

# Model of Law Harmonization on Coal Mining in the Forest Area: The Law of Natural Resources's Perspective

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## Abstract

Mining resources are one of natural resources that can be classified as one of the non-renewable resources. Due to its characteristic, the mining will be no more available when they are totally exploited by mining activity. Other characteristic of mining industry is its sediment locations that are located on beneath of the surface of earth. Therefore, mining exploitation must be quarried far to the bowels of earth to get its materials. The result of it the mining industry always bring many impacts toward the changes on earth landscape and other problems to the environment. At the beginning, forestry resources in Indonesia are managed under the regulation of the Act No. 5/1967 (LNRI-1967-8, TLN-2823) regarding Forestry, and then substituted by the Act No. 41/1999 (LNRI-1999-167, TLNRI-3587) regarding Forestry. By the status quo, its legal standing is even being legalized and facilitated under the regulation of Loan and Use of Forestry Area which regulated on article 38 of the Act No. 41/1999 and then substituted by the Act No. 19/2004 regarding Forestry, the Act No. 4/2009 regarding Mineral and Coal Mining, also the Government's Regulation (PP – *Peraturan Pemerintah*) No. 24/2010 on the Use of Forestry Area. The regulations at the ministerial level, which regulates the mining activity at forests, have also very dynamic since 1978 until 2014. The example of those regulations are: the Forestry Ministerial Regulation (PerMenHut; *Peraturan Menteri Kehutanan*) of P.14/Menhut/2006 on 10 March 2006 on the Guidelines for Loan and Use of Forestry Area *juncto* P.64/Menhut/2006 on 17 October 2006 on the alteration of P.16/2006, such as on article 2, article 8 point (3), article 13 point (2), and article 18 point (1) up to the Forestry Ministerial Regulation of P.18/Menhut-II/2014. There is a contradiction of legal standing and coal mining activities on the forestry areas, which shows that the problem needs to be solved by the mechanism of law harmonization. To deal with those problems, the framework of the law harmonization can use the model of legal reform – called: tinkering harmonization, following harmonization, and leading harmonization.

**Keywords:** Coal mining activities on the forestry areas

## 1. Introduction

Indonesia is a country which spread out from Sabang to Merauke. It consists of many islands that enriched with abundant of natural resources. The two of its most important natural assets are forestry and minerals. Mining exploitation is believed as one of the most important sector to support the living of modern society. One of the exploitation is in line with supplying an existed energy. Energy for modern civilized society is believed as one of the basic necessities of human beings besides foods, clothing, living-places/shelter, and also water. Coal nowadays is becoming one of the most favorite mining materials after petroleum and earth gas. "Coal is the predominant source of energy used to produce electricity."<sup>1</sup> "Over the past two decades, Indonesia's coal industry has transformed itself from being an unknown, minor player in Asia's coal markets to the world's largest exporter of steam coal."<sup>2</sup>

Mining resources are one of natural resources that can be classified as one of the non-renewable resources. Due to its characteristic, the mining will be no more available when they are totally exploited by mining activity. Other characteristic of mining industry is its sediment locations that are located on beneath of the surface of earth. Therefore, mining exploitation must be quarried far to the bowels of earth to get its materials. The result of it the mining industry always bring many impacts toward the changes on earth landscape and other problems to the environment.

Mining activities are believed as a sector that gives so much contribution to the economy of Indonesia. It can be seen in the London Mining Journal 1999 Annual Review that "minerals are mined through the world detailed 158 countries for whom mining is a significant contributor to the national economy."<sup>3</sup> However on the other side, there are some potential impacts of mining such as "environmental impacts, pollution impacts and

<sup>1</sup> Allan H, Lockwood. et.al. 2009. *Coals Assault on Human Health*. Physicians for Social Responsibility. 1875. Connecticut Avenue, NW, Suite 1012. Washington DC 20009 - PMG Group Ltd. P. 5

<sup>2</sup> Bart Lucarelli. 2010. *The History and Future of Indonesia's Coal Industry : Impact of Politics and Regulatory Framework on Industry Structure and Performance*. Program on Energy and Sustainable Development. Stanford University.

<sup>3</sup> *Industry and environment, A Publication of the United Nations Environment Programme, Division of Tecnology, Industry and Economic. Mining and Sustainable Development II Challenges and Perspectives. Volume 23 Special Issue 2000, p.4.*

occupational health impacts.”<sup>1</sup>

Mineral-Coal mining industries are “starving” from its field/terrain crisis. Due to acquire the coals, the industry needs the availability of acreages of lands.<sup>2</sup> The mining activities are even happening up to the forestry areas. Forests as one of the natural resource have the reverse characteristics than mining. On its process, the mining is always changing the earth landscape. Meanwhile forests have its function to keep the continuation of the ecosystem, and it needs to be well taken care of.

Beside of minerals as its natural assets, Indonesia also has its forestry areas that enriched with its biological diversities. The forests as a natural resource store its biological diversity assets economically and ecologically, which contains with so much important values. The forests as a natural resource in Indonesia have so much strategic role such as “the tropical forest of Asia are among the most biologically diverse in the world, In Borneo for example, one hectare of forest can contain more tree species than all of North America.”<sup>3</sup> Indonesia itself has the biggest tropical forest in the world, then, it is the third widest in the world after Brazil and the Democratic Republic of Congo. Based on the data from the Ministry of Forestry, the total width of Indonesia’s forestry areas is attained to 127.030.031 hectares or covering up to 67% of the country’s lands.<sup>4</sup>

Indonesia and its forestry assets with its vast and its biologic-tropical diversities are in between other dominating countries in the world. Its resources are believed employing for 50 to 70 million people. In terms of it, it takes Indonesia to be on the important level on the mapping of the world biological diversities and to be known as the second mega diversity country after Brazil.<sup>5</sup> Indonesia’s natural resources specifically on the forestry sector placing the country to be on the important level. Indonesia is on the 8<sup>th</sup> rank of 10 countries which owns the widest nature forest in the world.<sup>6</sup> Indonesia forestry assets have placed the country as a wealthy nation with its biological diversities, either it is their plants or animals. We can identify the plants up to 25.000 species across the country, it is yet includes: *Liana*, *Perdu*, and *Herba*, covering soil species or any plants that can be used for medication. There are, then, 900 species of birds that mostly about 550 species can be found in Borneo besides mammals, reptiles, amphibians, and thousands of insects enriched the country’s biologic-tropical diversities. It has also 300 species of fishes that are living across the country’s rivers and lakes.<sup>7</sup> However, the country’s deforestation index is also amongst the highest in the world.<sup>8</sup>

Reflecting from the status-quo of the country’s geology condition, we can know that mining activities to quarrying the materials from earth would face the status of its ground (surface of earth) that mostly consists of forestry areas. Thus it makes another problem because forests have a very important ecologic function to keep the lives on earth. The exploitation of natural resources basically happens to build the prosperity of the society but we knew that this activity for so many times brought many impacts to environment. In 1992, Rio de Janeiro Earth Summit published Rio Declaration on Environment and Development. From that time, there is a new paradigm towards the world development, which is sustainable development that proposes the balance of 3 pillars of development, which are economy, social, and environment.<sup>9</sup> This paradigm is in compliance with the idea of Lester Brown about sustainable concept “how development can fulfill the needs of present generation without decreasing the chances of future generations.”<sup>10</sup>

Jurisdictionally, the regulation on natural resources in Indonesia including mining and forestry sectors are based on the article 33 verse (3) the Constitution of the Republic of Indonesia (UUD NRI) 1945. It states that “earth and water and any natural assets beneath the land (of Indonesia) is authorized by the country and used as much for the prosperity of Indonesian.” Thereof the country’s authorization must be placed as the basis and aim of prosperity of the people. This authorization then become the foundation for the country to decide the allocation of its natural resources. On the same manner as regulated on the article 2 verse (1) of the Act No.

<sup>1</sup>Ibid. p. 7.

<sup>2</sup>Haris Retno Susmiyati, *Risalah Hukum Fakultas Hukum Universitas Mulawarman*, December 2005, Vol. 1 No.2, p. 64.

<sup>3</sup>*The RAFT Program-Responsible Asia Forestry and Trade*, without Dating, *Promoting Sustainable Forest Management and Responsible Timber Trade in Asia. The Nature Conservancy*. Bangkok-Thailand.

<sup>4</sup>Director of the Use of Forestry Area at the Direktorat General for Forestry Planology, the Republic of Indonesia’s Ministry of Forestry, *Current Development of Mining Management and Its Impact Of Forest Sector in Indonesia*. The paper presented on an International Conference on “*Reconciling Forestry and Mining Management: Some Current Environmental Concerns in Asia*”. Hasanuddin University, Makassar, 10-12 December 2013.

<sup>5</sup>Jatna Supriatna in Fachrudin M. Mangunjaya, 2005. *Konservasi Alam dalam Islam*, Yayasan Obor Indonesia, Jakarta, p. xxi.

<sup>6</sup>*Global Forest Resources Assessment: Progress towards sustainable Forest Management, Food an Agriculture Organizational of the United Nations*, 2010, in Mouna Wasef and Firdaus Ilyas. 2011. *Merampok Hutan dan Uang Negara*. Indonesia Corruption Watch. Jakarta. p. 10.

<sup>7</sup>Chandra Broer, 2011. *Bagaimana Hutan Tropis Bisa Rusak?*. Makindo Grafika, Jogjakarta, p. 56.

<sup>8</sup>*The Asia Foundation Policy Paper, 2012. Tata Kelola Lingkungan, Asia Foundation’s Program for Managing the Environment in Indonesia*, Jakarta. p. 1.

<sup>9</sup>Gusti Muhammad Hatta in Surna Tjahja Djajadiningrat et al. 2014 *Green Economy- Ekonomi Hijau*. Rekayasa Sains. Bandung. p.III-IV.

<sup>10</sup>Ibid. p. 93.

5/1960 (UUPA; *Undang-Undang Pokok Agraria*) regulates as based on the regulation of article 33 verse (3) UUD NRI 1945 and anything as proposed on the article 1; “earth, water, and space including any natural assets beneath the land (of Indonesia) is on the highest level of authorization by the country, as an organization of power from the society.” The purpose of state’s authorization distinct on the article 2 verse (3) UUPA, which the competence derives from the country’s rights to authorize as mentioned on the article 3 verse (2) used for achieving as much for the prosperity of Indonesian, in the meaning of happiness, prosperity, and liberty of the people and Indonesia as a Constitutional State (*rechtstaat*) that being independent, sovereign, just, and prosper.

At the beginning, mining were regulated particularly on the Act No. 11/1967 about Main Regulations on Mining, the National Sheets of the Republic of Indonesia (LNRI; *Lembaran Negara Republik Indonesia*) on 1967 No. 22, and 42 years later substituted by the Act No. 4/2009 about Mineral and Coal Mining, LNRI on 2009 No. 4. At the beginning, forestry resources were governed on the Act No. 5/1967 (LNRI-1967-8, TLN-2823) on Forestry. It then substituted by the Act No. 41/1999 (LNRI-1999-167, TLNRI-3587) on Forestry.

Forests based on the article 1 verse (2) of the Act No. 41/1999 is a bond of ecosystem area which consists of biologic-natural resources and dominated by the trees in Alliance with its surroundings, which one and another can not be separated. Forests are highly valueable natural resources for the living of human beings from the sight of the act’s regulators, the consciousness is attached on the general explanatory of the Act. No. 41/1999, in which forests as a gift and mandate from God the Almighty which granted to the nation is a highly valuable natural asset that must be thanked to Him. The Gift that He gives to be seen as a mandate. Because of that, forests must be well regulated and used honorably in addition to devote to Him, and as a realization of our gratitudes to God the Almighty.

The role of forests on context of development in Indonesia is based on the explanatory of the Act No. 41/1999. It states that “as a modal of national development, it has an obvious use for the lives and living of Indonesian. Whether it is the use of ecology, social-culture, or economy, it must be balanced and dynamic.” Because of that, forests must be well regulated and managed, protected and used continuously for the prosperity of Indonesian, either for the present generation or the future generations. As one of the determining system to support the living of human beings, forests are giving so much benefits to us. It needs to be well taken care of. Forests have an important role to harmonize the global environment, in which it has connection to the whole world. It play also an important role to protect the environment, indeed, it is still prioritizing our national interests.

The country’s authorization to authorize the natural resources in Indonesia is becoming the basis legality of the country to decide the allocation of area, either to be forests or mining sites. Naturally, there are also mining materials deep in the forests. As we knew, forests have an important role as lungs of the world, which means the most important function of forests are its ecology status. Meanwhile, mining industries obviously is an industry known for its extractive activity whose changes the landscape of forests. When the forests used as the mining sites, the result the condition of forests would be never be the same anymore. From this point, the country’s important role to manage the living zone of the people are really needed.

The regulation on zoning in Indonesia can be found on the Act No. 24/1992 on spatial planning. The article 1 verse (4) states that “the spatial planning is the result of the planning of zone arrangement.” Article 24 verse (1) further stipulates that “the country is conducting the spatial planning as much for the prosperity of Indonesian in which its implementation done by the government.” The regulation of spatial planning, then, substituted by the Act No. 26/2007 on spatial planning. Article 1 verse (5) states that “the spatial planning is process of zone arrangement system, the usage of zones, and the control of the usage of zone. The zones itself based on the regulation of article 1 verse (20) is an area which has an eminent functions as patronage or cultivation.

During the regulation of the Act No. 11/1967 concerning the Spatial Planning up to the Act No. 4/2009 concerning Minerals and Coals, mining activities have believed to give so much contribution to the development of Indonesia. However, we have to admit also that it creates a lot of problems especially in terms of occurring and harming the society caused by the operation of mining enterprises. Social conflicts with the society around the mining sites are happening on almost all the zones, because of land disputes, the condemnation of society around the mining sites, poverty, and many more.<sup>1</sup>

Mining activities on the forestry areas are believed as a threat to the continuation and the existence of forests. By the status quo, its legal standing are even being legalized and facilitated under the regulation of Loan and Use of Forestry Area which regulated on article 38 of the Act No. 41/1999 and then substituted by the Act No. 19/2004 on Forestry, the Act No. 4/2009 about Mineral and Coal Mining, also PP No. 24/2010 on the Use of Forestry Area. The regulations at the ministerial level which regulates the mining activity at forests are also very dynamic, since 1978 until 2014. The example of those regulations are the Forestry Ministerial Regulation

<sup>1</sup>Haris Retno Susmiyati, 2007. Analisis Teori Hukum Terhadap Tujuan Hukum Dalam Undang-undang Nomor 11 Tahun 1967 tentang Pokok-Pokok Pertambangan, *Risalah Hukum Fakultas Hukum Universitas Mulawarman*, June 2007, Vol. 3 No.2, p. 122.

(PerMenHut; *Peraturan Menteri Kehutanan*) of P.14/Menhut/2006 on 10 March 2006 about the Guidelines for Loan and Use of Forestry Area *juncto* P.64/Menhut/2006 on 17 October 2006 about the alteration of P.16/2006, such as: on article 2, article 8 verse (3), article 13 verse (2), and article 18 verse(1) up to the Forestry Ministerial Regulation of P.18/Menhut-II/2014. The contradiction of its legal standing and any problems that came along with the coal mining activities on the forestry areas shows that there is a problem needs to be solved by deepen analysis. Therefore, the focus of this paper is to find out what kind of law harmonization modeling are needed towards the Mineral-Coal Mining Law on the forestry areas in the perspective of Natural Resources Law.

## 2. The Paradigm to Manage the Mining Activity on the Forestry Areas

The founding fathers of Indonesia (on managing the country's natural resources) put the state's authority toward the resources to serve as much for the prosperity of Indonesian, as stipulated in article 33 verse (3) of UUD NRI 1945. The terminology of natural resources are pointed to something that having the economic value or could fulfill the needs of people.<sup>1</sup> According to Webster's New World College Dictionary, etymologically, natural resources could be defined to a couple definitions:<sup>2</sup> (1) the capability to fulfill or to handle something, (2) the source of availability, supports and assistency; and (3) as the tool produced by the capability or thinking of somebody. Thus the definition of natural resources are broad, which can include the natural resources itself, human beings, modals, products, and etc.

The natural resources could be defined as the resource or production factor provided by the nature, and not artificially made by men. Based on the definition, the law of natural resources, then, is the whole rules on managing and the exertion of the natural resources.

There is a paradigm towards the exploration and exploitation of the natural resources as the resource of incomes than the modals. The paradigm have rooted far away before the revolution of industry as the manifestation of passions of human beings to authorize the natures, which supposed to be mutually needed to head for the balance of higher lives quality.<sup>3</sup> The implication of its world view by the consciousness or not has made the mode of production of all the economic activities, including the exploration and exploitation on mining sites and the resources of forests.<sup>4</sup>

The paradigm which views the resources on mining activity as the modals would lead to awareness and (the resource itself would) never be sold out. Due to the principles of trading, modals are used to empower the economic activity and not to be sold to get revenue only. The paradigm which views the natural resources as the source of incomes/trading commodity and not as the modals, will put the direction and aims toward the regulation of mining activity on the forestry areas which seems to be exploitatively affects the resource to be used up so fast are also collides with the ecological function of forests. It is becoming a threat towards the ecological function of forests by the presence of risks on damage caused by the mining activities. For example, it can be seen the contradiction on the Forestry Ministerial Regulation of No. P.16/Menhut-II/2014 on the Guidelines for Loan and Use of Forestry Area. Based on the clausal of considering, there are 3 considerations as the intention of the regulation makers, which are (1) the improving of its managements; (2) to control the usage of forests; and (3) the acceleration towards the services on loan and use of forestry areas. The basis of consideration on point (b) on the context of the improving of its management and to control the usage of forests implies the makers' intention to rearrange and to controls the operation that already exist. Meanwhile on the third point, the idea seems to be contradicted with two previous points because they want to accelerate the services on loan and use of forestry area. Controlling consists of awareness substantial, but the acceleration head for the efficiency which so many times neglects the awareness.

## 3. The Status and Claim on the Forestry Area by the Country

The problem of the status and claim on the forestry area conducted by the country shows claiming the majority of the country's region to be the forestry areas. The government claims done through their political forest. On the era of Dutch Colonialism, "*DomeinVerklaring*" politics became the tool of the colonial to acclaim the lands on Dutch-Indies occupation area as the land of colonials including the forestry areas. Unfortunately, the claim is still going on after the independent through the Act No. 5/1967 on Forestry, then, subtitled by the Act No. 41/1999 on Forestry. Both regulations produce the state's major authorization towards decision making process of forestry area and it is about 69% of forestry areas in Indonesia are taken by the country's appointment. Despite the regulation on article 15 of the Act No. 41/1999 states that the affirmation of forests as mentioned on the article 14 done by the appointment process of forestry area, structuring the boundaries of forests, the

<sup>1</sup>Mayhew, S in Maria S.W Sumardjono. et.al. 2014. *Pengaturan Sumber Daya Alam Di Indonesia-Antara Yang Tersurat dan Tersirat*, Gadjah Mada University Press, p. 7

<sup>2</sup>*Ibid*, p. 8

<sup>3</sup>Arifin Sallatang et al. in Abrar Saleng. op.cit. p. 2

<sup>4</sup>Abrar Saleng. *Ibid*.



mapping of forests, and the fulfillment of forests.

Despite by the decrees of Constitutional Supreme Court (MK; *Mahkamah Konstitusi*) No. 45/PUU-IX/2011, article 1 verse (3) of the Act No. 41/1999 have changed then in determining an area to be the forestry area must “by means of fulfillment” and not just “by the appointment” as mentioned before. The decrees of Constitutional Supreme Court basically does not replace the clausal of the shift regulation on article 81, which states that: “any forestry area which had been appointed and/or fulfilled based on the effected regulations before this acts, be in effect or would be still in effect based on this acts.”

The authorization of state in deciding an area to be the forestry area forgets the facts regarding the society that lives around the mining sites before the fulfillment by the state, and even the decision making process towards forestry area have never been participated by the society. Besides the appointment of forestry areas in Indonesia, the geological data shows the abundant of potencies of the natural resources from mining sector triggers the overlapping usages by both sectors. And from day by day, mining activities surely would enter the forests. These matters have been answered by the government through the article 38 of the Act No. 41/1999, which regulates:

- (1) The usage of forests for the purpose of any other developments except the sector must be done on the production forests and protection forests area;
- (2) The usage of forests as mentioned on the first point could be done without changing the main functions of the area;
- (3) The usage of forests for the purpose of mining activity is done by the giving of licensing from the Minister with any consideration towards its vast boundaries and on the certain period of time also with the continuation of its environment;
- (4) On the protection forests it is forbidden to do mining activity by the modelling of open-pit mining; and
- (5) The giving of loan and use licensing as mentioned on the third point which importantly affects and has the extensive vast with its strategic values done by the Minister based on the House of Representative (DPR; *Dewan Perwakilan Rakyat*).

The limitation of article 38 of the Act No. 41/1999 states that the open-pit mining is not allowed to be done on the protection forests occurred the objection from the mining industrialists whose get the licensing to conduct open-pit mining operation on the protection forests since *Orde Baru* era or before the Act No. 41/1999 have made. These matters prompt the making of the Act No. 19/2004 which allow 13 mining enterprises to conduct open-pit mining activity. The regulation on usage of forestry area through the Act No. 41/1999 regulates the industrialists to have the licensing of Loan and Use of Forestry Area.

Unfortunately, those regulations consist of legal disputes, which are **first**, removing the forests legally, otherwise “removing the forests by the legalization from the country”.<sup>1</sup> The regulation of mining on the forestry area by on article 38 of the Act No. 41/1999 *juncto* the Act No. 19/2004, by using the construction of Loan and Use of Forestry Area Licensing (IPPKH) led to the possibility of the forests that turns into the mining sites which technically could not be restored to the exact condition of forests as its original condition after mined. So, the presence of IPPKH would only change the forests into non-forest. **Second**, there is a public lie through the scheme of Loan and Use of Forestry Area for mining activity. The legal status of these areas would not change and still remain as forestry area, but in fact no longer as the forestry area. So, the government can always claim that the forestry area in Indonesia has not experienced any reductions on the legal perspective, although in fact physically forests have been lost and does not fit the definition of forests based on article 1 verse (2) of the Act No. 41/1999. It states that “forests are a bond of ecosystem area which consists of biologic-natural resources dominated by the trees in Alliance with its surroundings, which one and another can not be seperated.”

#### 4. The Dynamic of Mining Law on the Forestry Areas

The regulation of mining activity on forestry areas is very dynamic. At the beginning of the country’s independence period, the mineral-coal mining activities were undeveloped. This was triggered by the policy of nationalization of foreign companies as well as anti-foreign funding policy. Thus, on 1945 until 1965 period, there was no needed for any special policies towards mining on the forestry areas. Since the *Orde Baru* period, the era of mineral-coal mining exploitation that even venturing up to the forestry areas were started. These activities happened to improve the country's economy rapidly. The government priority towards mining explicitly portrayed on the Presidential Instruction No. 1/1976, and it stated that: “if there are overlaps then mining should be prioritized.”

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<sup>1</sup>M. Muhdar, et.al, Halrev (Hasanuddin Law Review), Volume 1 Issue 3 December 2015, pp. 430-451.

**Table 1**  
**The Dynamics of Regulation on Mining Activity on the Forestry Areas**

Period	Regulations	the substantial of regulation on mining on the forestry areas
1945 – 1965	PP No. 37/1960 on Mining and then established as the Act No. 37/1960	<ul style="list-style-type: none"> <li>a. Mining was not developed because there were any policy of nationalization of foreign companies as well as anti-foreign funding policy.</li> <li>b. There was no any specific policy towards mining on the forestry areas.</li> </ul>
1966 – 1977	<ul style="list-style-type: none"> <li>- The Act No. 5/1967</li> <li>- The Act No. 11/1967</li> <li>- The Presidential Instruction No. 1/1976</li> </ul>	<ul style="list-style-type: none"> <li>a. Mining was one of the important sectors to boost the country's economy.</li> <li>b. If there were any overlaps then mining should be prioritized.</li> <li>c. Mining was allowed on the forestry area except Sanctuary Forests and Tourism Forests (Tourism and Wildlife Hunting Park).</li> <li>d. The licensing of mining activity was centralized, the authority only given by the minister.</li> <li>e. The supervision was not being specifically regulated.</li> <li>f. The obligations of the holder of mining rights did not differ, whether on the forests or outside the forestry areas.</li> </ul>
1978 – 1989	The Decree of the Director General of Forestry No. 64/kpts/DJ/I/1978 on Loan and Use of Forestry Areas.	<ul style="list-style-type: none"> <li>a. The expansions of forestry areas which legalized for the purpose of loan and use are: Nature Reserve, Wildlife, Hunting Park, Protection Forests and Production Forests.</li> </ul>
1990 – 1998	<ul style="list-style-type: none"> <li>- The Joint Decree (SKB) between the Minister of Mining and Energy and the Minister of Forestry No.969.K/05/M.PE/1989; 429/Kpts-II/1989</li> <li>- The Forestry Ministerial Decree (KMK) No. 55/Kpts-II/1994 <i>juncto</i> KMK No. 56/Kpts-II/1994; <i>juncto</i> KMK No. 41/Kpts-II/1994 KMK No. 614/Kpts-II/1997 <i>juncto</i> KMK and Plantation No. 720/Kpts-II/1998</li> </ul>	<ul style="list-style-type: none"> <li>a. The reinforcement of legalization of forestry area to be mined.</li> <li>b. The prohibition of activities that altered the conservation areas and nature reserves.</li> <li>c. The restrictions on mining sites which could be loan and use was only the production forests.</li> <li>d. There was no banning on open-pit mining system on the protection forests.</li> <li>e. There were any involvements from the local governments on the process of licensing.</li> </ul>
1999 - 2003	The Act No. 41/1999 on article 38	<ul style="list-style-type: none"> <li>a. The reinforcement of legalization of forestry area to be mined.</li> <li>b. The Restrictions of mining system on the protection forests must be done by close-pit mining system.</li> <li>c. The production forests might be mined by open-pit mining system.</li> </ul>
2004 - (nowadays) 2015	PerPu No. 1/2004 <i>juncto</i> The Act No. 19/2004	<ul style="list-style-type: none"> <li>a. The reinforcement of legalization of forestry area to be mined.</li> <li>b. The Restrictions of mining system on the protection forests must be done by close-pit mining system.</li> <li>c. The giving of Privileges to 13 mining companies to mined on the protection forests by open-pit mining system.</li> <li>d. The production forests might be mined by open-pit mining system.</li> </ul>

At the beginning of local autonomy, the regulation on forestry sector marked by the promulgation of Act. No. 41/1999 on Forestry. The Act did not become an obstacle towards the mining operation even though the operation entered the forests. As governed on article 38 of this Act, the mining activities on the production forests and protection forests are allowed. Open-pit mining are not allowed especially for the protection forests, but it must be done by the underground/subway/tunnel mining system. These regulations are then led to various objections from the mining industrialists whose get the licensing to conduct open-pit mining operation on the protection forests since *Orde Baru* era or before the Act No. 41/1999 has made. This matter prompts the making of Perpu No. 1/2004 which altered the regulation on article 38 of the Act No. 41/1999. Thus, it allows the open-pit mining to be done on the protection forests. The decrees injunction of Perpu No. 1/2004 explicitly states that: “the promulgation of Government’s Regulation (Perpu) proposes to gain the trust of investors” is an economic oriented reasoning that being overwhelmed. It shows the concern of government is inclined to the investors

regardless the environmental aspects and the conservation of natural resources. This regulation is subsequently confirmed through the Act No. 19/2004, thus the regulation allows the 13 mining companies which listed on the attachments to conduct their operation on the protection forests.

The next regulation is PP No. 24/2010 on the Use of Forestry Area. The regulation on ministerial level regulates the mining activity at forests area and is also very dynamic, since 1978 until 2014. The example of those regulations are the Forestry Ministerial Regulation (PerMenHut; *Peraturan Menteri Kehutanan*) of P.14/Menhut/2006 on 10 March 2006 on the Guidelines for Loan and Use of Forestry Area *juncto* P.64/Menhut/2006 on 17 October 2006 on the amendment of P.16/2006, such as on article 2, article 8 verse (3), article 13 verse (2), and article 18 verse (1) up to the Forestry Ministerial Regulation of P.18/Menhut-II/2014. Lots of technical regulations on the mining activity on the forestry area basically are to facilitate the interests of mining investments. In this situation, the forestry area is only looked as its economical function than its ecological functions. So, the only left is its status as forestry areas but no longer as the factual forests.

##### **5. The Contradiction on the Legal Construction of Loan and Use of Forestry Areas Licensing (IPPKH) for Coal Mining on the Forestry Areas**

The regulation of mining on the forestry areas is legalized by the mechanism of Loan and Use of Forestry Areas Licensing (IPPKH), which was on the first place formed by the Forestry Ministerial Decree No. 55/Kpts-II/1994 concerning the Guidelines of Loan and Use of Forestry Area. According to article 20 verse (1), "the parties who get the rights of loan and use of forestry areas known as the "...holder of license" Meanwhile on article 17, it uses the term "the agreement" on loan and use of forestry areas. Based on the perspective of its legal construction, there are some issues, which are **firstly**, there are merger between the construction of licensing and the agreements. The legal construction of licensing and the agreements have different consequences. Licensing is the product of state's administration that put the holder of license under the supervision of the licensor, meanwhile loan and use/leasing (on the context of agreement) is on the construction of civil law that put the government and the mining's industrialists as an equal party/parallel. This would be the weak point on the regulatory process.

**Secondly**, the use of forestry areas for mining with the construction of "leasing/ the agreement". The definition of Loan and Use/Leasing on the Civil Code (KUHP; *Kitab Undang-Undang Hukum Perdata*) on article 1740 states that "is an agreement in which a party submits an item to be used freely to another party, which requires the party that receiving the item to return the goods to the owner after the usage or after the appointed time. Under this regulation come up an issue, which is the delivery of the item to be used basically free, which means that the owner of the goods must not charge any certain rate towards the item in relation to the "leasing" regulation. While on the concept of loan and use/leasing of the forestry areas, the holder of license or the mining industrialists party burdened with any financial obligations, such as: royalties, land rents, and other payments. So, the using of leasing concept is not appropriate on this regulation.

**Thirdly**, based on the regulation of Civil Code on article 1740, the requirement of Loan and Use/Leasing is "...the party that receiving the item to return the goods to the owner after the usage or after the appointed time." Due to the using of forestry area is put under the construction of leasing, it means that the loaned goods must be returned to its origin. Then, it is different with the forestry area which leased for mining (because the area will never be the same as before mined). Even the natural assets consisting of its biological diversities and the mineral materials will be lost and never be back as before mined. At the beginning of leasing, the forests are factual. However at the end of activity, it leaves the site as a barren-shaped desert and a huge pit which not consists of its natural assets as mentioned before. So, the using of legal construction towards leasing the forestry areas for coal-mining operation is not appropriate.

**Finally**, based on article 1742 of Civil Code, it states that "anything that used by the people and cannot be destroyed by its users, can be the object of this agreement." On the construction of leasing agreement, the regulation requires the object of this agreement must be anything that used by the people and cannot be destroyed. On the context of leasing agreement on mining on the forestry area, it is clear that the object is lost as the result of mining, on the matters of the forests that enriched with its high value biological diversities and its mineral materials that mined. So, the using of forestry area for the purpose of mining cannot use the legal construction of leasing/loan and use anymore.

##### **6. The Implementation of Coal Mining Operation on the Forestry Areas**

The Secretary General of the Ministry of Forestry declares that there are 680.000 hectares of lands that being used for mining and with its IPPKH for 20 years. Until nowadays, the Ministry of Forestry has issued about 117 consents to the mining industries on the forestry area, besides its principle licensing about 257 consents given to the companies with the total 160.000 hectares of lands by the Ministry. Meanwhile, the consents has already held to 54.512 hectares for the purpose of loan and use of forestry area.<sup>1</sup>

<sup>1</sup> www.bisnis.com: Thursday, 10 November 2011.

Based on the data provided by the National Central Statistics Agency (BPS; *Badan Pusat Statistik*) on 2013, there were about 28.07 million of poor people in Indonesia, or equivalent to 11.37% of the total population of Indonesia.<sup>1</sup> On 2015, it reached about 28.52 million people or equivalent to 11.13% of the total population of Indonesia.<sup>2</sup> The data were based on the monthly expenditure by the population under the poverty. So, it can be imagined besides the data, there is still a lot of people living in poverty because their income per capita is on the critical condition right to the poverty. Besides of poverty, the degradation of our national natural resources has led the country to various natural disasters and the increasing of poverty. This condition is partly due to the implementation of short-term oriented policy, like the utilization of its extractive natural resources.<sup>3</sup>

Any regions in Indonesia having potential of their own mineral resources still have to fight the poverty of their citizens, the limitation to the infrastructures, and providing the basic necessities of their people such as foods, clothing, living-places/shelter, energy and the access to clean water. The portrays of the problem on the regions raise the question on how Indonesia as a country with the excellent condition of its tectonic and geological condition, and even enriched by its natural resources can manage its assets as mandated by the constitution? The management of its natural resources does not provide any direct benefits to the local community/the region to become the main trigger of conflicts on the society both horizontally and vertically.<sup>4</sup>

The management of the country's natural resources including its mining resources should be based on the principles of justice and expediency. In terms of examining legal issues, it cannot be separated from the purpose of law, which are justice, expediency, and legal certainty. The utilitarianism laid the benefit as the purpose of law. Then its expediency is interpreted as the happiness. So either the law is just or not, it is depending on whether the law gives the happiness to man or not.<sup>5</sup> The differences on the fulfillment of pleasure towards its expediency on mining activities on the forestry areas are what often cause the problems on the region that enriched with its natural resources.

Forestry as a natural resources that if against the mining exploitation, it is difficult and took very long time to be recovered as its characteristic.<sup>6</sup> The character makes both the expediency of the areas of mining resources and the forestry resources as non-permanent. Besides the characteristic of natural resources, especially on mining on the forestry areas including the removal of the huge rock materials, the moving of the rests of materials, changing the landscapes, the involving of large appliances (such as the excavators), and low absorption of the labors. The consequences which are unavoidable at the time when mining activities are being conducted which is the possibility on impacts toward the elements of other natural resources, especially: water, soil, and biodiversity.<sup>7</sup>

The community who living around the mining sites or to anybody who get the impacts by the mining activity are not participating on every single decision making process by IPPKH. Meanwhile the mining excavation will greatly affect the lives of the community. It takes place because mining excavation has so much risks such as changing the landscape's topography, condemnation, and also felling trees. Therefore, it can be said that mining is one of the potential activities to lead any environmental problems such as damage and pollution in water, soil, and air.<sup>8</sup>

Any problems occurring by mining activities could have its different natures and forms, as following:<sup>9</sup>

1. Mining activity relatively on the short term can change the form of topography and the surface of grounds (land impact). So, it changes the balance of ecology system of its surroundings.
2. Mining activity can occur any threats, such as pollution caused by the dusts and smokes which pollutes the air, water, waste, tailing, and also renunciation of mining that consists of poisonous substances. There are also disturbances from the excavators, the burst of explosive materials, and many more.
3. Mining without any concern to its geological field can occur land erosion, the explosion of mining sites, the downfall of mining sites, and also earthquake.

The implementation of mining on the forestry area also implies the problem of the weakness on

<sup>1</sup>BPS report. <http://bps.go.id/int/index.php/site/search?cari=jumlah+penduduk&Submit=Cari> accessed in Indonesian, on 25 August 2014.

<sup>2</sup>BPS report, *Republika*, Monday 4 January 2016, <http://m.republika.co.id/berita/nasional/politik/16/01/14/>, accessed in Indonesian, on 3 February 2016, on 12.34 Wita.

<sup>3</sup>The Institute of Ecolabel Indonesia. 2004. At [www.lei.or.id](http://www.lei.or.id)

<sup>4</sup>Abbar Saleng, 2013. *Ibid.* p. 5

<sup>5</sup>Darji Darmodihardjo and Shidarta, in Sukarno Aburaera, et al. 2014. *Filsafat Hukum Teori dan Praktik*. Prenada Media Grup. Jakarta. p.111.

<sup>6</sup>Academic Document on Drafts for Minerals and Coals Act and Minerals and Coals Mining Act which prepared by the Government on 12 June 2005. At Ahmad Redi. 2014. *Hukum Sumber Daya Alam Dalam Sektor Kehutanan*. Sinar Grafika Jakarta. p. 17-18

<sup>7</sup>*Ibid.*

<sup>8</sup>Abbar Saleng. 2013. *Kapita Selekta Sumber Daya Alam*. Membumi Publishing, Makasar. p. 48

<sup>9</sup>The Ministry of Mining and Energy, 1995, *50 Tahun Pertambangan dan Energi Dalam Pembangunan*, Jakarta. p. 236



surveillance. There are 10.000 consents given to the mining enterprises entire the nation, whether the operation conducted outside or on the forestry area. Now, it has become the obstacle to supervise the operation intensively. The supervision of mining on the forestry area seems so weak because the Ministry of Forestry as the institution that giving the licensing only could supervise when the mining activities have done, or when they enter the last phase of mining operation. Meanwhile, the officials do the surveillance by the same standard as what they do with mining outside the forestry area. This makes so much impression that forestry does not have any special meanings.

The audit towards any mining licensing given by the government finally happens after so much pressure from the society and Corruption Eradication Commission (KPK; *Komisi Pemberantasan Korupsi*). The government does the audit for its licensing by the schema of giving the certificate of CNC (Clean and Clear). However, the giving of the certificate is thought to topple their obligations only. There is no any transparency towards the information that given to society and how the mechanism of scoring given to the enterprises whose obtain the certification of CNC.

### 7. The Modelling of Mining Law Harmonization on the Forestry Area

Harmonization derives from “*harmoni*” in Indonesia (Bahasa), which means a declaration of sense, action, concept and interest, harmonization, as well as synchronization.<sup>1</sup> Harmonization itself can be meant as an action of balancing. It puts the law as an object on its balancing process. The Main idea of harmonization on any regulations as portrayed on the regulation of the Act No. 12/2011 on the Form of Regulation. One of the example is on article 1 verse (13), which determines that on any contents of materials of the Act must be appropriate with its kinds, functions, and hierarchies of the Act. Article 5 of the Act No. 12/2011 further must be done and based on the principle of the Act, which includes: “(a). the clarity of its aim; (b). the precise institution or framer officials; (c). the conformity between its: kinds, hierarchies, and contents of materials; (d). can be done; (e). its usefulness and outcome; (f). the clarity of its formulation; (g). its transparency.

John Henry Merryman proposes 3 kinds of law harmonization model that known as “tinkering, following, and leading.” Therefore, theoretically there are 3 law harmonization, which are: “tinkering harmonization”, ‘following harmonization’ and ‘leading harmonization.’<sup>2</sup>

**Table 2**  
**The Model of Legal Harmonization According to John Henry Merryman<sup>3</sup>**

The Model of Legal Harmonization	Substance
<b>Tinkering Harmonization</b>	a legal harmonization through optimization of existing law application with some adjustments, based on the consideration of efficiency.
<b>Following Harmonization</b>	Head for the legal harmonization towards certain sectors which aimed to adjust the existing law with any social changing.
<b>Leading Harmonization</b>	Head for the application or usage of law to commit any social changing.

Thus, the legal harmonization frameworks are related to the regulation towards mining on the forestry areas can be defined as:

- a. **‘Tinkering Harmonization’** is legal harmonization through optimization of existing law application with some adjustments, based on the consideration of efficiency. The actions towards harmonizing the law of mining on the forestry areas according to tinkering harmonization model are:
  - (1) There is a changing of paradigm on mining regulation on the forestry areas, which at the beginning oriented to put the natural resources as a trade commodity to get earnings, then it must be changes to be a modal to activate the societies’ living sector. This thing is be in mutual accord with the instruction of our constitution that any natural assets in Indonesia is authorized by the country and used as much for the prosperity of Indonesian.
  - (2) Inappropriate usage of legal construction on the licensing of Loan and Use of Forestry Areas (IPPKH) is the main factor occurring the legal *dis-harmonization*. The mechanism of licensing on Administration Law is really different with the mechanism of loan and use on Private Law. To make the legal harmonization, then we need to alter the current legal construction. Because mining activity commits something forbidden, which is altering the forestry area. And then, the

<sup>1</sup>Kamus Besar Bahasa Indonesia (KBBI) Online, <http://www.kamusbahasaIndonesia.org>, accessed on 25 January 2014

<sup>2</sup>John Henry Merryman at Koesnoe Goenadhi, 2006. *Harmonisasi Hukum dalam perspektif peraturan perundang-undangan*. JP.books, Surabaya, accessed on URL: <http://www.google.co.id/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&sqi=2&ved=0CDAQFjAC&url=http%3A%2F%2Fkgsc.files.wordpress.com%2F2012%2F01%2Fharmonisasi-hukum-lex-specialis-suatu-masalah.ppt&ei=fGH7U4zPPMKfugSq04GABw&usq>, on 25 August 2014. p.7

<sup>3</sup>Ibid.

- appropriate legal construction is licensing and not the agreement loan and use anymore.
- (3) The usage of forestry area without changing the status of its area yet with the construction of loan and use is only an action of public lie. Mining obviously change the landscape of forestry area, when the forestry area used for mining but its status still as the forestry area so it is surely a public lie. In addition of legal harmonization, we need to alter the regulation.
  - (4) The physical changing of forestry area after mined must be acknowledged as a form of demolition towards the area, and thus if the mining still continue then any assessment towards the capacity of nature supports must be done by public. It is to measure the mining risks and to compare with if mining never happened.
- b. **‘Following Harmonization’**, is head for the legal harmonization towards certain sectors which aimed to adjust the existing law with any social changing, in order the law can fulfill the sense of justice from the society. The actions towards harmonizing the law of mining at forestry area according to following harmonization model are:
- (1) The process of publication of IPPKH must consider the interests of the society around the forestry area, whether on the aspect of economy or environment. However on its implementation, the publication of IPPKH is authorized by the minister which based on the recommendation from the governor. Meanwhile the society is participating on the socialization of AMDAL only. So, the access of society towards decision making process of IPPKH is not even granted. Whereas the society will took the risks of environmental damage caused by the changing of forestry area, so they must be granted for access on the decision making process of IPPKH.
  - (2) The assessment of the capacity of nature supports needs to be conducted on any areas where the IPPKH would be published for mining. It is needed because the risks on mining operation which can massively impacts the environment requires any special assessment towards mining at forestry area, so it can be a consideration when the licensing are granted or not. Considering the importance on demand of the society towards the environment to be better.
- c. **‘Leading Harmonization’**, is a head for the application or usage of law to commit any social changing. In my opinion, the form of this harmonization has put the law as the agent of social change. To enforce and to direct the behavior of the society to be in line with the purpose and direction of the establishment of law. This efforts has to be done for creating the harmony and accordance in law enforcement. The actions towards harmonizing the law of mining at forestry area according to leading harmonization model are:
- (1) Increasing the audit for the licensing towards mining on the forestry area. The government did the audit for its licensing by the schema of giving the certificate of CNC (Clean and Clear). But the giving of the certificate is thought to topple their obligations only. There’s no any transparency towards the information that given to society, how the mechanism of scoring given to the enterprises who obtain the certification of CNC.
  - (2) The increasing of mining supervision at forestry area seems so weak, because the Ministry of Forestry as the institution that giving the licensing is only could supervise when the mining activities have done, or when they enter the last phase of mining operation. Meanwhile the official do the surveillance by the same standard as what they do with mining outside the forestry area. This makes so much impression that forestry does not have any special meanings.

## 8. Conclusion

The framework of legal reformation can use the model of law harmonization stated by John Henry Merryman. Theoretically there are 3 models known for legal harmonization model, which are: tinkering harmonization, following harmonization, and leading harmonization. **First: ‘Tinkering Harmonization’** is legal harmonization through optimization of existing law application with some adjustments, based on the consideration of efficiency. The actions towards harmonizing the law of mining at forestry area according to tinkering harmonization model are: (1) there is a changing of paradigm on mining regulation at forestry area, which at the beginning oriented to put the natural resources as a trade commodity to get earnings, then it must be changes to be a modal to activate the societies’ living sector. (2) Inappropriate usage of legal construction on the licensing of Loan and Use of Forestry Area (IPPKH) is the main factor occurring the legal *dis-harmonization*. (3) The usage of forestry area without changing the status of its area yet with the construction of loan and use is only an action of public lie. (4) The physical changing of forestry area after mined must be acknowledged as a form of demolition towards forestry area, and thus if the mining still continue then any assessment towards the capacity of nature supports must be done by publicly.

**Second: ‘Following Harmonization’** is head for the legal harmonization towards certain sectors which aimed to adjust the existing law with any social changing. The actions towards harmonizing the law of mining at forestry area according to following harmonization model are: (1) the process of publication on IPPKH must consider the

interests of the society around the forestry area, whether on the aspect of economy or environment. (2) The assessment of the capacity of nature supports needs to be conducted on any areas where the IPPKH would be published for mining.

**Third: ‘Leading Harmonization’** is head for the application or usage of law to commit any social changings. In my opinion, the form of this harmonization put the law as the agent of social changes. The actions towards harmonizing the law of mining at forestry area according to leading harmonization model are: (1) Increasing the audit for the licensing towards mining on the forestry area. The government did the audit for its licensing by the schema of giving the certificate of CNC (Clean and Clear). But the giving of the certificate is thought to topple their obligations only. (2) The increasing of mining supervision at forestry area seems so weak, because the Ministry of Forestry as the institution that giving the licensing is only could supervise when the mining activities have done, or when they enter the last phase of mining operation. Meanwhile the officials do the surveillance by the same standard as what they do with mining outside the forestry area. This makes so much impression that forestry does not have any special meanings.

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