The Constitutionality of Indonesian Mining Law Reform

Rosmini[1], Haris Retno Susmiyati[2], Rahmawati Al Hidayah[3], Zainuddin Zainuddin[4], Syifa Nur Aini[5*]

[1, 2, 3] Faculty of Law, Universitas Mulawarman, Samarinda, Indonesia
[4] Faculty of Law, Universitas Muslim Indonesia, Makassar, Indonesia
[5] Master's Student of the Sea and Maritime Law, Ankara University, Ankara, Türkiye

syifa.aini@uni-a.de*

Abstract. Mining extraction in Indonesia has been carried out from the new order to the reformation, with the consequence that thousands of mining licenses have been issued, causing environmental crises and casualties. That is through the dynamics of licensing authority arrangements which still cause controversy. The method used is doctrinal legal research with a qualitative approach. The research focuses on the constitutionally of mining governance after the revision of the mineral and coal law and establishment of the Omnibus Law on Job Creation and the implications of these arrangements for society and the environment. The result shows that the Indonesian constitution emphasises that the state controls the mining resources intending to create the greatest prosperity for the people. The constitutional right of citizens to obtain a good and healthy environment is also guaranteed. However, the mining governance since the new order has only been orientated towards extracting natural resources, which leaves the constitutional mandate for welfare. Mining law reform has instead led to changes in the mining legal system that favour entrepreneurs through simplification of licensing, ease of investment, and ignoring good environmental standards. Mining law reform implies that mining extraction is increasing, worsening the environmental crisis and threatening the safety of citizens. Therefore, mining law reform is needed, which can restore the environment and ensure the safety of citizens.

Keywords: constitutional, reform, law, mining.

1 Introduction

The state has guaranteed that the management of natural resources is for the greatest prosperity of the people. One of the aspects of natural resource management is mineral and coal mining. The exploitation of minerals and coal has long been in this country and has become one of the sectors contributing to energy raw materials. Therefore, this sector is increasingly attracting businesses as the world's energy needs keep increasing. Mining, as a non-renewable natural resource, attracts many parties with its economic value, but it is also a sector that generates many protests and conflicts be-

M. Umiyati et al. (eds.), *Proceedings of the International Conference on "Changing of Law: Business Law, Local Wisdom and Tourism Industry" (ICCLB 2023)*, Advances in Social Science, Education and Humanities Research 804,
https://doi.org/10.2991/978-2-38476-180-7_139

cause mining operations will significantly change the landscape and certainly create huge environmental impacts.

Mining, especially coal, is still the main extractive business supporting the economy in Indonesia. This is clearly seen from the 17.5 million hectares (JATAM; WaterKeeper, 2017) of mining area which contains 7,851 mining permits, consisting of up to 5,285 mining business permits, as well as 2,566 PKP2B and KK (ESDM RI-MODI, 2021). East Kalimantan, one of the provinces on the island of Kalimantan, is the area with the most mining permits. A total of 1,404 mining permits issued by the central and local governments cover 44% of the East Kalimantan area.

Mining extraction in Indonesia has been carried out since the New Order to Reform, and the consequences have been issued thousands of mining licenses, causing environmental crises and casualties. That is followed by the dynamics of licensing authority arrangements that still cause controversy.

The Indonesian Constitution regulates the management of natural resources through the provisions of Article 33 paragraph (3) of the 1945 Constitution, the state as the holder of power over the natural resources has the authority to regulate and manage with the aim for the welfare of the greatest number of Indonesian people. This constitutional mandate is very clearly regulated, which means that the state's authority over natural resources must ensure that the ultimate goal is the welfare of the people. In its progress, criticism has emerged of the practice of mining sector extraction governance which actually provides large profits for mining actors (entrepreneurs) instead of following the constitutional mandate for the welfare of the people.

Mining reform was carried out with the establishment of Law No. 3 of 2020 on the amendment of Law No. 4 of 2009 on Mineral and Coal mining and reinforced by the Omnibus Law on Job Creation. However, the existence of these two regulations has received criticism from various groups because they are considered only to benefit business actors and ignore the environment and society.

This paper focuses on how the constitutionality of mining governance in Indonesia after the amendment of the mineral and coal law and the establishment of the omnibus law on job creation and the implications of these provisions for society and the environment.

2 Methods

The method used in this paper is doctrinal legal research with a qualitative approach. Tracing mining regulations is absolutely essential to find the dynamics of regulatory changes in mining governance in Indonesia. With this approach, researchers examine the text of laws and legal politics that influenced the establishment of regulations in the old order, new order and reformation periods. The analysis of mining governance regulations is directed to answer the constitutionality of mining regulations. The results of this first question will be directed to answer the implications for businesses, the environment and the community.

Coal mining is a significant contributor to deforestation in East Kalimantan. From 2013 to 2016, there has been deforestation of 144,000 hectares Sonny (2020). The release of carbon in forests which are then converted into mining areas, damages the land surface which is difficult to reclaim and restore to its original state. In the end, the mining process will affect climate change. The follow-up impact of extractivism occurs in the last process of extractivism, namely the consumption process. This process directly has a major effect on producing substances, gases and outputs that will affect climate change whose consequences can be felt globally.

Not counting the damage done to the environment and all the ecosystems in it proves that the state still narrowly views the environment as an element that supports human economic activity. The environment is only placed as part of a chain to increase the economic value of other elements for the benefit of the state which is labelled as "increasing the national economy for the benefit of the state" by distorting and misinterpreting the state's right to control which is regulated and guaranteed in the state constitution, the 1945 Constitution. The state has not placed the environment as an entity Hannel (2021) which has rights that must be fulfilled and protected. The environment and all the ecosystems in it have the right to be protected and preserved in a sustainable manner so that it is not destroyed and can also be enjoyed by future generations as a form of justice between generations. Therefore, it is necessary to look at environmental justice Bush (2020) in mining governance.

2.1 The Constitutionality of Mining Governance in Indonesia After the Amendment of Mineral and Coal Law and the Establishment of Omnibuslaw on Job Creation

Mineral and coal mining regulations can be seen in the existing constitution and legislation. The 1945 Constitution as Indonesia's constitution has been amended through 4 amendments. Constitutionally, the purpose of the state affirmed in the fourth paragraph of the preamble of the 1945 Constitution can be inferred as the first goal, the protection of the whole Indonesian nation and the entire native land of Indonesia; secondly, to advance the public welfare; third, to educate the life of the nation, and to participate in the execution of world order which is by virtue of freedom, perpetual peace and social justice. The body of the constitution regulates mining through the provisions of Article 33 paragraph (3): "The land and waters and the natural wealth contained in it shall be controlled by the state and utilised for the optimal welfare of the people." Based on those provisions, the state as the holder of power over natural resources, including mining, does not mean as the owner but is interpreted as the holder of regulatory authority. The authority is intended to create the greatest prosperity for the Indonesian people.

Management efforts refer to the provisions of Article 33 paragraph (2) of the 1945 Constitution, for the branches of production which control the livelihood of the community are organised by the state. The principle of economic management is emphasised in Article 33 paragraph (4), that the national economy is conducted based on economic democracy with the principles of togetherness, equitable efficiency, sus-

tainability, environmental perspective, independence, and maintaining a balance of progress and national economic unity.

The implementation of the authority of the constitutional mandate on mining governance, especially mineral and coal mining, in the old order period (1945-1965) during the reign of President Soekarno, in a state speech, stated that mining excavation material is an important natural resource for all Indonesian people and its existence is limited and non-renewable, so it must be managed very carefully and must be managed by the nation itself. The government's policy of nationalisation of the mining sector which affirmed that the management of natural resources should be under the control of the national government, and the spirit of opposition to foreign investment is strong. The politics of nationalisation became an affirmation of Indonesia's spirit of independence from various forms of colonialism, including the economic sector. This affirmation was important at the beginning of independence after Indonesia had spent three and a half centuries under foreign colonial rule. During the Old Order, parliament formed a working team to examine and formulate mining governance. But before the team's recommendations were implemented, the government changed.

In the New Order period (1966-1998), the reign of President Soeharto brought political choices that were the opposite of the previous period. The New Order government provided an entry point for foreign investment through Law Number 1 of 1967 on Foreign Investment. This regulation contradicts the spirit of nationalisation implemented by the old-order government. The mining sector was targeted for extraction under Law Number 11 of 1967, a special regulation on general mining (regulating non-oil and gas mining).

Through this Mining Law, domestic and foreign investment is not limited to mining extraction, with the condition of obtaining a mining authorisation in the form of a work contract. This regulation opens up opportunities for investment in the mining sector in Indonesia Victor (2015). The mining industry developed during the New Order era by granting large-scale mining areas. The contract of work scheme puts mining businesses and the government, as the holder of state control rights in an equal position as a consequence of the scheme Balbir (2002). This causes supervision to be weak and the position of mining actors to strengthen because the contract cannot be terminated before the contract period expires except by the agreement of the parties. State control over mining actors is weakened Meray (2011). It is difficult for the government to impose new policies in the mining area because it is bound by contracts that have been made before. The mining industry develops with full state facilities.

The environmental responsibility scheme was regulated in 1982 but could not be fully enforced if it conflicted with the previously agreed mining contract. In addition, economically, communities in mining extraction areas do not enjoy the profits of mining due to the centralisation of power that does not give the regions the power to share in the profits of natural extraction, the government's part in the mining sector is managed by the central government.

The Reformation period, which was born from the economic crisis of the New Order era, carried out the people's mandate to make changes in various sectors, including the mining sector. The first change was through Law Number 41 of 1999 on Forestry. In the provisions of Article 38, it is regulated that forest areas that can be mined

are limited to production forest areas and protected forests. Other forest-status areas are prohibited from mining. Especially for protected forest areas, mining activities can only be carried out with a closed pattern mining (underground) and not with an open pit mining pattern.

This provision has attracted protests from both mining entrepreneurs and environmental activists. For environmental activists, opening up forest areas for mining is the same as legalising the destruction of forest areas, while for mining entrepreneurs, the limitation of forest areas that can be mined is a threat to the sustainability of mining activities, especially for 13 mining companies that have obtained mining contracts in protected forest areas with open mining patterns during the New Order era. The government eventually issued a Government Regulation in lieu of Law Number 1 of 2004 that allowed 13 mining companies to conduct open pit mining in protected forest areas. This provision was strengthened by Law Number 1 of 2004.

Mining reform efforts were carried out by establishing Law Number 4 of 2009 on Mineral and Coal Mining. This provision changed the contract scheme in mining to a licensing scheme. All mining companies are required to change the contract scheme to licensing. The licensing scheme gives the government stronger power because the position of the licensor is above the position of the license recipient. Therefore, the government's supervisory control over mining is stronger. This provision is not easily implemented, rejection from mining actors has occurred, and a lawsuit in the Constitutional Court has actually strengthened the obligation of mining actors to comply with the provisions of changing the licensing scheme. However, in reality, mining actors do not change their licences under the excuse that their mining contracts are still valid. The spirit of transparency is seen in the provisions of Law Number 4 of 2009, by requiring the granting of licences through an auction scheme with this scheme, obviously bidding for mining locations is carried out openly, not based on closed agreements between the government and entrepreneurs.

The reformation period gives great authority to the regions in the mining sector, and this triggers a stretch in the regions to issue mining licences. The sale of mining licences occurred, along with the authority of local governments to issue mining licences. One of them is Samarinda City, the capital of East Kalimantan Province, 71% of its area is a mining area. Mining operations in the city are the main cause of floods. Mining conducted without maximum state supervision has resulted in the abandonment of mining pits without reclamation, which has resulted in 44 children drowning in mining pits spread across East Kalimantan Province, and the most victims are in Samarinda City Haris (2021).

In 2020, mining sector reform was again carried out through the issuance of Law Number 3 of 2020 on the amendment of Law Number 4 of 2009. This regulatory change can be suspected to be closely related to the 6 mining contracts of work that expire in the 2020-2023 period. The provisions in the new regulation again revive the contract scheme in the mining sector, the scheme that is considered to be the problem of the difficulty of government control over mining. This provision enabled the extension of mining contracts without going through an auction scheme as regulated in the provisions of Law Number 4 of 2009. The expansion of mining areas occurs by claiming all of Indonesia's land area and continental shelf as mining areas Ali (2020).

The amendment of this regulation strongly indicates the provision of a red carpet for mining Haris (2022).

Moreover, facilitation for mining actors has strengthened with the issuance of Law Number 11 of 2020 on Job Creation. In the regulation of the Omnibus law scheme, there are provisions that favour mining actors. Among them, first: changing the status of the environmental impact analysis document - commonly abbreviated as Analisis Mengenai Dampak Lingkungan Hidup (AMDAL), which was previously a basic provision for granting permits, was changed to just one of the considerations. This provision has a huge impact because without AMDAL approval which involves the community, permits can still be granted on the basis of other considerations. Secondly, the removal of the obligation to allocate a minimum of 30% of forest area is a serious threat to forest areas. Third, the change of the scheme of the Forest Area Borrow-to-Use Permit - commonly abbreviated as Izin Pinjam Pakai Kawasan Hutan (IPPKH) to the scheme of the Borrow-to-Use Permit - commonly abbreviated as Pinjam Pakai Kawasan Hutan (PPKH), removing the permit scheme and strengthening the contract scheme which obviously benefits business actors. Fourth, the elimination of the strict liability scheme for the environment. Without a scheme of absolute responsibility for environmental issues, it becomes increasingly difficult to force the perpetrators of environmental damage and pollution to take responsibility. Fifth, the centralisation of the natural resources sector, including mining, removes regional authority.

The Job Creation Law received protests from various parties which led to a lawsuit at the Constitutional Court. In the Constitutional Court's decision, it was stated that the Job Creation

Law did not fulfil the formal requirements, and the government is required to make changes to these provisions. The revisions made are outlined in the provisions of Law Number 6 of 2023, but substantively they are not much different from the provisions in Law Number 11 of 2020. Strengthening facilitation for mining actors also weakens and even eliminates aspects of environmental protection, regional authority and state control.

Implication of Licensing System Change in Omnibus Law on Job Creation to Mining Governance The government stated that changes to the licensing system in the omnibus law were made to facilitate investment. Through an integrated licensing system using technology that is expected to provide convenience for the community, especially public services that are fast, easy, transparent and full of responsibility carried out by the government. This regulation is detailed in several derivative regulations, one of which is Government Regulation Number 5 of 2021 on the implementation of risk-based business licensing. Risk-based business licensing governance consists of risk-based business licensing arrangements, norms, standards, procedures, and risk-based business licensing criteria, licensing through the OSS system, supervision procedures, evaluation and licensing policy reform, licensing funding, settlement of problems and licensing obstacles and sanctions.

Meanwhile, the stipulation of risk-based business licensing policy consists of marine and fisheries, agriculture, environment and forestry, energy and mineral resources, nuclear power, industry, trade, public works and public housing, transportation, health, medicine, food, education and culture, tourism, religion, post, telecom-

munications, broadcasting, system and electronic transactions, land and security, and husbandry.

The risk-based licensing mentioned above, including mineral resources and the environment, needs to be guided and supervised by the minister/head of institution, governor, regent/mayor, in accordance with their respective authorities to maintain and prevent pollution and environmental damage due to these activities. Risk Analysis must be conducted transparently, accountably and prioritise the principle of prudence based on data and/or professional judgement.

The convenience provided to investors in the Omnibus Law on Work Creation and the Mineral and Coal Law amendment through simplifying business licensing and the time limit specified in the attachment of Government Regulations in 2021. The provision in Law Number 3 of 2020 on mineral and coal mining concerning simplification of business licensing requires a change in mindset (change management) and adjustments to the work procedures for implementing business licensing services (business process re-engineering) and requires a regulation (re-design) of business licensing business processes in the electronic business licensing system.

Furthermore, through the application of that concept, the implementation of business licensing can be more effective and simple because not all business activities are required to have a licence, this will pose a risk of pollution and environmental damage if there is no prevention, supervision and strict sanctions for entrepreneurs who violate licences that have been granted/issued by the government to entrepreneurs to carry out their activities.

Moreover, this is proven in Indonesia, in one of the East Kalimantan Provinces, which has natural resources, especially coal mines, in the Regional Spatial Plan is still giving space for entrepreneurs for coal mining areas. That will result in more ease of business licensing according to the constitution of mining amendments in 2020. To evaluate the impact of Law Number 3 of 2020 on mineral and coal mining, it is necessary to conduct continuous monitoring and evaluation to ensure that its implementation is going well, in line with the principles of sustainable mining and provides equal benefits for the community and the environment. Apart from having implications for the environment, these two regulations also have an impact on businesses. One of them is creating a more attractive investment climate for foreign and domestic investors. By simplifying the investment licensing process, it can improve welfare and job satisfaction and provide encouragement to the business sector to develop new jobs. Mining regulations can improve the management, supervision, and sustainable utilisation of coal resources, as well as provide protection to the mining-related environment. Law Number 3 of 2020 brings significant changes in the mineral and coal mining sector. Furthermore, mineral and coal mining companies have obtained a licence in the form of a mining contract.

Some of the important changes include increased supervision of mining activities, implementation of sustainable mining principles, and changes in the licensing system and granting of mining business licences. Significant positive impacts on society. One of the positive impacts is increased supervision of mining activities which is expected to reduce environmental offences and misuse of mineral and coal resources. This law also affirms the social responsibility and environmental responsibility of mining com-

panies, also provides a stronger legal basis for the protection of indigenous peoples' rights in respect of mining activities. On the other hand, the implementation of sustainable mining principles can provide better protection for the environment, as well as provide long-term benefits for communities by ensuring the sustainability of mineral and coal resources.

Additionally, other implications will certainly have an impact on people's lives. The negative impact on society is the potential of conflict between mining companies and society regarding the management of mineral and coal resources. In addition, changes in the licensing system and the granting of mining business licences may affect the stability of investment and economic growth of regions that depend on the mining sector. Therefore, strict supervision and prudent policies are required in the implementation of this law to minimise any negative impacts that may arise. The Mineral and Coal Mining Law has more direct implications for the environment because it regulates mineral and coal mining activities that can have negative impacts on the environment, such as ecosystem damage and pollution.

Those impacts implement strict supervision of mining activities to minimise environmental negative impacts. Strengthen the protection and involvement of local people, especially indigenous peoples, in decision-making related to mining activities. Encourage transparency and accountability in licensing and management of the mining sector. Furthermore, both the Job Creation Law and the Mining Law have diverse impacts on communities. Although there are significant positive impacts, it is necessary to comprehensively evaluate the negative impacts and the policy actions needed to minimise these impacts. Therefore, with good monitoring and prudent implementation, it is hoped that these two laws can provide equal and sustainable benefits to the people of Indonesia and a sustainable environment.

3 Conclusion

Mining law reform has instead led to changes in the mining legal system that are pro-entrepreneurs through the simplification of licensing, ease of investment and ignoring good environmental standards. The implication of mining law reform is that mining extraction has increased, exacerbating the environmental crisis and threatening the safety of citizens.

Recommendation

With the results of this paper, we recommend conducting mining law reform which is able to restore the environment and ensure the safety of citizens. However, no changes in the name of mining law reform like the current one that only facilitates investment and ignores the environment and society.

References

1. Ali Mardi, 2020. Impact of Law No. 3 of 2020 on Indonesia's Mining Sector. Deloitte Indonesia Business and Industry Updates.
2. Bush, R. (2020) Contested extractivism, society and the state: struggles over mining and land,
3. Review of African Political Economy. doi: 10.1080/03056244.2020.1826194.
4. Balbir Bhasin dan Jennifer McKay, "Mining Law and Policy in Indonesia: Reforms of the Contract of Work Model to Promote Foreign Direct Investment and Sustainibility", Australian Mining and Petroleum Law Journal Volume 21 Number 1 (April 2002)
5. Hamel, V. A. (2021) 'Air Sebagai Entitas Keadilan: Refleksi Akademik Pendekatam Environmental Justice dalam Krisis Air di Bali', Journal of Contemporary Public Administration (JCPA), 1(2), pp. 56–64. doi: 10.22225/jcpa.1.2.4257.56-64.
6. Haris Retno, 2021. Legal Construction of Post Mining Reclamation In Indonesia. Proceedings of the Joint Symposium on Tropical Studies, Advances in Biological Sciences Research, Volume 11.
7. Haris Retno & Siti Maimunah, Tubuh Tanah Air, Inside Indonesia, April – Juni 2022. https://www.insideindonesia.org/editions/edition-148-apr-jun-2022/tubuh-tanah-air
8. Meray Hendrik Mezak, "Pengaturan Hak Penguasaan Negara atas Pertambangan Studi Perbandingan Konsepsi Kontrak Karya dengan Izin Usaha Pertambangan", Law Review Volume XI Nomor 1 Juli 2011
9. Sonny, S. and Wardhana, I. (2020) 'Pertambangan Dan Deforestasi: Studi Perizinan Tambang Batubara Di Provinsi Kalimantan Timur', Jurnal Renaissance, 5(2), p. 681. doi: 10.53878/jr.v5i2.120.
10. The 1945 Constitution of the Republic of Indonesia, https://jdih.bapeten.go.id/unggah/dokumen/peraturan/116-full.pdf
11. Victor Imanuel, Hak Menguasai Negara Atas Mineral dan Batubara Pasca Berlakunya Undang-Undang Minerba. Jurnal Konstitusi, Volume 9 Nomor 3 September 2012