

Concept of Constructive Discretion in The Transformation of Gold Mining Governance in West Kalimantan Region

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ABSTRACT : Indonesian is a country of law, where the laws themselves are made with the aim of providing certainty, justice and benefit to society. With the existence of law, it should be possible to maintain social security and order and solve problems that exist in society. However, in reality, the law in Indonesia has not been able to fully resolve all existing problems, such as gold mining activities without permits or often called PETI which are rife in West Kalimantan Province. PETI activities are indeed beneficial for some communities and certain groups to meet their living needs because it is difficult to find work. However, on the other hand, PETI activities also have many problems, such as legal violations, massive environmental damage, and health problems due to the use of dangerous mercury. From the results of the law enforcement of PETI crimes carried out by the West Kalimantan Regional Police, it turns out that it has not been running optimally, because there is still resistance and even resistance from the community. Therefore, there is a need for problem solving or problem solving which is not only regulated in law, but can be realized by synergizing the central and regional governments and other related apparatus in creating a concept of constructive discretion in the transformation of gold mining governance as a recommendation for solving existing problems. exists, and of course it is hoped that it will provide benefits to society, the country and the environment.

KEYWORDS: PETI, Constructive of Discretion, transformation of gold mining governance

A. INTRODUCTION

West Kalimantan is currently the second largest province after Central Kalimantan, following the division of Papua into three provinces and the separation of East Kalimantan into North Kalimantan. It has a land area of approximately 146,807 km², which is 7.35% of Indonesia's total area, or 1.13 times the size of Java island. The region stretches straight from north to south for over 600 km and about 850 km from west to east, divided into 14 regions comprising 2 municipalities and 12 districts.

As one of the largest provinces, West Kalimantan possesses significant deposits of both metallic and non-metallic minerals such as bauxite, gold, zircon, silica sand, clay, and uranium, according to data from the Indonesian Mining Experts Association (PERHAPI) representing West Kalimantan. From these mineral resources, a legal and social issue in West Kalimantan is gold mining. The local community considers artisanal and small-scale gold mining as a traditional livelihood passed down through generations and seeks quick returns due to the ease of sale, leading to widespread PETI activities in the region..

Illegal gold mining, from a legal perspective, occurs without any permits and typically takes place on community lands, forest areas, plantation concessions, river basins, and even encroaches into residential areas in West Kalimantan. From a technical standpoint, these operations do not adhere to Good Mining Practice standards and often employ methods that endanger human safety. Economically, such unauthorized mining only benefits specific groups economically and fails to contribute positively to the national or regional economy. Ecologically, illegal gold mining leads to environmental degradation and disrupts local ecosystems, with abandoned sites often left without any effort to rehabilitate the damaged environment. Sociologically, there is resistance from other community members, leading to confrontations with law enforcement and mass mobilization against legal enforcement. Additionally, outsiders flock to these areas, setting up makeshift camps around the mines, leading to various social issues.

Illegal gold mining in West Kalimantan, without fulfilling the five crucial aspects of mining governance, truly provides no benefits whatsoever. It fails to benefit the general public, contribute to national revenues (through taxes and non-tax revenues), or protect the environment, which will be damaged and unavailable for future generations. Law enforcement has been optimally carried out using the ultimatum remedium principle, with operational concepts ranging from preemptive and preventive measures to the primum remedium principle of firm enforcement. Despite this, it has not deterred illegal activities effectively and has even faced mass resistance.

This indicates that enforcement alone cannot solve the issue. Therefore, there is a need for additional measures that are not yet regulated by existing laws but must comply with current legislation. The author proposes a concept of constructive discretion,

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applying Restorative Justice principles to prioritize the beneficial aspects of unauthorized gold mining in West Kalimantan.

B. RESEARCH METHODS

The research method used is qualitative, aiming to examine the concept of constructive discretion as an application of restorative justice emphasizing the benefits of unauthorized gold mining in West Kalimantan. To address existing issues, this research employs a doctrinal legal research approach.

The data sources utilized are secondary data including documents, books, dissertations/theses, legislation, statistical data, and others. These secondary data were obtained through literature review. The data collected were then qualitatively analyzed to answer questions about the concept of constructive discretion in the governance of gold mining.

C. RESULT AND DISCUSSION SENTENCE

1. The widespread occurrence of unauthorized gold mining in West Kalimantan and the resulting impacts of such activities.

Based on Regulation of the Minister of Energy and Mineral Resources of the Republic of Indonesia Number 24 Year 2012, Mining is a series of activities aimed at exploration, excavation, processing, utilization, and sale of mineral resources (minerals, coal, geothermal, oil and gas).

In conducting mining activities, adherence to the Republic of Indonesia Law Number 4 Year 2009 concerning Mineral and Coal Mining is required, which outlines 5 (five) crucial stages in mining operation management that must be observed, namely:

- **First**, conducting general exploration to understand the geological conditions and mineralization indications,
- **Second**, conducting exploration involves surveying the location, form, dimensions, distribution of mineral resources, natural resource quality, social environment, and the natural environment,
- **Third**, conducting feasibility studies involves testing and analyzing economic feasibility, technical feasibility, environmental impact analysis, and post-mining planning,
- **Fourth**, conducting production operations involve construction activities, mining, processing and refining, transportation and sales, and environmental impact control facilities according to feasibility study results,
- **Fifth**, conducting post-mining activities involves implementing reclamation, environmental restoration, and restoring the environmental conditions along with its ecological life.

Certainly, these aspects must consider the business process from legal, technical, economic, ecological, and sociological perspectives. The detailed elaboration of the five crucial aspects to be considered are as follows:

1. From a legal perspective, mining operations must be supported by compliance with regulatory frameworks as mandated by legislation, ensuring that these regulations do not conflict or overlap in terms of authority (worker protection or safeguards),
2. From a technical standpoint, mining companies must adhere to existing guidelines or standards (SOPs) and employ good technology to minimize potential future adverse impacts,
3. From a sociological perspective, mining companies need to consider the aspects of community life to ensure full support from the community and to avoid causing various resistances and impacts on community life,
4. From an ecological standpoint, mining companies must consider the ecological or environmental aspects to ensure that mining activities do not have negative impacts on sustainable environments and ecosystems,
5. From an economic standpoint, mining companies can provide economic benefits both to the country (revenue through taxes, non-tax state revenue, royalties) and to the community (worker wages, etc.).

In theory, conducting mining operations by following the aforementioned stages should not lead to significant risks or impacts on the country, environment, and community because they are supposed to adhere to good mining practices. However, the reality in West Kalimantan shows that illegal gold mining (PETI) remains rampant despite these principles. Illegal gold mining (PETI) in West Kalimantan is mining activity conducted by individuals, groups, or legal entities without proper permits from government agencies as required by applicable laws and regulations. This contradicts what Ibn Khaldun stated in his theory of cycles, where the state, represented by the government, and society should ideally complement and depend on each other. A government policy will be futile if it contradicts the legal sentiments of the society, thus lacking respect. Similarly, community ideas, desires, and needs become challenging to enforce when they are not supported by government policy and lack clear legal grounds. Based on data from the Department of Trade and Industry (Perindag) and the Energy and Mineral Resources (ESDM) Agency of West Kalimantan Province, there are potential reserves of metallic and non-metallic minerals amounting to 69,981,913 tons in the province. Currently, 37 companies hold mining business licenses (IUP) for gold commodities in West Kalimantan, with 16 companies actively operating, 13 companies having their licenses revoked by the Investment Coordinating Board (BKPM), and 8 companies whose IUP have expired.

However, on the other hand, West Kalimantan Province has 907 illegal gold mining (PETI) sites, employing approximately 5,661 workers spread across 13 districts (excluding Pontianak City and North Kayong Regency).

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The emergence of illegal gold mining (PETI) in West Kalimantan was originally driven by the presence of traditional miners, which later expanded due to factors such as poverty, limited job opportunities and business prospects, involvement of middlemen and financiers, disharmony between companies and local communities, as well as prolonged economic crises compounded by misunderstandings about reforms. On the other hand, weaknesses in law enforcement and regulations that neglect artisanal mining practices have also contributed to the proliferation of PETI in West Kalimantan.

PETI activities, which disregard proper mining practices (good mining practice), have resulted in environmental degradation, wastage of mineral resources, and mining accidents. This situation can lead to disasters if not managed properly and responsibly.

The impacts caused by illegal gold mining (PETI) in West Kalimantan can be outlined as follows:

1. **Legal Aspect**, Workers in illegal gold mining (PETI) in West Kalimantan do not have official permits and often do not intend to obtain them, which is normatively and legally unacceptable,
2. **Technical Aspect**, PETI workers in West Kalimantan do not adhere to good mining practices, safety standards, environmental standards, and so forth. As a result, these activities have resulted in the loss of more than approximately 30 PETI workers' lives in the field, due to non-compliance with good mining practices,
3. **Economic aspect**, PETI activities only benefit certain parties. Based on data from the West Kalimantan Regional Office of the Directorate General of Taxes, the gold mining sector contributed approximately 17.2 billion rupiah in the last 3 years. In this regard, PETI activities do not provide economic benefits, neither for the country (government revenue through taxes, non-tax state revenue, royalties) nor for the community (worker wages, etc.),
4. **Ecological Aspect**, PETI activities pose latent health hazards, particularly through the use of mercury which can have fatal long-term effects on human health. This is evidenced by the increasing incidence of stunting in West Kalimantan, where rivers are contaminated by chemicals used in PETI operations. Consequently, river water, which should be used for daily needs, and the fish inhabiting it become unsafe for consumption. Therefore, PETI activities also lead to massive environmental damage and often lack remediation efforts (reclamation),
5. **Sociological Aspect**, PETI activities face resistance from local communities against law enforcement efforts, which frequently emerge across various areas in West Kalimantan. Moreover, environments dominated by male miners contribute to the proliferation of prostitution, free mixing of genders, and narcotics in society. Another impact is the increased number of students skipping school or dropping out to join gold mining, leading to rising illiteracy rates and lower educational attainment among school-aged children.

2. Efforts by local governments and law enforcement agencies to tackle the rampant illegal gold mining in West Kalimantan face various obstacles and challenges.

The issue of illegal gold mining (PETI) is not only a matter of law enforcement or enforcement actions, but also involves social, cultural, and economic issues. Many communities view PETI as a traditional livelihood passed down through generations, rather than as a legal violation. Currently, PETI activities are widespread across almost all regions of West Kalimantan, conducted by various groups from different backgrounds, whether in forests, plantation lands, or even rivers that serve as vital resources for daily life. This activity severely damages the environment, disrupts ecosystems, and poses significant health risks due to environmental pollution caused by PETI operations.

The efforts by the local government to address the rampant illegal gold mining (PETI) in West Kalimantan include providing broad access to mining permits that are easy and affordable, while adhering to the pattern of Community Mining Permits (IPR) as stipulated in Law Number 3 of 2020. Additionally, the local government should provide guidance and oversight of community mining activities (IPR), including technical assistance and funding. This aims to enable communities to work legally by involving community cooperatives.

The central government, local governments, and law enforcement agencies need to continuously conduct socialization and education campaigns to raise awareness among the public about the legal consequences of illegal mining (criminal sanctions), environmental damage, and mining accidents. Additionally, local governments should draft regional regulations that govern the extraction of non-metallic minerals and other rocks excluded from non-metallic mineral and rock tax objects, as stipulated in Article 57 of Law Number 28 of 2009.

The final efforts that local governments can undertake include structural transformation, redirecting the local community's economic activities towards more attractive sectors than illegal gold mining (PETI). This can involve promoting supporting businesses within the mining sector or encouraging diversification into other sectors. Additionally, consistent law enforcement against PETI is crucial, involving law enforcement officials such as the PPNS (Environmental Police) and police authorities from the Indonesian National Police.

The operational concept of the Indonesian National Police, especially the West Kalimantan Regional Police, in efforts to address the rampant PETI activities in West Kalimantan, involves applying preemptive, preventive, and repressive operational concepts. The operational concept is described as follows:

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-Preemptive operational concept:

1. Conducting coordination meetings with the Heads of Departments from relevant agencies to align perceptions so that efforts to combat illegal gold mining can be undertaken together,
2. Mapping out the members of the community and business actors engaged in unauthorized gold mining. According to data from the Department of Energy and Mineral Resources of West Kalimantan Province and the recapitulation by the Criminal Investigation Directorate of West Kalimantan Regional Police, there are 907 locations of unauthorized gold mining sites, accommodating 5,661 workers spread across 13 districts/municipalities, excluding the city of Pontianak and North Kayong Regency. Typically, each miner forms a team consisting of 5-8 members,
3. Conducting a Group Discussion Forum between the community and mining business actors involving local government officials muspida/muspika,
4. Conducting socialization and education for the community and mining business actors through bhabinkamtibmas and relevant stakeholders about the consequences and legal violations of illegal mining PETI activities,
5. Engaging religious leaders, youth leaders, and traditional leaders to support the West Kalimantan Regional Police in efforts to combat illegal mining PETI activities among the community.

- Preventive operational concept:

1. Conducting socialization and education to the community and mining business actors through community police officers and relevant stakeholders about the consequences and legal violations of illegal gold mining PETI activities,
2. Installing signs urging prohibition at locations where illegal gold mining PETI activities occur,
3. Monitoring the circulation of mercury and subsidized fuels in collaboration with BPH Migas, aimed at disrupting the chain of illegal gold mining PETI activities,
4. Monitoring the distribution of tools used for illegal gold mining operations,
5. Coordinating with relevant agencies to provide alternative employment for PETI operators as an alternative livelihood.

Concept of repressive operations:

1. Law enforcement as the ultimate remedy, if preemptive and preventive efforts have been exhausted but illegal gold mining activities (PETI) persist, then Polda Kalbar can take repressive or legal enforcement actions based on the Environmental Law, which also regulates criminal penalties for environmental pollution offenders as stipulated in Article 98. This article states that the criminal penalty for anyone who intentionally conducts actions resulting in exceeding ambient air quality standards, water quality standards, marine water quality standards, or criteria for environmental damage, is imprisonment for a minimum of 3 years and a maximum of 10 years, and a fine ranging from at least Rp. 3,000,000,000 to a maximum of Rp. 10,000,000,000. Paragraph (2) of this article specifies that if such actions cause serious injury or death, the penalty is imprisonment for a minimum of 5 years and a maximum of 15 years, and a fine ranging from at least Rp. 5,000,000,000 to a maximum of Rp. 15,000,000,000.

The role of government officials, especially agencies directly handling legal issues, needs to continuously enhance their work patterns so that they can achieve effective outcomes to the maximum level. Good laws are undoubtedly useless if they are not enforced. Therefore, it requires high-quality resources and supporting infrastructure. In addition, broad public support is a prerequisite for achieving fair law enforcement.

Illegal mining activities (PETI) in the West Kalimantan region can temporarily cease with police operations. This indicates that the perpetrators or financiers of PETI activities take note of police actions, and once these operations conclude, PETI activities typically resume.

Generally, illegal mining (PETI) locations in West Kalimantan are situated in remote inland areas that are difficult to access using R4 or R2 vehicles. This situation can pose a challenge for law enforcement efforts by the police. Furthermore, in enforcing the law against illegal mining (PETI) in West Kalimantan, there are syndicates or networks involved in PETI activities in areas targeted by police operations. This is evidenced by several community members acting as financiers, perpetrators, collectors, or landowners who benefit mutually, allowing PETI activities to persist in West Kalimantan. Law enforcement efforts typically only manage to seize evidence from PETI activities, while the process of apprehending perpetrators or financiers has not been fully carried out to its maximum legal extent.

Illegal gold mining activities (PETI) conducted by communities in West Kalimantan tend to move from place to place, causing environmental damage both at the mining sites themselves and downstream areas due to the flow of PETI waste. The designation of Community Mining Areas (WPR) has been unresponsive to community desires. Therefore, efforts to monitor and control PETI activities in West Kalimantan are inseparable from various issues arising from PETI. From all the PETI activities present, almost all of them are gold mining. This is due to the potential of alluvial gold content spread across almost the entire region of West Kalimantan, and the mining and sales processes are also very easy.

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3. Constructive discretion as the application of restorative justice emphasizes utility, thereby capable of addressing unauthorized gold mining in West Kalimantan.

The concept of constructive discretion arises due to the absence of good mining practices and compliance with regulations, thereby providing no benefits to society, the state, or the environment. Therefore, a constructive discretion concept is needed to transform PETI activities from being entirely non-beneficial to becoming beneficial.

In the context of law enforcement, we often hear the term "discretion". Discretion is needed as a complement to the principle of legality, which is a legal principle stating that every action or administrative act of the state must be based on legal provisions. Police discretion itself is an act of the police in dealing with the dynamic situations of police duties, where there are no clear written provisions, or not governed by any regulations at all, or cannot be implemented due to lack of facilities. Therefore, a member of the Indonesian National Police (Polri) in their duty can apply police discretion to the best of their ability while still adhering to the applicable law at that time to resolve an existing issue.

Constructive discretion itself means making decisions and actions that can be taken under specific conditions due to legal regulations that are incomplete, unclear, or not yet regulated by law, while still considering the applicable principles or norms at that time and prioritizing the principle of utility.

As for the steps of the Indonesian National Police (Polri), especially the West Kalimantan Regional Police (Polda Kalbar), in implementing constructive discretion, they begin with mapping illegal gold mining PETI activities and documenting the potential of areas under Mining Business Licenses (IUP) that can be managed with the concept of local empowerment investment. The main goal of these actions is to eliminate illegal gold mining activities (PETI), while encouraging mining with good mining practices and providing benefits such as creating job opportunities for the community, generating state revenue from tax and non-tax sectors for the country, and minimizing environmental damage risks through reclamation efforts or environmental improvements. In addition, the West Kalimantan Regional Police (Polda Kalbar) also holds Focus Group Discussions (FGD) with mining companies to ensure that the potential holders of Mining Business Licenses (IUP) understand and are ready to optimize production by involving the local community.

Therefore, a concept of constructive discretion is needed in transforming the governance of gold mining in West Kalimantan, specifically through the concept of local empowerment. This can be elaborated by relocating artisanal and small-scale PETI miners into Mining Business License (IUP) concessions of companies, with a minimum allocation of 20% managed by the community, provided that feasible reserves, job opportunities, and revenue potentials for both the state and the community are available. This approach is supported by companies (Mining Business License holders) assisting in providing mining designs that prioritize good mining practices while being implemented in a conventional community concept, and ensuring safety, health, and environmental friendliness are maintained.

The practical and technical framework involves establishing cooperatives that will collaborate with companies. The cooperatives will sell mining outputs to the companies, enabling state revenue collection and ensuring benefits for both parties. Additionally, the framework includes provisions for reclamation costs, which are the responsibility of the Mining Business License (IUP) holders. Companies must provide appropriate chemical technology adhering to mining regulations, and law enforcement serves as a last resort (*ultimum remedium*). The activities aim to educate PETI miners on transitioning from illegal gold mining towards legal practices and fulfilling five critical aspects: legal (juridical), technical, economic, ecological, and sociological. The goal is also to encourage the rehabilitation of former illegal mining sites into productive lands, such as for food security purposes, restoring greenery, and preventing further illegal mining activities.

E. CONCLUSION

1. The law enforcement results of illegal gold mining (PETI) by the West Kalimantan Regional Police show that PETI crimes in West Kalimantan remain significant and occur annually. In its execution, these PETI activities have claimed the lives of more than 30 PETI workers due to non-compliance with Good Mining Practice principles. Other impacts of PETI activities include five aspects: juridical, technical, economic, ecological, and sociological. The final impact is the occurrence of interlinked crimes such as subsidized fuel misuse, drug trafficking, theft, document forgery, and others.
2. Efforts by the local government to address the widespread illegal gold mining (PETI) activities in West Kalimantan include providing broad access to mining permits (easy and affordable licensing), while adhering to the pattern of Community Mining Permits (Izin Pertambangan Rakyat). Additionally, there are efforts in coaching and supervising community mining activities, including providing technical assistance and funding. Furthermore, the local government must establish regulations (Perda) governing the extraction of non-metallic minerals and other rocks exempted from non-metallic mineral and rock tax objects, as stipulated in Article 57 of Law Number 28 of 2009.

The operational concept of the Indonesian National Police (Polri), especially the West Kalimantan Regional Police (Polda Kalbar), in tackling the surge of PETI activities in West Kalimantan involves applying preemptive, preventive, and repressive

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operational concepts. This requires high-quality resources and supporting facilities or infrastructure.

3. The concept of constructive discretion in transforming the governance of gold mining in West Kalimantan involves local empowerment. This can be elaborated by relocating PETI workers into Mining Business License (IUP) concessions, with at least 20% managed by the community. This initiative is supported by companies (Mining Business License holders) providing mining designs that prioritize good mining practices while adhering to conventional community concepts and maintaining safety, health, and environmental friendliness. The practical and technical framework includes establishing cooperatives that collaborate with companies, where the community sells mining outputs to companies for state revenue collection and mutual profit. Additionally, it addresses reclamation costs, which are the responsibility of the IUP holders. Companies must employ chemical technologies compliant with mining regulations, with law enforcement as a last resort (*ultimum remedium*).

F. RECOMMENDATION

That constructive discretion can be a breakthrough solution, can be realized by involving the central and regional governments through assessing the level of success of its implementation. If it provides more benefits (to society, the country, and the environment) than before, then it can be encouraged to have a Regulation of the Minister of Energy and Mineral Resources of Indonesia to complement the implementation of the Mining Law adjusted to the local situation and conditions so that regional leaders through *fokompimda* can take constructive discretion actions appropriately and effectively.

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