

Criminal Sanctions Reformulation in the Reclamation of the Mining Community

by Derita Prapti Rahayu



Submission date: 26-Sep-2022 04:17PM (UTC+0700)

Submission ID: 1909286800

File name: Jurnal_CF_FIAT_Justisia.pdf (661.48K)

Word count: 7884

Character count: 46414



Criminal Sanctions' Reformulation in the Reclamation of the Mining Community

Faisal¹, Derita Prapti Rahayu², Yokotani³

¹Universitas Bangka Belitung, Indonesia
E-mail: progresif_1shp@yahoo.com

²Universitas Bangka Belitung, Indonesia
E-mail: itha82017@gmail.com

³Universitas Bangka Belitung, Indonesia
E-mail: yokotaninayo@gmail.com

Submitted: January 27, 2021; Reviewed: January 14, 2022; Accepted: January 19, 2022

Article Info

Keywords:

Criminalization; Criminal Sanctions; People's Mining; Reclamation; Reformulation.

DOI:

10.25041/fiatjustisia.v16n01.2222

Abstract

The norm of sanctions in Mining Law 2020 through irrational legislative policies can trigger criminal disparities and become a criminogenic factor. Reformulation efforts are needed in formulating sanctions regarding reclamation. This research aims to realign the purpose of criminalizing the post-mining reclamation obligation in the community mining category. The discussion is focused on the provisions reformulation for the community mining category's reclamation obligation. The problem will be researched using normative legal research methods. According to this research, the reclamation obligation sanction is an omission offense. The reclamation omission offense is both a passive law and a formal offense. Reformulation is based on the basic idea of balancing the double-track system of criminal sanctions. Criminal sanctions become the last instrument if the sanctions are ignored. Action sanctions prioritize restoring post-mining environmental conditions. The criminal sanctions threat and fines in the community mining category must be lighter.

PENGESAHAN

Nomor. 25/UN50/J.1/LL/2022

Telah diperiksa kebenarannya dan sesuai dengan aslinya

28 September 2022

Balunjuk

Wakil Dekan

Bidang Akademik dan Kemahasiswaan,

Fakultas Hukum

Yokotani, S.H., M.H

NIPPRK. 196211102021212001

A. Introduction

In various countries, the mining problem is constantly faced with two interests, namely the aspects of welfare and the environment. Exploiting natural resources will bring economic value to state and regional revenues. National development in various sectors, including political, economic, social, cultural, defense, and security, is required to create a prosperous

society based on the Pancasila and 1945 Constitutions.¹ Furthermore, mining activities always cause damage to the post-mining environment and affect sustainable land development.²

The government only minimises the post-mining impact through various legal arrangements. The basic framework of mining regulations covers the main aspects of mining activities. These include 1) government authority over the sector, 2) restrictions on specific activities, 3) exploration and mining rights, and 4) environmental requirements.³ The constitution often declared as the 1945 constitution, mandates the government, business people, and elements of society to protect and manage the environment. As a basic norm, through Article 28H paragraph (1), the state is obligated to fulfil everyone's right to a guarantee of a good and healthy environmental life. Furthermore, Article 33, paragraph (4) requires that the national economy be regulated based on justice principles, sustainability, and environmental insight.⁴

The state requires all mining business permit holders, including community mining, to conduct post-mining reclamation and provide a reclamation guarantee fund to prevent environmental damage. The reclamation's purpose is to organize, restore, and improve the environment and ecosystem's quality to function again according to its purpose. This is stated in the Mining Law.

Small-scale miners frequently apply mining techniques to daily tasks with limited tools. The possibility of hyper-regulated natural resource regulations creates a legal situation that leads to multiple interpretations and problems with welfare and the environment.⁵ Moreover, the mining method that follows the regulations when the activity takes place is not attended by officers, including the Municipal Police Unit, the Police, and the mining service in the region. Community miners maintain their solidarity by not disturbing each other's territories.⁶ The Indonesian Centre for Environmental

¹ Fifik Wiryani and Mokhammad Najih, "The Criticism of Land Procurement Law to Improve Landowners Welfare in Indonesia," *Sriwijaya Law Review* 5, no. 2 (2021): 175–91, <https://doi.org/10.28946/slrev.Vol5.Iss2.1073.pp175-191>.

² Gensheng Li et al., "A New Approach To Increase Land Reclamation Rate In Coal Mining Subsidence Area: A Case Study Of Guqiao Coal Mine, China," *Land Degradation And Development* 1 (2022): 1, <https://doi.org/10.1002/ldr.4184>.

³ Irmeli Mustalahti et al., "Responsibilization in Natural Resources Governance: A Romantic Doxa?," *Forest Policy and Economics* 111 (2020): 1–12, <https://doi.org/10.1016/j.forpol.2019.102033>.

⁴ La Ode Angga, "Legal Responsibility in the Pollution and Environmental Destruction Due to Gold Mining Exploitation in Botak Mountain of Buru Regency," *Fiat Justisia* 13, no. 4 (2019): 382, <https://doi.org/10.25041/fiatjustisia.v13no3.1695>.

⁵ Muhamad Azhar, "Omnibus Law Sebagai Solusi Hiperregulasi Menuju Sinkronisasi Peraturan Per-Undang-Undangan Di Indonesia," *Administrative Law and Governance* 2, no. 1 (2019): 70–78, <https://doi.org/10.14710/alj.v2i1.170-178>.

⁶ Faisal, Ndaru Satrio, and Komang Jaka Ferdian, "Evaluasi Perbaikan Kebijakan Penegakan Hukum Pertambangan Perspektif Genealogi Hukum Dan Kuasa Di Kabupaten Bangka

Law's post-mining reclamation law study is interesting to observe. The urgency in improving Indonesia's mineral and coal mining governance is about mining license or *Izin Usaha Pertambangan* (IUP) and special mining business license or *Izin Usaha Pertambang Khusus* (IUPK) holders obeying reclamation activities due to community mining and reclamation problems. Policies for the natural resource management of mineral and coal mining cannot be resolved solely through a formal regulatory approach involving licensing, authority, supervision, and sanctions.⁷ The company has abandoned many mine pits, causing natural disasters such as floods and claiming significant casualties. The Mining Advocacy Network or *Jaringan Advokasi Tambang* (JATAM) found at least 3,033 ex-mining holes (coal, gold, sand, and tin), including 1,754 holes in East Kalimantan, 814 holes in South Kalimantan, and 163 holes in South Sumatra.⁸

This phenomenon was also discovered by Derita Prapti Rahayu while researching community mining (unconventional mining) in Bangka Belitung. Although community mining is legal under Regional Regulation Number 3 of 2004 on General Mining Business Management, this regulation allows the community to manage and exploit freely. In general, these unconventional mines do not have a permit. The regional regulation was not implemented as planned. Even though the community's income has increased from the mining sector, the environmental conditions have suffered damage. Unconventional tin mining waste has impacted several forest areas, water sources, and residential areas. Due to a lack of reclamation, the ex-mining holes have become barren, resulting in craters and gaping holes.⁹

According to Ade Lutfi Prayogo Research, the responsibility for community mine reclamation is to fulfil the obligation of post-mining land reclamation. This responsibility begins with the preparation, assessment, and approval of the reclamation plan as a reference frame for implementing reclamation with the regional government as regulated in Article 44 Government Regulation Number 7 of 2010 concerning Reclamation and Post-Mining. There is a legal vacuum related to the technicalities and procedures for implementing reclamation if there is no reclamation

Selatan,” *Jurnal Magister Hukum Udayana* 9, no. 3 (2020): 487, <https://doi.org/10.24843/JMHU.2020.v09.i03.p02>.

⁷ Hendry Julian Noor, Kardiansyah Afkar, and Henning Glaser, “Application of Sanctions Against State Administrative Officials Failing to Implement Administrative Court Decisions,” *Bestuur* 9, no. 1 (2021): 53–67, <https://doi.org/10.20961/bestuur.v9i1.49686>.

⁸ Grita Anindarini et al., “Beberapa Kritik Hukum Terhadap Perubahan UU No. 4 Tahun 2009 Tentang Mineral Dan Batubara” (Jakarta, 2020), p. 28, https://icel.or.id/storage/seri_analisis/1646670165.pdf.

⁹ Derita Prapti Rahayu, “Budaya Hukum Penambang Timah Inkonvensional (TI) Terhadap Mekanisme Perizinan Berdasar Perda Pengelolaan Pertambangan Umum Di Propinsi Kepulauan Bangka Belitung,” *Masalah-Masalah Hukum* 41, no. 4 (2012): 494, <https://doi.org/10.14710/mmh.41.4.2012.493-504>.

guarantee fund. So that it triggers people's mining business actors not to complete their reclamation responsibilities, sanctions that can be applied in this government regulation are paying fines for those who do not carry out the reclamation as planned. The imposition of sanctions for fines payment does not eliminate the obligation of community mining entrepreneurs to carry out reclamation with local governments to restore post-mining environmental damage.¹⁰

The opportunity for the community to utilize natural resources in the area where they live is wide open when the local government can make regional regulations regarding mining. Since the 2009 Mining Law enactment, the local government has granted mining permits to the people. Currently, this authority has been revoked by the 2020 Mining Law.

East Belitung Regency is the only Regency in the Bangka Belitung Islands Province with regional enthusiasm for community mining regulations. Since 2011, Regent Regulation Number 23 of 2011 has issued the People's Mining Permit mechanism. This means there has been a determination of the people's mining area or *Wilayah Pertambangan Rakyat* (WPR) as the basis for granting the People's Mining Permit or *Izin Pertambangan Rakyat* (IPR).¹¹

Granting mining permits under the authority of local government is also followed by the implementation of post-mining reclamation. Article 76 of Regional Regulation Number 17 of 2010 states, "Every IUP holder is obliged to submit a reclamation plan and a post-mining plan when applying for a Production Operation IUP." Mining business license holders must carry out reclamation to restore post-mining land. Land revitalization is a consequence of miners' reclamation efforts, including closing holes caused by mining activities.¹²

The fundamental issue is that the obligation of post-mining reclamation has been a problem to date. Mining practices contribute to deforestation caused by the absence of revegetation in the former mining excavation area. Several reasons for implementing reclamation include minimal compliance

¹⁰ Ade Lutfi Prayogo, "Tanggung Jawab Pelaku Usaha Pertambangan Rakyat Dalam Reklamasi Gumuk Setelah Kegiatan Tambang," *Lentera Hukum* 5, no. 3 (2018): 435, <https://doi.org/10.19184/ejlh.v5i3.8201>.

¹¹ Derita Prapti Rahayu, Faisal, and Jamilah Cholillah, "Rekonstruksi Partisipasi Masyarakat Dalam Perizinan Pertambangan Rakyat Berbasis Nilai Kearifan Lokal (Studi Kasus Izin Pertambangan Rakyat Di Kabupaten Belitung Timur)," in *Prosiding Seminar Hukum Dan Publikasi Nasional (Serumpun) 1* (Pangkal Pinang: Univeristas Bangka Belitung, 2019), 447, <https://prosiding.fh.ubb.ac.id/index.php/prosiding-serumpun/article/view/49/42>.

¹² Lutfi Zaini Khakim, "Model Revitalisasi Lahan Dampak Pertambangan Pasir Besi (Perspektif Implementasi Perda Kabupaten Cilacap Nomor 17 Tahun 2010)," *Pandecta: Jurnal Penelitian Ilmu Hukum* 9, no. 1 (2014): 117, <https://doi.org/10.15294/pandecta.v9i1.2854>.

with the obligation to place the reclamation guarantee fund, no reclamation planning, and technical reasons for not carrying out reclamation activities.¹³

Sanctions imposed on mining business actors who fail to perform reclamation are repressive actions taken in the sense of criminal law policies to ensure that mining technical principles are appropriately implemented. However, the only sanctions imposed under the 2009 Mining Law are administrative sanctions and fines for IUP and IUPK holders who do not reclamation and provide guarantee funds. Meanwhile, additional provisions for imprisonment and additional criminal payments of funds in implementing the Reclamation obligation are included in the 2020 Mining Law. It should be noted that additional criminal and criminal sanctions are only imposed on special mining business license (IUPK) and mining license (IUP) holders, not people mining permits. Only administrative sanctions are imposed for all mining permit holders, including mining permits.

Nevertheless, administrative sanctions do not eliminate the obligation of post-mining reclamation. Even reaffirmed in Article 50 Government Regulation Number 78 of 2010 concerning reclamation and post-mining, it only regulates administrative sanctions on holders of IUP, IUPK, and people mining permits (IPR). Hierarchically, a Ministerial Regulation on the procedures for imposing administrative sanctions on IUP, IUPK, and people mining permit (IPR) holders are regulated by district/city regional regulations.

The regional government's authority has been revoked under the provisions of the 2020 Mining law, both the granting of community mining permits and supervising and enforcing sanctions for not carrying out reclamation. The central government is currently assuming all these powers through the relevant ministries.

Many people mine conventionally, whether it has a permit. So far, the local government has been the spearhead as the regulator and the party that takes action against people's mining if a reclamation is not carried out. However, the local government is responsible for reclamation in the community mining category in several areas, including Bangka Belitung. Normatively, community mining actors are still obliged by the local government to reclamation. Administrative sanctions formulation is the leading choice imposed on community mines if they violate the reclamation obligations. There are no provisions for criminal sanctions against community mining permit holders. Meanwhile, in the statutory mining regulation, implementing the technical principles for community mining permits is the minister's responsibility, including environmental management, reclamation, and post-mining.

¹³ Muhammad Muhdar, "Aspek Hukum Reklamasi Pertambangan Batu Bara Pada Kawasan Hutan Di Kalimantan Timur," *Mimbar Hukum* 27, no. 3 (2015): 474, <https://doi.org/10.22146/jmh.15883>.

Based on the explanation above, two problem formulations are proposed: (1) how does the construction of criminal law understand post-mining reclamation? (2) how is the criminal sanctions' reformulation against the mining community violate the reclamation's obligation?

The problems in this research will be examined using normative legal research methods by focusing on the study of legal norms of post-mining reclamation provisions regulated in Law Number 3 of 2020 concerning Amendments to Law Number 4 of 2009 concerning Mineral and Coal Mining. The research aims to see the shift in norms in the 2020 Mining Law. Specifically, the obligation is to conduct post-mining reclamation in the community mining category. Therefore, the benefits will be transparent based on reclamation provisions that need reformulated in future policy formulations.

B. Discussion

1. Post Mining Reclamation in Criminal Law Construction

Several criminal law experts such as van Hamel, van Bemmelen, van Hattum, Pompe, Mezger, Lemaire, and Simons have contributed significantly to criminal law development. Their thoughts were pursued by several Indonesian criminal law experts such as Moeljatno, Sudarto, Roeslan Saleh, Satochid Kartanegara, Sahetapy, Romli Atmasasmita, Andi Hamzah, Muladi, and Barda Nawawi Arief. Several thought variations were inseparable from European criminal scientist thought's influence. Simultaneously, North American legal academia has proudly transcended the horizon of mere doctrine and embraced a variety of interdisciplinary approaches, the civil law tradition.¹⁴ Nevertheless, the development does not release the wisdom construction of Indonesian criminal law's value.

It must be admitted that Moeljatno's definition of criminal law frequently appears in the literature written by Indonesian criminal law experts. Sudarto said that criminal law is a law that fulfils certain conditions and a consequence in the form of a crime. Penalization in criminal law includes acts against the law (*actus reus*), criminal liability (*mensrea*), and sanctions such as punishment or treatment. These actions are ordered, and the implementation of crimes whose enforcement can be imposed by the state.¹⁵ Sudarto said that criminal law is a law that fulfils certain conditions and a

¹⁴ Alexander Somek, "Two Worlds Of Legal Scholarship and the Philosophy of Law," in *Common Law – Civil Law: The Great Divide?*, ed. Nicoletta Bersier, Christoph Bezemek, and Frederick Schauer, 1st ed. (Cham: Springer, 2022), 141–53, <https://doi.org/10.1007/978-3-030-87718-7>.

¹⁵ Sumarwoto, Mahmutarrom, and Ifrani, "Deradicalisation to Combat Terrorism: Indonesia and Thailand Cases," *Sriwijaya Law Review* 4, no. 2 (2020): 249–60, <https://doi.org/10.28946/slrev.Vol4.Iss2.232.pp%25p>.

consequence in the form of a crime. According to Barda Nawawi Arief, administrative criminal law is criminal law in administrative violations.¹⁶

Sudarto also stated that legal science is a normative social science (*normative maatschappij wetenschap*). This science means important aspects of behavior (society) and regulations (normative) are inseparable in studying Legal studies. Behaviour refers to all of society's actions, whereas normative implies what should be and what is expected. Sudarto provided an initial description of the essential elements of criminal law definition, which Barda Nawawi Arief redefined. In essence, criminal law science is a "normative social science." There is a balance between normative and social aspects of understanding criminal law. There are three essential pillars in criminal law: crime-oriented to action, criminal responsibility focused on mistakes, and punishment focused on criminal sanctions. The three pillars are the constructs of the criminal law system.¹⁷

The law is defined in the criminal law regulations as an offense. Several types of criminal laws outside the Criminal Code, according to the legislators, are known as commission delict (*commisie delicten*) and omission delict (*omissie delicten*). A commission offense is an offense that requires an active law. Omission offenses usually include formal offenses requiring certain acts to be carried out according to law. Simultaneously, the law's result is evident. An omission offense is an offense committed by passive action or allowing someone commits something by doing nothing.

The criminal provisions in Article 161B paragraph 1 of the 2020 Mining Law constitute a criminal offense for the omission. Everyone who fails to carry out or implement reclamation and submit a reclamation guarantee fund is punishable by a maximum imprisonment of five years and a fine of one hundred billion rupiahs.

The method of formulating criminal offenses in reclamation policies in which legislators prefer to specify the elements of the offense formulation and do not provide the legal qualifications of the offense. It can be seen that the elements of the offense formulation are every person holding IUP and IUPK, whether their license is revoked or expired, does not carry out reclamation, and placing a reclamation guarantee fund. The essence of the offense is that the IUP and IUPK holders do not carry out their obligations. An objective element formulated in Article 161B paragraph 1 is passive action or obligations neglect. If the essence of the offense can be proven, then the other elements only follow.

However, the reclamation omission offense is related to licensing administration. Only IUP and IUPK permits can be prosecuted if they do not

¹⁶ Dende Ratna Sari Marinah, Amiruddin, and Moh. Risnain, "Formulation of Administrative Criminal Sanctions in Law Number 11 of 2020 Concerning Creation of Work: Analysis of the Environment," *International Journal of Social Science Research and Review* 5, no. 1 (2022): 68-78.

¹⁷ Faisal, *Politik Hukum Pidana* (Tangerang: Rangkang Education, 2020), p. 2.

comply with Article 161B paragraph 1. The question is whether community mining permit holders or miners who do not have permits are required to carry out reclamation. Is there any consequence for criminal sanctions if it does not carry out reclamation? When viewed within the scope of the 2020 Mining law, it can be ascertained that there are no criminal provisions for violators who do not carry out reclamation of people mining permit holders, especially those who mine without permits. The Mining Law 2020 only covers reclamation violators of IUP and IUPK holders.

The minister is responsible for the reclamation of people mining permit holders (Article 73 paragraph 2 letter b). In the previous regulation, this responsibility was held by the head of the regency/city. In contrast to unlicensed miners, those who do not have a legal basis for permits and reclamation plans are unlikely to encounter reclamation obligations. Miners without a permit are subject to Article 158 regarding criminal offenses related to mining without a permit or *Pertambangan Tanpa Izin* (PETI), with a maximum imprisonment of five years and a maximum fine of one hundred billion. PETI cannot be subject to Article 161B paragraph 1 concerning the reclamation omission offense because they lack IUP, IUPK, and even people mining permits.

Compliance with laws concerns the construction of the criminal prosecution of the reclamation omission. The criminal reclamation law is formulated as a formal offense by threatening the offender who commits a passive law or does not carry out reclamation obligation and establishing a reclamation guarantee fund. This means that formal offenses focus on their actions as law formulation.

If further investigating the elements of the reclamation omission offense, criminal law construction can be described by measuring it from the criminal law elements conveyed by Moeljatno and explained by Eddy. O.S. Hieariej. There are several vital elements of criminal law; First, actions consist of behaviour and consequences. Second, the things that accompany the actions. Third, additional conditions are burdensome to the criminal. Fourth, objective and subjective elements of opposing the law.¹⁸

If further elaborated, the elements of the criminal omission offense of reclamation include the behaviour of not carrying out the reclamation obligation. This action is independent and depends on the damage to the post-mining environment. The action orientation in question is a passive law that disregards the reclamation obligation at the mining area location as specified in the ministry's mining permit.

The matter that accompanies the reclamation omission offense is that the permit holder's compliance did not include preparing a reclamation plan and provided a reclamation guarantee fund. This action is not in compliance with

¹⁸ Eddy O. S. Hieariej, *Prinsip-Prinsip Hukum Pidana* (Jakarta: Cahaya Atma, 2015), p. 125.

mining engineering principles. Even this argument can be used for additional burdensome circumstances for the crime.

The reclamation offense is a formal offense that emphasizes the objective elements of the law's formulation. The opposing objective law element is evident from the non-compliance of the reclamation obligations for IUP and IUPK mining permit holders. Meanwhile, the subjective element is more specific to the permit holder actor's inner attitude.

Article 96 letter b of the Mining Law specifies the formulation in other provisions that govern reclamation obligations (in applying mining technique rules). In this Article, both IUP and IUPK holders are obliged to carry out reclamation), as in Article 99 paragraph 1 (IUP or IUPK holders are obliged to compile and submit reclamation plans) and Article 100 (IUP or IUPK holders are required to provide a reclamation guarantee fund). Thus the existence of reclamation omission offense cannot be separated from these several articles, which emphasize the obligation of actions toward post-mining reclamation. Meanwhile, the reclamation obligation for people mining permit holders is the minister's responsibility by not including criminal provisions for not carrying out reclamation.

The new reclamation criminal provisions were adopted in the 2020 Mining Law, whereas the previous regulation only included administrative sanctions for reclamation violators. Besides criminal sanctions, Article 161B paragraph 2 stated that additional penalties might be subject to payment of funds in implementing the Reclamation obligation.

The criminal law construction recognizes that reclamation is the permit holder's obligation to comply with the implementation of good mining engineering principles. The essence of the offense is a passive law which includes not carrying out a statutory order. This passive law is carried out for those who have mining permits. The problem is that the mining permit holder is limited to IUP and IUPK holders but not up to the people mining permit. The sources of licensing are both from central government authorities. Based on the 2020 Mining Law, the central government takes all the authority to grant mining permits. Then the design of the reclamation obligation is only borne by the IUP and IUPK holders. At the same time, people's mining permit is not obliged to reclamation because it is the minister's responsibility. So, what if the relevant ministry deliberately or neglects not to carry out the reclamation. In this case, it cannot be subject to criminal sanctions but only administrative sanctions.

At the beginning of this paper, criminal law is action-oriented. As the legislators mean, the criminal law of reclamation is a law in the type of omission crime (omission offense). The formulation that treats violators of community mining category reclamation (IPR) as the reclamation is the minister's terrible responsibility. In the community mining category, the potential for non-reclamation is enormous, mainly because all authority is centralized, from issuing permits to supervising and enforcing post-mining

reclamation. In this context, the formulation of criminal provisions does not carry out criminal law construction. According to Barda Nawawi Arief, determining sanctions in the strategic planning stages framework of the criminalization field is critical in legislative policies. Formulating inaccurate criminal law sanctions can be a factor in the criminality development.¹⁹

At least three notes from the sanctions provisions in the 2020 Mining Law confuse. First, positioning administrative sanctions on all mining permit holders (IUP, IUPK, and IPR) is the first instrument rather than imprisonment and additional criminal sanctions. Second, the guarantee of reclamation funds seems to make the provisions of criminal sanctions vague (ambiguous). However, it is emphasized that providing reclamation guarantee funds does not eliminate the responsibility of the reclamation obligation. Likewise, the imposition of administrative sanctions does not cover the obligation of the permit holder to do reclamation.

The problem is that when mining permit holders have submitted the reclamation guarantee funds, they seem to give up their reclamation responsibility. The formulation of Article 100 paragraphs 2 and 3 suggests that this reclamation obligation may be neglected. It regulates that the minister can involve a third party in reclamation if the IUP and IUPK holders do not fulfil the reclamation obligations. It is necessary to rearrange the provision of this guarantee fund so as not to impress the permit holder who neglects the reclamation obligation.

Third, there is a different treatment for mining IUP and IUPK holders with IPR holders. The difference can be seen in imprisonment and additional penalties point of view. IUP and IUPK holders can be subject to Article 161B. Otherwise, IPR holders cannot be subject to this sanction. The minister carries out the reclamation obligation of people mining permit holders under Article 73 paragraph (2). It can be concluded that the minister issued the community mining permit. At the same time, the minister in community mining is also obliged to carry out reclamation. If there is an offense on reclamation, the ministry cannot be subject to the provisions of Article 161B, namely imprisonment and additional penalties.

The existence of criminal sanctions is the final instrument (*ultimum remedium*) in enforcing the legal obligation of mining companies to carry out reclamation. In addition, administrative sanctions provisions for reclamation violators are the primary choice compared to criminal sanctions. The choice of imposing criminal sanctions if the applications of administrative sanctions have not resolved the criminal element in the form of violating the reclamation law.²⁰

¹⁹ Sholehuddin, *Sistem Sanksi Dalam Hukum Pidana* (Jakarta: Rajawali Pers, 2003), p. 121.

²⁰ Ayu Linanda and Hudali Mukti, "Kewajiban Perusahaan Pertambangan Dalam Melaksanakan Reklamasi Dan Pascatambang Di Kota Samarinda," *Yuriska: Jurnal Ilmiah Hukum* 8, no. 2 (2016): 73, <https://doi.org/10.24903/yrs.v8i2.156>.

Reclamation entails adhering to the principle that mining and reclamation activities cannot be separated and must be viewed as single entities. It is better to begin reclamation as soon as possible without waiting for mining activities to finish.²¹ Even the Law on Environmental Management states that reclamation is an effort to conserve the environment, with functions such as policies on planning, utilization, maintenance, restoration, and supervision. These activities are carried out based on responsibility, sustainability, and environmental insight under organizing reclamation.²²

2. Reformulation of the Criminal Sanctions for Community Mining Reclamation

Reformulation implies restructuring the criminal norms in post-mining reclamation arrangements. The scope of reformulation is meant to be oriented towards studying the criminal law system related to criminal law policy in the formulation stage or legislative policy. This was done to sharpen the punishment objectives by providing the foundation for reformulating the criminal sanctions provisions regarding the people's mining category reclamation. Thus, reformulation can carry out the direction of consideration in determining criminal sanctions.

Karl O. Christiansen said that the imposition of criminal sanctions must be carried out rationally following the objectives of an integral criminal policy, namely the community protection for prosperity. This is also in line with Hoefnagels' opinion that a criminal policy must be pursued by a rational method under its definition as the total rational root of the response to crime.²³

The irrational sanctions formulation provisions in the 2020 Mining Law can trigger disparities in the criminal law application. Criminal sanctions are not intended to trap community mining license holders who violate Article 161B. On the other hand, IUP and IUPK holders can be charged under this Article. Legislative policies that formulate such norms may create criminal disparities when viewed from different sanctions treatment against license holders.

In addition, Article 73 paragraph (2) states that reclamation in the community mining permit zone is the minister's responsibility, and based on Article 96, IUP or IUPK holders must carry out reclamation. However,

²¹ Irsan, Helmanida, and Yunial Laily Mutiari, "Kebijakan Reklamasi Pasca Tambang Sebagai Bentuk Pengendalian Lahan Bekas Tambang Batubara Ditinjau Dari Kewenangan Otonomi Daerah Di Sumatera Selatan," *Jurnal Of Law Simbur Cahaya* 23, no. 1 (2016): 3, <https://ejournal.unsri.ac.id/index.php/jlsc>.

²² Nora Dwi Rahmawati, "Konstruksi Hukum Reklamasi Terhadap Pelaku Pertambangan Ilegal," *LoroNG: Media Pengkajian Sosial Budaya* 8, no. 1 (2019): 88, <http://urj.uin-malang.ac.id/index.php/lorong/article/view/412>.

²³ Barda Nawawi Arief, *Kebijakan Legislatif Dalam Penanggulangan Kejahatan Dengan Pidana Penjara* (Yogyakarta: Genta Publishing, 2010), p. 69.

Article 100 paragraphs 2 and 3 state that the minister can determine and transfer reclamation by collaborating with a third party with a reclamation guarantee fund that is provided if IUP and IUPK holders neglect to carry out reclamation. This formulation is seen in Sue Titus Reid's view that criminal disparities can arise from legislative, court, and administrative policies in certain circumstances. How can this norming be used as a provision for sanctions based on reasonable justification?

Even if measured by punishment theory, it is not pursued by enacting appropriate sanctions. In the classical era, retributive theory characterized itself as the goal of retaliation by observing actions that were considered immoral. This theory sees that criminal sanctions must be under the perpetrators of the crime even though they do not intend to correct or even educate the perpetrators through criminal sanctions. On the retributive theory argument, denouncing the reclamation obligation sanction in the Mining Law loses its basic idea orientation. Suppose the aim is to provide a deterrent effect on the perpetrators. Why is there a difference in treatment between IUP, IUPK, and mining license holders as violators of reclamation obligations? Even though the source of licensing both came from the minister's authority, only the implementation of the community mining reclamation was taken over to become the minister's responsibility. So, if the ministry does not carry out this obligation, it cannot be subject to criminal charges. This confusion can be said that the legislative policies are not carried out through a rational policy approach.

In the practice of tin mining, tin collectors often take advantage of the mining community to protect them from being caught up in sanctions and other obligations required by law. Suppose retaliation for criminal sanctions is not possible for actors in the community mining category. Why would the government, through the minister, take over the reclamation obligations that community mining permit holders should have carried out. This is irrational from the perspective of a policy approach. Based on the arguments of retributive theory, the formulation of the criminal reclamation sanctions provisions seems ambiguous.

On the one hand, the spirit of revenge is directed at perpetrators who violate IUP and IUPK permits. Furthermore, the scope of sanctions does not cover the community mining category because the ministry implements reclamation at the technical level. Thus, the minister cannot be subject to criminal sanctions, while business actors in other mining categories can be subject to criminal penalties (not people's mining permits).

The retributive theory is impressive in criminal sanctions' determination regarding reclamation when connected with the purpose of punishment. It can create criminal disparities, become a criminogenic factor, or trigger the growth and development of reclamation obligations violations in the community mining sector. In the absence of discipline through criminal sanctions, the complexity of community mining is not sensitive to

compliance with mining engineering principles. Given that the obligation to reclaim the IPR is the minister's responsibility, criminal sanctions cannot be imposed in their entirety.

At this time, it is necessary to reformulate or redesign the sanctions provisions in the 2020 Mining Law, which regulates reclamation. Legislative policies are implemented to strengthen the basic idea of punishment purpose. It is important to remember that policy formulation is an inseparable part of criminal policy. As is well known, the criminal policy is a derivative of social protection efforts to achieve welfare goals.

The state has the authority to make policies, regulations, maintenance, management, and supervision for the welfare of the people. Welfare refers to the fulfilment of basic needs, such as clothing, food, and shelter (primary), alongside additional (secondary) and complementary needs (tertiary), to achieve happiness.²⁴ The state also has fundamental rights to control energy and other natural resources. It is appropriate for the state to set limits on social justice related to welfare to protect its management reasonably.²⁵ In the Environmental Law of 2009, the state has the right to control the protection and management of the environment. This protection is realized through penal and non-penal efforts in the criminal policy. Penal means are also included in formulating the determination of sanctions.

Based on this, proposing a relative theory to criminalize community mining reclamation is considered entirely appropriate. Criminalization here is not assumed to be retaliation for the mistakes of community mining actors but rather to protect the community in fulfilling their fundamental rights, namely the right to a good and healthy environment. In addition, the purpose of punishment is to prevent so that community mining actors can play a role in maintaining the recovery of the post-mining environment.

In the reformulation substance of the sanctions provisions regarding reclamation, the author considers the double-track system concept, namely using criminal sanctions and action sanctions. The sanctions provisions have often been used only for criminal sanctions and fines in current legislative policies. The category of action sanctions in the penal policy is not a priority because the dominant theoretical construction of punishment is the retributive theory in every crime incident.

²⁴ I Gusti Ayu Ketut Rachmi Handayani et al., "Environmental Management Strategy in Mining Activities in Forest Area Accordance with the Based Justice in Indonesia," *Journal of Legal, Ethical and Regulatory Issues* 21, no. 2 (2018): 1–8, <https://www.abacademies.org/articles/Environmental-management-strategy-in-mining-activities-in-forest-area-accordance-with-the-based-justice-in-indonesia-1544-0044-21-2-156.pdf>.

²⁵ Sulaiman and Ade Arif Firmansyah, "The Reconstruction of Energy Management Law Based on Indonesia Legal System," *Fiat Justisia* 12, no. 1 (2018): 41, <https://doi.org/10.25041/fiatjustisia.v12no1>.

The double-track system model will be a new transformation in formulating the ambiguous sanctions provisions of mining law. Therefore, a basic idea of balance is needed regarding implementing the sanctions for the reclamation omission of the people's mining category through the double-track system concept (crime and action). The response of the double-track system concept to violators of community mining land reclamation is to place criminal sanctions as the last instrument if the perpetrators ignore sanctions. Because the typology of sanctions is anticipatory, it is not reactive for the perpetrator of criminal law to restore certain conditions in the balance of interests.

Imposing sanctions on this action will guide criminals to change their bad behaviour by promoting human and educational values. Action sanctions in the community mining category can be formulated in the form of mining activities cessation within a certain period, compensation by involving local wisdom values, revocation of certain rights, such as not being able to apply for mining permits within a certain period, post-mining environmental restoration supervised by the government and local communities, and fulfilling certain customary obligations.

The primary orientation of the action sanction is to improve or restore post-mining environmental conditions. Thus, the choice of sanctions for post-mining environmental restoration actions must be a priority. It would be better to supervise these sanctions involving the participation of the village government and local communities.

For example, the tin mines reclamation is used as agricultural land to meet food needs in Bangka Belitung. Using agricultural technology innovation is believed to improve the soil's physical, chemical, and biological properties as an ideal medium for agricultural cultivation.²⁶ Former tin mines can even be used as natural attractions such as blue lakes and plantation settlements. Nonetheless, the use of ex-mining land must be in line with regional development plans and agreements on essential elements of development, namely the community, government, and the mining industry.²⁷

It is vital to involve community aspirations in planning the implementation of reclamation. According to a survey conducted by examining an environmentally sound reclamation model in East Lombok, NTB, most people abandoned by the mine site were reclaimed in social

²⁶ Asmarhansyah and Rahmat Hasan, "Reklamasi Lahan Bekas Tambang Timah Berpotensi Sebagai Lahan Pertanian Di Kepulauan Bangka Belitung," *Jurnal Sumberdaya Lahan* 12, no. 2 (2018): 74, <https://doi.org/10.21082/jsdl.v12n2.2018.73-82>.

²⁷ Nur Habibah, Fournita Agustina, and Yulia, "Persepsi Masyarakat Terhadap Program Reklamasi Lahan Bekas Tambang Di Desa Gunung Muda Kecamatan Belinyu Kabupaten Bangka," *Journal of Integrated Agribusiness* 1, no. 2 (2019): 98, <http://repository.ubb.ac.id/2860/>.

forestry activities. There is also a consideration that reclamation should provide economic benefits by making motocross sports facilities.²⁸

This action sanction provision is the first instrument imposed on community mining permit (IPR) holders who do not require reclamation. Suppose the community mining permit violators do not sanction this action in predetermined situations and conditions. In that case, considering the imposition of criminal sanctions is rational enough to apply. However, the imprisonment and penalties severity for IUP/IUPK and community mining permit (IPR) violators must be distinguished. The threat of sanctions must be lighter than the IUP and IUPK permit holders. A mining permit does not exploit mining activities on a large scale.

C. Conclusion

Post mining reclamation in the criminal law construction is a type of criminal omission offense. A reclamation omission offense is a formal offense oriented towards the objective elements of the law formulation. Based on Article 161B paragraph 1, the essence of the offense is not carrying out the reclamation obligation and providing a reclamation guarantee fund. The elements characteristics of the reclamation omission include several qualifications for the criminal law, including actions that do not carry out the reclamation obligation. This action does not have to wait for the damage to the post-mining environment. The obligation to submit a reclamation plan and a reclamation guarantee fund are things that accompany the deed. Non-compliance with implementing mining engineering principles is an additional condition for the imposition of sanctions.

The formulation of sanctions in the 2020 Mining Law is ambiguous and irrational. This may lead to disparities in applying criminal sanctions if the criminal sanction cannot be imposed on the category of community mining. Moreover, administrative sanctions are the leading choice for reclamation violators to all mining permit holders. The provision of the ministry weakens the existence of sanctions threat to transfer the implementation of reclamation to third parties using the reclamation guarantee fund. Normalizing offenses for reclamation omissions by including the consequences of sanctions are not based on reasonable justification.

Reformulation is needed in restructuring the normalization of sanctions regarding reclamation. A basic idea of balance is offered through the concept of a double-track system (criminal sanctions and action sanctions). The model becomes a new transformation in formulating reclamation sanctions

²⁸ Ali R. Kurniawan and Wulandari Surono, "Model Reklamasi Tambang Rakyat Berwawasan Lingkungan: Tinjauan Atas Reklamasi Lahan Bekas Tambang Batu Apung Ijobalit, Kabupaten Lombok Timur, Propinsi Nusa Tenggara Barat," *Jurnal Teknologi Mineral Dan Batubara* 9, no. 3 (2013): 172, <https://doi.org/10.30556/jtmb.Vol9.No3.2013.760>.

for the people's mining category. Nevertheless, criminal sanctions will be the last instrument if community mining category reclamation violators do not carry out the action sanctions. The sanctions are aimed at prevention, not repressive. The form of action sanctions can be stopping mining activities, compensation by taking into account the values of local wisdom, revoking certain rights, restoring the post-mining environment, and fulfilling certain customary obligations. The priority for action sanctions is to improve or restore post-mining environmental conditions. Then, the threat of criminal sanctions and fines against the people's mining category must be much lighter.

Acknowledgements

In completing this Article, we thank the Faculty of Law and the Institute for Research and Community Service, the University of Bangka Belitung, who have contributed to providing funding material that has tremendously supported this research.

References

- Angga, La Ode. "Legal Responsibility in the Pollution and Environmental Destruction Due to Gold Mining Exploitation in Botak Mountain of Buru Regency." *Fiat Justisia* 13, no. 4 (2019): 382. <https://doi.org/10.25041/fiatjustisia.v13no3.1695>.
- Anindarini, Grita, Antonius Aditanyo, Adrianus Eryan, and Marsya Mutmainah. "Beberapa Kritik Hukum Terhadap Perubahan UU No. 4 Tahun 2009 Tentang Mineral Dan Batubara." Jakarta, 2020. https://icel.or.id/storage/seri_analisis/1646670165.pdf.
- Arief, Barda Nawawi. *Kebijakan Legislatif Dalam Penanggulangan Kejahatan Dengan Pidana Penjara*. Yogyakarta: Genta Publishing, 2010.
- Asmarhansyah, and Rahmat Hasan. "Reklamasi Lahan Bekas Tambang Timah Berpotensi Sebagai Lahan Pertanian Di Kepulauan Bangka Belitung." *Jurnal Sumberdaya Lahan* 12, no. 2 (2018): 74. <https://doi.org/10.21082/jsdl.v12n2.2018.73-82>.
- Azhar, Muhamad. "Omnibus Law Sebagai Solusi Hiperregulasi Menuju Sinkronisasi Peraturan Per-Undang-Undangan Di Indonesia." *Administrative Law and Governance* 2, no. 1 (2019): 70–78. <https://doi.org/10.14710/alj.v2i1.170-178>.
- Faisal. *Politik Hukum Pidana*. Tangerang: Rangkang Education, 2020.
- Faisal, Ndaru Satrio, and Komang Jaka Ferdian. "Evaluasi Perbaikan Kebijakan Penegakan Hukum Pertambangan Perspektif Genealogi Hukum Dan Kuasa Di Kabupaten Bangka Selatan." *Jurnal Magister Hukum Udayana* 9, no. 3 (2020): 487. <https://doi.org/10.24843/JMHU.2020.v09.i03.p02>.

- Habibah, Nur, Fournita Agustina, and Yulia. "Persepsi Masyarakat Terhadap Program Reklamasi Lahan Bekas Tambang Di Desa Gunung Muda Kecamatan Belinyu Kabupaten Bangka." *Journal of Integrated Agribusiness* 1, no. 2 (2019): 98. <http://repository.ubb.ac.id/2860/>.
- Handayani, I Gusti Ayu Ketut Rachmi, Adi Sulistiyono, Tommy Leonard, Ardi Gunardi, and Fatma Ulfatun Najicha. "Environmental Management Strategy in Mining Activities in Forest Area Accordance with the Based Justice in Indonesia." *Journal of Legal, Ethical and Regulatory Issues* 21, no. 2 (2018): 1–8. <https://www.abacademies.org/articles/Environmental-management-strategy-in-mining-activities-in-forest-area-accordance-with-the-based-justice-in-indonesia-1544-0044-21-2-156.pdf>.
- Hieariej, Eddy O. S. *Prinsip-Prinsip Hukum Pidana*. Jakarta: Cahaya Atma, 2015.
- Irsan, Helmanida, and Yunial Laily Mutiari. "Kebijakan Reklamasi Pasca Tambang Sebagai Bentuk Pengendalian Lahan Bekas Tambang Batubara Ditinjau Dari Kewenangan Otonomi Daerah Di Sumatera Selatan." *Jurnal Of Law Simbur Cahaya* 23, no. 1 (2016): 3. <https://ejournal.unsri.ac.id/index.php/jlsc>.
- Khakim, Lutfi Zaini. "Model Revitalisasi Lahan Dampak Pertambangan Pasir Besi (Perspektif Implementasi Perda Kabupaten Cilacap Nomor 17 Tahun 2010)." *Pandecta: Jurnal Penelitian Ilmu Hukum* 9, no. 1 (2014): 117. <https://doi.org/10.15294/pandecta.v9i1.2854>.
- Kurniawan, Ali R., and Wulandari Suro. "Model Reklamasi Tambang Rakyat Berwawasan Lingkungan: Tinjauan Atas Reklamasi Lahan Bekas Tambang Batu Apung Ijobalit, Kabupaten Lombok Timur, Propinsi Nusa Tenggara Barat." *Jurnal Teknologi Mineral Dan Batubara* 9, no. 3 (2013): 172. <https://doi.org/10.30556/jtmb.Vol9.No3.2013.760>.
- Li, Gensheng, Zhenqi Hu, Dongzhu Yuan, Pengyu Li, Zhanjie Feng, Yibo Hei, and Wenjuan Wang. "A New Approach To Increase Land Reclamation Rate In Coal Mining Subsidence Area: A Case Study Of Guqiao Coal Mine, China." *Land Degradation And Development* 1 (2022): 1. <https://doi.org/10.1002/ldr.4184>.
- Linanda, Ayu, and Hudali Mukti. "Kewajiban Perusahaan Pertambangan Dalam Melaksanakan Reklamasi Dan Pascatambang Di Kota Samarinda." *Yuriska: Jurnal Ilmiah Hukum* 8, no. 2 (2016): 73. <https://doi.org/10.24903/yrs.v8i2.156>.
- Marinah, Dende Ratna Sari, Amiruddin, and Moh. Risnain. "Formulation of Administrative Criminal Sanctions in Law Number 11 of 2020 Concerning Creation of Work: Analysis of the Environment." *International Journal of Social Science Research and Review* 5, no. 1 (2022): 68–78.
- Muhdar, Muhammad. "Aspek Hukum Reklamasi Pertambangan Batu Bara

- Pada Kawasan Hutan Di Kalimantan Timur.” *Mimbar Hukum* 27, no. 3 (2015): 474. <https://doi.org/10.22146/jmh.15883>.
- Mustalahti, Irmeli, Violeta Gutiérrez-Zamora, Maija Hyle, Bishnu Prasad Devkota, and Nina Tokola. “Responsibilization in Natural Resources Governance: A Romantic Doxa?” *Forest Policy and Economics* 111 (2020): 1–12. <https://doi.org/10.1016/j.forpol.2019.102033>.
- Noor, Hendry Julian, Kardiansyah Afkar, and Henning Glaser. “Application of Sanctions Against State Administrative Officials Failing to Implement Administrative Court Decisions.” *Bestuur* 9, no. 1 (2021): 53–67. <https://doi.org/10.20961/bestuur.v9i1.49686>.
- Prayogo, Ade Lutfi. “Tanggung Jawab Pelaku Usaha Pertambangan Rakyat Dalam Reklamasi Gumuk Setelah Kegiatan Tambang.” *Lentera Hukum* 5, no. 3 (2018): 435. <https://doi.org/10.19184/ejlh.v5i3.8201>.
- Rahayu, Derita Prapti. “Budaya Hukum Penambang Timah Inkonvensional (TI) Terhadap Mekanisme Perizinan Berdasar Perda Pengelolaan Pertambangan Umum Di Propinsi Kepulauan Bangka Belitung.” *Masalah-Masalah Hukum* 41, no. 4 (2012): 494. <https://doi.org/10.14710/mmh.41.4.2012.493-504>.
- Rahayu, Derita Prapti, Faisal, and Jamilah Cholillah. “Rekonstruksi Partisipasi Masyarakat Dalam Perizinan Pertambangan Rakyat Berbasis Nilai Kearifan Lokal (Studi Kasus Izin Pertambangan Rakyat Di Kabupaten Belitung Timur).” In *Prosiding Seminar Hukum Dan Publikasi Nasional (Serumpun) I*, 447. Pangkal Pinang: Univeristas Bangka Belitung, 2019. <https://prosiding.fh.ubb.ac.id/index.php/prosiding-serumpun/article/view/49/42>.
- Rahmawati, Nora Dwi. “Konstruksi Hukum Reklamasi Terhadap Pelaku Pertambangan Ilegal.” *LoroNG: Media Pengkajian Sosial Budaya* 8, no. 1 (2019): 88. <http://urj.uin-malang.ac.id/index.php/lorong/article/view/412>.
- Sholehuddin. *Sistem Sanksi Dalam Hukum Pidana*. Jakarta: Rajawali Pers, 2003.
- Somek, Alexander. “Two Worlds Of Legal Scholarship and the Philosophy of Law.” In *Common Law – Civil Law: The Great Divide?*, edited by Nicoletta Bersier, Christoph Bezemek, and Frederick Schauer, 1st ed., 141–53. Cham: Springer, 2022. <https://doi.org/10.1007/978-3-030-87718-7>.
- Sulaiman, and Ade Arif Firmansyah. “The Reconstruction of Energy Management Law Based on Indonesia Legal System.” *Fiat Justisia* 12, no. 1 (2018): 41. <https://doi.org/10.25041/fiatjustisia.v12no1>.
- Sumarwoto, Mahmutarrom, and Ifrani. “Deradicalisation to Combat Terrorism: Indonesia and Thailand Cases.” *Sriwijaya Law Review* 4, no. 2 (2020): 249–60. <https://doi.org/10.28946/slrev.Vol4.Iss2.232.pp%25p>.

Wiryani, Fifik, and Mokhammad Najih. "The Criticism of Land Procurement Law to Improve Landowners Welfare in Indonesia." *Sriwijaya Law Review* 5, no. 2 (2021): 175–91. <https://doi.org/10.28946/slrev.Vol5.Iss2.1073.pp175-191>.

Criminal Sanctions Reformulation in the Reclamation of the Mining Community

ORIGINALITY REPORT

4%

SIMILARITY INDEX

4%

INTERNET SOURCES

0%

PUBLICATIONS

0%

STUDENT PAPERS

MATCH ALL SOURCES (ONLY SELECTED SOURCE PRINTED)

4%

★ garuda.kemdikbud.go.id

Internet Source

Exclude quotes On

Exclude matches < 3%

Exclude bibliography On

