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# Coal Mining Governance in Indonesia: Legal Uncertainty and Contestation

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*Coal production and coal export are important elements of the Indonesian economy, but mining operations are frequently plagued by conflicts among companies or between companies and local communities. In this article, we consider the role law plays in these conflicts and argue that it is, in fact, a factor that causes conflict. This is because mining governance rests with different levels and institutions of government, which has divided and delegated government authority and efficiency, and because revisions of relevant laws fail to take this complexity into account. Coal mining governance is therefore hampered by the inconsistency, ambiguity and incompleteness of the law, causing legal uncertainty for the stakeholders. Making use of cases encountered during research in the province of East Kalimantan, a major coal-producing area, we discuss the causes and consequences of the current state of coal mining legislation.*

> The legal order is like a Gothic cathedral: it is permanently under construction. - Christoph Engel (2004)

Over the past 15 years, Indonesia's coal production has increased enormously. During the last three years (2017 to 2019), Indonesia was the largest exporter of coal worldwide (Prime, 2020). By 2040, Indonesia may provide 28 per cent of the total global coal exports (US Energy Information Administration, 2017). Coal export improves trade balance, increases government revenue, and is an important sector in terms of providing employment. Between 2015 and 2019, the coal mining industry contributed about 2.26 percent to Indonesia's GDP per annum (BPS, 2020).

While positive in terms of economic impact, coal mining activities are also associated with negative environmental impact (Fünfgeld, 2016, 2017; Atteridge, Aung and Nugroho, 2018; Izza and Afkarina, 2019), human rights violations (Komisi Nasional Hak Asasi Manusia, 2016; Jalaluddin, 2018; White *et al.*, 2018), land conflicts (Subarudin, et al, 2016; Muhdar, Nasir and Nurdiana, 2019; Tondo and Siburian, 2019), and a lack of regulation and legal integration (Budiono and Rini, 2017; Dwiki, 2018; PwC, 2019). These problems are manifested in disputes over land access between companies and local populations, the pollution of crops and farmlands with mining dust and mud, and involuntary displacement of local people due to mining operations (for example, Van Paddenburg, et al, 2012; Ives and Bekessy, 2015). Further, post-mining restoration[1] and reclamation[2] of finished concessions are frequently omitted by coal mining companies although they are required by Law No 4 of 2009 on Mineral and Coal Mining (the 2009 Mining Law) to undertake these activities. This leaves land and ecosystems severely damaged and means that conflicts continue after mining has ended (Abdullah Naim, et al, 2010; WaterKeeper Alliance and Mining Advocacy Network (JATAM), 2017; Atteridge, Aung and Nugroho, 2018).

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[1] 'Post-mining restoration' is a planned, systematic and continuous activity following mining activities that aims to restore the natural environment's function and social functions (art 1(27) of the 2020 Mining Law).

[2] 'Reclamation' is an effort to restore, maintain and improve land functions so that the carrying capacity, productivity and role in maintaining the life support system of the area remains sustained (art 1(26) of the 2020 Mining Law).

In this article, we consider the role of law in conflicts over coal mining activities. We argue that coal mining governance suffers from legal uncertainty and, as such, may contribute to conflicts - or even cause them - rather than providing a solution.

We found that several frequently occurring forms of such conflict, which we will introduce and discuss below, follow from three general causes. These are: a) ambiguity of the law, by which we mean lack of clarity regarding intention and meaning; b) inconsistency of the law, such as when relevant regulations are contradictory; and c) incompleteness of the law, which occurs when required regulations, instructions or explanations are not provided. These are not mutually exclusive or exhaustive categories, but they allow us to highlight what we believe to be the main issues of legal uncertainty in mining legislation and governance.

Such issues are not unique to the sector: various problems we encountered in mining governance are reported for Indonesian law more generally. They include a lack of public trust in the legal process and administrative institutions, corruption in the courts, and statutory law being out of date, marginal or poorly enforced (see, for example, Lev, 2000). They also include unclear formulations of laws and lack of elucidation causing problems with the implementation of new legislation (Butt and Lindsey, 2018), and problems of authority arising from the application of legal instruments that are not part of the official hierarchy of laws (Sadiawati, et al, 2015; Syahlan, 2019). Meanwhile, conflicts between laws are caused by lower-level lawmakers failing to consider higher-level laws and by sectoralist law-makers failing to consider relevant legislation from outside their own field (Sumardjono, et al, 2009). Long delays in the finalisation of supporting legislation required for implementing new legislation also often make it impossible to apply new legislation (Waddell, 2002).

Mining governance is a relatively fragmented legal field that is regulated through sector-based laws and policies on mining, the environment, land, forestry, regional government, and spatial planning. New legislation on mining is presented frequently but irregularly and reflects the sectoral and governmental divisions of mining authorities. Until the recent (2020) amendment to the 2009 Mining Law (see below), the authority to issue mining licenses and monitor mining operations was divided between provincial and central levels of government (while district governments also had such authority from 2001 to 2014). This makes mining governance a dynamic sector but also one that is difficult to predict and hard to keep track of. This is not without significance given the strong national discourse emphasising that mining activities should benefit the population at large and improve the lives of the general population, as well as alleviate negative impacts for those living near mining operations (see, for example, Gandataruna and Haymon, 2011; Robinson, 2016). Nationalism has shaped mining and other extractive sectors over the past decade in the form of a range of policies aimed at limiting foreign influence, to benefit Indonesia's domestic extractive industry. The ensuing policy regime has produced regulations and laws that are vaguely formulated, Warburton (2017) suggests, so as to keep options open and satisfy different patronage networks among the political and business elites. The result is a situation in which the different interests of central and regional governments cause these levels to apply conflicting policies (see, for example, Bakker, 2016) and the 'nationalism' at stake primarily benefits a small group of already massively wealthy business tycoons (Warburton, 2018). While our focus is not so much on the political aspects of mining governance, the question of who benefits from the current practice is one that should be raised.

We proceed as follows. First, we present an analysis of legislation governing coal mining, to come to an understanding of its strengths and problems. Next, we offer a brief overview of examples of ambiguity, inconsistency and incompleteness of the law to illustrate how these come to the fore in legislation. Subsequently, we illustrate the consequences of this legal uncertainty by discussing two frequently occurring constellations of conflict caused by overlap in coal mining concessions and other land rights. These are conflicts between companies and local communities, and conflicts between companies and local governments. We use examples we encountered during our research in the province of East Kalimantan.

This province is representative of Indonesia's coal mining problems and unique in the intensity of its involvement. Nearly 52.5 per cent of Kalimantan's coal reserves are concentrated here, making it the most significant coal-producing area in Indonesia (Lidwina, 2020). As of April 2016, some 1,404 mining permits, or around 11 per cent of the total number of mining permits in Indonesia, had been

issued for this province alone (Budiono and Rini, 2017). These permits total 5,134 million hectares, or 40.3 per cent of the province's territory (Apriando, 2017). Also, unlike other Indonesian provinces, East Kalimantan's provincial government has enacted important provincial legislation on coal mining, thus adding province-level policy and governance to the legislative framework.

## Coal Mining Governance in Indonesia

Indonesia's coal mining governance cannot be considered separately from the extensive decentralisation of administrative authorities that followed the end of the New Order regime in 1998. While this policy revolution gave the regional level of government considerable control over land and resources within their boundaries, much of this authority was recentralised to provincial government, national government, and various ministries during revisions of the regional autonomy law in 2004 and 2014.

In this decentralisation era, the Indonesian government enacted the 2009 Mining Law to replace the 1967 Mining Law. This law stipulated that the central, provincial, and district or municipal governments can manage coal mining, each of which may develop legislation on the sector. In 2014, however, the central government also enacted Law No 23 of 2014 on Regional Government (the 2014 Regional Government Law). The significant point related to mining in this law is the revocation of district/municipal government authority in the mining sector. The law also orders district/municipal governments to hand over all coal mining permits to the province. In April 2015, the Ministry of Energy and Mineral Resources (Kementerian Energi dan Sumber Daya Mineral) issued a circular letter declaring that regents (*bupati*) and mayors (*walikota*) no longer have authority to issue mining permits. Still, contracts and agreements that regional governments had entered into have mostly remained in force, which was of great consequence as the 2003-2013 global commodities boom saw an unprecedented rise in foreign demand for Indonesia's natural resources. As a result, regional governments benefited considerably, despite the national government seeking to develop the mining and the mineral processing industries to strengthen the national economy (see, for example, Bakker, 2016; Warburton, 2017). For this purpose, the 2009 Mining Law instructed mining companies to add value to the raw ore through smelting, refining and other value-adding processes before exporting it overseas.

In 2020, due to a revision of the 2009 Mining Law, mining again became the near exclusive remit of the national (central) government. However, under art 173C of the amended Mining Law, provincial governments continue to hold the authority to extend existing mining licenses, although they can no longer issue new ones. This authority remains with provincial governments for a maximum period of six months following the enactment of the law or until its implementing regulations have been issued. In coal mining governance, the 2020 Mining Law is the main piece of legislation governing coal mining, but other sectoral laws, such as those relating to the environment, spatial planning and forestry, also govern elements of coal mining, as do various other regulations. An overview is provided in Table 1.

| Subject | Government Regulation (GR) | Minister of Energy and Mineral Resources Regulation (MoEMR) | Related Regulations |
|---|---|---|---|
| **Mining Areas** | GR No 22 of 2010 | **Mining Area, Licensing and Reporting in Mineral and Coal Mining**<br>MoEMR No 7 of 2020 revoked MoEMR No 11 of 2018, as amended by MoEMR No 22 of 2018 and MoEMR No 51 of 2018 | **Spatial Planning:** Law No 26 of 2007 on Spatial Planning, Local Regulations on Spatial Planning (province, district/municipality).<br>**Forestry:** GR No 6 of 2007 on Forest Management and Formulation of Forest Management Plans, and Forest Utilisation, Regulation of Minister of Environment and Forestry (MoEF) on Borrow-to-Use Forestry Permit |
| | | **Determination of Mining Areas**<br>MoEMR No 37 of 2013 | |

| | | | |
|---|---|---|---|
| | | | MoEF No 27 of 2018 as amended by MoEF No 7 of 2019 |
| **Mining Business Activities** | GR No 23 of 2010 as amended by GR No 24 of 2012, GR No 1 of 2014, GR No 77 of 2014, GR No 1 of 2017, and GR No 8 of 2018 | **Mineral and coal mining operations** MoEMR No 25 of 2018 as amended by MoEMR No 50 of 2018 and MoEMR No 11 of 2019 | **Environment:** Law No 32 of 2014 on Protection and Management of Environment, Law No 11 of 2020 on Job Creation, GR No 27 of 2012 on Environmental Permit, MoEF No 4 of 2012 on Indicators of a Friendly Environment for Business and/or Activity Open Coal Mining, Local Regulations on Protection and Management of Environment (province, district/municipality). **CSR:** Law No 47 of 2007 on Limited Company **Online Single Submission (OSS):** GR No 24 of 2018, President Regulation No 97 of 2017, local regulation on OSS **Taxation:** GR No 37 of 2018 |
| | | **Licensing and Reporting in Mineral and Coal Mining** MoEMR No 7 of 2020 | |
| | | **Delegation of Authority for Granting Licensing as Implementing of One-Stop Services** MoEMR No 25 of 2015 | |
| **Reclamation and Mine Closure** | GR No 78 of 2010 | **Reclamation, post-mining, implementation of good mining principles and supervision of mineral and coal mining** MoEMR No 26 of 2018 replaced MoEMR No 7 of 2014 (on the implementation of reclamation and post-mining) | **Environment:** Law No 32 of 2014 on Protection and Management of Environment, Law No 11 of 2020 on Job Creation, GR No 27 of 2012 on Environmental Permit, MoEF No 4 of 2012 on Indicators of a Friendly Environment for Business and/or Activity Open Coal Mining, Local Regulations on Protection and Management of Environment (province, district/municipality). |
| **Mineral and Coal Mining Direction and Supervision** | GR No 55 of 2010 | **implementation of good mining principles and supervision of mineral and coal mining** MoEMR No 26 of 2018 replaced MoEMR No 2 of 2013 (on supervision of the implementation of mining activities by provincial and district/municipal governments) | **Environment:** Law No 32 of 2014 on Protection and Management of Environment, Law No 11 of 2020 on Job Creation, GR No 27 of 2012 on Environmental Permit |
| | | **Evaluation procedures for the issuance of mineral and coal mining business permits** MoEMR No 43 of 2015 | |

Table 1: Regulations related to coal mining governance

This scattered division of regulatory authority over various levels of government, ministries and other governmental bodies is complicated and creates confusion. The Fraser Institute, an independent research and educational organisation based in Canada, conducts an annual survey of mining companies. Over the past three years it has consistently indicated a high degree of uncertainty in the Indonesian administration's interpretation and enforcement of existing regulations, particularly with respect to its environmental regulations. The researchers pointed to the existence of regulatory duplications and inconsistencies. The survey gives Indonesia ominously low ratings on these aspects (Jackson and Green, 2017; Stedman and Green, 2018, 2019). Other

studies present similar findings. Fünfgeld (2016) and O'Callaghan and Vivoda (2017) report inconsistencies in regulations issued by the central, provincial and regional levels of government, as well as among different agencies at these levels of government. Devi and Prayogo (2013) argue that uncertainty of law emerges due to an absence of implementing regulations or because technical directives are lacking, while ambiguity is caused by competing regulations and differing interpretations given to these by various actors (O'Callaghan, 2010; Devi and Prayogo, 2013).

## Legal Uncertainty in Governing Coal Mining in East Kalimantan

Although the 2020 Mining Law made the central government the coal mining sector's exclusive licensing authority, previously existing regulations on licensing are valid until the promulgation of the implementing regulations of the new law, which at the time of writing (April 2021) were not yet announced or introduced. This implies that, at the time of writing, the authority to manage coal mining in East Kalimantan, which mainly consists of permit monitoring, reclamation and post-mining activities, was still managed predominantly at the provincial level of government. During our research, we found this management to be problematic in various ways, as we discuss below.

### Ambiguity in Permit Guarantees

Under art 46(1) of the 2009 Mining Law, any holder of a Mining Business Permit (*Izin Usaha Pertambangan*) for exploration is 'guaranteed' to obtain a Mining Business Permit for production to ensure the continuation of the mining business. Similar provisions exist in art 34(2) of Government Regulation No 23 of 2010 on the Implementation of Mineral and Coal Mining Business Activities and art 43(2) of the Ministry of Energy and Mineral Resources Regulation No 11 of 2018 on Procedures for Giving Area, Licensing, and Reporting on Business Activities of Mineral and Coal Mining. Yet the meaning of 'guaranteed' (*dijamin*) is unclear. Does it mean that the licensor cannot refuse the applicant a production permit once an exploration permit has been granted, or does it mean that continuation is subject to meeting the conditions set out in the law?[3]

'Guaranteed' was interpreted differently by parties in the case of *PT Marimun Bara Sejahtera (PT MBS) v the East Kalimantan Provincial One-Stop Investment and Integrated Services Office* (Dinas Penanaman Modal dan Pelayanan Terpadu Satu Pintu Provinsi, DPMPTSP). In July 2018, the company submitted a request to DPMPTSP to upgrade the status of its permit from exploration to production operations. However, DPMPTSP found that the company did not meet the requirements for such an upgrade as set out in art 4 of Ministry of Energy and Mineral Resources Regulation No 43 of 2015 on Evaluation Procedures for Issuing Permits of Mineral and Coal Mining. Also, the requested area included overlaps with plots that were designated as residential and horticultural areas in the provincial spatial plan, which made them out of bounds for mining. DPMPTSP interpreted the 'guarantee' as being conditional on the fulfilment of these requirements and therefore rejected the request. PT MBS disputed the decision and brought the case to the administrative court in August 2018. At the trial process, the judges found that the 2009 Mining Law and Ministry of Energy and Mineral Resources Regulation No 34 of 2017 on Mineral and Coal Mining Permits (as amended by Ministry of Energy and Mineral Resources Regulation No 11 of 2018) provide an unconditional guarantee that the exploration permit holder can upgrade the permit status as a continuity of his investment. Based on these considerations, the judges ordered DPMPTSP to issue the production operation permit to PT MBS. However, at the time of writing DPMPTSP had not done so and, while we have been unable to obtain a clear answer as to why this is so, the issue illustrates that, even with a court decision, it may take considerable time to obtain a permit upgrade.

[3] These conditions concern administrative requirements such as production of valid permits, a correct map of the concession and confirmation from the provincial government that the permit contains no overlaps. Also, Mining Business Permit holders need to show that they have complied with all financial liabilities (both tax and non-tax) and that they have met all technical requirements. These include submission of a final exploration report, a feasibility study, an environmental impact analysis (see below), and a reclamation and post-mining plan, as well as approvals of all these by the authorities responsible.

### Inconsistencies in Post-mining Restoration Governance

While the previous example already included elements of legal inconsistency, the effects of such deficiencies are central to many problems of regulating reclamation and post-mining restoration.[4] These are regulated by the 2009 Mining Law, with details of its implementation provided in Government Regulation No 78 of 2010 on Reclamation and Post-mining and in Ministry of Energy and Mineral Resources Regulation No 7 of 2014. Although the 2009 Mining Law and Government Regulation No 78 of 2010 explicitly order the mining companies to fill in open mining pits upon conclusion of their activities, Ministry of Energy and Mineral Resources Regulation No 7 of 2014 allows companies to leave the pits open if these are designated to be used as residential areas, for tourism, as water sources, or as cultivation areas. The regulation also allows companies to leave mining pits open if a pit is too large to fill in or for other technical reasons, which are not specified or explained in the law.

The opportunity to use mining sites for other purposes rather than carry out the reclamation and post-mining obligations set out in the 2009 Mining Law has obscured and neglected the intentions of reclamation and post-mining to restore the quality of the environment and ecosystem to its previous condition. Companies frequently claim 'technical reasons' to leave pits open (Azis, 2019), which brings into question their responsibility for post-mining restoration of the ecosystem and the social environment. In addressing this issue, Ministry of Energy and Mineral Resources Regulation No 7 of 2014 was recently replaced by Ministry of Energy and Mineral Resources Regulation No 26 of 2018 on the Implementation of Good Mining Rules and Supervision of Mineral and Coal Mining. This regulation ordered companies to restore land use according to the environmental impact analysis (*Analisis Mengenai Dampak Lingkungan*),[5] which the company is obliged to carry out before commencing mining activities. By doing so, this new regulation ended the possibility of companies to changing the designation of mining locations upon conclusion of activities, unless such a change is already stated in the environmental impact analysis. Ministry of Energy and Mineral Resources Regulation No 26 of 2018 thus places final responsibility much more clearly with the company.

At the same time, a more technical provision as a follow-up to the regulation is Ministry of Energy and Mineral Resources Decree No 1827 of 2018 on Guidelines for Reclamation and Post-Mining Implementation in Mineral and Coal Mining Business Operations. The Annex to this decree states that at the production operations stage reclamation can take the form of re-vegetation or other designations, including turning them into housing areas, tourism sites, water sources, or cultivation areas. While Ministry of Energy and Mineral Resources Regulation No 26 of 2018 states that reclamation is intended to organise, restore and improve the quality of the environment and ecosystem following its previous use, this Ministerial Decree again opens the opportunity to use former mine pits for other purposes that differ from their original designation.

East Kalimantan's Provincial Regulation No 8 of 2013 on the Implementation of Reclamation and Post-mining addresses the issue as well. This regulation also allows companies to not restore former mining areas to their original function. They can, instead, develop such land for livestock farming and smallholder plantations, or leave mining pits open in up to 10 per cent of the disturbed land area.[6] However, areas for such redevelopment, as well as pits to be left open, must be clearly indicated in the environmental impact analysis.

Complicating matters further is the Minister of the Environment Regulation No 4 of 2012 on Indicators of a Friendly Environment for Business and/or Open Coal Mining Activities, which is based on the 2009 Environmental Law.[7] The Annex to this Ministry of Environment Regulation

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4 The 2020 Mining Law removes provincial and district authority in the mining sector (arts 7 and 8 of the 2009 Mining Law). Under art 6 of the 2020 Mining Law, only the central government can carry out guidance and supervision of reclamation and post-mining.

5 An environmental impact analysis is conducted, to establish the scale and significance of the environmental impact of planned development. It is required as input for the process of decision-making for issuing permits.

6 'Disturbed land' connotes an area used for mining business activities, drilling holes, test wells, test trenches, and mining supporting facilities.

7 Law No 32 of 2009 on Environmental Protection and Management stipulates that every business and/or activity that has critical impact on the environment must conduct an Environmental Impact Analysis.

stipulates that open excavation pits may remain for up to 20 per cent of the coal mining permit's area. In 2014, the Ministry of Forestry and the Ministry of Environment were merged into the Ministry of Environment and Forestry. Earlier Ministerial Regulations of both ministries have remained in force, yet simultaneous implementation of Ministry of Energy and Mineral Resources Regulation No 26 of 2018 and Ministry of Environment Regulation No 4 of 2012 is highly complex due to their different provisions on post-mining pit closure.

Regardless of which regulation is to take precedence, each refers to environmental criteria that mining companies should meet. Once a company fails to do so, the regulations refer to the different provisions of the 2009 Mining Law and the 2009 Environmental Law. Which of these laws is to be enforced, and by which authority is, however, not clear.

### Ongoing Incompleteness of Mining Governance Authority

The enactment of the 2014 Regional Government Law that was discussed above annulled the earlier distribution of government authority as set out in the 2009 Mining Law, specifically ending district government authority in permit-issuing and in the monitoring and evaluation of reclamation and post-mining activities. To address these changes the Ministry of Energy and Mineral Resources issued three regulations in 2018 that jointly revoked fourteen earlier Ministry of Energy and Mineral Resources regulations that authorised district governments to carry out these tasks.[8] The three new regulations ordered the Ministry of Energy and Mineral Resources and the Directorate General of Coal Mining to draft a comprehensive set of implementing guidelines for the environmental management of mining, for mining reclamation, post-mining management, the supervision of mining business governance, and for the monitoring and evaluation of reclamation and post-mining activities.

However, in 2020 one of these, Ministry of Energy and Mineral Resources Regulation No 11 of 2018 (which had been amended twice since its promulgation), was revoked by the new Ministry of Energy and Mineral Resources Regulation No 7 of 2020 on Procedures for Granting Areas, Licensing, and Reporting on Mineral and Coal Mining Business Activities. The guidelines ordered in Ministry of Energy and Mineral Resources Regulation No 11 of 2018 were not ready, while Ministry of Energy and Mineral Resources Regulation No 7 of 2020 instructed that yet further new guidelines should be drafted.[9] While not dissimilar in terms of required guidelines, Ministry of Energy and Mineral Resources Regulation No 7 of 2020 shifts the authority for enacting the guidelines from the director-general to the minister. While creating a higher binding force, the involvement of the minister also causes new delays.

In short, the changes brought about by Law No 23 of 2014 have still not been implemented in 2020. This situation is further complicated by the 2020 Mining Law revoking provincial governments' authority to issue permits and supervise reclamation and post-mining activities, and placing these with national government, while the implementing regulations are, as yet, not available. As a result, the 2020 Mining Law does not resolve the legal vacuum on supervision guidelines but rather adds to the ensuing legal gap.

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8 These three regulations are: 1) Ministry of Energy and Mineral Resources Regulation No 11 of 2018 on Procedures for Granting Area, Licensing and Reporting on Mineral and Coal Mining Business Activities, which replaced six regulations related to the permit, mining area, and the authority of local government; 2) Ministry of Energy and Mineral Resources Regulation No 25 of 2018 on Exploitation of Mineral and Coal Mining, which annulled two regulations related to licensing; and 3) Ministry of Energy and Mineral Resources No 26 of 2018 on the Implementation of Good Mining Rules and Supervision of Mineral and Coal Mining, which repealed six regulations on reclamation and post-mining activity, monitoring and evaluation, and environment.

9 These guidelines should take the form of Ministry of Energy and Mineral Resources Decisions on: 1) enactment and implementation of granting mining business license areas; 2) application, evaluation, and issuance of the exploration permit; 3) application, evaluation, issuance, and extension of production operation permit; 4) application, evaluation, and approval of partnership program; and 5) preparation, submission, evaluation, and approval of the Annual Work Plan and Budget.

## Contestation of Coal Resources in East Kalimantan: Rights to Land versus the Right to Exploit

The various competing interests in natural resources in East Kalimantan have given rise to numerous conflicts over their usage. In 2019, there was an overlap of approximately 4.5 million hectares in licenses granted to plantation and mining companies and to various types of forestry sector enterprises (Fel GM, 2019).

Conflict settlement between such diverse parties should follow the law. For natural resources, various sectoral laws — forestry, land, plantations, and mining — provide specific instructions on conflict resolution. As we have shown above, however, such diverse legislation may not only give rise to confusion, it may also cause conflict. For instance, if a coal mine is located in a forest area and causes environmental degradation in that area, which legislation takes precedence and must be applied to resolve the conflict? The Mining Law, the Forestry Law, or the Environmental Law?

In this section, we discuss several conflicts that we encountered during our research, to examine how such contests were worked out.

### Coal Mining Companies versus Communities

In 2014-15, there were 18 cases of this type of conflict (JATAM, 2016, unpublished data). Two of these were brought before the administrative court. We identified two main causes for these conflicts. The first is when a local government grants a coal mining permit in a settlement area or for land that is otherwise occupied by a community, such as gardens or rice fields. Articles 135 and 136 of the 2009 Mining Law allow for this on the condition that the mining company provides compensation to which the holder(s) of land rights agree(s). In practice, such an agreement is often not reached. This is not just because the amount of compensation offered is deemed too low, but because communities often do not want to release their land for coal mining in the first place. The absence of an agreement gives rise to conflict as both parties contest the other's rights: the company maintains that it has a permit, while the community counters that no legally required agreement was reached. This is an inconsistency in the law.

The second cause of such conflicts is ambiguity in the 2009 Mining Law, which does not provide explicit provisions to solve overlaps between coal mining concessions and other parties' land rights. Article 136(1) of the 2009 Mining Law only states that these 'should be settled under statutory provisions,' but such provisions are still lacking at the time of writing, and they have not been included in the 2020 Mining Law either. The lack of clear rules encourages parties to apply other methods to further their interests. Communities often resort to blockades and protests, while mining companies react by bringing criminal charges against stubborn opponents who persist in asserting their right to land. The companies accuse protesting communities of obstructing or interfering with mining operations, as stated in art 162 of the 2009 Mining Law (CNN Indonesia, 2019; Hukum Online, 2020) and the court frequently endorses such accusations. While this may end the blockades, it does not resolve the conflict. Nor does it improve relations between the parties involved.

Contests between companies and communities are generally resolved through direct negotiations between the parties, often through mediation by a third party (which is nearly always the local government). If this fails, the case is often brought before the court. It is not uncommon for parties to apply a number of these methods before the issue is eventually decided upon, as the following example illustrates. In 2011, a coal mining company, PT Mahakam Sumber Jaya (MSJ), came into a conflict with the villagers of Sebuntal village in Kutai Kartanegara District. PT MSJ had a concession area of 23,000 hectares, of which 4,000 hectares overlapped with a community plantation cultivated by a Land Ownership Association (Kelompok Persatuan Pemilik Lahan*)* of some 300 local families. The association's claim to the land was based on a Land Tenure Statement (*Surat Pernyataan Pemilikan Lahan*) that had been issued by the local village head and was recognised by the sub-district government (Detak Kaltim, 2017).

In 2011, PT MSJ appealed to the district government to facilitate a solution to the land conflict. The district government sent a team to investigate and identify land claims by the villagers farming in the disputed area (Dimas, Idris and Fitriyah, 2014; Harjanto, et al, 2019). The team failed to settle

the conflict, as PT MSJ did not agree with the amount of compensation requested by the villagers. In 2013, the East Kalimantan Provincial Legislative Council mediated between the parties involved in the dispute but also failed to reach a settlement (Antara Kaltim, 2013). Meanwhile, the Sebuntal villagers living around the mining concession did not wait for events. Arguing that PT MSJ had not paid compensation for their land, they frequently put up physical blockades to obstruct the company's activities. PT MSJ countered that while no agreement had been reached about compensation, they had conducted the process as per the legislation in force (Dimas, Idris and Fitriyah, 2014; Harjanto, et al, 2019). As a non-litigation approach had failed to bring about an agreement, the villagers stated that they would start a lawsuit if PT MSJ commenced mining activities in their community plantation (Detak Kaltim, 2017). PT MSJ ignored this threat of being sued by the community and continued to carry out its operations.

That such conflicts may be resolved through a lawsuit is shown by the case of the village of Muara Kaeli disputing a mining concession held by PT Sinar Kumala Naga (PT SKN) in the district of Kutai Kartanegara. Here a Forest Education and Research Area in the village overlapped with PT SKN's concession.[10] The mining activities of PT SKN had damaged the Forest Education and Research Area and had disrupted the livelihoods of people living in its vicinity. In November 2015, the Barisan Anak Dayak (BADAK), an NGO based in Samarinda, filed a lawsuit in the administrative court in Samarinda against PT SKN and the Regent of Kutai Kartanegara (the issuer of the permit). The NGO asked the court to order the regent to exclude the overlapping area of about 29.61 hectares from the concession. The judge accepted the plaintiff's claim and ordered the Regent of Kutai Kartanegara to release these hectares from the permit.[11]

A third example of this type of conflict illustrates the criminalisation of opponents by companies. In the district of Paser, a conflict began in 2009, when PT Kideco Jaya Agung (PT KJA), a coal mining company, conducted land clearing in Songka Village, a settlement of indigenous Paserese. A total of 598 hectares of the disputed land was claimed by Mrs. Noorhayati, a local villager who based her claim on a *segel*[12] issued in 1957. PT KJA did not pay compensation, since the amount offered by the company was deemed insufficient by Noorhayati and her family. As no solution was forthcoming, they staged a six-day *Belian* ritual on the disputed land in June 2014. A *Belian* is a ritual to cleanse the community and the environment from harmful aspects or misdeeds (Bakker, 2009). Staging such a ritual in this context may be considered a creative way to perform an obstructive protest yet circumvent the prohibition on hampering mining operations. The *Belian* was intended to spiritually repair the consequences of PT KJA's operation on the land, yet PT KJA felt that the *Belian* hampered its activities, particularly the transportation of coal, claiming it caused a loss of around 95 billion rupiahs (US $9,858,128).[13] The company called in the police and asked them to arrest Noorhayati as the instigator of the ritual. Noorhayati was indicted on the grounds that the *Belian* ritual had blocked mining activities. After a series of trial examination sessions, Noorhayati was found guilty of obstructing coal mining operations and sentenced to two months' probation in June 2015. The High Court confirmed the verdict in October 2015, followed by the Supreme Court in January 2017.

These three cases illustrate some of the more common conflicts that arise regularly between companies and communities as a result of overlap between mining permits and other land rights. The situation is caused mainly by ambiguity in the registration of land that the companies can use for mining and the poor formulation of dispute resolution in the laws. As a consequence, clear and more precise legislation about fair and adequate compensation could remedy this condition. The criminalisation of protest is a cause for concern in itself, since legal procedures to stop ritual events can trigger widespread conflict with indigenous peoples, as happened in Noorhayati's case. Importantly, the three cases show that coal mining companies are well-placed to use their permits

[10] Forest Education and Research Area is a forest area designated for forestry research and development, forestry education and training as well as religion and culture.

[11] See Administrative Court Decision No 30/G/2015/PTUN-SMD.

[12] A *segel* is a letter containing a statement regarding land control by a person, issued by the village head and approved by the head of the sub-district.

[13] See Tanah Grogot Court Decision No 04/Pid.B/2015/PN.TGT.

and the law to privatise disputed land and dominate communities' social spaces and natural resources.

### Coal Mining Companies versus Local Government

Based on our research in the administrative court in Samarinda, we identified eighteen conflicts between coal mining companies caused by overlapping licenses, and which took place between 2009 and 2019. These overlapping permits resulted from a local government granting a permit to a company for an area in respect of which another company already holds a permit. This can be a consequence of poor or incomplete permit administration, poor coordination between responsible authorities, or corruption (Arwanto, 2018; JATAM, et al, 2019). Such overlaps frequently become conflicts because of inconsistencies in the law and because of the significant business interests that are at stake. Often these overlaps involve multiple companies, which are generally mining companies, but can also be other types of companies, such as plantation owners.

Our first example here, the case of *PT Bumi Energy Kaltim (PT BEK) v PT Penajam Prima Coal (PT PPC) and PT Energi Penajam Mandiri* (*PT EPM),* provides an illustration of how such disputes occur. This conflict commenced in August 2011, when the government of Penajam Paser Utara district upgraded the mining permit status of PT PPC and PT EPM from exploration to production operations. During the process, however, the district government found that the two companies' concessions overlapped with the concession of PT BEK. The district government subsequently asked PT BEK to stop its mining activities in the overlapping area, and resolve the issue. The local government facilitated a series of mediation meetings to explore the possibility of an amicable solution.

Since all companies maintained their claims, the regent then applied a formal approach. After verifying all of the licensing documents, the district government identified that the area of overlap between PT BEK and PT PPC totalled 730 hectares (22.25 per cent of PT BEK's concession), while the overlap between PT BEK and PT EPM amounted to 2,254 hectares (68.70 per cent of PT BEK's concession). According to the district government's findings, PT BEK had obtained its permit in 2008, whereas PT PPC and PT EPM obtained theirs in 2004. Since mining permit services must be applied according to a first-come, first-served principle, as stated in the Decree of Ministry of Energy and Mineral Resources No 1603K/40/MEM/2003, the regent decided to reduce the concession of PT BEK in December 2014. In response, PT BEK brought the decision before the administrative court in March 2015. The company argued that the decision of the district government was against the law and had caused legal uncertainty for PT BEK's business, calling for the court to cancel the regent's decision, however, the court rejected their request as the judges considered the regent's decision to have followed applicable laws and regulations.[14]

Between 2009 and 2019, the administrative court in Samarinda also heard ten cases of conflicts between coal mining and palm oil companies that were caused by overlapping licenses. The case of *PT Perkebunan Kaltim Utama I (PT PKU) v PT Kutai Energi (PT KE), PT Trisensa Mineral Utama (PT TMU), PT Adimitra Baratama Nusantara (PT ABN), and PT Indomining* serves as our second example. On June 9, 2009, the regent of Kutai Kartanegara district issued a coal mining license to PT KE for 6,932 hectares. PT PKU protested the issuance of the permit as they held a license, also issued by the regent, that overlapped with the new concession of PT PKU. When looking into the case, PT PKU found further overlaps with new permits that the regent had issued to other coal mining companies, namely PT TMU, PT ABN, and PT Indomining. The total overlapping area amounted to 3,968.3 hectares.

On 6 December 2010, a coordination meeting was held between the district government and the various companies and an agreement was reached that involved shared land use with priority for coal mining activities. This meant that the coal would first be mined, after which plantations would be set up once the area had been restored. Although PT PKU signed the agreement, the company remained dissatisfied with the outcome and sued the regent in the administrative court in July 2011. The judges rejected PT PKU's demands to revoke the permit issued to PT KE because the lawsuit

[14] See Administrative Court Decision No 05/G/2015/PTUN-SMD.

was filed late (more than 90 days after the issuance of the license).[15] In turn, PT KE opted to settle the matter on commercial basis. PT Toba Bara Sejahtera, the parent company of PT KE, PT TMU, PT ABN and PT Indomining decided to buy 11,250 shares (equivalent to 90 per cent) of PT PKU in June 2013 (Pradipta, 2013). The acquisition of PT PKU minimised the risk of future legal disputes (PT Toba Bara Sejahtra Tbk., 2013).

These examples illustrate how local governments fail to provide legal certainty for permits issued to companies. When granting a coal mining permit, the local government often does not ascertain the concession area to be awarded to a company on the basis of existing permits. Such poor administration results in inconsistent decisions by local governments as they generate significant overlap between concessions.

## Conclusion

In this article, we have discussed the role of law in conflicts over mining activities. We find that coal mining governance is plagued by legal uncertainty that poses a significant obstacle to a functional and effective coal mining regime. We see three causes of this. The first is the distribution of authority over three different levels of governance (regional, provincial and national), which overlap, contradict and lack mutual coordination. As mining governance is dispersed over multiple sectoral laws in addition to the Mining Law itself, concentrating and coordinating its authority requires extensive collaboration between different levels and bodies of government. This proves to be problematic in practice. The second cause is the speed and coordination of the revision of coal mining governance. Decentralisation, recentralisation and new divisions of coal mining authority followed one another at a fast pace – the 2020 Mining Law being the latest instalment – but this caused problems in legislation due to overlaps, contradictions and a lack of implementing regulations. Thus, the legal structure suffers from the speed with which it is constructed, altered and new aspects added to it. The third cause of legal uncertainty is the existence of multiple permits to the same plots of land and overlaps between permits and other land titles. A clear and transparent permit system is fundamental for companies, communities and land users in general. In sum, we perceive a lack of regulatory clarity in coal mining governance that results from a lack of coordination and alignment in the development of legislation and the allocation of authority and responsibility in governance.

Based on the cases we reviewed above, we discern two major consequences. The first is that mining companies are the actors that appear most capable of benefiting from the present situation. Local governments are relatively powerless to act. In particular, the regulatory opacity allows mining companies that are unwilling to meet their obligations in reclamation and post-mining restoration ample opportunity to avoid the implementation of such activities and the expenses associated with them. Although we see government bodies undertaking serious attempts to compel companies to fulfil their obligations, these are hampered by a lack of legal and governmental cohesion and coordination. The second is that the law fails to assist and protect people living in the vicinity of mining areas. In particular, rural villagers and small-scale farmers suffer adverse effects by loss of farmland, pollution of the natural environment, and exposure to illegal and hazardous conditions. The lack of implementation of restoration and rehabilitation may impact many others in the future as well.

To resolve these issues, it is not only indispensable to critically take stock of the present structure of coal mining governance, as we have done in this paper, but also to overhaul its organisation so that overlaps may be removed, gaps repaired and clarifications provided where necessary. In terms of research, a study analysing the policies underpinning such changes – or, rather, the lack thereof –would be a very welcome contribution to the debate.

[15] See Administrative Court Decision No 24 /G/2011/PTUN- SMD.

**Postscript**

Following completion of this paper, in November 2020, the Indonesian government promulgated Omnibus Law No 11 of 2020 on Job Creation, which inserted a new article, 128A, into the 2020 Mining Law. This article offers a no royalty fee fiscal incentive to coal mining license holders (IUP and IUPK) who carry out value-added activities (that is, coal upgrading, coal liquefaction, and coal gasification). This incentive follows governmental plans to step up the domestic derivative industry to reduce the export of unprocessed coal. Furthermore, overlaps in permits and land rights are now addressed in an implementing regulation under the Job Creation Law, Government Regulation No 43 of 2021 on the Incompatibility Settlement of Spatial Planning, Forest Areas, Permits, and Land Rights. Article 12 (2) of this regulation instructs that when a new permit is issued that overlaps with existing permits, the overlapping areas will remain with the existing permit. The article also allows for settlement of such overlaps through a joint land-use agreement between the permit holders.

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*Tanah Grogot Court Decision No 04/Pid.B/2015/PN.TGT: Defendant Dra. Noorhayati, MT, binti M Thaib*

## Abbreviations and Acronyms

| | |
|---|---|
| ABN | Adimitra Baratama Nusantara |
| BEK | Bumi Energy Kaltim |
| DPMPTSP | Dinas Penanaman Modal dan Pelayanan Terpadu Satu Pintu/One-Stop Investment and Integrated Services Office |
| EPM | Energi Penajam Mandiri |
| GR | Government Regulation |
| JATAM | Jaringan Advokasi Tambang/Mining Advocacy Network |

| | |
|---|---|
| KE | Kutai Energi |
| KJA | Kideco Jaya Agung |
| MBS | Marimun Bara Sejahtera |
| MSJ | Mahakam Sumber Jaya |
| MoEMR | Ministry of Energy and Mineral Resources |
| MoE | Ministry of Environment |
| MoEF | Ministry of Environment and Forestry |
| NGO | Non-governmental organisations |
| PKU | Perkebunan Kaltim Utama |
| PPC | Penajam Prima Coal |
| PT | Perseroan Terbatas/Limited Compnay |
| SKN | Sinar Kumala Naga |
| TMU | Trisensa Mineral Utama |