

**Working
Paper**

Implications of Legal Uncertainty in Coal Mining Sector Licensing Governance for Environmental Degradation and Contamination: Case Studies in East Kalimantan

MOHAMAD NASIR

FEBRUARY 2020

This Working Paper constitutes the outcome of a study by researchers and academics commissioned by Auriga Nusantara and the Corruption Eradication Commission (KPK) with support from the Government of Norway. In the event of any material or source in this paper not meeting predetermined rules and standards of writing, responsibility resides with the author and outside the institutional liability of Auriga Nusantara and the Corruption Eradication Commission (KPK). All rights reserved by the author and Auriga Nusantara.

Citation: Mohammad Nasir, *Implications of Legal Uncertainty in Coal Mining Sector Licensing Governance for Environmental Degradation and Contamination: Case Studies in East Kalimantan*, Working Paper 2/2020, Auriga Nusantara, Jakarta, 2020.

©2020 Mohammad Nasir

Editorial Team:

Mumu Muhajir

Erwin Natosmal Oemar

Putut Aryo Saputro

C. Bregas Pranoto

Layout & design : Nur Alfi Hidayat

Cover source : Auriga Nusantara

Auriga Nusantara

auriga.or.id

ABSTRACT

This paper looks at legal uncertainty in regulating coal mining in East Kalimantan, Indonesia. As a significant coal producing region, 5,227,136 hectares or 40.3% of the province has been allocated for coal mining under the provincial spatial plan. Consequently, this sector needs good mining permit governance to ensure its natural resources can be sustainable.

This study reveals legal uncertainty in regulating mining permit governance in East Kalimantan. This uncertainty is caused by ambiguous, inconsistent and incomplete norms. Legal uncertainty has resulted in licensing failing in its functions to control coal mining activities and protect community access to a decent and healthy environment. Licensing in fact does the opposite in becoming a cause of environmental degradation and contamination.

Key words: coal, licensing, legal uncertainty, environment, East Kalimantan



Mohamad Nasir

Lecturer at the Balikpapan University Faculty of Law, Program Manager for Yayasan Prakarsa Borneo, PhD Candidate at Radboud University, The Netherlands





image: Auriga Nusantara

CONTENTS

abstract	1
Daftar Isi	3
I. Introduction	4
Methodology	5
II. Coal Mining Licensing authority Dynamics: From Decentralization to Centralization	6
III. Coal Mining Sector Legal Uncertainty Contributes to Environmental Degradation	9
The Case of Mulawarman Village	9
The Case of Kerta Buana Village	11
Links between Legal Uncertainty in Licensing Governance and Environmental Degradation/Contamination	12
IV. Conclusion	16

I. Introduction

A commitment to realizing sustainable development goals (SDGs) has led the government to evaluate a number of development and economic policies and programs.¹ Demands for environmentally friendly energy use, for instance, have encouraged discourse on whether natural resources exploitation, particularly coal mining, only prioritizes economic interests or also considers environmental carrying capacity.²

Undeniably, coal exports have become a mainstay of the Indonesian economy for more than a decade. In 2018, mining industries contributed approximately 8.3% of Indonesia's gross domestic product.³ Production continues to increase to support national earnings, though Indonesia has only 3.5% of the world's coal reserves.⁴

The government has targeted coal production of 590.7 million tons and 602.1 million tons respectively for 2020 and 2021.⁵ However,

coal mining is frequently deemed an extractive industry with a destructive impact on surrounding regions. Rapid growth and unstructured expansion in coal mining has created many problems, including environmental degradation, deforestation, rampant corruption, illegal mining and overlapping land claims. Mining companies frequently flout their obligations to rehabilitate mining land and leave degraded ecosystems in their concession areas.⁶

Debates over the plusses and minuses of coal mining have often caused governance in this sector, particularly licensing, to experience some quite intense dynamics. At least two factors affect these dynamics: firstly, regulation of the coal mining sector is closely interlinked with other sectors, including the environment, forestry, spatial planning and governance. Further, authority, which is already sectoral in nature, is also layered at central, provincial and district levels. These two things can cause legal uncertainty in mining. In regard to licensing, this legal uncertainty can lead to environmental degradation or contamination, which contradicts the spirit of licensing. As legal instruments, licenses should have the capacity

¹ Bappenas, Roadmap of SDGs Indonesia Towards 2030, Jakarta, 2019.

² See for example: Tilburg, X. van *et al.*, Energy Security as a Positive Force for Green Growth in Indonesia? The Hague; IRENA, Renewable Energy Prospects: Indonesia, A Remap Analysis, International Renewable Energy Agency (IRENA), Abu Dhabi, 2017. doi: 10.1145/347642.347800; Raithwaite, D. and Gerasimchuk, I., Beyond Fossil Fuels: Indonesia's Fiscal Transition, GSI REPORT, Manitoba, 2019.

³ Katadata, Industry Sectors Contribute 20% to the National Economy 2019.

⁴ British Petroleum, BP Statistical Review of World Energy Statistical Review of World, The Editor BP Statistical Review of World Energy, 2019.

⁵ National Development Planning Agency (Bappenas), Final Report: Coal DMO 2019 60% National Production Target

Achievement Study, Jakarta, 2019.

⁶ Lihat Abdullah Naim. *et al.*, Deadly Coal: Coal Extraction & Borneo Dark Generation. I. Edited by A. W. and S. Maemunah., Mining Advocacy Network (JATAM), Jakarta, 2010; Waterkeeper Alliance and Mining Advocacy Network (JATAM), Hungry Coal: Coal Mining and Food Security in Indonesia, Jakarta, 2017; Atteridge, A., Aung, M. T. and Nugroho, A., Contemporary Coal Dynamics in Indonesia, Stockholm, 2017.

IMPLICATIONS OF LEGAL UNCERTAINTY IN COAL MINING SECTOR LICENSING GOVERNANCE FOR ENVIRONMENTAL DEGRADATION AND CONTAMINATION: CASE STUDIES IN EAST KALIMANTAN

to control and influence coal mining companies' activities, and ensure they respect the rights and interests of communities and protect and preserve environmental functions around their concession areas.

This paper studies the links between uncertainty in the norms of legislation on coal mining sector licensing and law enforcement in East Kalimantan. A study in East Kalimantan was important, bearing in mind two things: *firstly*, by April 2016, 1,404 mining licenses, or around 11 percent of all mining licenses in Indonesia, were in East Kalimantan,⁷ where licenses covered a total area of 5.134 million hectares, or 40.3 percent of the province.⁸

Secondly, almost 74 percent of existing coal reserves in Kalimantan are concentrated in this province, making it the most significant coal producing region in Indonesia.⁹ At the national level, East Kalimantan has coal resources of 47,063.46 metric tons and coal reserves of 13,762.39 metric tons, second only to South Sumatra.¹⁰

This study is based on legislation before Law No. 3/2020 on Amendments to Law No. 4/2009 on Mineral and Coal Mining (the 2020 mining law) was passed. Referencing provisions in the 2020 mining law, authority over coal mining licensing is currently concentrated with the central government. However, until its implementation regulation has been issued, existing legislation relating to coal mining still remains in force. Therefore, a study of coal mining licensing

based on legislation prior to the 2020 mining law, remains relevant.

Methodology

This research used a desk study approach to analyze the legal framework surrounding government authority relating to coal licensing governance. The contents of this analysis are based on information collected through systematic reviews of legislation and documents relevant to coal mining licensing governance. A legal doctrinal approach was used to identify ambiguities, inconsistencies and incompleteness in norms regulating government authority relating to the governance of coal mining licensing. This legal doctrinal analysis specifically considered the extent to which legal texts (laws, regulations, and court verdicts) are consistent and coherent and able to bring certainty and parity.¹¹

⁷ Budiono, A. and Rini, R. A. W. S., *Administration of Coal Permit Under Coordination and Supervision of KPK*, Jakarta, 2017.

⁸ Apriando, T., 'Who Owns Indonesia's Deadly Abandoned Coal Mines?', *Mongabay Series: Indonesian Coal*, 2017.

⁹ Coordinating Ministry for Economic Affairs, *Masterplan for Acceleration and Expansion of Indonesia's Economic Development (MP3EI) 2011–2025*, Coordinating Ministry for Economic Affairs, Jakarta, 2011.

¹⁰ Bappenas (2019a), *Final Report: ...*, Op. Cit.

¹¹ Check: Dworkin, R., *Law's Empire*, Harvard University Press, 1986; Kissam, P. C., 'The Evaluation of Legal Scholarship', *Washington Law Review*, 1988, 63(2), pp. 221–255; Hesselink, M. W., 'A European Legal Science? On European Private Law and Scientific Method', *European Law Journal*, 15(1), 2009, pp. 20–45.

II. Coal Mining Licensing authority Dynamics: From Decentralization to Centralization

Article 33 paragraph (3) of the 1945 Constitution forms the basis of the legal framework for natural resources management in Indonesia. This article states that, "*The land, the waters and the natural riches contained therein shall be controlled by the State and exploited to the greatest benefit of the people.*" The expression "*controlled by the State*" was subsequently known as the state control right in the Indonesian legal system. The Indonesian Constitutional Court later expanded the interpretation of this right in Constitutional Court decisions on judicial reviews of Law No. 20/2002 on Electric Power, Law No. 22/2001 on Oil and Natural Gas and Law No. 7/2004 on Water Resources. The court decided the phrase "*controlled by the State*" in Article 33 paragraph (3) of the Constitution means the 1945 Constitution provides the State with a mandate to establish policies (*beleid*) and governing actions (*bestuursdaad*), regulation (*regelendaad*), management (*beheersdaad*) and oversight (*toezichthoudensdaad*) for the greatest benefit of the people.

The State's governance (*bestuursdaad*) function is carried out by the government through its authority to issue and revoke permits (*vergunning*), licenses (*licentie*) and concessions (*consessie*). The State's regulatory function (*regelendaad*) is carried out through legislative

authority with the Legislative Assembly (DPR) and the government, and regulation by the government. The management (*beheersdaad*) function is carried out through a shareholding mechanism and/or through direct involvement in State-Owned Enterprises or State-Owned Legal Entities as institutional instruments through which the State, *c.q.* government, exercises its control over natural riches for the greatest benefit of the people. Similarly, the oversight function (*toezichthoudensdaad*) is carried out by the State, *c.q.* government in an oversight framework so State control of natural riches is genuinely for the greatest benefit of the people.¹²

In addition, Article 33 paragraph (3) implies that the State should ensure natural resources are utilized for the benefit of the people. This obligation covers protecting individuals' access to natural resources and providing a safe and healthy environment. This is reiterated, in turn, by Article 28H paragraph (1), which states that every person has the right to enjoy a decent and healthy environment. According to these two provisions, the State is obligated to provide legal instrumentation to respect, protect and

¹² Magnar, K., Junaenah, I. and Taufik, G. A., 'Constitutional Court interpretation of Article 33 of the 1945 Constitution: (A study of Constitutional Court decisions on Judicial Reviews of Law No. 7/2004, Law No. 22/2001 and Law No. 20/2002)', *Jurnal Konstitusi*, 2010, 7(1), pp. 111–180.

IMPLICATIONS OF LEGAL UNCERTAINTY IN COAL MINING SECTOR LICENSING GOVERNANCE FOR ENVIRONMENTAL DEGRADATION AND CONTAMINATION: CASE STUDIES IN EAST KALIMANTAN

fulfil this right. In this phase, the law should become an instrument that protects citizens, the environment and natural resources from excessive and unjust government control, including protecting the people from excessive and unfair control by private companies.¹³ The State should prepare and implement regulations that stipulate government limits and obligations, the rights, obligations and space for individuals, and mechanisms for protecting them or guaranteeing restitution if violations occur.¹⁴

One instrument for bringing about such provisions is licensing. The issuing of natural resource exploitation permits, for instance, means the government takes steps and measures to regulate, manage and monitor. Licensing regimes, in addition to legislation, are important factors in natural resources governance in coal mining in Indonesia. This implies two things: *firstly*, licenses are the main instruments for overseeing and controlling coal mining operations; and *secondly*, licenses are instruments used as a means for distributing land for mining coal. Errors in issuing licenses will impact upon the implementation of oversight and control, as well as the sharing of land for stakeholders (communities and mining companies).

Authority to issue mining licenses has experienced various dynamics over the last ten years. Law No. 4/2009 on Mineral and Coal Mining (the 2009 mining law) shared the authority to issue licenses between three levels of government, i.e., district/municipal (if mining sites were in individual district/municipalities), provincial (if sites spanned districts/municipalities), and central (if

they spanned provinces). This authority was later changed under Law No. 23/2014 on Regional Governments, where license issuing authority was given only to provincial governments, unless mining sites spanned different provinces, in which case authority lay with the central government. In 2020, through Law No. 3/2020 on Amendments to Law No. 4/2009 on Mineral and Coal Mining (the 2020 mining law), the government decided to centralize authority over mining, allowing only the central government to issue licenses. Most of these revisions relate to mining licenses, such as authority to issue licenses, rights, and responsibilities of license holders. However, based on Article 173C of the 2020 mining law, provincial governments still retain authority for up to six months after the law was passed, or until its implementation regulation has been issued. However, this authority is limited to license extensions and does not cover issuing new licenses.

Referencing these dynamics, prior to establishment of the 2020 mining law, variations in authority over coal mining licensing led to problems with legal uncertainty triggered by three things: regulatory ambiguity, inconsistency and incompleteness. Two factors caused these problems: *firstly*, linkages between mining and many sectors, including the environment, spatial planning, forestry and others. This included sectoral regulations, including the mining sector, also being layered at different levels (central, provincial and district/municipal) prior to the 2020 mining law. Three annual surveys on mining companies conducted by Canada-based independent research and education organization, the Fraser Institute, consistently show high levels of uncertainty in Indonesian government interpretation and enforcement of regulations. The organization consistently referenced regulatory duplication

¹³ Mermin, S., *Law and The Legal System: An Introduction*, Little, Brown and Co., Boston, 1982.

¹⁴ Barón Soto, M. and Gómez Velásquez, A., 'An Approach to the State Responsibility by an Omission in The Inter-American Court of Human Rights Jurisprudence', *Revista CES Derecho*, 2015, 6 (1), pp. 3–17.

and inconsistency.¹⁵

Other research reveals similar findings. Fünfgeld¹⁶ and O'Callaghan and Vivoda¹⁷ also recorded inconsistencies between central, provincial and regional government regulations, as well as between institutions at each level of government. Devi and Prayogo¹⁸ felt that legal uncertainty arose due to absences of implementation regulations, or unclear and confusing technical directives, and that legal ambiguity resulted from "competition" between regulations. In addition, different parties have different interpretations, which can lead to significant problems for investors.

The second factor is political and economic interests behind the preparation of these regulations. In this regard, there are pressure groups with political or economic agendas that influence policymakers in preparing coal mining regulations. Such efforts to intervene in policies or regulations are known as regulatory capture.¹⁹ Room to influence legislation processes can be traced from a politics of law viewpoint, where law is perceived as a political product that considers regulations a formulation or crystallization of interacting and competing political desires.²⁰ Similar ideas come from a political-economics

perspective, like Stigler's claim that regulations are merely products, produced in markets like any other products.²¹ Regulatory capture is basically corruption of authority that occurs when a political entity, policymaker or legislative body is coopted to serve specific commercial, ideological or political interests.²² Artidjo Alkostar (former Chief Justice) categorized this phenomenon as political corruption.²³

In Indonesia, opportunities for regulatory capture are wide open, as marked by closely intertwined relationships between mining companies and government officials, which can trigger "adultery" between companies, bureaucrats and politicians. Such business and political collaboration is apparent, among others, with Aburizal Bakrie (former chair of the Golkar party) and Bumi Resources, Prabowo Subianto (Gerindra party chair and Minister of Defence) and the Nusantara business group, or Luhut B. Panjaitan (senior Golkar party figure and Coordinating Minister for Maritime Affairs and Investment) and the PT Toba Sejahtera group.²⁴

At the local level, regulatory capture has played a part in the formulation of mining license policies.²⁵ A study by JATAM East Kalimantan confirms this. Research conducted in five districts (West Kutai, East Kutai, Bulungan, Berau and North Paser Penajam) shows that numbers of coal mining licenses issued by district governments increased significantly in the run up to regional head elections.²⁶

¹⁵ See three consecutive surveys (2017, 2018 and 2019) conducted by the Fraser Institute. Jackson, T. and Green, K. P., Fraser Institute Annual Survey of Mining Companies 2016, 2017; Stedman, A. and Green, K. P., Fraser Institute Annual Survey of Mining Companies 2017, 2018; Stedman, A. and Green, K. P., Fraser Institute Annual Survey of Mining Companies 2018, 2019.

¹⁶ Fünfgeld, A., 'The State of Coal Mining in East Kalimantan: Towards a Political Ecology of Local Stateness', *Austrian Journal of South-East Asian Studies*, 2016, 9(1), pp. 147–162. doi: 10.14764/10.ASEAS-2016.1-9.

¹⁷ Vlado Vivoda and Callaghan, T. O., '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, 2017.

¹⁸ Devi, B. and Prayogo, D., 'Mining and Development in Indonesia: An Overview of the Regulatory Framework and Policies', *International Mining for Development Centre*, 2013.

¹⁹ Dal Bó, E., 'Regulatory Capture: A Review', *Oxford Review of Economic Policy*, 2006, 22(2), pp. 203–225.

²⁰ Mahfud MD, M., *Political Law in Indonesia*, 2nd edition, Pustaka LP3ES Indonesia, Jakarta, 1998; Borges, M. R., 'Regulation and Regulatory Capture', *XIV International Colloquium-Papers*, 2017, pp. 1–18.

²¹ Carrigan, C. and Coglianese, C., *Penn Law: Legal Scholarship Repository, Capturing Regulatory Reality: Stigler's The Theory of Economic Regulation*, Faculty Scholarship at Penn Law, 1650, 2016.

²² Dal Bó, E., 'Regulatory Capture ...', *Op. Cit.*

²³ Alkostar, A., *Political Corruption in Modern States*, edited by N. Huda, FH UII Press, Yogyakarta, 2008.

²⁴ JATAM *et al.*, *Coal Corruption: Shedding Light on Political Corruption in Indonesia's Coal Mining Sector*, Jakarta, 2019.

²⁵ Arwanto, B., '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*, 2018, 8(4), p. 66.

²⁶ JATAM *et al.*, *Coal Corruption: ...*, *Op. Cit.*

III. Coal Mining Sector Legal Uncertainty Contributes to Environmental Degradation

As discussed earlier, as instruments of the law, licenses should be able to control and guide coal mining company operations to respect community rights and interests and protect and preserve environmental functions around their concession areas. However, facts, as illustrated in the following case studies, show they actually trigger environmental degradation and contamination.

The Case of Mulawarman Village

Originally known as Separi IV, Mulawarman is one of several villages in Tenggara Seberang subdistrict that stemmed from transmigration sites in Kutai Kartanegara district (formerly Kutai district) in 1981. The village covers an area of approximately 18,000 hectares, almost all of which – around 15,628 hectares or 87 percent of the village area – falls inside a forestry growth estate (KBK). Only around 2,380 hectares (13%) is non-forestry estate. Juridically speaking, residents of Mulawarman village can only farm 13 percent of the village area, or only 2,380 hectares. Of these 2,380 hectares, only around 338.88 hectares have potential for rice paddies. Settlements and house lots cover an area of around 103.42 hectares, while the remaining 1,937.70 hectares comprises dryland farming,

mixed plantations and scrub.²⁷

When the region was first cleared, a total area of around 526 hectares was settled by 263 transmigrant families originally from East Java, Central Java and West Java provinces.²⁸ In 2018, according to the Kutai Kartanegara District Central Statistics Agency (BPS), the village had a population of 2,710.²⁹ Farming is the main livelihood source for communities in Mulawarman village. Farming was so successful in the village that in 1997, that the Kutai Kartanegara District Government declared Mulawarman village the rice bowl of the district.³⁰

In 2003, both the central government and the regional government of Kutai Kartanegara issued a number of coal mining concessions in Mulawarman village. The Kutai Kartanegara District Regional Research Council reported in 2013 that the whole of the Mulawarman village

²⁷ Kutai Kartanegara Regional Research Council (DRD), Environmental Conditions in Mulawarman Village, Tenggara Seberang Subdistrict, Kutai Kartanegara District, Tenggara, 2013.

²⁸ Antara Kaltim, 'Rice Bowl Village Threatened by Black Gold!', 20 April 2017.

²⁹ Kutai Kartanegara District Central Statistics Agency, Tenggara Seberang subdistrict in Figures 2019, Central Statistics Agency (BPS) Kutai Kartanegara district, Tenggara, 2019.

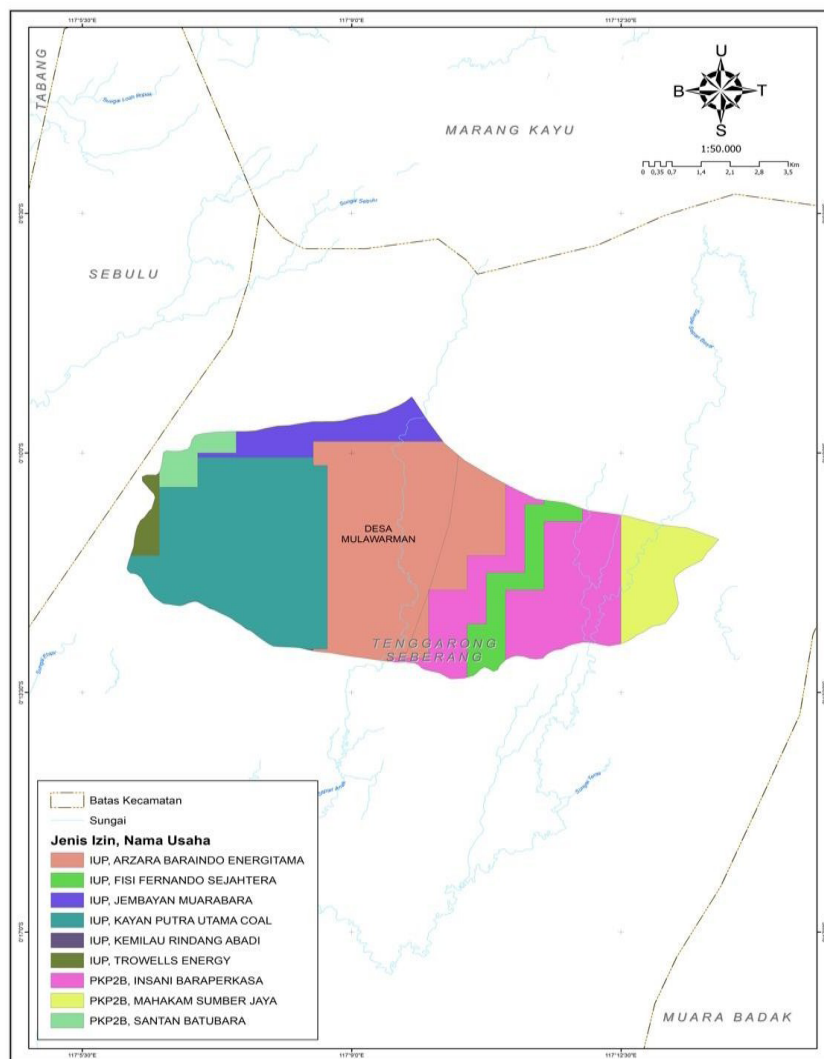
³⁰ Antara Kaltim, 'Rice Bowl Village Threatened by Black Gold!', Op. Cit.

Coal Mining Sector Legal Uncertainty Contributes to Environmental Degradation

area of 18,008 ha had been allocated to coal mining companies like 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 and PT Santan Batubara.³¹

Map of Coal Mining Concessions



Source: processed from East Kalimantan Provincial Development Planning Agency data 2019

³¹ Kutai Kartanegara Regional Research Council (DRD), Op. Cit.

IMPLICATIONS OF LEGAL UNCERTAINTY IN COAL MINING SECTOR LICENSING GOVERNANCE FOR ENVIRONMENTAL DEGRADATION AND CONTAMINATION: CASE STUDIES IN EAST KALIMANTAN

The appearance of mining companies in the village gradually reduced rice production as rice paddies became coal mining areas. Mulawarman Village Head, Mulyono, stressed that the area of agriculture land was originally approximately 526 hectares in 1981, but now only 20 hectares are left. Coal mining companies have destroyed irrigation systems making it difficult for villagers to grow rice. Land has become unproductive leaving many villagers no choice but to sell their rice paddies to coal companies. Meanwhile, the area of land in the village fit for habitation has fallen to 65.75 hectares.³²

Coal mining operations in Mulawarman village have had detrimental environmental impacts. *Firstly*, mining effluent has contaminated farmland and settlements, in addition to causing erosion and sedimentation. *Secondly*, dust from mining activities has polluted the air and caused respiratory problems for villagers. *Thirdly*, mining activities have destroyed irrigation systems and triggered a clean water crisis. *Fourthly*, blasting causes excessive noise, tremors and cracks in villagers' homes.³³ In February 2020, sixty-eight families from neighborhoods 18 and 19 were evacuated to the village government office because of landslides and damage to homes resulting from nearby mining activities.³⁴

Responding to their situation, villagers have submitted reports to regional and central government and even proposed relocation as an alternative option. Following up on villagers' demands, the Kutai Kartanegara District

Government, members of the Kutai Kartanegara District Legislative Assembly, members of the East Kalimantan Provincial Legislative Assembly, and even the governor visited Mulawarman and promised to resolve the problem, but until now there has been no progress at all.³⁵ In addition, local NGOs and student organizations have tried to facilitate resolution, including by taking the case up with the Presidential Staff Office in February 2017.³⁶ The last negotiations between villagers and the mining company PT Kayan Putra Utama Coal (PT KPUC) took place on 26 February 2019 and 11 March 2019, but these meetings also led to a dead end.³⁷

The Case of Kerta Buana Village

Kerta Buana village, previously called L4 (Location 4) under the Teluk Dalam transmigration settlement project, is located in Kutai district. In 1979, the settlement, built by the East Kalimantan Provincial Public Works Department Transmigrant Training and Education Center (PLPT), was allocated as a general and local transmigrant settlement area (APPDT). In stages, from May 1980 to March 1981, 2,000 families comprising 8,375 individuals were placed there. The transmigrants originated from Jakarta, Yogyakarta, Central Java, East Java and West Nusa Tenggara provinces, as well as from Kutai district.³⁸ Kerta Buana village covers an area of 232.50 km² or 23,250 hectares.³⁹ Geographically, the village region consists of 35

³² Sunan, G. M., 'Mulawarman Village, A Transmigration Region Threatened with Extinction, Relocation at Any Cost', 19 April 2017.

³³ Jawa Pos, 'Kutai Kartanegara Villages Slowly Disappearing, 3,000 Villagers Demand Relocation', 20 April 2017.

³⁴ Kaltim Post, 'Threatened with Landslides, Mulawarman Villagers Evacuate', 20 February 2020; *Tribun Kaltim*, 'Week After Mulawarman RT 17 and 18 Residents Evacuate, HMI Alleges Coal Blasting', 16 February 2020.

³⁵ *Tribun Kaltim*, 'Surrounded by Mining, Eight Companies to Fix Mulawarman Village', 10 September 2017; *KlikKaltim*, 'Governor to Shut Down Problem Mines', 18 April 2017.

³⁶ KSP, Fighting for Mulawarman Transmigrants' Grievances, 2017.

³⁷ Muhdar, M., Nasir, M. and Nurdiana, J., 'Risk Distribution in Coal Mining: Fighting for Environmental Justice in East Kalimantan, Indonesia', August 2019, pp. 1–15.

³⁸ Purba, J., Listiana, D. and Murlianti, S., Transmigration Social Integration ..., Op. Cit.

³⁹ Kutai Kartanegara Central Statistics Agency, Tenggarong Seberang subdistrict ..., Op. Cit.

percent wetlands, which became rice farming land, while the remaining 65 percent is hilly and was allocated for settlements and dryland farming or cultivation.⁴⁰

In December 2000, PT Kitadin secured a license to increase production and expand its mining area. Then in 2004, the government also granted a mining license to PT Mahakam Sumber Jaya (PT MSJ). Since then, threats to farming land in Kerta Buana village began. By 2010, only 398 of the 475 hectares of rice paddies remained productive. This was exacerbated by the fact that of those 398 hectares, only 80 hectares belonged to villagers, while the rest were controlled by the two mining companies.⁴¹ Further, in a report, Greenpeace⁴² stated that around half of farming land in Kerta Buana village (approximately 700 hectares) had disappeared due to mining concessions. PT Kitadin had proposed relocating Kerta Buana village but met with resistance from villagers.⁴³

Like Mulawarman, coal mining activities in the village have had detrimental environmental impacts with degradation and contamination. *Firstly*, rice paddies are shrinking, irrigation destroyed, and farmers struggling to identify planting seasons. Productivity has also fallen, and many new and difficult to identify pests and diseases have emerged.⁴⁴ *Secondly*, mining effluent has contaminated farming and settlement areas, and caused erosion and sedimentation.⁴⁵

Thirdly, villagers have lost access to clean water.⁴⁶ *Fourthly*, villagers' rice paddies and homes are inundated by floods. *Fifthly*, blasting damages villagers' homes and causes landslides.⁴⁷ This environmental degradation has led to protests from villagers. Villagers have demonstrated to protest company activities on numerous occasions but to no avail. Neither coal mining companies nor the government have been serious in following up these protests.⁴⁸

Links between Legal Uncertainty in Licensing Governance and Environmental Degradation/Contamination

In legal terms, the provision of coal mining licenses in the two villages does not constitute a violation. Provisions in the 2009 mining law and its implementation regulation state that mining activities are permitted in growth regions, which cover production forest, plantations and settlements. Yet, these provisions' implementation has the potential to lead to environmental degradation. The cases in Mulawarman and Kerta Buana villages show uncontrolled coal exploitation being disastrous as it destroys the environment and settlements. Mulawarman villagers resorting to submitting requests for relocation, for instance, reflects the community's helplessness and is a manifestation of the injustices surrounding natural resource utilization in the village. The law and licenses,

⁴⁰ Johansyah, M. and Bahri, K. *et al.*, Rice Bowl to Open Mining Pit: A Case Study in Kertabhuana Village, Tenggarong Seberang, Kutai Kertanegara District, Samarinda, 2011.

⁴¹ Johansyah, M. and Bahri, K. *et al.*, 2011; Purba, J., Listiana, D. and Murlianti, S., 2018; *Prokaltim*, 'Mines Surround Rice Paddies, PT Kitadin Denies Being Cause', *Prokal.co*, 2019.

⁴² Greenpeace, *The Dirty Work of Banpu*, Jakarta, 2016.

⁴³ Johansyah, M. and Bahri, K. *et al.*, 2011; Purba, J., Listiana, D. and Murlianti, S., 2018.

⁴⁴ Purba, J., Listiana, D. and Murlianti, S., *Op. Cit.*

⁴⁵ Greenpeace, *The Dirty*, *Op. Cit.*

⁴⁶ Johansyah, M. and Bahri, K. *et al.*; Yustinus S. Hardjanto, 'Kertabuana, the Rice Producing Village Wasting Away and Squeezed by Coal Mines', 31 August 2016.

⁴⁷ Purba, J., Listiana, D. and Murlianti, S., 2018; Muliawan, F., 'The Puzzle Surrounding the Prajapati Temple Collapse in Tenggarong Seberang', *Kaltimkece.id*, 18 June 2019.

⁴⁸ M. Ghofar, 'Kerta Buana Farmers Close Mining Road', *Antaranews.com*, 22 November 2017; *Koran Kaltim*, 'East Kalimantan Govt Asked to Act against Water Source Damaging Mines', *Korankaltim.com*, 23 November 2017; Purba, J., Listiana, D. and Murlianti, S., 2018.

IMPLICATIONS OF LEGAL UNCERTAINTY IN COAL MINING SECTOR LICENSING GOVERNANCE FOR ENVIRONMENTAL DEGRADATION AND CONTAMINATION: CASE STUDIES IN EAST KALIMANTAN

which should be instruments able to afford protection, are failing in this function.

In the cases of Mulawarman and Kerta Buana villages, these instruments are unable to work properly due to three factors: *Firstly*, ambiguity – the 2009 mining law stipulates that mining activities are only permitted in growth estates. Growth estates themselves are divided into various designations, such as production forest, plantations, settlements and industry. The leeway for growth on community plantations and farmland and the settlements of certain communities will trigger issues, as occurrences in Mulawarman and Kerta Buana villages show.

This ambiguity is illustrated by Provincial Government Regulation No. 1/2015 on the East Kalimantan Provincial Spatial Plan for 2015-2035. This regulation provides room for growth areas of 10,451,331 hectares, consisting of 6,055,793 hectares for production forest, 5,227,136 hectares for coal mining, 3,681,657 hectares for agriculture and estate crops, and 738,188 hectares for settlements and other sectors. When added together, the area allocated for these sectors totals 15,702,774 hectares, far exceeding the growth area designation of 10,451,331 hectares.

Table showing Growth Estate Designation

Designation	Area
Production Forest	6,055,793 ha
Estate Crops and Agriculture	3,681,657 ha
Fisheries	187,304 ha
Industry	57,176 ha
Settlements	97,442 ha
Tourism	396,266 ha
Mining	5,227,136 ha
Total	15,702,774 ha

The table above shows overlapping between sectors. The land designation formula shown by the East Kalimantan Provincial Spatial Plan (RTRW) is ambiguous, allows multiple interpretations leading to problems with implementation, and also gives rise to legal uncertainty.

The second factor is inconsistency, which, among other things, can be traced to provisions relating to obligations to provide reclamation and post-mining plans. According to Article 6 of Government Regulation No. 78/2010 on Reclamation and Post-Mining, applications for exploration license extensions and upgrades to production operations must list reclamation and post-mining plan documents. These two documents must reference environment permits and environmental impact analyses (*Amdal*). In the event of any changes being made to approved environment documents, corresponding adjustments must be made to reclamation plan and post-mining plan documents (Article 14). In addition, Government Regulation No. 78/2010 stresses firmly that reclamation plan and post-mining plan documents must meet principles, including mining environment protection and management (Article 3).

Provisions in Government Regulation No. 78/2010 were subsequently regulated in detail under Minister of Energy and Mineral Resources Regulation No. 26/2018 on Good Governance and Supervision of Mineral and Coal Mining Operations (Ministerial Regulation No. 26/2018). However, this regulation has three inconsistencies when compared with higher legislation (Government Regulation No. 78/2010). *Firstly*, Ministerial Regulation No. 26/2018 no longer stipulates environmental protection and management as mandatory principles in reclamation and post-mining activities. In Government Regulation No.

78/2010, these are independent principles, but under Ministerial Regulation No. 26/2018 they are only one aspect of good mining governance techniques (Article 3 paragraph [3] letter e). *Secondly*, this regulation no longer stipulates environmental protection as a part of mining activities. This differs from Government Regulation No. 78/2012, which integrates environmental protection and management with coal mining activities. The term 'environmental protection' is not even found in Ministerial Regulation No. 26/2018, only the term 'environmental management'. *Thirdly*, in contrast to Government Regulation No. 78/2010, Ministerial Regulation No. 26/2018 no longer stipulates the obligation to adjust reclamation and post-mining plans to environmental documents.

Though in legal terms these conflicting norms can be resolved by applying the principle of *lex superior derogat legi inferiori*, in their implementation, such inconsistencies can ignite problems. Coal mining companies tend only to follow those provisions that benefit them. It seems license holders no longer care about environmental protection and management as integral parts of good mining governance, and coal utilization consistently disregards preserving environmental functions, which results in damage to the environment and settlements, as has happened in the villages of Mulawarman and Kerta Buana.

The third factor contributing to environmental degradation in Mulawarman and Kerta Buana villages is incompleteness. There are no provisions on coal mining that regulate rejecting applications for exploration license status

upgrades to production operations licenses when applicants fail to meet administrative, technical, financial and environmental requirements. According to Article 46 paragraph (1) of the 2009 mining law, every holder of an exploration Mining Business License (IUP) is guaranteed to secure a production operations IUP as a follow-up. A similar provision appears in Government Regulation No. 23/2010 on Implementation of Mineral and Coal Mining Business Activities (Government Regulation No. 23/2010), which also states that applicants must fulfil requirements to change the status of their licenses from exploration to production operations. These requirements are regulated under Minister of Energy and Mineral Resources Decree No. 1796 K/30/MEM/2018 on Guidelines for Mineral and Coal Mining License Applications, Evaluations and Issuance. Annex 3 of this decree explains that requirements for changing license status cover administrative, technical, financial and environmental aspects.

In practice, there are no norms explaining whether these four requirements are cumulative or alternative in nature, as illustrated in the case of PT Marimun Bara Sejahtera (PT MBS). In July 2018, the company submitted a request to the Provincial One Stop Capital Investment and Integrated Services Office (DPMPTSP) to upgrade the status of its license from exploration to production operations. In its evaluation, DPMPTSP found the company had failed to meet requirements and rejected the request, as according to the provincial spatial plan (RTRW), the area PT MBS requested was settlement area (172.31 hectares) and horticultural estate (4,857.94 hectares). PT MBS objected to the decision and filed a lawsuit with

IMPLICATIONS OF LEGAL UNCERTAINTY IN COAL MINING SECTOR LICENSING GOVERNANCE FOR ENVIRONMENTAL DEGRADATION AND CONTAMINATION: CASE STUDIES IN EAST KALIMANTAN

the State Administrative Court in Samarinda in August 2018. During proceedings, the judges concluded that legislation provides guarantees for exploration permit holders to upgrade the status of their licenses to ensure returns on their investments. Based on this consideration, the panel of judges ordered DPMPTSP to issue a production operations license to PT MBS.

This case shows the regulatory void surrounding the upgrading of exploration to production operations licenses, particularly whether applications should be rejected or approved in cases where license holders are unable to meet all the stipulated requirements. This void is undoubtedly a 'weapon' for coal mining companies in submitting applications to upgrade the status of their licenses.

IV. Conclusion

As an instrument of the law, licensing fails in its functions to control coal mining activities and protect community access to a decent and healthy environment. Licensing, as the two case above show, in fact does the opposite in becoming a cause of environmental degradation and contamination. This failure is a result of legal uncertainty.

From this study, there are at least three aspects to legal uncertainty in licensing governance norms in East Kalimantan: ambiguity, inconsistency, and incompleteness.



Image: Auriga



AURIGA NUSANTARA

SEKRETARIAT GAKKUM-SDA

Jl. Siaga II No. 42A, Pejaten Barat
Jakarta Selatan