

# REVISITING PEOPLE'S INVOLVEMENT IN ENVIRONMENTAL IMPACT ANALYSIS PROCESS: A CONSTITUTIONAL REVIEW TOWARDS SUSTAINABLE DEVELOPMENT

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**Abstract.** The protection of environmental and economic rights has been part of the human rights as well as one of the main purposes of sustainable development. However, the drive caused by rapid economic growth have caused the effort in environmental protection to be neglected in the past decades, including in Indonesia. Since 1982, Indonesia has enacted environmental protection regulatory framework, including by adopting the Environmental Impact Analysis (EIA) as the legal instrument in the environmental decision-making process. One of the main characteristics in the EIA process is the people's involvement as regulated under Law No. 32 of 2009 and its implementing regulations. However, the enforcement of this mandatory obligation only remains as a formal compliance rather than serving the actual purpose. Even worse, the recently enacted Job Creation Law have immensely severed the environmental protection effort by amending the people's involvement principle into a more restrictive regulatory framework. Therefore, this article is aimed to revisit the current Job Creation Law on the people's involvement in the EIA Process from a constitutional perspective towards sustainable development.

**Keywords:** job creation law; environmental law; environmental impact analysis; constitutional review; eodb

## I. INTRODUCTION

Soemarwoto in his book defines environment as every material and condition that existed in the space we occupied and have an impact to the livelihood of the human being [1]. By such definition, the existence of human being occupying and utilizing the environment have a huge impact towards the sustainability of the environment in fulfilling needs of the many. In a way, such relationship between human being and the environment has always been significant, yet paradoxical. The paradoxical nature of such relationship lies on the ever-growing population of humankind within the past decades, which has become the main drive in economic and industrial development on one hand, but on the other hand slowly contributes to the growing detrimental effect on the environmental sustainability thereby threatening the livelihood of the many. This is mainly caused by the hundreds of years capitalist system in developed countries and inequitable international order in which environment does not exist as a natural domain where humankind must coexist with other species, but rather a domain to be developed in the ever-expanding process of economy [2]. In response to this unfortunate fact, the global community has accepted that environmental degradation as a critical issue. In the early 1970s, environmental issue has become the main purpose in various development policies, both in global and national scale. However, the trade-off between economic development and environmental protection remains a critical point in balancing both sides of the scale [3].

In 2000, the United Nations has also included creating environmental stability as one of the eight development goals to improve the lives of the world's disadvantaged populations. However, the separation of environmental considerations from other development goals has created somewhat a limited view thereby impacting the effort in achieving other development goals such as poverty, health, food supplies, etc [4]. Over the last few decades, environmental pollution has escalated due to the rapid growth of the manufacturing and industrial sectors, being the backbone of a country's economy. Recent statistical data indicates that about 50% of environmental pollution is due industries and manufacturing units, especially in developing countries [5]. The Lancet Commission on Pollution and Health reported that as of 2019, pollution remains responsible for approximately 9 million deaths per annum as shown in Picture 1 below. Deaths from modern pollution risk factors, which are the unintended consequence of industrialization and urbanization, have risen by 7% since 2015 and by over 66% since 2000. Further, the Lance Commission on Pollution and Health also noted that 92% of pollution-related deaths as well as greatest burden of pollution's economic losses occur in low-income and middle-income countries [6].

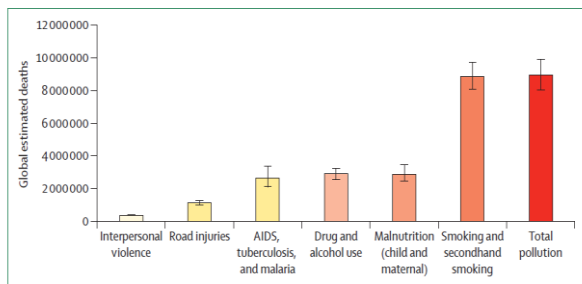


Figure 1. Global Estimated Deaths by Major Risk Factor or Cause

By taking consideration of the foregoing, environmental pollution has caused irreversible destruction that becomes a serious challenge to natural ecosystem and human health which eventually will result to socio-economic impacts towards human being. In this case, environmental pollution has become a national issue to every developing country thereby calling an accountable and systematic monitoring and reporting of environmental actions [5]. In reference to the abovementioned, an accountable and systematic monitoring and reporting of environmental actions is called for to ensure a balanced approach is taken by the government in regulating a less environmentally-intrusive industrialization and urbanization practices. In Indonesia, a regulatory framework on environmental protection has been placed since 1997 and replaced in 2009 by the enactment of Law No. 32 of 2009 on the Environmental Protection and Management (2009 Environmental Law). However, amendment to Environmental Law was recently made via the enactment of Law No. 6 of 2023 on the Enactment of the Government Regulation In Lieu of Law No. 2 of 2022 on the Job Creation (Job Creation Law).

The enactment of the Job Creation Law was made on several reasonings, in which two of the most prominent reasonings were to increase Indonesia’s attractiveness as a destination country to foreign investments as well as to create job opportunities hence increasing employment growth nationwide [7]. From a different perspective, the enforcement effort in environmental protection in Indonesia may be exposed to greater risks as there are questions raised by various stakeholders as to whether the newly enacted law will provide a balanced position between environmental protection versus the ever-growing industrial sector, given the enforcement on any violation of environmental protection that remained relatively weak in the past decades. The rising concern is mainly due to the controversial Ease of Doing Business (EoDB) policy imbued under the Job Creation Law as well as its implementing regulations, particularly by regulating a more relaxed regulatory framework on environmental protection and management [8]. In respect to the foregoing, the abovementioned controversial views risen from the enactment of the Job Creation Law that amends the 2009 Environmental Law must be referred back to the 1945 Constitution of the Republic of Indonesia (1945 Constitution) as the constitutional basis in ensuring the people’s sustainable welfare, both from an economic perspective as well as

environmental protection perspective. Therefore, this research is aimed to review the recently enacted Job Creation Law from a constitutional perspective as to whether it may uphold the common interest of the people in environmental and economic rights.

## II. RESEARCH METHOD

This article is prepared by using the normative legal approach. The normative legal approach is made by reviewing and discussing the research object from a legal perspective and by referring to secondary data that comprises of primary, secondary and tertiary legal resources. The collected legal resources shall further be compiled and analysed further on a qualitative basis by using several approaches, among others, statute approach, historical approach, conceptual approach, as well as comparative approach [9]. The results of this research shall be formulated in the form of qualitative analysis, thereby explaining the findings in the form of descriptive sentences. Furthermore, the research conclusion shall be made by deducing the analysis results, i.e. via thinking method based on the general facts and then summarized into a specific conclusion.

## III. RESULTS AND DISCUSSION

As one of the developing country, Indonesia has been exposed to a serious environmental pollution spreading nationwide in the last few decades. A 2019 Pollution and Health Metrics report from Global Alliance on Health and Pollution (GAHP) indicates that Indonesia is ranked as the fourth-highest number of premature pollution-related deaths per annum on a global scale, equal to 232,974 deaths per year [10]. The rapid Indonesian economic growth towards what is deemed as newly industrialized country has also brought a detrimental impact to the sustainable water quality as in addition to sanitation and agriculture-related pollution, emergent pollutants such as chemicals and heavy metals are on the rise thereby significantly impacting health [11]. Based on the latest World Bank report, up to 53% of Indonesia’s rivers are heavily polluted (as shown in Picture 2 below) whereby 2 of the country’s major river systems are among the most polluted in the world [11].

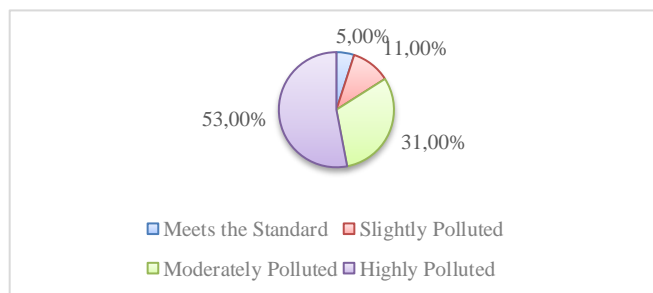


Figure 2. River Water Quality Status Across Indonesia

Based on Figure 2 above, majority of the Indonesia's population is exposed to water pollution whereby up to 70% of the national GDP is generated in river basins in which the majority of the sampling locations are found to be 'heavily polluted' [11]. By taking the above into consideration, a rapid economic growth driven by the industrialization of its country impose a serious impact towards the sustainable living of the people as environmental deterioration via various kinds of pollution is inevitable. From a regulatory perspective, the 2009 Environmental Law has adopted the use of Environmental Impact Analysis (EIA, or *Analisis Mengenai Dampak Lingkungan/AMDAL*) as a preventive tool in mitigating environmental damage/pollution that may occur by a development activity [12]. The use of EIA under the 2009 Environmental Law is further regulated under the Minister of Environment Regulation No. 17 of 2012 on the Public Participation in the Environmental Impact Analysis and Environmental Permit Process (MoER No. 17/2012). Under MoER No. 17/2012, public participation in the EIA process is mandatory by law and must be upheld by Initiator and the EIA Appraisal Commission to ensure that the approved EIA does not detrimentally affect the public. To ensure this, the public may participate in the EIA process by giving opinions or objections on the feasibility of the activity or business as proposed in the EIA document [13]. Despite such mandatory nature, the implementation of public participation in the EIA process in Indonesia has never been more than just a formality since the enactment of MoER No. 17/2012 [12].

In West Java, an average of 10 EIA documents has been issued annually since the enactment of MoER No. 17/2012 until 2019. However, during that period, there has not been any evaluation made on the quality and transparency of the EIA process insofar as to ensure a proper public participation was made [14]. Further, research in 2017 on PT Harita in West Kalimantan has found that the mandatory obligation of public participation in the EIA process under MoER No. 17/2012 has been violated whereby PT Harita as the business owner of bauxite mining site only involved the Head of Village, Head of the Village Consultative Body, and several public figures. Furthermore, there are other notable cases that indicates deliberate omission of public involvement in EIA process during the past years, such as the proposed construction of electric steam power plant in Sepang Bay, Bengkulu, the reclamation project on Jakarta Bay and Tanjung Benoa, Bali [15]. In reference to the foregoing, cases of environmental pollution as well as deliberate omission of the mandatory public participation in EIA process in Indonesia remained as critical issues and are correlated to each other. The deliberate omission of public participation in EIA process by the initiators/business owners clearly caused various environmental pollution/damage and therefore detrimentally affect the public within the impacted environment. Based on such precedence, it should be noted that the enforcement of the 2009 Environmental Law and MoER No. 27/2012 must be subject to reevaluation. However, the enactment of the Job Creation Law that amends the 2009 Environmental Law and revokes MoER No. 27/2012 along with other several implementing regulations may have

triggered more loosened regulatory framework in environmental protection, specifically by adopting a more limitative scope on public participation in EIA process. From a constitutional approach, the protection of human rights has been long included, among others, environmental rights and economic rights. However, the precedence on environmental pollution cases that remained in the past decades as well as the recent enactment of the Job Creation Law in Indonesia has raised a serious question on whether the protection of the people's rights under Article 28H paragraph (1) *jo*. Article 33 paragraph (4) of the 1945 Constitution of the Republic of Indonesia are still upheld.

Human being as part of the public (*Gesamtperson*) indicates a coexistence between one individual to another via the rights and obligations among them in a collective livelihood and therefore creates a common interest. Further, Socrates explained that such co-existential relationship is also known as *polis*, or what is currently known as a nation [16]. The foregoing explanation further shows a correlation between what is known as nation (*polis*) with what is now known as a modern nation or country. Under the Montevideo Convention, there are 4 requirements for a formation of a nation or country, i.e. the people, the territory or authority, a sovereign government, and the capability to communicate with other countries [17]. Therefore, it is widely accepted that to date, the existence of the people in forming a country or nation is paramount. Further to the above, Aristoteles also added that the people living in a nation (*polis*) formed a political purpose (*eudaimonia*), which then gives birth to the constitution as the basis formation of a modern country [16]. The crystallization of *eudaimonia* into a constitution is in fact attributable to the existence of rights and obligations between individuals as part of the people (*Gesamtperson*). Historically, a constitution further evolved to fundamental law. By referring to the same idea that a constitution reflects the intention of the people, Hamilton, Madison and Jay further explained that a constitution must be referred by the judges as a fundamental law, which therefore it belongs to them to ascertain meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has superior obligation and validity ought, of course, to be preferred; or in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents [18]. Theoretically, the substance of a constitution as a fundamental law of a country consists of what is known as negative rights and positive rights. In general, negative rights may consist of freedom of speech, ownership of property, freedom from violent crime, protection against being defrauded, freedom of religion, *habeas corpus*, a fair trial, and the right not to be enslaved by another. While on the other hand, positive rights may consist of right to counsel and police protection of person and property, economic, social and cultural rights (such as food, housing, public education, employment, national security, military, health care, social security, and a minimum standard of living) [19].

Indonesia as a state of law have regulated under Article 1 paragraph (2) of the 1945 Constitution of the Republic of Indonesia (1945 Constitution) that sovereignty shall remained in hands of the people and must be carried out pursuant to the Constitution. Therefore, it is conceived that Indonesia as a state of law must be ruled democratically with reference to the constitution as the basis (*demokratische rechtsstaat*). Similarly, Law No. 10 of 2004 on the Establishment of Laws and Regulations (Law No. 10/2004) expressly stated further that the 1945 Constitution is the fundamental law of any form of regulations. In relation to the theoretical explanation above, the provisions under Article 1 paragraph (2) of the 1945 Constitution *jo*. Law No. 10/2004 reaffirms that a constitution is the fundamental law of Indonesia as a state of law. Therefore, such regulatory framework indicates that any laws or regulations shall not be in contravention with the 1945 Constitution as a fundamental law [20]. With respect to this article, the question then lies on whether the guarantee upon the people's environmental rights and economic rights as stipulated under the 1945 Constitution remained upheld by the regulatory framework made in reference to the said Constitution. The guarantee of the people's environmental rights is found under Article 28H paragraph (1) of the 1945 Constitution, whereby it expressly states that every person is entitled to a life of well-being in body and mind, to a place to dwell, to enjoy a good and healthy environment, and to receive medical care. Further, the guarantee of the people's economic rights is found under Article 33 paragraph (4) of the 1945 Constitution, whereby it expressly states that the national economy shall be based on economic democracy that upholds the principles of solidarity, efficiency along with fairness, sustainability, keeping the environment in perspective, self-sufficiency, and that is concerned as well with balanced progress and with the unity of the national economy.

Referring to the abovementioned provisions, it is clear that the existence of a healthy environment to be enjoyed as part of both environment and economical rights of the people is paramount. By definition, environment consist of every object and condition including human being and its activities within the space occupied by them that affect and correlated with the wellbeing of human being and other form of life [21]. Therefore, any activities made by human being within the space occupied may create an impact to the environment which further may also be attributable to the sustainability of the wellbeing of the human being in the future. In this regard, the environment must be managed insofar as to maintain its optimum condition. In other words, the utilization of the natural resources that are found in the environment must be controlled to ensure that sustainability of the said natural resources [15]. The urgency of environmental protection has come to the attention of the global community since early 1970s as marked by the 1972 Stockholm Convention, the 1992 Rio Convention, and the 2002 Johannesburg Convention. The ever-growing urgency on the environmental protection was closely related to the common interest of the global community in both economic growth and sustainable development [12]. In principle, sustainable development is

aimed to control the utilization of natural resources insofar as to enable the environment in sustainably providing adequate natural resources, which to date, remains as the primary source in ensuring the livelihood of the human being. In other words, the sustainable development process should be made with the understanding that a development is a tool to resolve any issues including poverty, arrearage, and other socio-economic issues. Further Surna T. Djajadiningrat opines that the process of sustainable development relies on 3 major factors, i.e.: 1) the condition of the natural resources; 2) the quality of the environment; and 3) population factor [15]. Tjokrowinoto further explained that sustainable development may be achieved via a correct interlinkage between nature, socio-economic and cultural aspect [13]. Indonesia has been part of the global community that supports environmental protection and sustainable development. Since its involvement in the 1972 Stockholm Convention, Indonesia as one of the developing countries have enacted various regulatory framework on environmental protection. The first legislation on environment was issued via the enactment of Law No. 4 of 1982 on the General Provisions of Environmental Management (1982 Environmental Law). Later, 1982 Environmental Law has been replaced several times by the enactment of Law No. 23 of 1997 on Environmental Management (1997 Environmental Law) and lastly by Law No. 32 of 2009 on the Environmental Protection and Management (2009 Environmental Law).

Since the regulatory framework on environmental management and protection was introduced in Indonesia in 1982, EIA as a legal instrument in planning and decision-making process to manage environmental considerations in sustainable development has been adopted. Originally, EIA was firstly adopted in the US National Environmental Policy Act (NEPA) in 1969 and has since spread globally, including in many developing countries [22]. Given the significancy in ensuring environmental sustainability, the use of EIA as a legal instrument is aimed to avoid failure in environmental management which may then cause environmental damage or pollution. In other words, EIA is used as a controlling tool to monitor that the environmental quality standards as regulated by the laws are consistently complied with from time to time. Pursuant to Article 14 paragraph 1 of the 2009 Environmental Law, it is expressly stated that EIA is one of the legal instruments used to mitigate environmental damage and/or pollution. Under Article 1 paragraph 11 of the 2009 Environmental Law, the EIA is defined as an analysis on the important impact of a business and/or activity being planned upon the environment necessary for the decision-making process on the implementation of the proposed business and/or activity. Prior to implementing a business and/or activity, Article 22 paragraph (1) of the 2009 Environmental Law mandates every business and/or activity bearing any important impact to the environment to possess an EIA. In enforcing such regulatory framework, Article 36 paragraph (1) of the 2009 Environmental Law also provides a mandatory obligation that any business and/or activity possessing EIA must also obtain environmental permit.

In reference to the foregoing, the adoption of EIA is closely related with the theoretical basis that it is the common interest of the people to enjoy environmental rights as provided under any constitution. Given such common interest, the 1992 Rio Convention has acknowledged several rights of the people, among others, the right to healthy environment, right to sustainable development, as well as the responsibility towards environmental protection. In general, the enactment of the 2009 Environmental Law was made in reference to, among others, the principles adopted under the 1992 Rio Convention. The same regulatory framework is also found under Article 65 paragraph (1) of the 2009 Environmental Law that stipulates every person is entitled to a healthy environment as part of the human rights. Further, it also includes the adoption of the 10<sup>th</sup> Principle under the 1992 Rio Convention in the implementation of the EIA system in Indonesia, namely the urgency of public participation or involvement in the environmental decision-making process. The same principle was further explained in the 1998 Aarhus Convention, whereby Article 3(9) stipulates that within the scope of the relevant provisions of this Convention, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality, or domicile and, in the case of a legal person, without discrimination as to where it has registered seat or an effective centre of its activities.

In honoring the abovementioned principles, Article 25 paragraph c, Article 26 paragraphs (1) and (2) of the 2009 Environmental Law stipulates that an EIA process must at least include, among others, public's opinions / responses on the proposed business and/or activity plan and during the preparation stage, the initiator of the proposed business and/or activity plan must involve the public in preparing the EIA by abiding to the principle of disclosure of information that are transparent, complete and must be announced prior to the implementation of the proposed business and/or activity plan. However, certain limitations are found whereby Article 26 paragraph (3) of the 2009 Environmental Law only limits the scope of public involvement in the EIA process to; 1) affected public; 2) environmental activist; and/or 3) public affected by any form of decision in the EIA process. Despite the adoption of principle of public involvement in the EIA process has been made from a regulatory perspective, research results as discussed in Section 3.1 above indicates a worrying fact whereby many omissions of public involvement in various EIA processes across Indonesia throughout the last decades have been deliberately made. Such worrying fact remarks that the adoption of the EIA process under the 2009 Environmental Law regulatory framework only serves as formality compliance rather than ensuring the protection of the common interest in having a healthy and maintained environment as part of the human rights protection, as well as in ensuring the constitutional rights of the people under Articles 28H paragraph (1) and 33 paragraph (4) of the 1945 Constitution.

Notwithstanding the above, the enactment of the Job Creation Law has somewhat worsened the state on the effort

of environmental protection, given the current weak enforcement on the EIA process. The initiative in enacting the Job Creation Law was made in 2019 by adopting the omnibus law approach with the aim to boost investment thereby accelerate the national economic development. The deregulation effort via the enactment of the Job Creation Law is intended to rearrange the overlapping and disharmonious regulatory framework relating to business activities in Indonesia, thereby amending more than 70 prevailing laws at the time, including the 2009 Environmental Law. The main idea of enacting the Job Creation Law was to improve the EoDB rating and thereby opening the possibility to achieve the targeted economic growth of up to 5.7% - 6% [23].

In respect to this article, one of the most controversial amendments made via the Job Creation Law is the amendment of Article 26 of the 2009 Environmental Law via Article 23 Section 5 and 6 of the Job Creation Law. The amendment provides a more restrictive limitations in defining 'people' that may be involved in the EIA process only to those regarded as 'directly affected people' by a relevant impact of a business and/or activity, thereby excluding environmentally-concerned people. The term 'directly affected people' under the Job Creation Law may impaired the effort to ensure such people's interest in environmental protection as majority of the people has yet possess adequate awareness on the impact of environmental decision-making, thereby exposes them to the threats of environmental damage and/or pollution arising from the implementation of the relevant business and/or activity as proposed in the EIA process [23]. Furthermore, the abolishment of Articles 29, 30 and 31 of the 2009 Environmental Law are also deemed to be in contrast with the basic principle of people's involvement in the EIA process and decision-making, whereby the EIA Appraisal Commission is now replaced by an ad-hoc due diligence team formed by the Due Diligence Institution (*Lembaga Uji Kelayakan*) which no longer includes the representative from the potentially impacted people and environmental organization as previously governed under Article 30 paragraph (1).e and (1).f of the 2009 Environmental Law.

#### IV. CONCLUSIONS

The limitative approach of the Job Creation Law in amending the 2009 Environmental Law, specifically in this case, the restrictive scope of 'affected people', the abolishment of the EIA Appraisal Commission, as well as the omission of certain stakeholders representing the affected people in EIA process in the said ad-hoc due diligence team have grossly neglected the basic principle of ensuring that the laws and regulations made shall be abide and conform with the 1945 Constitution as the fundamental law of Indonesia. As discussed above, the true purpose of ensuring environmental and economic rights is part of the basic human rights, as have been expressly regulated under Articles 28H paragraph (1) and 33 paragraph (4) of the 1945 Constitution. Although there may be ambiguity in weighing a proportionate view between environmental right and economic right, Article

33 paragraph (4) of the 1945 Constitution have clearly stated that the national economy shall be based on economic democracy that upholds the principles of, among others, environmentally friendly. In consideration of the foregoing, the said provision is linear with the theoretical view of sustainable development that emphasizes on 1) the condition of the natural resources; 2) the quality of the environment; and 3) population factor. Therefore, the enactment of the Job Creation Law in the effort to resolve the disharmonious regulatory framework should have not been considered solely for the purpose of improving EoDB rating and achieving the targeted economic growth, but rather to ensure a balanced view that a sustainable economic growth must also consider a well-protected environment to ensure sustainable natural resources availability. The notion that the common interest of the people as the *eudaimonia* of a nation must be upheld as the core value of the constitution as well as the fundamental law to achieve a welfare state.

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