



## Right to Information, Judicial Activism and the Rule of Law: The Case of Indonesia's Mining Litigation

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**Abstract:** *The right to information is fundamental in environmental protection. Lack of access to information regarding environmental planning and licensing has often lead to public interest environmental litigation. The right to information is also an element in the formation of the rule of law in both its formal and substantive aspects. Mining must be cautionary conducted due to its high potential for environmental damage and pollution. This paper discusses the extent to which is the right to environmental information protected in Indonesia through several cases of mining litigation. Using statutory and court cases methods, it discusses laws on the rights to information in general and in the field of environmental protection, how Indonesian courts have interpreted the government obligations to fulfill citizens' access to mining information, and the extent to which that legal interpretation contributes to the rule of law elements.*

*This paper then concludes that the right to mining information is still difficult to attain. Public bodies tend to prioritize formal-procedural aspects in providing information and setting up a public consultation. However, the cases studied indicate that judicial activism has provided corrections to such a procedural approach. More substantive rule of law principles used by the courts to interpret mining zones and environmental permits procedures.*

**Keywords:** *Indonesian mining law, judicial activism, mining litigation, right to information, rule of law*

### I. INTRODUCTION

In 2008, for the first time, Indonesia had a law on information disclosure. Law no. 14 of 2008 concerning Openness of Public Information (also known as Freedom of Information Law, FoI Law) was formed to implement the Constitutional order regarding the recognition and protection of citizens' rights to information. The FoI Law requires

public bodies to manage information and provide citizens' access to information. In addition to this, various laws in the field of environment and natural resources also call

for rights to information too.<sup>1</sup> Environmental Law number 32 Year 2009, for example, obliges the central and regional governments to establish an environmental information system and announce each application and decision on granting of environmental permits.<sup>2</sup>

Not only regulations, a state institution for the fulfillment of the right to information are also provided. Indonesian Information Commission, which was first established in 2010, is tasked with setting technical guidelines for public information service standards and completing public information disputes. Meanwhile, in every government agency, information service units are set up.

Simultaneously, public interest disputes in the environmental sector in Indonesia have increased. Court cases of forestry, plantation, and mining are three major litigations in this regard. In this article, however, we limit our discussion to mining litigation. Of a number of mining court cases involving the community as environmental defenders, the author observes that issues related to rights to information regarding mining plans and permits are quite widely used, both in civil and administrative claims as well as in information disputes.

The practice of achieving the rule of law elements in environmental disputes, in particular, mining, is mostly carried out through formal legality procedures. Nevertheless, in the midst of such legal formalism, there are several court cases on mining information that show a progressive legal interpretation. The extent to which regulatory framework and institutional developments have corresponded to the improvement of the rule of law is the key theme of this article. To answer, this article

describes the following questions: (1) Why does the right to information matter to the rule of law formation in environmental protection? (2) How do Indonesian laws conceptualize the right to information? (3) How did Indonesian environmental defenders get access to mining information through judicial proceedings? (4) How have Indonesian courts interpreted the government's obligation to fulfill citizens' right to mining information? The extent to which such legal interpretation has contributed to the elements of the rule of law?

Result and discussion of this paper are divided into five. Following the section of research method, is an overview regarding the relevance of the right to information to the rule of law formation. A conceptual discussion regarding the rule of law and its linkage to the right to information is part of this section. Afterward, there will be a section that describes the legal and institutional framework of the right to information particularly the right to environmental information. The following section elaborates judicial proceedings regarding the right to mining information. Taking examples from three public interest litigation, this part discusses how judicial interpretation on the right to information will contribute to the improvement of the rule of law in the Indonesian mining sector. Finally, this article is ended with a concluding remark and some recommendations.

## II. LEGAL MATERIALS AND METHODS

This article was a result of my independent research conducted in the first half of 2018. A juridical and normative legal research was carried out using statutory and

<sup>1</sup> See Law No. 32 of 2009 on Environmental Protection and Management, Law No 4 of 2009 on Mineral and Coal Mining.

<sup>2</sup> Art. 62 and Art. 39 of Environmental Law.

court case approaches. Legal materials that had been collected and analyzed were derived from laws and regulations concerning the environment, mining, public information disclosure, public services, and citizen administration. More specifically, this research scrutinized Indonesian Constitutional provisions regarding the citizens' right to information and the right to environment, Law 32/2009 on Environmental Protection and Management, Law on Mineral and Coal Mining No. 4 of 2009, Law 14/2008 on the Openness of Public Information (Freedom of Information Law), Law No. 25 of 2009 on Public Services and Law on Population Administration number 24 of 2013. Furthermore, Government Regulation No. 27 of 2012 on Environmental Permit and Ministry of Environment Regulation Number 17 of 2012 concerning the guidance of people's participation in the enactment of Environmental Impact Assessment and Environmental Permit were also analyzed.

The United Nations Economic Commission for Europe's Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) and the 2013 Jakarta Declaration for Strengthening the Right to Environmental Information for People and the Environment were also studied in this research.

Four court decisions were collected and analyzed. They are the Constitutional Court Ruling number 32/2010 that reviewed several Articles of Mining Law and a Supreme Court Ruling concerning a karst mining dispute in Central Java (Ruling 99/2016). Included in the decisions reviewed

were the Information Commission decision in East Kalimantan Province (Decision number 00031REG-PSIIIT/2014) that then agreed by the state administrative court (Ruling number 17/2015) and the Supreme Court through Ruling number 614/2015.

The analysis of these decisions showed a strong correlation in judicial activism carried out by the judges on the completion of the right to environmental information. Completing the data in this study were various literature to enrich information, including mass media news, research reports, books, and journal articles as can be seen in the footnotes and references.

### III. RESULT AND DISCUSSION

This part describes legal issues, findings, and discussion concerning the focus of this study. It contains three sub-sections. The first part describes conceptual issues concerning the role of the right to information in the rule of law formation. The second part explains the Indonesian legal framework on the right to information in general and the right to environmental information. Part three discusses judicial interpretation regarding the right to information as found in three court cases on mining litigation.

#### 1. Right to Information and the Rule of Law Formation

The assessment of the rule of law index conducted by the World Justice Project (WJP) in 2017-2018 placed Indonesia in 63rd out of 113 countries surveyed.<sup>3</sup> The improvement of the rule of law in Indonesia, in general, is inseparable from some progress in the legislative, judiciary and government

<sup>3</sup> World Justice Project, 2018. Rule of Law Index 2017-2018. Washington DC: World Justice Project, Pp. 6.

actions. In terms of environmental governance, the last five years are marked by the issuance of a number of regulations. Then there are also judicial processes for environmental crimes.

With regard to the rule of law, WJP calls four pillars that must be robust. The first is related to accountability in both government agencies and the private sector. The second pillar is just law that is characterized by clear, publicized, stable, and just regulations. Those are applied evenly; and protect the fundamental rights, including the security of persons and property and the certain core of human rights.

An open government is another condition where the law is enacted, administered, and enforced are accessible, fair and efficient. Included in this Open Government pillar is the right to information. The last is accessible and impartial dispute resolutions. This mechanism allows justice "is delivered timely by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources and reflect the makeup of the communities they serve".<sup>4</sup>

These four pillars intersect with the elements of the rule of law presented by Brian Tamanaha and refined by Adriaan Bedner.<sup>5</sup> Both state that the rule of law is achieved in both formal and substantive aspects. In the formal aspect, the rule of law develops from the lowest level, namely rule by law, to formal legality and finally is on the aspects of democracy. The rule by law requires that state action is bound by law. The formal legality asks for legal material that is clear and certain, accessible and predictable

and general in its application. In terms of democracy, a people's agreement will determine or influence the content of the law and legal actions. In the substantive aspect, the legal material and its interpretation must be subject to the principles of justice. The protection of individual rights and the freedoms and protection of human rights in groups must exist.

Unlike Tamanaha, Bedner then added that the rule of law entails guardian institutions. In this sense, an independent judiciary is the main requirement. However, it can be obtained through other institutions that function as safeguards of the rule of law elements.

The right to information is clearly an important part of the achievement of the rule of law elements. From the pillars used by WJP we can see that an open government needs access to information for citizens. The right to information is also important to realize the democratic aspect in the formal version of the rule of law. Through the access to information, the protection of citizens' rights either individually or in groups is rewarded.

The right to information itself has been globally recognized as one of the fundamental human rights. Stated for the first time in Swedish Constitution in 1776, the right to information became part of fundamental rights to the constitution of several countries.<sup>6</sup>

In the field of environment, the right to information is strengthened through The Aarhus Convention. It is the first international law instrument that provides mechanisms for public participation in

<sup>4</sup> WJP, Pp. 10-11.

<sup>5</sup> Tamanaha, Brian Z., *On the Rule of Law; History, politics, theory* (2004). Cambridge: Cambridge University Press. Bedner, Adriaan. *An Elementary Approach to the Rule of Law* (2010). *Hague Journal on the Rule of Law*, 2: 48-74.

<sup>6</sup> Access Info Europe, *Access to Information: A fundamental right, a universal standard* (2006). Briefing Paper.

environmental matters. This Convention introduces the three pillars of public participation that are access to information, participation in decision-making and access to justice.<sup>7</sup>

Protection at the right to information is generally carried out through the courts. Nonetheless, the existence of safeguard institutions to the rule of law can be other providers of access to justice for information right defenders. In Indonesia, such safeguard institution is the Information Commission which will be explained briefly in the following section.

Noticeably, the existence of safeguard institutes is important in terms of recognition, protection, and fulfillment of the right to information. In this regard, judicial activism will be a key because as Mesonis says, it allows judges to have more freedom to determine legal issues and to invalidate legislative or executive actions that undermine the basic principle of justice.<sup>8</sup>

The judicial activism, however, must be supported by the ability of citizens and civil society organizations to effectively utilize public interest environmental litigation. In addition to this, government agencies must indicate a strong commitment to protecting the public interest in their environmental policy.<sup>9</sup> The judicial activism is not a total freedom of the judges. It cannot rely upon the discretionary powers of the judges. Faiz states that judicial activism must be dedicated to protect the constitutional rights of the citizens and to provide the

greatest protection to minority or vulnerable groups. It should be used to recover and protect the violations of individual and group rights and to adapt the national law to internationally recognized notion of global justice.<sup>10</sup>

## 2. Indonesian Law on Right to Environmental Information

Indonesia has complete legal and institutional arrangements regarding the right to information. The 1945 Constitution, Art. 28F, states:

Every person shall have the right to communicate and obtain information for the development of his / her self and social environment, and shall have the right to seek, obtain, store, process and convey information by employing all available types of channels.

As mentioned in the introductory part, to implement Article 28F of the Constitution, the Government of Indonesia established Law No. 14 of 2008 concerning Public Information Openness (Freedom of Information Law). The Aarhus Convention inspired some provisions in this Law. The FoI Law generally aims to:

1. Ensure the right of citizens to know about public policy making, policy programs, and public decision-making processes and the reasons behind them;
2. Encouraging community participation in the process of public policy making;

<sup>7</sup> Madrid, Juliana Zuluaga, Access to Environmental Information from Private Entities: A Rights-Based Approach (2017). Review of European Community and International Environmental Law 26 (1), Pp. 40.

<sup>8</sup> Gediminas Mesonis, Judicial Activism in the context of the jurisprudence of the constitutional court. [http://www.satv.tiesa.gov.lv/en/wp-content/uploads/sites/2/2017/06/Book\\_Judicial-activism-of-the-Constitutional-Court-in-a-](http://www.satv.tiesa.gov.lv/en/wp-content/uploads/sites/2/2017/06/Book_Judicial-activism-of-the-Constitutional-Court-in-a-Democratic-State_part_2_ENG.pdf)

[Democratic-State\\_part\\_2\\_ENG.pdf](http://www.satv.tiesa.gov.lv/en/wp-content/uploads/sites/2/2017/06/Book_Judicial-activism-of-the-Constitutional-Court-in-a-Democratic-State_part_2_ENG.pdf) retrieved 18 September 2018.

<sup>9</sup> Niyati, Mahajan, 2015. Judicial Activism for Environmental Protection in India. In: International Research Journal of Social Sciences. Vol 4(4), Pp. 13-14.

<sup>10</sup> Faiz, Pan Mohammad, Judicial Restraints vs. Judicial Activism (2017). Majalah Konstitusi 130, Pp. 8.

3. Increasing the active role of the community in public policy making and good public agency management;
4. Realizing good state administration, which is transparent, effective, efficient, and accountable;
5. Knowing the reasons for public policies that affect the lives of people;
6. Develop knowledge and educate the life of the nation; and/or
7. Improve information management and services within public agencies.

The enactment of FoI Law to some Indonesian researchers brings to a new paradigm. The Law reemphasizes that the right to information is the constitutional right of the citizens that must be fulfilled by the State. The activities of public bodies that are used public fund and carried out in accordance with the mandate given by the people must be accounted for to the public. Besides, the public information disclosure improves the quality of public participation in the decision-making process.<sup>11</sup>

The FoI Law states that individuals, groups, legal entities, and public bodies have the right to obtain public information. This right includes the right to see and know, attend public meetings to obtain public information, obtain a copy of the public information, or disseminate information in accordance with legal provisions.<sup>12</sup>

Public bodies according to FoI Law consist of state agencies and other public bodies. The state agencies include the executive, legislative, judicial, and all state

administration institutions at the central or regional level. The FoI Law also includes non-governmental organizations as public bodies as long as some or all of their funds are sourced from the state budget, community contributions, and foreign country grants.

Partridge concluded that the provisions concerning the public bodies in FoI Law are a result of government and civil society compromise. The civil society urged the openness of public information in all government agencies including state-owned corporations. The government agreed but asked for a number of exceptions and required for the openness of information held by the civil society organizations.<sup>13</sup> Nevertheless, the inclusion of private entities into the public bodies in Freedom of Information Law has been a recent trend of the implementation of a rights-based approach in development and environmental protection.<sup>14</sup>

All public bodies must provide public information. It is mandatory for them to have a special unit that is responsible for storing, documenting, and providing public information services. Excluded from that obligation is if the information requested is that that could endanger the state security, information relating to business protection from unfair competition and information relating to personal rights. Apart from that, entering this exception too is the information relating to the secret office and information

<sup>11</sup> Prayitno, Dessy Eko et al. *Penafsiran atas Pengecualian dalam Hak atas Informasi: Pengalaman di Indonesia dan Negara Lain* (2012): Jakarta: Indonesian Center for Environmental Law, Pp.7-8.

<sup>12</sup> Art. 45 section 2 of FoI Law.

<sup>13</sup> Partridge, Jodie. *The Freedom of Information In Indonesia and Australia*. Brawijaya Law Journal Vol 2, No 1 (S) (2015), Pp. 35.

<sup>14</sup> Madrid, Juliana Zuluaga, *Access to Environmental Information from Private Entities: A Rights-Based Approach* (2017). *Review of European Community and International Environmental Law* 26 (1), Pp. 43.

that has not been mastered or documented by the public bodies.<sup>15</sup>

Excluded information due to its confidential must be tested by an authorized official to see the consequences that will arise when it is given to the public. Test results can lead to a decision of prohibiting public access to that information, in order to protect greater interests.

A special institution, the Information Commission, was formed to implement the FoI Law. A Central Commission is based in Jakarta, but there are also commissions in provinces and districts. The Information Commission is tasked with setting technical guidelines for public information service standards and resolving public information disputes through mediation and/or non-litigation adjudication.<sup>16</sup>

If the parties agree to settle their information disputes at the Information Commission through mediation and accept the results, the mediation decision is final and binding. However, in the case that those parties do not receive the results of the mediation and state in their written objections or withdraw from the mediation process, they can submit a dispute resolution through non-litigation adjudication. The Information Commission decides on the dispute. Objection to the Information Commission Decision can be submitted through a lawsuit. The FoI Law states that the filing of that suit is carried out through state administrative courts for information disputes involving state agencies. Meanwhile, if the person who is sued is another public body then the lawsuit is submitted to general district courts. Once the decision of the state administrative court or district court cannot also be accepted, the

objection party has the opportunity to submit a court cassation to the Supreme Court as a final legal remedy.<sup>17</sup>

The obligation of government institutions to provide information is also regulated by the Law on Public Services (Law No. 25 of 2009). In addition to managing information, government institutions are also compelled to serve public complaints. The protection of citizens' rights to information in Indonesia is also increasingly possible with an Open Government policy. Since 2012, the Government of Indonesia has a biennial Action Plan on Open Government. One of the contents of such Plan is to instruct relevant ministries or state agencies to make and implement an information transparency policy.

In the environmental sector, the right to information is related to several aspects. Firstly, it is part of environmental democracy. The Elucidation of Law 32 of 2009 states that environmental democracy is obtained through access to information, access to participation, access to justice and the strengthening of community rights in the protection and management of the environment. The right to environmental information is also an elaboration of the principles of good governance in environmental protection and management, where the principles of participation, transparency, and accountability are essential in addition to the principles of efficiency and justice.<sup>18</sup> Secondly, the rules regarding environmental information are associated with the obligations of the central and regional governments to establish an environmental information system. This system aims to support the implementation

<sup>15</sup> Art. 6 section 3 and Art. 17 of FoI Law.

<sup>16</sup> Art. 23 of FoI Law.

<sup>17</sup> Art. 47, Art.50 of FoI Law.

<sup>18</sup> The Elucidation of Art. 1 m of Environmental Law.

and development of environmental policies. According to Article 39 of the Environmental Law, the government and regional governments are also compelled to announce each application and decision on environmental permits. The announcement must be done in a way that is easily known by the public. It is then stated in Article 62 paragraph (2) of Law 32 of 2009 that the environmental information system must be published. The third is in terms of implementing the right to a good and healthy environment. To achieve this right, Indonesian Environmental Law guarantees the right of citizens to access environmental information. Art. 65 section 2 of Law no. 32/2009 states:

Everybody shall be entitled to an environmental education, information access, participation access and justice access in fulfilling the right to a good and healthy environment.

Indonesian Environmental Law also requires those who run businesses or activities to provide information related to the protection and management of the environment in a correct, accurate, open and timely manner. They are prohibited from giving false information, misleading, removing information, damaging information, or giving false information. Criminal sanctions are given for violations of this prohibition.<sup>19</sup>

More operational provisions regarding the right to information in the protection and management of the environment are regulated in a Government Regulation concerning Environmental Permits

(Regulation No. 27 of 2012). Business or activity proponents who will prepare documents for Environmental Impact Assessment (EIA)<sup>20</sup> must involve the community through announcements of its business plans and/or activities and the holding of public consultations. Within ten working days, after the announcement is given, the community has the right to submit suggestions, opinions, and responses to the planned business and/or activities. There are three groups of people who need to be involved in this matter. They are those who will be directly affected, environmental groups and the community who will be indirectly affected by the government's decision to approve the EIA document and environmental permit.

To regulate the procedure for the announcement and public consultation, the Minister of Environment makes a Ministerial Regulation concerning guidelines for community involvement in the process of environmental impact analysis and environmental permits enactment (Ministerial Regulation Number 17 of 2012). The implementation of the announcement according to that Regulation is carried out by the initiator of the activity through a compulsory and supporting media announcement. Mandatory media are national or regional newspapers or notice boards that are easily accessible to affected communities.

The announcement must also use supporting media in the form of brochures, flyers, or banners; electronic media such as television, websites, social networks, text message and/or radio, bulletin boards in

<sup>19</sup> Art. 68 a and Art. 69 j of Law 32/2009.

<sup>20</sup> EIA must be conducted by every business or activity that will have a substantial impact on the environment. Those substantial impacts are measured based on: the number of population to be affected by the business and/or activity plan; the

size of area of impact; intensity and duration of Impact; environmental components to be affected; cumulative characteristic of impact; reversibility of impacts, other criteria determined by science and technology (Art. 22 section 2 of Law 32/2009).



environmental agencies and agencies in charge of businesses and/or activities at the central, provincial and/or district levels. The announcements are made in Bahasa Indonesia and can be translated into local languages. Meanwhile, the public consultation can be carried out through various forms of meetings such as workshops; seminar; focus group discussion; village meeting; hearing forum; interactive dialogue; and other two-way communication methods.

Looking at the above explanation seems that since 2002, the Government of Indonesia has conducted efforts to the protection and fulfillment of citizens' right to information. Legal and institutional instruments are adequately available. Nevertheless, for Indonesian CSOs, this Law has not been effectively implemented. After the enactment of FoI Law, Indonesian CSOs in 2013 initiated a regional commitment to strengthen the right to information. That commitment was named the Jakarta Declaration for Strengthening the Right to Environmental Information for People and the Environment. The Declaration states that public participation must be guaranteed in terms of policy making, formulation of standards for release of air and water pollutants, environmental planning, application for permission for development, grant and renewal of permits, environmental impact assessment processes, enforcement and reporting of violations and environmental disclosure program such as Pollutant Release and Transfer Registers.<sup>21</sup> In addition to this, an Indonesian NGO has

initiated to create a smart application called 'Open Mining' to assist the public to know the types and locations of oil, gas, mineral and coal mining throughout Indonesia.<sup>22</sup>

### 3. The Judicial Interpretation

This paper believes that judiciary is an important safeguard institution on the rule of law. As earlier stated, the safeguard institution for the protection of the right to environmental information in Indonesia is not only a court but is also run by the Information Commission. There are several environmental information disputes handled by this Commission, both at the national or regional level. Similarly, there are a number of court cases related to the right to information in the environmental field. This article limits the discussion to three court cases on mining information rights. They are the Constitutional Court Ruling regarding the examination of provisions for the determination of mining zones in Law on Mineral and Coal Mining (Law No. 4 of 2009), the Supreme Court Ruling that relates to the procedure for announcing environmental permit for mining activities and an Information Commission Decision that was confirmed by the court regarding the interpretation on mining information that is excluded from public access.

The court cases selected are public-interest litigation where the aim of one party is to protect the group and environmental rights. This article follows the notion of public interest dispute of Nicholson who said that those disputes exist when environmentally damaging or polluting

<sup>21</sup> For a complete report regarding the implementation of the right to environmental information in Indonesian CSOs' eyes see Indonesian Center for Environmental Law (ICEL), Strengthening the right to information for people and environment; Case study from Indonesia (2013). Jakarta: ICEL.

<sup>22</sup> Rini, Rizky Ananda Wulan Saptia, Open Mining: From Extractive Data Disclosure to Citizen Empowerment (2016), <https://www.opengovpartnership.org/stories/open-mining-extractive-data-disclosure-citizen-empowerment> accessed 16-10-2018.

activities have impacted on the public interest in environmental preservation.<sup>23</sup> Public-interest litigation is an appropriate judicial proceeding to examine the achievement of the highest substantive element of the rule of law (see Tamanaha and Bedner again in the previous section).

#### A. *The Constitutional Court Ruling*

The Constitutional Court in Indonesia has the authority to examine the consistency of Law to the Constitution. The 2009 Law on Mineral and Coal Mining is one of the Laws that had been tested.<sup>24</sup> In 2010 a number of individuals and non-governmental organizations requested four Articles of that Mining Law to be constitutionally reviewed. They are related to the determination of mining zones and penal articles concerning people's blockade of mining activities. The Constitutional Court then decided on those legal matters through Ruling number 32/2010. Before describing this Court Ruling, I begin the discussion of this sub-section by explaining the mining zone.

A mining zone (*wilayah pertambangan*) is an area that determines where mining activities can be carried out. The zone is determined by the Government upon coordination with the regional governments

and consultations with the House of Representatives of the Republic of Indonesia.<sup>25</sup> Art. 10 of Law 4/2009 obliges the mining zones determination to be transparent, participatory, and responsible. The zones must be integrated with due regard to the opinions of the relevant government agencies and the public. They must also consider ecological, economic, and socio-cultural aspects as well as environmental soundness. Lastly, it must reflect regional aspirations.

The petitioners of this Constitutional Court case believed that the determination of mining zone is against Indonesian Constitution provided it is not understood as an obligation to protect, respect, and fulfill the interests of the people whose territories and land will be included in the mining zone as well as the community who will be affected. The petitioners stated that Article 10 (2) of Mining Law is contrary to citizens' right to choose their domicile<sup>26</sup>, right to the due process of law<sup>27</sup>, right to the freedom of expression<sup>28</sup>, right to the protection from fear<sup>29</sup>, right to a good and healthy environment. and the protection of property right<sup>30</sup>. For this reason, they called for *the opinion of the community* in terms of

<sup>23</sup> Nicholson, David, 2009. *Environmental Dispute Resolution in Indonesia*. Leiden: KITLV Press. Pp.3

<sup>24</sup> For an overview of Indonesian current mining regulatory framework see Pricewaterhouse Cooper Indonesia, *Mining in Indonesia: Investment and Taxation Guide* (2018). Jakarta: PwC.

<sup>25</sup> Art. 6. e and Art. 9 section 2 of Law 4/2009.

<sup>26</sup> Art. 28C (2) of the 1945 Constitution: Every person shall have the right to improve him/herself through the collective struggle for his/her rights to develop his/her society, nation and state.

<sup>27</sup> Art. 28D (1) of the Constitution: Every person shall have the right of recognition, guarantees, protection, and certainty before a just law, and of equal treatment before the law.

<sup>28</sup> Art. 28E (3) of the Constitution Every person shall have the right to the freedom to associate, to assemble and to express opinions.

<sup>29</sup> Art. 28G (1) of the Constitution: Every person shall have the right to protection of his/herself, family, honor, dignity, and property, and shall have the right to feel secure against and receive protection from the threat of fear to do or not do something that is a human right.

<sup>30</sup> Art. 28H (1) of the Constitution states that Every person shall have the right to live in physical and spiritual prosperity, to have a home and to enjoy a good and healthy environment, and shall have the right to obtain medical care; Art. 28H (4) mentions Every person shall have the right to own personal property, and such property may not be unjustly held possession of by any party.

determining the mining zone must be conducted in writing.

The petitioners, interestingly, did not include the Constitution's Article on the right to information. As explained in the previous section, Art. 28F of the Indonesian Constitution states that citizens have the right to communicate and obtain information for their life development and social environment. In addition to this, they have the right to seek, possess, store, and convey information by employing all available types of channels.

The petitioners also called for the annulment of penal provisions concerning communities' blockade of mining activities. This was declared contrary to the constitutional right to express opinions (Art. 28E section 3 of the Constitution), and collective rights to advancing life (Art. 28C section 2). Article 136 of Mining Law states that Mining Permit holders, before carrying out production operations activities, must settle all land claims. The land settlement may be conducted in stages as needed by the Mining Permit holders. Then, Art. 162 of Law 4/2009 mentions that activities that disturb mining activities belonging to Mining Permit holders who have settled land claims shall be sentenced to imprisonment of at least 1 (one) year or a fine of most IDR 100,000 million or USD 6,708. This article has been frequently used to criminalize people who are facing land conflicts with mining permits.

The Constitutional Court agreed to the petitioners' argument concerning provisions on mining zone. This is what is discussed in this sub-section. In the Decision of the Indonesian Constitutional Court Number 32 / PUU-VIII / 2010, the judges said that the phrase "paying attention to the opinion of the public" in determining a mining zone (Art. 10 section 2 of Law 4/2009) must be interpreted as an obligation to protect, respect and realize

the interests of the community whose territory or land will be included in the mining zone and those that will be affected.

Legal reasoning delivered by the judges begins by explaining the relationship between the people and the state in terms of natural resources tenure. The people, according to the judges, have given their mandate to the state through the government to conduct policy and regulatory making, resource management and supervision of natural resources management. The state through the Government is obliged to take action in order to respect, protect and fulfill citizens' economic and social rights.

Thus, the determination of the mining zone must be interpreted as the Government's obligation to realize those economic and social rights. The Government cannot act arbitrarily so that it must first coordinate with local governments, consult with the parliament, and consider to the opinions of the community.

The mechanism for determining mining zones as stipulated in Article 10 paragraph 2 of Law 4/2009 has the potential to violate the constitutional rights of citizens if solely conducted to accomplish formal-procedural provisions and obscure the main purpose of respecting, protecting, and fulfilling economic and social rights of citizens. The Constitutional judges stated that the opinion of the people in determining mining zones is a form of people's control over the Government. That control must be directly done by the community will be affected. As such there must be direct involvement of the community, facilitated by the government, in giving their opinions. The judges disagreed with the request of the petitioners to use written agreements as a form of expressing public opinion. Written approval according to the judges is only formal-procedural but does not reflect substantive opinion. Then

direct public opinion is more required in establishing mining zones.

### *B. The Supreme Court Ruling<sup>31</sup>*

The decision of the Supreme Court which is discussed in this sub-section concerns legal provisions for submitting announcements of environmental permits. The case examined in this court is an administrative dispute on the issuance of an environmental permit in Central Java Province.

In 2012, the Governor of Central Java issued an environmental permit for a state-owned cement company that plans to do karst mining in the Kendeng Mountains. The Mountains, in fact, are one of water catchment areas in Java and the area to maintain food security. The Mountains are surrounded by fertile rice fields managed by indigenous peoples known as the Samin People.<sup>32</sup>

The plan to build a cement factory in the Kendeng Mountains was opposed by the community. A number of protests were performed. Legal remedies are carried out through administrative claims against the environmental permit. According to farmers, the environmental permit issued for the cement factory in Kendeng are made without adequate information and consultation with the community. Meanwhile, the provincial government of Central Java and the cement company viewed that information has been provided and consultation has been carried out through meetings held in the village. For

the community, this cannot be accepted because the consultation is only formal-procedural and does not really aim to capture people's opinions.

The announcement of environmental permits is the implementation of Article 39 of Indonesian Environmental Law. It has been explained in the previous section that the provision requires Minister, and local government to announce every application and environmental permit decision. That announcement must be accomplished by easily understood means.

The Supreme Court through Ruling Number 99/2016 cancels the Central Java Governor's decree on the environmental permit. The Supreme Judges argued that the announcement of the permit in the Kendeng Mountains could not be accepted because it did not include any information regarding potential pollution or environmental damage of the enacted Environmental Permit. The formal justice procedural socialization model does not provide protection to the rights of the people. The announcement of environmental permits must deliver the information effectively to all groups of people, either directly or indirectly through representation, and "in accordance with the language and level of their social stratification".<sup>33</sup>

### *C. The Commission of Information Decision*

In sub-sections A and B, we have discussed the judicial activism contained in

<sup>31</sup> This sub-section has been partially included in my paper titled: Social Movement in Indonesian Mining Law Enforcement: The case of peasants-scholars nexus in karst mining dispute in Java, presented in International Conference on International Conference on Energy and Mining Law 2018, Jakarta 18 September 2018.

<sup>32</sup> Further readings concerning the history of Samin People see Harry J. Benda, and Lance Castle, "The

Samin movement", *Bijdragen tot de Taal -, Land - en Volkenkunde*, 125. no: 2, Leiden, Pp. 207-240 and Sartono Kartodirdjo. *Agrarian Radicalism in Java: Its Setting and Development*. In C. Holt (Ed.), *Culture and Politics in Indonesia* (1972), Pp. 71-125. Jakarta and Kuala Lumpur: Equinox Publisher.

<sup>33</sup> Supreme Court Ruling Number 99/2016, Pp. 111.

the Constitutional Court and the Indonesian Supreme Court in terms of obtaining public opinion and submitting information about environmental permits. This section discusses another safeguard institution's role that is the Information Commission Decision.

As repeatedly explained, the Information Commission is responsible for handling information disputes. In this section, the dispute discussed is related to an information request for mining business licenses in Kutai Kartanegara District in the Province of East Kalimantan. This district is known as an area that is rich in mining, especially coal. There are 625 mining permits in Kutai Kartanegara or 45% of all mining permits in East Kalimantan. With this figure, the Kutai Kartanegara Government is also listed as the largest mining permit issuer in Indonesia.<sup>34</sup>

In 2014, the Information Commission of East Kalimantan Province through the Decision Number 00031REG-PSIIIT/2014 decided to agree for the request of a citizen to open all mining permits granted by the Mining and Energy Services of Kutai Kartanegara. Rejecting this ruling, the Mining Services filed a lawsuit before the State Administrative Court in the City of Samarinda, the capital of East Kalimantan. The court upheld the decision of the Information Commission.<sup>35</sup> The Mining Services then appealed to the Supreme Court. Yet, the Supreme Court, through its Ruling number 614 K/TUN/2015, confirmed the decision of the Information Commission and the State Administrative Court.

One interesting legal issue, in this case, relates to the understanding of legal

protection priorities related to public information. The local government, in this case, is the Mining and Energy Services, believed that mining licenses cannot be handed over to the public because they are classified as 'excluded public information'. As discussed in section III, Indonesian FoI Law states that some information is exempt from the public's right to know it. Included in this group, according to Article 6 paragraph (3) and Article 17 of FoI Law, are information that can endanger the state security, information relating to business protection from unfair competition, information relating to personal rights, information relating to office secret; and information that has not been mastered or documented by the public bodies.

Using the provisions of these two Articles, the Kutai Mining Services stated that the mining licenses requested contained information regarding personal rights of permit holders. Therefore it is not publicly accessible. In accordance with Population Administration Law number 24 of 2013, the security of personal data is protected by law. Then it was also stated that disseminating information regarding mining permits also has the potential to disrupt business protection efforts from unfair competition.

On the contrary, the East Kalimantan Information Commission interpreted that the reason of Kutai Mining and Energy Services for excluding information on mining permits from public information that must be available at any time is unacceptable. The reason was that this permit concerns the interests of many people. Nonetheless, the Commission was aware that the permit information may include the personal data of

<sup>34</sup> <https://kaltim.antaranews.com/berita/38664/kutai-kartanegara-miliki-izin-pertambangan-terbanyak>, <http://kaltim.tribunnews.com/2017/04/13/begini->

wajah-pertambangan-batu-bara-di-kabupaten-terkaya, retrieved 1 October 2018.

<sup>35</sup> State Administrative Court of Samarinda Ruling number 17/G/2015/PTUN-SMD.

the holder. Therefore, in order to protect those data, information regarding the identity of the permit holder must be obscured. Other information regarding the permit, however, could be accessible. The Provincial Information Commission further argued that the Right to Know of the Applicant is a Basic Right that is protected by the law. Any state agency must be transparent and accountable in granting permits and policies. Therefore, the information regarding mining business licenses must be open to the public.

The East Kalimantan Information Commission only based its considerations on the FoI Law. Interestingly, the Supreme Court had broader their interpretation. Besides using the FoI Law, the Supreme Judges used Article 67 of Environmental Law that states the obligation of every citizen to participate in maintaining and preserving a healthy environment. Similarly, Article 65 of the same Law states that every citizen has the right to a healthy environment.

Both the Decision of the Information Commission and the Supreme Court Ruling have emphasized the protection of the rights of community groups above the protection and freedom of individual rights. In the rule of law scheme presented by Tamanaha or Bedner, this judges' consideration shows partiality to the fulfillment of the highest substantive aspect of the rule of law where the basic principles of justice must be guaranteed through the discharge of group rights rather than the rights of individuals.

#### IV. CONCLUSION AND SUGGESTION

This article finds that Indonesia has relatively complete legal instruments that relate to the right to information in the environmental sector. This, however, does not necessarily make the right to environmental information easily met. Various public interest litigations in the

mining sector indicate that the right to information is still difficult to attain. One of the reasons is the tendency of public bodies to prioritize formal-procedural aspects in providing information and setting up the public consultation.

Improvements to this situation, interestingly, occurred in the courtroom. The judicial activism has led to the emergence of a progressive legal interpretation of the procedure for public participation to determine mining zones and how to announce environmental permits. The court's decisions state that information and consultation with the public must be substantive in terms of the material and in a way that is easily understood. The efforts of environmental defenders to obtain mining information are also facilitated when the judge decides that the mining business permit is open information. The excuse of certain public bodies to hide permit information on the basis of protection of citizens' personal data is rejected by the judges. The court stated that the information must be open considering that there are collective rights of other citizens towards a good and healthy environment that must be fulfilled from their right to obtain mining information. The cases studied also indicated that the courts protect group rights higher than individual rights. This causes the highest substantive aspects of the rule of law to be simply obtained.

Obviously, the three cases discussed show better progress in the formation of the rule of law in Indonesia. Nevertheless, more efforts are needed to maintain it. The author suggests that progressive court decisions be informed to all levels of the judiciary in Indonesia. There is a tendency for first-level courts to be more conservative in interpreting the law than the Supreme Court. Another suggestion is to improve the legal empowerment of environmental defenders so

that they are more willing to fight for environmental information, especially in the mining sector.

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