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Unconstitutional Article 173A Law Number 3 of 2020 Concerning Mineral and Coal Against Asymmetric Local Governments in Indonesia

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Abstract

Article 18A of the 1945 Constitution recognizes an asymmetric regional government unit, but the existence of article 173A of Law no. 3 of 2020 concerning Mineral and Coal does not reflect the state's recognition of the legality of asymmetric regional government, of course it raises problems both in the concept of asymmetric autonomy, regional authority and impact on the environment. This research uses a normative juridical research method with a statutory and conceptual approach. The results of the study show that the position of article 173A of the Minerban Law is contrary to the 1945 Constitution which heeds Article 18A of the 1945 Constitution and eliminates the authority of the asymmetric regional government in the management of mineral and coal. As well as having an impact on creating a gap in the relationship between the central and regional governments as well as oversight of management, as well as environmental impacts in the mineral and coal mining area.

Keywords: *Inconstitutional; Asymmetric Local Governments; Concerning Mineral and Coal*

Introduction

Article 18 paragraph (2) and paragraph (5) of the 1945 Constitution of the Republic of Indonesia (1945 Constitution) explains that provincial, regency and city regional governments regulate and manage their own government affairs according to the principles of autonomy and co-administration. Regional government carries out the widest possible autonomy, except for government affairs which are determined by law as the affairs of the central government. (Gunawan A. Tauda. 2018: 414).

The granting of broad autonomy to the regions is aimed at accelerating the realization of prosperity through improving services, and community empowerment. Furthermore, through broad autonomy, the regions are expected to be able to increase competitiveness by taking into account the principles of democracy, equity, justice, privileges and specificities as well as regional potential and diversity within the system of the Unitary State of the Republic of Indonesia (HAW. Widjaja, 2005:425)

Regarding the relationship between the central government and regional governments, Article 18A of the 1945 Constitution explains that, the relationship of authority between the central government and provincial, regency and city regional governments is regulated by law taking into account the

specificities and diversity of regions, as well as financial relations, public services, resource utilization natural resources and other resources between the central government and regional governments are regulated and implemented fairly and in harmony based on the law. This indicates that the constitution requires different arrangements for each region which has a special and varied style. Thus, the meaning of decentralization contained in Article 18A paragraph (1) of the 1945 Constitution, provides a direction for the occurrence of asymmetric decentralization which focuses on regional specificities, privileges and diversity,

Derivative arrangements from Article 18 of the 1945 Constitution, ordering the assistance of local government laws. With asymmetric decentralization and symmetric decentralization, Indonesia has 2 legal regulations related to regional government, namely Law of the Republic of Indonesia Number 23 of 2014 concerning Regional Government which emphasizes the delegation of authority which is the authority of regional government to all regions within the country in a uniformistic manner. and local government laws with special status/special autonomy such as the Provinces of Papua & West Papua, Aceh Province, the Province of the Special Capital Region of Jakarta, and the Province of the Special Region of Yogyakarta.

The division of central government and regional government affairs is contained in Law number 23 of 2014 concerning regional government. Local government laws bring new consequences regarding the mapping of concurrent government affairs between levels of government. There are several concurrent government affairs which were previously the authority of the province and then became the authority of the center. Article 14 paragraph (1) of the Regional Government Law explains that the implementation of government affairs in the forestry, marine and energy and mineral resources sectors is divided between the central government and the provincial regions.

Change of paradigm in the implementation of governmental authority related to the management of natural resources, including the implementation of affairs in the fields of forestry, maritime affairs and energy and mineral resources which are divided between the central government and provincial regional governments. Regional autonomy, in the formation of regional regulations must be the main part that must be considered. Arrangements for the management of natural resources, especially mineral and coal mining, are regulated in Law Number 3 of 2020 concerning Minerba.

Article 8A of Law Number 3 of 2020 concerning Minerba stipulates that the authority of the central government, in this case the ministry, is to establish a national mineral and coal management plan in a systematic, integrated, directed, comprehensive, transparent and accountable manner. Furthermore, through the Minerba Law in Article 173A it is explained that the Minerba Law also applies to the Province of the Special Region of Yogyakarta, the Province of the Special Capital Region of Jakarta, Aceh Province, West Papua Province and Papua Province as long as it is not specifically regulated in the law that regulates area specialties and specialties. So, juridically, regional authority in managing natural resources related to mineral and coal was taken over by the central government.

The authority taken by the central government over the management of mineral and coal natural resources in the regions, this is of course contrary to what is mandated in Article 18A paragraph (1) of the 1945 Constitution and its derivative laws and regulations such as Article 9 paragraph (3) Jo. Article 12 paragraph (3) letter (e) of Law Number 23 of 2014 concerning Regional Government, and so is the asymmetrical decentralization authority, namely, one of themLaw Number 11 of 2006 concerning the Government of Aceh (UUPA). UUPA also regulates the management of natural resources which is regulated in Article 156 UUPA explaining that the Aceh Government and district/city governments manage natural resources in Aceh both on land and at sea in the Aceh region according to their authority.covering the mining sector which consists of mineral mining, coal which is carried out by applying the principles of transparency and sustainable development.

The elimination of the authority of the asymmetric regional government in the management of natural resources, especially minerba in Aceh, is caused by Article 8A of the Minerba Law, which emphasizes that the central government has absolute authority to manage mineral and coal natural resources in Indonesia. 173A, regions that have privileges and specificities, the authority in managing mineral and coal natural resources is taken over by the central government. Based on this study, it is interesting to study the implementation of the position of authority, the principle of asymmetric decentralization that applies in Indonesia and the impact it has.

Research Methods

This study uses a normative juridical research method, namely legal research regarding the enforcement of normative legal provisions (codification, legislation) in action on any particular legal event that occurs in society. Normative legal research is based on secondary/basic data, namely data obtained directly from reading legal books, journals, scientific works, expert doctrines, and jurisprudence, (Abdulkadir Muhammad, 2004:134). as well as interview methods with experts to support research, which were selected by purposive sampling with the doctoral education cluster in the field of state law.

This research only uses a statutory approach, and a conceptual approach, (Peter Mahmud Marzuki, 2011: 93), which emphasizes research aimed at obtaining legal knowledge in a normative juridical manner that raises data and facts in this case taking a statutory science approach is carried out by analyzing all regulations relating to the issue to be studied, which is then compared to a conceptual approach that looks at the normative application of legal principles and the principle of asymmetric decentralization.

Research Results and Discussion

The essence of asymmetric decentralization is the opening of space for the implementation and creativity of the province in the implementation of regional government outside the general provisions stipulated in Law Number 23 of 2014 concerning Regional Government, or other special regional laws and regulations. (Bayu Dardias Kurniadi, 2012:8-9). Freedom and independence in autonomy is not independence, freedom and independence are freedom and independence in a bond of greater unity.

The manifestation of the implementation of regional autonomy is the realization of regional government that is able to answer various problems of the people in the region. (Widjaja, HAW, 2009: 21-22). The administration of regional government is inseparable from the administration of the central government, because regional government is part of the administration of state government, which becomes the basis of governance is the basis of a government system such as the ideology of a nation, the philosophy of life and the constitution that forms a government system (Inu Kencana Syafiie, 2011 :104).

The division of power vertically, is the division of state power between the central government and local governments (Philipus M Hadjon, paper: 1), this is a system of household teachings in which the division of the administration of state government is towards the affairs of both the central and regional governments (Joeniarto, 1979 :29). So that the things that are regulated and managed by the regional government are certain tasks or affairs that are handed over by the central government to the regions to be carried out in accordance with the policies, initiatives and capabilities of the regions, especially asymmetric regional government (HM Busrizalti,: 68), for example regarding education and culture, land, health, and others (Noer Fauzi and R. Yando Zakaria, 2000:11).

The division of authority in central and regional relations is related to the distribution of household affairs or in the language of laws and regulations is called government affairs (Ni'matul Huda,

2009:19). Concurrent government affairs are government affairs that are divided between the central, provincial and district/city governments, which are at the same time the basis for the implementation of regional autonomy, to realize concurrent authority. Government affairs which are handled in certain fields, can be carried out jointly between the central government and regional governments.

The substance of the division of concurrent government affairs in the asymmetric regional government law is one of them is government affairs in the field of energy and mineral resources. In the field of energy and mineral resources, which was originally shared between the central government, provincial regional governments, and regency/city regional governments, it was only given to the central government and provincial regional governments. Regency/city governments are not given authority regarding mineral and coal management. There are differences in the formulation contained in Law no. 3 of 2020 concerning minerba, regulates the authority related to the management of minerba in a centralized manner, changes the authority possessed by regional governments asterisks in the management of natural resources, especially minerba.

Arrangements regarding the authority of the asymmetric regional government in the management of mineral and coal natural resources are specifically regulated. If you look at local government laws in general, namely Law Number 23 of 2014 concerning Regional Government, which gives authority regarding the management of mineral and coal mining only to the central government and provincial regional governments, this explains that local governments have the authority to manage natural resources. especially minerals. The central government involves regional governments in this management and this is in accordance with the constitutional mandate in Article 18B paragraph (1) where the central government guarantees a special and special regional government unit.

Likewise in laws and regulations that are special and special, one of which is Law Number 11 of 2006 concerning the Government of Aceh (UUPA), UUPA also regulates the management of natural resources in Aceh, especially mineral and coal in Article 156explained that the Government of Aceh and district/city governments can manage natural resources in Aceh both on land and in the sea of the Aceh region in accordance with their authority by applying the principles of transparency and sustainable development. This means that the Government of Aceh is involved in the management of mineral and coal natural resources in the Aceh region.

In 2020, the government issued Law Number 3 of 2020 concerning Mineral and Coal Mining (Minerba Law) as a substitute for Law Number 4 of 2009. The revision of the Minerba Law brought changes in the application of a centralized system to management and licensing authority. Citing the opinion of the Minister of Energy and Mineral Resources (ESDM) Arifin Tasrif who stated that the withdrawal of management authority to the central government was carried out in order to control the amount of production and sales, especially metals and coal as strategic commodities for energy security and metal downstream supplies (Zsazsa Dordia Arinanda and Aminah, 2021:170).

In principle, government relations between the regional government and the central government and vice versa must implement coordination or relations in each implementation of their respective duties and responsibilities (Lalu Wira Pria S, 2015:44), but in fact the Minerba Law has abolished the authority of regional governments in administering minerba mining thereby overriding the principle of asymmetric regional government in which all authority related to minerba in the form of policy formation, management actions, regulation, management and supervision is withdrawn to the central government which will affect central and regional relations. Seeing this, the coordination system or distribution relationship between the central and regional governments no longer exists.

Juridically, the existence of Article 173A of the Minerba Law removes the authority of the asymmetric regional government in joint management of mineral and coal. Of course, the Minerba Law,

when viewed from the formation aspect, does not take a clear view of the 1945 Constitution Article 18A paragraph (2) and Article 18B paragraph (1) which explains that the Indonesian government recognizes or legalizes special and special government units and the utilization of natural resources. regulated and implemented in a fair and consistent manner based on the law. Article 173A of the Minerba Law does not reflect the legal principles for forming legislation, namely the legal principle that the legal norms below must not conflict with the legal norms above,

The Minerba Law leads to centralization, even though the Constitutional Court (MK) in MK decision No. 10/PUU-X/2012 this decision considers the division of government affairs which is optional in nature must be based on the spirit of the constitution which provides the widest possible autonomy (Muhammad Salman Al Farisi,2021:20–31). However, there is one interesting thing related to the authority to issue mining permits, where the provision of Article 35 paragraph (4) of the Minerba Law states that the central government can delegate the authority to issue business permits to regional provincial governments in accordance with statutory provisions. Although licensing authority can be delegated to regional governments through a government regulation, in reality the government regulation that delegated the Minerba Law does not provide licensing authority other than the Minister of Energy and Mineral Resources (Ahmad Redi, 2021: 473–506).

Several implications arise because of the existence of Article 173A of the Minerba Law on asymmetric regional governments, namely the relationship between the central and regional governments, which indicates that there is no longer the authority of the regional government to exercise control in the mineral and coal mining sector. If you look at Article 8 paragraph (2) of the previous Minerba Law No. 4 of 2009, it gives authority to local governments to submit information on production results, domestic sales, and exports to the Minister. With the loss of regional authority in the management of mineral and coal, it will definitely also eliminate the coordination relationship between the central government and regional governments. This vacancy is the result of the existence of article 173A of the Minerba Law which totally does not carry out the constitutional mandate to carry out asymmetrical autonomy,

In addition to the relationship problems as above, the problem of supervisory relations is a problem in itself, if you look at mineral and coal mining as a type of non-renewable natural resource and its destructive nature is very high, so that the implementation of mining is very detrimental to the environment and the people who live in the mining area. The loss of asymmetrical government authority in the control of mineral and coal mining will certainly increase the consequences of environmental damage. So that people who want to protest related to mining activities in their area, must report to the central government or at least the province. Even though so far most of the mining locations are in remote areas (WALHI, 2021 :-)

The transfer of authority for mineral and coal mining was carried out to create an efficient mining licensing system, but this cannot be ignored as a result of the wide range of mining areas and the absence of authority by the local government to supervise mining, it is not impossible that this will actually have an impact on the monitoring process not being intensive, guidance, and supervision of mineral and coal mining activities in the regions. (Muhammad Helmi Fahrozi Rika Putri Wulandari, 2021: 191–206)

Conclusion

The existence of Article 173A of the Minerba Law expands the authority of the central government in managing natural resources, especially mineral and coal and eliminates the authority of asymmetric regional governments in managing mineral and coal in their territory. the management of natural resources by the regions is a concurrent matter owned by the regions. because in terms of its formation it does not accommodate Article 18A of the 9145 Constitution. So that the impact that is

generated is not only communication and supervisory relations between the central and regional governments.

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