

MEASURING ECOLOGICAL LOSS AS STATE LOSS IN ILLEGAL MINING CRIME

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ABSTRACT

The environment is one of the most important elements of life for human life whose rights are guaranteed in accordance with Article 28 H of the 1945 Republic of Indonesia Constitution. So it needs to be maintained as an ecosystem that cannot be damaged. The aim of this research is to measure the ecological losses arising from illegal mining crimes as a state loss. This research is normative legal research that uses juridical analysis using a conceptual approach and a statutory approach. The results of this research found that ecological losses from illegal mining crimes can be calculated or used as state losses due to damage or loss of function of the environment due to illegal mining which is detrimental to society and the state. So by including ecological damage as a state loss, human rights and environmental rights can be maintained.

Keywords: *Human rights; Ecology; illegal mining*

INTRODUCTION

Natural resource management is a human activity to explore and manage natural resources and wealth, such as water, air and land, with the aim of achieving people's welfare. This is regulated in Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, which states that the earth, water and natural resources within are controlled by the state and used for the welfare of the people. One of the activities to utilize these natural resources is to carry out mining activities.

Mining activities are an effort to utilize natural resources as a commodity. The mining sector is an important business activity for development in Indonesia.¹ This is because the country is rich in mineral resources, including silver, gold, oil, copper, natural gas and coal. Meanwhile, to carry out these mining activities, a business license is required in the form of a Mining Business License (IUP). IUP is a license that gives approval to the holder to be able to carry out mining business. The mining activity itself includes various stages, such as general investigation, exploration, feasibility study, construction, mining, processing and refining, transportation, sales, and post-mining activities.²

IUPs can be obtained by applying to the government by business entities, cooperatives, or individuals. In addition, local residents are also entitled to apply for a People's Mining License (IPR) to manage mining activities. If a mining activity is not equipped with an IUP, it is certain

¹Robby Surya Rusmana, (2017) *Perizinan Pertambangan Rakyat dan Pengawasan di Kabupaten Pesisir Barat*, Lampung:Universitas Lampung, p 1

²Pasal 1 angka 1, Undang-Undang Nomor 3 Tahun 2020 tentang Pertambangan Mineral dan Batu Bara, Lembar Negara Republik Indonesia Tahun 2020 Nomor 147

that the activity is categorized as *illegal mining*. In reality, the strict process of obtaining a mining license often means that there are parties who do not take care of obtaining a license but continue to carry out mining activities for their own economic interests. This can be seen from the number of *illegal mining* cases that occurred until 2023 revealed by the Ministry of Energy and Mineral Resources that there were more than 2,700 illegal mining locations spread throughout Indonesia, especially in Kalimantan, Sumatra and Sulawesi.³

Law Number 3 of 2020 concerning Mineral and Coal Mining in Article 158 has regulated criminal threats for parties who carry out mining without a license. The article stipulates that for perpetrators of criminal acts of mining without a license, the criminal threat that can be imposed is 5 years in prison and a fine of IDR 100,000,000,000, - (One hundred and twenty billion rupiah). The criminal threat, which can be said to be relatively light, is a big problem or not proportional to the impact that has been produced. The environment that should be managed by the state for the benefit and welfare of the community has been lost and to repair the lost environmental ecosystem requires considerable costs by the state. Therefore, ecological losses due to *illegal mining* should be counted as state losses.

The control and utilization of natural resources that are only oriented towards economic profit reflects the lack of *political will* from the state to protect the environment. This can be seen in regulations that prioritize investment development, while the interests of conservation and environmental sustainability are ignored.⁴ In the end, the reality that occurs actually causes a serious problem as described by the author earlier. So that from the description that the author has conveyed, a problem can be drawn that will be explained in this study, namely how the law enforcement of *illegal mining* crimes in Indonesia. Furthermore, the author will also explain whether ecological damage due to *illegal mining* can be categorized as a state loss.

METHOD

In conducting this research, the method used is the normative juridical approach method. The normative-juridical approach is a type of approach that considers the provisions of a country's laws or doctrinal legal approach methods, such as theories and opinions of legal scientists, especially those related to the problem being discussed.⁵

ANALYSIS AND DISCUSSION

Law Enforcement of *Illegal Mining* Crime in Indonesia

Article 33 paragraph (3) of the 1945 Constitution states that: "The land, water and natural resources contained therein shall be controlled by the state and utilized for the greatest prosperity of the people". The prosperity of the people in this case is the individuals of the Indonesian people. This article is one of the articles that guarantees the right of every individual Indonesian to be able to receive benefits from natural resources in Indonesia. The affirmation in Article 33 paragraph (3) of the 1945 Constitution authorizes the state to regulate and supervise the management of minerals through legislation. Regulation and supervision of mining governance is very important because mining materials are non-renewable natural resources. Without supervision, mining management can cause negative impacts in various

³M Haris Zakiyyudin, (2024). Maraknya Tambang Ilegal di Indonesia: Menelisik Faktor Penyebab dan Dampaknya. *Wartatambang* Home Page Energi. Dikutip Dari <https://www.wartatambang.com/read/1169/maraknya-tambang-ilegal-di-indonesia--menelisik-faktor-penyebab-dan-dampaknya.html>

⁴Endang Sutrisno. (2007), *Bunga Rampai Hukum dan Globalisasi*. Penerbit Genta Press. Yogyakarta. p 126

⁵Soemitro. (1998) . *Metodologi Penelitian Hukum dan Jurimetri*. Jakarta: Ghalia Indonesia. p 24

fields, such as environmental damage, threats to health, and conflicts over economic land between communities.

The Minerba Law as a positive legal regime governing mining emphasizes that all activities or utilization of mining business areas can be carried out if they have been given permission by the government in accordance with their designation. This is a form of the state regulating the governance of natural resource utilization so that it runs in accordance with the mandate of the constitution and as a form of supervision carried out by the government. So that any activity or utilization of mining business areas that do not have a permit can be classified as *illegal mining* activities. Even in the mineral and coal law, *illegal mining* is an action that falls into the category of a criminal offense or a crime.

The crime of unlicensed *mining*, or *illegal mining*, refers to criminal acts in the mining sector committed by individuals, groups, or legal entities such as companies or foundations, which do not have permits from government agencies in accordance with applicable regulations. This action can be subject to criminal sanctions for those who violate the prohibition due to the wrongdoing.⁶ Thus, what is meant by illegal mining in this context is mining activities carried out without permission from the state, especially without land rights, as well as without permits for mining, exploration or transportation of minerals. In Indonesia, regulations governing *illegal mining* can be found in several regulations. Some of these regulations include:

- a) Law Number 11 of 1967 as amended by Law Number 4 of 2009 and amended again by Law Number 3 of 2020 concerning Mineral and Coal Mining (Minerba Law)
- b) Government Regulation No. 22/2010 on Mining Areas;
- c) Government Regulation No. 23/2010 on the Implementation of Mineral and Coal Mining Business Activities;
- d) Government Regulation No. 55/2010 on the Guidance and Supervision of Mineral and Coal Mining Business Activities.

The crime of *illegal mining* is expressly regulated in the Minerba Law as a *lex specialist* regulation regarding mineral and coal mining. One of the provisions can be seen in Article 158 of the Minerba Law which stipulates that if mining activities are carried out without holding a permit, it is punishable with a maximum imprisonment of 5 (five) years and a maximum fine of Rp100,000,000,000.00 (one hundred billion rupiah). The licenses referred to in the minerba law in this case consist of:

- a) Mining Business License (IUP);
- b) IUP Eskplorasi;
- c) IUP Production operation;
- d) People's Mining License (IPR);
- e) Special Mining Business License (IUPK);
- f) IUPK Exploration;
- g) IUPK Production Operation.

Perpetrators of *illegal mining* who violate the provisions of Article 158, in addition to criminal sanctions, can also be subject to administrative sanctions. This is because in the mineral and coal law, the subject of criminal acts is not only aimed at individual perpetrators, but perpetrators in the form of legal entities or corporations are also subject to criminal acts.

⁶Trisia Anjani,(2017). The Social Impact Of Illegal Gold Mining In The Village Sungai Sorik Kecamatan Kuantan Hilir Seberang Kabupaten Kuantan Singingi, *Jurnal JOM FISIP*, 4,.(22), 1-14. Dikutip Dari: <http://jom.unri.ac.id/index.php/JOMFISIP/article/view/17063>

Therefore, the imposition of administrative sanctions is imposed on corporate actors. The types of administrative sanctions are :

- a. written warning;
- b. temporary suspension of part or all exploration activities or production operations, and/or
- c. revocation of IUP, IPR, or IUPK. /1

Law enforcement of *illegal mining* offenders is not only defined as activities that do not have a license as in the provisions of Article 158 of the Minerba Law. The activity of utilizing a business area by a party who has a permit can also be said to be *illegal* if the permit held is not in accordance with the activities carried out. This is as stipulated in the provisions of Article 160 which regulates the incompatibility between licenses and activities Where in this case the activity license held is an exploration license but carries out production operation activities. For perpetrators who violate the provisions of Article 160, the minerba law is subject to a maximum imprisonment of 5 (five) years; and a maximum fine of Rp 100,000,000,000.00 (one hundred billion rupiah).

Legal entities or corporations, in addition to the main criminal sanctions, may be subject to an additional criminal sanction. The imposition of criminal sanctions /1against corporations is different from the imposition of criminal sanctions against individuals. As for the principal punishment that can be imposed in the form of imprisonment and fines with aggravation plus 1/3 (one-third) of the maximum provisions of the imposed fines. In addition to the main punishment, corporation as the perpetrator may also be subject to additional punishment in the form of revocation of business license and/or revocation of legal entity status. The scheme of criminal responsibility can be seen in the following table:

Table 1 : Corporate criminal liability scheme

Terms	Criminal Sanctions	Criminal Liability
Article 163	<p>Principal punishment:</p> <ul style="list-style-type: none"> • prison • fines • fine with aggravation plus 1/3 (one third) of the maximum fine imposed. <p>Additional punishment:</p> <ul style="list-style-type: none"> • revocation of business license; and/or • revocation of legal entity status 	<ul style="list-style-type: none"> • Manager • legal entity

According to the provisions of Article 164 of the Minerba Law, other additional penalties that can be imposed on the perpetrator can be in the form of confiscation of goods used in committing a criminal offense, confiscation of profits obtained from a criminal offense and / or the obligation to pay costs incurred as a result of a criminal offense. So based on the provisions of the articles described above, it can be seen that any mining activity that does not have a permit as stipulated in the Minerba Law can be categorized as *illegal mining*. In addition, for individuals or legal entities who have obtained a permit at the exploration activity stage but the activities carried out are production operations, this can also be classified as an *Illegal Mining* crime that can be held criminally responsible as the author has described.

Ecological damage due to illegal mining as a State Loss

The relationship between humans and the environment was emphasized in the preamble of The Rio Declaration on Environment and Development in 1992. The preamble emphasizes the central position of the relationship between humans and nature.⁷ Nature is the vehicle of the living environment for humans, where nature will be able to survive as a source of life if nature is cared for, maintained, and preserved. But if not, then there will be damage to nature, so that there will also be damage to human life.⁸

Philosophically, the state must realize human values, recognize human dignity, human rights, and human freedom. Human rights to the environment must also pay attention to ecological ethics (environmental ethics or eco-ethics) and environmental justice.⁹ Thus, the relevance between human rights and the environment can be seen from the right to the environment which is an instrument in human rights, where one of the basic rights for humans is the right to a good and healthy environment¹⁰ and the fulfillment of environmental rights will be realized if environmental justice is achieved.

Environmental justice is viewed from two sides. The first side sees environmental justice as part of social justice because it views the environment as a resource that must be distributed, so the focus is on humans. Meanwhile, the second side views nature (ecology) as a party that also has the 'dignity' to get justice.

In this regard, one of the forms of state responsibility in protecting human rights and the environment is by considering ecological losses as state losses and need to be regulated in the formation of regulations at the level of law. In the current positive law, losses for ecological damage are regulated in the Minister of Environment Regulation Number 7 of 2014 concerning Environmental Losses Due to Environmental Damage (Permen LH). From the Permen LH, what is said to be Environmental Loss is a loss arising from pollution and/or environmental damage that is not a private property right. In this context, it can be seen that ecological damage due to *illegal mining* meets the elements referred to in the Permen LH. This is because *illegal mining* is an activity of utilizing state-owned natural resources without a permit.

Losses for ecological damage are further regulated in the provisions of Article 3 of Permen LH No. 7 of 2014. The losses due to ecological damage in this case are:

⁷Priya Tandirerung Pasapan. (2020) Hak Asasi Manusia Dan Perlindungan Lingkungan Hidup. *Paulus Law Journal*. 1 (2), . (48-58). E-Issn p: 2722-8525.

⁸Majda El-Muhtaj, (2008), *Dimensi-Dimensi Ham Mengurai Hak Ekonomi, Sosial, Dan Budaya*, PT Raja Grafindo Persada, Jakarta, p: 49

⁹Susmayanti, Riana. (2020). REFLEKSI KEADILAN LINGKUNGAN DALAM PANCASILA PADA PUTUSAN MAHKAMAH AGUNG NOMOR 3555K/PDT/2018 dipresentasikan oleh RIANA SUSMAYANTI Fakultas Hukum Universitas Brawijaya pada Konferensi Nasional HAM, Kebudayaan & Tujuan Pembangunan Berkelanjutan Indonesia pada Masa Pandemi Covid-19: Tantangan untuk Keilmuan Hukum & Sosial.

¹⁰Abdurrahman Supardi Usman. (2018). Lingkungan Hidup Sebagai Subjek Hukum: Redefinisi Relasi Hak Asasi Manusia Dan Hak Asasi Lingkungan Hidup Dalam Perspektif Negara Hukum, *Jurnal Legality*, 26(1), p: 10

- a. losses due to the exceedance of the Environmental Quality Standard as a result of non-implementation of all or part of the wastewater treatment, emission, and/or hazardous and toxic waste management obligations;
- b. losses for reimbursement of the costs of implementing Environmental Dispute Resolution, including the costs of: field verification, laboratory analysis, experts and supervision of the implementation of environmental loss payments;
- c. losses to compensate for the costs of overcoming environmental pollution and/or damage and environmental restoration; and/or ecosystem losses.

The components of these losses can be losses received by the state that have an impact on human society and the environment itself. And these losses can also be calculated in real terms.

The calculation of environmental losses can be calculated by an expert in charge. In Permen LH No. 7 of 2014, it is stated that experts who carry out environmental loss calculations must be in charge of environmental pollution and/or damage and/or environmental economic valuation.¹¹ In calculating environmental losses, the expert must refer to the Guidelines for Calculating Environmental Losses listed in Appendix II of the Ministerial Regulation. So that from the calculation can be found the real number or nominal losses arising from ecological damage done.

The law on corruption, namely Law (UU) Number 31 of 1999 concerning the Eradication of Corruption jo. Law No. 20/2001 on the Amendment to Law No. 31/1999 on the Eradication of the Crime of Corruption, there is no clear definition of state losses. The definition of state loss is found in Article 1 point 22 of Law Number 1 Year 2004 on State Treasury, where state/regional loss is a shortage of money, securities, and goods, which is real and certain in amount as a result of unlawful acts either intentionally or negligently. So, following this understanding, the calculation of ecological damage losses by experts as regulated by Permen LH No. 7 of 2014 can be said to be a state loss. This is because the state experiences a shortage of money that should be obtained from the utilization of natural resources intended for the welfare of the community as mandated by the Constitution. However, with the occurrence of *illegal mining*, the state cannot utilize its natural resources for the welfare of the people as well as damage to the environment.

Article 28 H of the 1945 Indonesian Constitution which mandates that a good and healthy environment is the human right of every Indonesian citizen. Then, the definition of the environment according to Law Number 32 of 2009 concerning Environmental Protection and Management is the unity of space with all objects, forces, conditions, and living things, including humans and their behavior that affect nature itself, the continuity of life and the welfare of humans and other living things. From this definition, it can be said that the environment is one of the components/aspects that affect human survival and welfare.

In addition, this is in line with the objectives of environmental protection and management stated in Article 3 of the PPLH Law, one of which is to ensure the fulfillment and protection of the right to the environment as a human right. However, at the practical level, the protection of the right to the environment is often misinterpreted by some parties who in this case only use their rights to utilize the environment, but do not take into account the protection of the environment itself and its impact on other human lives. In this case, there is still a dichotomy between the right to the environment and human rights, which should not be set aside from each other.

¹¹Pasal 4 Peraturan Menteri Lingkungan Hidup Nomor 7 Tahun 2014 tentang Kerugian Lingkungan Hidup Akibat Pencemaran dan/atau Kerusakan Lingkungan Hidup.

Even in a historical context, the right to the environment is a third-generation human right.¹² “Third generation rights” or “Fraternity” are found in the demand for “solidarity rights” or “common rights”. These rights were pioneered by developing countries for a just international order. Through these demands, they want an international economic and legal order that is conducive to securing the following rights, including the right to development, the right to peace, the right to one’s own natural resources, the right to a good environment; and the right to one’s own cultural heritage. These third-generation rights are really just a reconceptualization of the value demands of the previous two generations of human rights.¹³

Without respect for human rights, a good quality environment cannot be maintained. Human rights cannot be obtained without a good and healthy environment. Respect, protection, enforcement and fulfillment of human rights as mandated in the constitution will be greatly influenced and dependent on a healthy and livable environment.

In a damaged natural ecosystem, it is very difficult or even impossible for humans to fulfill their food needs, get the right to health and safety as a support for the right to life, because humans are part of being able to get their right to life, because the environment is a source of human life and humans are part of the ecosystem and the environment is a source of human life. Humans from birth have the right to obtain fair access to the environment to meet their needs.

The exploitative nature of business actors and the state for profit that has been carried out so far has made the people lose their environmental rights, which are the basic rights of the people. Therefore, environmental management requires an ethic that promotes environmental justice and recognizes the interdependence between humans and the environment. The right to the environment, which is one of the environmental ethics to achieve environmental justice, has not been maximally agreed upon and implemented as a human right that must be recognized both politically and legally.¹⁴ By making ecological damage a state loss, at least the state is present to protect the environment and its people as a human being who has rights.

CONCLUSION

Mining activities that do not have a permit as stipulated in the mineral and coal law can be categorized as illegal mining. In addition, for individuals or legal entities who have obtained a license at the exploration activity stage but the activities carried out are production operations, this can also be classified as an Illegal Mining crime that can be held criminally liable. The law enforcement of illegal mining can be subject to basic criminal sanctions in the form of imprisonment and fines as well as additional penalties. In addition, there are administrative sanctions that can be imposed on the perpetrators of Illegal Mining crimes in Indonesia. The relationship between humans and the environment is inseparable. Likewise, human rights and the environment influence and need each other, so that all efforts to respect and protect the environment are also a form of respect for human rights. This is because a quality environment will have a good influence on humans, on the contrary, an unqualified environment will have a bad impact on humans. So that efforts need to be made to prevent ecological damage. One of the efforts made is to make ecological damage due to *illegal mining* a state loss and regulated in a law-level regulation. This is because ecological damage can be calculated by experts in

¹²Philip Alston, (1982) “A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law”, *Netherlands International Law Review*, 29. (3) .. (307- 322) sebagaimana ada dalam Knut D. Asplund, Suparman Marzuki, Eko Riyadi (Penyunting/Editor);, at.al.--- Yogyakarta: PUSHAM UII, 2008, p.: 14 – 17

¹³Weston dalam Satya Arinanto,(2008). *Hak Asasi Manusia dalam Transisi Politik di Indonesia*, Jakarta: Pusat Studi Hukum Tata Negara Fakultas Hukum Universitas Indonesia, p. 80

¹⁴Laurensius Arliman S, (2018), Eksistensi Hukum Lingkungan dalam Membangun Lingkungan Sehat Di Indonesia, *Lex Librum*, 5(1), 761-770. DOI : <http://dx.doi.org/10.46839/ljih.v5i1.116>

charge so that it can produce a real figure of losses received by the state in order not to be able to utilize existing natural resources for the welfare of the community to repair ecological damage arising from *illegal mining*.

BIBLIOGRAPHY

- Abdurrahman Supardi Usman. (2018). Lingkungan Hidup Sebagai Subjek Hukum: Redefinisi Relasi Hak Asasi Manusia Dan Hak Asasi Lingkungan Hidup Dalam Perspektif Negara Hukum, *Jurnal Legality*, V26n1.
- Endang Sutrisno. (2007). *Bunga Rampai Hukum dan Globalisasi*. Yogyakarta: Penerbit Genta Press.
- Laurensius Arliman S, (2018), Eksistensi Hukum Lingkungan dalam Membangun Lingkungan Sehat Di Indonesia, *Lex Librum*, 5(1), 761-770. DOI : <http://dx.doi.org/10.46839/lljih.v5i1.116>
- Majda El-Muhtaj, (2008), *Dimensi-Dimensi Ham Mengurai Hak Ekonomi, Sosial, Dan Budaya*, Jakarta: Pt Raja Grafindo Persada.
- M Haris Zakiyyudin, (2024). Maraknya Tambang Ilegal di Indonesia : Menelisik Faktor Penyebab dan Dampaknya. *Wartatambang* Home Page Energi. Dikutip Dari <https://www.wartatambang.com/read/1169/maraknya-tambang-ilegal-di-indonesia--menelisik-faktor-penyebab-dan-dampaknya.html> diakses pada tanggal 24 Oktober 2024.
- Philip Alston. (1982) "A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law", *Netherlands International Law Review*, 29 (3), 307- 322; sebagaimana ada dalam Knut D. Asplund, Suparman Marzuki, Eko Riyadi (Penyunting/Editor);, (2008) at.al.--- Yogyakarta: PUSHAM UII, p. 14 – 17
- Satya Arinanto,(2008), *Hak Asasi Manusia dalam Transisi Politik di Indonesia*, Jakarta: Pusat Studi Hukum Tata Negara Fakultas Hukum Universitas Indonesia,
- Soemitro. (1998). *Metodologi Penelitian Hukum dan Jurimetri*. Jakarta: Ghalia Indonesia.
- Tandirerung Pasapan. (2020). Hak Asasi Manusia Dan Perlindungan Lingkungan Hidup. *Paulus Law Journal*.1 (2). E-Issn : 2722-8525.
- Trisnia Anjani, (2017) The Social Impact Of Illegal Gold Mining In The Village Sungai Sorik Kecamatan Kuantan Hilir Seberang Kabupaten Kuantan Singingi, *Jurnal JOM FISIP*, .4(22) (1-14) Dikutip Dari: <http://jom.unri.ac.id/index.php/JOMFISIP/article/view/17063/1Priya>.
- Susmayanti, Riana. (2020). REFLEKSI KEADILAN LINGKUNGAN DALAM PANCASILA PADA PUTUSAN MAHKAMAH AGUNG NOMOR 3555K/PDT/2018 dipresentasikan oleh RIANA SUSMAYANTI Fakultas Hukum Universitas Brawijaya pada Konferensi Nasional HAM, Kebudayaan & Tujuan Pembangunan Berkelanjutan Indonesia pada Masa Pandemi Covid-19: Tantangan untuk Keilmuan Hukum & Sosial.

Laws and Regulations

Peraturan Menteri Lingkungan Hidup Nomor 7 Tahun 2014 tentang Kerugian Lingkungan

Hidup Akibat Pencemaran dan/atau Kerusakan Lingkungan Hidup.

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