



# Arrangement for Settlement of Unlicensed Gold Mining Crimes Through A Restorative Justice

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**Abstract.** Unlicensed gold mining damages the ecosystem of natural resources and the environment. The sanctions applied can be non-penal in the form of Restorative Justice in order to find a win-win solution. It is very important to pay attention to the forms of criminal sanctions that will be applied. This study aims to analyze the settlement of gold mining crimes through a restorative justice approach. The method used in this research is normative juridical by using a conceptual and statutory approach. This study analyzes the settlement arrangements for gold mining without a permit as stipulated in the Minerba Law, there are still juridical problems in its application, especially those related to the determination of juridical qualifications whether the crime of mining without a permit is a crime or a violation and the application of combined criminal sanctions making it difficult to be met by criminals. So that it is possible to do restorative justice with certain conditions.

**Keywords:** Restorative Justice · Sanctions · Unlicensed Gold Mining

## 1 Introduction

The Indonesian Constitution regulates the management of land, water and the wealth contained therein in Article 33. With a diverse background, every community in Indonesia in a certain geographic location has a different perspective in controlling and managing their own environment [1]. Everyone can take advantage of all the potential openly [2]. All potentials can be said to be natural resources, including flora and fauna, earth, water and air as well as water and even space. Where in essence it can fulfill all the needs of society in general [3]. However, there are times when nature creates a lot of problems [4]. Jambi Province is rich in minerals, including gold. Gold mining in Jambi is mostly done without legal permits. According to the positive law perspective, public property resources are not owned by anyone, including indigenous communities. Everyone in society and the environment has equal access to use it in a way that is not excessive [5].

Integrated conservation efforts are needed with reference to the law on the utilization of living and non-living natural resources. This is to avoid degradation and severe environmental pollution. One of the potential natural wealth of Indonesia is gold [6]. Gold mining has existed since colonial times. Even former mining has not been resolved properly until now [7]. The management of these natural resources is not uncommon for

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conflicts of interest to occur in management, even though various management groups have been explained in writing. Gold mines are industrial objects in areas rich in minerals. There is also rampant exploitation that is not appropriate. Exploitation must be carried out with permission according to applicable regulations. This also happened a lot in Jambi Province. Gold mining without a permit or do-called PETI sometimes and strangely there are legal entities.

Regulation of the Minister of Energy and Mineral Resources of the Republic of Indonesia Number 32 of 2003 concerning procedures for granting special permits in the mining, mineral and coal sectors explains that the business permits that must be owned by miners are divided into three types: (1) Exploration mining business permit (IUP): a business license granted to carry out the stages of general investigation, exploration and feasibility study activities; (2) Special mining exploration permit (IUPK): a business permit granted to carry out the stages of general investigation, exploration activities, and feasibility studies in special mining areas; (3) People's mining permits (IPR): business permits to carry out mining business in smallholder mining areas with limited area and investment.

Regulations related to permits that gold miners must obtain before carrying out their mining activities. Likewise with criminal liability with sanctions that are obtained when carrying out gold mining without a permit (PETI), as stated in Article 158 of Law Number 4 of 2009 concerning Mineral and Coal Mining it is explained that: "Anyone who carries out a mining business without an IUP, IPR or IUPK as referred to in Article 37, Article 40 paragraph 3, Article 48, Article 67 paragraph (1), Article 74 paragraph (1) or paragraph (5) shall be punished with imprisonment for a maximum of 10 (ten) years and a maximum fine Rp. 10,000,000,000.00 (ten billion rupiah)".

Many rules have been made, but as many were violated. Sociological and economic factors became the trigger [7]. So that actions committed by the community without following the existing rules can be categorized as criminal acts. All criminal acts that fulfill formal elements have been regulated in the Criminal Code. And regulations that are criminally oriented and fulfill material requirements can be indicated as unlawful or criminal in nature [8]. The settlement of criminal sanctions for PETI must be viewed from a different angle, it must look at the local community so that natural resources can still be enjoyed by the surrounding community in a wise manner. According to this research, the settlement of this crime needs to be seen from the point of view of restorative justice. But not to necessarily eliminate the original nature of punishment. This research will look at how laws and regulations can accommodate the settlement of these crimes through restorative justice.

## **2 Results and Discussion**

### **2.1 Arrangements for Settlement of the Crime of Gold Mining Without a Permit in the Perspective of Criminal Law Policy**

By law, the act of illegal mining of minerals and coal in the form of gold, can be subject to criminal sanctions, this is because everyone who will carry out mining activities must have a permit first. Thus, illegal gold mining is an act that is not permitted by law because it is carried out illegally or illegallly, where the end of this action is the existence of threats

(sanctions) in the form of certain crimes for perpetrators of illegal mining as contained in the provisions of Article 158 of the Law Number 3 of 2020 concerning Amendments to Law Number 4 of 2009 concerning Mineral and Coal Mining, which states that “Anyone who carries out mining without a permit as referred to in Article 35 shall be punished with imprisonment for a maximum of 5 (five) years and a fine of up to a lot of IDR 100,000,000,000.00 (one hundred billion rupiah)”.

Based on the provisions of article 158, there is no legal certainty regarding the minimum prison sentence that should be imposed on the perpetrator. In addition, in the Minerba Law, which is a special law outside the Criminal Code which contains criminal provisions, it does not stipulate juridical qualifications related to delict in the Minerba Law, which constitutes a crime or violation. Two, namely crimes and violations, so that juridically this can lead to problems in enforcing the general rules of the Criminal Code which are not specifically regulated in the Minerba Law as special laws outside the Criminal Code. For example, there was an “attempt” to commit a criminal act in the field of mineral and coal mining (where the Minerba Law does not regulate “experiment”), then the provisions of the general rules regarding “trial” in the Criminal Code cannot be enforced, resulting in doubts among law enforcers because there is no basis to prosecute the perpetrators of the “experiment”.

Article 1 paragraph (1) of the Criminal Code which stipulates that “An act cannot be punished, unless it is based on the strength of existing criminal legislation.” Criminal law contains the principle that there is no punishment without law. This means that there are no sanctions without mistakes. Human action is divided into active actions and passive actions. Where the act poses a danger to other people, be it a danger to life or to property rights, honor and independence. Harmful acts must be against the law. Acts against the law are related to prohibitions and orders.

In criminal law in Indonesia, there is a penal system that regulates sentencing procedures. It cannot be done in a mere repressive manner by law enforcement officials. In terms of law enforcement, social control is needed. Social control can be done by carrying out the law with a sense of justice in society [9]. The regulation also relates to the utilization and management of mineral and coal natural resources.

Regulations regarding Minerals and Coal were updated with Law no. 3 of 2020. In this regulation, a permit is required for each miner through several permits, namely by: (1) Regent or Mayor if the mining business permit area is in the same regency or city area and the mining business permit, (2) Governor if the mining business permit area is located across regencies or cities within 1 (one) Province after obtaining a recommendation from the local Regent or Mayor, (3) Minister if the area of the first business license is across provincial areas after obtaining a recommendation from the Governor and the local Regent or Mayor in accordance with the provisions of the Laws Invitation. After Law no. 4 of 2009 amended by Law No. 3 of 2020 concerning Mineral and Coal Mining (UU Minerba), permits are only issued by the central government.

The current regulations that have undergone changes are increasingly burdensome for small miners who are categorized as illegal miners, existing regulations are more in favor of large miners who have power and power. On the other hand, the limitations of small miners also do not allow it to damage the environment, because as local people they understand the geographical structure and natural environment around them. So

that in practice they are very careful about carrying out mining activities, it's just that statements that are often heard and conveyed to the public are that they are very dangerous and damage the environment [10]. This means that regulations that are friendly to the local community are needed. Because the local people where natural resources exist and they live in them know how to manage them wisely. The government only provides a regulation that is localized.

## **2.2 Urgency of Restorative Justice in Handling the Crime of Unlimited Gold Mining**

Research observes that according to miners, there are things that sociologically influence them to continue mining without a permit. One of them is administrative requirements which are technically complicated, then there are rules which according to them are not in favor of small miners, but in fact in favor of big miners. Synergy between agencies, both at the regional and central levels, is one of the factors that can preserve natural resources. Rearranging mining regulations that are not only in favor of large corporations and investors, returning regulations that are in accordance with the provisions of the law and the state's basis that Indonesia's natural wealth can be enjoyed and managed by all levels of society. On the other hand, there is a need to reform administrative elements, tax rates and fair supervision so that small mining activities can take place with the applicable regulations. All elements must be involved to streamline and reformulate regulations for the sake of upholding quality natural resource management, not destroying nature, the environment and flora and fauna ecosystems.

The imposition of sanctions for perpetrators of illegal miners based on Article 158 of Law Number 3 of 2020 concerning Amendments to Law Number 4 of 2009 concerning Mineral and Coal Mining aims to enforce legal norms, to protect the community, resolve conflicts arising from illegal mining, and restore the balance of the ecosystem as a result of these mining activities [11]. However, this does not mean that the provision of witnesses in the Minerba Law necessarily prioritizes the use of criminal law to provide a deterrent effect on perpetrators without the aim of upholding justice and legal certainty.

Lately, it's as if only the courts are the main objective of resolving the problem of illegal gold miners, so that any indication of a criminal act without taking into account the escalation of his actions will continue towards law enforcement which is the jurisdiction of law enforcers and as if negating efforts outside the criminal law in the case of illegal gold miners which are carried out by the community on a small scale because of the standard rules in the regulations. Arrangements for the settlement of illegal gold miners are indeed supported by criminal law provisions, but given the nature of crime as a last resort (*Ultimum Remedium*), it does not rule out the possibility that in its implementation legal remedies are applied which prioritize protection and justice for the parties involved outside the court in a formal manner or by means of legal action. Non penal by using a restorative justice approach or better known as restorative justice which aims to restore justice [12]. Conceptually, restorative justice is an approach that focuses more on conditions for the creation of justice and balance for perpetrators of criminal acts and victims of these crimes. So far, the orientation of the criminal justice system has focused on criminal acts (crime, *strafbaarfeit*) and perpetrators of criminal acts (*criminal, dader*).

The mindset of each component of the criminal justice system tends to be based on formal rules or is positivistic without caring about benefits and a sense of justice which is the spirit of criminal law enforcement. The criminal justice process reflects more justice between the interests of the State against the interests of the perpetrators on the grounds of the principle of legality so that each component does not want to take risks so that the handling of the case injures the sense of justice in society.

Restorative justice has been around for a long time under different names. It is an alternative in imposing criminal sanctions. Even though Joh Braithwait suggested that this is a new direction between justice and welfare models, then between retribution and rehabilitation [13]. The idea of restorative justice puts forward several principles (a). Namely building togetherness between perpetrators and victims and community groups. Here actors, victims and society are systems that try to work together to provide a solution to a problem with a fair settlement for all parties. (b). The principle of responsibility for the emergence of negative things such as bodily injury, or loss to the victim. And also the principle of awareness of not repeating his actions c. Place events or criminal acts not primarily as a form of violation of the law, but as a violation by a person (a group of people) against someone (a group of people). Because of that, the perpetrator should be directed to accountability to the victim, not prioritizing legal responsibility. d. Encouraging solving an event or crime in more informal and personal ways, rather than solving it in a formal (rigid) and impersonal way [14]. But that does not mean that the approach to the concept of restorative justice can mean eliminating the perpetrator's guilt. In the sense that there is a change in perspective in the application of criminal law, shifting from retributive justice to restorative justice. This change in perspective/paradigm is different from the old perspective which views criminal sanctions as an alternative form of state responsibility in carrying out its function of imposing crimes in order to maintain security and order and provide protection to its citizens. So far, the paradigm of the Indonesian criminal law system is in which the state, through its organs, carries out what is under its authority, both as the holder of the right to establish a number of applicable norms (*ius punale*) and the right to convict (*ius puniendi*). Victims as parties who feel directly harmed by the criminal acts committed actually lose their role in the process of resolving their criminal cases [15]. Several regulations regarding restorative justice can be seen in the Chief of Police Circular Letter concerning the Implementation of Restorative Justice. Regulations concerning Investigation of Criminal Acts, and regulations regarding Termination of Prosecution Based on Restorative Justice and Decree of the Director General of the General Court of the Supreme Court of the Republic of Indonesia No.1691/DJU/SK/PS.00/12/2020 concerning Enforcement of Guidelines for the Implementation of Restorative Justice. In addition, restorative justice is also implemented in the Memorandum of Understanding with the Chief Justice of the Supreme Court, Minister of Law and Human Rights, Attorney General, National Police Chief Number 131/KMA/SKB/X/2012, Number M.HH.07.HM.03.02 of 2012, Number KEP- 06/E/EJP/10/2012, Number B/39/X/2012 dated 17 October 2012 concerning the Implementation of the Application for Adjusting the Limits for Misdemeanors and the Amount of Fines, Procedures for Quick Examinations and the Application of Restorative Justice.

So that in fact the criminal justice system can be carried out with various approaches that continue to uphold justice for both victims and perpetrators. The application of the concept of restorative justice certainly does not necessarily cover all criminal acts. Because so far the restorative justice arrangements are currently limited to minor criminal cases as stipulated in Articles 364, 373, 379, 384, 407 and 483 of the Criminal Code. In addition to minor criminal cases, restorative justice can also be applied to juvenile crime cases, women's crimes against the law, narcotics crimes, information crimes and electronic transactions and traffic crimes.

### **2.3 Unlicensed Gold Mining as a Special Crime and Its Relation to the Responsible Management of Natural Resources**

Mining is a part or stage, namely part or all of the stages prepared and carried out for the purposes of research, processing and exploitation of minerals or coal which includes general investigations, exploration, construction feasibility studies, mining, processing and refining, transportation and sales, as well as post-mining activities.. In the Big Indonesian Dictionary, what is meant by mining is digging (taking) minerals from the ground. In the previous bill, there was no regulation regarding the authority of the regional and central government, and how to divide this authority regarding the management of natural resources, especially mining. Mining without a permit in foreign language is known as illegal mining, in everyday language it is called PETI. In this activity, many people are involved in mining business. All parts of the person have their respective duties. In the field there is a working relationship both in the nature of coordination and subordination. This involvement is very systematic, even unscrupulous officials participate in this activity. In this activity system, all are considered to have participated in a criminal act. So justice must be applied to all.

To realize justice, it is very important to know the nature of a person who is a victim in a criminal case, while according to Christie there are 6 (six) attributes to know the identity or identity of a victim of a particular crime [18], including:

The victims are weak in relation to the offender. The victims are, if not acting virtuously, then at least going about their legitimate, ordinary everyday business. The victim is blameless for what happened. The victim is unrelated to and does not know the stranger who committed the offense. The offender is unambiguously big and bad. The victim has the right combination of power, influence or sympathy to successfully elicit victim status without threatening (and thus risking opposition from) strong countervailing vested.

The statement above conveys the meaning that victims need to receive empathy for justice. This is where the nature of restorative justice comes into play. The main principle of resolving criminal acts through a restorative approach is a settlement that must be able to penetrate the space of the hearts and minds of the parties involved in the settlement process in order to understand the meaning and purpose of carrying out a remedy and the form of sanctions applied are sanctions that are restorative or preventative [19].

Meanwhile, the conventional penal system, which is a reaction to legal action, is very rigid. Moreover, in the country of Indonesia, whose soul is full of compromises. Punishment must be seen from the purpose and how much loss suffered. The aim is solely to provide a deterrent effect, order, security or to uphold the rule of law. Punishment for

minor crimes does not only focus on the actions of the perpetrators. Another indicator is still needed, namely the person who commits a criminal act must have guilt or guilt (subjective guilt). Here applies what is called the principle of “no crime without guilt” (Keine Strafe ohne Schuld or Geenstraf zonder schuld or Nulla Poena Sine Culpa (culpa) in a broad sense, including intentionality. Regarding this, compare with Scheb’s opinion which states that:

“The criminal law, indeed our entire legal system, rests on the idea that individuals are responsible for their actions and must be accountable for them. This is the essential justification and rationale for imposing punishments on persons convicted of crimes. On the other hand, society recognizes that certain individuals (for example, young children) lack the capacity to appreciate the wrongfulness of their conduct. Similarly, factors beyond individuals’ control can lead them to commit criminal acts. In such instances the law exempts individuals from responsibility. Moreover, there are situations in which acts that would otherwise be crimes might be justified. The best example of this is committing a homicide in self-defense”.

It would be contrary to the sense of justice, if someone is sentenced to a crime even though he is completely innocent. Before entering the criminal justice process a person can take the mediation route. Penal mediation is known as mediation in criminal cases, mediation in penal matters, victim offenders mediation, offender victim arrangement (English), strafbemiddeling (Netherlands), der Au Bergerichtliche Tatausgleich (Germany), de mediation penale (French). According to Ms. Toulemonde Mediation Penal (penal mediation) is an alternative prosecution that provides the possibility of a negotiation settlement between the perpetrators of criminal acts and victims. Accordingly, Martin Wright defines penal Mediation as; a process in which victim(s) and offender(s) communicate with the help of an impartial third party, either directly(face-to-face) or indirectly via the third party, enabling victim(s) to express their needs and feelings and offender(s) to accept and act on their responsibilities” This definition can be translated that a process in which victims and perpetrators of crimes meet each other and communicate with the help of third parties either directly or indirectly by using third parties as liaisons, makes it easier for victims to express what is the need and feelings and also allows the offender to accept and be responsible for his actions.

Once it is known that someone has committed a crime, then someone will be held criminally responsible. Criminal liability has two conditions, namely external requirements and internal requirements. The external requirement of criminal responsibility is committing a crime, while the internal requirement of criminal responsibility is having a fault. So someone will be held criminally responsible not only because he has committed a crime but also that someone has made a mistake. However, the Minerba Law regarding illegal miners does not clearly and explicitly state whether the act is a crime or a violator by only emphasizing the actions of miners without a permit including criminal acts as stipulated in article 158 of Law No. 30 of 2020 concerning Amendments to the Law Law Number 4 of 2009 concerning Minerals and Coal.

Judging from the social stigma, the mistake is a situation where someone can be blamed because that person should have done something else. Mistakes are marked by a person’s awareness and soul, a madman will not be held criminally responsible because

a person whose mental state is disturbed can be said to be unaware of what he is doing. Criminal responsibility in foreign terms is also known as *theorekenbaardheid* or criminal responsibility which leads to punishment with the intention of determining whether a defendant or suspect is held accountable for a criminal act that occurred or not.

Peti's punishment in substance is in criminal offenses outside the Criminal Code. Article 103 of the Criminal Code is a special crime which contains criminal provisions in the Minerba Law that are regulated outside the Criminal Code itself. Criminal acts are shown by the emergence of dangers in various fields which result in harm to the wider community and the environment. In some regulations, it does not mention or determine the qualifications of a crime as a crime or violation, so that juridically it can cause problems in enforcing the general rules of the Criminal Code which are not specifically regulated in special laws outside the Criminal Code.

### 3 Conclusion

Arrangements for the settlement of gold mining without a permit as stipulated in the Minerba Law Number 3 of 2020 concerning amendments to Law Number 4 of 2009 concerning Mineral and Coal Mining, there are still juridical problems in its application, especially those related to the determination of juridical qualifications. Criminal mining without a permit as a crime or violation. The application of criminal sanctions in the Minerba Law so far is still in the form of a combination of imprisonment, excessively heavy fines, and compensation and other additional penalties that are deemed not to provide justice, certainty and legal benefits for the parties involved in solving gold mining criminal issues. Without a permit, besides that, from a regulatory perspective, there are also no regulations at the level of a law which are used as a legal basis in settling cases of gold mining without a permit through a restorative justice approach, but rather in the form of general regulations, such as Regulation of the Indonesian National Police Number 8 of 2021 concerning Handling Actions Criminal based on Restorative Justice, Attorney General Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice, as well as through Decree of the Director General of the General Judiciary Agency of the Supreme Court of the Republic of Indonesia No.1691/DJU/SK/PS.00/12/2020 concerning Enforcement of Guidelines for the Implementation of Justice restorative.

The aspects of certainty, benefit and legal justice in the settlement of cases of gold mining without a permit through the Minerba Law Number 3 of 2020 concerning amendments to Law Number 4 of 2009 concerning Mineral and coal mining have not been realized because in the Minerba Law Number 3 of 2020 regarding changes regarding Law No. 4 of 2009 concerning Mineral and coal mining, there are still many provisions in articles that are not clear and firm in regulating, among others, the application of sanctions that are equated between petty petty offenders and corporations as well as from the formulation of criminal sanctions which only regulate criminal maximum without any provisions governing the shortest or lowest penalty which at the implementation stage raises doubts for the judiciary to prosecute perpetrators of gold mining without small-scale permits so that it is not uncommon for this to lead to imprisonment so that a regulation at the level of law is needed that guarantees the justice and legal benefits



in solving gold mining without a permit through a restorative justice approach through penal mediation which is realized in the form of direct relationships that focus on solving problems with the aim of repairing losses caused or related to criminal acts instead of emphasizing punishment in the form of imprisonment.

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