

## HARMONIZATION OF LEGISLATION RELATED TO MINERAL AND COAL MINING FOR LEGAL CERTAINTY OF INVESTMENT IN INDONESIA

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### ABSTRACT

*The fundamental reason for revising Law no. 4 of 2009 concerning mineral and coal mining into Law no. 3 of 2020 is to answer the problems and actual conditions in the implementation of the mineral and coal mining business related to cross-sectoral issues between the mining sector and the non-mining sector to ensure legal certainty for investors who carry out business activities in the mineral and coal mining sector in Indonesia. However, the amendment to the Mineral and Coal Mining Law has further exacerbated problems, especially problems in the non-mining sector such as spatial planning, environmental and land issues, as well as relations between the central and regional governments in granting mining business permits, which are not synchronized with the amendments to the Law. This problem can cause legal uncertainty in implementing investment in the mining business sector because, in the long term, housing is possible to return to the Mineral and Coal Mining Law.*

**Keywords:** Business License, Mining, Mineral and Coal

### INTRODUCTION

Ratification of Law No. 3 of 2020 concerning Amendments to Law No. 4 of 2009 concerning Mineral and Coal Mining caused controversy. It drew many responses and criticisms from various circles because the process of ratifying the Mineral and Coal Mining Law seemed very closed and very fast amid everyone being busy and panicking in the face of the spread of the pandemic covid-19 virus.<sup>1</sup>

There were protests from the parties against the Mineral and Coal Mining Law, but the House of Representatives of the Republic of Indonesia and the Government were still forced to ratify the Mineral and Coal Bill (RUU) for various reasons. The fundamental reason, as stated in the section on the explanation of the Mineral and Coal Law, is that Law no. 4 of 2009 has not been answering the problems and actual conditions in the implementation of the mineral and coal mining business, including cross-sectoral problems between the mining sector and the non-mining sector. The 2009 Mineral and Coal Mining Law improvements are carried out to ensure legal certainty for business actors. In the mineral and coal sector.<sup>2</sup>

However, can the reasons mentioned above be sure to be implemented in Indonesia's implementation of mining business activities? Especially concerning legal certainty guarantees for business actors or investors who invest in mineral and coal mining?

### LEGAL PROBLEMS

Various problems arose in the revision of the 2020 Minerals and coal Law 2020 Law. These problems include the ease with which mining business Licence are granted to business actors, especially when the provisions of Article 165 of the 2009 Minerals and coal mining Law are removed, thus opening up space for the sale of mining business permits, people's mining licence, special mining business licence.

The next problem is that the 2020 Minerals and coal Law seems very exploitative due to the addition of a clause in Article 22 and unlimited land tenure due to changes in Article 42 Paragraphs (1), (2), and (3). "In the Minerals and coal mining Law 2020, it is explained about mining areas, rivers, there, for example, ancient river areas, but there is a maximum content of land reserves that can be mined. That means it can also provide exploratory opportunities for residents,<sup>3</sup> The 2020 Minerals and coal mining Law are also considered to have eliminated the corporation's obligation to reclaim excavations or mining locations after the business license expired as regulated in Article 99 paragraph (2). Another problem is related to the revocation of the authority of local governments in granting Mining Business licence and the authority to supervise the implementation of business mining in the area.

The problems mentioned above certainly have implications for several legal products related to the implementation of the mining business,<sup>4</sup> So this paper is essential to examine the harmonization of laws and regulations relating to Mining and Coal Mining business activities such as the Environmental Law, Forestry Law, Spatial Planning Law, Land Law and Local Government Law to ensure certainty for investors to invest in mineral and coal mining in Indonesia.

<sup>1</sup> The Executive Director of the Center for Energy and Mining Law Studies (Pushep), Bisman Bhaktiar assessed that the Mineral and Coal Bill discussion seemed forced. Because the discussion on the policy revision was carried out during the corona pandemic, he assessed that the process of discussing the Mineral and Coal Bill was closed from the public. "Does not involve public participation seriously". See, <https://pushep.or.id/sepakati-uu-minerba-dpr-dan-government-menuai-banyak-kritik/>. Access date, August 2, 2021.

<sup>2</sup> See the section on Explanation of Law no. 3 of 2020 concerning Amendments to Law No. 4 of 2009 concerning Mineral and Coal Mining.

<sup>3</sup> Ustman A Halimi, in Dani Prabowo, there are at least seven issues in the discussion of the Mineral and Coal Law Bill, Kompas.com - 12/05/2020, 16:55 WIB, see more at, <https://nasional.kompas.com/read/2020/05/12/16553401/at-least-there-are-7-problems-in-discussion-the-Mineral-and-Coal-Law-bill>. Access August 10, 2021

<sup>4</sup> Sectors related to implementing the mineral and coal mining business, such as the Environment sector, spatial planning, and the interests of the community and the region.

## APPROACH METHOD

This study uses a normative legal research method with a statutory *approach*, prioritizing legal material in legislation as essential reference material in conducting research.<sup>5</sup> The statutory *approach* examines the laws and regulations related to mining business activities wherein the norms are still shortcomings or even foster irregularities, either at the technical level or in their implementation in the field. This approach is carried out by reviewing all laws and regulations relating to problems or legal issues regarding mining that are currently being faced. This statutory approach study the consistency/conformity between the Constitution and the Law, or between one Law and another.

The use of data in this study in the form of secondary data which includes; first; Primary legal materials are in the form of binding legal materials, and consist of basic norms (Preamble to the 1945 Constitution of the Republic of Indonesia), Basic Regulations (Body of the 1945 Constitution of the Republic of Indonesia) and Legislative Regulations. Second, secondary legal material explains primary legal materials such as research results, scientific works from the legal community. Third, tertiary Law relates to legal materials that provide instructions and explanations for primary and secondary legal materials, such as the internet, Indonesian language dictionaries.<sup>6</sup>

## FINDINGS AND DISCUSSION

### A. Investment Policy in Mining Sectors

The allure of Indonesia from an investment point of view is the combination of the wealth of natural resources that Indonesia has in its advantageous position.<sup>7</sup> Furthermore, strategic geographical location combined with many human resources has received high ratings on the Human Development Index (HDI). In December 2019, UNDP, for the first time, reported that Indonesia was included in the high human development category with an HDI of 0.707 (UNDP, 2019).<sup>8</sup> Therefore, when the ease of doing business is improved and the Government of Indonesia reaffirms the investment-friendly climate and governance reforms, this sends the proper signal for investors to consider opportunities to invest in Indonesia.<sup>9</sup>

Indonesia has enormous potential for natural mineral and coal resources. Indonesia continues to be an essential player in the global mining industry, with significant coal, copper, gold, tin, bauxite and nickel production. Indonesia also continues to be one of the world's largest exporters of thermal coal. Even during the Covid-19 pandemic, investment in the mining services sector until the third quarter of 2020 reached Rp 70.31 trillion. This number increased significantly, namely 25.4% compared to 2019, which was Rp. 56.07 trillion.<sup>10</sup>

The above conditions show that global mining companies consistently place Indonesia in a high ranking in terms of prospects for coal and minerals, but the assessment of the mining investment policy regime and investment climate has not been so positive.<sup>11</sup> The investment that has not been positive is due to the changing legal policies in arranging and manage the mining sector. Since the enactment of Law no. 4 of 2009 concerning Mineral and Coal Mining, there have been four changes to implementing regulations at the level of Government Regulations (PP). Previously, PP No.23 of 2010 was amended by PP. 24 of 2012. Then amended by PP No. 1 of 2014, then amended again with PP No. 77 of 2014, and the last one became PP. 1 of 2017.<sup>12</sup> It has not even been a decade since the implementation of Law no. 4 of 2009. This Law then underwent a very drastic change.

The conditions mentioned above certainly have a very negative impact on implementing investment in the mining sector. Because mining investment is a type of long-term investment, capital requirements have a very high level of risk. Of the 100 mining companies that carry out exploration, the success rate of finding mineral reserves is usually not more than 50%. The other 50% of the companies failed, so their investment was forfeited failed. Furthermore, for a company that succeeds in finding mineral deposits to continue exploration to the exploration stage, the company must open the mine itself, starting from building access roads, mining facilities, processing plants, and other needs. If in carrying out all these processes, then there is a change in the legal rules related to mining management, then the condition that occurs is the disruption of the mining process, so that investment must stop. Of course, this impacts labour issues and the company's responsibility to restore a damaged environment.

Changes in the rule of Law to accelerate investment in the mining sector that place too much importance on economic interests often clash and even ignore other legal areas such as human rights issues, environmental issues and the rights of the parties involved in mining activities. This problem is undoubtedly alarming and creates uncertainty in the implementation of long-term investments. Moreover, a rule of Law is more concerned with the short-term interests of certain groups or the interests of the ruling group; of course, it has the potential to be cancelled by the Rule of Law.

<sup>5</sup> Soerjono Soekanto and Sri Mamuji, *Penelitian Hukum Normatif (Suatu Tinjauan Singkat)*, Rajawali Pers, Jakarta, 2001, p. 14

<sup>6</sup> Soerjono Soekanto & Sri Mamuji, *ibid.*, p. 13

<sup>7</sup> Data from the Ministry of Energy and Mineral Resources states that bauxite reserves are ranked 7th in the world (4.1%), copper reserves are ranked 5th in the world (8.1%), tin reserves are ranked 2nd in the world (26%) for gold reserves are ranked 7th in the world (2, 3%), and nickel reserves ranked 8th in the world (2.9%). Meanwhile, in terms of mineral production, Reichhl, Schatz, and Zak, in the World-Mining-Data (2016), report that tin (tin) production is ranked 2nd in the world, nickel production is ranked 4th in the world, bauxite production is ranked 10th in the world, and copper production is ranked 4th in the world. cooper) ranked 13th in the world, and gold production (gold) was ranked 14th in the world. In Syahrir Ika, *Downstreaming Mineral Policy: Policy Reform to Increase State Revenue*. Kajian Ekonomi Keuangan, Vol. 1 No. 1 (2017), p. 52

<sup>8</sup> Imelda & Rekan, *Deloitte Touche Solutions, 2020-2021 Investment Window Into Indonesia (IWI)*, PT Deloitte Konsultan Indonesia PT Deloitte Advis Indonesia KJPP Lauw & Rekan. Jakarta, 2020.

<sup>9</sup> *Ibid.*

<sup>10</sup> Anisatul Umah, in the condition of a pandemic, investment in mining services has skyrocketed!, <https://www.cnbcindonesia.com/news/20201216184221-4-209615/di-tengah-pandemi-investasi-jasa-tambang-malah-melonjak>, access on August 2, 2021, at 14.30 WIB

<sup>11</sup> *Mining in Indonesia Investment and Taxation Guide*, May 2018, 10th Edition, [www.pwc.com/id](http://www.pwc.com/id)

<sup>12</sup> M Dani Pratama Huzaini, *Regulasi Labil Berdampak Pada Iklim Investasi Pertambangan*, <https://m.hukumonline.com/berita/baca/lt58cfb53599203/regulasi-labil-berdampak-pada-iklim-investasi-pertambangan>. Access on August 2, 2021, at 14.30 WIB.

Investment policy in the mining sector is more concerned with how legal certainty guarantees investments in the long term, which does not conflict with other sectors' interests. Of course, it is hoped that the Mining Law and its supporting regulatory framework will provide investors with the regulatory certainty needed to spur new investment and strengthen Indonesia's position as a critical player in the mining sector.<sup>13</sup>

In the context of policymaking for changes to the Rule of Law, it is crucial to study more comprehensively whether mining policies and laws are coherent with other national laws relevant to this sector? The Government must ensure that policies for amendments to the Mining Law are in line with other areas of Law. This legal policy must be based on relevant constitutional considerations, such as environmental protection and community empowerment provisions. Several countries have adopted constitutional provisions or laws that guarantee the right to a healthy and safe environment.<sup>14</sup>

Legal policies to support the implementation of investment considerations must be carried out comprehensively, regularly and coherently, both vertically and horizontally. Vertically, of course, based on the order of the laws governing issues of mining business management. Legal rules that regulate technically at a lower level may not conflict with legal rules at a higher level. Likewise, horizontally it is intended that legal policies to support investment implementation should not conflict or conflict with legal rules governing other fields, such as legal rules on spatial planning, environmental laws and human rights.

The government should have a much broader set of legal policies relevant to economic and social development in this position.<sup>15</sup> Benefits of the mining sector while preventing or mitigating adverse impacts on environmental protection, protection of human rights, protection of labour laws, laws on gender equality, on child protection, on land allocation, and the Law on regional Government in the context of implementing regional autonomy which has become the nation's commitment.<sup>16</sup> Legal policies adopted to support investment implementation should be integrated with various other fields.

## B. Mining Business Related to Other Sectors

Mining business activities that cannot be separated from other sectors, such as the spatial planning, environmental, and land sectors, are closely related to the local community and government's interests. Therefore, mining business activities cannot be separated from these various fields, and they must be carried out in a synergistic and integrated manner to support each other. If only one sector is prioritized by ignoring the interests of other fields, then what happens is that there is a comparison in the implementation of development. The fields that have a direct relationship with mining business activities can be explained as follows:

### 1. Mining Business Related to Spatial Planning

Mining business activities in an area or area should be in an integrated spatial system that aims to create a safe, comfortable, productive, and sustainable national space based on the Archipelago Insight and National Resilience to protect spatial functions and prevention of negative impacts can be realized. To the environment due to the use of space. To realize the mandate of Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia as a constitutional basis for the utilization of mineral and coal resources, Law no. 26 of 2007 concerning Spatial Planning states that the state organizes spatial planning, the implementation of which is carried out by the government and local governments while respecting the rights of everyone.

Meanwhile, Mining Areas have mineral and/or coal potential and are not bound by government administrative boundaries, part of the national spatial plan. Mining Areas as the basis for mining activities determined the Government after being the regional Government and consultation with the DPR. Mining Areas is located in the land area or sea area, with the criteria of rock formation that carries minerals and/or coal or potential solid/liquid mining material resources. Mining Areas planning is prepared through stages such as (1) inventory of mining potentials aimed at finding mineral and/or coal potential and (2) preparation of Mining Areas plans. The contents of the Mining Areas are data and information containing:<sup>17</sup>

- a. Rock formations carrying metallic minerals and/or coal;
- b. Geological data resulting from the evaluation of mining activities that are in progress, have ended, or have been returned;
- c. Licensing data from the inventory of Licencethat are still valid, have expired, or have been returned;
- d. Remote sensing interpretation is in the form of lithological structure/distribution patterns.

Regulations related to Mining Areas in Minerals and Coal Mining Law No. 4 of 2009 pay attention to spatial planning, as explained in Article 9 of the 2009 Mineral and Coal Mining Law that Mining Areas as part of national spatial planning is the basis for determining mining business activities to be part of Mining Legal Area. As part of the national spatial plan, the determination of the Mining Areas must consider the integration and sustainable use of space based on the carrying capacity of the environment. Consequently, spatial planning and Strategic Environmental Studies (KLHS) as instruments for preventing and/or environmental damage are the basis for determining Mining Areas. The integration of impacts on ecosystems in spatial planning, as stated in the KLHS, is critical and needed to achieve a quality of life that is qualified and balanced between economic use and environmental protection. The use of KLHS in principle is the need for business actors to consider the social, economic, and environmental aspects of spatial planning so that there is clarity and certainty regarding what actions need to be taken to maintain this balance which will later be contained in obligations in the form of permits.<sup>18</sup>

<sup>13</sup> Mining in Indonesia Investment and Taxation Guide, May 2018, 10th Edition, [www.pwc.com/id](http://www.pwc.com/id).

<sup>14</sup> UNEP, Environmental Law Institute, "Environmental Rule of Law Discussion Paper," (Dec 2016), p. 3. (on file).

<sup>15</sup> L. Cotula, "Foreign investment, law and sustainable development: A handbook on agriculture and extractive industries," (2016), p. 26, <http://pubs.iied.org/pdfs/12587IIED.pdf>.

<sup>16</sup> IISD, "The Mining Policy Framework: Assessing the implementation readiness of member states of the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development - Synthesis Report," (2015), <http://www.iisd.org/sites/default/files/publications/mining-policy-framework-synthesis-report.pdf>

<sup>17</sup> Dida Rachma Wandayati, Nur Rahmadayana Siregar, Wilayah Pertambangan Pasca UU No. 3 Tahun 2020 Tentang Pertambangan Mineral dan Batubara di Masa Yang Akan Datang, *Paradigma Jurnal Multidisipliner Mahasiswa Pascasarjana*, Vol. 1 No. 1 (2020).

<sup>18</sup> ICEL, 2020, Beberapa Kritik Hukum Terhadap Perubahan UU No. 4 Tahun 2009 Tentang Mineral dan Batubara. [https://icel.or.id/wp-content/uploads/Seri-Analisis-ICEL-Minerba.rev1\\_1.pdf](https://icel.or.id/wp-content/uploads/Seri-Analisis-ICEL-Minerba.rev1_1.pdf)

Meanwhile, in the amendment to the Minerals and Coal Mining Law no. 3 of 2020, dividing the area in the mining business which includes the Legal Mining Area, Mining Area, Mining Business Area, Mining Business Licence Area, People's Mining Area, State Reserve Area, Special Mining Business Area and Special Mining Business License Area. The regulation on mining areas in the Mineral and Coal Mining Law can change the status of mining areas without taking into account the spatial planning previously regulated in Minerals and Coal Mining Law no. 4 of 2009.<sup>19</sup> In Minerals and Coal Mining Law no. 3 of 2020, Mining Legal Area is defined as all land space, sea space, including space within the earth as a single territorial unit, namely the Indonesian archipelago, the land under the waters of the continental shelf. This Law confirms that all objects, from the mining area with the broadest scale to the IUP/IUPB/SIPB on the most miniature scale, are within the Mining Legal Area environment.

The Mining Legal Area concept arrangement sets aside notes related to the arrangement and its relation to spatial planning. In-Law no. 3 of 2020 does not mention how the principles of Mining Legal Area preparation are related to spatial planning. Article 6 paragraph (1) of Law no. 26 of 2007 concerning Spatial Planning stipulates that spatial planning must be carried out by taking into account (a) disaster-prone areas, (b) potential natural resources, human resources, and artificial resources, economic, social, political culture, Law, defence conditions. Security, environment, science and technology as a unit, geostrategy, geopolitics, and geoeconomics. However, in the latest minerals and coal mining Law, no provision states how the position and determination of Mining Legal Area are in the national spatial planning concept; this is as the comprehensive definition of Mining Legal Area. Spatial planning and space use policies have a crucial role in managing trade-offs between economic use, environmental protection, and social benefits to achieve sustainable development.

Minerals and Coal Mining Law no. 3 of 2020 abolishes the Mining Areas, which is part of the national spatial plan, which the Mining Areas replaces to become part of the Mining Legal Area, which has no prior stipulation and covers all regions in Indonesia. Whereas in Article 10 paragraph (2), it is explained that the Mining Areas needs to be determined considering the ecological, economic, human rights, social, cultural aspects that are environmentally sound. Thus, if a Mining Areas becomes part of a Mining Legal Area for which there is no prior study, it is necessary to ask what environmental protection instruments are used to ensure that the determination of the Mining Areas can take these various aspects into account.<sup>20</sup>

Based on the explanation above, it can be said that the existence of the Minerals and Coal Mining Law 2020 is not in line with the Spatial Plan Law, because the substance of the minerals and coal mining Law no. 3 of 2020, the determination of mining areas are not based on existing spatial plans. However, it is more determined in areas with mineral and/or coal potential and are not bound by government administrative boundaries that are part of the national spatial layout. Of course, this is a separate note, how then in Law no. 3 of 2020 is not based on a previously regulated spatial basis. It is feared that in terms of mining exploration and utilization, it will be far from existing procedures. It is precisely for launching and utilizing mining that mining activities can be carried out without being accompanied by protection of the existing environment because previously, it has been determined in areas categorized as production or protected areas.<sup>21</sup>

## 2. Mining Business related to the Environment

Article 28 paragraph (1) of the 1945 Constitution affirms that the right to a good and healthy environment does not only refer to the physical environment, moreover the right to a decent and clean environment as the essence and existence of human beings to be guaranteed in order to fulfil the right to human life. Substantially. For the right to a good and healthy environment in national Law, it is explicitly stated in Article 65 paragraph (1) of Law Number 32 of 2009 concerning Environmental Protection and Management, stating that:

- a. Everyone has the right to a good and healthy environment as part of human rights;
- b. Everyone has the right to environmental education, access to participation, and access to justice in fulfilling the right to a good and healthy environment;
- c. Everyone has the right to submit proposals/and/or objections to business plans and/or activities that are estimated to have an impact on the environment;
- d. Everyone has the right to play a role in the protection and management of the environment by the laws and regulations;
- e. Everyone has the right to make a complaint due to allegations of environmental pollution and/or destruction.

All mineral and coal mining business activities have a close relationship with environmental Law because of every mining business. It can be said that mining inherently causes environmental degradation, so mining activities are not environmentally friendly.<sup>22</sup> Mining business activities affect all environmental media; land, air, water, flora and fauna, and the social environment of humanity, individual health and safety, affect the local community's lifestyle, cultural survival, social order and economic welfare community.<sup>23</sup> At the exploration stage, which includes surveys, mapping, drilling, and others, in general, it has an impact on the felling of trees and vegetation, the transfer and death of wildlife, and changes in landform through the construction of access roads, camps, excavations, pads, holes, shaft. Although often considered "localized,"<sup>24</sup> the impacts of the exploration phase can displace communities, close off alternative land uses, create social conflict, and, by building roads, open ecosystems that are sensitive to unexpected population influx.<sup>25</sup>

The impact of mining at the stage of exploitation or development is to enlarge all the impacts of land use, ecosystems, and populations above. Mining can destroy large areas of vegetation, topsoil and terrain, the hazard from excavation, landslides, slope

<sup>19</sup> Mining Legal Area was previously contained in Law no. 4 of 2009.

<sup>20</sup> Dida Rachma Wandayati, Nur Rahmadayana Siregar, Wilayah Pertambangan ..., *Op.cit.*

<sup>21</sup> Dida Rachma Wandayati, Nur Rahmadayana Siregar, Wilayah Pertambangan ..., *Ibid.*

<sup>22</sup> Madeline Cohen, A New Menu for the Hard-Rock Cafe: International Mining Ventures and Environmental Cooperation in Developing Countries, 15 Stanford Environmental Law Journal 130, 1996, p; 135, 137.

<sup>23</sup> Eggert, Roderick G, Mining and the Environment: An Introduction and Overview, Mining And The Environment: International Perspectives On Public Policy 1 (Roderick G Eggert ed. 1994, p. 1.

<sup>24</sup> Wälde, Thomas, Environmental Policies towards Mining in Developing Countries, Journal Of Energy & Natural Resources Law, 1992; reprinted in 30 Public Land & Resources Law Digest, 1993. p. 43.

<sup>25</sup> George W. (Rock) Pring, Mining, Environment And Development, A series of papers prepared for the United Nations Conference on Trade and Development (UNCTAD), University of Denver College of Law, p. 7.

failure, collapse, erosion and subsidence. It also eliminates ecosystems and other water users through water-intensive practices and generate noise, dust, development disturbances, and the amount of solid waste in the form of tailings and waste rock dumps (as much as 1,000 units of waste for one unit of mineral output). Toxic chemicals (xanthate, cyanide, sulfate) are used in primary processing, some of the base metals themselves are toxic (lead, mercury, cadmium), and toxic and other gases may be released. (e.g., methane in coal mining, a significant greenhouse gas). Then the quality of surface water, wetlands, groundwater and oceans is negatively affected by the extraction phase of this mining activity. Acid drainage from mines and tailings/waste heaps, leakage and toxic overflow from tailings dams or reagent ponds, metal leaching from waste piles, and sedimentation/erosion from damaged sites and quarries can cause local problems of magnitude and extend to hundreds of kilometres, causing transboundary impacts on people and nature.<sup>26</sup> Likewise, the reclamation stage is also full of problems. Abandoned mines can continue to cause contamination of water supplies, destruction of ecosystems, landforms, and lifestyle impacts.

These environmental hazards and impacts also threaten indigenous cultures, land use, and socio-economic and cultural practices in developing countries with resource-based economies. These disturbances include permanent loss of natural resources, prevention of alternative land uses (for agriculture, forestry, hunting or recreation), degradation and loss of ecosystems, destruction of critical flora and fauna, displacement of populations, the influx of settlements, crime and diversion of individuals and communities from traditional practices to employment and dependence on small-scale or artisanal mining.<sup>27</sup>

Therefore, mining business activities are obliged to maintain the continuity of the carrying capacity and capacity of the environment,<sup>28</sup> because this activity has a considerable destructive power on the environment. Thus the construction of mining law is one of the fields of legal science that has various dimensions, one of which is in the environmental field because the object of mining activities must place environmental aspects as an essential aspect because of the dynamics and changes in the nature and physical changes of the environment, so treatment is needed. Specifically for the environment, it is hoped that the environment managed in the implementation of the mining business will always have a permanent environmental function and power.<sup>29</sup>

However, what happened when the ratification of Law no. 3 of 2020 regulates the essential relationship in mining business activities with environmental utilization. UU no. 3 of 2020, which has expanded the term Mining Legal Area, can damage the environment's carrying capacity. Article 1 paragraph (28a) states that the Mining Legal Area is all land space, sea space, including space within the earth as a single territorial unit, namely the Indonesian archipelago, land underwaters, and the continental shelf. Furthermore, Article 9 states that the Mining Area as part of the Mining Legal Area is the basis for granting mining business activities. In fact, in Law 4 of 2009, the National Spatial Plan is used to reference taxpayers. So in this context, the granting of mining areas no longer refers to the National Spatial Plan. This provision becomes ambiguous and creates legal uncertainty because, in its meaning, it is stated as part of the spatial layout, while the preceding provision states that mining areas are part of the legal mining area.

The determination of mining areas is based solely on the technical aspects of mining and does not care about environmental aspects as stipulated in Article 18 of Law no. 3 of 2020. Article 18 of Law no. 3 of 2020 states that the determination of the area and boundaries of metallic Mineral and Coal Mining Business License Area as referred to in Article 17 must take into account the national Mineral and Coal management plan, availability of data on resources and/or reserves of Mineral or Coal, and area status. Meanwhile, previously, the criteria for determining one or more Mining Business Licence Area in one Mining Areas must be based on geographic location, conservation principles, carrying capacity of environmental protection, optimization of mineral/coal resources, and population density.<sup>30</sup>

This environmental management based on spatial planning, environmental carrying capacity, and conservation is increasingly marginalized in Law no.3 of 2020. The determination of Mining Areas as a legal mining area that shifts the national spatial planning system to the regions can cause serious environmental problems, especially if there are community rights to land management in forest areas that intersect with customary land and customary forests located in mining areas.

### 3. Mining Business related to Land Law

Mining business activities are closely related to land issues. So that this activity often creates conflicts between holders of Mining Business Licence and community rights to land and mining companies in the mining area. This conflict often occurs because the arrangement of legal relations between legal subjects of land ownership and mineral resources has not been regulated regarding the status of land rights, especially the rights of communities in mining areas. The Basic Agrarian Law stipulates that the relationship between people and land is accommodated with 'rights'. In contrast, the relationship between people and mineral and natural coal resources, including other non-land natural resources, is accommodated in the form of a permit.<sup>31</sup>

In simple terms, according to Olan Sitorus, it is stated that the legal relationship with the land is stronger than the legal relationship with mineral and coal resources. Because land rights can only be granted to a legal subject if previously an underlying right, permission can be given to a legal subject even though they have not previously owned the right, the determination of legal relations in land rights on a large scale must be preceded by a location Licenceto ensure that the land to be acquired is by the spatial

<sup>26</sup> George W. (Rock) Pring, Mining, Environment And Development ..., *Ibid*, p. 8.

<sup>27</sup> *Ibid*.

<sup>28</sup> Rangkuti, Siti Sundari, *Perangkat Hukum Lingkungan: Dari Ius Constitutum, Sekali Lagi, Ke Ius Constituendum*, disampaikan pada Seminar "Good Governance and Good Environmental Governance" held by the Faculty of Law, Universitas Airlangga on February 28, 2008 in Surabaya, p. 5

<sup>29</sup> Franky Butar Butar, Penegakan Hukum Lingkungan di Bidang Pertambangan, *Yuridika vol. 25 No. 2, Mei-Agustus 2010: 151*.

<sup>30</sup> Nur Hidayati, Law Number 3 of 2020: Continuous Suffering for the People and the Environment. In, Ahmad Khoiril Umam (ed), Power of the Oligarchy Over Indonesian Mining? Analysis After the Ratification of Law Number 3 of 2020 concerning Mineral and Coal Mining, Paramadina University Jakarta, January 2021, p. 36.

<sup>31</sup> Article 4 in conjunction with Article 8 of Law no. 5 of 1960 UU Pokok Agraria.

layout. Observing the legal character contained in the legal relationship with land and mining materials is essential when the reality shows that the granting of the two legal relationships can occur over space or in the exact location.<sup>32</sup>

Articles 4 and 8 of the Agrarian Law emphasize that the legal relationship with the land is called land rights (the surface of the earth), while the legal relationship in the use of mining materials in the body of the earth is called a permit, namely a Mining Business Permit. In its implementation, the risk of "conflict" between land rights and Mining Business Licence will potentially occur because, in granting, the concept of Mining Area is known as the basis for determining mining activities. The Government determines Mining Areas after coordinating with the Regional Government (Pemda) and consulting with the House of Representatives of the Republic of Indonesia (DPR RI) as stipulated in Article 9 paragraph (2) of the 2009 Mineral and coal mining Law.<sup>33</sup>

And then, the Mining Areas intended for mining businesses is called the Mining Business Area. The Government determines Mining Business Area after coordinating with the regional Government and submitted in writing to the House of Representatives of the Republic of Indonesia.<sup>34</sup> On top of that, Mining Business Licence Area, an Mining Business Permits, is granted. This Mining Areas concept underwent a drastic change in Law no. 3 of 2020 regarding mining areas, as explained in the previous point, which changes the status of mining areas without paying attention to the spatial layout previously regulated in Law no. 4 of 2009.<sup>35</sup> In mineral and coal mining Law no. 3 of 2020, Mining Legal Area is defined as all land space, sea space, including space within the earth as a single territorial unit, namely the Indonesian archipelago, the land under the waters of the continental shelf so that the conflict between land rights as a legal relationship with the land (on the earth's surface) and Mining Business Licence as a legal relationship with mining materials (on the body of the earth) will potentially occur.

It can even be said that conflict is natural because almost all mining minerals are found underground, which is overgrown with forest, so it cannot be avoided but must be faced with making regulations that overlap or are harmonious.<sup>36</sup> This is because the settlement of land rights for mining business activities contains norms and implementation problems. Article 137A paragraph (1) of Law no. 3 of 2020 states that the Central Government undertakes to resolve land rights issues for Mining Business activities as referred to in Article 134, Article 135, Article 136, and Article 137. Meanwhile, paragraph (2) states further provisions regarding the settlement of land rights as referred to in paragraph (1). in paragraph (1) shall be regulated by a Government Regulation. In his explanation, the Central Government resolves land rights issues through mediation if an agreement is not reached between the Mining Business Licence or special mining business licence holders and the land rights holders.

The above provisions raise interpretation problems regarding the right to control the state as interpreted by the Constitutional Court. In addition to this, the provisions of Article 137A paragraph (2) of Law no. 3 of 2020 is still waiting for further arrangements in a Government Regulation (PP), while conflicts during the process of relinquishing land rights continue to occur. The state's transfer of the obligation to settle land rights from Mining Business Licence holders can create legal uncertainty in the centralized licensing process and place the state as an entrepreneur. In such a position, it can be said that; "When land rights conflict with mining business permits, land rights must be defeated".<sup>37</sup>

Therefore, in order to avoid any regulatory conflicts related to the use of land for mining business activities, it is better if the policy is in the context of the settlement of land rights for mineral and coal mining business activities according to the amendment of Law no. 3 of 2020, must still pay attention to the provisions in the the Agrarian Law. This must be seen as an integral part of the regulation of land rights as regulated in Articles 16 and 54 of the the Agrarian Law, namely permanent land rights and temporary land rights. Even if mining business activities are carried out in the earth's womb, it will be a problem if the settlement of land disputes is still not complete, especially if there is a land conflict.

#### 4. Mining Business related to Local Government

One of the severe problems in the revision of the Mineral and Coal Law no. 4 of 2009 is related to the revocation of the authority of local governments in granting mining business Licence by the central Government. Article 4 of Law no. 3 of 2020 changes the authority to grant mining Licence by local governments to the central Government. This provision states that the central government controls minerals and coal; previously, in the 2009 Mineral and Coal Law, the authority to grant this permission was given to the Regional Government. This revision of the Mineral and Coal Law stipulates that all licensing authority is no longer in the local Government, but the central Government withdraws all these authorities.

The amendment to the Mineral and Coal Mining Law has fundamentally changed the legal structure of the relationship between the central government and regional governments in the context of the implementation of regional autonomy as mandated by Article 18 paragraph (5) of the 1945 Constitution, which states that, "Regional governments exercise the widest possible autonomy, except for government which by law is determined as the affairs of the Central Government."<sup>38</sup> This article is the constitutional basis for implementing regional autonomy in various fields, including mineral and coal mining.<sup>39</sup> So that at the implementation level, decentralization of the authority to manage natural resources in the mining sector by regional governments is regulated in detail in the Regional Government Law, as well as the 2009 Mineral and Coal Mining Law. 4 of 2009 concerning Mineral and Coal Mining, among others:

- a. determination of national policies;
- b. making laws and regulations;

<sup>32</sup> Oloan Sitorus, Penataan Hubungan Hukum Dalam Penguasaan, Pemilikan, Penggunaan, Dan Pemanfaatan Sumber Daya Agraria (Studi Awal terhadap Konsep Hak Atas Tanah dan Ijin Usaha Pertambangan), *Bhumi* Vol. 2 No. 1 Mei 2016, p. 6

<sup>33</sup> *Ibid.*

<sup>34</sup> Article 14 ayat (1) the Agrarian Law.

<sup>35</sup> Mining Legal Area was previously contained in the preamble of Mineral and Coal Law no. 4 of 2009.

<sup>36</sup> Abrar Saleng, 2004: 185

<sup>37</sup> Oloan Sitorus, Penataan Hubungan Hukum ..., *Op.cit.*, p. 7

<sup>38</sup> Article 18 paragraph (5) of the 1945 Constitution of the Republic of Indonesia

<sup>39</sup> Nabilla Desyalka Putri dan Dian Agung Wicaksono, Implikasi Legislasi Pengambilalihan Kewenangan Di Bidang Pertambangan Mineral Dan Batubara Oleh Pemerintah Pusat (*Legislation Implication Of The Takeover Authority In Mineral And Coal Mining By The Central Government*), *Jurnal Legislasi Indonesia*, Vol. 13 N0. 01 - Maret 2016: 19 – 32

- c. determination of national standards, guidelines, and criteria;
- d. determination of the national mineral and coal mining Licence system;
- e. determination of the Mining Area which is carried out after coordinating with the regional Government and consulting with the House of Representatives of the Republic of Indonesia;
- f. granting Mining Business Licence, fostering, resolving community conflicts, and supervising mining businesses located across provincial areas and/or sea areas more than 12 (twelve) miles from the coastline;
- g. granting Mining Business Licence for fostering, resolving community conflicts, and supervising mining businesses whose mining locations are in cross-provincial areas and/or sea areas more than 12 (twelve) miles from the coastline;
- h. granting Mining Business Licence, fostering, resolving community conflicts, and supervising mining business production operations that directly impact the environment across provinces and/or in a sea area more than 12 (twelve) miles from the coastline;
- i. granting a special mining business licence for Exploration and a special Mining Business Licence for Production Operation;
- j. evaluation of production operation mining licence issued by local governments, which have caused environmental damage and which do not apply sound mining principles;
- k. stipulation of policies on production, marketing, utilization, and conservation;
- l. establishing policies for cooperation, partnership, and community empowerment;
- m. formulation and determination of non-tax state revenues from mineral and coal mining business results;
- n. fostering and supervising the management of mineral and coal mining carried out by local governments;
- o. fostering and supervising the preparation of regional regulations in the mining sector;
- p. inventory, investigation, and research as well as exploration in order to obtain data and information on minerals and coal as materials for the preparation of Mining Business Areas and State Reserve Areas;

The central government's takeover of all of the above local government authorities contradicts the Constitution and the spirit of implementing regional autonomy. In the long term, it can cause disharmonious relations between the central government and regional governments. This disharmonious relationship between the central government and local governments affects the certainty and convenience of implementing investments in Indonesia's mineral and coal mining sector in Indonesia.

### C. Harmonization of Mining Regulations for Legal Certainty in Investment in Indonesia.

The definition of harmonization concerning laws and regulations, according to L.M. Gandhi, is;

"Adjustment of laws and regulations, government decisions, judges' decisions, legal systems and legal principles to increase legal unity, legal certainty, justice, and comparability, usefulness and legal clarity, without obfuscating and sacrifice legal pluralism if it is necessary."<sup>40</sup>

Harmonization of Law in fields related to mining business activities in principle is a comprehensive study of the laws and regulations related to mining business activities to find out whether these regulations, in various aspects, reflect alignment or conformity with the laws and regulations in the sector. Others, for example, conformity with spatial planning law, environmental law, national land law and local government law, and the interests of local communities. This is because the implementation of mining business without paying attention to the suitability of the Rule of Law with the various sectors will present the face of legal inequality in the implementation of the investment itself.

In general, the steps needed to study the harmonization of legal regulations related to mining business activities are carried out because they are based on several facts that;

- a. Mineral and coal mining business activities cannot stand alone; these activities are closely related to other legal fields, so they have the potential to overlap and cause many conflicts during their implementation. For this reason, it is necessary to conduct an in-depth study of the legislation, especially in terms of the material content of the Law, so that there is no overlap and conflicts between the related regulations.
- b. Environmental Law is increasingly marginalized due to the highly exploitative nature of mineral and coal regulations. The same applies to land law. The status of land ownership, especially community land rights in the area around mining, is increasingly unclear in the mining business Licence policy. At the level of implementation, land rights are always defeated by mining business permits.
- c. The fact that there is a revocation of the authority of the Regional Government in granting mining business Licence by the Central Government. This fact cannot be avoided if, in the long term, it will cause conflicts between the central Government and local governments, which can disrupt the relationship between the Central Government and Regional Governments.
- d. The rights to customary land are increasingly marginalized. Marginalization of the rights of indigenous peoples to land and their familiar environment because formulating laws and regulations and decisions for the implementation of mining businesses in the region does not involve local customary law communities. Customary law communities are not allowed to consult or negotiate in the decision-making process to implement mining businesses in the region.

The facts above show no synchronization of mining law regulations with other sectors due to regulations related to various legal products being regulated and implemented by different authorities and the objectives of each of these laws are different. For example, the Mineral and Coal Law is more oriented towards exploitation and maximum economical utilization in mining business activities, while the Environmental Law is more of an effort to protect the environment by limiting the rapid destruction of the environment due to the exploration and exploitation of natural mineral and coal resources. Construction of the Mineral and Coal

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<sup>40</sup> L. M. Gandhi. Harmonization of Law Towards Responsive Law, Scientific Oration on the Inauguration of Permanent Professors at the Faculty of Law, University of Indonesia, Jakarta, October 14, 1995. In, Bambang Iriana Djajaatmadja, Final Report on the Preparation of the Scientific Framework for Legal Development Planning on Legal Harmonization of Marine Resources Management in the Framework of Decentralization, National Legal Development Agency Ministry of Law and Human Rights RI Jakarta, 2005, p. 3

Mining Law should consider potential conflicts, provide a comprehensive regulatory formulation to find common ground for the interests of all relevant legal areas.

As it is known that the mineral and coal industry has unique characteristics when compared to other industries and requires quite different treatment. Therefore, how to formulate a harmonious legal regulation that can accommodate all the different interests and authorities in the ministry or institution with their respective authority in managing these various fields (mining, spatial planning, environment, economy, energy, finance, trade), land use). As a practical example, for example, if a deposit is located in an area because the existing land use is not suitable for mining activities, then the competent authority is obliged to determine the type of utilization that is the most prioritized. Applicable laws should govern relevant processes (e.g. mining, spatial planning, and environmental laws). It should not only be because of the interests of extracting mining materials, then environmental and spatial aspects are ignored.

Therefore, harmonization of legal regulations related to investment in mineral and coal mining should be carried out to support the balanced functioning of other sectors without disturbing and negating the interests of these other fields. This is done in order to ensure legal certainty in the implementation of investments in the mining sector. Moreover, the main objective of modern mining laws is to establish a legal framework that regulates the steady development of the minerals industry. To this end, the Law should provide investors with the necessary incentives and guarantees and allow the Government to provide guidance to industry and provide mining policies that are compatible with the broader economy and overall national policies. For this reason, it should be considered in the general design of national policies and the context of other relevant laws, such as those relating to the environment, spatial planning, land affairs, health and safety, and community empowerment. After the mining business license is granted and other approvals and agreements are given, the party who has the authority is responsible for ensuring the correct fulfilment of the regulations and obligations agreed with the investor so that the interests of other fields related to the implementation of the mining business must have complied.

The Minerals and Coal Mining Act should consider sections specific to the mining industry. Transparent regulation is needed to ensure legal certainty and effective procedures to minimize administrative costs and maximize economic value and the conditions of an acceptable legal framework related to the interests of various sectors. The construction of a comprehensive legal code that accommodates all interests will positively impact increasing investment in the mining sector in Indonesia. In general, some investors are reluctant to invest in an area (especially investors concerned with environmental issues and the protection of human rights) due to legal regulations that do not guarantee investment certainty.

Therefore, investment law policies related to mining business activities must provide a comprehensive framework for the safe and economical implementation of mining businesses during the phases of the mining process. Moreover, in the context of global development, modern mining requires transparent and predictable decision-making criteria and an emphasis on legal regimes that meet business expectations and provide balanced protection for the interests of other fields to establish a harmonious relationship in the implementation of a country's development.

On a practical level, to measure a harmonious legal policy in the implementation of mining business activities, there is a standard assessment framework that can be used in the process of formulating a comprehensive legal regulation related to mining governance to improve and ensure the implementation of investment in the mining business sector as recommended by the World Bank.<sup>41</sup> The Mining Investment and Governance Review method help countries and governments identify areas to strengthen mining sector governance, attract mining investment, and increase resource revenues for sustainable national development.

To overcome gaps and disharmony in the legal and regulatory structure that applies to mining business activities, the Government must have ideas and ways to fill these gaps. Especially the policy and legal framework is often a source of conflict with local communities resulting in repeated incidents or repeated patterns of damage.

Concerning the problems mentioned above, several things that become recommendations for building a unified legal framework to ensure legal certainty in the implementation of investments in the mineral and coal mining sector are as follows:

- a. the legal framework of the Mineral and Coal law should be harmonized with various laws governing related fields, spatial planning laws, environmental laws, land laws, local government laws, and others. Therefore, it is essential for the Government to immediately establish a systematic and integrated legal framework as a basic guideline for integrating various regulations to create legal certainty in implementing investment in Indonesia.
- b. Justice must be the primary benchmark in the formulation of laws, justice as an essential prerequisite for legal certainty, not only for mining entrepreneurs but also for the community (access to justice). Because in the mineral and coal mining Law, there is a legal space for the community in the context of community protection. However, this protection is only limited to communities affected by mining activities. Protection of community rights should begin from determining mining areas, licensing to mining operations.<sup>42</sup>
- c. The community should also be given space to supervise and complain about mining operations that ignore environmental issues, commit maladministration and act that causes violations of human rights, not only to business actors but also to authorized officials who do not carry out their duties and authorities following procedures. For this reason, it is necessary to regulate public information disclosure in the mining sector, including sanctions if the principle of openness is not heeded or not fulfilled and not implemented.
- d. The authority to manage, supervise, and control mineral and coal mining activities (from exploration, exploitation, processing/refining, sales, reclamation, post-mining) must be firmly granted to the state. Thus, sanctions must be regulated if the company/corporation/miner does not comply with the regulation by the state; Likewise, there needs to be a mechanical arrangement that can be taken if the Government ignores the authority granted by the state;
- e. the loss of the Regent's authority does not mean that the number of Licencewill decrease. The mineral and coal mining Law are no different from Law no. 4 of 2009; there is no regulation on the limitation of granting mining Licencoor

<sup>41</sup> The World Bank, "The Mining Investment and Governance Review (MInGov)", <http://www.worldbank.org/en/programs/mingov>

<sup>42</sup> The coalition of Civil Society Advocacy for Mineral and Coal Mining Bill Paper Position of Civil Society Coalition for Advocacy for Mineral and Coal Mining Law, [https://igj.or.id/kertas-position-koalisi-Masyarakat-civil-advocation-uu-Mineral and Coal Mining /](https://igj.or.id/kertas-position-koalisi-Masyarakat-civil-advocation-uu-Mineral-and-Coal-Mining/), accessed on August 15, 2021.

clarity about Spatial Planning. With the Government's decree on the Mining Area, which has covered almost the entire mainland of the Indonesian island, the Governor and the Minister who have the authority are likely to re-issue new mining permits. Regarding the Licence issued, the draft mineral and coal mining Bill seems discriminatory in terms of evaluation. Only Licence issued by local governments are evaluated, which should also be carried out on the central government's permits.

- f. The mineral and coal mining law has not regulated the rights to land included in the scope of the mining area, especially the land rights of local communities who have occupied the area for generations. Therefore, determining land status is essential to be emphasized in the mineral and coal mining Law to align with the National Land Law.
- g. The obligation to reclamation and post-mining has not been explicitly regulated in the mineral and coal mining law. Firm pressure on entrepreneurs to take responsibility is weakened by the authority of the Minister/Governor to appoint a third party as executor, as happened in Law no. 4 of 2009. This reduces the responsibility of the company, which is only obliged to place a reclamation guarantee fund. Even though, in reality, many companies do not also deposit their reclamation guarantee funds.<sup>43</sup>

Some of the points mentioned above should be emphasized in the legal rules in the mining sector because they have links with other fields in implementing mining businesses to assure investors to invest in Indonesia.

## CONCLUSION

Business activities in the mineral and coal mining sector are closely related to other fields, such as the spatial planning sector, the environmental sector, the land sector, the regional government sector and community protection. Revision of Law No. 3 of 2020 concerning Mineral and Coal Mining in Indonesia does not yet regulate the alignment of the relationship between these fields and the implementation of the mineral and coal mining business. This Law is still exploitative because it is more oriented towards economic interests by maximizing the exploitation of mineral and coal natural resources to increase economic value, and seems to ignore spatial planning, environmental aspects and the rights of local governments and communities so that in practice, it has the potential to cause problems. Conflict in the long term and this conflict will impact legal uncertainty in implementing mineral and coal mining investments.

In such conditions, the Government as the authority holder in regulating and managing natural resources in the mining and coal sector should reformulate a clear and definite legal framework by considering all aspects related to implementing the mineral and coal mining business. The legal framework of the Mineral and Coal law should be harmonized with various laws governing related fields, spatial planning laws, environmental laws, land laws, local government laws, and others. Therefore, it is essential for the Government to immediately establish a systematic, integrated legal framework as a basic guideline for integrating various regulations to create legal certainty in implementing investment in mining and coal in Indonesia.

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