

# RECLAMATION FULLPAPER

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**Submission date:** 03-Nov-2023 02:34AM (UTC+0200)

**Submission ID:** 2192006643

**File name:** RECLAMATION\_FULLPAPER.docx (399.9K)

**Word count:** 8178

**Character count:** 56339

# 5 Strengthening Reclamation Obligation Through Mining Law Reform

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## ABSTRACT

1  
*The reclamation can produce more value to the environment and create a far better situation than post-mining conditions. While reclamation obligation policy is a great way to introduce a restorative approach to the environment as well to support the REDD+ framework, however, the main problem is disobedient of reclamation obligation by companies holding permits. Therefore, we focused on conceptualizing the idea of strengthening the reclamation obligation policy in the Mining Act based on the understanding of preventing environmental and social damage. This research is conduct in the realm of doctrinal legal studies to create a prescriptive result. The study shows that the principle of clarity in-laws can be used to revise disharmony between the Mining Act and Implementing Laws. We believe the placement of the reclamation fund and the role of a third party should not eliminate the company's obligation to carry out reclamation. Therefore, this reform will cause a shift and strengthening the value of obligation in post-mining reclamation.*

**Keywords:** Indonesia; Mining; Reform; Policy; Reclamation.

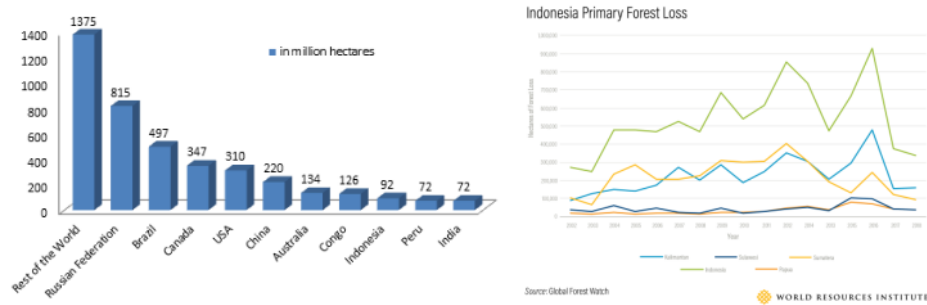
**JEL Classification :** K10; K23; K32; K42

## 1. INTRODUCTION

One of the main national issues in developing countries besides the slow economic development is environmental damages. [1] Deforestation and forest degradation are one of the major leading causes of global warming, responsible for around 15% of global greenhouse gas emissions, which makes the loss of forests a major issue for climate change. In some countries, for example, Indonesia and Brazil,

deforestation and forest degradation together are by far the main source of national greenhouse gas emissions.

**1**  
**Figure 1: Global Distribution of Forests and Indonesia Primary Forest Loss**

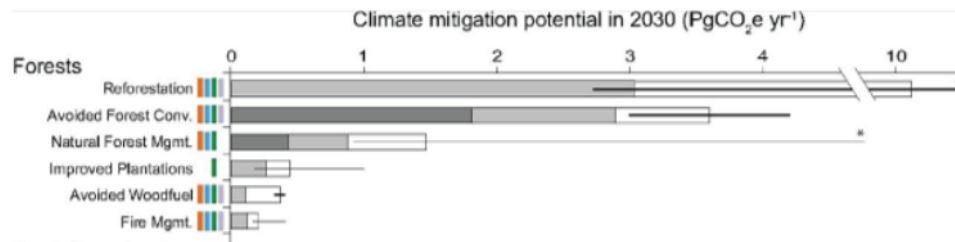


(Source: FAO, Global Forest Watch, and World Resource Institute)

It is undeniable that the irresponsible practice of surface mining in Indonesia is resulting in deforestation and forest degradation which creates damages to forests and ecosystems while became a major factor of greenhouse gas emissions. Furthermore, minerals and coal mining often decreasing land productivity, increasing soil density, erosion, and sedimentation, landslides, disruption of flora and fauna, disruption of public health, and impacts on microclimate change. [2] While the post-mining impacts resulted in changes in land morphology and topography, landscape changes [3], the land becomes unproductive and potentially vulnerable to avalanche. [4] It is undeniable that mining has an important role in development by producing raw materials for industry, absorbing labor, as a source of foreign exchange, and increasing local revenue. But on the other hand, mining also produces various adverse impacts on the environment. [5]. Mining activities have a high risk of environmental damage by pollution. The issue of environmental justice in mining not only happening in Indonesia but has become a globally serious concern. [6].

Recent studies and analyses [7] estimate that stopping deforestation, restoring forests, and improving forestry practices is the most cost-effective way to reduce 7 billion metric tons of carbon dioxide per year, equivalent to emissions from 1.5 billion cars. [8] Therefore to restore the land's function, reclamation must be completed on the post-mining site. [9]

**Figure 2: Climate Mitigation Potential in 2030**



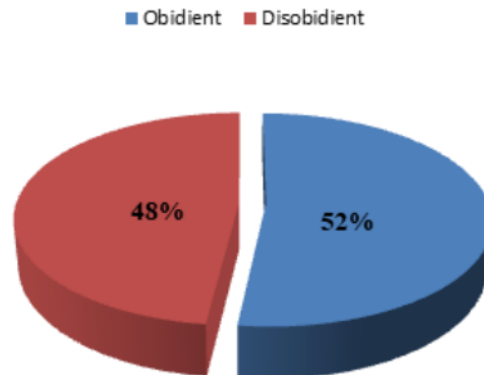
(Source: Bronson W. Briscoe Et.al)

Reclamation needs to be done, therefore mining companies need to be given the obligation to restore the environmental loss that they have been caused. The purpose of land reclamation is to repair damage to post-mining ecosystems through improving soil fertility and planting land on the surface. Another goal is to make the land more productive. Thus reclamation can produce more value to the environment and create a far better situation than post-mining conditions.

The reclamation obligation policy is a great way to introduce a restorative approach to the environment as well as to support the REDD+ framework. [10] REDD+ is a mechanism developed by Parties to the United Nations Framework Convention on Climate Change (UNFCCC). It creates a financial value for the carbon stored in forests by offering incentives for developing countries to reduce emissions from forested lands and invest in low-carbon paths to sustainable development. [11]

The issue is according to the Director-General of Mineral and Coal, Ministry of Energy and Natural Resources, Bambang Gatot Ariyono, the level of compliance of companies holding Mining Business Licenses (IUP) against reclamation and post-mining obligations is still low. Moreover, he stated that only around 50 percent of IUP holders who fulfilled their obligations had only increased 2 percent of the conditions in September 2017, which made 48 percent of companies did not fulfill reclamation and post-mining obligations. [12] In general, the main problem is disobedience of reclamation obligations.

**3**  
**Figure 3: The Compliance Level of Reclamation**



(Source: Ministry of Energy and Natural Resources)

Most Asian nations have introduced new mining laws with the intent to promote private sector investment. [13] For an instance, Jennifer McKay and Balbir Bhasin argue that ‘the mining industry in Indonesia is poised for a major reform effort which is necessary to sustain foreign direct investment and rescue the industry from serious decline’. [14] However, our major concern is the major changes visible are the morphological changes and topography of the land, as well as the excavation holes are left untreated and the carrying capacity of the environment is damaged, such as polluted water and infertile soil.

Furthermore, the abandonment of reclamation on ex-mining sites is irresponsible action not only affecting the environment and economy of Indonesia but more often affecting the social aspect of the people. The unrestored ex-mining sites create many conflicts between locals and the mining company. Many of the local communities on the mining sites are affected by the environmental damages making them often confronting the company responsible for creating more social conflicts and legal battles in the process. Furthermore, as the evidence shows, that excavation holes in ex-mining sites resulting in huge casualties over the years. During 2014-2018, JATAM (Mining Advocacy Network) recorded 140 victims who died from drowning in the ex-mining excavation holes that were left untreated. The excavation holes are the result of non-reclamation mining activities taking casualties in 12 Province in Indonesia with 3,033 holes from coal mining without any attempt of restoration. [15]

The negative impact needs to be minimized by better regulations. Therefore a reform is necessary to prevent further damage to the environment in the mining area. After mining activities are completed, the post-mining area must be reclaimed immediately. The aim is to avoid the possibility of other potential damage.

Thus, this research is focused on conceptualizing the idea of strengthening reclamation obligations in the Mining Act based on the understanding of high potential issues in reclamation obligations as an instrument to prevent environmental and social damage.

## 2. METHOD

### 2.1. The Concept of Doctrinal Legal Research

The method used in this study is doctrinal (normative) legal research. This method was chosen because the object of the study consisted of the norms and principles of law, legal theories, and doctrines of legal experts. [16] Peter Mahmud Marzuki argues that legal research was conducted to produce new arguments, theories, or concepts as a prescription in solving the problems encountered. [17] Soerjono Soekanto and Sri Mamudji reinforce the characteristics of normative research as follows: [18]

- a. Research on the principles of law on legal elements, both in ideal elements (*sollenwissenschaft*) which produce legal rules through legal philosophy, and actual elements (*seinwissenschaft*) which produce certain law (*written*).
- b. Research on legal systematics, which is to identify the main definitions in law such as legal subjects, rights, and obligations in law.
- c. Research on the vertical and horizontal synchronization degree, such as examining the harmony of positive law (legislation) following the hierarchy of law (*stufenbau des Rechts* theory).
- d. Comparative law to building general knowledge on positive law by comparing the legal system in one country with another.
- e. History of law, which examines the development of law in a certain period.

Meanwhile, Soetandyo Wignjosoebroto used the term doctrinal research as the research on the law which was conceptualized and developed based on the doctrine adhered to by the developer. According to Wignjosoebroto, doctrinal legal research is divided into three parts, as follows: [19]

- a. Doctrinal research that examines the law conceptualized as the principle of natural law in the moral system according to the doctrine of natural law;
- b. Doctrinal research that examines the law conceptualized as a rule of law according to the doctrine of positivism;
- c. Doctrinal research that examines the law is conceptualized as a court ruling *in concreto* according to the doctrine of realism.

### 2.2. Research Design

The design used in this research is action research which begins with a preliminary study by problem identification. Using the action plan, it is aimed that this research can produce a common perception that reclamation is an essential instrument in the exploitation of natural resources which aims to restore land's function. In analyzing legal issues, the source of primary legal material are consists of Act 32/2009 on Environmental Protection and Management, Act 4/2009 on Mineral and Coal Mining. Other legal materials such as Legislative Bill and Minutes of The Bill 32/2009 on Environmental Protection and Management, Academic Draft, and Minutes of The Bill 4/2009 on Minerals and Coal Mining, and Government

Regulation 78/2010 on Reclamation and Post-Mining. Sources of secondary legal materials include books, research reports, legal articles and journals, published papers, printed/electronic mass media news, and interviews and the respondents.

### **2.3. Procedure for Analysis**

The collection of legal material is carried out with the following steps: *First step*, collecting primary legal material and secondary legal materials relevant to the research. Legal materials that have been collected with a recording system use a qualified file card based on the sub-topics to discuss. For primary legal material in the form of a card recording the results of an inventory of legislation review, while for secondary legal material cards are collected with the qualification of recording a quotation card and a summary analysis card. After legal materials are inventoried and classified. *The second step* is to systematize and interpret the primary legal materials and then conduct a qualitative juridical analysis based on legal reasoning and legal argumentation coherently. The material that has been successfully collected is then analyzed. In analyzing the material, we use prescriptive analysis.

## **3. RESULT AND DISCUSSION**

The environmental ethics of used-oriented policy on natural resources is still debatable until today. [20] The policy framework of sustainable resources should within the understanding of harmony, balance, and sustainability of environmental functions. [21] Disruption of environmental functions results in discontinued development. A sustainable environment is the goal of natural resources management to guarantee use without reducing environmental quality in the future. As part of the environment, natural resources can be defined as "*all objects, powers, circumstances, functions of nature and living things, which are the result of natural processes, both in biological and non-biological, renewable and non-renewable*". From this concept, natural resources can be distinguished from biological, non-biological, renewable, and non-renewable resources. Thus Coal as one of the mining products is a non-renewable and non-biological resource. Furthermore, it is undeniable that coals provide many benefits to human life. Therefore, humans are obliged to maintain the availability of coal continuously through appropriate and integrated management.

Regulation on the utility of natural resources is based on Art 33 (3) of the 1945 Constitution of the Republic of Indonesia, "*The earth, water and natural resources contained therein are controlled by the state and used for the greatest prosperity of the people*". The mandate of Art 33 (3) contains the *maximum principle* as ground principle reflected in the word "*greatest*", in line with the purpose of its use which is limited by the *principle of eternity* reflected in the words of "*the people*", which implies covering the entire generation of the Indonesian. Therefore, natural resources such as coal should be cultivated to not only become dead goods or become unprocessed treasures, but it must be utilized for the benefit of the people.

The exploitation of natural resources generally at an early stage is interpreted from an economic perspective through merely an economic approach. Then, the modern policy should put the use of natural resources beyond economic approaches, by using the non-economic approach as a principle inherent in sustainable management. [22]

### **3.1. The Authority, Power, and Affairs in Coal Mining Practices**

The environment from an ecological perspective does not recognize the borderline of the region, both in the State and Administrative. On the contrary, environmental management cannot be separated from the concept of authority in administration law. Indonesia's environment in the regional concept is a legal definition. In this sense, the Indonesian environment extends to the archipelago, which is crossed between continents and oceans. With this concept, the Environment Act should be the Grand Act for other environment-related laws, either biological or non-biological Natural Resources (NR).

To understand the practice of coal mining in Indonesia, it is essential to covers the authority to manage natural resources. Conceptually, three terms should be understood within the process of thought in administrative policymaking: authority, powers, and governmental affairs, because authority can be interpreted as the right or obligation to conduct one or several management functions such as creating regulation, planning, organizing, management, supervision of a particular object by the government. Moreover, Cheema and Rondinelli argue that it is more precise to use the term "Authority" to interpret the government's rights to manage natural resources [23], while Hans Antlov uses the term "Power" instead of "Authority". [24]

Authority is one of the core conceptions in Global Administrative Law to enforce good governance values. [25] Authority known as formal power comes from the legislative (given by law) or from executive administration. There is a power within the authority to carry out a public action, for example, the power to sign and issue permits from an official on behalf of the minister, while that power comes from the authority that remains in the hands of the minister.

The regulation on the authority of the Regional Government undergoes a change in terminology in each Regional Government law. Act 22/1999 on Regional Government uses the term "authority", while Act 32/2004 uses the term "affairs". [26] Furthermore, the law on regional government currently marks by the enactment of Act 23/2014 on Regional Government, which brought significant changes to the concept of a government authority.

The environmental management concept in Indonesia was mainly developed by Professor Emil Salim which stated that environmental management is every effort to use and utilize the environment, where humans also must maintain, prevent, and overcome the outcome due to the use of the environment. Therefore every environmental management must be thoroughly planned.

In the case of the authority to issue Mining Permit, before Act 23/2014 on Regional Government, the majority of Mining Permits are issued by the District Government. This authority has conditioned the local heads to become "small kings"



in his area. With this authority, the issuance of mining permits was considered from economic value rather than sustainable value, which creates damage and pollution due to coal mining.

The authority to issue permits undergoes significant changes with the issuance of Act 23/2014 which replaced Act 32/2004. In the Attachment to Act 23/2014, the Distribution of Concurrent Affairs between Central Governments, Provincial, and Regency/City, the Regency and City Government no longer has the authority to issue Coal Mining Permits, including the People's Mining Permit (IPR). The authority previously owned by the District Region is drawn into the authority of the Province.[27]

Art 2 section b Environmental Act stipulates that sustainability is one of the principles underlying environmental protection and management. In Art Elucidation, elaborate the meant of "principles of sustainability" is that each person bears the obligations and responsibilities towards the next generation and each other in one generation by making remedies to preserve the ecosystem and improve the quality of the environment. While Art 1 section 1 of Act 4/2009 on Minerals and Coal Mining regulates that mining management is the entire stage of activities in mining from planning, operations, reclamation to post-mining. The management flow is manifested through stages of activities includes general investigation, exploration, feasibility studies, construction, mining, processing and refining, transportation and sales, and post-mining activities. For integrated policing, therefore all of the entire stages of activities in mining should also contain a principle of sustainability.

The source of authority and power of the government in environmental control can be traced since the birth of the 1945 Constitution. Art 33 (3) of the 1945 Constitution of the Republic of Indonesia only acknowledges the state's power over energy if the power is used for the greatest prosperity of the people. Art 33 (3) can be seen as the implementation of Jeremy Bentham's view on justice and ethics, so the State with the ultimate control over energy is also burdened by the obligation to provide for the people as their duty as a welfare state. But quite the contrary, based on the analysis on the Indonesian Mining Act by Gandataruna and Haymon by studying five significant elements of the legislation, their analysis finds that the Indonesian Mining Act is unlikely to result in a mining industry that provides maximum benefit to the Indonesian people. [28] The impact of mineral and coal extraction is often localized rather than national or affecting global [29], therefore it is important to learn the environment, economy, and social impact of mining activities from the local community and indigenous people's perspective.

The conflicts between the mining company and local peoples ranging from land rights between the company and indigenous tribes to social conflict and human rights violations. [30] A researcher from Jaringan Advokasi Tambang (JATAM), Ki Bagus Hadikusuma recorded 71 conflicts in the mining sector in 2014-2019. The conflict occurred between the local people who refused the mining business permit against the company and the government. The case occurred in a land area of 925,748 hectares. Most conflicts occurred in the province of East Kalimantan (14 cases); followed by East Java (8 cases); and Central Sulawesi (9 cases). The conflict was mostly related to gold mines and coal mines. Furthermore, in 2019 alone, JATAM recorded several

cases of criminal law misconduct related to mining activities, 2 cases of an alleged assault that resulted in death, and 4 intimidation by thugs allegedly ordered by the owner of the mining company. The most criminalization and attacks occurred in East Kalimantan and Central Java followed by Bangka Belitung; Maluku; East Java; North Sumatra; West Sumatra; and South Kalimantan. [31]

The Indonesian always believed that we are blessed with a wealth of natural resources. Even after the power struggle from colonialism, the founding fathers of our new republic agreed upon a constitutional obligation of the State to not only controlled but also utilize the national resources for the maximum prosperity of the people. From a Political perspective, the dream of using the natural resources for socio-economic development was stagnant until 1967, when Soeharto comes to power with the New Order regime introduced policies that supported a significant expansion of the mining industry. However, the combined effect of the financial crisis and domestic political unrest from 1997 until 1998 interrupted this process. Therefore in 2009, the enactment of the Mining Act brought hopes for the people, but in practice, minerals and coal mining activities create further disputes. [32] As for today's era, the decline of Democracy as Thomas P. Power argues in his study [33] requires a big step toward the reformation of the Mining Act to make sure the mining companies comply with Reclamation Obligation based on success criteria of restoration.

### 3.2. Norms of Reclamation Obligatory

The essence of the rule of law is law enforcement beyond other affairs. Therefore, legislation is a major part of creating a law for the nation. [34] Law as a tool of social control also translates to prevent the government from acting arbitrarily. Similarly, in natural resources, the right to regulate, manage, and supervise natural resources is given by the Constitution as the ground law in legal substance. [35] With Art 33 (3) of the 1945 Constitution of the Republic of Indonesia, the laws and regulations for implementing the control over natural resources should reflect the spirit of the welfare state. [36]

The control over natural resources also raises the responsibility for sustainable management which is balanced by the roles and functions of all stakeholders. In addition to the government and mining companies, Non-Governmental Organizations (NGOs), universities/research institutions, and communities also have roles that complement each other to create a sustainable environment in implementing mining law. [37] The description of the roles and functions of each stakeholder can be seen in the following table:

**Table 1: Role and Function of Stakeholders**

Stakeholder's Role and Function
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	Regional Government	Corporation	NGOs	Universities	Community
Role	<ol style="list-style-type: none"> <li>1. Formulated a regional regulation on post-mining land management</li> <li>2. Improving post-mining land management following the government's standard</li> <li>3. Encourage partnership in post-mining land management</li> </ol>	<ol style="list-style-type: none"> <li>1. Provide capital and environmentally friendly technologies for post-mining.</li> <li>2. Employment for the local community.</li> <li>3. Provide income in the form of taxes.</li> </ol>	<ol style="list-style-type: none"> <li>1. Promote transparency in post-mining land management policy</li> <li>2. Provide advocacy and legal guidance for people</li> <li>3. Supervised and evaluated the government's program</li> </ol>	<ol style="list-style-type: none"> <li>1. Institutionalizing peoples participation along with government and NGOs in post-mining management</li> <li>2. Developing science and technologies with other research for post-mining land management</li> <li>3. Supervised and evaluated the government's program and corporation activities</li> </ol>	<ol style="list-style-type: none"> <li>1. Provide consideration in public policy on post-mining land management</li> <li>2. Participate in the post-mining land management</li> <li>3. Supervised and evaluated the government's program</li> </ol>
Function	Act as regulator, mediator, and consultant in post-mining land management	Act as investor and implementer of post-mining land management	Act as an advocate and social control to the government's policy	Act as science and technologies provider and social control to the government's policy	Act as actors of post-mining supervision and social control to the government's policy

Reclamation is regulated in Mining Act, as an activity carried out throughout the stages of mining to organize, restore, and improve the quality of the environment and ecosystem to be able to function according to its designation. The policy is further regulated in Art 99 and Art 100 of the Mining Act, which explains that business owners are obliged to submit reclamation and post-mining planning along with reclamation and post-mining funds when applying for IUP and IUPK. Then if reclamation and post-mining are not carried out, the Minister, Governor, Regent/Mayor may assign a third party to conduct the reclamation.

Art 101 of Mining Act is the ground for creating the implementing policy on post-mining reclamation which is Government Regulation No. 78/2010 on Reclamation and Post-Mining (furthermore will refer to as Post-Mining Regulation). Furthermore, Post-Mining Regulation has strong aspirations to discipline mining companies in implementing reclamation and post-mining programs to meet

environmental revitalization targets comparable to the original ecosystem by giving the companies the responsibility to restore and improve the environment through reclamation and post-mining.

On the Post-Mining Regulation, the principles of reclamation and post-mining are contained in Art 2 (1) and (2) which regulated that IUP Exploration and IUPK Exploration holders must carry out reclamation; While holders of IUP Production Operation and IUPK Production Operation not only must carry out reclamation but also post-mining activities. Furthermore, reclamation by holders of IUP Exploration and IUPK Exploration should be preform with the principles of environmental protection and management and also occupational health and safety. Thus in mining activities, some criteria must be implemented as the form of principles of environmental protection and management: (1) Protection of the quality of water surface, groundwater, seawater, soil, and air based on quality standards or criteria for environmental damage; (2) Protection and recovery of biodiversity; (3) Warranty of the stability and safety of overburden rock deposits, tailings ponds, ex-mine land, and other artificial structures; (4) Utilization of ex-mining land by its designation; (5) Adopting social and cultural values; and (6) Protection of groundwater quantity; While the principles of occupational safety and health, includes: (a) safety protection for worker or laborer; and (b) protection of labor worker from occupational diseases.

### **3.3. Parameter of Reclamation Policy**

Act 32/2009 on Environmental Protection and Management (furthermore will refer to as Environmental Act) regulates Control Activity which is carried out in the framework of environmental conservation includes: prevention, mitigation, and recovery. Included in the prevention instrument are:

1. Strategic Environmental Assessment (KLHS);
2. Spatial Planning;
3. Environmental Quality Standards;
4. Standard Criteria for Environmental Damage;
5. Environmental Impact Analysis (AMDAL);
6. UKL-UPL;
7. Mining and Environment Permits;
8. Environmental Economic Instruments;
9. Environmental-based Legislation;
10. Environment-based Budget;
11. Environmental Risk Analysis;
12. Environmental Audit; and
13. Other instruments under the needs and development of science.

The mitigation instrument is an instrument of control activities that regulate the obligation of every person who has polluted the environment to: provide information on environmental pollution or damage warnings to the community, isolate environmental pollution and damage, and stop the sources to the environment or other means that are under the development of science and technology.

The legal policy of environmental management experienced a fundamental change in the 1945 Constitution since the second amendment on 18 August 2000 and the fourth amendment on 10 August 2002. One aspect of the idea of constitutional content is the legal policy of environmental management. Constitutional protection of individual environmental rights has two reasons: First, it becomes a strong basis for individuals to defend the environment from damage that affects them. Second, it is the basis for demanding the state to realize these rights. [38]

The recovery referred to in Art 54 of the Environmental Act as a form of control, has the same meaning as reclamation and post-mining activities referred to in Mining Act. Art 1 number 26 of the Mining Act stipulates that reclamation is defined as an activity carried out throughout the mining stages to organize, restore, and improve the quality of the environment and ecosystem. While post-mining activities in Art 1 number 27 are defined as planned, systematic, and continuation after the end of mining activities to restore the function of the natural environment and social functions according to local conditions in all mining areas.

The recovery referred to in Art 54 of the Environmental Act regulates the obligation of every person who conducted environmental damage to restore environmental functions as insurance to carry out environmental recovery, the permit holders are required to provide funds for the restoration of environmental functions. The obligation to provide these funds is also in line with the obligations in reclamation or post-mining activities. Namely for mining license holders are required to provide reclamation funds.

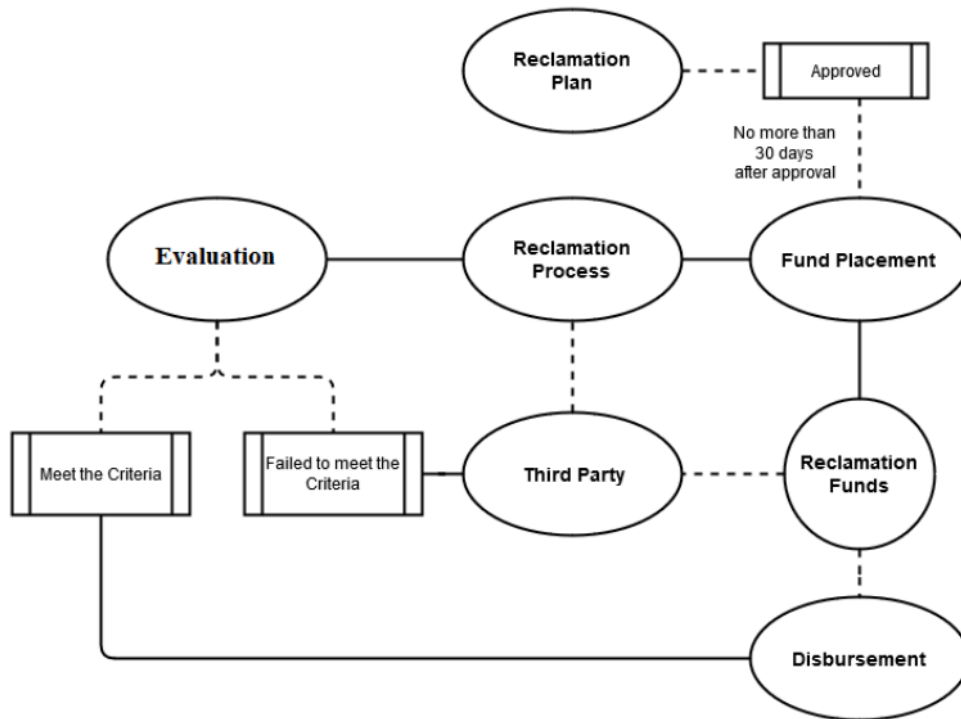
### **3.4. Reclamation Steps**

Reclamation should be conducted on post-mining land. The land is both in the inside ex-mining area and outside which is no longer used. Land outside the ex-mine area includes (1) Landfill; (2) Stockpiling of raw materials; (3) Road transportation; (4) Plant/processing/refining installation; (5) Offices and housing; and (6) Ports/docks. Art 1 point 26 of the Mining Act regulates the scope of reclamation activities starting from exploration, land clearing, excavation of topsoil and over borden, coal extraction, land management, revegetation including preparation of nurseries, and maintenance and evaluation of activities.

For the reclamation and post-mining activities to perform successfully, several steps must be followed, starting from the reclamation plan and post-mining plan, approval of the plan, to changes of the plan. The process of these stages is regulated in Post-Mining Regulation, which requires permission from the Minister, Governor, Regent/Mayor.

At a later stage, holders of mining licenses should provide reclamation insurance funds and post-mining insurance funds. The government sets policies for each IUP and IUPK holder to place funds as reclamation and post-mining insurance.

### **Figure 4: Reclamation Stages**



**(Source: Reclamation and Post-Mining Regulation)**

The fund placement is needed as a form of insurance for each IUP and IUPK holder to restore ex-mining land following the designation agreed upon by the stakeholders in the context of sustainable development. The release or disbursement of funds is under the post-mining plan. The fund is placed every year in the form of time deposits at government banks. The amount of post-mining insurance is calculated based on the cost, in detail as follow:

**Table 2: Costs Detail**

Category	Cost Includes
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Direct costs	<ol style="list-style-type: none"> <li>1. Demolition of buildings and supporting facilities that have not been used;</li> <li>2. Reclamation of ex-mining sites, processing, and refining facilities, and supporting facilities;</li> <li>3. Handling of Hazardous and Toxic Materials (B3) and Hazardous and Toxic Waste;</li> <li>4. Maintenance and care;</li> <li>5. Monitoring; and</li> <li>6. Social, Economic, and Cultural aspects.</li> </ol>
Indirect costs	<ol style="list-style-type: none"> <li>1. Mobilization and demobilization;</li> <li>2. Activity planning;</li> <li>3. Administration and profits of third parties as mine closure implementing contractors; and</li> <li>4. Supervision.</li> </ol>

The deposit is valid until all reclamation activities are declared completed by the Governor. For the disbursement of deposits and their interest, it is done after the reclamation activities are under the criteria of completion that has been performed based on the reclamation plan approved and accepted by the governor.

### 3.5. Reforming <sup>3</sup> the Reclamation Obligation in Mining Act

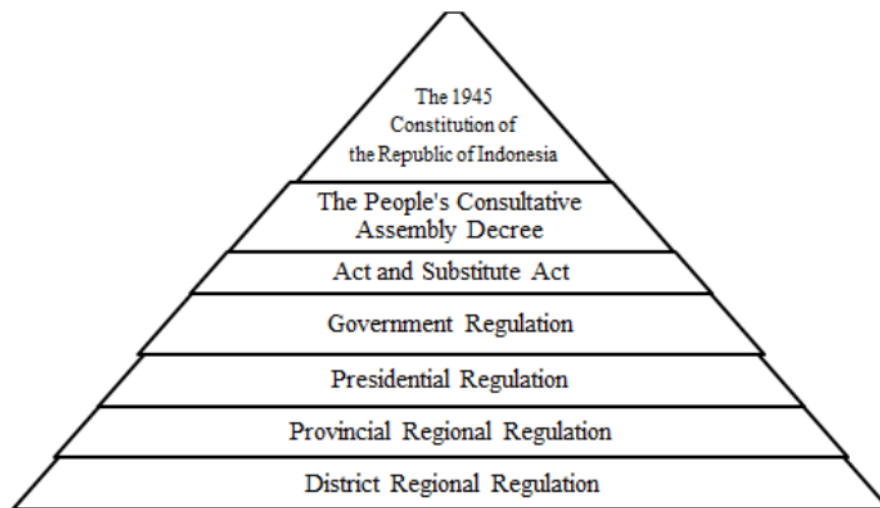
Article 100 (1) of the Mining Act regulates the obligation for IUP and IUPK holders to provide reclamation funds. Subsequently in section (2) that the Minister, Governor, or Regent/Mayor can determine a third party to perform reclamation and post-mining. Whereas Reclamation and Post-mining Regulation as the implementation of Art 101 of the Mining Act, in Art 2 (2) strictly regulates that the holder of IUP Production Operation and IUPK Production Operation must perform reclamation and post-mining, without giving space to third parties to take action for in reclamation and post-mining. A third party is permitted to be appointed to perform reclamation and post-mining, only if the result does not meet the criteria as in Art 33 of Reclamation and Post-Mining Regulation which reads: *"If based on the evaluation of the reclamation implementation report shows the reclamation result does not meet the criteria of success, Minister, Governor, or the Regent / Mayor by their authority may determine a third party to perform part or all of the reclamation activities using a reclamation fund placement."*

There is an issue of disharmony regarding the obligation to implement reclamation and post-mining by the holders of IUP and IUPK and the role of third

parties in reclamation. Art 100 of the Mining Act can be interpreted that by placing a reclamation and post-mining insurance fund, the IUP and IUPK holders can transfer their reclamation obligation to a third party appointed by the Minister, Governor, or Regent/Mayor. Whereas Reclamation and Post-Mining Regulation expressly stipulates that reclamation and post-mining must be performed directly by IUP and IUPK holders without exception.

If we look at Art 7 (1) of Act 12/2011 on Lawmaking (Lawmaking Act), the meaning of legislation is: "written law that contains general binding norms and is established or stipulated by state institutions or an authorized official through the procedures stipulated in the Laws and Regulations." In other words, any legislation related to mineral and coal mining must be guided by the Mining Act. Furthermore, based on Art 7 of the Lawmaking Act, the order of laws and regulations is as follows:

**Figure 5: The Hierarchy of Legislation**



**(Source: Lawmaking Act)**

In section (2) states that the legal force of the Law is following the hierarchy as referred to in section (1). In other words, based on the hierarchy of legislation, Act 4/2009 (Mining Act) has a higher force compared to Government Regulation No. 78/2010 (Reclamation and Post-Mining Regulation). Therefore Government Regulation No. 78/2010 should not be conflicted with the Mining Act as the superior law. The issue is that Government Regulation No. 78/2010 arguably more effective in forcing reclamation by rigorously regulated the reclamation and post-mining obligatory for IUP and IUPK holders without exception. Normative construction on the use of natural resources, especially minerals and coal shows diverse arrangements with different formulations. Management of natural resources which normally includes planning, organizing, and actualizing, can be viewed as stakeholders'



aspirations. Activities in the management can be used as a means to do legal interpretation, legal reasoning, and rational arguments for the formulations in each law.

The results of legal interpretation, reasoning, and rational-legal arguments can be used to harmonize the law. However, the harmonization of law will not automatically result in legal unification, because harmonious legal conditions are not normatively followed by harmonious implementation. An implementation which consists of legal actions, legal relations, and legal consequences will also be harmonious if the stakeholders of natural resource management have the same perception about the normative aspects of legal harmonization. The same perception of harmonious law is the basis for the realization of legal unification.

In the Legislative Draft of the Environmental Act, it is stated that the conflict between natural resources and the environment is a conflict that has the characteristics of confronting frontally between those who have access to resources and stronger power with those who are access-disabled or at least have access to resources and weaker power. The emergence of environmental conflicts is generally caused by exploitation which ignores the interests and rights of the community, justice, and environmental principles.

As mentioned before that one of the causes of natural resource and environmental conflicts is the disharmony of laws and regulations, both vertically and horizontally. Art 5 of Lawmaking Act states, one of the principles that became a milestone in the creation of legislation is "the principle of clarity", which is complete as follows:

*“Article 5*

*forming good legislation, include:*

*a. Clearness of purpose;*

*b. The right institution or official;*

*c. Correspondence between type, hierarchy, and content material;*

*d. Can be implemented;*

*e. Utilization and usefulness;*

*f. **The clarity in the formulation;** and*

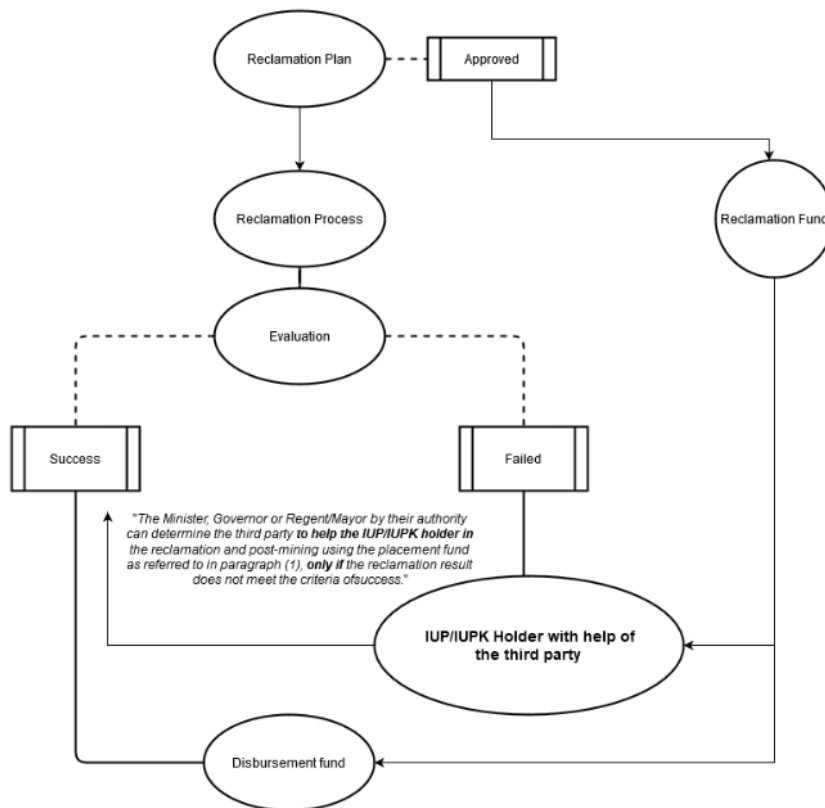
*g. Transparency.”*

In the Elucidation of Lawmaking Act, the principle of clarity in the formulation of the law meaning that each Legislation must fulfill the technical requirements for the preparation of Legislation, systematic, choice of words or terms, as well as clear and easy to understand to prevent misinterpretation in the implementation.

The principle of clarity in the formulation can be applied in the effort to reforming the reclamation obligatory in the Mining Act with the aim that the reclamation and post-mining becomes a non-transferable obligation to the third party. The reformation of the Mining Act, specifically on reclamation and post-mining obligations must be performed to prevent the occurrence of multiple interpretations of the obligations and liability in reclamation and post-mining.

In the Mining Act, the key formulation that needs to change is Art 99 intending to reinforce the essence of "obligatory" for IUP and IUPK holders to perform reclamation and post-mining with the supervision as in the Environmental Act. Furthermore, Art 100 (2) is also revised by adding the concept: "*The Minister, Governor or Regent/Mayor by their authority can determine the third party to help the IUP/IUPK holder in the reclamation and post-mining using the placement fund as referred to in paragraph (1), only if the reclamation result does not meet the criteria of success.*" With this formulation, in essence, the placement of the reclamation fund by the company does not eliminate the company's obligation to carry out reclamation and post-mining activities.

**Figure 6: Reclamation Obligation After the Reform**



#### 4. CONCLUSION

In summary, strengthening reclamation obligatory value should include the concept of reclamation and post-mining as non-transferable obligations by IUP and IUPK holders. Furthermore, Art 100 (2) of the Mining Act should then regulate that the Minister, Governor, or Regent/Mayor can determine a third party only to help for reclamation and post-mining. In essence, the placement of the reclamation fund and the support of a third party will not eliminate the company's obligation to personally carry out reclamation and post-mining activities. Therefore shifting and strengthening the value of "obligatory" to support REDD+.

#### END NOTES

1. The economic issue can be seen from the unresolved poverty, social inequality, regional disparities, environmental damage due to excessive exploitation of natural resources, and the dependence on food, energy, finance, and technology. Moreover, one of the major issues in slow economic development is due to complex regulatory framework on investment law. See Stephen Magiera, (2011), "Indonesia's Investment Negative List: an evaluation for selected services sectors", *Journal Bulletin of Indonesian Economic Studies*, Vol.47, Issue.2, July 2011, PP.195-219. Furthermore see the Indonesia National Medium-Term Development Plan 2014-2019
2. See Andrew S. Goudie, and Heather A. Viles, (2013), *The Earth Transformed: An Introduction to Human Impacts on the Environment*, Wiley-Blackwell, PP.20-22
3. The formation of landscapes on the post-mining sites are usually irregular, causing steep holes, mounds of land used heavy dumps.
4. Nurul Listiyani, (2018), "Konsep Perizinan Terpadu Sebagai Upaya Pencegahan Tindak Pidana Korupsi Sektor Pertambangan", *Lambung Mangkurat Law Journal*, Vol.3, Issue.1, PP. 19-36
5. A. Effendi, (2012), "Prinsip-Prinsip Pengelolaan Pertambangan Berbasis Lingkungan Berdasar Undang-Undang Dasar Negara Republik Indonesia Tahun 1945", *Jurnal Konstitusi*, Vol. 1, Issue. 1, November, P. 84.
6. The Hon. Justice Brian J Preston, (2018), "Environmental Justice and Land Use Conflict: The Governance of Mineral and Gas Resource Development", *Journal of Energy & Natural Resources Law*, Vol.36, Issue.3, PP. 364-369.
7. Bronson W. Briscoe et.al., (2017), "Natural Climate Solutions", *Proceedings of the National Academy of Sciences of the United States of America*, Vol. 114, Issue. 44, PP. 11645-11650
8. Susan Minnemeyer, Nancy Harris, and Octavia Payne, "Pelestarian Hutan Dapat Mengurangi Emisi Karbon Setara dengan Emisi Semua Mobil di Bumi", 25 January 2018, World Resource Institute Indonesia, available online at <https://wri-indonesia.org/id/blog/pelestarian-hutan-dapat-mengurangi-emisi-karbon-setara-dengan-emisi-semua-mobil-di-bumi>

9. Reclamation or usually known as Land Reclamation is an attempt to repair and restore damages as a result of mining activities in order to restore the ecological function.
10. Reducing Emissions from Deforestation and forest Degradation, plus the sustainable management of forests, and the conservation and enhancement of forest carbon stocks (REDD+), is an essential part of the global efforts to mitigate climate change.
11. Developing countries would receive results-based payments for results-based actions. REDD+ goes beyond simply deforestation and forest degradation and includes the role of conservation, sustainable management of forests and enhancement of forest carbon stocks.
12. Bambang Gatot Ariyono, (2017), Interviews on *Kontan.co.id*, Available online at: <https://industri.kontan.co.id/news/iup-menolak-setor-dana-jaminan-reklamasi>.
13. Koh Naito, James M. Otto, David N. Smith, and Hajime Myoi, (1999), "Legal Aspects of Exploration and Mining: a Comparative Table of Mining Law in Asia", *Journal of Energy & Natural Resources Law*, Vol.17, Issue.1, 1999, PP.1-12.
14. Jennifer McKay & Balbir Bhasin, (2001), "Mining Law and Policy in Indonesia: Issues in Current Practice that Need Reform", *Journal of Energy & Natural Resources Law*, Vol.19, Issue. 4, PP. 329-343
15. Jaringan Advokasi Tambang (Mining Advocacy Network), "143 Anak Mati Sia-Sia di Lubang Tambang", Available at <https://www.jatam.org/2019/03/20/143-anak-mati-sia-sia-di-lubang-tambang/>
16. Peter Mahmud Marzuki argues "*Penelitian hukum normatif adalah penelitian hukum yang meletakkan hukum sebagai sebuah bangunan sistem norma. Sistem norma yang dimaksud adalah mengenai asas-asas, norma, kaidah dari peraturan perundangan, putusan pengadilan, perjanjian serta doktrin (ajaran)*". Mukti Fajar and Yulianto Ahmad. (2009), *Dualisme Penelitian Hukum: Normatif dan Empiris*, Yogyakarta: Pustaka Pelajar, PP. 33- 38
17. Peter Mahmud Marzuki only acknowledge normative legal research as the true research in the field of law because it resulting in prescriptive analysis instead of in descriptive study. He believe that these characteristics of legal study is what makes legal research of its own kind (*sui generis*)
18. Soerjono Soekanto and Sri Mamuji. (1995). *Penelitian Hukum Normatif, Suatu Tinjauan Singkat*, Jakarta: RajaGrafindo, P. 15.
19. *Ibid.*
20. The dysfunctional use of resources in modern societies arises from increasingly fragmented ways of understanding natural resources. M.Yasir Said and Yati Nurhayati, (2020), "Paradigma Filsafat Lingkungan Dalam Menentukan Arah Politik Hukum Lingkungan Hidup", *Al-Adl: Jurnal Hukum*, Vol. 12, Issue.1, January 2020, PP. 39-60. Also See Basil Bornemann Et.al., (2017), "Research on Natural Resources: The Quest for Integration Revisited" *Ecological Perspectives for Science and Society*, Volume 26, Number 1, PP. 16-21

21. For an instance, the framework for Egypt water resources policy analysis developed by Simonovic and Hussam Fahmy who proposing integration of object-oriented modeling approach with systems analysis. They discuss on how the water policy analysis process should be structured to best address a policy choice, and with the object-oriented model that will aid understanding and prediction. Furthermore See Slobodan P. Simonovic and Hussam Fahmy, (1999), "A New Modeling Approach for Water Resources Policy Analysis", *Water Resource Research*, Volume 35, Issue 1, January 1999, PP. 295-304
22. Ifrani, F.A. Abby, A.H. Barkatullah, Y. Nurhayati, M. Yasir Said, (2019), "Forest Management Based on Local Culture of Dayak Kotabaru in the Perspective of Customary Law for a Sustainable Future and Prosperity of the Local Community", *Resources*, Vol.8, Issue.78, April 2019, PP.1-17
23. For other reference see Dennis A. Rondinelli, John R. Nellis, and G. Shabbir Cheema, "Decentralization in Developing Countries: A Review of Recent Experience", World Bank Staff Working Papers No. 581, Management and Development Series No. 8, Washington: WorldBank, PP.5-46.
24. Hans Antlov, (1995), "Exemplary Centre, Administrative Periphery: Rural Leadership and the New Order in Java", *Nordic Institute of Asian Studies Monograph Series*, No.68, Richmond: Curzon Press, P.222
25. Harlow argues that there are four potential sources as a foundation for a global administrative law system: first, the principle of legality and due process principles; second, the set of rule of law values; third, the good governance values; and lastly, human rights values. Carol Harlow, (2006), "Global Administrative Law: The Quest for Principles and Values", *European Journal of International Law*, Volume 17, Issue 1, February 2006, PP. 187–214, <https://doi.org/10.1093/ejil/chi158>
26. Government affairs according to Art 9 (2) of Act 23/2014 are divided into three parts in absolute affairs, concurrent affairs and general affairs. Absolute affairs are governmental affairs that are fully the authority of the Central Government, which includes foreign policy, defense, security, justice, national monetary, fiscal, and religion. Subsequently Art 9 (3) regulates that concurrent affairs are governmental affairs that are divided between the Central Government and Regional (Local) Government. The Regional Authority consists of mandatory and preferred government affairs. Furthermore mandatory affairs consist of Basic Services and Non-Basic Services.
27. See Nurul Listiyani, (2017), *Pengelolaan Lingkungan Hidup Yang Berkelanjutan Dalam Pemanfaatan Sumber Daya Batubara*, Yogyakarta: Atap Buku, P.24.
28. Kosim Gandataruna and Kirsty Haymon, (2011), "A Dream Denied? Mining Legislation and the Constitution in Indonesia", *Journal Bulletin of Indonesian Economic Studies*, Vol.47, Issue.2, July 2011, PP.221-231.

29. Thomas Wälde, (1992), "Environmental Policies Towards Mining in Developing Countries", *Journal of Energy & Natural Resources Law*, Vol. 10, Issue.1-4, PP. 327-357.
30. Jaringan Advokasi Tambang (The Mining Advocacy Network) assesses that most of all mining companies that enter a region are always followed by conflicts between local communities, companies, and the government.
31. Hukumonline, "Jatam: Ada 71 Konflik Pertambangan Periode 2014-2019", 07 January 2020, available online at <https://www.hukumonline.com/berita/baca/lt5e14311f6aa5a/jatam--ada-71-konflik-pertambangan-periode-2014-2019?page=2>
32. For examples the conflict between Sawai Tribe and Tobelo Dalam Tribe v PT Weda Bay Nickel and PT Tekindo Energy in Central dan East Halmahera, North Maluku Province; Podi Villagers v PT Arthaindo Jaya Abadi, in Tojo, Central Sulawesi Province; and Tongo Sejong Villagers v PT Newmont Nusa Tenggara, in West Sumbawa in the basis that the local suffers from deforestation and water pollution.
33. Thomas P. Power, (2018), "Jokowi's Authoritarian Turn and Indonesia's Democratic Decline", *Bulletin of Indonesian Economic Studies*, Vol. 54, Issue. 3, December 2018, PP. 307-338
34. Legislation is one of the policy instruments (*beleids instrument*) which is very important to resolve and anticipate problems in society, even today the legislation is used as a tool to direct people towards better lives. See M. Aziz, (2006), "Aspek Konstitusional Pembentukan Peraturan Perundang-Undangan", *Jurnal Konstitusi*, Vol. 3, Issue. 3 September, P. 120
35. In Hans Kelsen's *Stufenbau des Rechts* Theory, The ground law (*grundwet*) is use to describe the highest form of written law. However it is important to notice that a ground act (*grundwet*) is different than the ground norm (*grundnorms*) which is the basis regulating norms that reflect the way of the people. For example in Indonesia, ground norm is Pancasila which contains the five beliefs values of Indonesian people: the all-powerful God; the humanitarian and human rights; the national unity; the teaching of deliberation and peace; and the social justice for all.
36. Welfare state is the main utility theory in implementing State's control over natural resources and energy. The modern rule of law is not only to protect the people but also provide for social welfare. Therefore the State through Government should actively play roles in creating jobs, financial security, foods, and security for their society. Furthermore see M.Yasir Said and Ifrani, (2019), *Pidana Kehutanan Indonesia*, Bandung: Nusa Media, PP.81-82
37. Irsan, Helmanida & Laily Mutiari, (2017), "Kebijakan Reklamasi Pascatambang Sebagai Bentuk Pengendalian Lahan Bekas Tambang Batubara Ditinjau Dari Kewenangan Otonomi Daerah di Sumatera Selatan". *E-Journal Universitas Sriwijaya (UNSRI)*, available online at <https://ejournal.unsri.ac.id/index.php/jlsc/article/download/2597/1360>.
38. Nurul Listiyani and M.Yasir Said, (2018), "Political Law on the Environment: The Authority of the Government and Local Government to File Litigation in

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