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Cross Dispute on Legal Authority for Granting Mining Business Permits Between Central and Regional Governments

Anis Ibrahim, JatiNugroho, Henny Purwanti, DwiSriyantini
Sekolah Tinggi IlmuHukumJenderalSudirmanLumajang
Email: thomasjatinugroho@gmail.com

ABSTRACT
Cross disputes related to the authority to grant mining business permits between the central government and regional governments always occur. The legal issue is whether the district/city autonomous regional government can refuse a mining business license issued by the central government. Based on the juridical analysis, it can be concluded that there is a centralization of authority in granting mining business permits. However, through Presidential Decree No. 55 of 2022 the authority to grant mining business permits can be delegated to the government below them, namely only up to the provincial government. Regency/city regional governments may ask for the mining business license to be revoked. But that depends on the willingness of the central government to revoke it.

Keywords: legal authority; mining license; Presidential Decree No. 55 Year 2022

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I. INTRODUCTION

In the Regional Head Accountability Activity Report (LKPJ) for the 2021 fiscal year at the Lumajang Regency DPRD Building there has been a protest against the decision of the Ministry of Energy and Mineral Resources (ESDM) to issue mining permits in the southern coastal area of Lumajang. The Lumajang Regency Government has repeatedly stated that the location of the southern coast of Lumajang is not designated for mining activities. Even the Provincial Government of East Java through the Special Mining Committee stated that the coast was not for the location or business of sand mining. In fact, there are still a number of areas on the southern coast of Lumajang which are now used as mining business locations by several companies because they received permission directly from the Ministry of Energy and Mineral Resources. This is clearly contrary to the policy of the Government of Lumajang which has long decided that the southern coastal area of Lumajang is used as a nature conservation area.

As happened in the field, iron sand mining activities often raise pros and cons from local residents. In fact, in 2015, Salim Kancil, one of the farmers who objected to iron sand mining activities in SelokAwar-AwarLumajang, was killed. Even so, so far his party does not know for sure how many companies have obtained mining permits in the area. The protest by the Head of the Lumajang Region, which could also occur in other regions, is interesting for further study from a legal perspective. The legal issue directly related to the regional head's protest against the central policy is the legal authority to grant mining business permits between the center and the regions. The legal issue that needs to be explained is how are the legal norms regarding the regulation of the authority to grant mining business permits in autonomous regions that have mining resources in Indonesia?.

II. STUDY METHOD

To obtain answers to the issues and problems raised in this paper, the study method used is the normative juridical method, namely the study is carried out by examining legal materials or secondary data only.In line with the normative juridical study method, the approach taken is based on the main legal material by examining theories, concepts, legal principles and laws and regulations related to legal issues regarding the authority to grant mining business permits. While the method of analysis is to use a qualitative analysis method, which is done by tracing laws and regulations and library materials which are then written descriptively.

III. DISCUSSION

Division of State Power: Vertical And Horizontal

In a democratic government, power does not exist and is carried out by one body but is exercised by several bodies or institutions. The purpose of dividing the exercise of this power is so that power is not concentrated in only one hand which can result in authoritarian government and hamper the participation of the people in determining political decisions. With the distribution of power in the administration of the country as one of the characteristics of a democratic country, there are several power implementing bodies such as the legislature, executive, judiciary and others.

In general, countries that implement a power-sharing system refer to Montesquieu's "TriasPolitica" doctrine by carrying out several variations and developments of this theory in its application. Montesquieu's rationale was previously formulated by Aristotle and then developed by John Locke in his book Two Treatises on Civil Government, published in 1690, which divided power into three branches of power namely: (1) legislative power, (2) executive power, and (3) federative power (Mulyosudarmo, 1999; Kusnardi and Ibrahim 1998).

According to Montesquieu's triaspolitica doctrine, that state power consists of three kinds of power: (1) legislative power or the power to make laws; (2) executive power or power to implement laws; (3) judicial power or the power to try on violations of the law. Thus the basic assumption of triaspolitica is a normative principle that this power should not be handed over to the same person to prevent abuse of power by those in power, thus it is hoped that the existence of citizens' human rights is more secure.

The Indonesian state after the amendments to the 1945 NKRI Constitution adheres to a system of separation of power with the principle of checks and balances which in reality still adheres to the separation of power and the distribution of power (Asshiddiqie, 2002). In this power sharing system, there are two types: horizontal division and vertical division. Horizontal separation of powers in the sense that power is divided into functions that are reflected in state institutions that are equal and offset each other. Meanwhile, the distribution of power is vertical in the sense that power is distributed vertically down state institutions.

While Budiardjo (1998) states that dividing the division of powers into two types, namely: first, vertically, namely the division of powers according to levels and in this case what is meant is the division of powers between several levels of government. Second, horizontally, namely the distribution of power according to its function. This division refers to the distinction between the legislative, executive and judicial functions of government.

In a constitutional perspective, there are 2 (two) forms of distribution (division) of state power: namely (1) horizontal distribution of power, and (2) vertical distribution. Horizontal distribution shows that state power is divided into three branches of power, namely: (a) legislative power, (b) executive power, and (c) legislative power (Juanda, 2004).

Especially in terms of the vertical distribution of power, it will give birth to a central government and autonomous regions that bear the right to decentralization. Warren (1952) acknowledged the importance of vertical power development, as well as horizontal division, with his statement as follows: "Above everything, however, Local Government is a fundamental institution because of its educative effect upon the masses of ordinary citizens". Based on this brief description of the vertical distribution of power, it can be argued that the existence of autonomy and decentralization departs from the central government. Such a vertical distribution of power is implemented because it is based on democratic principles. With such a perspective, Mahfud MD (1999) emphasized that the principles of regional autonomy and decentralization in power relations (gezagverhouding) between the central and regional governments are one way to implement the principles of democracy. That is, the principle of democracy must be implemented through the distribution of power both horizontally and vertically. The implications of the relationship between the central government and regional governments will lead to a division of authority related to what matters are the rights and obligations of each government concerned. How extensive and what authority is undoubtedly based on legal regulations made by the central government which has the authority to make regulations that apply to all regional governments under it.

Regarding Government Authority

In various literatures on political science, government science, and law science, it is often found that the term authority coincides with the terms authority and power. Therefore, the term power is often equated with authority, and power is often interchanged with the term authority, and vice versa. In fact, authority is often equated with authority. Power usually takes the form of a relationship in the sense that "there is one party who rules and another party is governed" (the rule and the ruled) (Budiardjo, 1998).

Based on the above understanding, it may happen that a power is not related to law. Power that is not related to law by Henc van Maarseven is called a blot match (Mulyosudarmo, 1990). Whereas power related to law by Max Weber is referred to as rational or legal authority, namely authority based on a legal system is

understood as a rule that has been recognized and obeyed by society and even strengthened by the State (Setiardja, 1990).

In public law, authority relates to power. Power has the same meaning as authority because the power possessed by the executive, legislature and judiciary is formal power. Power is an essential element of a State in the process of administering government in addition to other elements, namely: (a) law; (b) authority (authority); (c) fairness; (d) honesty; (e) bestarian policy; and (f) virtue (Kantaprawira, 1998).

Power is the core of state administration so that the state is in a state of movement (de staat in beweging) so that the state can act, work, have capacity, achieve and perform in serving its citizens. Therefore the State must be given power. Power according to Miriam Budiardjo is the ability of a person or group of people to influence the behavior of another person or group in such a way that the behavior is in accordance with the wishes and goals of the person or the State (Budiardjo, 1998).

In order for power to be exercised, a ruler or organ is needed so that the state is conceptualized as a set of positions (eenambten complex) where these positions are filled by a number of officials who support certain rights and obligations based on subject-obligation construction (Kantaprawira, 1998). Thus power has two aspects, namely the political aspect and the legal aspect, while authority only has a legal aspect. This means that power can come from the constitution, or it can also come from outside the constitution, for example through a coup or war, while authority clearly comes from the constitution.

Authority is often equated with the term authority. The term authority is used in the noun form and is often equated with the term "bevoegheid" in Dutch legal terms. If you look closely, there is a slight difference between the term authority and the term "bevoegheid". The difference lies in the legal character. The term "bevoegheid" is used in the concept of public law as well as in private law. In our legal concept, the term authority or authority should be used in the concept of public law (Hadjon, tt).

Meanwhile, a distinction must be made between authority (gezag) and authority (competence, bevoegheid). Authority is what is referred to as formal power, power that comes from the power granted by law. Meanwhile, authority only concerns a certain "onderdeel" (part) of authority. Within authority there are powers (rechtsbevoegdheden). Authority is the scope of public legal action, the scope of governmental authority, not only includes the authority to make government decisions (bestuur), but includes authority in the context of carrying out tasks, and granting authority and the main distribution of authority is stipulated in laws and regulations (Syafrudin, 2000). Juridically, the notion of authority is the ability granted by laws and regulations to cause legal consequences (Indroharto, 1994). H.D. Stoud (2004) states: "Bevoegheid wet kanwordenomscrevenals het geheel van bestuurechttelijkebevoegdheden door publiekrechtelijkerechtssubjecten in het bestuurechttelijkerechtsverkeer (Authority can be explained as a whole of rules relating to the acquisition and use of government authority by public law subjects in public law).

From the various definitions of authority as mentioned above, it can be concluded that authority has a different meaning from authority. Authority is a formal power that comes from law, while authority is a specification of authority, meaning that whoever (legal subject) is given authority by law, then he is authorized to do something within that authority.

The authority possessed by government organs in carrying out concrete actions, making arrangements or issuing decisions must always be based on the authority obtained from the constitution by attribution, delegation, or mandate. An attribution refers to the original authority on the basis of the constitution (UUD). On the authority of the delegation, a delegation of authority must be emphasized to other government organs. In the mandate there is no delegation of any kind in the sense of giving authority, however, those who are given the mandate act on behalf of the giver of the mandate. In granting a mandate, the official who is given the mandate appoints another official to act on behalf of the mandatory.

In connection with the concept of attribution, delegation, or mandate, Brouwer and Schilder, (1998), say:

a) withatribution, power is granted to an administrative authority by an independent legislative body. The power is initial (originair), which is to say that is not derived from a previously existing power. The legislative body creates independent and previously non existent powers and assigns them to an authority.

b) Delegation is a transfer of an acquired atribution of power from one administrative authority to another, so that the delegate (the body that the acquired the power) can exercise power in its own name.

c) With mandate, there is not transfer, but the mandate giver (mandans) assigns power to the body (mandataris) to make decision or take action in its name).

d)

Attribution is the authority given to an organ (institution) of government or state institution by an independent legislature. This authority is genuine, which is not taken from the authority that existed before. The legislature creates independent authority and not an extension of previous authority and assigns it to the competent organs. Delegation is authority that is transferred from attribution authority from a government organization (institution) to another organ so that the delegator (organ that has given authority) can test this authority on its behalf. Whereas in the Mandate, there is no transfer of authority but the mandate giver gives authority to other organs to make decisions or take an action on its behalf.

There is a fundamental difference between attribution and delegation of authority. In attribution, existing authority is ready to be delegated, but this is not the case for delegation. With regard to the principle of legality, authority cannot be delegated on a large scale, but only possible under the condition that legal regulations determine the possibility of such delegation. The delegation must meet the following conditions:
a. the delegation must be definitive, meaning that the delegate can no longer use the delegated authority himself;
b. delegation must be based on statutory provisions, meaning that delegation is only possible if there are provisions that allow for that in statutory regulations;
c. delegation is not to subordinates, meaning that in the staffing hierarchy no delegation is permitted;
d. the obligation to provide information (explanation), meaning that the delegates have the authority to ask for an explanation regarding the exercise of that authority;
e. policy regulations (beleidsregel), meaning that the delegans provide instructions (instructions) regarding the use of this authority.

Authority must be based on existing legal provisions, so that this authority is a legitimate authority. Thus, officials (organs) in issuing decisions are supported by this source of authority. Stroink explained that sources of authority can be obtained for government officials or organs (institutions) by way of attribution, delegation and mandates. The authority of government organs (institutions) is an authority strengthened by positive law to regulate and defend it. Without authority, a correct juridical decision cannot be issued (Talib, 2006).

Legal Study of the Authority to Grant Mining Business Permits

Laws (in the sense of laws and regulations) related to the matter of the authority to grant mining business licenses fall under two legal regimes namely: (1) Law on Regional Government (UU Number 23 of 2014 as amended the second time by Law Number 9 of 2014). 2015) (Regional Government Law), and (2) Law Number 4 of 2009 concerning Mineral and Coal Mining (2009 Minerba Mining Law) as amended by Law Number 3 of 2020 concerning Mineral and Coal Mining (Minerba Mining Law year 2020).

Regarding mineral and coal mining, this is also regulated by Law no. 11 of 2020 concerning Job Creation. However, in 2021 this law was declared "conditionally unconstitutional" by the Constitutional Court of the Republic of Indonesia. This was emphasized by the Panel of Constitutional Justices that Law Number 11 of 2020 concerning Job Creation (Job Creation Law) is formally flawed. For this reason, the Court stated that the Job Creation Law was "conditionally unconstitutional". That is the MKRI Decision Number 91/PUU-XVIII/2020 which was read out at the decision hearing which was held on Thursday (25/11/2021).Because the Job Creation Law was ruled by the Constitutional Court as "conditional unconstitutionality", then related to the matter of the authority to grant mining business permits refers to the 2020 Minerba Mining Law and does not refer to the 2020 Job Creation Law.
With the amendment to the Minerba Mining Law, there are at least five points related to changes in mineral and coal management in Indonesia, namely:
a) With the enactment of Law Number 3 of 2020, the implementation of the authority to manage mineral and coal mining by the Provincial Government which has been carried out based on Law no. 4 of 2009 and other laws governing the authority of regional governments in the field of mineral and coal mining, remain in force for a maximum period of 6 (six) months from 10 June 2020, or until the issuance of implementing regulations of Law Number 3 of 2020.
b) Within the period of implementing the authority to manage mineral and coal mining (as referred to in the first point), the governor cannot issue new permits as regulated in Law Number 4 of 2009 and other laws governing regional government authority in the mining sector.
c) Issuance of new permits (as referred to in point two), in the form of issuance of: a. Mining Business Permit (IUP); b. People's Mining Permit (IPR); c. Temporary permit to carry out transportation and sales; d. Special Production Operation Mining Business Permit for processing and/or refining; e. Production Operation Mining Business Permit specifically for transportation and sales; f. Mining Service Business License (IUJP), and g. Production Operation Mining Business Permit for sales.
d) Issuance of permits and non-permits other than those referred to in point three, in the form of: a. Increase of Exploration IUP to production operation IUP; b. Granting of extensions to licenses that have been issued, as referred to in the third point; c. Licensing adjustments in the context of changes in investment status, and d. Approval and recommendations regarding the implementation of guidance and supervision of mineral and coal mining business activities.

Applications for permits that have been submitted to the governor before June 10 2020 and have not been issued permits until the enactment of Law Number 3 of 2020 cannot proceed with the issuance process, in accordance with the provisions of Article 173 C of Law Number 3 of 2020. Taking into account the points above It can be clearly stated that Law Number 3 of 2020 as the new Minerba Law means that mining business permit authority

has been taken over from the local government and transferred to the central government. This is clear from the provisions in Article 35 paragraph (1) of the Minerba Mining Law 2020 which states that mining businesses are carried out based on Business Permits from the Central Government. Nevertheless, in Article 35 paragraph (4) it is stated that the central government can delegate the authority to issue business permits to regional provincial governments in accordance with statutory provisions.

The takeover of the authority to grant mining business licenses from the regions to the center which then makes the central government have the legal authority to issue such mining business licenses is legally constant as an attributive acquisition of authority. As previously explained, an attribution refers to the original authority on the basis of the constitution (UUD). This means that the central government obtains authority in granting mining business permits from law (namely the 2020 Minerba Mining Law) which does not originate from other expansions of authority.

Then in 2022 the President issued Presidential Regulation (Perpres) Number 55 of 2022 concerning Delegation of Authority in Minerba Mining Management which was promulgated on April 11, 2022. Presidential Decree No. 55 of 2022 is a derivative of Government Regulation (PP) No. 96 of 2021 concerning Implementation of Mineral and Coal Mining Business Activities. Article 6 paragraph (1) expressly states that mining business is carried out based on business permits from the Central Government, including through the granting of permits for various mining businesses including the granting of IUP {paragraphs (2) and clause (3)}.

Then in 2022 the President issued Presidential Regulation (Perpres) Number 55 of 2022 concerning Delegation of Authority in Minerba Mining Management which was promulgated on April 11, 2022. Presidential Decree No. 55 of 2022 is a derivative of Government Regulation (PP) No. 96 of 2021 concerning Implementation of Mineral and Coal Mining Business Activities. Article 6 paragraph (1) expressly states that mining business is carried out based on business permits from the Central Government, including through the granting of permits for various mining businesses including the granting of IUP {paragraphs (2) and clause (3)}.

This delegation also includes business licensing authority. The central government gives part of the authority to guide and supervise the management of mineral and coal mining. While local governments have some authority to grant Midwives Practice Licenses (SIPB), People's Mining Permits (IPR), transportation and sales permits for commodities, Mining Service Business Permits (IUJP) for one province, and IUP for the sale of Minerba commodities.

In addition, the central government also delegates some of the authority to support the management of mineral and coal mining including, granting and stipulating Mining Business Permit Areas (WIUP) for non-metallic minerals, certain types of metal minerals, and rocks provided that they are still in one province and up to 12 sea areas. mile. The central government also delegates the determination of benchmark prices for non-metallic minerals, certain types of metallic minerals and rocks, and provides recommendations or approvals related to the delegated authority. This delegation of authority is only limited to type C excavation mines including bentonite, limestone, quartz sand, and others. Meanwhile, the authority for mineral and coal mining business activities is still the authority of the central government.

The delegation of authority to grant business licenses from the Central Government to the Provincial Governments on the legal basis of Presidential Regulation No. 55 of 2022 cannot be sub-delegated to district/city governments. Because, in the Perpres there is not a single provision that provides an opportunity for that. Thus the delegation of authority for granting IUP (Mining Business Permits) stops only at the provincial government and not at the district/city regional governments.

With the takeover of the authority to grant mining business licenses from the regional government to the central government, this can be read as a form of recentralization of power, especially in the field of power to grant mining business licenses. This can be read from the expression of the Director of Law Enforcement of the Auriga Nusantara Foundation, Roni Saputra, this delegation actually shows that the government is centralizing mining business authority. He said this delegation was a form of centralization of mining business authority. The regional government's authority is limited to receiving delegates, not self-management. Even that was actually given to provinces, not smaller government areas, districts/cities.

In the perspective of the distribution of power and democracy, this is contrary to the spirit of decentralization which actually tends to direct most of the central power and authority to the regions. With the delegation of authority from the central government to the regions, it means that the regions are not independent in managing the mining areas in their territory. Moreover, districts/cities that directly own mining areas obviously do not have significant power and authority in mining management because districts/municipalities do not receive delegation of authority for granting mining business permits from the central government.

IV. CONCLUSION

Based on the explanation above, it can be argued that the regulation of the authority to issue mining business permits between the central government and regional governments has seen a centralization of authority in granting permits. However, through Presidential Decree No. 55 of 2022 the authority to grant

mining business permits can be delegated to the government below them, namely only up to the provincial government. District/city regional governments that clearly own mining areas do not have the power to independently manage their mining areas because district/city regional governments do not have the authority to grant mining business permits.

With such an arrangement of authority for granting mining business permits, the district/city regional government will only accept mining companies entering the mining area, exploring and exploiting it as long as those concerned have obtained a mining business permit from the central government. This is because the regions no longer have the authority to grant mining business permits to mining companies.

When the local government does not know how many companies have mining business licenses in their territory, this is an indication that factually the practice of issuing mining business licenses is truly centralized which does not involve the heads of districts/cities where the mining area is located. It is possible for the regions to submit a letter to the central government to revoke the mining business permits in their respective regions. But this depends on the central policy is willing to comply or not. Looking at the examples that have occurred, the request for the revocation of the mining business license seems to be still difficult to fulfill.

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