LICENSING CRIMINAL ACTS IN MINING LAW: AN EPISTEMOLOGICAL ERROR WITH THE CONCEPT OF PEOPLE'S MINING AREA

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ABSTRACT

Money laundering crimes (TPPU) are increasingly complex, crossing jurisdictional boundaries, using increasingly varied modes. ML has penetrated into various sectors, so that it can threaten the integrity and stability of the financial system and the economy, as well as endanger the foundations of social, national and state life. This study aims to describe and analyze the regulatory dimensions of policies in controlling cash and/or other payment instruments whose implementation is borne by DJBC. This research uses a type of normative legal research method with a qualitative descriptive approach. The results of the study show that DGCE's policy in supervising the carrying of cash is based on 2 (two) dimensions of different laws and regulations. First, the dimensions of prevention, monitoring and supervision of the potential of ML. Second, the dimension of the manifestation of Bank Indonesia's authority to request information and data regarding foreign exchange activities that cross national borders. The results of the study show that DGCE's policy in supervising the carrying of cash is based on 2 (two) dimensions of different laws and regulations. First, the dimensions of prevention, monitoring and supervision of the potential of ML. Second, the dimension of the manifestation of Bank Indonesia's authority to request information and data regarding foreign exchange activities that cross national borders. The DGCE's role is increasingly important and strategic in overseeing the transfer of cash and/or other payment instruments to and from the territory of the Unitary Republic of Indonesia in order to prevent and eradicate money laundering crimes.

INTRODUCTION

Indonesia is a country rich in natural resources, from Sabang to Merauke, all kinds of natural resources are abundant. Several sectors of the Indonesian economy, such as plantations, agriculture, and animal husbandry as well as mining, are experiencing rapid growth. The mining industry is still one of the most important sectors in the Indonesian economy.[1] As a rule of law, Article 33 paragraph 3 of the 1945 Constitution states that the land, water and natural resources contained therein are controlled by the state and used for the greatest prosperity of the people. Thus,

[1] Ruth Laksmi Charisma, "Problematika Penegakan Hukum Kegiatan Pertambangan Batuan Ilegal Di Kota Samarinda", Natural Resources and Environmental Law Review, Vol. 1, No. 1, 2021, pp. 44.

the state controls the natural wealth contained therein and can be properly empowered to realize people's prosperity, promote public welfare and create sustainable order based on an integrated national policy that considers the needs of present and future generations.

Indonesia is a country with potential natural wealth through mineral extraction. Gold, silver, copper, oil, natural gas, coal and other mining resources are examples. The state's right to control includes the authority to regulate, manage and supervise the management and control of mineral materials, as well as the regulation and obligation to make maximum use of them for the benefit of the people in the area where they are located.[2]

Mining is one of the natural resources that contributes quite a lot to the country's development, including community mining. In order to support the life of the nation that provides welfare, is sustainable and environmentally sound, mining activities, especially in this case community mining, must have arrangements so that these activities can still support sustainable development without having a negative impact on the environment.[3]

Implementation of the provisions of Article 33 paragraph (3) of the 1945 Constitution, one of which is Law Number 3 of 2020 concerning Amendments to Law Number 4 of 2009 concerning Mineral and Coal Mining which regulates mining. Meanwhile, the Implementation Arrangements regarding Business Activities in the Mining Sector, namely the Fifth Amendment to Government Regulation Number 23 of 2010 concerning the Implementation of Mineral and Coal Mining Business Activities, are regulated in Government Regulation Number 18 of 2018 that the purpose of mineral and coal management is to ensure the availability of minerals and coal. coal as a raw material and/or energy source for domestic needs in the framework of long-term national development.

The authority of the (central) government in the management of mineral and stone mining, in the Mining Law is formulated in full, namely the establishment of national policies, the making of laws and regulations, the placement of national standards, the determination of Mining Areas (MA) which are carried out after coordinating with local governments and consulting with the People's Representative Council of the Republic of Indonesia.

Mining activities that are highly developed provide benefits for improving the welfare of the community, especially for miners. However, besides these activities bringing benefits to the community, they can also cause damage to the environment if the mining activities are not based on predetermined regulations where the mining activities are carried out illegally.[4]

Mining activities are divided into mineral mining and coal mining. Based on Article 1 paragraph (4) and (5) of Law Number 3 of 2020 concerning Mineral and Coal Mining. Article 1 paragraph (4) states that Mineral Mining is mining of a collection of minerals in the form of ore or rock, excluding geothermal, oil and natural

[2] Adrian Sutedi, *Hukum Pertambangan*, Jakarta: Sinar Grafika, 2011, pp. 7.
[3] Polin Pangaribuan, "Analisis Hukum Terhadap Tindak Pidana Pertambangan Pasir Yang Dilakukan Secara Ilegal". *Tesis*, Program Pascasarjana Magister Ilmu Hukum. Universitas Sumatera Utara Medan. 2017, pp. 7.
[4] Yudhistira, *et.al.*, "Kajian Dampak Kerusakan Lingkungan Akibat Kegiatan Penambanga Pasir Di Desa Keningar Daerah Kawasan Gunung Merapi", Jurnal Ilmu Lingkungan, Vol. 9, No. 2, 2011, pp. 76-84

gas and ground water. Article 1 paragraph (5) states that Coal Mining is the removal of carbon deposits from the earth, such as solid bitumen, peat and asphalt rocks.
Thus, referring to the description above, mining law is closely related to the environment; is a gift from God Almighty that must be preserved and developed so that its ability can continue to be a source of life support for humans and other living things for the sake of continuity and improvement of the quality of life as a whole. Environmental crime is on the rise worldwide, but most people don't realize it. Mining, for example, is an effort to explore various potentials contained in the bowels of the earth.[5]

People's mining is an activity that is managed by the local community in a simple way and in its management uses traditional tools such as crowbars, shovels, pans and others. People's mining management experiences changes that bring about the environment, the impacts caused by mining management activities provide benefits and have an impact on risks to the environment, economy and socio-culture of the community.[6]

Illegal mining carried out without a permit, not according to operational procedures and regulations from the government. This can cause losses to the state due to illegal exploitation of resources, thereby avoiding state taxes and can also cause small or large environmental damage impacts. Granting mining business permits, supporting community conflict resolution and supervision of mining businesses located in provincial, district/city and/or sea areas that are more than 12 (twelve) kilometers from the coast. The granting of Mining Business Permits (MBP), coaching, community conflict resolution and supervision of mining businesses is urgently needed by the community around the mine.[7]

The development of criminality which has become an open fact is the toughest task for countries rich in natural resources in the mining sector. Mining problems occur not only from the existence of legal mining activities, but also from illegal mining activities (without a permit/illegal), which is also known as Illegal Mining. Even mining without a permit contributes to the formation of uncontrolled environmental degradation and other problems.[8]

Regarding mining without a permit, as described above, the example of the case to be raised is that which occurred in the Overseas District Court which tried a criminal case in the case of Defendant H. Abd. Rahman Bin Sadda, who was charged with committing the crime of "conducting a mining business without a permit as stipulated in Article 158 of Law Number 4 of 2009 concerning Mineral and Coal Mining jo. Article 2 paragraph (2) letter e Government Regulation Number 23 of 2010 concerning Implementation of Mineral and Coal Mining Business Activities.

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[5] Muflikhudin, "Tinjauan Yuridis Sosiologis Perda Nomor 10 Tahun 2011 Tentang Pertambangan Galian C Di Kabupaten Boyolali", Diponegoro Law Journal, Vol. 8, No. 3, 2019, pp. 12.
[6] Nova Yanti Siburian, "Penegakan Hukum Terhadap Pertambangan Pasir Bahan Galian C di Kabupaten Kuantan Singingi Berdasarkan Undang-Undang 4 Tahun 2009 Tentang Pertambangan". JOM Fakultas Hukum. Vol. III, No. 2, 2016, pp. 22.
[7] Otong Rosadi, *Pertambangan dan Kehutanan dalam Perfektif Citra Hukum Pancasila*, (Yogyakarta: Thafa Media, 2012). pp. 59.
[8] Riswandi, "Penyelesaian Kasus Penambangan Pasir Ilegal (Studi Kasus Penambangan Pasir di Kabupaten Gowa)". *Skripsi*, UIN Alauddin Makassar, 2016, pp. 59.

The defendant's actions had various impacts on the community and life around the mine, including; environmental damage, the level of pollution (soil, river water), also results in disruption to the wider community in the form of damage to roads as public facilities. Of course, this activity has violated Government Regulations because it does not have a Coal Mining Business Permit in accordance with established procedures.

Referring to the descriptions above, studies in the field of mining seem to have become a common sense when a permit violation occurs as a single narrative as a criminal act that deserves criminal responsibility. As previous research also shows the same thing. It was Edy Kastro who conducted research with the title "Law Enforcement Against Illegal Mining Crimes in the Legal Area of the Muara Enim Resort Police" which was published in the Journal of Varia Hukum, Edition No. XL Year XXXI March 2019, which asks about how to enforce the law against criminal acts of illegal mining (Illegal Mining) in the Muara Enim Resort Police area? Regarding these problems, Edy Kastro, concluded that the enforcement of the criminal provisions of Article 158 of Law Number 4 of 2009 concerning Mineral and Coal Mining against mining activities without a permit in Muara Enim Regency is proceeding according to the procedure with the applicable provisions. The defendants have been processed by law through the stages of investigation, prosecution and trial examination in court and were sentenced according to regulations that violate Article 158 of Law Number 4 of 2009. Over the past 3 (three) years there has only been 1 (one) mining case without a permit who violated Article 158 of Law Number 4 of 2009 and has been legally processed.

Meanwhile, Shafira Nadya Rahmayani Sembiring, Elis Rusmiati and Imamulhadi conducted research with the title "Criminal Law Enforcement of Unlicensed Coal Mining in East Kalimantan is Associated with the Purpose of Punishment" which was published in the Kertha Semaya Journal, Vol. 8 No. 4 of 2020. Where, in this study, the researchers questioned the application and enforcement of law against violations of Article 158 Law Number 4 of 2009 in East Kalimantan. With regard to this, the researchers concluded that law enforcement officers in East Kalimantan at the application stage had attempted to realize the law through imposition of a crime (means of penal) based on Article 158 of the Minerba Law. However, law enforcement has not run well due to obstacles in the supporting factors of law enforcement, namely people who do not have high legal awareness. For this reason, preventive non-penal efforts need to be made to support law enforcement against mining without a permit in East Kalimantan. Law enforcement has not gone well due to obstacles in the supporting factors of law enforcement, namely people who do not have high legal awareness. For this reason, preventive non-penal efforts need to be made to support law enforcement against mining without a permit in East Kalimantan. Meanwhile, at the stage of enforcing the criminal law against coal mining without a permit in East Kalimantan, it is not yet in accordance with the purpose of punishment. Bearing in mind, that the act of mining without a permit is a criminal act of mining in the environmental field, the sentencing should be oriented towards the environment. This can be pursued through the application of relative theory or prevention in the purpose of punishment that is oriented towards environmental conservation. This can be pursued through the

imposition of (criminal) sanctions that are remedial (payment of compensation) through criminal fines and sanctions for coercive actions through additional punishment in Article 164 of Law No. 4/2009 which is aimed at environmental restoration.

The weakness of the two studies mentioned above is that they only focus on one field of study, namely Criminal Law. Thus, accountability for business actors and/or individuals who carry out mining activities without a permit, will only use the parameters of the objective of punishment alone. Even though there are advantages to the research conducted by Shafira Nadya Rahmayani Sembiring, Elis Rusmiati and Imamulhadi, in the construction of their thinking there are still traces of the classic doctrine of criminal law.

This article aims to dismantle epistemological errors in the mindset of law enforcers—who experience a deterrent effect from criminal sanctions, and state administrators—especially regional governments who are not aware of their legal obligations, which has an impact on the emergence of legal losses for the community in utilizing the concept of People's Mining Areas [PMA]. Therefore, this article explores the following research questions; How is the occurrence of epistemological errors in the construction of thinking in the realm of criminal mining licensing related to the Welfare State Concep

METHOD RESEARCH

This study uses a doctrinal method using secondary data through an interdisciplinary approach, a case approach, a conceptual approach and a statutory approach as well as a semiotic approach obtained from literature studies. An interdisciplinary approach is used to emphasize the limitations of criminal law in solving concrete problems. Meanwhile, the semiotic approach is used to read normative symbols that are scattered in the legal and social realms for the state's obligation to prosper its citizens.

ANALYSIS AND DISCUSSION

The rule of law principle, as regulated in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution of the Republic of Indonesia) The Third Amendment emphasizes "Indonesia is a state based on law". Thus, the authority and powers of administering the state are regulated and limited by the 1945 Constitution of the Republic of Indonesia and statutory regulations, in a sense, government administrative actions must be based on law.

A rule of law requires normative and empirical recognition of the principle of the rule of law, namely that all problems are resolved by law as the highest guideline and all life, whether state life, national life or social life, must be based on law. This means that all actions must be based on legal and written laws and regulations. These laws and regulations must exist and apply beforehand or precede the actions taken.[9] Thus, the concept of the rule of law is essentially a concept/principle regarding the regulation of

[9] Rachmat Trijono, *Dasar-Dasar Ilmu Pengetahuan Perundang-Undangan*, Papas Sinar Sinanti, Jakarta, 2014, pp. 45.

restrictions on state administrators in making arrangements for their citizens. These restrictions are set forth in written form which in the realm of criminal law is known as the Principle of Legality. The principle of legality has two aspects of meaning, namely (a) as a limitation on the powers of state officials and (b) at the same time as a legal basis for him to carry out his state functions.

Broadly speaking, the state functions consist of 2 (two) types of state functions, namely the function of determining state policies and the function of implementing predetermined policies. State policies that have been chosen/determined and formulated in legal products, in practice we are faced with statutory-forming institutions that act as institutions authorized to impose these restrictions.[10]

In the further development of the course of history on the rule of law principle, where the latest development of the rule of law principle gave rise to the concept of a welfare state (welvare staats/welfare law state) which requires the state to expand its responsibilities to include socio-economic problems faced by many people, personal roles to dominate the life of the people many eliminated. It was this development that led to the legislation for the interventionist state in the twentieth century. In fact, the State needs and must intervene in various socio-economic problems to ensure the creation of shared prosperity in society.[11]

The achievement of state goals as the ultimate goal of the function of administering the state, the power and authority of the state has expanded, especially in the many interests that were formerly held by private persons (private), now are held by the government because these interests have become the public interest. The task of the government in the welfare state by Lemaire is referred to as "*bestuurszorg*" namely the duties and functions of organizing public welfare. *Bestuurszorg* covers all fields of society that make the government participate actively in human relations. *Bestuurszorg* is the duty of the "welfare state" government so that it is a modern legal state that pays attention to the interests of all the people and which has abandoned the principle of *staatsonhounding*. It can be said that the existence of the *bestuurszorg* is a sign indicating the existence of a welfare state.[12]

This goal, within the framework of the principle of a welfare state, as explained by Scheltema, where the Government and Officials carry out the mandate as public servants in the framework of realizing community welfare in accordance with the objectives of the state concerned.[13] Thus, a basic assumption can be drawn that the purpose of exercising discretionary authority also refers to the goals of the state which are generally laid out in Paragraph IV of the Preamble of the 1945 Constitution of the Republic of Indonesia.

In relation to the goals of the state, Sjachran Basah explained that national development which is multi-complex has resulted in the government having to intervene a lot in the life of the people in all sectors. This interference is contained in the provisions of laws and regulations, both in the form of laws and other implementing

[10] Padmo Wahyono, *Indonesia Negara Berdasarkan Atas Hukum*, Ghalia Indonesia, Jakarta:, 1986, pp. 37.
[11] Muntoha, *Negara Hukum Indonesia Pasca Perubahan UUD 1945*, Kaukaba, Yogyakarta, 2013, pp. 7.
[12] E. Utrecht, *Pengantar Hukum Administrasi Negara Indonesia*, Ichtiar Baru, Jakarta, 1962, pp. 23.
[13] Bernard Arief Sidharta, "*Kajian Kefilsafatan tentang Negara Hukum*", dalam Jentera (Jurnal Hukum), "*Rule of Law*", Pusat Studi Hukum dan Kebijakan (PSHK), Jakarta, Edisi 3 Tahun II, November 2004, pp. 124-125.

regulations carried out by the state administration that carries out public service duties.[14]

According to Hotma P. Sibuea, the consequence of adopting the concept of a material rule of law or welfare state is that the government/state functions, not only as a ruler, but also as a public servant, because the goal to be achieved is welfare for all the people of the country. Under such conditions, and with the growing needs of society in accordance with the needs of the times, the government's function as a public servant takes precedence over its function as a ruler.[15]

The notion of the obligation to submit oneself as a public servant masters all legislation that is subject to State Administrative Law. In relation to this research, in providing the widest possible opportunity for the community to strive for the welfare of their lives—which is philosophically a basic obligation for the state, it contains an obligation for Regional Governments—especially Regional Heads, to compile and determine People's Mining Areas [PMA].

People's mining is an activity that is managed by the local community in a simple way and in its management uses traditional tools such as crowbars, shovels, pans and others. People's mining management experiences changes that bring about the environment, the impacts caused by mining management activities provide benefits and have an impact on risks for the environment, economy and social culture of the community[16], which are borne by the Regional Government as emphasized in Article 6 paragraph (1) Law Number 3 of 2020 concerning Amendments to Law Number 4 of 2009 concerning Mineral and Coal Mining [Law No. 3/2020] which confirms "The Central Government in the management of Mineral and Coal Mining, has the authority: to determine the Mining Areas after being determined by the Provincial Government in accordance with its authority and in consultation with the People's Representative Council of the Republic of Indonesia."

In common sense, when the discussion touches on the issue of the People's Mining Area [WPR], the denotative meaning that emerges is that there is an obligation for the community to be able to mine in that mining area, it is mandatory to have a People's Mining Permit (PMP), which is then often associated with fulfillment tax obligations. However, if the study of the obligations of the Regional Head is only studied in terms of legal linearity, then it will result in a delay in people's activities to try in mining.

This, semiotically, becomes one of the triggers for social jealousy and social inequality between the community and mining business actors, in relation to their desire to improve their standard of living. Thus, the location of the epistemological error in this issue relates to the way the Regional Head gives meaning to the concept of 'authority' - only as a legal right and not as a legal obligation, which is attributive.

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[14] Sjachran Basah, *Eksistensi dan Tolak Ukur Badan Peradilan Administrasi di Indonesia*, Bandung: Alumni, 1985, pp. 3.

[15] Hotma P. Sibuea, *Asas-Asas Negara Hukum, PEraturan Kebijakan & Asas-Asas Umum Pemerintahan yang Baik*, Jakarta: Erlangga, 2010, pp. 63-64

[16]Nova Yanti Siburian, "Penegakan Hukum Terhadap Pertambangan Pasir Bahan Galian C di Kabupaten Kuantan Singingi Berdasarkan Undang-Undang 4 Tahun 2009 Tentang Pertambangan". *JOM Fakultas Hukum*. Volume III Nomor 2. 2016. pp. 22.

An epistemological error is characterized by an ethical problem[17] in the meaning of concepts articulated in the form of language (both spoken and written), which hides behind a common sense logic. As a result, the communication patterns spoken are always grammatical and *letterlijke* or only rely on authoritative words.

In fact, the concept of authority, in the study of State Administrative Law, does not only contain rights, but also contains obligations. The meaning of these rights and obligations should be related to the concept of the welfare state which is a burden on his position. Thus, as a result of this epistemological error, it is not surprising that awareness of the right to increase welfare only starts from the community side, without any self-awareness from state administrators, it will bring about the impact of the operation of the Criminal Law to determine the existence of criminal licensing in mining. Therefore, the logic of the concept of the People's Mining Area [PMA], is discussed in a normative manner only.

CONCLUSION

Problems regarding Licensing Crimes within the scope of Mining Law, it is impossible to interpret only as the authority of the Criminal Law alone. Because of this, there is a legal obligation for the Regional Head - with reference to the concept of a welfare state, to designate People's Mining Areas to be used as much as possible for the community around the mining area. The epistemological error of failing to give meaning to the concept of 'authority', in fact, creates legal losses and violations of human rights in the people of a region. The failure to reveal this meaning, in the end, gave rise to the absolutism of the Criminal Law to determine someone who tries in Mining Law with the determination as a perpetrator of a Licensing Crime.

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