

# PROPORTIONALITY OF JOINT OPERATIONAL COOPERATION AGREEMENT FOR THIRD PARTIES AND IUP HOLDERS IN MINING LAW IN INDONESIA

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## ABSTRACT

*The proportionality measure of the exchange of rights and obligations in a joint operational Operational Cooperation is based on the values of equality (equitability), freedom, proportional distribution. Of course, it cannot be separated from the principles of accuracy (zorgvuldigheid), feasibility (redelijkheid; reasonableness), and appropriateness (bilijkheid; equity). The search for the meaning of proportionality is an uneasy process. It often overlaps in understanding the principle of balance. The focus of credit and proportionality direction cannot be separated from its existence in contract law. Proportionality is the embodiment of the doctrine of "contracted justice," which corrects the domination of the principle of freedom of contract, which creates injustice. Proportionality of Joint Operational Cooperation Agreements for Third Parties and IUP Holders In mining law in Indonesia, adhering to the principle of proportionality is not the principle of freedom of contract, which creates injustice especially third parties in the mining cooperation agreement. Therefore, joint operational makers can discard the attitude of showing that freedom of contract is the main principle in forming joint operations. Still, proportionality is the essential principle in building a cooperative operational Cooperation Agreement in the mining sector by making the principle of morality the basis for preparing an Operational Cooperation Agreement (joint operating). In realizing an excellent combined operation, proportional balance becomes an essential pillar in its formulation. Therefore, the importance of a balanced joint operational arrangement for the parties in the future and no longer making the principle of freedom of contract as an absolute that can be binding like law but can make the principle of proportionality the basis of morality formation of joint operations.*

**Keywords:** Proportionality, Joint Operational, Nickel Mining

## INTRODUCTION

The development of mining law in Indonesia can be seen from the Dutch colonial era until the current reform era. The Dutch colonial applied the Indische Mijnwet 1899 related to Indonesia's mining policies. Subsequently, this provision was amended with Indische 1910 and 1918; Mijndonatie 1906, which emphasized that the Central Government issued licensing arrangements for petroleum and mining of metal, coal, gemstones, etc. several other minerals. For mining materials deemed unnecessary, such as sand, pumice, and limestone, the Regional Government issued the permit, such as residents or officials who are given the authority to do so (Haryadi, n.d.). Indonesia is a country that is rich in natural resources, both renewable and non-renewable natural resources (Tuna & Tuna, 2019). One of the natural resources owned is minerals and coal, which are included in the group of non-renewable

natural resources which have an important role in meeting the living needs of people (Hajer et al., 2016).

As stated in Article 33 paragraph (3), it reads that the State must control Earth, water, and natural resources contained therein for the people's greatest prosperity. The 1945 Constitution of the Republic of Indonesia (from now on referred to as the 1945 Constitution of the Republic of Indonesia) (Wibowo, 2018). The article's provisions above contain the State's meaning of control as the highest authority in controlling all natural resources contained therein, including minerals and coal (Reumi & Sawen, 2018). Such power also includes a mandate to the State that the Earth and water and natural resources contained therein are used only for the people's maximum welfare. It can be further observed that Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia is seen as a simple formula. However, it has a comprehensive and profound meaning formulated for all Indonesian people's welfare. Hence regarding the rights of the State's control are carefully placed in CHAPTER XIV concerning Social Welfare, which is the fundamental law for the people's welfare and prosperity nationally. Thus, to realize these ideals, a person or legal entity can manage natural resources through a joint operational agreement (Borrini et al., 2007).

The problem that then arises in the joint operation is that the object in the form of production land managed by miners does not match what is contained in the UP. As a result, the miner experiences a loss (Spitz & Trudinger, 2019). Also, the fulfilment of royalties raises joint operations problems wherein the collective operational clause does not rigorously address conditions according to the law where rights and obligations are difficult to fulfil due to detrimental to IUP owners. The losses suffered by IUP owners and miners are more due to the parties' weaknesses in understanding the rights and obligations in the joint operation both for objects and for fulfilling achievements in the form of royalties (Park, 2013).

Another problem is related to joint operations. When examined in statutory regulations, there is a vacuum of norms (Rahman et al., 2021). In-Law Number 4 of 2009 concerning Mineral and Coal Mining and Law Number 3 of 2020 concerning Amendments to Law Number 4 of 2009 concerning Mineral and Coal Mining. The absence of norms referred to in mining regulations is that they are not regulated about a third party's interests, including the miners. As a result, there is no guarantee of legal certainty protection for miners in a joint operational agreement (Rahbiah, 2020). The legal vacuum's impact is not only experienced by third parties but also intrinsically by IUP holders (Alghamdi, 2013). This is well proven in Law Number 4 of 2009 concerning Mineral and Coal Mining and Law Number 3 of 2020 concerning Amendments to Law Number 4 of 2009 concerning Mineral and Coal Mining which do not regulate standardization and criteria for third parties can meet the formal and material requirements to become a third party in an operational joint with the IUP Owner. The purpose of establishing the criteria and standardization of third parties in the mining management cooperation agreement with IUP owners (Gupta, 2019). These problems will impact implementing the principle of proportionality in joint operations. The collaborative process for third parties and IUP holders in Indonesia's mining law?

## **LITERATURE REVIEW**

### **The Basis of the Theory of Justice and Legal Certainty**

As one of the law's objectives, Justice comes from the view that philosophically law is created and enforced to make sense of Justice for the community. Even in the ordinary people's understanding, Justice is often identified with the law itself (Selznick, 2020).

As one of the law's objectives, Justice comes from the view that philosophically law is created and enforced to make sense of Justice for the community. Even in the ordinary people's understanding, Justice is often identified with the law itself (Selznick, 2020). Furthermore, Agus Yudha Hernoko explained that legal thinkers, among others, John Locke, JJ Rousseau, Immanuel Kant, and John Rawls, realized that without contracts and the rights and obligations, they resulted, the business community would not run. People will not be willing to be bound by and dependent on other parties' statements. The contract guarantees that each individual will fulfill his promise, allowing for transactions between them (Hernoko & SH, 2019). According to Agus Yudha Hernoko, the most significant equal principles referred to by Rawls are none other than the "principle of equal rights," which provides equal rights and is inversely proportional to the burden of obligations that each person has (i.e. The contractors). This principle is the spirit of the principle of freedom of contracting. Furthermore, the different directions and the principles of (fair) equality of opportunity referred to by Rawls are the "objective difference principle," which ensures the realization of the proportionality of the exchange of rights and obligations (Hernoko, 2016). The parties so that it is reasonable (objectively) to accept the difference in exchange, provided that they meet the requirements of good faith and fairness (*redelijkheid en billijkheid*). The first principle and the second principle cannot be separated from one another because Justice will be realized only if the two directions are applied comprehensively (Hesselink, 2010).

Prioritizing legal certainty in applying the law is wrong because even if legal certainty is realized, it does not necessarily provide Justice. It is different if Justice is realized. Legal certainty will also be included (felt). Legal certainty cannot give an appraiser of a traditional relationship's behavior. Therefore, legal certainty only provides what exists, in this case, only what is written in the Articles of legislation made by the government, agreement/contract clauses, and court decisions that are considered correct. On the other hand, legal Justice can assess the nature of the legal relationship's behavior because Justice shows what exists and states what should be given, exploring, discovering, and expressing the meaning contained behind the Articles of regulation. The legislation made by the government, agreement/contract clauses, and court decisions. Considering Hualien Budiono and Houwing's legal thoughts as described above, it is clear that philosophically, there is an antinomy between legal certainty and Justice in the fabric of contract law values. Hence, it needs to be harmonized using a traditional philosophical approach that rests on the principle of harmony (Dewi & Saputra, 2020). The basic idea of harmonizing antinomies in contract law is based on the philosophy of law thought developed by Purnadi Purbacaraka and Soer Joint operational no Soekanto that physically humans are a harmonious organism. In contrast, spiritually, humans are animated by three principles: enjoyment, the focus of reality, and the direction of harmony. These principles produce specific desires, namely, in human life, the enjoyment principle and the reality principle are antinomies. The two principles are paired and tense, which must be harmonized by the principle of harmony. Thus, in the process of inner human life, the enjoyment principle and the reality principle make the human soul like a clock pendulum that moves left and right, but in a stable position, due to the influence of the principle of harmony. So, the focus of peace is a legal principle that can be developed and used to harmonize the antinomy between legal certainty and Justice in the fabric of contract law values. The concretization of the principle of harmony law is in the form of legal norms (Articles) in standard rules and contracts made by the parties based on a principle that Justice may be prioritized in certain situations and conditions, but legal certainty is not neglected. Then, legal certainty may take precedence under the circumstances sure others, but Justice is not ignored (Nijeweme-d'Hollosy et al., 2020).

The statement above is in line with Thomas Aquinas's thought, which divides two kinds of Justice: distributive Justice (*iustitia distributiva*) and commutative Justice (*Justitia*

commutative). The two types of Justice are variants of equality, but not equality itself. The principle of equality implies: "the same things must be treated equally, and those that are not the same must be treated differently." It seems that this principle is an incorrect translation of the teaching of *ius sum cuique tribuere* because this teaching has nothing to do with the problem of treatment. In this case, Justice's learning is related to the right of a person to deal with one another and in relations with society (Pieper, 2009).

### **The Concept of Proportionality in Law**

The business relationships between the parties are generally because they aim to exchange interests. Roscoe Pound defines "interest" or "interest" as "a demand or desire which human beings, either individually or through groups or associations in relations seek to satisfy" (interest as a demand or desire that humans want to satisfy, both individually. or groups or associations). Pound's basic framework is broader social interests and humans' desire to fulfill them, both personally, in interpersonal and group relationships. On that basis, Pound distinguishes between various parts that must be protected by law, namely personal interests, public interests, social or community interests (Pound, 2006). In business, the exchange of interests of the parties is always stated in the form of a contract, considering that "every business step is a legal step (i. C. contract)." This expression is the primary basis that must be considered by the parties who interact in the business world. Even though the parties are often unaware of it, every party who enters the business wilderness takes legal steps with all the consequences.

The search for the meaning of the principle of proportionality is a complicated process, and in fact, it often overlaps in understanding with the focus. The principle of balance and proportionality principle cannot be separated from its existence in contract law. However, no matter how simple the understanding is, it can still be drawn a red thread through a more comprehensive experience to distinguish the two. The proportionality principle needs to be put forward and the focus of balance in the contract. To distinguish the two, first of all, it can be traced from the linguistic meaning between the two terms, namely "equilibrium" and "proportionality." In some dictionaries, the two terms differ in essence, but some equate them. In the dictionary, the word "balance" means a state of balance (equal weight, equilibrium, proportional, equal); In physics, it is defined as a state that occurs when all the in forces and tendencies that exist in any object or system are exactly neutralized or opposed by forces or trends that are the same but have the opposite direction. Meanwhile, the word "proportionality" or "proportional" means proportional, proportional, balanced. The definition of the principle of proportionality is translated by begins proportionality. There must be a certain balance between the incidence of losses and the provision of compensation (defense) (Van den Boogaard, 2019). This principle mainly plays a role in forced defense (forced treatment of violence; noodweer) in Article 49 of the Criminal Code's criminal law, which states that urgent protection must cause forced violence.

### **Operational Cooperation Concept (Joint Operational)**

The notion of joint operations about taxation in Indonesia is contained in the Letter of the Director-General of Taxes No. S-123/PJ. 42/1989. It was emphasized in the letter that a joint operation is a form of a joint operation, namely an association of two or more agencies joining to complete a project (MIRANINGSIH, 2018). The merger is temporary until the project is completed. In several confirmation letters issued by the Directorate General of Taxes, the term joint operation is often confused with Consortium. The operational joint can be divided into two types, namely Administrative and Non-Administrative joint operations.

The form of a joint operational cooperation agreement is commercial cooperation based on a contractual (contractual non-equity partnership) and not based on capital (equity partnership) where the parties in collaboration can stand alone. Kristian F. Sinatra sees joint operations from a legal aspect to date. The regulation regarding collaborative operational business entities has not been regulated in Indonesia's laws and regulations. Therefore, many opinions perceive the form of a joint operational business entity as equated with the conditions of a business entity regulated in the Civil Code and the Commercial Code. There is a norm vacuum regarding joint working arrangements. No legal provisions govern the legal status of collaborative operational and legal relations with third parties (Costantino et al., 2019).

## METHODOLOGY

This study uses a typology of normative legal research, especially about the Proportionality of Joint Operational Cooperation Agreements for Third Parties and IUP Holders in Indonesia's mining law (Christiani, 2016). The study uses several approaches, namely the statutory process, the conceptual approach, the case approach, and the comparative approach (Pangaribuan & Zamhuri, 2018).

## RESULTS

### Proportionality in the Cooperation Agreement in the Nickel Mining Sector

The search for the meaning of proportionality is a complicated process. It often overlaps in understanding with the principle of balance. The focus of credit and proportionality direction cannot be separated from its existence in contract law. However, no matter how simple the understanding is, it can still be drawn a red thread through a more comprehensive experience to distinguish the two. The principle of proportionality is the embodiment of the doctrine of "contracted justice," which corrects the domination of the principle of freedom of contract, which creates injustice. Konrad Zweigert & Hein Kotz remind scholars to discard the attitude of showing that freedom of contract is the main principle informing contract law. The main task of scholars today is no longer to glorify freedom of contract but to look for criteria and procedures for the development of the doctrine of "contractual justice." The realization of contracted Justice is determined through two approaches (Zweigert & Kötz, 2011).

Contracts as a process in the chain of relations between the parties must be built based on an understanding of fairness based on recognizing the contractors' rights. Recognition of the existence of these contractors' rights is manifested in providing equal opportunities and opportunities in the exchange of interests (rights and obligations). However, recognizing rights, freedoms, and equality in the business of claims (rights and obligations) must still be within the game rules' framework that consider the principle of proportional distribution.

The measure of proportionality is based on equality (equitability), freedom, and proportional-distribution. Of course, it cannot be separated from the principles of accuracy (*zorgvuldigheid*), worthiness (*redelijkheid*; reasonableness), and appropriateness (*bilijkheid*; equity) (Hernoko, 2010). To find the principle of proportionality in a contract using the criteria or measure of values mentioned above, it should not be interpreted that the findings will be obtained in the form of mathematical numbers. The proportionality principle does not question the balance (equality) of the results mathematically. Instead, it emphasizes the proportion of the distribution of rights and obligations among the parties that occur legally and properly (fair and reasonableness). The joint operational description of a contract fulfills the parties' principle of proportionality. The joint operational agreement is a symbiosis of

mutualism. The parties working together complement each other's shortcomings and own assets but do not have sufficient working capital/capital to develop these assets. Of course, they cannot make these assets a source of financial income for their owners. On the other hand, some parties have sufficiently large capital/capital but do not have a business area that can be developed. This situation is then considered a mutually beneficial union (Sawitri, n.d.).

To be able to achieve balance and equality in the implementation of a joint operational contract, especially in nickel mining, things that can be done are preventive or preventive, one of which is by regulating these provisions in the cooperation agreement, which is the starting point for all mining cooperation activities Nickel. Suppose these matters are not notified and agreed upon in advance in the agreement, then in the future. In that case, when the project and operational activities have begun to be implemented, it will be prone to conflict. This is because the parties' rights and obligations are not regulated and previously confirmed in detail in the agreement. From the description above, it can be seen at a glance that a combined business entity has its characteristics, namely, among other things, that its rights and obligations are equal to the rights and obligations imposed on a business entity in the form of a limited liability company, the business activities of providing nickel mining land are carried out without the need for transfer of rights first. ownership of assets, their establishment does not require approval/approval from the Department/Ministry of Law and Human Rights and other factors that are also crucial, namely that the age of a joint venture is as agreed by the parties in the joint operation or while the project is still ongoing, and for termination./dissolution of a joint venture business entity does not need to carry out the stages of termination/dissolution as required by a business entity in the form of a legal entity.

In-Law No. 3 of 2020 concerning Amendments to Law No. 4 of 2009 concerning Minerva, the contract regime has been renewed with the permit regime (Syafrida & Hartati, 2020). In the era of regional autonomy, as regulated in Law Number 23 of 2014 concerning Regional Government, it states that government affairs regarding energy and mineral resource management are concurrent governmental (optional) affairs whose authority is held by the central and regional governments. Local governments are given the power to take care of their government affairs to advance their economy. The issuance of mining business permits (IUP) is a form of government control and mining management and exploitation supervision. As the highest entity, the State grants licenses to business entities, cooperatives, and individuals to play a role in exploiting and managing mineral and coal mining through the issuance of IUPs issued by the central and regional governments. Theoretically, there is a conflict of regulatory norms between Law No. 23/2014 on Regional Government and Law No. 4 of 2009 concerning Minerva, where mining management according to Law Number 23 of 2014 concerning Regional Government is submitted to the regions to regulate it including related to IUP.

In the perspective of regional autonomy, the return of management and issuance of IUP to the central government is contrary to the principle of provincial freedom, where regions can manage their natural resources independently (Hariri & Irawan, 2020). For that reason, Law No. 4 of 2009 concerning Minerva contradicts the principle of regional autonomy and legally. Law no. 4 of 2009 concerning Minerva is not in line with reform objectives in managing natural and mineral resources.

In another aspect of the study, if the problem of conflict of regulatory norms is resolved through the principle of legal prevention, namely the focus of *lex specialis derogat legi generali*, that special laws override general laws, then Law No. 4 of 2009 concerning Minerva which can be applied legally. This state of legal uncertainty creates problems at the level of legal principles and principles that can cause the investment climate in the mining sector to decline so that the philosophical objectives of Article 33 of the 1945 Constitution

and the goals of mining management with legal certainty cannot be achieved and this is a form of standard failure in the mining sector.

The need for harmonization between Law Number 23 of 2014 concerning Regional Government and Law No. 4 of 2009 concerning Minerva needs to be done to ensure a legal and investment climate conducive to the mining sector. The philosophical basis of Article 33 of the 1945 Constitution can be achieved following the constitutional objectives, namely the achievement of welfare and social justice for all Indonesian people in mining management.

According to the author, to build harmonization in resolving legal norms regarding mining management authority, a solution is needed as a legal finding on these problems. Both Law No. 23 of 2014 on Regional Government and Law No. 4 of 2009 concerning Minerva both have standard strength at the primary level that underlies the law's enactment. To solve it, a legal philosophy approach is the best solution. Philosophically, the provisions of Article 33 of the 1945 Constitution state that "The land, water, and natural resources contained therein and which control the lives of many people, are governed by the State. The State's phrase refers to an institutional hierarchy in which the Central Government has the highest authority through the Ministry of Energy and Mineral Resources. At the same time, the local government is part of the government.

According to the author regarding the phrase controlled by the State also implies that what applies to mining management authority rights is Law No. 4 of 2009 concerning Minerva, not Law Number 23 of 2014 concerning Regional Government as stated in the provisions of Article 35 paragraph (1) of Law No. 4 of 2009 concerning Minerva, that the mining business is carried out based on a business license from the central government.

In empirical practice, the joint operation that the parties make is solely based on two main principles in private law, namely the principle of contra freedom and the *Sunservanda fact* principle, as a result of which there is a loss to one of the parties, especially the third party in the joint operation, this happens because there is no legal certainty for communal operational statutory level (Kolb, 2017).

The principle of proportionality in the agreement should be essential in the preparation of joint operations in the mining sector. Joint operational based on the principle of proportionality will result in an exemplary implementation of the agreement and prevent defaults that can harm third parties, as has been the case in empirical practice. According to Yudha, the principle of proportionality must work in every stage of contract formation, which, according to the author, is also essential to be included in joint operations in the mining sector because the principle of proportionality has the task of creating good rules for the exchange of rights and obligations through the application of equality values (equitability), freedom, proportional-distribution, which cannot be separated from the principles of accuracy (*zorgvuldigheid*), worthiness (*redelijkheid*; reasonableness), and appropriateness (*bilijkheid*; equity) must be carried out in a check and balance system (Asao et al. 2005).

### **Proportionality in the Ideal Cooperation Agreement and Legal Certainty**

In the business of exchanging the parties' interests, it is always stated in the form of a written agreement considering that every business step is a legal step. The search for the meaning of balance is a process that is not easy, even though there is often overlap in understanding with the principle of balance. In essence, the balance principle cannot be separated from its existence in the Joint operational agreement.

A joint operational agreement based on general civil law. The binding law particularly so that the rights, obligations, ownership, asset ownership patterns, income sharing patterns. In the ideal contract conception, the legal relationship in the Joint Operational Agreement itself has binding power if it has been made by fulfilling the agreement's standard terms as

stated in Article 1320 of the Civil Code (Amalia, 2018). Contract execution in the mining sector, related to applying the principle of legal certainty, has been practiced by the parties in joint operational contracts, especially in nickel mining. Implementing an operating Joint Agreement on nickel mining can cause conflict between the parties involved in an operational Joint Agreement because it is not impossible if this can also impact the emergence of disputes with other parties related to the Joint Operational Agency. After all, making and signing an operational Joint Agreement means that various activities that involve other parties have been carried out.

Thus, implementing the Principle of Legal Certainty's primary function and the task is to guarantee each party's position involved in the Nickel Mining Joint Operational Agreement and other parties involved in implementing mining activities either directly or indirectly. Thus, there is a clear boundary between each party's rights and obligations, and it is hoped that there will be no intervention between the rights and obligations of one party with the rights and obligations of the other.

Optimizing nickel use needs to be renewed, especially about the contract being applied. The occurrence of a legal vacuum in Law Number 4 of 2009 concerning Mineral and Coal Mining and Law Number 3 of 2020 concerning Amendments to Law Number 4 of 2009 concerning Mineral and Coal Mining do not regulate standardization and third party criteria that can meet formal and material requirements to become a third party in an operational joint with the IUP Owner (RI 2020). In practice, the joint operation has been implemented by the parties. Joint operational in the conception of legal certainty is based on proportionality so that third parties and IUP holders, especially in nickel mining, are ideal and fair for the parties.

In matters that become his obligations as specified in the Joint operating agreement. The parties' position in the joint operational contract is freer to determine profits distribution. It is not too regulated by provisions other than those in the contract in general from existing agreement principles (Hussain & Pasha, 2011). Based on the discussion of the third legal issue, it can be concluded that the Proportionality of the Joint Operational Agreement for Third Parties and IUP Holders in Mining Law in Indonesia that the principle of proportionality is the embodiment of the doctrine of "contractual justice," which corrects the dominance of the principle of freedom of contract which in several cases it creates injustice for the parties, especially third parties in the mining cooperation agreement. Therefore, the joint operative makers can discard the attitude of showing that freedom of contract is the main principle informing contract law.

The main task of joint operational makers is no longer to glorify the freedom of contract but to seek criteria and procedures for developing the doctrine of "contractual justice" (Liu et al., 2012). The realization of contracted Justice is determined through two approaches. First, the procedural course focuses on freedom of will in a contract. The second approach, namely the substantive approach, emphasizes the contract's content or substance and execution (Katz, 2004). In the principle of freedom of contract as the basis for the formulation of a cooperation agreement in the mining sector, it is limited by three things: first, limited by law, secondly limited by the habits that develop in society, and the third is limited by both subjective and objective ethics (De Sadeleer, 2020). Thus, joint operations made for third parties and IUP holders in mining law as a process in the chain of relations between the parties must be built based on an understanding of Justice based on recognition. The contractor's rights in joint operational recognition of the existence of these contractors' rights are manifested in providing equal opportunities and opportunities in the exchange of interests (rights and obligations). However, recognition of rights, freedoms, and equality in the exchange of interests (rights and obligations) must still be within the framework of morality, which considers proportional distribution.

## CONCLUSION

This research concludes that the proportionality measure of the exchange of rights and obligations in joint operational cooperation is based on equality (equitability), freedom, proportional distribution. Of course, it cannot be separated from the principle of accuracy (zorgvuldigheid), feasibility (redelijkheid; reasonableness). And appropriateness (bilijkheid). The search for the meaning of proportionality is an uneasy process. It often overlaps in understanding the principle of balance. The focus of credit and proportionality direction cannot be separated from its existence in contract law. Proportionality of Joint Operational Cooperation Agreements for Third Parties and IUP Holders in Mining Law in Indonesia adhere to the principle of proportionality, not the focus of freedom of contract, which creates injustice for the parties, especially third parties in the mining cooperation agreement. Therefore, joint operational makers can discard the attitude of showing that freedom of contract is the main principle in the formation of joint operations. Still, proportionality is the most essential in building a cooperative operational Cooperation Agreement in the mining sector by making the principle of morality the basis for the preparation of the Operational Cooperation Agreement joint operational).

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