

Maqashid Sharia Study on Minerals And Coal Law in Indonesia

Ahmad Lutfi Rijalul Fikri

Hukum Ekonomi Syariah Study Program, STIS Darul Falah Pagutan Mataram

Nusa Tenggara Barat Indonesia

e-mail: luthfi2311@gmail.com

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Abstrak

Maqashid syariah merupakan prinsip pembuatan hukum yang bertujuan membawa ajaran islam sejalan dengan berbagai konteks yang dihadapi, termasuk dalam konteks modern seperti saat ini, seperti dalam penerapan Undang-Undang Nomor 3 Tahun 2020 tentang Mineral dan Batubara yang belakangan ini menjadi polemik di tengah-tengah masyarakat. Analisis maqashid syariah dirasa perlu untuk dilakukan karena bersentuhan langsung dengan kemashlahatan dan kemudharatan yang akan ditimbulkan dari pengimplementasian perundang-undangan. Penelitian ini merupakan penelitian hukum normatif dengan menggunakan pendekatan konseptual (Maqashid Syariah) dan pendekatan perundang-undangan (statute approach) dengan teknik deskriptif dan interpretasi secara kualitatif untuk menemukan kesesuaian antara peraturan perundang-undangan yang berlaku dengan Maqashid Syariah. Hasil dari penelitian menjelaskan terakomodirnya prinsip Maqashid Syariah dalam Undang-Undang Mineral dan Batubara yang berlaku di Indonesia. Dimana tujuan kesejahteraan masyarakat atau dalam bahasa hukum islam disebut Mashlahah 'Ammah yang terkandung dalam Undang-Undang Minerba ini mengindikasikan bahwa undang-undang ini telah sesuai dengan tujuan syariat dalam pembentukan dan penetapan sebuah hukum. Namun demikian, Undang-Undang Minerba ini tidak terlepas dari kritik akan adanya potensi kemudharatan yang ditimbulkan akibat penetapan beberapa pasal yang dianggap kontroversial oleh beberapa ahli hukum. Oleh sebab itu, prinsip menghasilkan kebaikan dan menghindari atau meminimalisir keburukan merupakan prinsip dasar dalam Maqashid Syariah harus menjadi perhatian para legislator dalam membuat sebuah undang-undang sehingga keputusan perundang-undangan yang dihasilkan selaras dengan tujuan syariah.

Keywords: Maqashid Syariah, Mashlahah 'Ammah, Mineral dan Batubara.

Abstract

Maqashid Sharia is a law-making principle that aims to bring Islamic teachings in line with various contexts encountered, including in today's modern context. This includes the application of Law Number 3 of 2020 concerning Minerals and Coal which has recently become a polemic among the people. Maqashid Sharia analysis is deemed necessary because it is in direct contact with the benefits and harms that will arise from the implementation of this legislation. This research is a normative legal research using a conceptual approach (Maqashid Syariah) and statutory approach (statute approach) with qualitative descriptive and interpretation techniques to find compatibility between the applicable laws and regulations and Maqashid Syaria. The result of this research is

that the principles of Maqashid Syaria are accommodated in the Mineral and Coal Law that applies in Indonesia. Where the goal of community welfare or in the language of Islamic law is called Mashlahah 'Ammah contained in this Minerba Law indicates that this law is in accordance with the Shari'a goals in the formation and determination of a law. However, this Minerba Law cannot be separated from criticism regarding the potential for harm arising from the stipulation of several articles which are considered controversial by several legal experts. Therefore, the principle of producing good and avoiding or minimizing bad is a basic principle in Maqshid Syariah that legislators should pay attention to in making a law so that the resulting statutory decisions are in line with shari'a goals.

Keywords: Maqashid Syariah, Mashlahah 'Ammah, Minerals and Coal.

Introduction

Indonesia has abundant natural resource richness. Nevertheless, the community's well-being is not much impacted by this richness of resources. Every year, many types of mining minerals are discovered and exported to different nations, but in practice, relatively few people profit from them, and the majority of the population suffers losses as a result of mining operations. The 1945 Constitution's Article 33 states that the people's maximum prosperity is to be achieved through the exploitation of the land, water, and natural resources found therein. (Rio Fafen Ciptaswara & Sulistiowati, 2022; *UUD 1945*, n.d.) Article 33 is what then becomes the basic foundation on Indonesia's natural resource management, which must provide the greatest possible benefit for the people's prosperity. The management rights granted constitutionally to this state are a form of power to plan, formulate rules, implement, manage, utilize and extract the results of minerals contained in mining areas in Indonesia. (Barkatullah, 2019, p. 3; Nugrahani, 2023)

Law Number 11 of 1967 is a descendant of the 1945 Constitution; modifications were subsequently made to Law Number 4 of 2009, and the final revision, pertaining to mineral and coal mining, became Law Number 3 of 2020. According to this regulation, "mineral mining" refers to the extraction of mineral aggregates in the form of rock or ore, excluding groundwater, geothermal, and oil and gas resources. While the mining of carbon deposits found in the earth, such as solid bitumen, peat, and asphalt rock, is known as coal mining. As per the legal framework established by law number 3 of 2020, the mining business encompasses various stages of mineral or coal exploitation, such as general investigation activities, exploration, feasibility studies, construction, mining, processing, development, and/or utilization, transportation, sales, and post-mining.

Increasing the income of local, regional, and state communities and creating jobs for the maximum possible welfare of the populace are two of the state's objectives in regulating

mineral and coal mining. According to Jufri et al., one of the many mainstays of state revenue in order to realize people's welfare is the metal mineral (nickel) mining subsector.(Dewa et al., 2023). Apart from this noble goal, the government as the manager and formulator of regulations must pay attention to the positive and negative impacts arising from this mining business. The purpose of this research is to examine how Indonesian laws and regulations pertaining to mineral and coal mining reflect the maqashid side of sharia.

Maqashid sharia is one of the important instruments in viewing the values contained in the establishment of an Islamic law. Islam exists to realize and uphold the welfare of humanity, as the idea of maqashid sharia underscores.(Musolli, 2018) Some scholars place *maqashid sharia* in the discussion of *ushul fiqh*, while some other scholars discuss it as separate material and expand it in the philosophy of Islamic law..(Shidiq, 2009, p. 2) *Maqashid sharia* has the spirit and concern to bring Islamic teachings in line with the various contexts they face, including in the modern context as it is today.(Tohari & Kholish, 2020) In various statutory legal products, for example, an analysis of maqashid sharia is deemed necessary to be carried out because it is in direct contact with the good and harm that will result from the implementation of the applicable legislation.

Research Method

This study uses a descriptive-qualitative methodology and a library research design to examine whether Law Number 3 of 2020 concerning Minerals and Coal contains the idea of maqashid sharia. This research aims to analyze a set of data using general theories or concepts to show comparisons or relationships between one set of data and another set of data.(Zainudin Ali, 2009, p. 11). In order to determine if the relevant laws and regulations in Indonesia regarding mineral and coals and Maqashid Sharia are in compliance with each other, this study employed a qualitative descriptive data analysis technique.

Research Finding

Indonesia's Legal Foundation for the Mining of Minerals and Coal

Mining law is the body of legislation that governs the use of state power in the administration of minerals (mining) and the legal relationships between nations, individuals, and/or legal entities in the management and use of minerals (mining).(Salih HS, 2005, p. 8) According to this concept, mining law consists of three crucial components: the rule of law, the state's regulatory power, and the presence of a legal connection between the state and

individuals or organizations for the management and use of minerals..(Ahmad Redi, dkk, 2020, p. 23; Maulvi Ratri Adinda Putri et al., 2023)

In order to fulfill the mandate of the 1945 Constitution article 33 and accelerate national economic development, specific regulations regarding Indonesian mineral and coal mining are needed.(Hanif & Suherman, 2023; Istifahani Nuril Fatiha et al., 2023). This situation underlies the publication pertaining to Basic Mining Provisions of Law Number 11 of 1967 which came into effect on December 2, 1967. This law is a form of the spirit of national renewal and development produced by the New Order government, where to increase national development requires very large financing and one of the expected sources of financing is to explore sources of state income from the natural wealth contained in Indonesia's earth.

Through law number 11 of 1967, there are wide opportunities for foreign investors to manage the minerals they are interested in.(Hasbi et al., 2021; Nanang Sudrajat, 2013, p. 56) Even so, the centralization of permits for the management of minerals in the hands of the minister has created disharmony in the management of minerals between the government and the people in regions rich in minerals. In addition, Law Number 11 of 1967 is considered not to be in favor of the interests of the community where the minerals are located.(Thendry, 2016).

Along with the development of economic politics carried out by the government of Indonesia, law number 4 of 2009 concerning mineral and coal mining was passed after law number 11 of 1967 was found to not relate to the political economy being practiced.(Khairul, 2022). This new legislation accommodates new provisions that indicate a paradigm shift when handling mineral and coal resources.(Nalle, 2012) The distinction between the prior law and this law, number 4 of 2009, is in the participation of local governments in mining management based on the distribution of autonomy based on the authority of each region. (Rahayu & Faisal, 2021)

However, several problems have not been resolved with the implementation of Law number 4 of 2009.(Amania, 2020). Among them is the activity of adjusting contracts to become mining business licenses with downstream obligations for mineral mining that will carry out export activities with the obligation to process and refine them domestically to get added value.(Tri Hayati, 2015, p. 23) Another issue is the cross-sectoral issue involving the mining industry and the non-mining industry.(Suryaningsih et al., 2023)

To address the issues and current state of mineral and coal mining in Indonesia, it is thought that the law has to be improved.(Darongke et al., 2022; Kubota & Bangsawan,

2022). In order to give business actors in the mineral and coal sectors legal certainty, these modifications must also be implemented. An improvement was made with the issuance of Law Number 3 of 2020 concerning Amendments to Law Number 4 of 2009 concerning Mineral and Coal Mining.

Some of the improvements contained in Law number 3 of 2020 are in the form of agreements pertaining to mining jurisdictions, the authority on mineral and coal management, Plans for the management of minerals and coal, strengthening the role of BUMN, rearranging permits in mineral and coal exploitation, and Strengthening environmental management regulations, such as those pertaining to reclamation and post-mining

The Objective of Indonesian Mineral and Coal Mining as Per Law No. 3 of 2020

A precise set of regulations governing governmental control rights over natural resources owned by the Indonesian country is required to meet sustainable national development goals. Mastery is a form of state ownership in which the government is the only entity with the power to establish rights over the land, water, and money it contains, as well as to control and oversee how they are used. (Barkatullah, 2019, p. 12)

The granting of state control rights by the constitution gave birth to the purpose of managing minerals and coal in accordance with Law Number 4 of 2009's Article 2 which has not changed even with the adoption of 2020 Law Number 3. The article reads: To promote national development that is sustainable, Managing coal and minerals is done with the intention of:

- a. Ensuring the implementation and control of mining business activities in a manner that is effective, efficient, and competitive.
- b. Ensuring the advantages of extracting coal and minerals in an environmentally responsible and sustainable way.
- c. Ensuring the accessibility of coal and minerals for use as energy sources for home requirements or as raw commodities.
- d. Supporting and developing national capacities to increase their capacity to compete on a national, regional, and global scale.
- e. Raising local, regional, and state communities' incomes and generating jobs to maximize the welfare of the populace; and
- f. Ensuring judicial assurance in conducting mineral and coal mining business activities.

The purpose of establishing law number 3 of 2020 is not completely perfect because there are still several things that must be regulated in government regulations. Like the

increase in added value in article 102 paragraph 3 which says *“The processing and/or refining activities mentioned in paragraph (1) that increase the added value of minerals must adhere to the minimal standards for processing and/or refining, among other considerations.: a. economic value increase; and/or. b. market needs”*. In verse 4, it says: *“Additional guidelines concerning the lowest thresholds for processing and/or refining are governed by or predicated on a government regulation.”*. Increasing the economic value of mining products is also an important matter controlled by 2020 Law No. 3. When the added value of mineral products in a nation can increase and yield maximum economic benefits, this is known as an increase in economic value.

Share divestment is also a crucial matter whose provisions have been amended in Law No. 3 of 2020. Where in article 112 paragraph 1 it is stated that *“business entities holding IUP and IUPK at the Production Operational stage whose shares are owned by foreigners are required to divest 51% (fifty one percent) of their shares in stages to the Central Government, Local government, BUMN, regionally owned enterprise, and/or National private enterprise”*.

Divestment is a strategy to sell the company or the main components of the company. The conditions or reasons for a company to carry out a divestiture strategy are the need for cash, government regulations, compatibility with the company, divisional performance, and organizational follow-up strategy. In relation to government regulations, a divestment is carried out if the government implements anti-monopoly/anti-trust which opposes the merger of industries or companies with the intention of monopoly.(Jemsly Hutabarat & Martani Huseini, 2006, p. 179)

The provisions regarding the divestment of shares were initially contained in Law No. 4 of 2009 Article 112 paragraph (1) which says: *“Five (five) years into the production run, companies that possess IUP and IUPK whose ownership is controlled by foreign nationals must sell such shares to the government, local government, state owned enterprise, regional owned enterprise, or national private enterprise”*. The implementation of the provisions of Article 112 paragraph (1) regarding the Share divestment is further regulated in Government Rule Number 23 of 2010 about the execution of business activities related to the mining of minerals and coal. In this Government Regulation foreign capital holders of IUP and IUPK are required to divest their shares by 20% to be possessed by the Central Government, Provincial/district/municipal government, State Owned Enterprises and Regional Owned Enterprises after 5 (five) years of production.

Until now, No. 23 Government Regulation of 2010 has undergone four revisions, namely Government Regulation No. 24 of 2012, Government Regulation No. 77 of 2014, and Government Regulation No. 1 of 2017. Regulatory inconsistencies in divestment implementation have clearly created legal uncertainty for both the state, foreign investors and Potential International Investors. Even if examined from its history, Indonesia has lost many moments and opportunities for state revenue that should have been received from divestitures. (Tamam, 2019)

Sharia Maqashid in Minerba Law

According to Imam Al Juwaini, *maqashid sharia* means *Al-Maslahah Al-'Ammah* or public interest. According to Al-Thufi *maqashid sharia* is the main cause that leads to the goal of sharia in terms of worship. Imam Al-Ghazali divides the objectives of this Shari'a into 3, namely *Dharuriyat* (primary), *Hajiyyat* (secondary) and *Tahsiniyyat* (tertiary). (Maqashid Syariah 'Inda Syaikh Qardhawy, 2007) *Dharuriyat* is benefit related to basic human needs that must exist. *Hajiyyat* is the advantage required to enhance the preceding fundamental advantage in the form of alleviation to uphold and preserve fundamental human necessities. Meanwhile, *tahsiniyyat* is the level of need which, if not fulfilled, does not threaten existence and does not cause difficulties. (Rauf, 2014)

Referring to the above understanding, that a law is said to fulfill the elements of *maqashid* if the law accommodates the principle of benefit. Modification to Law Number 4 of 2009's Article 1 Point 6, which states “*A mining business encompasses all phases of general inquiry operations, exploration, feasibility studies, construction, mining, processing and purification, transportation and sales, and post-mining in the context of mineral or coal exploitation*”. The sound of this article was changed in law number 4 of 2020 to “*Within the framework of mineral or coal exploitation, mining business encompasses the following stages: general investigation activities, exploration, feasibility study, construction, mining, processing and purification or development and/or utilization, transportation and sales, and post-mining*. Additional sentences have been added to this article “*development and/or utilization*” is a form of the desire of legislators to include elements of benefit or benefit in the mining business being carried out.

The insertion of two digits between the numbers 20 and 21 is also an addition that requires more benefits in the process of managing mineral and coal mines, this addition reads “*Development and/or Utilization is an attempt to improve the coal's quality, whether or not the physical or properties of the original coal's composition*”. The benefit that stands out the

most is stated in Law Number 4 of 2020's Article 4, Paragraph 1: “*Minerals and coal as non-renewable natural resources are national assets controlled by the state for the greatest possible welfare of the people*”.(UU Nomor 3 Tahun 2020.Pdf, n.d.) The statement of this article is a form of safeguarding rather than basic needs in the form of natural resources owned by humans where defending community property rights in accordance with maqashid sharia is something that must be implemented in every legislation that has been or will be established by the government.(Fikri, 2021)

The purpose of changing this law is in line with what was conveyed by Ibn 'Asyur, who said that Maqashid Sharia is the meaning and rules observed by Legislators in all or most cases of legislation that are not only limited to certain sharia cases. The legislator's observations are related to the description of sharia, the purpose of sharia, and the meaning contained in a law.(Hisyam Syaid Azhar, 2010, p. 213) Imam Al-Ghazali said that what is meant by Maslahah' Ammah (general welfare) is a benefit that is felt as a whole by all parties and not only felt by some parties,(Hisyam Syaid Azhar, 2010, p. 213) so that in determining whether a law contains benefits or not, it can be seen from the two variables contained therein. The first variable is that the benefits resulting from the application of a law must be felt by all parties regardless of their status and position. The second variable is that all legal derivatives related to the law must be based on the benefit in it.

The sociological circumstances of society have a direct bearing on how sharia economic law is formed. Where sharia economic law highlights the requirement that to apply a society's or nation's economic conduct with views, analysis, and settlement in the Islamic way by applying the principles of justice through anti-usury, *maysir*, *gharar* and unjust behavior.(Hidayati et al., 2022, p. 270) Therefore, in the framework of enactment of law at this time, *maqashid sharia* is very important due to the consideration of the theory of benefit and harm contained in it.

This consideration implies a very significant relationship between sharia law and the human condition.(Muhyidin, 2019) According to Al-Buthi the concept of maslahtan in establishing a law is very important, this is partly because: *First, maslahat* (goodness) and *mafsadat* (badness) not only for worldly life but also for the afterlife. So that these two things are the goal of forming a law, where the law is a tool to achieve good and avoid evil. *Second*, the measure of *maslahat* (goodness) must respond to human physical and psychological needs. *Third*, *maslahat* (goodness) produced in the world must be based on *ukhrawi maslahat* (goodness).(Said Ramadhan Al Buthi, 1960, pp. 45–57)

The modifications to Law No. 4 of 2009 to Law No. 3 of 2020 also left criticism from several academics regarding the removal of several articles which were considered to be detrimental to the government and society. These articles include: *first*, the elimination of articles 7 and 8 which regulate the authority of provincial and Managing coal and mineral mining by district/city administrations. The deletion of this article undermines the principle of decentralization which is marked through the publication of Regional Government Law No. 22 of 1999 in which provincial and city/district governments utilize natural resource wealth in each region as a source of regional revenue.,(Yazid, 2021) where this enactment will return to law number 11 of 1967 which in fact is centralized.(Permana, 2010)

Second, the abolition under Article 45 of Law No. 4 of 2009, as stated: “ *Production fees apply to coal or minerals that have been excavated, as stated in Article 43.* ”. The abolition of this article means that the company is no longer obliged to pay royalties for each unit of coal or mineral. From the other side, the potential for government revenue or revenue from royalties on minerals or coal will be greatly reduced or even lost.(BEM Kema Unpad, n.d.)

Third, the abolition of Article 165, which deals with the criminal penalties for those who commit abuse of authority to issue licenses for mining, such as IUP, IUPR and IUPK which read: “ *Anyone who issues an IUP, IPR, or IUPK that contravenes this Law and abuses their authority is subject to criminal sanctions for two (two) years in prison and a fine of up to Rp 200,000,000.00 (two hundred million rupiahs) are the maximum penalties.* ”

Meanwhile, WALHI (Wahana Lingkungan Hidup Indonesia) said that there are 4 issues that are still problems that are considered to be detrimental to society: 1) people can not protest to the local government, 2) the risk of being policed if you refuse a mining company, 3) Even though mining has been shown to harm the environment, these corporations are nevertheless allowed to continue, and 4) Mining firms can earn as much money as they want and are even guaranteed no royalties.(“Menyoal 4 Masalah UU Minerba Yang Merugikan Masyarakat Luas,” 2021)

Apart from having to fulfill the principle of benefit/benefit, a statutory regulation established by the government must also fulfill the element of avoiding harm/loss that can be experienced by the community. No matter how small the potential for the emergence of harm in the establishment of a regulation, efforts must be made to eliminate it. The principle of avoiding harm has been exemplified by the Prophet Muhammad, when he sent Mu'az and Abu Musa to Yemen while telling the two of them “ *Make it easy in setting the law, don't*

make it difficult". (Hisyam Syaid Azhar, 2010, p. 217) Al-Buthi said that, Shari'a recognizes the presence of customary law that applies in the midst of society so long as there is no harm and does not waste the benefits it causes. (Said Ramadhan Al Buthi, 1960, p. 81) He continued that Islamic Shari'a recognizes several laws that existed during the time of ignorance such as giving a living, diyat for criminals, accounts payable, and so on, where the law that has been in force contains goodness in it and is in line with the purpose of the messenger being sent, namely as a carrier of mercy for all nature. (Said Ramadhan Al Buthi, 1960, p. 82)

The words of the apostle to his two envoys not to give difficulties to legal objects and to apply laws that existed during the time of ignorance, indicate that Islamic sharia actually aims to eliminate all forms of difficulties and harm that occur as a result of establishing a law. Based on the above findings and analysis, some of the harm that might arise from the Mineral and Coal Law's passage must be a serious concern for regulators so that they can minimize even the smallest possible harm that will be caused

Conclusion

Law No. 3 of 2020 which regulates Mineral and Coal Mining is an effort by the government to control and manage natural resources owned by Indonesia to be utilized as much as possible for the welfare of society as mandated by the 1945 Constitution. *Maqashid Syaria* in the determination of a law requires the existence of two basic principles, namely, producing goodness (*mashlahat*) and avoiding evil (*mafsadat*).

The existence of the goal of community welfare or in the language of Islamic law is called *Mashlahah 'Ammah* contained in this Minerba Law indicating that this legislation complies with the goals of Shari'a in the formation and determination of a law. However, this Minerba Law cannot be separated from criticism regarding the potential for harm arising from the stipulation of several articles which are considered controversial by several legal experts. Therefore, the principle of producing good and avoiding or minimizing bad is a basic principle in *Maqashid Syaria* which must be the concern of legislators so that the resulting statutory decisions are in line with sharia goals.

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