 - 2) Income countries referred to in paragraph (1) shall consist of taxes and non-tax receipts;
 - 3) Tax revenue as referred to in paragraph (2) shall consist of:
 - a) taxes under the authority of the government in accordance with the provisions of the tax law field; and
 - b) and excise duties.
 - 4) Non-tax revenues consist of :
 - a. fixed fees
 - b) dues exploration
 - c) dues production
 - d) compensation information data .

Thus based on these conditions, the adjustment to the Contract of Work PT . NNT particularly with respect to fees (royalties) production as stated in Article 13 Contract of Work can not be applied, because it is the exception.

This provision is contrary to the spirit contained in article 33 (4) UUD 1945 that specifies:

“The national economy was organized based on economic democracy with perinsip togetherness , efficiency equitable, sustainable, environmentally sound, self-reliance, and to maintain the balance and economic progress and national unity”.

Then Article 2 of Law No. 4 of 2009 also provides that :

Mining and mineral/coal managed berasaskan :

- i. benefits, fairness and balance ;
- ii. alignments to the interests of the nation;
- iii. participation, transparency, and accountability;
- iv. sustainable and environmentally friendly.

Work under the Contract Agreement by the Government of Indonesia with PT. Newmont Nusa Tenggara that royalty payments over the production set with the following details :

- i. 1 % to 2 % when the gold price between U.S. \$ 300/troy/ons up to U.S. \$ 400/troy/ons .
- ii. Then to 2 % silver mineral deposits with a price range between U.S. \$ 10 to U.S. \$ 15 / troy / oz .
- iii. While for platinum between 1 % to 2 % with a price range between U.S. \$ 750 to U.S. \$ 925/ troy/oz.

This clause does not satisfy the justice of course, because of the First; principally intended as a compensation payment of royalties over the mining activities, both to improve the livelihoods of communities, infrastructure development and reclamation over the area of the mine to the preservation of the environment is maintained at all times on the economic front (unit price) financing burden continues to increase, while the percentage of royalty payments remain, despite the ever-increasing price of minerals. second; Pricing standard to determine the percentage of the royalties set out in 1986 to the effective since 1999. At that time the gold price of U.S. \$ 400/troy/ons, silver and platinum 50/troy/ons U.S. \$ U.S. \$ 750/troy/ons . While the current gold price of U.S. \$ 1400/troy/ons, silver price of U.S. \$ 90 / troy / oz and U.S. \$ 1000/troy/ons platinum .

Under the provisions of Article 132 of Law No. 4 of 2009: “the magnitude of the production contribution rates are set based on: the level of exploitation , the mine production and commodity prices”. This means that the total area of cultivation area, an increase in production and an increase in commodity prices should be offset by an increase in the percentage of royalties.

Likewise, the type of material affected mining royalties, the type of contract work affected mineral royalty payments are: Gold, silver and platinum, while since 1999 the material produced by PT. NNT mine is Gold, silver and copper, has never produced platinum .

- g. That the exclusion of State Revenue to be adjusted after the enactment of Law 4/2009, it became an obstacle to the Local Government (especially mine producer) for demanding penyelesaian the CoW substantially have not reflect the principle of fairness in the management and utilization of natural resources;

- h. That adjustments for state income exclusion has caused loss to the Government of West Sumbawa Regency Producing Mine in particular as an area that directly bear the brunt of the risks due to declining social and ecological environmental quality as a result of mining activities;
- i. That the concerns would be reduced if adjusted revenues is unwarranted . Due to an adjustment to the tax (which has decreased an average of 8 %) will be offset by an adjustment to the payment of production royalties are based on the Law 4/2009 is 10 % and based on PP 45 of 2003 on non-tax state revenue rates applicable within the Ministry of Energy and Mineral Resources ranged between 3.75 % to 4 % .
- As an illustration that PT. NNT in 2008 has paid fixed fees , production fees , personal income tax , tax on buildings and dividends and VAT amounting to Rp . 468,319,123,848.00 (Four Hundred Sixty- Eight Billion Three Hundred Nineteen Million One Hundred Twenty- Three Thousand Eight Hundred Forty Eight Dollar) . Based on preliminary calculations made adjustments so that if state revenues from fixed fees, production fees, personal income tax, tax on buildings and dividends and VAT will increase to Rp. 807 808 654 975 (eight hundred and seven billion eight hundred and eight million six hundred and fifty-four thousand nine hundred and seventy- five dollars) (Details attached). Thus there is an increase in state revenue items totaling Rp . 339 489 531 127. (Three hundred and thirty-nine billion four hundred eighty-nine million five hundred and thirty- one thousand one hundred twenty-seven dollars).
- j. That based on the above description is the Petitioner is aggrieved by the provisions of Article 169b of Law 4/2009 and therefore constitutionally have the right to file this petition.

4. Conclusion

With the exception of the State revenues to be adjusted norms would lead to ambiguity, because such provisions are not consistent with the spirit of the birth of the Mining Law is one to increase people's income, Mandated state region and in Article 2 as Mining Law. KK one substance directly related to State revenues are royalties that amount between 1 % to 2 % , while in some other countries royalties ranging from 5% to 15%, so the proportionate liability is not worth the risk of social and ecological must be borne by the government of the Republic of Indonesia. Despite the Government Regulation No. 45 Year 2003 on State Non- acceptance rates of tax prevailing in the ministry of energy and mineral resources which determine the amount of the royalty rates between 3.25 % to 4 % , however, due to hit the provisions of Article 169 Mining Law, the provision cannot be applied to KK, as an exception in the adjustment . Thus the constitutional provisions contrary to the principle of justice as mandated in Article 33 of the Constitution 45 which is a manifestation of a grain of Pancasila 5 precepts of social justice for all Indonesian people that maintain a balance between the rights and obligations and is able to do justice.

5. Recommendation

Therefore, to provide legal certainty on whether or not the Contract of Work adapted as an effort to maximize the utilization of natural resources (SDA) is reserved for the greatest welfare of the people as mandated in Article 33 (3) 45 Constitution, there should be a judicial review to the Constitutional Court.

References

- Andre Ata Ujan, *Justice and Democracy, Assessing Political Philosophy of John Rawls*, Canisius, Yogyakarta, 2001
- Bertrand Russell, *History of Western Philosophy and its Connection with Political and Social Circumstances from The Earliest Times to the Present Day*, Georgie Allen and Unwin LTD., London, 1946. Sigit Translation Jatmiko et al, *History of Western Philosophy and the Relation to the Socio-Political Conditions of antiquity to Now*, Library Student, Yogyakarta, 2007
- Dardji Darmodiharjo and Shidarta, *Principles of Philosophy of Law. What and How Philosophy of Law Indonesia*, Gramedia Pustaka Utama, Jakarta, 2006
- John Rawls, *A Theory of Justice*, Harvard University Press, Cambrridge, Massachusett, 1995s. Translation and Heru Prasetyo Uzair Fauzan, *Justice Theory Basics Political Philosophy to Achieve Social Welfare in the State*, Library Studen, Yogyakarta, 2006
- Tahir Muhammad Azhari, *Indonesian State Law on Normative Juridical Analysis of its Elements*, the UI Press, Jakarta.1955
- Retno Sulistyowati, Christina Bernadette Munthe, *The Difficulties Renegotiation Mine*, Tempo, dated July 15, 2012
- Sunaryati Hartono, *Indonesian Development of Economic Law*, Binacipta London, 1982.
- Sukarmi, *Cyber Law, Contract Electronics in the shadow of business*, Sutra Library, London, 2008.
- Sudikno Mertokusumo, *Legal Discovery*, (London: Liberty, 2009), p. 29
- Background paper, *Analysis Commission against Law No. 4 of 2009 on Mineral and Coal*, <http://www.kppu.go.id.com>, accessed on 15 August 2010

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