DEGRADATION OF ENVIRONMENTAL PROTECTION AND MANAGEMENT INSTRUMENTS UNDER DRAFT BILL ON JOB CREATION
A. INTRODUCTION

Draft Bill on Job Creation (Rancangan Undang-Undang Cipta Kerja – RUU CK) which is drafted by using the Omnibus Law approach attempts to codify and integrate 79 laws, of which, the majority of them possessing different principles from one another. Omnibus Law approach is chosen with the expectation that it is able to reform licensing to become simpler, easily to be secured by businesses and giving impact toward the recruitment of workforce, as well as economic growth.

One of the affected laws is Law Number 32 of 2009 on Environmental Protection and Management (UU 32/2009). There are 30 articles under UU 32/2009 which are amended, 17 articles which are removed and 1 additional article. Amendment and removal of such articles generally raise negative impact toward UU 32/2009 and in the future implementation as well. There are at least 5 aspects which are certain to be affected, namely: risk-based business licensing, environmental licensing (environmental permit and AMDAL), access to information and public participation, supervision and law enforcement (strict liability/pertanggungjawaban mutlak). Those five aspects are broken down below.
B. RISK-BASED LICENSING POTENTIALLY DEGRADES ENVIRONMENTAL PROTECTION

Under Draft Bill on Job Creation, the granting of business licensing becomes the authority of central government based on risk calculation. Risk is obtained by multiplying assessment with damage (bahaya) level and probability (kemungkinan) on the occurrence of damage.¹

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\text{Risk Level} = \text{Degree of Damage} \times \text{Potential/Probability}
\]

Assessment of such degree of damage is performed against the aspects of health, safety, environment and/or utilization of resources. On the other hand, the probability on the occurrence of damage is classified into has never occurred, rarely occurs, has ever occurred, frequently occurs.² As for activities which are categorized as possessing high risk, business licensing in the forms of license and business identification number will be granted, as for medium risk, business licensing in the forms of certificate of standard and business identification number will be granted, as well as for low risk, only business identification number which will be granted.³

In comparison with UU 32/2009, currently, mechanism for environmental approval which is implemented is through environmental permit. Environmental Permit is mandatory for activity or business, both having substantial impact (mandatory AMDAL) and those having non-substantial impact (mandatory UKL/UPL). As for small business which is not mandatory to secure AMDAL or UKL/UPL, businesses are not required to process environmental permit. Businesses are only required to sign Affidavit on Capability for Environmental Management and Monitoring (Surat Pernyataan Kesanggupan Pengelolaan dan Pemantauan Lingkungan – SPPL).

Unfortunately, categorization of risk under Draft Bill on Job Creation also raises other risks, namely:

¹ Academic Script of Draft Bill on Job Creation, pg. 100.
² Draft Bill on Job Creation, art. 8
³ Ibid.
(1) **Risk-assessment factor which is limited to the aspects of health, safety, environment, and/or utilization of resources.**

Article 8 paragraph (4) still opens space for other aspects in accordance with the nature of business activity. In its elucidation, Article 8 paragraph (4) does not explain the criteria of such other aspects and only mention “security or defense aspect is in accordance with business activity”. Criteria for the establishment of other aspects are also predicted will be very bureaucratic because it awaits Regulation of the Government.

Asides from that, risk assessment is closely related with perception which is possible to be different from one person to another. Supposedly, risk factor is not assessed in this narrow manner, more flexible and having clear criteria. For example, risk classification which is used in England very broadly opens up for factors which become the basis for assessment. Several of them encompass legal risk, information risk, technology risk, security risk, operational risk, and others.\(^4\)

(2) **It is unclear on the extension of indicator which is calculated in each risk-assessment factor.**

For example, to what extent that such environmental factor is considered in determining risk is also not described. In addition, in determining environmental risk, it should also be based on adequate environmental administration, comprehensive data relating to environmental supporting capacity and accommodating capacity, as well as very strict standards. Unfortunately, the availability of these data and strict standards actually become the task of the government, therefore, it is concerned that environmental risk is not considered in comprehensive and careful manners.

(3) **Formula for the calculation of risk level potentially overlooks business or activity which is affected by environmental change.**

In reference to Academic Script of RUU CK, benefit from the use of risk-based business licensing against businesses is ease in licensing, namely: decrease in business license, licensing deregulation and reducing licensing cost, as well as other matters relating to, such as supervision.\(^5\) This condition obviously raises concern because it almost certainly aims to exclude several types of business and activity from the list of mandatory AMDAL. Consequently, several businesses are potentially classified into the category of medium or even low risk.

Although, if referring to formula for calculation of risk level, impact component has been addressed under Regulation of the Minister of Environmental Affairs and Forestry Number P.38/MENLHK/SETJEN/KUM.1/7/2019 on Types of Business and/or Activity Plan Which are Mandatory to Possess Environmental Impact Analysis (Permen LHK 38/2019).\(^6\) Such impact components encompass: area on the spread of impact, intensity and the period of impact, cumulative nature of impact, etc.

Matter which is non-existent or not specific under Permen LHK 38/2019 is the probability aspect. It is important to be ascertained that probability aspect does not offer space for business which is hazardous, having substantial impact, causing serious


\(^5\) Academic Script of Draft Bill on Job Creation, pg. 87.

\(^6\) Regulation of the Minister of Environmental Affairs and Forestry Number P.38/MENLHK/SETJEN/KUM.1/7/2019 on Types of Business and/or Activity Plan which are Mandatory to Possess Environmental Impact Analysis, appendix I pg. 22
threat, etc., to be not included in the high-risk category. Due to that condition, mechanism for direct determination of business as high-risk level without undergoing calculation, as performed by Permen LHK 38/2019, should be performed.\(^7\) Unfortunately, such mechanism is not addressed under RUU CK and included in NA.

\(^7\) Ibid., pg. 27.
C. DOWNGRADING OF THE MEANING OF ENVIRONMENTAL LICENSING

1. Environmental Permit

Under UU 32/2009, environmental permit possesses strategic functions, namely: (i) “legal” medium of AMDAL, (ii) as instrument for prevention of environmental pollution and/or damage, (iii) as the “entrance” for supervision and law enforcement and (iv) in order to integrate permits within the environmental sector, such as: permit for wastewater disposal, permit for B3 waste management, etc. Due to such strategic functions, it is reasonable that environmental permit acts as prerequisite to secure business license.

From those four strategic functions, removal of functions (i), (ii) and (iii) constitutes harm for the environment. Meanwhile, removal of function (iv) otherwise constitutes harm to the government and businesses, because it dismisses the opportunity to integrate and deregulate licensing. Although, under Article 63 of Regulation of the Government of the Republic of Indonesia Number 24 of 2018 on Electronically-Integrated Business Licensing Services (PP 24/2018), the mechanism for integration of licenses into environmental permit has been addressed. Since the environmental permit is deleted, then permit which should have been integrated will continue to be uncodified.

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8 Raynaldo Sembiring, et.al, Anotasi Undang-Undang Nomor 32 Tahun 2009 tentang Perlindungan dan Pengelolaan Lingkungan Hidup, (Jakarta: Indonesian Center for Environmental Law, 2014), pg. 138-139.
2. AMDAL

Differs with environmental permit, provisions on AMDAL undergo several amendments which downgrade the meaning of AMDAL itself. Firstly, the amendment to criteria of business which having substantial impact. In reference to Academic Script of RUU CK, the amendment to criteria of business which having substantial impact due to detailed conditions will be addressed under implementing regulation and, so that there is flexibility for central government to follow public dynamic and global development. Reason for the regulation of provisions under implementing regulation actually raises new convolution because it should break down ancient regulation and it potentially becomes counterproductive with the purpose of drafting RUU CK which envisages to perform licensing deregulation.

Secondly, removal of AMDAL Assessor Commission (Komisi Penilai AMDAL – KPA) and the possibility that only private party which replaces the role of KPA. Removal of KPA basically dismisses the opportunity for the public from all categories to be able to participate and be involved in decision making. Under RUU CK, AMDAL feasibility test may be delegated to certified agency and/or expert. The problem is, decision or policy which has environmental impact is delegated only to private party, without any involvement from the government and the public (in formal manner). This condition is due to the removal of KPA which, from normative perspective, is more participative.

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9 Academic Script of Draft Bill on Job Creation, pg. 342 (Matrix of Analysis on Draft Bill on Job Creation appendix 1b pg. 6)

10 Draft Bill on Job Creation, art. 23 point 4 against amendment to article 24 paragraph (3) Law No. 32 of 2009, pg. 82
D. MORE RESTRICTED SPACE FOR PUBLIC PARTICIPATION AND PUBLIC ACCESS TO ENVIRONMENTAL INFORMATION

Under RUU CK, restriction of public participation in the course of AMDAL drafting also occurs. Based on RUU CK, the public which is necessary to become the object of public consultation only refers to public which sustains direct impact from business and/or activity plan. The following is amendment on the editorial of such article:

<table>
<thead>
<tr>
<th>Law Number 32 of 2009</th>
<th>Draft Bill on Job Creation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Article 26</strong></td>
<td></td>
</tr>
<tr>
<td>(1) The AMDAL document as referred to under article 22 shall be formulated by initiators by involving the public</td>
<td>Article 23 point 6 on amendment to article 26 of Law No. 32 of 2009</td>
</tr>
<tr>
<td>(2) ….</td>
<td>(1) The AMDAL document as referred to under Article 22 shall be formulated by initiators</td>
</tr>
<tr>
<td>(3) Public involvement as referred to in paragraph (1) encompasses:</td>
<td>(2) Formulation of AMDAL document is performed by involving the public which sustains direct impact from business and/or activity plan</td>
</tr>
<tr>
<td>a. Those which sustain impact;</td>
<td>(3) ……</td>
</tr>
<tr>
<td>b. Environmental activist; and/or</td>
<td></td>
</tr>
<tr>
<td>c. Those which are affected by any form of decision in AMDAL process</td>
<td></td>
</tr>
</tbody>
</table>

In reminiscing of the history aspect of Law No. 32 of 2009, involvement of such three elements aims to increase the quality of AMDAL formulation. In Academic Script of UU 32/2009, it is stated that the public which sustains impact not necessarily be aware of

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11 Draft Bill on Job Creation, art. 23 point 6 against amendment to article 26 Law No. 32 of 2009, pg. 83.
information relating to development plan, although it possesses knowledge on the impact of such development against them.\textsuperscript{12} Therefore, involvement of those two other elements will be the answer on the existence of such knowledge gap. However, roles of these two elements are otherwise removed under RUU CK.

In addition, RUU CK further restricts public access to information. This condition is portrayed from the limitation of method to access decree on environmental feasibility, as well as restricting space to obtain information relating to such decree.\textsuperscript{13} The following is comparison of amendment to editorial of such article:

<table>
<thead>
<tr>
<th>Law Number 32 of 2009</th>
<th>Draft Bill on Job Creation</th>
</tr>
</thead>
</table>
| **Article 39**
| (4) Minister, Governor, or Regent/Mayor, in accordance with respective authority, must announce **every application and decree on environmental permit** |
| (5) Announcement as referred to in paragraph (1) is performed **by using method which is easily accessed by the public** |
| **Article 23 point 18 on amendment to article 39 Law No 32 of 2009** |
| (4) **Decree on environmental feasibility** is announced to the public |
| (5) Announcement as referred to in paragraph (1) is performed via **electronic system and or other methods as established by Central Government** |

In amendment to such article, it is visible that Draft Bill on Job Creation restricts the space for the public to be able to access information regarding decree on environmental feasibility. Previously, the public was entitled to receive information on such decree starting from the stage where application exists, however, under Draft Bill on Job Creation, access to such information is only accessible after such decree has been issued. Asides from that, Draft Bill on Job Creation also restricts the method for making announcement relating to such decree by only making announcement via electronic system and/or other methods as established by Central Government.

From historical perspective, announcement under this Article 39 is the embodiment of disclosure of information. Existence of such announcement should be used to accommodate public involvement in decision-making process, specifically for those which are yet to utilize the chance in the procedures of objection, hearing, and others.\textsuperscript{14} With the termination of obligation to perform announcement since the existence of application, then this condition will also terminate the entrance for public participation in decision-making process. Furthermore, method for accessing announcement which is currently limited, considering not all strata of society in Indonesia are able to access internet. This condition will even restrict space for the public to obtain proper access to information.

\textsuperscript{12} Minutes of Draft Bill on Environmental Management, Saturday 18 July 2009, pg. 82
\textsuperscript{13} Draft Bill on Job Creation, art. 23 point 18 against amendment to article 39 of Law No. 32 of 2009, pg. 85.
\textsuperscript{14} Law Number 32 of 2009, elucidation of art. 39 paragraph (1)
E. SUPERVISION OF COMPLIANCE WHICH IS PREDICTED TO BE EVEN WEAKER

There are at least 3 important matters from supervisory concept which are addressed under UU 32/2009: (i) existence of distribution of authority from central government to regency/city government, (ii) existence of environmental supervisory official (pejabat pengawas lingkungan hidup – PPLH) as functional official who possesses authority to perform supervision up to ceasing certain violation, and (iii) existence of authority of Minister of Environmental Affairs and Forestry to perform oversight (pengawasan lapis kedua).

Unfortunately, these three matters are amended and removed. Supervisory authority currently becomes center-based at Central Government. Meanwhile, authority of PPLH and oversight has been removed. This condition will cause supervision against compliance will continue to be weaker, specifically due to huge “burden” which must be borne by central government. Besides that, inexistence of PPLH causes the dismissal of specialization in regards to supervision and authority to perform immediate preventive measure. In regards to oversight, since it is commonly known that supervision in region is frequently ineffective, hence oversight should be performed.

Dismissal of authority of regional government and oversight will have implication against historical data on compliance which become crucial factor in assessing the probability of damage.\(^{15}\) Nevertheless, locations where business operates are mostly situated within the administrative regions of regency/city government or provincial government. Thus, regional government is the one which is the nearest and likely possible to have cognizance regarding data on compliance of businesses. Under RUU CK, regional government does not possess authority which is attributed under law. In addition, oversight authority is also removed. Hence, collection of data on compliance will certainly be hindered. More importantly, it certainly raises impact toward environmental quality.

\(^{15}\) Academic Script of Draft Bill on Job Creation, pg. 88-89
F. UNCLEAR CONCEPT ON STRICT LIABILITY

1. Legal provision on Strict Liability or Pertanggungjawaban Mutlak becomes unclear and it is even removed

RUU CK apparently degrades provision relating to strict liability, at least under two laws, namely UU 32/2009 and Law Number 41 of 1999 (UU 41/1999). Under UU 41/1999, provision relating to strict liability is removed by amending obligation to be held liable for the occurrence of forest fire in working area to be only mandatory to perform preventive and control measures on forest fire. Amendment of its editorial is changed into as follow:

<table>
<thead>
<tr>
<th>Law Number 41 of 1999 on Forestry</th>
<th>Draft Bill on Job Creation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 49</td>
<td>Article 37 point 16 on amendment to article 49 of Forestry Law</td>
</tr>
<tr>
<td>Holder of right or permit is held liable for the occurrence of forest fire within its working area.</td>
<td>Holder of right or business licensing is mandatory to perform preventive and control measure in regards to forest fire within its working area.</td>
</tr>
</tbody>
</table>

Although under UU 41/1999, it is not mentioned as strict-liability norm, but environmental law experts in Indonesia agree that this provision may be deemed as strict liability, or even leaning toward absolute liability (because it does not address defense element or escape clause). This provision has also been used several times for forest-fire cases. One of them is when Minister of Environmental Affairs and Forestry filed a civil lawsuit against PT. Bumi Mekar Hijau (2015-2016), even in statement of appeal which is examined by High Court of Palembang, Ministry of Environmental Affairs and Forestry, through its attorney, claims such Article 49 of Law 41/1999 as strict liability. However, this provision under RUU CK is actually removed and replaced only to “mandatory to prevent and control forest fire”.

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16 See Statement of Appeal of Ministry of Environmental Affairs and Forestry in Decision No. 51/PDT/2016/PT.PLG, pg. 90-91
Besides that, Strict liability under such Law 32/2009 is also amended. Although provision on strict liability is not removed, but the editorial of article is amended to be as follow:

<table>
<thead>
<tr>
<th>Law No. 32 of 2009</th>
<th>Draft Bill on Job Creation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 88</td>
<td>Article 23 point 35 on amendment to article 88 of Law No. 32 of 2009</td>
</tr>
<tr>
<td>Any person, whose action, business, and/or activity uses B3, produces and/or manages B3 waste, and/or which causes serious threat to the environment is held strictly liable for incurred losses without the need to prove the wrongdoing element.</td>
<td>Any person, whose action, business, and/or activity uses B3, produces and/or manages B3 waste, and/or which causes serious threat to the environment is held strictly liable for losses which are incurred from its business and/or activity.</td>
</tr>
</tbody>
</table>

If referring to Academic Script, then it is visible that this removal is a deliberate effort due to the incomprehensible state of the drafter. Reason for the removal of “wrongdoing element” is because every criminal provision should prove wrongdoing element.\(^\text{17}\) Obviously, this reason will become irrational because strict liability which is referred to under UU 32/2009 refers to civil law enforcement.

\(^{17}\) Academic Script of Draft Bill on Job Creation, pg. 383-384 (Matrix of Analysis on Draft Bill on Job Creation appendix 1b, pg. 47-48)
2. Removal of Exemption to Prohibition for Burning by Traditional Farmers Constitutes Neglect toward Local Wisdom and Potential on Shifting Liability Burden

<table>
<thead>
<tr>
<th>Law No. 32 of 2009</th>
<th>Draft Bill on Job Creation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 69 paragraph (2)</td>
<td>Article 23 point 25 on amendment to article 69 of Law No. 32 of 2009</td>
</tr>
<tr>
<td>Provision as referred to in paragraph (1) letter h seriously takes regards local wisdom in each region</td>
<td>Provision under article 69 paragraph (2) is removed</td>
</tr>
</tbody>
</table>

Elucidation of article 69 paragraph (2)

Local wisdom which is referred to in this provision refers to committing burning of land with the total area of 2 hectares at maximum for each householder to be planted with the type of local variety and be surrounded by firebreaks to prevent the spreading of fire to the surrounding area.

Note:
- Article 69 paragraph (1) letter h:
- Any person is prohibited from clearing land by the way of burning

Under Article 69 paragraph (2) of UU 32/2009, exemption to prohibition for burning by traditional farmers with a total area of 2 hectares at maximum per household to be planted with local variety and be surrounded by firebreaks is addressed. This provision basically functions as respect to local wisdom, specifically toward nomad farmers’ activities which are commonly found in several regions in Indonesia, for instance in Kalimantan. Drafter of Law Number 32 of 2009 also envisages that this form of local wisdom to not be easily criminally processed.  

Under RUU CK, Article 69 paragraph (2) is removed, thus the activity of burning by traditional farmers may be criminally processed, since the criminal provision for any person who burns the land under Article 108 of UU 32/2009 is not removed under RUU CK. Within the context of liability for forest and land fire, shifting of liability burden from businesses to the society has existed, because businesses will be even more difficult to be legally processed, but the society, specifically those who carry out their local wisdom, will be easier to be criminally processed.

In practice, Article 108 jo. Article 69 paragraph (1) letter h of Law 32/2009 in relation to prohibition for burning is frequently be used as legal ground to criminally process farmers. For example, two cases regarding farmers in Central Kalimantan which were processed in 2019. According to Public Prosecutor, these two farmers were proven to commit land cleaning, collecting lumbers, and dry leaves to be burned later on. Said two farmers were charged because they caused one hectare of forestry Area to be burnt. However, the practice of land clearing for farming by the way of burning is a traditional method and they only burn only for the purposes of local food

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security, and not in order to damage the environment.\textsuperscript{19} It is concerned that this criminalization will only to snowball if the provision in relation to exemption to local wisdom under Article 69 paragraph (2) under RUU CK is removed in the future.

Moreover, removal of exemption to prohibition for burning potentially shifts the liability burden from businesses to the society. This condition is highly possible because generally, the defense of businesses as the defendant is that conflagration occurs due to natural disaster or contribution from third party. This contribution from third party which makes it possible for traditional farmers or society who performs the burning based on local wisdom to be criminally processed.

\textsuperscript{19} Andre Barahamin, “Menyasar dan Memenjarakan Para Peladang”, https://www.mongabay.co.id/2019/12/10/menyasar-dan-memenjarakan-para-peladang/
G. CONCLUSION

Based on the above explanations, several conclusions which may be taken are:

1. Risk-based business licensing is concept which is necessary to be further studied. On practical level, risk-based business licensing will likely be difficult to be implemented because it should be addressed in details under Regulation of the Government and break down a number of existing regulations.

2. Removal of environmental permit dismisses the opportunity of license integration, which is actually counter-productive with the purpose of licensing deregulation under RUU CK.

3. Provision on public participation and access to information under RUU CK is setback in regards to public involvement in the course of environmental protection and management.

4. Degradation of supervisory provision will obstruct the collection of data on compliance of businesses. More importantly, it potentially results in environmental pollution and/or damage.

5. There is misconception in the drafting of strict liability which was previously addressed under UU 32/2009. This condition will have fatal consequence because it will be difficult to implement strict liability. Provision on strict liability under UU 41/1999 raises more concerns because, in principle, it has been non-existent.

6. Removal of provision on exemption to prohibition for burning in order to implement local wisdom will only potentially result in a great number of society and traditional farmers who are criminally processed. Moreover, it is highly possible that there is shift of liability burden.
These six conclusions show that regulation on risk-based licensing under RUU CK will only obstruct the implementation of RUU CK. Furthermore, amendment to and removal of norms will raise negative impact to the public and environment. Lastly, misconception, specifically relating to strict liability, not only endangers the public and environment, but also science.
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