

Implication of Coal Mining Permit Governance to Environmental Degradation in East Kalimantan

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ABSTRACT

This article analyzes the regulation dynamics regarding coal mining permit governance and its impact on environmental degradation. This paper addresses two main issues. First, it explores the dynamics of coal mining regulations and to what extent they create legal uncertainty in coal mining permit governance. Second, it investigates the implications of the legal uncertainty to the environmental damage around the mining sites. The findings demonstrate that two factors have driven policies and laws in the coal mining sector for over a decade. First, coal mining legislation relates to other industries such as the environment, forestry, spatial planning, and regional governance. Besides, the regulations are multi-level, where the authority lies with the central, provincial, and district/city governments. The second is legislative capture, where licensing legal norms are "co-opted" by particular economic interests. Such policies and laws dynamics lead to uncertainty in the permit governance of the coal mining sector. Further, the legal uncertainty that makes a permit has failed to control coal mining activities and protect citizens' access to a good and healthy environment. On the contrary, permit demonstrated the opposite role: becoming a legal instrument that drives environmental damage and pollution.

Keywords: Coal Mining; Permit Governance; Environmental Degradation; East Kalimantan

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INTRODUCTION

Commitment to realizing sustainable development goals (SDGs) drives the government to evaluate a number of policies and programs for development and economic improvement.¹ The demand for the use of environmentally friendly energy, for example, has prompted a discourse about whether the exploitation of natural resources, especially coal mining, only prioritizes economic interests or also considers the environment's carrying capacity.²

¹ Bappenas. 2019. *Roadmap of SDGs Indonesia Towards 2030*. Jakarta: Badan Perencanaan Pembangunan Nasional

² See for instance: van Tilburg, Xander, et al. 2016. *Energy Security as Positive Force for Green Growth in Indonesia?* Available at: <https://www.clingendael.org/sites/default/files/pdfs/Energy_security_green_growth_Indonesia.pdf> [Accessed: 13 January 2019; International Renewable Energy Agency/IRENA, (2017). *Renewable Energy Prospects: Indonesia, a REmap Analysis*. Available at: <<http://www.irena.org/remap>> [Accessed: 25 February 2019; David Braithwaite and Ivetta

The Indonesian government have established several laws and procedures in order to satisfy the growing concern of sustainability issues.³ Coal exports undeniably have been one of the main pillars of the Indonesian economy for more than a decade. During 2017-2021, for instance, the coal mining industry contributed approximately 2.5 percent of Indonesia's gross domestic product.⁴ However, on the other hand, coal mining is often considered an extractive industry⁵ with destructive power to the surrounding area. The rapid growth of coal mining and its unstructured expansion has created many problems, including environmental degradation, deforestation, corruption, and overlapping land claims. Mining companies also often violate their obligations to rehabilitate ex-mining land and leave ecosystem damage on their concessions.

The debate about the "plus-minus" of coal mining has caused the governance of this sector, especially licensing, to experience quite intense dynamics. At least two factors influence the dynamics; firstly, the regulation of the coal mining is closely related to other sectors such as the environment, forestry, spatial planning, and government. For example, the National Legal Development Agency identified 15 laws, ten government regulations, 16 ministerial regulations, one presidential regulation, and three presidential instructions related to the mining sector.⁶ Second, the sectoral authorities are also multi-level (central, provincial, and district). Further, both cause legal uncertainty in the mining sector, particularly in terms of permit governance, and can lead to environmental damage or pollution in terms of licensing. It is, of course, against the spirit of the permit as a legal instrument that intends to control and manage the activities of coal mining companies to respect the rights and interests of the community and protect and preserve the environmental functions around their concession areas.

To investigate such issues, the author chose the province of East Kalimantan as the site considering three reasons. First, this province provides about 5,2 million hectares for coal mining in its 2016-2036 spatial planning document or about 40 percent of its land. Second, East Kalimantan holds 9,5 million tonnes or 38 percent of Indonesia's national coal reserves, making this province's coal production and exports dominate at the national level. In 2021, for example, East Kalimantan provided a 47.35 percent share of national coal production, reaching 288 million tons. Meanwhile, East Kalimantan's coal

Gerasimchuk, (2019). *Beyond Fossil Fuels: Indonesia's Fiscal Transition*. Available at: <www.iisd.org/gsi> [Accessed: 20 December 2020].

³ Limaho, Handoko, Rudy Pramono, and Rio Christiawan. 2022. "Collaboration Between Government and Palm Oil Industry to Achieve Sustainability Development Goals in Indonesia". *Mulawarman Law Review* 7 (1). Samarinda, ID.:1-16. <https://doi.org/10.30872/mulrev.v7i1.757>. page.3

⁴ BPS. 2022. *Statistik Indonesia 2022*. Jakarta: Badan Pusat Statistik. pg. 683

⁵ Haris Retno Susmiyati and Siti Maimunah. 2022. "Tubuh-Tanah Air - Inside Indonesia: The Peoples and Cultures of Indonesia," [Insideindonesia.org](http://insideindonesia.org). <https://www.insideindonesia.org/tubuh-tanah-air-2>.

⁶ BPHN. 2020. *Laporan Akhir Analisis dan Evaluasi Hukum Terkait Pengelolaan Pertambangan Mineral dan Batubara yang Berkelanjutan*. Jakarta: Badan Pembinaan Hukum Nasional. pg. 2

exports contributed 74.37 percent to national coal exports or 236 million tonnes.⁷ The third reason is that coal is the central pillar of East Kalimantan's economy. Between 2017 and 2021, the coal mining sector contributed 34.5 percent to the province's gross regional domestic product (GRDP).⁸

These three factors, undeniable, have encouraged massive coal mining operations in the province, which causes various problems for the environment and communities, such as land conflicts between mining companies and local communities,⁹ disputes over pollution, degrades forests, and poses a risk to the health of the local population.¹⁰

Several articles have examined the implementation of mining regulations in East Kalimantan. Still, they have not specifically addressed the relationship between the dynamic of the rule regarding coal mining permit governance and its impact on environmental degradation. Bakker, for instance, underlined that the political context of conflict settlement and the application of extra-legal intimidation and violence by paramilitary groups on behalf of mining companies contributed to hampering the successful implementation of regulations.¹¹ Besides, Toumbourou et al. found that contestation over legal meanings and definitions limited administrative and judicial capacities to enforce policies and regulations on coal mining reclamation and post-mining rehabilitation in East Kalimantan.¹² Furthermore, Nasir et al. highlighted three main problems that impede effective coal mining governance. Initially, the distribution of authority over district, provincial and national is overlapped and contradictory. The second is a lack of coordination and the slow speed of revising coal mining governance. The third is the existence of multiple permits for the same plots of land and considerable overlap between licenses and other land titles.¹³

⁷ Bank Indonesia, *Laporan Perekonomian Provinsi Kalimantan Timur Mei 2022*. Samarinda: Kantor Perwakilan Bank Indonesia Provinsi Kalimantan Timur. p. 47

⁸ BPS Kalimantan Timur, *Kalimantan Timur dalam Angka 2022*. Samarinda: BPS Kalimantan Timur. p. 681

⁹ See: Fünfgeld, Anna. 2016. 'The State of Coal Mining in East Kalimantan: Towards a Political Ecology of Local Stateness.' *Austrian Journal of South-East Asian Studies*, 9(1). pp. 147-162. <<https://doi.org/0.14764/10.ASEAS-2016.1-9>>; WaterKeeper' Alliance and JATAM (2017), *Hungry Coal: Coal Mining and Food Security in Indonesia*. Jakarta: WaterKeeper' Alliance and JATAM.

¹⁰ Anggraeni, Ike, et al. 2019. 'Environmental Quality On Surrounding Community Of Coal Mining Area In Samarinda, East Kalimantan, Indonesia'. *Public Health of Indonesia*, 5(4). pp. 91-98. <<https://doi.org/10.36685/phi.v5i4.270>>; Kristanti, Rina, et al., (2019) 'Institutional Performance of Mining Reclamation In Forest Areas of East Kalimantan' (2019) *Jurnal Manajemen Hutan*, 25(2), pp. 69-81. <<https://doi.org/10.7226/jtfm.25.2>>

¹¹ Bakker, Laurens. 2016. 'Perceiving Neoliberalism beyond Jakarta' in Michaela Haug, Martin Rössler and Anna Teresa Grumbles (eds), *Rethinking Power Relations in Indonesia*. London [u.a]: Routledge. pp. 117-131.

¹² Toumbourou, Tessa, et al. 2020. 'Energy Research & Social Science Political Ecologies of the Post-Mining Landscape : Activism, Resistance , and Legal Struggles over Kalimantan's Coal Mines'. *Energy Research & Social Science* 65(12) 101476 <<https://doi.org/10.1016/j.erss.2020.101476>>

¹³ Nasir, Mohamad, Laurens Bakker and Toon Van Meijl. 2022. 'Coal Mining Governance in Indonesia: Legal Uncertainty and Contestation'. *Australian Journal of Asian Law*, Vol. 22, No. 1, Article 4: 53-67. Available at SSRN: <https://ssrn.com/abstract=4047425>

This manuscript analyzes the dynamic of regulation regarding coal mining permit governance and its impact on environmental degradation. The author argues that this discussion is essential, considering that the previous papers do not specifically address the implications of the lack of permit governance to the environment around the mining sites. Following the argument, this paper addresses two main issues. First, it explores the dynamics of coal mining regulations and to what extent they create legal uncertainty in coal mining permit governance. Second, it investigates the implications of the legal uncertainty to the environmental damage around the mining sites.

This article begins by outlining the approach that applied to collect and analyze data. Next, analyzes regulation governing coal mining permit. This section also offers a brief overview of legal uncertainty of regulations that emerged from the dynamics of laws and policies on coal mining and related sectors. Subsequently, we illustrate the consequences of the dynamic and legal uncertainty by discussing two cases to demonstrate how coal exploitation can have disastrous consequences for the environment and village settlements.

METHOD

This study applied a desk study approach to analyze the legal framework of government authority related to coal licensing governance. The content of this analysis is based on information gathered through a systematic review of laws and regulations and documents relevant to the governance of coal mining permits. The doctrinal method is used to identify the dynamic of rules and policies that can create the legal uncertainty governing the government's authority regarding coal licensing governance. The doctrinal analysis primarily concerns the extent to which legal texts are consistent and coherent to bring certainty and equality.¹⁴

DISCUSSION

Licensing: an instrument to manage and control natural resource uses

Article 33, paragraph (3) of the 1945 Constitution is the basis of Indonesia's legal framework for managing natural resources. The article states that "the land, waters and natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people." The phrase "shall be under the powers of the state," is then known as state's right to control (*hak menguasai negara*) in the Indonesian legal system.

In recent years, the Indonesian Constitutional Court has broadened the interpretation of this right. The interpretation can be traced to the Constitutional Court's decisions concerning the judicial reviews of Law No. 20 of 2002 on Electrical Power, Law No. 22

¹⁴ See: Dworkin, R. 1986. *Law's Empire*. Harvard University Press; Kissam, P. C. 1988 'The Evaluation of Legal Scholarship', *Washington Law Review*, 63(2), pp. 221–255; Hesselink, M. W. 2009. 'A European Legal Science ? On European private law and scientific method', *European Law Journal*, 15(1), pp. 20–45.

of 2001 on Oil and Natural Gas, and Law No. 7 of 2004 on Water Resources.¹⁵ The court ruled that the phrase 'controlled by the state' in Article 33 paragraph (3) of the constitution means that on land and natural resources, the state holds the public authority of making policies, administering, regulating, managing, and supervising. These five activities needed to be performed for one purpose: the greatest prosperity of the people.¹⁶

The making policy and regulatory functions of the state are carried out through the legislative authority of the people's representative council (regional and central) together with the executive power and the authority to set implementing regulations by the government. Thus, the government carries out the administration function with the authority to issue and revoke permits and concessions. Further, the management function is carried out through a share-holding mechanism or through direct involvement in the management of State-Owned Enterprises or State-Owned Legal Entities as institutional instruments, through which the government utilizes its control over these resources to be used for the greatest prosperity of the people. Finally, the government carries out the function of supervision by the state in order to control and manage natural resources. Implementing this function over the resources is performed and intended for the greatest prosperity of the entire people.¹⁷

The state's obligation to ensure the use of natural resources for the prosperity of the people also implies protecting individuals in their access to natural resources and providing a safe and healthy environment as regulated in Article 28H paragraph (1) of the constitution. This provision states that everyone is entitled to acquire a good and healthy environment. The state, thus, must provide legal instruments to respect, protect and fulfill these rights. In such a context, the law must become an instrument that protects citizens, the environment, and natural resources from excessive or unfair government or private sector power.¹⁸ States should develop and implement regulations that provide for boundaries of obligations and the authority of government, the scope of rights and obligations of the citizens, and mechanisms to protect them or guarantee remedies when violations occur.¹⁹

One of the instruments to realize these obligations is licensing. The granting of permits for exploiting natural resources, for example, implies that the government takes steps and actions to regulate, manage, and supervise. Therefore, licensing regimes, in addition to statutory regulations, are an essential factor in natural resource

¹⁵ Constitutional Court Decisions Case Numbers 002/PUU-I/2003; 05S-059-060-063/PUU-II/2004 and 00S/PUU-III/2005.

¹⁶ Siregar, Fritz Edward and Simon Butt. 2013. 'State Control Over Natural Resources in Indonesia: Implications of the Oil and Natural Gas Law Case of 2012'. *Journal Of Energy & Natural Resources Law*, 31(2). pp.107-121. <<https://doi.org/0.2139/ssrn.2661849>>

¹⁷ Magnar, K., Junaenah, I. and Taufik, G. A. 2010. 'Tafsir MK Atas Pasal 33 Uud 1945 : (Studi Atas Putusan MK Mengenai Judicial Review UU No. 7/2004, UU No. 22/2001, dan UU No. 20/2002)', *Jurnal Konstitusi*, 7(1), pp. 111–180.

¹⁸ Mermin, S. 1982. *Law And The Legal System: An Introduction*. Boston: Little, Brown and Co.

¹⁹ Barón Soto, M. and Gómez Velásquez, A. 2015. 'An approach to the state responsibility by an omission in The Inter American Court of Human Rights Jurisprudence', *Revista CES Derecho*, 6(1), pp. 3–17.

governance in Indonesia, particularly in coal mining. The permit has two leading roles. First, a permit is the main instrument for supervising and controlling coal mining activities. Second, a permit is a means of distributing land for coal mining. Therefore, improperly granting a permit will impact the implementation of monitoring and supervision and the land distribution for the parties (community and mining companies).²⁰

Dynamics of Coal Mining Licensing Authority: From Decentralization to Centralization

The authority to grant coal mining permits has experienced dynamics in the last ten years. Law Number 4 of 2009 concerning Mineral and Coal Mining (the 2009 Mining Law) divides the authority to grant permits into three levels of government: district/city (if the mining location is in a district/city), province (if across districts/cities), and central (if cross-provincial). In this period, in the East Kalimantan, according to the East Kalimantan Mining Advocacy Network (Jatam Kaltim), the number of mining business permits as of December 2012 reached 1,488.²¹ This division of authority was later amended through Law No. 23 of 2014 concerning Regional Government, where the jurisdiction to issue permits is only with the provincial government. However, if the mining location is cross-provincial, the central government has the authority to give it. During this period, the government of East Kalimantan province reconciled the mining permit data in March 2019. The evaluation results showed that 386 mining permits were declared clear and clean (CnC) and still valid. In addition, 133 mining permits with CnC status have expired and are still in the process of being extended.²²

In 2020, through Law Number 3 of 2020 concerning Amendments to Law Number 4 of 2009 concerning Mineral and Coal Mining (the 2020 Mining Law), the government decided to centralize mining authority only to the central government. Most revisions are related to mining permits, such as the authority to issue permits and the permit holder's rights and obligations. However, based on Article 173C of the 2020 Mining Law, the provincial government can still exercise its authority for a maximum of six months from the promulgation of the law or until the implementing regulations are issued. However, the jurisdiction is limited to the extension of permits, not to issuing new permits. In this period, the central government reported that up to March 2022, there were 361 coal mining permits in East Kalimantan.²³ Furthermore, through Presidential Regulation Nr. 55 of 2022 concerning Delegation of Authority in Mineral and Coal Mining Management, the central government delegates the authority of

²⁰ Philipus M. Hadjon. 2002. *Pengantar Hukum Administrasi Negara Indonesia*. Surabaya: Yuridika. pp. 4-5

²¹ Tempo. 2013. 'Izin Tambang di Kalimantan Timur Terus Bertambah.' Available at: <https://nasional.tempo.co/read/483967/izin-tambang-di-kalimantan-timur-terus-bertambah>. [Accessed: 15 September 2022].

²² Dinas ESDM Provinsi Kalimantan Timur. 2019. *Daftar Perusahaan IUP Komoditas Batubara Hasil Rekonsiliasi*. Available at: <http://esdm.kaltimprov.go.id/info-publik/daftar-informasi-publik/informasi-setiap-saat.html>. [Accessed: 15 September 2022].

²³ Ditjen Minerba Kementerian ESDM. 2022. *Status IUP Nasional Per Maret 2022*. Available at: <https://www.minerba.esdm.go.id/pdf/233-Status%20IU>. [Accessed: 28 March 2022].

granting people's mining permits (*Izin Pertambangan Rakyat/IPR*) and mining services business permits (*Izin Usaha Jasa Pertambangan/IUJP*) to the provincial government.

Undeniable that policies and regulations' dynamics lead to legal uncertainty in permit governance of coal mining sector. Devi and Prayogo, for instance, argue that legal uncertainty arises because of the absence of implementing regulations or confusing technical directions due to a lack of clarity.²⁴ In addition, Fünfgeld,²⁵ O'Callaghan and Vivoda²⁶ also highlighted a number of regulatory inconsistencies among the central, provincial and local governments and between institutions at these levels of government. Further, The Fraser Institute—an independent research and education organization based in Canada—in its annual survey of mining companies over the past three years (2019-2021), consistently shows a high degree of uncertainty in the interpretation and enforcement of existing regulations by the Indonesian government. The agency refers to the existence of duplication of regulations and inconsistencies.²⁷

The author argues that two factors drive the dynamics of policies and regulations that cause uncertainty in the permit governance of the coal mining sector. First is the linkages between mining and many sectors, such as the environment, spatial planning, forestry, and several other industries. It includes the regulation of each sector, which is also tiered (central, provincial, and district/city), including the mining sector, before enacting the 2020 Mining Law.²⁸ The second factor is the political and economic interests behind the regulation preparation. In this case, a pressure group with a political or economic agenda influences lawmakers in drafting coal mining regulations. The attempt or process to intervene in these policies or regulations is known as regulatory capture.²⁹ The opportunity to influence the legislative process can be traced from the legal policy point of view, which perceives the law as a political product that manifests or crystalize various political wills and interests.³⁰ Besides, similar thoughts also come from a political-economic perspective, such as Stigler's claim that regulation

²⁴ Devi, B. and Prayogo, D. 2013. 'Mining and Development in Indonesia: An Overview of the Regulatory Framework and Policies', *International Mining for Development Centre*

²⁵ Fünfgeld, A. 2016. 'The state of coal mining in East Kalimantan: Towards a political ecology of local stateness', *Austrian Journal of South-East Asian Studies*, 9(1), pp. 147–162. doi: 10.14764/10.ASEAS-2016.1-9

²⁶ Vivoda, Vlado and Callaghan, T. O. 2017. 'Regimes, Mining Investment and Regulatory Risk in the Asia-Pacific Region: Comparative Evaluation and Policy Implications', in O'Callaghan, T. and Graetz, G. (eds) *Mining in the Asia-Pacific, The Political Economy of the Asia Pacific*,. Springer International Publishing

²⁷ Please see: Stedman, Ashley, Jairo Yunis, and Elmira Aliakbari. 2020. *Fraser Institute Annual Survey of Mining Companies 2019*. Fraser Institute. <<http://www.fraserinstitute.org>>; Yunis, Jairo, and Elmira Aliakbari. 2021. *Fraser Institute Annual Survey of Mining Companies 2020*. Fraser Institute. <<http://www.fraserinstitute.org>>; Yunis, Jairo, and Elmira Aliakbari. 2022. *Fraser Institute Annual Survey of Mining Companies 2021*. Fraser Institute. <<http://www.fraserinstitute.org>>

²⁸ Nasir, Mohamad, Laurens Bakker and Toon Van Meijl. 2022. *op.cit.*, pg. 63

²⁹ Dal Bó, E. 2006. 'Regulatory capture: A review', *Oxford Review of Economic Policy*, 22(2), pp. 203–225.

³⁰ Mahfud MD, M. 1998. *Politik Hukum Di Indonesia*. Jakarta: Pustaka LP3ES Indonesia; Borges, M. R. 2017. 'Regulation and Regulatory Capture', *XIV International Colloquium-Papers*, pp. 1–18.

is just a product produced in the market like any other product.³¹ Finally, regulatory capture is a corruption of authority that occurs when political entities, policymakers, or legislative bodies are co-opted to serve particular commercial, ideological, or political interests.³² Artidjo Alkostar (former chief justice) categorizes this phenomenon as political corruption.³³

In Indonesia, the chance for regulatory capture is available. It is, for example, indicated by the close relationship between mining companies and government officials, which can trigger “infidelity” among companies, bureaucrats, and politicians. This business and political collaboration can be seen, among others, in Aburizal Bakrie (former Chairman of the Golkar Party) with Bumi Resources, Prabowo Subianto (Chairman of the Gerindra Party and Minister of Defense) with the Nusantara business group, or Luhut B Panjaitan (a senior figure from the Golkar Party and Coordinating Minister for Maritime Affairs and Investment) with the PT Toba Sejahtera group.³⁴ At the local level, the pattern of regulatory capture plays a role in formulating mining permit policies.³⁵ A study conducted by JATAM Kaltim confirmed it. Research conducted in five districts (Kutai Barat, Kutai Timur, Bulungan, Berau, and Penajam Paser Utara) demonstrated that the number of coal mining permits increased significantly ahead of the regional head election.³⁶

Implications of Legal Uncertainty in Coal Mining Licensing Governance on Environmental Damage

As explained earlier, as a legal instrument, a permit should be able to manage and control the activities of coal mining companies to respect the rights and interests of the community and protect and preserve environmental functions around their concession areas. Nevertheless, unfortunately, some facts as shown in the following cases trigger environmental damage and pollution.

Case of Mulawarman Village

Mulawarman Village is one of the villages in the Tenggara Seberang sub-district, which started from the transmigration location (Separi IV) in Kutai Kartanegara district in 1981 (formerly Kutai district). This village has an area of about 18,000 hectares and consists of a forestry area (15,628 hectares or 87 percent of village areas) and a non-forestry area (2,380 hectares). Furthermore, this non-forestry area covers agriculture

³¹ Carrigan, C. and Coglianese, C. 2016. *Penn Law : Legal Scholarship Repository Capturing Regulatory Reality : Stigler ' s The Theory of Economic Regulation, Faculty Scholarship at Penn Law*. 1650

³² Dal Bó, E. 2006. *Loc.cit.*

³³ Alkostar, A. 2008. *Korupsi Politik Di Negara Modern*. Edited by N. Huda. Yogyakarta: FH UII Press

³⁴ See: JATAM et al. 2019. *Coal Corruption: Shedding Light on Political Corruption in Indonesia ' s Coal Mining Sector*. Jakarta: JATAM

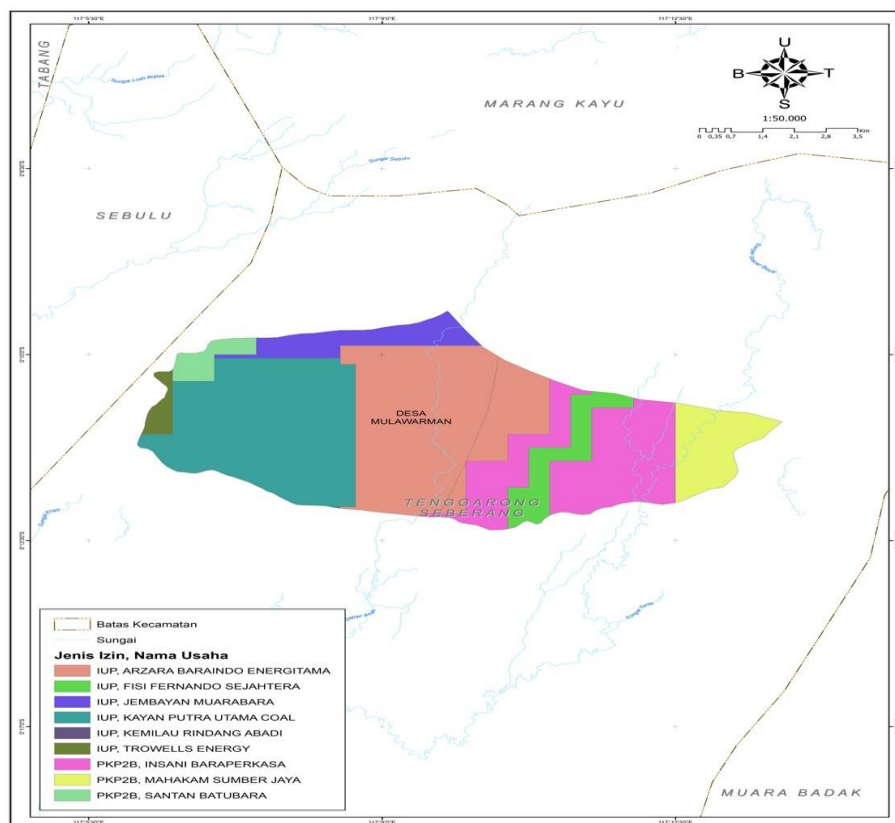
³⁵ Arwanto, B. 2018. 'Political Economy of Coal Mining Policy: A Case Study in Rent Seeking of Surveyor's Data Manipulation in East Kalimantan (2009-2014)', *Journal of Public Administration and Governance*, 8(4), p. 66.

³⁶ JATAM et al. 2019. *op. cit*, pg. 9

(338.88 hectares), residential (103.42 hectares), dry land, mixed gardens and shrubs (1,937.70 hectares).³⁷

In the beginning, the village was inhabited by 263 heads of transmigrant families from East Java, Central Java, and West Java. They occupied about 526 hectares for paddy fields. Farming is the main livelihood of the people in Mulawarman Village. Agriculture in the village was thriving, so in 1997, the Government of Kutai Kartanegara district declared Mulawarman Village as a rice barn for the district.³⁸ In 2003, both the central government and the district government issued a number of coal mining concessions in the village. The Regional Research Council of Kutai Kartanegara Regency reported that in 2013 the entire Mulawarman Village had been allocated to several coal mining companies, such as PT. Kayan Putra Utama Coal, PT. Azara Baraindo Energitama, PT. Kemilau Rindang Abadi, PT. Fisi Fernando Sejahtera, PT. Insani Bara Perkasa, PT. Mahakam Sumber Jaya, dan PT. Santan Batubara.³⁹

Picture 1. Map of Coal Mining Concessions in Mulawarman Village



Source: Processed from East Kalimantan Regional Planning and Development Agency's data (2019)

³⁷ DRD Kutai Kartanegara. 2013. *Kondisi Lingkungan Hidup Di Desa Mulawarman Kecamatan Tenggarong Seberang Kabupaten Kutai Kartanegara*. Tenggarong: Dewan Riset Daerah Kutai Kartanegara. pg. 4

³⁸ Antara Kaltim. 2017. 'Desa Lumbung Padi Terancam Emas Hitam !', 20 April 2017. Available at: <https://kaltim.antaranews.com/berita/37934/desa-lumbung-padi-terancam-emas-hitam>. [Accessed: 27 May 2019]

³⁹ DRD Kutai Kartanegara. 2013. *op. cit.*, pg. 8

The presence of mining companies in the village is slowly reducing rice production because the rice fields are converted into coal mining areas. The head of Mulawarman Village, Mulyono, emphasized that from the area of agricultural land around 526 hectares in 1981, only 20 hectares remain. In addition, coal mining companies have damaged the irrigation system, making it difficult for farmers to grow rice. As a result, the land becomes unproductive, and it makes many villagers have no choice but to sell their fields to coal companies. Meanwhile, the livable areas in the village have also been reduced to 65.75 hectares.⁴⁰

Coal mining activities in Mulawarman village have caused several environmental impacts. First, liquid waste from activities in mining areas has polluted agriculture and settlements. Besides that, it also causes erosion and sedimentation. Second, dust from mining activities has polluted the air and disturbed the residents' respiratory tract. Third, mining activities have damaged the irrigation system and triggered a clean water crisis. Fourth, blasting causes noise, land slides, and cracks in the houses.⁴¹

In response to such conditions, villagers have submitted reports to the local government and the central government and even proposed relocation as an alternative. To follow up on the demands, the district government, members of the Regional People's Representative Assembly, both district and province levels, and even the governor have visited Mulawarman village and promised to solve the problem but have not shown any results.⁴² In addition, local NGOs and student organizations have also attempted to facilitate the resolution of the case, including bringing it to the Presidential Staff Office in February 2017.⁴³ Finally, the last negotiation occurred between the villagers and the mining company (PT. KPUC) on 26 February 2019 and 11 March 2019, and the meeting also reached a dead end.⁴⁴

⁴⁰ Sunan, G. M. 2017. 'Desa Mulawarman, Daerah Transmigrasi yang Terancam Punah, Relokasi Harga Mati', 19 April 2017. Available at: <https://bontangpost.id/11065-desa-mulawarman-daerah-transmigrasi-yang-terancam-punah-relokasi-harga-mati/>. [Accessed: 4 March 2020]

⁴¹ Jawa Pos. 2017. 'Desa di Kukar Perlahan Menghilang , 3000 Warga Minta Relokasi, 20 April 2017. Available at: <https://www.jawapos.com/jpg-today/20/04/2017/desa-di-kukar-perlahan-menghilang-3000-warga-minta-relokasi/> [Accessed: 4 March 2020]; Kaltim Post (2020) 'Terancam Longsor, Warga Desa Mulawarman Mengungsi', 20 February 2020. Available at: <https://kaltim.prokal.co/read/news/367336-terancam-longsor-warga-desa-mulawarman-mengungsi.html>. [Accessed: 20 February 2020]

⁴² Tribun Kaltim. 2017. "Dikepung Tambang', Delapan Perusahaan Bakal Benahi Desa Mulawarman', 10 September 2017. Available at: <https://kaltim.tribunnews.com/2017/09/10/dikepung-tambang-delapan-perusahaan-bakal-benahi-desa-mulawarman>. [Accessed: 3 March 2020]; KlikKaltim (2017) 'Gubernur Segera Tutup Tambang Bermasalah', 18 April 2017. Available at: <http://klikkaltim.com/berita-141-gubernur-segera-tutup-tambang-bermasalah.html>. [Accessed: 5 March 2020]

⁴³ KSP. 2017. *Memperjuangkan Keluhan Transmigran Mulawarman*. Available at: <http://ksp.go.id/memperjuangkan-keluhan-transmigran-mulawarman/> [Accessed: 3 March 2020]

⁴⁴ Muhdar, M., Nasir, M. and Nurdiana, J. 2019. 'Risk Distribution in Coal Mining: Fighting for Environmental Justice in East Kalimantan , Indonesia', (August), pp. 1–15.

Case of Kertabuana Village

Kerta Buana Village is a transmigration settlement project in Teluk Dalam, located in the Kutai Kartanegara district (previously Kutai district). In 1979, the Department of Public Works of East Kalimantan Province developed the area and designated it as a place for general and local transmigration. Gradually, from May 1980 to March 1981, as many as 2,000 families or 8,375 people were placed there. The trans-migrants came from Jakarta, Yogyakarta, Central Java, East Java, West Nusa Tenggara, and Kutai district.⁴⁵

The total area of the village is 23,350 hectares.⁴⁶ Geographically, the village area comprises 35 percent of swamps utilized as agricultural land. The remaining 65 percent is hills used as settlements and dry agricultural land or cultivation areas.⁴⁷

There are two coal mining companies in this village: PT. Kitadin (2000) and PT. Mahakam Sumber Jaya (2004). The coal mining operations of both companies threatened the existence of agricultural land in Kerta Buana Village. Until 2010, from 475 hectares of rice fields, only 398 hectares of fertile rice fields are now. It was further exacerbated by the fact that of the 390 hectares of rice fields, only 80 hectares belonged to the residents, while two mining companies controlled the rest.⁴⁸ Furthermore, in a report, Greenpeace stated that about half of the agricultural land area in Kerta Buana Village (about 700 hectares) had been lost to mining concessions.⁴⁹ PT Kitadin even proposed relocating Kerta Buana Village, which later met resistance from residents.⁵⁰

Like Mulawarman village, coal mining activities in Kerta Buana also impact environmental damage and pollution. First, paddy fields are getting narrower, irrigation sources are destroyed, and it is difficult for farmers to identify the planting season.⁵¹ Second, wastewater from coal mining activities has polluted agricultural and residential areas, as well as causing erosion and sedimentation.⁵² Third, people lose access to clean water.⁵³ Fourth, the blasting activities caused the houses to crack and

⁴⁵ Purba, J., Listiana, D. and Murlianti, S. 2018. *Integrasi Sosial Transmigran Bali Di Desa Kerta Buana, Kabupaten Kutai Kartanegara, Provinsi Kalimantan Timur*. Yogyakarta: Diva Press. pg. 39

⁴⁶ BPS Kutai Kartanegara. 2019. *Kecamatan Tenggarong Seberang Dalam Angka 2019*. Tenggarong: BPS Kutai Kartanegara

⁴⁷ Johansyah, Merah dan Kahar Al Bahri. 2011. *Lumbung Pangan ke Lubang Tambang: Studi Kasus Desa Kertabhuana, Tenggarong Seberang, Kabupaten Kutai Kertanegara*. Samarinda: JATAM Kaltim. pg. 1

⁴⁸ Purba, J., Listiana, D. and Murlianti, S. 2018. *op.cit*, pp.180-184; Prokaltim. 2019. 'Sawah dikepung tambang, PT Kitadin Bantah jadi penyebab', 18 June 2019. Available at: <https://samarinda.prokal.co/read/news/17099-sawah-dikepung-tambang-pt-kitadin-bantah-jadi-penyebab>. [Accessed: 14 May 2020]

⁴⁹ GreenPeace. 2016. *The Dirty Work of Banpu*. Jakarta: GreenPeace. pg. 7

⁵⁰ Purba, J., Listiana, D. and Murlianti, S. 2018. *op. cit*. pp. 157-160

⁵¹ *Op. cit*. pg. 144

⁵² GreenPeace. 2016. *op. cit*. pp. 8-9

⁵³ Yustinus S. Hardjanto. 2016. 'Kertabuana, Desa Penghasil Padi yang Merana Akibat Himpitan Tambang Batubara', 31 August 2016. Available at: <https://www.mongabay.co.id/2016/08/31/kertabuana-desa-penghasil-padi-yang-merana-akibat-himpitan-tambang-batubara/>. [Accessed: 14 May 2020]

landslide.⁵⁴ These environmental damages have sparked protests from the villagers. They held several demonstrations against the company's activities, but to no avail. Coal mining companies or the government have never taken the protests seriously.

The Linkages Between Legal Uncertainty in Licensing Governance and Environmental Damage or Pollution

Legally, granting coal mining licenses in the two villages is not a violation. The 2009 Mining Law and its implementing regulations stipulate that mining activities are permitted in cultivated areas, including production forests, plantations, and settlements. However, in practice, these provisions can potentially cause environmental damage. The cases of Mulawarman Village and Kerta Buana Village show that uncontrolled coal exploitation is a disaster because it destroys the environment and settlements in the village. The relocation option proposed by the residents of Mulawarman village, for example, is a reflection of the community's powerlessness and the form of injustice in the use of natural resources that occurs in the village. Such a situation demonstrates how the regulation and permit that should be able to provide protection do not carry out their functions.

In the cases of Mulawarman and Kerta Buana villages, the two instruments did not work well due to three factors. First is the ambiguity of norms. The 2009 Mining Law explains that coal mining activities are allowed in cultivation areas. Further, the cultivation area is divided into various uses, such as the production forests, plantations, settlements, and industries. The permissibility of cultivation in agricultural (community) and residential areas will trigger problems, as shown by the cases in Mulawarman and Kerta Buana villages.

The ambiguity of the norm is indicated by Provincial Regulation Nr. 1 of 2015 concerning the Regional Spatial Plan of the Province of East Kalimantan (2015-2035). The regulation provides space for a cultivation area of 10,451,331 hectares as follows:

Table 1. Allocation for Cultivation Areas

Allocation	Hectares
Production forests	6.055.793
Plantations and agricultures	3.681.657
Fisheries	187.304
Industries	57.17
Settlements	97.442
Tourism	396.266
Mining	5.227.136
Total	15.702.774

⁵⁴ Purba, J., Listiana, D. and Murlianti, S. 2018. *op. cit.* pp. 93-94 & 176; Muliawan, F. 2019. 'Tekateki Penyebab Amblesnya Pura Prajapati di Tenggarong Seberang', *kaltimkece.id*, 18 June 2019. Available at: <https://kaltimkece.id/warta/terkini/teka-teki-penyebab-amblesnya-pura-prajapati-di-tenggarong-seberang> [Accessed: 14 May 2020]

The table above shows the overlap among sectors and the ambiguous formulation of the land-use allocation. It provides the opportunity for multiple interpretations that cause implementation problems and create legal uncertainty.

The second factor is the inconsistency of norms, which among other things, can be traced from the provisions related to the obligation to provide reclamation and post-mining plans. According to Article 6 of Government Regulation Nr. 78 of 2010 concerning Reclamation and Post-mining (GR Nr. 78 of 2010), the application for extension of the status of exploration to production operations must include reclamation and post-mining plans. In addition, both documents must refer to the environmental permit and environmental impact analysis. If there are alterations to the environmental documents that have been approved, the permit holder must adjust them to the reclamation plan and post-mining plans (Article 14). In addition, GR Nr. 78 of 2010 explicitly states that the reclamation plan document and post-mining plan must comply with the principles, among others, to protect and manage the mining environment (Article 3).

The provisions in the GR are then regulated in more detail in the Minister of Energy and Mineral Resources Regulation Nr. 26 of 2018 concerning the Implementation of Good Mining Rules and Supervision of Mineral and Coal Mining (MoEMR Regulation Nr. 26 of 2018). However, when compared to GR Nr. 78 of 2010, there are three inconsistencies. First, under GR Nr. 78 of 2010, environmental protection and management is a principle a permit holder must fulfill in reclamation and post-mining activities. In contrast, MoEMR Nr. 26 of 2018 no longer set it as an independent principle but as only one of the aspects of good mining technique rules (Article 3 paragraph [3] letter e). Second, MoEMR Nr. 26 of 2018 no longer regulates environmental protection as part of mining activities. Therefore, it is different from GR Nr. 78 of 2010 integrates environmental protection and management in coal mining activities. Even MoEMR Nr. 26 of 2018 only set environmental management, not environmental protection. Third, in contrast to GR Nr. 78 of 2010, MoEMR Nr. 26 of 2018 no longer mentions the obligation to adjust reclamation and post-mining plans with environmental documents.

Although legally, this legal conflict can be resolved by applying the principle of *lex superior derogat legi inferiori*, at the level of implementation, the inconsistency of these norms can trigger problems. In such cases, coal mining companies tend to only comply with the terms in their favor. As a result, the Permit holders no longer consider environmental protection and management as a part of good mining practices. Instead, they exploited coal resources without considering the environmental functions, causing environmental and settlement damage, as in Mulawarman and Kerta Buana villages.

The third factor causing environmental damage is the incompleteness of norms. For example, no regulation on coal mining stipulates the refusal to upgrade the permit status from exploration to production operations if the applicant does not meet the administrative, technical, financial, and environmental requirements. In practice, no provisions explain whether the four conditions are cumulative or alternative—as shown in the case of PT. Marimun Bara Sejahtera (PT. MBS). In July 2018, the company

submitted a request to upgrade its license status from exploration to production operation to the East Kalimantan Provincial One-Stop Investment and Integrated Services Office (Dinas Penanaman Modal dan Pelayanan Terpadu Satu Pintu Provinsi, DPMPTSP). Based on the evaluation, DPMPTSP found that the area requested covers residential areas (172.31 hectares) and horticulture (4,857.94 hectares), so the request was rejected. PT. MBS challenged the decision to the Administrative Court in Samarinda in August 2018. During the trial, the judge concluded that the laws and regulations guarantee exploration permit holders to upgrade their permit status as a guarantee for continued investment. Based on these considerations, the panel of judges ordered DPMPTSP to issue a production operation permit to PT. MBS.⁵⁵

The case above shows a legal vacuum in upgrading the status of an exploration permit to a production operation permit, primarily when the permit holder cannot fulfill all the requirements that have been determined (whether rejected or accepted). This legal gap will undoubtedly become a 'weapon' for coal mining companies to apply for an increase in their licensing status.

CONCLUSION

Regulation dynamics in the coal mining sector have been fast for over a decade. This study found two factors that drive such dynamics. First, coal mining legislation relates to other sectors such as the environment, forestry, spatial planning, and regional governance. The regulations are also multi-level, where the authority lies with the central, provincial, and district/city governments (including mining before the 2020 Mining Law was enacted). Second is legislative capture, where licensing legal norms are "co-opted" by particular economic interests. At the local level, this "co-optation" can be seen from the issuance of permits that are not following procedures and the lack of supervision and evaluation of existing licenses.

Rapid regulatory development in this sector leads to uncertainty in the permit governance of the coal mining sector. This study concluded that such legal uncertainty covers three aspects: ambiguity, inconsistency, and incompleteness of norms. Further, the legal uncertainty of permit governance in the coal mining sector gives rise to permit has failed to perform their function: to control coal mining activities and protect citizens' access to a good and healthy environment. On the contrary, the two cases above demonstrated that the permit has the opposite role: becoming a legal instrument that drives environmental damage and pollution.

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⁵⁵ For further information see: Nasir, Mohamad, Laurens Bakker and Toon Van Meijl, (2022). 'Coal Mining Governance in Indonesia ...'

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