



## Environmental Protection in the Era of Omnibus Law

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Received: April 10, 2022 Accepted: May 25, 2022 Online Published: May 30, 2022

### Abstract

Indonesia is not a green constitution implementing country that explicitly states the Environmental Law in the constitution. In an environment that is not recognized as a subject of law, the guarantee of its protection relies on the dominating regime's will. This paper is aimed to identify and analyze environmental protection since Omnibus Law on Job Creation was enacted. The analysis technique used in this paper is normative juridical. The result of this research found that Omnibus Law enforcement is weakening against environmental protection in Indonesia and is incompatible with the sustain theory/principal of the environmental management that has been established with the characterization of profit-oriented. The weakening of the environment includes the environmental permits sector which is replaced by environmental agreement, the absence of criminal penalty that may lead to the absence of deterrent effect as well as people's control rights. Increasing economic growth investment does not necessarily mean sacrificing environmental protection. This study suggests the government formulate a proper and balanced regulation between economic improvement and environmental spirit.

**Keywords:** environment, omnibus law, protection

### 1. Introduction

Environmental management is inevitable since it is to create environmental harmony and balance for sustainable development, policies must be implemented in utilizing any of each potential natural resource and environment so the eco-friendly implementation can also be achieved. Natural resources utilization should be aimed to create maximum prosperity for people as well as to maintain environmental sustainability, sustainable economic development, and local culture in the frame of harmonious law. Human beings and the environment are described as a building that mutually supports each other. In this relationship, human being actively plays their roles while the environment remains passive so its quality relies on human action.

The impacts of a destroyed environment such as many disasters and biodiversity damage on the land and the sea, ozone layer damage, unpredictable global climate change, and the new variant of disease can threaten people's life. Environmental issues are getting worse every day, this is as the rapid growth of industrialization consequence in developed countries as well as uncontrolled population rate which make environmental damage get worse permanently or even irreversibly (*irreversible environmental damage*). This massive environmental damage occurs nearly in the entire part of the world Richard Stewart and James E Krier categorize environmental problems into 3 (Laode M Syarif dan Andri G Wibisana, 2005:87):

- a. Pollution;
- b. land misuse;
- c. natural resource depletion.

The correlation is that the decrease in environmental quality is caused by the overexploitation of natural resources without concerning its sustainability. Pollution occurs gradually through the quality degradation of the environment. It is started by contamination of certain substances in long term. According to Munadjat Danusaputro, environmental pollution can be explained as below "*Pollution is a condition that a substance or energy is introduced to an environment by human's or nature's act in some form of concentration, to cause a transformation leading into a non-functional condition in terms of health, prosperity, and biosafety*" (Munadjat Danusaputro:1986).

The increase in development has risks, the more risks mean the more pollution and environmental damage level including toxic and hazardous waste (B3), which results in damage to ecosystem structure and functions. The environmental pollution and damage will become social issues which eventually affect the high cost of its recovery. Environmental law was created to protect the environment and people. It means that the rule was made for the sake of the people. In its regulation and implementation, the element of certainty, the element of benefit, and the element of justice must be compromised, that these three should be proportionally concerned in order to restore the polluted environment (Sudikno Mertokusumo:1988).

Environmental protection relies on the dominating government regime. In the new order era, the character of environmental protection was centralized, the regions were given a mandate or delegation to implement what had been commanded by the central government. The mandate and delegation relied on the dominating regime. There was no regulation concerning the district's rights and obligations in managing and implementing environmental protection. This happened as long as the new order regime dominated.

After the collapse of the new order and the shift by the reformation regime that promoted regional autonomy in 1999, regional authorization of environmental management has been defined. This is stated in Constitution No. 22 the Year 1999 of Region continued by Constitution No. 32 the Year 2004 and refined by Constitution No. 23 the Year 2014. The last constitution mentioned the detail of permit distribution in the environment between the region and the central government. The government's roles in macro policies management and norms establishment, the standard of criteria and procedure. In the era of regional autonomy, there was also Constitution PPLH-2009 which defined regional permits of environmental management. The permit was more for regional government, especially district/city.

Some regional district/city permits based on Constitution PPLH-2009 (Muhammad Akib, 2021): The establishment of RPPLH is done by the regional head and approved by the Regional House of Representatives (DPRD) follows:

- a. Compile KLHS which describes the comprehensive analysis of environmental effects starting from plans, policies, and government programs. There are two main functions of KLHS, they are the government fundamentals to make policies and environmental management.
- b. Given the environmental permits, this is a direct regulation in environmental laws and also a public laws instrument (Siti Sundari Rangkuti, 1992:1). The environmental permit is expected as a prevention instrument of environmental protection. Its function is vital which is to control human acts which may cause pollution and damage. The environmental permit requirements mention obligations to be done and it is the prevention act, while the administrative act is the termination act in order to stop the violation and it is the overcome act of the environmental permits (Muhammad Akib, 1994). The permit's revocation causes the cancelation of business access and/or the activity cancelation (Article 40 Constitution PPLH-2009). The environmental permit is the requirement for business/activity permits publishing.

The reformation spirit that requires decentralization of regional autonomy was a struggle to ruin the authoritarian centralization system in the dominated new order era. The struggle was highly cost and also sacrificed reformation figures' life. The over dominating central government in managing and protecting the environment has been delegated to the regional. The region itself understands more about how to manage and protect its environment. Nevertheless, since Constitution on Job Creation (Omnibus Law) has been enacted on October 5th, 2020, the implementation of fundamental laws which has been established for years seems ruined. Regional rights and authorization pursued were revoked by the central government. The decentralization system of environmental management was being centralized. The central government was full of control over natural resources and environmental management. The environmental management that was initially defined as sustainable developed shifted to profit-oriented and prioritized profit and needs of the investors. In the name of investment, environmental protection was being negation.

Based on the background, this paper will describe the concept of environmental protection since the Constitution on Job Creation (Omnibus Law) has been enacted. Is Omnibus Law positively affecting environmental protection or weakening the implementation of the Indonesian law?

## **2. Method**

This study puts more emphasis on the normative juridical method (Soerjono Soekanto dan Sri Mamuji: 1990). That means by studying and analyzing the regulation of valid laws including other kinds of literature such as

journals on laws, it aims to describe the influence of Lawson Job Creation (Omnibus Law) on Indonesia's environmental protection.

### **3. Result and Discussion**

#### *3.1 The Fundamental Laws of the Environmental Protection*

Indonesia is a legal state as stated in the Indonesian Constitution which is stated in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, namely the State of Indonesia is a state of law (Rechtsstaats) not a state of power (Machtsstaat). This kind of enforcement is very much needed so that various free spaces are opened to the meaning of the rule of law itself, perhaps this will be one of the advantages of the regulatory mechanism that should not be regulated in the 1945 Constitution.

Indonesia is a country rich in natural resources (SDA) living and non-biological natural resources. These natural resources are regulated in "Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945)" which states that "Earth, water and natural resources contained therein are controlled by the state and used as much as possible". The word "be controlled" means that the management of all-natural resources including mining minerals is in the hands of the government, including the authority to administer, and supervise widely in order to realize prosperity for all Indonesian people, not for the benefit of the people. Article 33 paragraph 3 gives power to the state to control the natural wealth in Indonesia and use it for the prosperity of all Indonesian people. Environmental protection is one of the most important elements to pursue Indonesian goals. The goals are mentioned in the opening of the 1945 Constitution paragraph 4 Amendment IV:

- a. To protect all Indonesian people
- b. To promote public prosperity
- c. To enrich the nation's life
- d. To participate in the implementation of world order in accordance with independence, eternal peace, and social justice

The main content of the 1945 Constitution after the Amendment mentioned the environmental protection in an Article of human rights. It is also stated in Article 28 H paragraph (1) 1945 Constitution Amendment IV that "each person has the right to own healthy environment" Environmental law is a field that is special and it is called by Drupsten the field of functional laws, its content has elements of administrative laws, criminal laws, and civil laws (Takdir Rahmadi: 2013). Those three elements are stated in Constitution No. 32 the Year 2009 on Environmental Protection and Management.

Human behavior affects nature, so they must have a commitment to create a proper environment and obey the laws, in order to preserve discipline and a sustainable environment. Constitution No. 32 the Year 2009 on Environmental Protection and Management covers Indonesian laws on the environment, therefore it becomes fundamental to the previous regulation and also as an integral provision of a system.

Constitution No. 32 the Year 2009 on Environmental Protection and Management, Article 1 paragraph (2), states "The environmental protection and management is a systematic and integrated effort done to sustain environmental function and prevent pollution and/or environmental damage including planning, utilizing, controlling, maintaining and laws implementing." Article 3 of Constitution No. 32 the Year 2009 on Environmental Protection and Management, states: "The environmental protection and management aims to protect The Unitary States of the Republic of Indonesia from pollution and/or environmental damage;

- a. To ensure human life, health, and safety;
- b. To ensure the sustainability of living things and the ecosystem;
- c. To maintain functional sustainability of the environment;
- d. To pursue compatibility, harmony, and balance in the environment;
- e. To ensure the fulfillment of justice in the present and future generations;
- f. To ensure the fulfillment and the environmental protection as a part of human rights;
- g. To manage wisely the utilization of the natural resources
- h. To anticipate global environmental issues."

The implementation of environmental laws in order to protect it is way more complicated since it is a functional form that has administrative, civil, and criminal laws. The implementation of administrative laws is certainly different from the implementation of civil and criminal laws. The starting point of environmental laws violation is people's complaints as well as the inspection of the concerned apparatus. Later on, it will be followed up on

whether it is as pollution and/or environmental damage. Next, the authorized would conduct a laboratory examination that determines the complaint if it fulfills the standard level.

There are two ways to cope with the environmental dispute (Skanda Husin: 2011). First, it is off the court. Second, it is through the court. If off the court is chosen, people are unable to settle the dispute through the court before having a statement that declares the initial mechanism is failed. The court system is unable to solve environmental crime.

Generally, there are two main structural obstacles that cause the dysfunctional of environmental laws implementation in Indonesia:

- a. The strong belief of the policymaker that contradicts development and environment;
- b. The absence of good governance makes the environmental law implementation impossible to be effectively done.

The implementation of laws may help the function of environmental protection and sustainability. It does not solely refer to the favor of laws without concerning the development side or even preventing the sustainable development, instead, the development act negatively affects the environment. This explains that there are two tasks to be wisely done, they are to maintain the synergy of the balance and the harmony between environmental laws implementation and development.

a. *The Environmental Laws Principles*

The environmental issue is recently inseparable from human life. It becomes undeniable after being neglected, it also triggers national and international economic growth issues, therefore some wide fundamental principles of environmental laws should be known. Some environmental laws principles that become fundamentals to environmental issues both globally and nationally are below (United Nations Declaration on the Human Environment and Development Rio de Janeiro: 1992):

b. *The Sustainable Development Principle*

Sustainable development means the compliance of the present generation's needs without reducing the future generation's ability. Susan Smith states that sustainable development is improving today's generation's quality of life and stoke the modals/natural resources for the next generation. According to her, there are four things that can be achieved this way:

- a) The maintenance of sustainable results of renewable natural resources,
- b) To sustain and replace the saturated natural resources,
- c) The maintenance of the ecological support system,
- d) The maintenance of sustainable biodiversity.
- e) The definition of development is formulated as: "Eco-friendly sustainable development is conscious and well-planned, combining environment including the resources in the process to ensure the present and future ability, prosperity, and quality of life." Furthermore, it is stated in Article 1 Paragraph 3, Article 2 Letter b, Article 3 Letter i the Constitution of The Environmental Protection and Management No. 32 the Year 2009.

c. *Intergenerational Justice Principle*

The Intergenerational Justice Principle is that a country is supposed to sustain and utilize the environment as well as the natural resources for the sake of present and future generations, in the definition of sustainable development declared by WCED, the mandate of intergenerational justice is reflected in the statement "without compromising the ability of future generations to meet their own needs". Therefore, sustainable development requires a balance of justice for the present and future generations. According to Voigt, in the frame of sustainable development, the balance of justice can only be done through the protection of the earth's ecosystem integrity. As a result, the development conducted must protect the support system of life as well, especially when in trouble. It means that the development concept in the frame of sustainable development does not only emphasize fair allocation issues of rights and obligation but also admits the wholeness and integrity of the environment as an inseparable part of justice.

d. *Intragenerational Justice Principle*

There is also another principle related to a generation called the intragenerational justice principle. The intragenerational principle is the first priority of sustainable development. This is, according to Langhelle, to define the sustainable development main point. This part shows the presence of a nation's commitment to justice, including a redistribution from the rich to the poor, not only at the national level but also at an international one. Then, Prof. Ben Boer, the environmental jurist from the University of Sydney, refers to the idea that people and other life demands in a generation have the right to utilize and enjoy a healthy and clean environment. Intergenerational justice can be defined nationally and internationally. At the national level, the

management is applied in a form of fair access to the resources, clean air, and clean water in national water resources and territorial sea. This also leads to the need for government limitation issues on private access. While intergenerational justice refers to fair allocation implementation of air, water, and sea resource system.

e. *Polluter Pays Principle*

This principle emphasizes more the economic section than laws it regulates policy on damage rate count and its differentiation. This principle was initially suggested by an economist *E. J. Mishan* on *The Cost of Economic Growth* in the 1960<sup>th</sup>. It can be said that the polluter pays principle is based on economics and starts from the idea that a polluter is someone who pollutes while he can prevent it. On the standard of laws in form of prohibition and authorization requirements, it aims to prevent undeniable pollution (Siti Sundari Rangkuti: 2005). PPLH Constitution instructs compensation or any other actions to recover the polluted or damaged environment. In PPLH Constitution 2009, the polluter pays principle is stated in Article 2, which is then described in Article 14 Letter h, Article 42, and 43. The principle regulation mentions the provisions of internalization of the environmental cost, environmental recovery fee, tax, and environmental retribution (Muhammad Akib: 2013).

### 3.2 *Environmental Goals*

According to Mochtar Kusumatmadja, the role of environmental law is to structure the entire process so that certainty and order are guaranteed. The seminar, which was held in Lembang on September 1, by the National Legal Development Agency in collaboration with the Faculty of Law, Padjadjaran University on the legal aspects of environmental management, explained the environmental objectives, namely increasing the role of courts in resolving environmental disputes with the help of expert witnesses in the field of ecology. . According to Ilyas Asaad, environmental law enforcement aims in the form of actions to apply legal instruments through efforts to impose legal sanctions to ensure compliance with the provisions contained in laws and regulations and environmental law enforcement aims at structuring ecosystem protection values and environmental functions. Enforcement of environmental law functions as the last link in the regulatory system for the role of environmental policies, which consists of several sequences, namely: legislation, setting standards, granting permits, implementing and enforcing laws. Environmental management is an effort to maintain and or improve the environment so that our basic needs can be fulfilled as well as possible. The term management has the meaning, namely controlling, organizing or government and so on, running the management of companies and or projects, etc., management has several definitions or meanings, including processes, methods, and actions to manage, processes to carry out certain activities by mobilizing other people's energy, processes that help to formulate organizational policies and objectives and processes that provide oversight on all matters involved in implementing policies and achieving objectives.

*According to Article 1 number 2 of Law Number 32 of 2009 concerning the protection and management of the environment, it is explained that environmental management is "a systematic and integrated effort carried out to preserve environmental functions and prevent pollution and or environmental damage which includes planning, utilization of, controlling, maintaining, supervising and enforcing the law".*

Environmental protection and management have several principles listed in article 2 of the law on environmental protection and management, namely: state responsibility, sustainability, and sustainability, harmony and balance, integration, benefits, caution, fairness of biological ecoregions, polluters pay to the environment. participatory local wisdom, good governance, and regional autonomy. Article 3 of the law on environmental protection and management states that the objectives of environmental protection and management are to protect the territory of the Unitary State of the Republic of Indonesia from pollution and or environmental damage and to ensure the safety of human health and life.

Article 14 of Law No. 32 of 2009 concerning the protection and management of the environment explains that the instruments for preventing pollution and environmental damage are basically also instruments for environmental management because environmental management is also intended to prevent and overcome problems of pollution and damage. environment. In article 14 of Law number 32 of 2009 concerning environmental protection and management, it is written that the instruments for preventing pollution and or environmental damage consists of KLHS (Strategic Environmental Studies), Spatial planning, environmental quality standards, and environmental damage standard criteria. environment, AMDAL, UKL-UPL, Licensing, Environmental economic instruments, environmental-based laws and regulations, Environmental-based budgets, Environmental risk analysis, Environmental audits, and other instruments in accordance with the needs and or development of knowledge.

Human rights with the environment are contained in Article 65 and Article 66 of Law no. 32 of 2009, as follows: everyone has the right to a good and healthy environment as part of human rights, everyone has the right to environmental education, access to information, access to participation, and access to justice in fulfilling the right to a good and healthy environment. healthy, everyone has the right to propose and/or object to the planned business and/or activity that is estimated to have an impact on the environment, everyone has the right to play a role in environmental protection and management in accordance with the laws and regulations, everyone has the right to make a complaint as a result of allegations of environmental pollution and/or destruction and anyone who fights for the right to a good and healthy environment cannot be prosecuted criminally or be sued in a civil manner. The obligations of a person to the environment in Article 67 of Law no. 32 of 2009, is that every person is obliged to maintain the preservation of environmental functions and control environmental pollution and/or damage and everyone carries out business and/or activities with an obligation.

### *3.3 The Environmental Laws on Job Creation (Omnibus Law)*

Since Constitution on Job Creation was enacted called as Omnibus Law or Omnibus Bill, some articles on PPLH Constitution were eliminated and substituted with the articles mentioned in Job Creation Law or Omnibus Law. Below are the Articles of Constitution No. 32 the Year 2009 on Environmental Protection and Management that were eliminated and substituted by new articles mentioned on Omnibus Law.

#### *a. Article 29, 30, and 31: Environmental Impact Assessment and the Evaluator Commission*

Environmental Impact Assessment document as the requirement for a company and an activity that brings impacts for the environment is not eliminated/substituted on Job Creation Constitution. Nevertheless, there are some articles of Environmental Impact Assessment eliminated. The Articles are numbers 29, 30, and 31. Some experts mentioned that even though the Environmental Impact Assessment exists, the elimination of the article has a huge effect. Article 29 regulates the formulation of the Evaluator Commission, that it is as Regional Government's authorization (Governor and Regent/Mayor) dan the Ministry of Environment and Forestry. By the elimination of article 29, the Evaluator Commission formulation is the central government's authorization. Article 30, regulates the membership of the Evaluator Commission consisting of Environmental Agencies, Related Agencies, Experts elements in the proposed business/activity, and experts in the environmental field. Importantly, article 30 also regulates that Communities and Environmental Organizations become members of the EIA Evaluator Commission. This article is eliminated and substituted with Article 24 of the Job Creation Constitution. In this new article, the EIA assessment is conducted by a team formed by the Feasibility Test Institute (Central Government). The team consists of related institutions and certified experts (Article 24 paragraph 3). The Job Creation Constitution eliminates the community and Environmental Organization's involvement in the EIA assessment. Although the regulation still requires that the EIA document contains responses and input from the affected community. However, the community and environmental organizations have no more right to evaluate the proposed EIA document as previously regulated and ensured in Article 30 of the PPLH Constitution. Article 31 regulates that the results of the EIA Commission's assessment are used as the basis for a decision on whether it is environmentally appropriate for a business or activity that has an impact on the environment. By the elimination of this article, it means that the results of the EIA Assessment Commission are no longer the basis for making decisions.

#### *b. Article 35, 36, 38 & 40: Environmental Permit eliminated & substituted by Environmental Feasibility Test*

Article In the PPLH Constitution, an Environmental Permit is a requirement that must be fulfilled besides the EIA document. Every business that has an EIA document is also required to have an environmental permit issued by the Minister and the Regional Government. This obligation is eliminated in the Job Creation Constitution so that the Environmental Feasibility Test of a business or activity only goes through the EIA or UKL and UPL. These two things will form the basis for the issuance of a business permit by the Central Government. Environmental Permit in Constitution Number 32 the Year 2009 is a requirement that must be fulfilled in addition to the EIA assessment. Eliminating the obligation to have an Environmental Permit for a business or activity does simplify the licensing process. However, it is vulnerable to creating abuse of authority by administrative officials who are not suitable for AUPB. In article 36 of the PPLH Law, it is stated that every business that is required to have an EIA must obtain an Environmental Permit. Even though the Environmental Permit provides legal certainty when there is a business or activity that violates it, then with the revocation of the Environmental Permit, the Business / Activity Permit of a company is also automatically canceled. It is including a change in the business and management of a company, the company is obliged to renew its Environmental Permit. The PPLH Constitution also provides space for the public to demand the cancellation of the Environmental Permit of a business/activity through a lawsuit by the State Administrative Court (PTUN). An environmental permit is a form of State Administrative Decree (KTUN) issued by the government, the public can sue in the PTUN if the KTUN is not suitable with AUPB or the business/activity

has the potential to damage the environment. This is stated in Article 38 of the PPLH Constitution. By the elimination of the Environmental Permit obligation, the community will automatically not be able to sue the Environmental Permit through the PTUN. The elimination of article 38 in the Job Creation Constitution has had a major impact on the community to participate directly in environmental protection, in addition to the elimination of the community and Environmental Organizations from the membership of the EIA Evaluator Commission. The elimination of the article related to the Environmental Permit also has an impact on other related articles, for example, articles 72, 73, 74, 75, and 79 which delegate authority to the Minister and local governments to be supervisors of a business/activity for compliance with the Environmental Permit. Additionally, Article 93 which regulates administrative lawsuits against KTUN in the form of Environmental Permits and Business/Activity Permits in the State Administrative Court was also removed.

c. *The Elimination of Environmental Violation Criminal Sanction*

Criminal sanction elimination on PPLH Constitution is the effect of edited content, not the article. For instance, Article 98 on criminal provisions and penalty for the violator of water, seawater, and environmental ambient quality standard. The assertive article prioritizes criminal sanction and penalty for the violator of environmental quality standards. The article is changed on Job Creation Constitution by substituting the criminal sanction with a penalty. Meanwhile, the sanction is given to those who are responsible for the penalty. The sanction on Job Creation Laws is the consequence of not paying the penalty, instead of managing and protecting the environment.

#### 4. Conclusion

Based on the explanation above, it concludes that: The Formulation of Environmental Laws must be based on global and national principles for the sake of the sustainability of human beings and natural resources. Omnibus Law raises many negative impacts on people and the environment. The degradation of environmental protection and management quality in the focus of Omnibus Law contains transformation and elimination of environmental management articles which is actually capable as business guidelines. On the other hand, the government's effort to facilitate any forms of authorization in order to encourage businessmen, in fact, brings negative impacts on environmental protection by weakening controlling business instruments and laws implementations. Businessmen may underestimate the procedure and penalty. Assertive actions are required to create regulations based on the fundamentals of environmental management. It is also to improve the quality of environmental protection and management of the Omnibus Law Constitution. It is needed to re-examine the risk-based approach, maintain environmental authorization as well as criminal penalty for administrative violation and people's engagement

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