

# Analyzing the Perspective of Indonesia Mining Conflict Regulation

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## Abstract

Indonesia is a country with abundant natural resources given by God. Its natural resource potent and metallic mineral resource are scattered in 437 locations throughout Indonesia, from copper and gold in Papua, gold in Nusa Tenggara, nickel in Sulawesi and eastern Indonesia islands, to bauxite and coal in Kalimantan, along with the other minerals that spread in various locations... Vertical conflict is including the conflict that triggered by an authority dispute between the Central Government and local governments. While horizontal conflict occurs between fellow communities of customary law as Ulayat rights owners in Papua. The conflict is also including the conflict in the context of regulation in both the national and international context.

**Keywords:** Mining Conflict, Regulation

## 1. Introduction

Indonesia is a country with abundant natural resources given by God. Its natural resource potent and metallic mineral resource are scattered in 437 locations throughout Indonesia, from copper and gold in Papua, gold in Nusa Tenggara, nickel in Sulawesi and eastern Indonesia islands, to bauxite and coal in Kalimantan, along with the other minerals that spread in various locations.<sup>1</sup>

Those Indonesia's abundant assets made the founding father realized that its utilization must be able to bring prosperity for all Indonesian people. Therefore, those founding fathers' noble vision and mission were written in Article 33 of Republic of Indonesia Constitution, which point (2) regulated that the production branches that prominent for country and hold people's interest widely, must be held by country for people's prosperity. Proceed to point (3), it regulates that earth (land?), water, and all natural wealth within must be controlled by state and used optimally for people's prosperity. Hence, this nation's founding fathers' purpose was that utilization of natural resource by country in Indonesia should aim for Indonesian welfare. Thus, all regulations about natural resources must put "for people's prosperity to the fullest" clausal.

The meaning of this clausal is that the concept of the possession of Indonesia's natural resources richness that came from mining minerals "belongs to Indonesia people". Natural resource richness that belongs to people that trusted to state, are mandated to be managed properly to achieve Indonesia state purposes. Government as state representative has been given rights to manage those natural resources in order to be enjoyed by people equally and justly.<sup>2</sup> Thus, all regulations related to natural resources management are always put clausal mention that natural resource management is aimed for people prosperity.

Therefore, ownership concept that used in Indonesia is slightly different with state ownership system who acknowledged personal ownership of mining materials that found underground of his land or property.<sup>3</sup> That ownership system can be clearly seen on consideration part of Law number 4 2009 about mining, which states:

"That mineral and coal that contains under Indonesia mining territory as natural resources that cannot be renewed is God's gift who has important role in fulfilling people's needs, thus it maintenance should be controlled by state in order to give added value for Indonesia's economy in attempt to achieve people's prosperity and wealth in justice".<sup>4</sup>

Furthermore:

"That mineral and coal mining business activity which is mining business activity besides geothermal, oil and natural gas, also ground water has important role in give added value tangibly to economic growth and sustainable regional development".<sup>5</sup>

<sup>1</sup> Gatot Supramono, *Coal and Mining Law in Indonesia*, Rineka Cipta, Jakarta, 2012, p. 1.

<sup>2</sup> Adrian Sutedi, *Mining Law*, Sinar Grafika, Jakarta, 2011. p.24.

<sup>3</sup> Ibid. p.vi. Private land owners automatically become owners of land mine material is in the subsurface in the United States and Australia. While in Russia, the state is the owner of all minerals, while at the self-governing state or the king has royal system that has the entire ingredients mine. In Indonesia, the owner of mineral mining jurisdictions in Indonesia is the Indonesian Nation.

<sup>4</sup> See the consideration of the Law No. 4 Year 2009 concerning Coal and Mining.

<sup>5</sup> Ibid.

## 2. Indonesia Mining Law Legal Policy

Legal policy of regulation in mining fields can be simply depicted as following:

1. Mineral and coal as natural resources that cannot be renewed is held by state, and its development and utilization are conducted by the government and local government together with business actor.
2. The government henceforth given opportunity to Indonesian legal business entity, cooperation, person, as well as local community to managed mineral and coal mining venture based on permit that related to local autonomous, issued by government and/or local government according to its competence and authority.
3. In attempt to implementing decentralization and local autonomous, mineral and coal mining management will be carried out based on the principle of externalities, accountability, and efficiency that involves government and local government.<sup>1</sup>

From that legal policy, it is intended that mining in Indonesia is hoped to give huge influence for the rate of country's economic growth. It means that if both exploration and market of mining sector goes well, it will significantly increase economic growth. This is because the income from mining sector comes in various forms such us royalty, several kinds of taxes, and retribution.

From its connection aspect to economic mechanism, mining activity also has impact on multiplier effect, such as increasing of market value of domestic brute, household income, and employability either regionally, nationally, and locally. So, with a good activity's flow in mining sector, the other economic activities units will also escalated as a manifestation of the increasing of business diversification. In the end, it will be resulted on the growth of Indonesian economy which in bigger perspective can be calculated from selling value, value added, worker's income, and worker absorbent by mining companies, also contribution of fund for local development, particularly the region where the mining company taking place.

As illustration, it can be seen on Freeport Indonesia's activity in Papua that has been operated for 30 years.<sup>2</sup> Freeport Indonesia is a world mega mining corporation who work in Indonesia and produce concentrate rock with metal concentration such as copper, gold, and silver. Positive influence from the existence of Freeport Indonesia can be clearly seen on the emerging of new economic area in Mimika District which is more modern compare to the other parts of Papua. In that district, there are two economic activities in mining sector that can be found. Firstly, mining exploration on highland, and secondly, company's administration activity, final procession of concentrate and its shipping, together with government work on the lowland.

The existence of this mining company economically brings significant influence towards the growth and development in economic sector, e. g. in 8 years period of time from 2004 to 2012, Freeport Indonesia fiscal contribution to Indonesia's state budget (APBN) is 114.35 trillion rupiah. It shows that mining company financial contribution to country is quite huge. However, although it's financially and economically gives huge contribution, in reality there are numbers of social conflicts emerged in Papua related to the mining company. As it has been forecasted by *wetgeverin* general provision of Law number 4 2009 about mining, where it is stated that the main challenge to faced in mineral and coal mining in Indonesia is the influence of globalization who encourage democratization, local autonomous, human rights, environment, information and technology development, intellectual property rights, also demand of private and community participation, which has been a global phenomenon nowadays. Additionally, it will bring a huge impact to Indonesia natural resource mining in Indonesian in the future.

What is written in general provision of Law number 4 2009 has already existed in Indonesia, especially in areas with mining resources, including Papua as the eastern province of the country as well as province with a biggest mining resource in Indonesia. It is allegedly caused by the management conducted by government was not based on justice principle, spirit of local autonomous, and reward problem to indigenou people nearby the operation area or local people with ulayat rights (customary right) where their territory located in mining location.<sup>3</sup> Allegations of government's misconduct in mining operation in Indonesia come from government who appears to solely seen article 33 of Indonesia Constitution as country platform to control land, water, and riches contained therein. There is a shifting understanding by country government from only regulate and manage (regelen en berstuuren) to posses (eigens daad) in mining resources utilization. As a result, the policy that issued

<sup>1</sup> Explanatory of the Law No. 4 Year 2009 concerning Coal and Mining.

<sup>2</sup> See at Sandhi Bagus Permana, *Interviewing with Representatives of PT. Freefort Jayapura*, 12 December 2008.

<sup>3</sup> See at Abrar Saleng, *Management of Natural Resources based on Social Justice*, Paper, Faculty of Law – Cenderawasih University, Jayapura, 19 Maret 2011.

becomes biased from the main purpose of for the prosperity of the people.<sup>1</sup>

### 3. Mining Conflicts in Indonesia

Allegation about the cause of conflict in the handling of mining resource in Indonesia nowadays is that the operation of mining natural resource as part of country assets that supposed to give benefit for people prosperity. However, in reality, it becomes a struggling object between central and local government, between the local themselves such as province and district, also dispute between Adat law community and company, which in the end trigger injustice in its utilization.<sup>2</sup> Other allegation that needs to be examined is country or government regime unwillingness to acknowledge and appreciate the application of Adat law community's ownership and authority of the land or area where mining resources located. That unwillingness caused role changing of the government from *regelen en besturen*, as it should be, to *eigensdaad*. Then unilaterally as if there is no local government and community with ulayat rights, give management concession to transnational mining company.<sup>3</sup>

Suspected that this government policy according mining resource emerge a sense of injustice amongst indigenous people in Papua Province because this transnational mining company shows less appreciation to the existence of Adat law people with ulayat rights. This case not only occurs to gold and copper mine in Mimika District, but also appears in the other natural resource that related to Papua's Adat law people such as forest, oil, sea products, natural gas, and biodiversity. In Papua's Adat law people perspective, this phenomenon is more likely called "colonization" as a result of government policy in mining resource management that neglect economy, social, and cultural rights of Adat law people who hold ulayat rights in Papua province. Also, unbalance profit share between central government and Papua province local government.

In traditional natural resource management in Papua, Adat law community must dealing with increasing number of national and international companies. Adat land that believed by Papuans in their traditional rituals as "mother" is being massively exploited by capital owners under permit that issued by national government. Profit that gained by the investors and infestation for the country also is considerably big. However, local people as an owner of ulayat rights only derive abuse and various kinds of human rights violation in their life, how meager people and the province where the mine taking place.<sup>4</sup>

Accuse of separatism stigma becomes their restrain if they demand their rights either of profit share or compensation according to the principle of justice. They are considered as development obstacle and threat to national stability. Consequently, security approach that used is taken by force as solution to the emerging dispute between Adat law community and company also the government. This is indicating government ignorance to people's rights that guaranteed by Constitution.

Related to the rights of traditional management of natural resources, Papua's adat law community, hereditary since from their ancestor for a very long period of time even before the establishment of Indonesia's country and government, has had their own customary law. The customary law covers regulations as well as system of natural resource and land management that adopted by certain ethnic community groups on the area of adat law community. The law that applied is verbal or oral regulation, but it has an absolute legal force and binding for all adat law people that live in that area. In Indonesia law system this right called Ulayat rights, a right that in reality still exist in Papua. This is the right that has been sacked by mining company who conduct exploitation without recognition.

In Indonesia's system of law, appreciation and recognition to Adat law community implicitly figured on Article 18 point (2) of Indonesia Constitution that has been amend as Article 18 b point (2) who stated that "Country recognize and respect the units of Adat law people together with its traditional rights as long it still lives and accordance to society development and the principle of Republic of Indonesia. Article 28 1 point (3) Indonesia Constitution strengthen that "culture identity and the rights of traditional society is respected according to current development and civilization".

In the Law number 4 year 2009 about Mineral and Coal Mining, written in Article 2 point (2) about principle and purpose, where this law adopts the principle and objective of "fairness and balance". Furthermore, Article number 3 point (e) stated that "generating local people, region, and country's income, also to create employment

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<sup>1</sup> Ibid.

<sup>2</sup> Ibid.

<sup>3</sup> Juajir Sumardi, *Franchise and Transnational Company Law*, Arus Timur, Jakarta, 2012, p. 11.

<sup>4</sup> See report on Center Statistic Beureu , *the Number of Indonesia Poor People in 2014*.

to achieve people's prosperity" which strengthen in Article 4 point (1): Mineral and coal as natural resource that cannot be renewed is national asset that controlled by country for people prosperity.

Moreover, the provision of Article 3 Law number 5 1960 about the Basic Rules of Agrarian Principles determined: considering the provisions in Article 1 and 2, Adat law society, as long in reality still exist, should be in any way harmonious with country and national's interest, which based on nation unity and should not contradict with the other laws and rules in a higher hierarchy. In the Law number 22, 2001 about Petroleum and Natural Gas article 33 point (3) which regulate "petroleum and natural gas business activity cannot be conducted in: cemetery, holy place, public place, public infrastructure, nature conservation, culture conservation, and adat law society's land.

As a *lex specialis* Law number 21 2001 about Special Autonomous for Papua Province, in chapter X about Economy, where in article 38 point (2) written: economy business ventures in Papua Province which utilize natural resource conducted with respect to Adat society's rights, give guarantee of law certainty to the business player, also principles of environment preservation, and sustainable development that regulated with specific local regulation.

In chapter XI on Protection of Adat Law Society's Rights article 43 point (1) stated: Papua Province Government must acknowledge, respect, protect, empower, and develop Adat society's right based on provision of the applicable regulations, and point (2): Adat law society's rights mentioned in point (1) comprised of Ulayat rights of Adat law society and personal rights of each resident of the society.

Moreover in point (3): implementation of Ulayat rights, as long still exist in reality, done by Adat leader of the concerning Adat law society according to local provision, in honor of the land authorization of former Ulayat right which obtained by another party lawfully according to the legal rules and regulation. Furthermore in point (4): providing of ulayat right land or land that belong to adat society resident for any objective, done by colloquy/discussion between Adat society and concerned party to obtain agreement related to land handover that needed and its reward. Next, in point (5): province and district/city government conduct active mediation in attempt to settle ulayat land dispute fair and wisely.

From international law perspective, acknowledgement and appreciation toward the existence of indigenous people has been gone globally as followings: three main human rights related international documents, Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), and International Covenant on Economic, Social, and Cultural Rights (ECOSOC) have codes which regulate about Adat Law society or indigenous people, though these covenant does not firmly regulate and determine the rights of indigenous people.

Big concern towards indigenous people rights, particular related to land tenure, begun after the establishment of World Council of Indigenous People (WCIP) in 1966. Next in 1982, Working Group on Indigenous People (WGIP) was formed through United Nation Social and Economy Council agreement.<sup>1</sup> Later after the declaration of Convention concerning indigenous and tribal peoples in independent countries (Convention No. 169) in 1989 by International Labour Organization (ILO), the entity of customary law societies became more recognized by many countries, where every government should respect cultures and values that live in customary law societies.

One important event related to indigenous people recognition and reinforcement departed from the result of Earth Summit in Rio de Janeiro in 1992 by the issued of Rio Declaration on Environment and Development (1992). In principle 22, mentioned that customary law societies play important role in environment management and development because of their traditional knowledge and practice. Another important result from Earth Summit which known well as Agenda 21 which in chapter 26 stated about protection to "Ulayat rights of customary law societies".<sup>2</sup> Hence, country have to know and fully support the entity, culture, and their interest as well as give them opportunity to actively participating in accomplishment of sustainable development.

The next is, United Nations Permanent Forum on Indigenous People that established in 2000 has endorsed United Nations Declarations of the Rights of Indigenous People (UNDRIP) in September 13<sup>th</sup> 2007 where Indonesia was one of the signatory countries. This declaration has recognized customary law societies' both

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<sup>1</sup> M. Akil Mochtar, *Protection of Constitutional Rights of Adat Law Society*, Paper on National Meeting of Adat Dayak Community, p. 3.

<sup>2</sup> Ibid.

individual and collective rights, from economy, social, cultural, political, etc which strengthen by Constitutional Court interpretation through Verdict Number 31/PUU-V/2008. Therefore, protection towards customary law societies in Indonesia has been backed up by constitutional basis either nationally or through international law conventions to defend their rights. Thus normatively, natural resource management has promised justice and prosperity to people of Indonesia, particularly customary law societies with Ulayat rights in Papua. Unfortunately, in reality, there is only an accumulation of the sense of injustice for years that highly suspected has been transformed into conflict which resulting erosion of the sense of nationalism and in the end directed to disintegration.

From the phenomenon that elaborated above, there is condition called customary law societies' marginalization in Papua, since the operation of transnational mining company who exploiting mining resource in indigenous people environment so their access to the forest becomes more narrow or, like in the other places, cut at all. The phenomenon that happened evenly to customary communities in Papua is the decreasing of cultivation fields rotating pattern that is done by the people. It is getting harder to find a hunting area, hard to find clear water because it has been polluted by tailing waste, sacred place for community rituals has been destroyed, river and sea biota around the estuary which is food supply has been contaminated with mining waste, and that is the only food resource that comes from the water.

Within the framework of the capitalist political economy models of thinking which is Indonesia's current economic system, and integrated with the global economic system through the process of development and modernization. So that as the result, economy of Papua is experiencing the transformation under the pressure of national and international companies' expansion power who tightly connected with national elite politics. That power came in the form of capital expansion through a variety of investments in various sectors, particularly mining natural resources sector.

The exploitation of natural resources in Papua province occurs systematically and on a large scale. Politically, since the New Order until today, domination and hegemony are systematically in all political decision-making done by the Central Government. Thus, for customary people involvement in this aspect is absolutely nothing. Local people don't see as representation of local needs but central interest.

External forces (The New Order government regime) are present in the form of bureaucratic expansion development designed from the Centre almost without involving local communities. The phenomenon is known as country illegitimate, due to the presence of State institutions in the local region turned out to be unrelated to the interests of the citizens.

The whole area in Papua province became part of the expansion of capital institutions both national and international. Capital institutions are present in the form of HPH, HPHTI, oil and natural gas companies, as well as transnational corporations such as freeport which does not embedded directly to people's life. As a result, there is an imbalance relationship between the state institution and capital center against the Papua Province. Because natural resources are going to be exploited to the maximum, unfortunately the result is absolutely not for the interest or prosperity of indigenous peoples, so that the condition of indigenous peoples remains in conditions far from justice.

Conflict in natural resource management in Papua, resulted on customary law society had to deal with an increasing number of trans-national companies. Indigenous land which believed by the general customary law in their custom rituals as "biological mother" was taken by the owners of capital only with the power of permit and concession from the government. Profit earned by investors and investment for the country was not few in number. But on the other hand, the community as customary rights owners only gained force and various types of human rights violations in their life.

What is done by transnational corporations is clearly very incompatible with human rights as set in Draft United Nations Code of Conduct on Transnational Corporation in article number 12, part Adherence to socio cultural objectives and values. Article 13 part Respect for human rights and fundamental freedom, including in doing transfer pricing as stated on Article 33 Draft United Nations Code of Conduct on Transnational Corporations. Next is contradicting with article 41 Code of Conduct because of environment pollution and demolition to the area where the mining corporation operated, together with tailing dump.

The conflict also involves society and the Government, especially the Central Government who in fact under the economic development reason, by means of changing the economic potential into real economy, then the



Government gives permission or concession to the companies without looking at all customary law community interests as ulayat's rights holder of the mining area. This is due to the presence of the wrong view of the Government that considers natural mining resources as a source of income that should be realized.

Permits or concessions that granted by the national Government to the transnational company was perceived by customary law community as something very detrimental. It is because customary law society lost their access to the forest as their hunting and cultivating place, also the destruction of the forest environment as a sacred place for their ritual towards the ancestor spirit, the government has neglected his people's constitutional rights.

Another interesting thing to examine is a conflict of interest between the authorities of the Central Government with local governments in the field of permission for mining resources processing. That the core of a regional autonomy is the relationship between the Central Government with local government, which also includes the division of authority between the Central Government and Local Government, in this case, authority in mining permission.

The spirit of local autonomy is the background of the birth of Act No. 4 of 2009 about Mineral and Coal Mining. But it turns out that the existence of the mineral and mining law of coal is in practice still much violated by local governments. Number of cases of overlap permit that issued by local government, not to mention the royalty and tax result of the company that entirely co-opted by central government.

Based on the conflict map of the management of natural resources in mining that explained above, then the law issue which can be expressed is that the processing of natural resources in Indonesia, including Papua province has yet to welfare the people of Indonesia, especially the community's customary law as Ulayat rights holders in the area of the mine. Even if they are deemed to not have the capacity or does not meet a particular classification in terms of the process of management of mining resources in the area of their Ulayat rights, it doesn't mean that their constitutional rights which are protected by national and international law, and strengthen by Republic of Indonesia Constitutional Court's Verdict number 31/PUU-V/2008, can be simply ignored.

Not to mention the environmental damage as a result of the mining exploitation, which also resulted in tailings mounting that are polluting rivers where people from Kamoro tribe searching for food. Also it is contaminating all the water biota which within a certain period will influence on human life. Another conflicts involving the Central Government with local authorities relates to the sharing of the income from mining which is indeed small in number when compared with the results of the transfer pricing conducted by mining companies which result in high potential losses from the tax sector

There is a strong tendency that because of the accumulation of things mentioned above have pushed native Papua in general to struggling hard in order to get out of the snare of poverty and inequity that is caused mining management policies by the Government which considerably wrong. Allegedly that the aspirations of Papua Merdeka, which very strongly championed by the indigenous people of Papua, is because their basic rights have been long neglected by the State and mining company. So the feeling as a nation that colonized and marginalized in their own land is always reflected in their lives. Apparently this injustice problem is allegedly as one of the triggers of Adat's society fight.

#### 4. Conclusion

Mining conflicts in Indonesia is caused by conflict that is vertically and horizontally. Vertical conflict is including the conflict that triggered by an authority dispute between the Central Government and local governments. While horizontal conflict occurs between fellow communities of customary law as Ulayat rights owners in Papua. The conflict is also including the conflict in the context of regulation in both the national and international context. In other words, justice is a source of conflict in the management of natural resources in mining because of the Government's income is very small.

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