

A Combined Imposition of Administrative and Criminal Sanctions
for Negligence of Corporate Post-Mining Obligations:
A Comparative Study of Indonesian, Thailand, and South African
Mining Regulations*

การกำหนดบทลงโทษทางปกครองและทางอาญาร่วมกันในกรณีความประมาท
เลินเล่อของภาระผูกพันหลังการทำเหมืองขององค์กร: กรณีศึกษาเปรียบเทียบ
กฎระเบียบการทำเหมืองแร่ของประเทศอินโดนีเซีย ไทย และแอฟริกาใต้

Fachrian Rizki

ฟาเรียน ริซกี

LL.M Candidate in Business Laws (International Programme)

Faculty of Law, Chulalongkorn University, Phayathai Road, Pathumwan, Bangkok 10330

นิสิตในหลักสูตรนิติศาสตรมหาบัณฑิต สาขากฎหมายธุรกิจ ภาควิชาภาษาอังกฤษ

คณะนิติศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย ถนนพญาไท แขวงวังใหม่ เขตปทุมวัน กรุงเทพมหานคร 10330

Corresponding author E-mail: fachrianrizki98@gmail.com

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Abstract

The legal formulation for a proper and sufficient provision in punishing corporate post-mining obligations is unfortunately not being noticed by the legislature of mineral producer countries around the globe. Whereas, negligence of corporate post-mining obligations has brought direct and indirect damages, not only against the environment and the local community but also against the corporation itself. It is argued that the imposition of administrative sanctions against the negligence of corporate post-mining obligations has considerably met the due deter. Nevertheless, by referring to the Indonesian, Thailand, and South African mining regulations, negligence of corporate post-mining obligations is punishable by a combined imposition of administrative and criminal sanctions both to the corporation and its responsible officers. Thus, it is questioned whether or not such combined imposition of administrative and criminal

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sanctions for the negligence of corporate post-mining obligations is disproportional and over-deterrent to the side of the corporation. Therefore, this article will elaborate and discuss the application of the combined imposition of administrative and criminal sanctions for the negligence of corporate post-mining obligations to acknowledge whether or not such combined imposition is disproportional and over-deterrent.

Keywords: Minerals Mining Law, Corporate Criminal Misconduct, Corporate Negligence, Corporate Post-Mining Obligations, Administrative Sanction, Criminal Sanction, Combined Imposition of Sanctions

บทคัดย่อ

วิธีการทางกฎหมายที่เหมาะสมและบทบัญญัติของกฎหมายที่เพียงพอต่อการลงโทษนิติบุคคล ซึ่งละเลยหน้าที่อันต้องกระทำการหลังการขุดเหมืองแร่ นั้นถือเป็นประเด็นในทางกฎหมายที่หลายประเทศทั่วโลกไม่ได้ให้ความสนใจเท่าไรนัก นอกจากการละเว้นหน้าที่ดังกล่าวโดยประมาทจะส่งผลร้ายทั้งทางตรงและทางอ้อมต่อสิ่งแวดล้อมและชุมชน บริเวณรอบพื้นที่แล้ว การกระทำดังกล่าวยังส่งผลเสียต่อด้านนิติบุคคลด้วย ในอินโดนีเซียมีผู้เห็นว่าการบังคับใช้มาตรการบังคับทางปกครองเพียงอย่างเดียวก็สามารถป้องปรามการกระทำดังกล่าวได้อย่างเพียงพอ แต่อย่างไรก็ตาม เมื่อได้ศึกษาเปรียบเทียบกฎหมายของอินโดนีเซียกับประเทศไทยและแอฟริกาใต้แล้ว พบว่ามีการใช้มาตรการทางอาญาควบคู่ไปกับมาตรการบังคับทางปกครอง ดังนั้น กรณีดังกล่าวจึงนำมาสู่ปัญหาของงานวิจัยฉบับนี้ว่า การบังคับใช้มาตรการทางอาญาควบคู่ไปกับมาตรการบังคับทางปกครองต่อความผิดฐานละเลยหน้าที่ที่พึงต้องกระทำหลังการขุดเหมืองแร่โดยประมาทจะมีผลสัมฤทธิ์มากกว่าการใช้มาตรการบังคับทางปกครองเพียงอย่างเดียวหรือไม่ และการใช้โทษทางอาญาในความผิดฐานดังกล่าวนี้ขัดต่อหลักความได้สัดส่วนและหลักการกำหนดความผิดในทางอาญาหรือไม่

บทความวิจัยนี้จึงมุ่งศึกษาปัญหาดังกล่าวโดยเน้นการวิเคราะห์หลักเกณฑ์ทางทฤษฎีที่เกี่ยวข้องและเปรียบเทียบกฎหมายของประเทศไทยและแอฟริกาใต้

คำสำคัญ: กฎหมายเหมืองแร่, การประพฤตินิยมชอบทางอาญาขององค์กร, ความประมาทเลินเล่อขององค์กร, ภาระหน้าที่หลังการทำเหมืองแร่ขององค์กร, การลงโทษทางปกครอง, การลงโทษทางอาญา, การกำหนดบทลงโทษแบบผสมผสาน

INTRODUCTION

During the development of corporate criminal misconduct against the environment in the global context, violations of environmental regulations were often classified as regulatory offences, whereby the moral blameworthiness of such regulatory offences is

absent.¹ However, that notion is developed since the element of negligence and blameworthiness are applied for the importance to held violators of environmental regulations criminally liable.² The negligence ‘*does not involve the inquiry into the state of mind of the accused*’,³ making the determinant of the negligence to environmental regulations will be depending on the corporate’s failure to comply with the standards of the environmental regulations.

Corporate negligence in its post-mining obligations against the environment has been contributing to direct and indirect damages, not only against the environment and the local community but also against the corporation itself. This is because the mining activities are inseparable from the livelihood of the people surrounding the mining areas. This implies that the impacts of the mining activities are not only limited to the environment but also to the socio-economic of the local residents.⁴ Moreover, the continuing presence of negligence of corporate post-mining obligations against the environment will also affect the integrity of the mining industry. Nevertheless, proper and deterrent punishments for the negligence of corporate post-mining obligations are likely to be left disregarded.

In Indonesia, by referring to Article 96 Subsection (c) of Act Number 4 of 2009 on Mineral and Coal Mining Act (hereinafter referred to as the 2009 Mineral and Coal Mining Act of Indonesia), the mining corporation was obliged to carry out management and monitoring, including reclamation and post-mining activity (hereinafter referred to as corporate post-mining obligations),⁵ against the environment surrounding the mining areas. However, if the mining corporation tends to neglect its legal obligations, it might only be subjected to administrative sanctions as set in Article 151 Subsection (2) of the 2009 Mineral and Coal Mining Act of Indonesia, meaning that such negligence would not be prosecuted before the criminal court. Nevertheless, since the enactment of Act Number 3 of 2020 on the Amendment of Act Number 4 of 2009 on the Mineral and Coal Mining Act (hereinafter referred to as the 2020 Mineral and Coal Mining Act of Indonesia), as an

¹ Julie Adshead, “Doing Justice to the Environment”, in *The Journal of Criminal Law* 77, 3 (2013), p.218.

² Ibid.

³ David Kerem, “Change We Can Believe in: Comparative Perspectives on the Criminalization of Corporate Negligence”, in *Transactions: The Tennessee Journal of Business Law* 14, 1 (2012), p.109.

⁴ Afidah Nur Rizki and Amrie Firmansyah, “Kewajiban Lingkungan atas Reklamasi dan Pasca Tambang Pada Perusahaan Sektor Pertambangan di Indonesia [Environmental Obligations for Reclamation and Post-Mining in Mining Sector Companies in Indonesia]”, in *EKOMBIS Sains* 6, 1 (2021), p.38.

⁵ People’s Representative Council, *Act Number 4 of 2009 on Mineral and Coal Mining*, (Jakarta: Ministry of the State Secretariat, 2009), a 96 (c) (ID).

amendment to the 2009 Mineral and Coal Mining Act, the negligence of corporate post-mining obligations is eventually punishable by criminal sanctions.⁶

In this regard, this research will further discuss the punishment for the negligence of corporate post-mining obligations to acknowledge whether or not the punishment of such negligence has been proportional and sufficient in deterring and preventing the negligence of corporate post-mining obligations against the environment. It is interesting since, on the one hand, the imposition of both administrative and criminal sanctions is deemed over-deterrent, believing that the deterrence effect of administrative sanctions alone is considerably high.⁷ However, on the other hand, the imposition of administrative sanctions alone, such as fines even with relatively high amounts, is deemed disproportional to the overwhelming profits resulting from the corporate business activities, considering that fines and other administrative sanctions in the perspective of corporation are considerably as '*cost of doing businesses*'.⁸

Therefore, to acknowledge whether or not the punishment for the negligence of corporate post-mining obligations is proportional and sufficient, it is necessary to conduct a comparative legal study. It is beneficial to conduct a comparative legal study to understand different approaches applied by different countries. The primary objective is to find a better reach of laws in punishing negligence of corporate post-mining obligations against the environment. The comparative legal analysis will be conducted by comparing the rules within the 2020 Mineral and Coal Mining Act of Indonesia to the rules of some other jurisdictions which punish negligence of corporate post-mining obligations. The selected foreign jurisdictions are Indonesia, Thailand, and South Africa. These countries are selected because the countries have a similarity in their legal tradition, since both Indonesia and Thailand adopt the civil law system,⁹ and South Africa adopts a hybrid legal tradition one of which is the civil law system.¹⁰ Moreover, there are economic and developmental similarities between the countries. This implies that through this

⁶ People's Representative Council, **Act Number 3 of 2020 on the Amendment of the Act Number 4 of 2009 on Mineral and Coal Mining**, (Jakarta: Ministry of the State Secretariat, 2020), a 161B (1) (ID).

⁷ Anonymous, "Developments in the Law: Corporate Crime: Regulating Corporate Behaviour through Criminal Sanctions", in **Harvard Law Review** 92, 6 (1979), p.1373.

⁸ Nicholas T. Schnell, "Beyond All Bounds of Civility: An Analysis of Administrative Sanctions against Responsible Corporate Officers", in **Journal of Corporation Law** 42, 3 (2017), p.715.

⁹ Margaret Fordham, "Comparative Legal Traditions: Introducing the Common Law to Civil Lawyers in Asia", in **Asian Journal of Comparative Law** 1, 1 (2006), p.1.

¹⁰ The University of Melbourne, "The South African Legal System," [online] Available from : <https://unimelb.libguides.com/c.php?g=929734&p=6718215#:~:text=The%20Republic%20of%20South%20Africa%20is%20a%20constitutional,common%20law%2C%20customary%20law%20and%20religious%20personal%20law.> [17 July 2023]

comparative legal study, it is expected that there will be found foreign laws which are considered to have a preferable reach in the punishment of negligence of corporate post-mining obligations and may contribute more directly to protecting the environment and avoiding damages. Finally, it is hoped that Indonesia may transplant the deemed preferable provisions in the punishment of the negligence of corporate post-mining obligations so that the future mining regulation of Indonesia can be a just, firm, and environmentally-friendly regulation that brings about justice and order to all of the mining stakeholders.

RESEARCH METHODOLOGY

The type of this research will be a comparative research which is intended to compare the applicable laws of different countries. This documentary research will be done by researching library materials with the objective to study the legislation by examining all relevant laws and regulations to the research. This research uses secondary data sources, which are comprised of but not limited to the legislations, law reference books, journals, and websites. The collected data are analysed and interpreted qualitatively to answer the research questions.

RESULTS AND DISCUSSIONS

1. Damages Resulting from Corporate Activities

Corporate business activity, in particular the business linked with the exploitation of natural resources, is closely related to the damages either environmental or socio-economic. One of the most distinguished business sectors linked to the exploitation of natural resources is the mining industry. The process of mining exploration and exploitation, when operated unorderly, has always injured the environmental landscape of the mining area,¹¹ which is an instance of the predicted impact of the unregulated mining industry. Sadly, it is often overlooked that the unregulated mining industry will always be linked with the presence of unanticipated impacts, not only on the environment but also on the socio-economic of the people who reside in the mining areas and the corporation itself. In reality, the damages are most likely to manifest later as an indirect result of corporate criminal misconduct, implying that the direct consequences are less likely.

¹¹ Prafful Saini, "Impact of Coal Mining on the Environment and the Climate", in *Law Essentials Journal* 1, 1 (2020), p.15.

Corporate mining activities may result in a sequent of environmental damages, one of the most prominent damages is the physical environment of the mining areas. These environmental damages include water, land, and air pollution; destruction of environmental landscapes and habitats; deforestation and also erosion.¹² Furthermore, in the sector of the coal mining industry, the damages will be related to the loss of biodiversity and degradation of natural resources as well as global warming.¹³ These damages arise from the strong impact of mining activities on the environment of the mining areas, thus the deforestation of the environment surrounding the mining areas is unavoidable. Even though deforestation is considerably the unavoidable harm of mining activities, however, the effects of this harm may be prevented through proper management and monitoring during and subsequent to the closure of the mining operation. This implies that when the effect of deforestation cannot be prevented through proper management and monitoring, the corporation will be administratively or criminally liable.

Corporate criminal misconduct against the environment in the mining sector is also, directly and indirectly, damaging the socio-economic of the people living surrounding the mining areas. The most prominent socio-economic damage is the loss of residents' livelihood against their environment, due to the destruction of their environmental landscape. This environmental landscape destruction, directly, will also result in economic losses suffered by the affected community.¹⁴ However, it is often forgotten that the indirect impact may create larger and greater effects to the community, due to the circumstance that the indirect impact is difficult to predict and assess.¹⁵ The indirect consequences of corporate criminal misconduct provide broader effects on the socio-economic of the people living surrounding the mining areas because the indirect damages resulting from the corporate activities will be experienced far away after the closure of the mining areas.

This might be argued that the presence of the mining industry may improve the economic condition of the people by presenting alternative employment to the impacted community. Nonetheless, the mining industry will only last temporarily, meaning that the exploited natural resources will be completely exhausted making the

¹² Ibid.

¹³ Ibid., p. 23.

¹⁴ Gabrio Forti and Arianna Visconti, "From Economic Crime to Corporate Violence: The Multifaceted Harms of Corporate Crime," in **The Handbook of White-Collar Crime**, ed. Melissa L. Rorie (John Wiley & Sons, Inc, 2020), p.68.

¹⁵ Ibid., p. 68-69.

corporation will stop its business activities. As a result, the people will have no choice other than to withdraw from their employment offered by the corporation and return to their basic occupation. When the land is damaged, the local resident cannot enjoy their land for cultivation purposes any longer. Even if the presence of a corporation may contribute to the economy of the local resident, however, its presence is temporary, meaning that when the mines closed, the local resident will not enjoy any further occupational privileges, and what is left for the people is the damaged and uncultivable environment.

Corporate criminal misconduct may also create damages that may be indicated through corporate victimisation, notwithstanding that corporate victimisation is considerably hard enough to be detected at the early stage of corporate criminal misconduct. It takes years to finally realise that corporate criminal misconduct is producing victims through its indirect impacts. This is due to the notion that corporations deemed not intending to produce victims, but their orientation for profit-maximisation frequently results in numbers of victims, thus making the blameworthiness of the corporation hard to prove.¹⁶ When connecting to the mining industry, this corporate victimisation could be in the form of late-detected disease derived from water, air, and land pollution which results in casualties.

Moreover, the expansion of the mining industry, either from a national or multinational corporation, has a direct correlation to the presence of indigenous movements opposing the appearance of large-scale mining corporations impacting their land and culture.¹⁷ These indigenous people are certainly vulnerable to the direct or indirect environmental damages resulting from corporate activities, due to their strong dependency on the environmental resources which is essential for their lives.¹⁸

¹⁶ John Navarro, "Corporate Crime," in **The Encyclopedia of Criminology and Criminal Justice**, ed. Jay S. Albanese (John Wiley & Sons, Inc, 2014), p.4-5.

¹⁷ Al Gedicks, "Transnational Mining Corporations, the Environment, and Indigenous Communities", in **Brown Journal of World Affairs** 22, 1 (2015), p.130-131.

¹⁸ *Ibid.*, p. 131.

In relation to this, Hatton argues that the view believing that an environmental offence is not a serious offence is derived from the indirect effect of the environmental offence which harms the people or threatens social stability.¹⁹ Hatton further explains that the presence of environmental law is not only ensuring justice for the people but also for the environment, of the present and the future generation.²⁰

Corporate criminal misconduct against the environment may, directly and indirectly, damage the environment and the socio-economic of the affected community. However, these are not the only damages resulting from corporate criminal misconduct against the environment, whereby the corporation itself may also experience direct and indirect damages. One of the most serious damages that may be experienced by the concerned corporation is reputational damages. According to Adshead, the present environmental offences involving corporate activities are somehow greater compared with the past, making the environmental offences attract a serious stigma to the corporation.²¹ The stigma may severely damage the corporate reputation by attracting public attention which results in significant monetary consequences against the deviant corporation.²²

Corporations, particularly the large scale, are concerned about their good reputation in doing business. Thus, corporations are highly aware of the lawsuits brought by victims of environmental and human rights abuses.²³ These circumstances might cause damages directly or indirectly to the reputation of the corporation itself, as the result of its misconduct. The reputation, in certain, is directly proportional to the corporate profitability, meaning that damages to corporate reputation will result in the loss of market preference; fall of the corporation's share prices as well as the cessation of business activities.

2. Negligence of Corporate Post-Mining Obligations

Often classified, violation of environmental regulation is considered a form of regulatory offence, implying that there is no moral blameworthiness for regulatory offences.²⁴ However, in its development, the element of negligence and blameworthiness

¹⁹ Julie Adshead, "Doing Justice to the Environment", in *The Journal of Criminal Law*, p.230.

²⁰ Ibid.

²¹ Ibid., p. 229.

²² Ibid.

²³ Al Gedicks, "Transnational Mining Corporations, the Environment, and Indigenous Communities", in *Brown Journal of World Affairs*, p.136.

²⁴ Julie Adshead, "Doing Justice to the Environment", in *The Journal of Criminal Law*, p.218.

are applied to be able to criminally prosecute the violator of environmental regulations.²⁵ According to West's Encyclopaedia of American Law, criminal negligence is defined as '*the failure to use reasonable care to avoid consequences that threatened or harm the safety of the public and that are the foreseeable outcome of acting in a particular manner*'.²⁶ This definition expresses that negligence is considered a criminal act that poses a threat and endangers public safety which results from careless behaviour in avoiding possible damages. Therefore, the failure to comply with environmental regulations, particularly the corporate post-mining obligations, can be considered criminal negligence under this definition.

Further, Noyon and Langemeijer explain that the word 'action' within the word 'criminal action' has a positive and negative meaning, this means that an action has a positive meaning if the action has been carried out, otherwise, an action has a negative meaning if the action has not been carried out.²⁷ In consequence, negligence can be defined as an action that has not been carried out as it is supposed to be carried out, hence corporation may certainly be held criminally liable for its negligence. Negligence, which is different from the intention in doing criminal misconduct, '*does not involve the inquiry into the state of mind of the accused*',²⁸ meaning that the criminal culpability of the deviant corporation will be based on its failure to comply with the applied standards. In this regard, the corporate post-mining obligations against the environment.

The punishment of negligence of corporate post-mining obligations needs to be taken into greater attention, considering the direct and indirect damages that may be experienced by the physical environment; the local community; and the corporation itself as the result of such negligence. Arguably, the effects of the negligence of corporate post-mining obligations are not visual, due to the effects most likely appearing after a period of time. For instance, corporate victimisation which considerably hard enough to be detected at the early stage of corporate misconduct, in this regard the negligence of corporate post-mining obligations. This circumstance will eventually result in casualties since the indirect impact of the negligence of corporate post-mining obligations will not be detected at that very moment, in particular in the case of the abandonment of a

²⁵ Ibid.

²⁶ West's Encyclopedia of American Law, "Criminal Negligence," [online] Available from : <https://legal-dictionary.thefreedictionary.com/negligence>. [9 March 2023]

²⁷ Paul W. Yudoprakoso, **Pertanggungjawaban Pidana Korporasi dan Pemidanaan Korporasi [Corporate Criminal Liability and Corporate Punishment]**, (Yogyakarta: Kanisius, 2016), p.34.

²⁸ David Kerem, "Change We Can Believe in: Comparative Perspectives on the Criminalization of Corporate Negligence", in **Transactions: The Tennessee Journal of Business Law**, p.109.

closed mining area. Therefore, the formulation of a proper provision in the punishment of the negligence of corporate post-mining obligations will be directly proportional to the efficacy in deterring and preventing the negligence.

3. Proportionality and Sufficiency of A Combined Imposition of Administrative and Criminal Sanctions

Fundamentally, criminal action is considered to be proportionally punished according to the types of crime committed. It embodied a notion believing that the fairness of punishment imposition should be depended on the proportionality in punishing an offence based on its wickedness or seriousness. The principle of proportionality which is then developed, requires that punishments should be proportional to the seriousness of a crime.²⁹ Hart explained that *‘at the sentence stage, the punishment must bear some sort of relationship to the act: it must in some sense “fit” it or be “proportionate” to it’*.³⁰ Montesquieu noted that *‘it is a great abuse amongst us to subject to the same punishment a person that only robs on the highway, and another that robs and murder. Obvious it is that for the public security some difference should be made in the punishment’*.³¹ Further, Montesquieu explained that *‘it is essential that there should be a certain proportion in punishments, because it is essential that a great crime should be avoided rather than a lesser one, and that which is more pernicious to society rather than that which is less’*.³² Likewise, Beccaria discussed that *‘if an equal punishment is meted out to two crimes that offend society equally, the men find no stronger obstacle standing in the way of committing the more serious crime if it holds a greater advantage’*.³³ These refer to the same idea that the proportionality of punishment is not merely ended up with the proportional punishment against criminal actors only, but it is also applicable as an instrumental, which is deemed to reduce the rate of similar crimes in the future. These indicate that the fitness and proportionality of the punishments will be directly proportional to the prevention of crime in the future.

²⁹ Andrew von Hirsch, “Proportionality in the Philosophy of Punishment”, in **Crime and Justice** 16 (1992), p.56.

³⁰ Thomas J. Miceli, “On Proportionality of Punishments and the Economic Theory of Crime”, in **European Journal of Law and Economics** 46 (2016), p.304.

³¹ *Ibid.*, p. 304-305.

³² *Ibid.*, p. 305.

³³ *Ibid.*

Concerning the proportionality of punishment, Miceli in his account noted four conceptions of proportionality norm in punishing criminal perpetrators, *id est*: (i) the first concept of proportionality: punishments should equal harms; (ii) the second concept of proportionality: punishments should increase with harms, and (iii) the third and fourth concept of proportionality: expected punishments should equal (increase with) harms.³⁴ Based on the first conception, it is interpreted that the imposed punishments should be equal to the harmfulness of the committed crimes. Miceli connected this conception to economic theory, which overcoming the measurement problem to the equity of the punishments and harms through dollar-equivalent terms, noting that the amount of monetary punishments should be equated to the dollar value of the harm that is imposed by the perpetrator on society.³⁵ Based on the second conception, it is argued that the imposition of punishments should be proportional to the wickedness or seriousness of the crimes which is indicated by the scale of imposed punishments.³⁶ While the third and fourth conceptions rely on criminal deterrence, which is not the imposition of the actual punishments but the expected or can be said the effective punishment.³⁷

In connection with the application of sanctions against corporations, Rich, in her article, provides several interesting arguments. Rich describes the three parts of why she argues that corporations cannot be punished. In essence, Rich tries to explain that if suffering is the goal of punishing a corporation, then the corporation cannot be punished because a corporation cannot suffer.³⁸ Nonetheless, Rich believes that although punishment cannot make a corporation suffer, punishment can make a corporation financially suffer by imposing penalties in the form of confiscation of the corporation's assets.³⁹ This is in line with my point of view that the corporation itself, other than its responsible officer, should be punished by administrative sanctions, in this regard in the form of financial penalties. Even so, punishments that cause suffering physically and mentally, must still be given to corporate officers, who are responsible for corporate activities, which are considered to be against the applicable law. Since in practise, criminal prosecution is applied as an additional sanction to administrative and civil sanctions, particularly in the matter of corporate criminal misconduct against the

³⁴ *Ibid.*, p. 306-307.

³⁵ *Ibid.*, p. 306.

³⁶ *Ibid.*

³⁷ *Ibid.*, p. 306-307.

³⁸ Sylvia Rich, "Corporate Criminals and Punishment Theory", in **Canadian Journal of Law and Jurisprudence** 29 (2016), p.110.

³⁹ *Ibid.*

environment, which applies to both corporation and its responsible officer as the result of their collective misconduct.⁴⁰ Through the combined imposition of administrative and criminal sanctions, it is believed that such a combined imposition may shape the corporate behaviour to finally comply with its post-mining obligations against the environment.

Even if the status of a corporation as a subject of criminal law is still debated by legal scholars, however, the argument that I stand on is that corporation, as well as its responsible officers, are subject to criminal law as long as the criminal law recognises so.⁴¹ Indonesia, Thailand, and South Africa altogether recognise that corporation is also considered a subject of criminal law under their respective mining regulations. Similarly, the status of the corporate mental state is also questioned, nonetheless criminalising negligence is different from criminalising conventional crime whereby there is no need to prove the intention of the corporation against the negligence.⁴² Therefore, according to this view, the liability of the corporation will be flown from the fact that the corporation has failed to fulfil its post-mining obligations against the environment.

On the contrary, there is a notion that the imposition of criminal sanctions against individuals involved in corporate criminal misconduct is somehow over-deterrence, believing that the deterrent effect of the administrative sanctions alone is considerably high.⁴³ However, it is sometimes forgotten that the damages, either directly or indirectly, resulting from corporate criminal misconduct against the environment are extremely high. Nonetheless, the corporate officers, as corporate actors, play an important role in the negligence of the corporation. Further, since the individuals who involve in corporate misconduct have a close relation to corporate interests, not merely for the interests of the individuals themselves,⁴⁴ thus, the individuals will also be liable for corporate negligence. Therefore, the application of criminal penalties against the individual, as the additional sanction to the administrative sanctions against the corporation, has met the due deter while not over-detering the concerned individual.

⁴⁰ Sally S. Simpson et al., “An Empirical Assessment of Corporate Environmental Crime-Control Strategies”, in *Journal of Criminal Law and Criminology* 103, 1 (2013), p.232.

⁴¹ Paul W. Yudoprakoso, *Pertanggungjawaban Pidana Korporasi dan Pemidanaan Korporasi [Corporate Criminal Liability and Corporate Punishment]*, p.68.

⁴² David Kerem, “Change We Can Believe in: Comparative Perspectives on the Criminalization of Corporate Negligence”, in *Transactions: The Tennessee Journal of Business Law*, p.109.

⁴³ Anonymous, “Developments in the Law: Corporate Crime: Regulating Corporate Behaviour through Criminal Sanctions”, in *Harvard Law Review*, p.1373.

⁴⁴ David Kerem, “Change We Can Believe in: Comparative Perspectives on the Criminalization of Corporate Negligence”, in *Transactions: The Tennessee Journal of Business Law*, p.96.

4. Regulation on Corporate Post-Mining Obligations of Indonesia, Thailand, and South Africa

Indonesia, Thailand, and South Africa have been aware that the establishment of proper and sufficient mining regulations is important for ensuring the equilibrium in the economic and social development of the mining industries by paying more attention to environmental protections to ensure the continuity of the environment for the present and future generations of the countries. In this regard, it is necessary to compare the applied mining regulations of Indonesia, Thailand, and South Africa to have a closer view of how they regulate and punish negligence of corporate post-mining obligations against the environment. Finally, from the legal comparison, there will be compiled the deemed proper and sufficient mining regulations of the countries to establish a legal model for punishing negligence of corporate post-mining obligations.

In Indonesia, under Article 96 Subsection (b) of the 2020 Mineral and Coal Mining Act of Indonesia, the corporation is obliged to *'carry out management and monitoring, including reclamation and/or post-mining activity, surrounding the mining area.'* This provision has clearly emphasised that the corporation is obliged to carry out one of the two post-mining obligations against the environment, implying that the non-fulfilment of the other post-mining obligations cannot be considered as negligence to corporate post-mining obligations against the environment in Indonesia. This provision, I argue, is a setback to the previous mining regulation of Indonesia which obliged corporations to carry out both the post-mining obligations against the environment.⁴⁵

In Thailand, under Section 68 Subsection (8) of the Thai Minerals Act B.E. 2560 (2017) (hereinafter referred to as the 2017 Thai Minerals Act), it is the obligation of the corporation to *'rehabilitate the mined area, during the mining and subsequent to the closure of the mine ...'*. Moreover, the corporation must conduct surveillance of the impacts on the environmental quality and public health during and subsequent to the closure of the exploited mining areas.⁴⁶ This clearly indicates that the 2017 Thai Minerals Act also obliges corporations to carry out post-mining obligations to carry out management and monitoring of the exploited mining areas.

⁴⁵ Cf People's Representative Council, Short Act Number 4 of 2009 on Mineral and Coal Mining, a 96 (c) (ID); and Act Number 3 of 2020 on the Amendment of the Act Number 4 of 2009 on Mineral and Coal Mining, s 96 (b) (ID).

⁴⁶ National Assembly of Thailand, **Thai Minerals Act B.E. 2560 (2017)**, (Bangkok: The Secretariat of the Cabinet, 2017), s 68 (8) (TH).

While in South Africa, by referring to Section 25 of Act Number 49 of 2008 on Mineral and Petroleum Resources Development Amendment Act (hereinafter referred to as the 2008 Mineral and Petroleum Resources Development Act of South Africa), the corporation must '*comply with the conditions of the environmental authorisation.*', for the importance to manage and monitor the mining impacts after the mining operation has been carried out by the corporation.⁴⁷ Under the law of South Africa, environmental authorisation is defined as a type of measure applied to prevent future impacts on the environment and socio-economic of the people resulting from corporate mining activities.⁴⁸ In connection with this, if there is occurred environmental damages against the mining areas as a result of corporate mining operations, the government of South Africa may provide supervision against the concerned corporation through the Ministry of Environmental Affairs and Tourism.⁴⁹ This supervision aimed to take necessary measures to prevent and rehabilitate the concurrence impacts.⁵⁰ Even though the corporate post-mining obligations against the environment have not been clearly specified under the 2008 Mineral and Petroleum Resources Development Act of South Africa, nevertheless, by connecting the related Acts of South Africa, it can be concluded that corporations must carry out management and monitoring the environmental and socio-economic impacts of the mining activities which specified under the environmental authorisation.

According to these three regulations of the compared jurisdictions, it can be considered that the corporate post-mining obligation against the environment to rehabilitate the mining areas is a mandatory obligation of a mining corporation. Regardless of the difference in the applied terms of the countries, it is clear that all of the countries are aware that corporate post-mining obligations against the environment are necessary for the importance of environmental continuity.

It is also prominent that by referring to the aforementioned provisions of the countries, there are also differences, in particular regarding the conception of the corporate post-mining obligations, within the mining regulation of the compared jurisdictions. Firstly, the mining regulation of Indonesia, which is different from Thailand

⁴⁷ National Assembly of South Africa, **Act Number 8 of 2004 on the National Environmental Management Amendment Act**, (Cape Town: National Assembly of South Africa, 2004), s 24 (4) (f) (ZA).

⁴⁸ National Assembly of South Africa, **Act Number 107 of 1998 on the National Environmental Management Act**, (Cape Town: National Assembly of South Africa, 1998), s 23 (2) (b)(c) (ZA).

⁴⁹ National Assembly of South Africa, **Act Number 49 of 2008 on Mineral and Petroleum Resources Development Amendment Act**, (Cape Town: National Assembly of South Africa, 2009), s 45 (1) (ZA).

⁵⁰ National Assembly of South Africa, Short Act Number 49 of 2008 on Mineral and Petroleum Resources Development Amendment Act, s 46 (1) (ZA).

and South Africa, directly mentions that the corporation is obliged to carry out reclamation or post-mining activity against the exploited mining areas as a form of corporate post-mining obligations against the environment. In relation to this, in Indonesia, under Article 1 Subsection (26) and Subsection (27) of the 2020 Mineral and Coal Mining Act of Indonesia, it is clearly defined definitions of reclamation and post-mining activity which cannot be found in Thailand and South Africa. These definitions are applied to differentiate the type and process of each of the corporate post-mining obligations so that these corporate post-mining obligations can be easily distinguished.

The mining regulation of Thailand straightforwardly mentions that the corporation must carry out management and monitoring of the exploited mining areas, without further explaining the threshold of the management and monitoring as the mining regulation of Indonesia does. Whereas, the 2017 Thai Minerals Act may define the corporate post-mining obligations under Section 4 of the Act, since several used terms are defined under that Section.

The mining regulation of South Africa, different from Indonesia and Thailand, does not mention that management and monitoring of the exploited mining areas is obligatory for the corporation. Instead, the mining regulation of South Africa mentions that the corporation must comply with the conditions of the environmental authorisation, regardless that the definition and conditions of the environmental authorisation are regulated under separate regulations.⁵¹ This circumstance leads to confusion in acknowledging the mandatory obligations of the corporation against its exploited mining areas.

Even though Indonesia, Thailand, and South Africa have similarities in their provisions in the regulation of corporate post-mining obligations against the environment, nevertheless, the provisions of these countries have their distinctive and unique measures to regulate the corporate post-mining obligations against the environment. These unique and distinctive measures, I believe, derived from the practical issues experienced by each of the countries that are expected to be more directly sufficient in preventing the negligence of corporate post-mining obligations against the environment. This is due to the mining regulations of the countries explicitly mentioning that their previous mining regulations are no longer relevant to deal with the current development in the mining sector. In this regard, it will be very beneficial to acknowledge the applicable measures that can be translated into the legal model to regulate; punish; and further prevent the negligence of corporate post-mining obligations against the environment in the future.

⁵¹ Cf National Assembly of South Africa, Short Act Number 107 of 1998 on the National Environmental Management Act, s 23 (2) (b)(c) (ZA); and Act Number 8 of 2004 on the National Environmental Management Amendment Act, s 24 (4) (f) (ZA).

5. Application of Administrative and Criminal Sanctions to Negligence of Corporate Post-Mining Obligations

In accordance with the applicable punishment to the negligence of corporate post-mining obligations against the environment, it is found that the compared jurisdictions commonly recognise two types of punishments imposable to the negligence of corporate post-mining obligations against the environment, *id est* administrative sanctions and criminal sanctions. It is also prominent that the compared jurisdictions recognise a combined imposition of administrative and criminal sanctions on the deviant corporation as well as its responsible officers.

In Indonesia, under the 2020 Mineral and Coal Mining Act of Indonesia, the imposition of sanctions against the negligence of corporate post-mining obligations will be depending on the timeline of the negligence. The 2020 Mineral and Coal Mining Act of Indonesia divides the negligence into: (i) the negligence before the closure of mining activity; and (ii) the negligence after the closure of mining activity. This indicates that, if the negligence occurs before the closure of mining activity, thus, the corporation will be punishable by administrative sanctions. On the contrary, if negligence occurs after the closure of mining activity, thus, the corporation will be punishable by criminal sanctions. In relation to this, there are several administrative sanctions imposable upon a deviant corporation for neglecting its post-mining obligations before the closure of mining activity. By referring to Article 151 Subsection (2) of the 2020 Mineral and Coal Mining Act of Indonesia, it is stated that '*Administrative sanctions as referred to in Subsection (1) are: (a) written reprimand; (b) fines; (c) cessation; and (d) revocation of mining licenses.*'

Similarly, in Thailand, if a corporation fails to comply with its post-mining obligations, the corporation will be imposed by administrative sanction in the form of revocation of mining license, which may only be imposed if the corporation is yet unable to comply with its post-mining obligations even after the corporation is given time to behave correctly and appropriately.⁵² This implies that the 2017 Thai Minerals Act will not directly revoke the mining license of the corporation, yet, the corporation will initially be given a specified time to behave accordingly.

While in South Africa, by referring to Section 93 Subsection (1) of the Act Number 28 of 2002 on Mineral and Petroleum Resources Development Act (hereinafter referred to as the 2002 Mineral and Petroleum Resources Development Act of South Africa), which is still in force, the imposable administrative sanctions against the corporation are in form

⁵² National Assembly of Thailand, Short Thai Minerals Act B.E. 2560 (2017), s 70 para (4) (TH).

of a suspension or termination to the mining operations. Moreover, subject to Section 47 Subsection (1) of the 2008 Mineral and Petroleum Resources Development Act of South Africa, the imposable administrative sanction against the corporation is in the form of cancellation of its mining licenses.⁵³ These Acts indicate that South Africa recognises three forms of administrative sanctions imposable upon the deviant corporation, *inter alia*: (i) suspension of mining operations; (ii) termination of mining operations; and (iii) cancellation of mining licenses.

These manifested that there are similarities between the compared jurisdictions in imposing administrative sanctions to the negligence of corporate post-mining obligations against the environment, particularly the types of administrative punishments recognised by the Indonesian and South African mining regulations. Notwithstanding, both Indonesia and South Africa use different terms to refer to the types of punishments which are actually the same, whereby Indonesia uses the terms cessation and revocation while South Africa uses the terms suspension or termination and cancellation.

In connection with the aforementioned provisions of the countries, it is prominent that there are several differences in the punishment of negligence of corporate post-mining obligations against the environment of the compared jurisdictions. Indonesia, different from Thailand and South Africa, recognises more complex types of administrative sanctions against the negligence of corporate post-mining obligations, including monetary penalties upon the deviant corporation. Moreover, Thailand only recognises a revocation of a mining license as a type of applicable administrative sanction upon the corporation, while South Africa recognises three types of administrative sanctions in the form of suspension or termination of the mining operations and cancellation of mining licenses upon the deviant corporation. These also indicated that the 2020 Mineral and Coal Mining Act of Indonesia applies a gradual imposition of administrative sanctions to the negligence of corporate post-mining obligations against the environment. This implies that the failure to comply with the corporate post-mining obligations will not directly result in the revocation of mining licenses, but the deviant corporation will be initially imposed by lower types of administrative sanctions, *inter alia* written reprimand and cessation.

Moving to the imposable criminal sanctions against the negligence of corporate post-mining obligations. In Indonesia, the deviant corporation will be imposable by criminal sanctions in the form of imprisonment not exceeding five years and fines not

⁵³ National Assembly of South Africa, Short Act Number 49 of 2008 on Mineral and Petroleum Resources Development Amendment Act, s 47 (1) (ZA).

exceeding IDR 100 billion,⁵⁴ which is approximately equal to USD 6.7 million. In addition, by referring to Article 161B Subsection (2) of the 2020 Mineral and Coal Mining Act of Indonesia, the corporation may also be imposed an additional penalty in the form of payment of funds to fulfil the neglected post-mining obligations.⁵⁵ Since the 2020 Mineral and Coal Mining Act of Indonesia has divided the types of negligence into two types, thus such criminal sanctions may only be imposed upon the negligence occurring after the closure of mining activity.

Similarly, in Thailand, the negligence of corporate post-mining obligations will be subjected to imprisonment not exceeding one year and/or a fine not exceeding THB 300.000,⁵⁶ which is approximately equal to USD 8.9 thousand. These show that both Indonesia and Thailand have quite similar measures in punishing negligence of corporate post-mining obligations against the environment, notwithstanding, the amount of the applicable criminal sanctions are very much different.

The applicable criminal sanctions in South Africa are clearly different from the other two countries since the 2008 Mineral and Petroleum Resources Development Act of South Africa leaves a legal vacuum in the punishment of negligence of corporate post-mining obligations against the environment. As it could be seen that the Act leaves a space for negligence to be punished by a flexible provision, which may also be applied to the other types of corporate misconduct that are not clearly punished within the mining regulations of South Africa. It is stated under Section 98 Subsection (1) of the 2002 Mineral and Petroleum Resources Development Act of South Africa that a corporation is guilty of an offence if it contravenes or fails to comply with any other provisions of this Act. The penalty for such an offence is governed in Section 99 Subsection (1) (g) of the 2002 Mineral and Petroleum Resources Development Act which imposes the corporation with imprisonment not exceeding six months and/or fines whose amounts do not explicitly stipulate. Therefore, it is implied that the mining regulations of South Africa, yet, do not specifically regulate that negligence of corporate post-mining obligation will be imposable by criminal sanction.

In these regards, there is a prominent similarity between both Indonesia and Thailand. Both countries directly ruled that neglecting corporate post-mining obligations will be punishable by criminal sanctions within their respective mining regulations. While

⁵⁴ People's Representative Council, Short Act Number 3 of 2020 on the Amendment of the Act Number 4 of 2009 on Mineral and Coal Mining, 161B (1) (ID).

⁵⁵ People's Representative Council, Short Act Number 3 of 2020 on the Amendment of the Act Number 4 of 2009 on Mineral and Coal Mining, 161B (2) (ID).

⁵⁶ National Assembly of Thailand, Short Thai Minerals Act B.E. 2560 (2017), 160 (1) (TH).

on the contrary, South Africa in its mining regulation does not even stipulate a specific provision intended to criminally punish the negligence of corporate post-mining obligations against the environment. Nevertheless, it can be concluded that Indonesia, Thailand, and South Africa share a similarity in the application of a combined imposition of administrative and criminal sanctions to the negligence of corporate post-mining obligations, regardless of the applicable criminal provision of South Africa is not exclusively intending to punish such a thing.

The emergence of administrative sanctions somehow, according to Adshead, is closely related to the rise of perception that the environmental offences are not as serious as conventional crime, leading to the decriminalisation of environmental offences.⁵⁷ Nonetheless, it is sometimes forgotten that the damages, either directly or indirectly, resulting from the negligence of corporate post-mining obligations against the environment are extremely high which affects the environment, the community as well as the corporation itself. Moreover, the responsible corporate officers are most likely involved in the negligence corporate of post-mining obligations, not because of the importance of the corporate officers themselves. Therefore, I strongly believe that the application of criminal sanction upon the individual as well as administrative sanction upon the corporation will meet the due deterrent while not over-detering the concerned individual as well as the corporation.

Therefore, to deter the deviant corporation, the sanctioning should be severely imposed upon the corporation as well as its responsible officers, because the fact that a corporation itself cannot be imprisoned, thus, the imprisonment should be attached to the responsible corporate officers, while the corporation itself should be bound by administrative sanctions, in particular the monetary penalties.⁵⁸ Moreover, the imposition of monetary penalties should be high enough to make the corporation, on the one hand, deters and on the other hand, perforce to discharge all of the profit obtained from the illegal activities.⁵⁹ What criminal regulation should regulate is the measure to discharge all of the profits obtained by the corporation from its deviant behaviour and at the same time to impose a monetary penalty in the form of monetary fines. Certainly, responsible corporate officers should also be imposed with proportional imprisonment.

⁵⁷ Julie Adshead, "Doing Justice to the Environment", in **The Journal of Criminal Law**, p.225-227.

⁵⁸ Anonymous, "Developments in the Law: Corporate Crime: Regulating Corporate Behaviour through Criminal Sanctions", in **Harvard Law Review**, p.1365.

⁵⁹ *Ibid.*, p. 1365-1366.

Indonesia can be a good example in the combined imposition of both administrative and criminal sanctions against the negligence of corporate post-mining obligations, due to Indonesia has clearly and explicitly threatened the negligence with considerably strong sanctioning. Under the 2020 Mineral and Coal Mining Act of Indonesia, the imposition of sanctions against the negligence of corporate post-mining obligations will be depending on the timeline of the negligence. This is due to the 2020 Mineral and Coal Mining Act dividing the negligence into: (i) the negligence before the closure of mining activity; and (ii) the negligence after the closure of mining activity. This means that when a corporation is neglecting its post-mining obligations before the mining activity is ceased and completed, the deviant corporation is punishable by administrative sanctions in the form of written reprimand; cessation; revocation of mining licenses, and fines. While the contrary, when a corporation is neglecting its post-mining obligations after the mining activity is finally ceased and completed, the deviant corporation is punishable by criminal sanctions in the form of imprisonment for a maximum of five years and fines for a maximum of IDR 100 billion,⁶⁰ which is approximately equal to USD 6.7 million. Moreover, the corporation may also be subject to an additional penalty in the form of payment of funds to fulfil the neglected post-mining obligations.

Accordingly, it can be said that the imposition of both of these punishments will not be given at the same time, due to the timelines of the negligence being different. In this regard, it is suggested to transplant the regulation of both the 2017 Thai Minerals Act and the 2020 Mineral and Coal Mining Act of Indonesia, because the two Acts have their respective advantages. From the side of the 2017 Thai Minerals Act, the measure which directly applies both administrative and criminal sanctions against a corporation can be transplanted as a model in the legal formulation. While from the side of the 2020 Mineral and Coal Mining Act of Indonesia, the amount of sanctioning is significantly higher compared to Thailand and South Africa, indicating that such measure can also be transplanted as a model in the legal formulation. This will result in strong sanctioning, which is considerably proportional and not over-deterrent to the side of the corporation. Therefore, the application of this measure is expected to contribute more directly to the protection of the environment and avoid damages resulting from the direct and indirect impacts of the negligence of corporate post-mining obligations against the environment.

⁶⁰ People's Representative Council, Short Act Number 3 of 2020 on the Amendment of the Act Number 4 of 2009 on Mineral and Coal Mining, 161B (1) (ID).

CONCLUSION

It could be said that the continuity of corporate negligence of its post-mining obligations is resulting from the considerably low standards in the punishment of the negligence of corporate post-mining obligations against the environment. It is argued that the imposition of an administrative sanction in the form of monetary penalty alone has considerably met the due deter for the deviant corporation. Nevertheless, the direct and indirect impacts of the negligence of corporate post-mining obligations are not only damaging the environment and the surrounding community but also damaging the corporation itself, meaning that the impacts are considerably massive. Therefore, I strongly believe that a combined imposition of administrative sanction against the corporation and a criminal sanction against the responsible corporate officers will be proportional and not over-deterrent to both of corporation and its responsible officers. In relation to the application of a combined imposition against the negligence of corporate post-mining obligations, I argue that such imposition will not over-detering the corporation as well as its responsible corporate officers, meaning that the combined imposition of administrative and criminal sanctions will meet the due deterrent. I suggest that this combined imposition can be transplanted by countries that face issues relating to the negligence of corporate post-mining obligations against the environment so that the countries may present a deterrent effect to the corporation and its responsible officers.

Indonesia, Thailand, and South Africa have similar and also different applicable measures, which are unique and distinctive in punishing negligence of corporate post-mining obligations against the environment. These compared jurisdictions recognise that the mining operations should be carried out in an environmentally-friendly perspective without leaving the importance to create an equilibrium in the economic and social development of the countries, which leads to the formulation of a legal provision that obligates the corporation to carry out post-mining obligations against the environment during and subsequent to the closure of the mining activity. Moreover, the compared jurisdictions apply a combined imposition of administrative and criminal sanctions against negligence of corporate post-mining obligations, by means to proportionally and sufficiently punish negligence of corporate post-mining obligations against the environment. Notwithstanding that, there are different measures applied by the countries in punishing such negligence. Through proportionately and sufficiently punishing negligence of corporate post-mining obligations, I strongly believe that a combined imposition of administrative sanctions and criminal sanctions will be proportional and not over-deterrent

to the negligence of corporate post-mining obligations against the environment. I recommend that, at least to the future mining regulations of Indonesia, the legal formulation for the punishment of the negligence of corporate post-mining obligations should be carried out proportionally and sufficiently so that the future mining regulation may contribute more directly to the protection of the environment and avoiding damages.