Good mining practices toward a good mine management: a case of mining business permit issuance

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Good mining practices toward a good mine management: a case of mining business permit issuance

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Abstract. Maladministration fundamentally starts from the misconduct of public officials. It then extends to providing bad service ranging from acceptance, process, and administration execution, which includes the issuance of permit in mining sector. Mining management plays an important role in meeting people’s needs. The management also serves an important function to provide added value to national economic growth and sustainable regional development. This study aims to examine the correct method to find the philosophy of Mining Business Permit (IUP) issuance, norm formulation of government authority to grant IUP, and government authority to issue IUP that carries implication for criminal offense. The methods combine two approaches, namely legal and problem approach. The application of such method can contribute to the formulation of an integrated holistic policy to issue IUP and optimize collective strategic resources for the greater good of human life. This study found that maladministration of mining business permit has engendered complexities and overlapping decisions in both vertical and horizontal levels. In vertical level, conflict of authority and overlapping decisions occurred in central and regional government.

1. Introduction
Management and supervision of non-renewable resources such as mineral and coal are the authority and responsibility of public officials in accordance with statutory laws[1]. Mining management has an important role in meeting the needs of many people [2]. Besides, the management also provides tangible added value to national economic growth and sustainable regional development. In order to meet the good mining practices philosophy, a good mechanism and legal instrument comprising mining business permits are needed.

Many problems may exist in the management of mining products, particularly those associated with the mining business permit issue that can offend the law. One type of violations of law is the maladministration that might result in criminal offense. Maladministration carries a legal consequence that triggers a negative reaction and incompalance act. An example of maladministration that offends law is the abuse of authority in issuing mining license or permit such as Production Operation Mining Permit (IUP), Production Operation Special Mining Permit (IUPK), and Community Mining License (IPR). Such conduct is performed by a number of regional public officials and businesspeople, leading to abuse of authority and disruption of mining investment. Therefore, if there is a mistake or intention...
in the management of mining as country’s assets, maladministration tends to occur. Maladministration could not be seen as a person or job mistake[1] but a government act that creates jobs and personal responsibility. In addition, this responsibility can be imposed with criminal law for abusing the authority. If it is neglected, it will indirectly harm a country’s economy and its community’s life. Furthermore, maladministration is part of administrative law and the development and problem of administrative law or administrative penal law towards internal specific criminal law were summarized by[2][3]. Administrative law or administrative penal law (verwaltungsstrafrecht) according to [2] is a regulation or legislation product, and legislation product where all products of laws within the sphere of administration law carry criminal sanction. Therefore, all legislation products such as laws of electricity, forestry, customs, finance, tax, environment, telecommunication, fisheries, mining, and others are called an administrative penal law as long as there is a stipulation regulating the criminal sanctions. Administrative penal law, from the point of view of criminal law function, is interpreted as special criminal law.

One of the good mining practice indicators is reflected from the regulation compliance as stated in the Minister of Energy and Mineral Resources Decree Number 26 of 2018. Therefore, the fulfillment of regulatory requirement including mining business permit is mandatory for being classified as a good mining company. The study is aimed to reveal the philosophy and norm formulation of mining business permit issuance.

2. Method
Currently, some legal issues carry criminal offense consequence including philosophy of mining business permit issuance, norm formulation of government’s authority to issue mining business permit, and government’s authority to issue mining business permit. These consequences lead to preventive action for avoiding the legal implication.

The method used is divided into a desk study and problem approach. Desk study refers to legal research and discovers a pragmatic based on the congruence between the examined truth and imposed rules. Furthermore, legal research is a process to find out the rule of law, law principles, and law doctrines to solve an existing legal problem. Problem approach uses several approaches as a comprehensive analysis including statute approach, case approach, and conceptual approach.

3. Result and Discussion
3.1 The philosophy of mining business permit issuance
This section discusses the government’s authority based on the legal and justice perspective. Government’s action to act on the principle of state of law is primarily related to legal protection of basic rights. Nevertheless, constitution legitimation for government can be perused in Article 1 of UUD NRI 1945 that functions as principle of state of law, and Article 33 of UUD NRI 1945 that functions as the right of state control (HPN) as well as principle of welfare state. Ratio “legis” in those articles suggests that the state goal is creating the greatest benefit of the people.

The explanation above converges with the idea and concept in the Preamble of UUD NRI 1945, which is the essence of the fifth principle of Pancasila (the philosophical basis of human rights in Indonesia). According to[5] that the definition of HPN consists of three concepts as follows: (1) Controlling in the form of state ownership, which means that the state through government is the only one that has authority to decide authority right over resources, including land, waters, and any natural riches contained therein; (2) Regulating and overseeing exercise and utilization; (3) Capital assistance in the form of state companies for certain businesses.

Another discussion in this study is associated with justice and injustice terms. Two main streams of the philosophical perspectives have a similar opinion with slightly different implementation[6][7]. The [6] explication puts more emphasis on justice recognition by way of injustice; it is popularly known as injustice. On the other hand, the [7] highlights internal notion of justice. This idea is popular in practitioner groups and lawyers. The theory approached by[7] is the approach of recognizing justice and justice and equality. In similar vein,[8] in his abstract focuses on non-renewable resources. In his
concept of intergeneration justice, a chain of obligation is inherent in intergeneration justice, which is the existence of current generation’s life and future generation. The main purpose is to ensure that natural resources, including mining, do not run out for future generation, and to achieve the goal then it is necessary to have an intergeneration justice-based policy in mining management. The description implies that justice in the context of abundant natural resources in Indonesia is relevant if it adopts the thought of the three legal experts above.

The aforementioned principle definitions underscore that mining management is the foundation or compass that guides not only the government’s actions, but also other stakeholders. These principles are automatically parallel to good governance principles.

3.2 The government authority norms in the issuance of mining business permit

The function and authority of government to issue IUP can be studied through authority. The term “authority” in Dutch is “bevoegheid” and “gezag” in German. In English, the term “authority” is understood as “competence”, which means ability, capability, and qualification. Authority is a term that is related to authority, power, and force. Such authority is legitimate if it is performed according to law and preferentially owned by the state that has right to demand compliance. The scope of the law is within public sphere.

According to its function and authority, the implementation of IUP issuance is the authority of authorized public officers, referring to the law Article 22 paragraph (3) Government Regulation Number 23 of 2010 on Implementation of Mining Business Operations that was amended by Government Regulation Number 24 Year 2012. The regulation stipulates several points including (1) IUP that is stipulated in Article 7 letter b consists of (a) Exploration IUP and (b) Production Operation IUP; (2) Exploration IUP consists of (a) metal minerals, (b) coal, (c) non-metal minerals, and/or (d) rocks. According to Article (3), the operation IUP comprises: (a) metal minerals, (b) coal, (c) non-metal minerals, and/or (d) rocks. With the function and authority of authorized officials, it is obvious that the position of the officials includes administrative position of government in mining management.

The function and authority to issue mining business permit are the task and responsibility of authorized officials in accordance with the administrative law. Furthermore, according to [9][10] that the legality of a letter or decision including mining business permit issuance should be supported with the following matters: (1) Existence of authority, (2) Correct procedure, and (3) Correct substance. Procedural defect of those requirements could lead to either maladministration or criminal act. Maladministration can become criminal act if there is collusion or bribery found as regulated in Article 21 Laws No. 28 of 1999 on the State Officials Who is Clean from Collusion, Corruption, and Nepotism. In terms of administration, if procedural defects occurred then the procedure can be repeated. Thus, there is no forgery procedure, and it does not make an administrative decision become void.

Source of authority in IUP issuance can be elucidated from the points of view of several experts. The first point of view is revealed by [3] that authority is a power owned by an administrative body or authorized officials in conducting real acts, enacting regulation, or issuing decision that is based on attribution, delegation, or mandate. Attribution refers to original authority according to stipulation of state law. Delegation emphasizes a transfer of authority to another government body, while mandate does not entail any transfer in terms of delegation of authority. The mandated officer acts on behalf of mandator (the one who gives mandate). In mandate transfer, the officer that gives mandate appoints another officer to act on his/her behalf. The second point of view is based on[10] that emphasizes the authority as free power. In real practice, the word ‘policy’ or ‘wisdom’ is more familiar. As a comparison, a term that can be used in various systems of administrative law is coined. From the explanation, the term ‘authority’ shall be introduced according to authority essence with the references as follows: discretionary power (English administrative law), ermess (not “freieresermessen“, German administrative law), “discretionariebevoegheden” (Dutch administrative law), vrijbevoegdheid. According to the essence of those terms and concepts, the term ‘authority’ is used in Draft Law on the
Government Administrative. The nature of the term ‘authority’ is used as the opposite of rule-bound authority (gebondenbevoegdheid). Based on its essence, there are two choices to carry out governmental act. The choice is attributed to: (a) norm formula, such as suspect can be detained...in certain condition...shall...should...and for the public interest ...and others. (b) factual condition, such as disaster and emergency situation.

Maladministration that carries criminal offense implication can be abuse of authority in mining business permit issuance that can result in loss, corruption from the mining profits, bribe from mining businessmen, and gratification like facilities given by mining businessmen with intention to obtain permit issuance without having to embark on the right mechanism and procedure of obtaining mining business permit. According to [10] that maladministration does not only bear administrative and civil responsibilities, but also criminal responsibilities, for example, bribery, gratification, collusion, corruption, and many others. Addressing the misuse of authority, [11] argues that an act that has constituent of “violating law” is the “genus”, while the constituent of “misuse of authority” is the “species”. Then, the growing number of maladministration practices, especially the ones with criminal offense implication in permit issuance in mining sector, can be found in several regions. Furthermore, maladministration is administration infringement that has criminal offense consequence such as abuse of authority that is criminally accountable.

3.3 Criminal offense implication in issuing IUP

Criminal provision in Laws No.4 Year 2009 is part of criminal theory. According to [2], criminal theory traditionally can be classified into two categories: (1) Absolute theory (retributive), in which the punishment is declared on someone because he/she commits a crime or criminal act (qua peccatum est); (2) Relative theory, in which punishing is not to satiate the absolute demand of justice, so the revenge has no value, but it is only as an instrument to protect community interests. Definition of criminal act is the differentiate conduct, consequence of conduct, and criminal accountability (known as criminal liability). Another theory is presented by [13] that divides intention into will theory and knowledge theory or “voorstellingstheorie”. The most interesting part of his explanation is the will theory, which means that people who have will certainly know what they do, whereas people who know are not always people who have will. However, in the process of proving criminal offense, especially corruption, law enforcement apparatuses are more inclined to use knowledge theory. It means that although the offender or corruptor does not have will to do corruption, but he or she is aware of his or her action that is against the law or abuses his or her power.

The analysis on offense is stipulated Article 165 Laws No. 4 of 2009. The criminal offense is elaborated as anybody that issues IUP, IPR, or IUPK in breach of this Law and abuses his or her authority shall be sentenced to a maximum of 2 (two) years in jail and fined a maximum of Rp200,000,000 (two hundred million rupiahs). There is one component mentioning that anybody according to Article 165 refers to the public official. The persons who have authority based on the laws to issue a permit, in this context mining permit is categorized as a public officer. The permit includes Mining Business Permit (IUP), Small-scale or Community Mining Permit (IPR) and Special Mining Permit (IUPK). The second component is issuing IUP, IPR, or IUPK that contradicts the laws and it is often known as formal unlawfulness in legal term. Formal unlawfulness occurs because it does not meet the offense formulation of the laws. The third component is the abuse of authority. The stipulation in Article 165 Laws No. 4 Year 2009 is not adequate due to unclear parameters.

The abuse of authority in issuing IUP that is marked with the implementation of government administration law Year 2014, stipulation of Prohibition on Abuse of Authority is regulated in the seventh part of Article 17-21 Laws No. 30 of 2014. Article 17 prescribes: (1) Body and/or State Officers are prohibited to abuse their authority; (2) Prohibition on abuse of authority that is referred to in paragraph (1) comprises: a) prohibition to exceed authority; b) prohibition to mix up authority; and/or; c) prohibition to act in arbitrary. In addition, the abuse of authority stipulated in Article 165 Laws No.4 of 2009 cannot be categorized as a criminal offense or personal responsibility if there is no legal and convincing verification before the court. If there is a deviation found, it is very clear that this
abuse of authority falls into administration error in the form of position or job responsibility. The utilization of authority to issue mining business permit requires careful deliberation and predicts legal consequences. It is done in order to prevent arbitrary act, abuse of authority, and utilization of authority for other purposes.

It is interesting that there are criteria similar to elements in criminal offense found in the explanation of maladministration criteria by[14]. An example of maladministration criteria that are similar to elements of a criminal offense are as follows: (1) unlawful acts, (2) acts that exceed authority, (3) abuse of authority for other purposes which are not the objective of the authority. It converges with the statement by [2] who classify abuse of authority in Administration Law in three forms: (1) Abuse of authority to commit acts against public interest or to exclusively benefit themselves or certain groups; (2) Abuse of authority that means the act of a public official is for the sake of public, but it deviates from the objective of authority enshrined in laws or other regulations; (3) Abuse of authority in the sense that correct procedures are misused to achieve certain goal, and instead, other procedures.

Lastly, the authors underline that maladministration in IUP issuance is able to engender job and personal responsibilities. The qualifications of positional responsibilities are as follows a) act arbitrarily to issue mining business permit, prolonged postponement during the process of mining business permit issuance; b) inaccuracy and carelessness in checking physical data on the area that will be granted HGU (right of cultivation) certificate; c) abuse authority, no confirmation, and response to all interests and rights of legally legitimate parties; d) the act is clearly against public interests; e) the act intentionally violates the goals of authority, which has been stipulated by the laws; and f) the act intentionally trespasses a procedure.

4. Conclusion

Philosophy of mining business permit issuances is (a) the government control (“sturen”) in realizing prosperity and wealth to people who are just and prosperous; (b) as juridical instrument in order to prevent maladministration, management, supervision, and control, especially issuance of IUP, exploration IUP, and product outcomes including IPR and IUPK; (c) as juridical instrument to prevent abuse of authority, arbitrariness, and excess of authority. In the implementation, the paradigm of mining business permit actually has shifted from a juridical instrument to mining income source. Authority for the greatest benefits of Indonesian people in Laws No. 32 of 2004 is abused. Hence, in order to create authority harmony between central, provincial, and city governments, the country amended the Laws with the Laws No. 23 of 2014 and Laws No. 30 of 2014, considering that it is closely related to intergenerational justice and chain of obligation.

Authority in Laws No. 4 of 2009 on Minerals and Coal is in line with Laws No. 23 of 2014 on Regional Government. They complement one another and accommodate the authority relationship between central, provincial, and city governments. The two laws also balance legal power and assuage the conflict of legal power between central, provincial, and city governments. Therefore, balance of governance in authority relationship will result in correct allocation of mining outcome for the greatest benefits of the people and law state that is sovereign, just, and prosper.

The shift in the paradigm of mining business permit issuance from preventive juridical instrument to mining income source causes abuse of authority with criminal offense implication that must be personally accounted. Therefore, the preventive juridical instrument needs to be strengthened to lead the social license to operate and good mining practices.

References


