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TENDENCIES OF LAW ENFORCEMENT OFFICERS IN ENVIRONMENTAL CRIMINAL LAW FORMAL DEFENSES RELATED TO IMMEDIATE ULTIMUM REMEDIUM

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Abstract

This research aims to explain Law no. 32 of 2019 concerning Environmental Protection and Management and explains the Job Creation Law no. 11 of 2020, where in enforcing environmental criminal law formal offenses are applied as an ultimum remedium. The research was conducted at the Ministry of Environment and Forestry in 2019, using normative legal research methods relating to environmental issues which were analyzed qualitatively and conclusions were drawn deductively, namely general thinking to specific matters, so that the research results were that in enforcement of environmental criminal law, law enforcement officers tend to apply the primum remedium principle, so that the environment has not been polluted and/or damaged but the perpetrator is punished with a criminal sentence, even though in fact the environment can still be repaired, therefore an ultimum remedium principle is needed. For incidents like this, it is wise to first hand over the handling to the administrative law regime. So the procedural law must be very technical which does not give rise to multiple interpretations, detailed and clear and can be implemented. This is because formal offenses related to the principle of ultimum remedium must be applied. Because almost all law enforcement officers tend not to be able to distinguish between how formal and material offenses are applied in enforcing environmental criminal law. This correlates with cases of environmental pollution and/or destruction that are referred to the Court, there is no distinction in the application of formal offenses and material offenses, as if there is no meaning in the ultimum remedium principle in the UUPPLH. The existence of the ultimum remedium principle should accumulate with formal offenses which give rise to special procedural law. Special procedural laws must be obeyed in implementing these formal offenses. If this is ignored, the process of handling environmental cases could result in being null and void.

Keywords: Principle of Ultimum Remedium, Formal Offenses, Environmental Crimes.

1. INTRODUCTION

The Code of Practice is a supervision guideline by the community which basically participates in decision-making, regulation and supervision of environmental management to make people aware of their rights and obligations to participate in decision-making. However, it does not mean that in ADS, the Government does not have the authority and obligation to take action if there is a violation of laws and regulations. The government also implements command and control regulations designed to prohibit or limit activities that damage the environment with the aim of enforcing environmental laws. In the enforcement of environmental laws, there are efforts to achieve compliance with the regulations and requirements in the applicable legal provisions in general and individually, through the supervision and application (or threat) of administrative, criminal and civil sanctions(Rahman et al., 2022).

According to Siti Sundari Rangkuti, the application of sanctions can be imposed if the law that regulates the reciprocal relationship between humans and other living things is violated. Environmental law establishes the values that are currently in force and the values that are expected to be enforced in the future and can be called "the law

that regulates the environmental order". Likewise, Drupsteen said that the elements in environmental law are administrative law, criminal law and civil law which are commonly referred to as functional law (functioneel rechtsgebeid), but more domain to administrative law (bestuur recht), including: "As a management function (bestuursdaad), especially related to "licensing as a function of coaching, regulating, controlling, and supervising space utilization activities, the use of natural resources, goods, infrastructure, and certain facilities, or facilities to protect the public interest and maintain the sustainability of the environment"(Arsyiprameswari et al., 2021).

The development of environmental law undergoes a process that was originally known as the law of disturbances (Hinderrecht) which is simple and contains civil aspects. Then gradually its development shifted towards the field of administrative law, in accordance with the increasing role of the ruler in the form of intervention in various aspects of life in an increasingly complex society. The aspect of administrative environmental law arises when the decision of the ruler that is wise is poured out in the form of determination (beschikking) of the ruler such as Amdal, environmental permits and the determination of environmental quality standards. In addition to the development of environmental law influenced by civil law and administrative law, environmental law that contains values is also inseparable from the moral values embraced by the local community in the form of customary or customary law. These values are believed to be violated, they will get sanctions called criminal acts(Dewi et al., 2021).

Criminal sanctions are seen as an effective solution in overcoming the problem of crime rates or the quantity of crimes that are increasing rapidly in Indonesia, especially crimes related to environmental law. Criminal sanctions are a form of the state's responsibility to maintain security and order as well as legal protection efforts for its citizens and are the last resort in overcoming the problem of crime in society. The responsibility of the state is the formation of a law that includes criminal sanctions. In shaping laws, it is necessary to realize that in including criminal sanctions in the law, rationality and proportionality are needed. Rationality means that it can only be given with justifiable reasons. Meanwhile, proportionality, namely the provision of criminal sanctions, needs to be balanced with the needs of the State in order to maintain, protect and maintain order and security in society(Ismail, 2023).

This is also stated in the Criminal Code which states that no act can be punished except on the strength of the criminal rule in the law (principle of legality). This means that if an act that is against the law has been regulated in laws and regulations, then the act must be sanctioned and punished. Quoting Bassioni's opinion in Teguh Prasetyo, crimes can only be justified if there is a need that benefits the community and vice versa, crimes that are unnecessary, unjustifiable and dangerous to the community. The form of legal regulation made is considered an instrumentation of law enforcement in the life of the nation and state. In the instrument of environmental law enforcement, it is carried out through supervision regulated in Law Number 32 of 2009 concerning Environmental Protection and Management, which is carried out by Ministers, Governors and Regents/Mayors and both Ministers(Butt, 2023).

With the aim that environmental management can provide legal protection and great benefits for every citizen and can enforce environmental laws in restoring the environment into an ecosystem in the sense that the environment lies in the order of environmental elements which are a whole and mutually influencing unit in forming

environmental balance, stability, and productivity. Ecosystems are problematic due to pollution and environmental damage, so they have their own character, because environmental law enforcement is a bit complicated because environmental law occupies a crossover between various areas of classical law. In the view of environmental law experts, Siti Sundari Rangkuti related to environmental law enforcement is an environmental supervision. Environmental law enforcement activities are the last stage or process in the series of regulatory chains (regulatory cycles)(Chazournes, 2017).

Environmental law enforcement is an important step in constituting compliance with environmental laws and regulations. And according to A. Hamzah, law enforcement is a supervision and application (or threat) of the use of administrative, criminal, or civil instruments to achieve compliance with the provisions of laws and regulations that apply generally and apply to individuals, and is also part of the last link in the regulatory chain of environmental policy planning. Environmental law enforcement instruments can be distinguished into three aspects, namely: administrative environmental law enforcement; criminal environmental law enforcement; civil environmental law enforcement. And these three aspects of environmental law enforcement can be enforced with one or all three instruments at once(Risma et al., 2023).

Law Number 4 of 1982 concerning Basic Provisions on Environmental Management (UULH) which was in effect for approximately 15 years which was then refined through the issuance of Law Number 23 of 1997 concerning Environmental Management (UUPLH) cannot be separated from the application of the principle of subsidiarity of criminal law which is almost said to be "mandatory" in the enforcement of environmental law and as a support for administrative law only. And the application of criminal law provisions must still pay attention to the principle of subsidiarity, namely that criminal law should be utilized if sanctions in other legal fields, such as administrative sanctions and civil sanctions, and alternative resolution of environmental disputes are ineffective and/or the level of the perpetrator's guilt is relatively severe and/or the consequences of his actions are relatively large and/or his actions cause public unrest. In other words, the principle of subsidiarity is not a fixed price, but it can be set aside with a number of conditions(Dewi et al., 2021).

The existence of the principle of subsidiarity in the enforcement of environmental crimes since the beginning has also contained weaknesses in the concept of the principle of subsidiarity in the formulation of the 1982 UULH which resulted in the elimination of the principle of subsidiarity in its application. The formulation system in the explanation is unclear, making it difficult in practice. To fix it, the principle of subsidiarity was changed to the principle of ultimum remedium. Meanwhile, in UUPLH Number 23 of 1997 which has been changed to Law Number 32 of 2009 concerning Environmental Protection and Management (UUPPLH), there are two principles in the use of criminal law means, namely the principle of ulmitimum remedium which is the last resort, and the principle of premium remedium which prioritizes law enforcement through criminal law means which are no longer the last resort but rather the first remedy to deter people from committing criminal violations. This is because criminal law is considered more effective in order to regulate and discipline society through laws and regulations. The dynamics of law can be seen from the existence of a policy of using criminal sanctions through the inclusion of a chapter on "criminal provisions" at the end of most regulatory products. Most regulatory products always include a chapter on criminal sanctions or a chapter on criminal provisions, this indicates that

the criminal law instrument is an effective instrument in enforcing the law against the legislation that is made(Martini, 2012).

Criminal law enforcement in the UUPPLH introduces the threat of minimum sentences in addition to maximum, expansion of evidence, criminalization for violations of quality standards, integration of criminal law enforcement, and regulation of corporate crimes. So actually Law Number 32 of 2009 concerning Environmental Protection and Management in enforcing its criminal provisions emphasizes the application of the principle of premum remedium in enforcing environmental criminal law. The Law on Environmental Protection and Management (UUPPLH) regulates various provisions that aim to protect the environment from detrimental actions. In the regulated articles, there are strict sanctions for every individual who commits an act that can damage the environment(Rusdyani, 2021).

Article 98 paragraph (1) of the UUPPLH emphasizes that anyone who intentionally commits an act that results in a violation of ambient air quality standards, water quality standards, seawater quality standards, or environmental damage criteria, can be subject to imprisonment with a minimum sentence of three years and a maximum of ten years. In addition, violators are also subject to a fairly large fine, namely a minimum of IDR 3,000,000,000.00 (three billion rupiah) and a maximum of IDR 10,000,000,000.00 (ten billion rupiah)(Suhardin et al., 2024).

Furthermore, Article 98 paragraph (2) of the UUPPLH provides heavier sanctions for those whose actions result in injury or health hazards to humans. In this case, violators can be punished with a minimum prison sentence of four years and a maximum of twelve years, as well as a fine ranging from IDR 4,000,000,000.00 (four billion rupiah) to IDR 12,000,000,000.00 (twelve billion rupiah)(Suhardin et al., 2024).

If the act results in serious injury or even death, Article 98 paragraph (3) of the UUPPLH stipulates a heavier penalty. Violators can be subject to a minimum of five years and a maximum of fifteen years in prison, as well as a fine ranging from IDR 5,000,000,000.00 (five billion rupiah) to IDR 15,000,000,000.00 (fifteen billion rupiah).

Meanwhile, Article 99 of the UUPPLH regulates sanctions for individuals whose negligence results in violations of environmental quality standards. In paragraph (1), it is explained that violators can be punished with a minimum of one year and a maximum of three years in prison, as well as a minimum fine of IDR 1,000,000,000.00 (one billion rupiah) and a maximum fine of IDR 3,000,000,000.00 (three billion rupiah).

If the negligence results in injury or health hazards to humans, Article 99 paragraph (2) of the UUPPLH stipulates a prison sentence of at least two years and a maximum of six years, with a fine ranging from IDR 2,000,000,000.00 (two billion rupiah) to IDR 6,000,000,000.00 (six billion rupiah).

Finally, if the negligence causes serious injury or death, Article 99 paragraph (3) of the UUPPLH provides a heavier sanction, namely a minimum of three years and a maximum of nine years in prison, and a fine ranging from IDR 3,000,000,000.00 (three billion rupiah) to IDR 9,000,000,000.00 (nine billion rupiah)(Suhardin et al., 2024).

With these provisions, the UUPPLH shows a commitment to protecting the environment and public health, as well as providing a deterrent effect for violators who harm the environment.

Article 98 and Article 99 of the UUPPLH are often used by investigators from the Police and PPNS of the Directorate General of Law Enforcement (Gakkum) of the Ministry of Environment and Forestry (KLHK) in forest and land fire (karhutla) cases involving corporations. This article is also used by public prosecutors including by the panel of judges from the district court level, high court to cassation at the Supreme Court. Because in essence, Articles 98 and 99 in Law No. 32 of 2009 concerning PPLH applies the Premium Remedium principle which means that investigators can immediately make a person or corporation a suspect. What distinguishes criminal law from other laws, namely public law and private law, is the issue of sanctions. Criminal sanctions can be in the form of imprisonment and confinement which make the convict have to compete and be separated from family and society. The most cruel sanction is the death penalty which makes the convict separated from his life, therefore, the judge is given the option not to use the sanctions in criminal law. The judge can choose other sanctions that are not harsh and not cruel, as long as they are with rational considerations for the good of the defendant and the future of the defendant. This is the same as the general principle stated in the Criminal Code, stating that no act can be punished except by the power of criminal regulations in legislation (principle of legality). This means that if an unlawful act has been regulated in legislation, then the act must be given a criminal sanction(Name et al., 2023).

Criminal law also regulates the relationship between individuals and the government because the things that are regulated can result in "social harm" if violated. Every crime that causes victims has been accepted as a legal definition. So, according to Perkins as cited by Richard Quinney, it should be noted that every crime is defined as a social loss and can be punished by law. Social loss can be in the form of physical injuries to a person, the state should be responsive if such things (suffering) threaten social order. Finally, it is said that victims are in fact part of the state itself, so handling them is an effort to protect social order. Richard Quinney, that in every act that is qualified as a criminal act/crime causes victims. Efforts to protect victims must be provided by the state, because in reality they are part of the state, so efforts to protect victims are in themselves efforts to protect social order, because criminal acts/crimes greatly disrupt social order. Likewise in the environmental sphere, of course environmental destruction causes "social harm" because its impact is felt by many. Therefore, it is necessary to implement the principle of ultimum remedium in enforcing environmental law as stated in Article 100 of the UUPPLH, which states that(Lynch, 1996):

(1) Any person who violates wastewater quality standards, emission quality standards or disturbance quality standards shall be subject to a maximum imprisonment of 3 (three) years and a maximum fine of Rp3,000,000,000 (three billion rupiah).

(2) The criminal acts as referred to in paragraph (1) may only be imposed if the administrative sanctions that have been imposed are not complied with or the violation is committed more than once.

The article above is clarified in the general explanation number 6 which states that(Pinem & Area, 2024):

"Enforcement of environmental criminal law must still pay attention to the principle of ultimum remedium which requires the application of criminal law enforcement as a last resort after the application of administrative law enforcement is deemed unsuccessful".

However, the application of the principle of ultimum remedium only applies to certain formal criminal acts, namely criminalization of violations of wastewater quality standards, emissions and disturbances. It's just that the UUPPLH is very limited to certain formal crimes (related to administrative law), whereas there are still many other formal crimes but criminal law is utilized in a primum remedium manner. Therefore, it is necessary to deconstruct the ultimum remedium principle in the enforcement of environmental criminal law which properly includes arrangement and enforcement (compliance and enforcement) which can also be a criminal law perspective that can be used as an instrument in the context of protecting the environment and can have consequences for the intertwining of criminal law with administrative law. The problem that will be discussed is why law enforcement officers tend to use the primum remedium principle more than the ultimum remedium principle(Pinem & Area, 2024).

2. RESEARCH METHODS

In accordance with the formulation of the research, this type of research is conducted with normative research with the consideration that the starting point of the research is the analysis of laws and regulations governing the enforcement of environmental criminal law and the principle of ultimum remedium. The nature of the research conducted is prescriptive research, which is more emphasized on certain problems related to business permits in relation to the principle of ultimum remedium and the enforcement of environmental criminal law based on the UUPPLH(Fernando et al., 2023). The approach in this study uses 6 (six) types of approaches. First, the statute approach, which is an approach used to study and analyze the provisions of the Law used to determine the principle of ultimum remedium and is carried out in order to conduct a content analysis of laws and regulations related to the enforcement of environmental criminal law to make the principle of ultimum remedium a relevant legal norm in the realm of environmental criminal law. Second, the conceptual approach is used to examine the concept of the Ultimum Remedium principle in the enforcement of environmental criminal law related to business permits. Third, the philosophical approach is used to examine the need for the application of the ultimum remedium principle to violations of business permits in the enforcement of environmental criminal law. Fourth, the comparative approach is an approach taken to compare the application or functionality of the ultimum remedium principle in Common law countries and Civil law countries, especially in the enforcement of environmental criminal law. Fifth, the historical approach is used to examine the history of the application of the ultimum remedium principle to violations of environmental permits which are now called business permits in the enforcement of environmental criminal law. Sixth, the case approach is used to examine the application or functionality of the ultimum remedium principle to violations of environmental permits/business permits in the enforcement of environmental criminal law(Fernando et al., 2023). Data analysis is carried out using qualitative data analysis methods. The selection of this method is based on various considerations, namely: First, qualitative analysis is based on the paradigm of a dynamic relationship between theories, concepts, and data which are feedback or constant modifications of theories and concepts based on the data collected. In the research, the collected data will be analyzed using theories that are considered relevant so that propositions can be formulated that connect the legal concepts found. Second, the data to be analyzed is diverse and has different basic properties between one and another. This research requires very diverse data to find the relationship between data through the perspective of the legal theory used. Third,

the basic nature of the data to be analyzed in the research is comprehensive and is an integral (holistic) unit that requires the availability of in-depth information. The very diverse data in this research is systematized into categories that can describe the interconnectedness of the data so that all research problems can be explained and answers can be found that can be accounted for in the perspective of the theory used(Suter, 2014).

3.1. Tendency of Law Enforcement Officers in Applying Formal Offenses in Environmental Criminal Law Enforcement Related to the Ultimum Remedium Principle

Some academics argue that law enforcers tend to apply the principle of pimum remedium rather than ultimum remedium, it turns out that their opinions are still abstract, a special procedure for applying formal crimes at the applicative level has not been obtained. According to Mudzakir, M. Daud Silalahi, Andi Hamzah, Muladi, et al., stated that criminal procedures as the ultimate procedure, meaning that criminal elements are utilized for environmental violations after administrative law procedures, civil law, alternative dispute resolution fail or are ineffective. The principle of ultimum remedium is actually still needed, some even suggest that it be included in a special article(Law et al., 2024). The application of the principle of ultimum remedium must place the function of criminal law as a guard (guard only), must be preceded by administrative actions, not directly criminal law (criminal procedures as supporting or ultimate procedures or ultimum remedium).

This is in line with the draft resolution on The Role of Criminal Law in the Protection of Nature and the Environment in the 1990 UN Congress, among others, stating that in addition to actions based on administrative law and accountability based on civil law, it is also necessary to take action on environmental problems based on criminal law. UN member countries are urged to implement effectively in their respective national laws, including criminal law related to environmental protection. Only Hartiwiningsih is of the opinion that the principle of ultimum remedium should be abolished in the environmental law system, because it is impossible for criminal law to be dependent on administrative law(UNODC, 2022).

However, many disagree with Hartiwiningsih's opinion, because if nature has been damaged and/or heavily polluted, due to relatively large actions, and the community has been restless, then this kind of crime is a completed crime, namely a material crime. For material crimes, the function of criminal law should be primum remedium, therefore repressive actions can be directly operationalized. This ultimum remedium principle must always be associated with formal crimes, where nature has not actually been polluted and/or damaged. For incidents like this, it is wise to first hand over the handling to the administrative law regime(Dewi et al., 2021).

There is another expert opinion, namely RB. Prabowo in a pre-trial case, where before the environmental PPNS conducts an investigation, the environmental PPNS must first provide guidance, without providing guidance first, the environmental PPNS is not allowed to conduct an investigation. This opinion is clearly wrong, because the task of PPNS according to the Criminal Procedure Code is not to provide guidance (enters the realm of administrative law) but to conduct an investigation and continue with an investigation (the realm of criminal law). Because the one carrying out the guidance action is an agency related to the environment, not the task of PPNS(Dewi & Rahma Wat, 2014).

Procedural law must be very technical that does not give rise to multiple interpretations, detailed and clear and can be implemented. This is because in formal crimes related to the ultimum remedium principle, it must be arranged in an applicative manner. Because almost all law enforcement officers tend not to be able to distinguish how to apply formal crimes and material crimes in enforcing environmental criminal law. This is correlated with cases of environmental pollution and/or destruction that are referred to the Court, there is no distinction in the application of formal and material crimes, as if there is no meaning of the ultimum remedium principle in the UUPPLH. The existence of this ultimum remedium principle should be correlated with formal crimes that give rise to special procedural law. Special procedural law should be obeyed in the application of these formal crimes. If this is ignored, the process of handling environmental cases can result in being null and void(Dewi et al., 2020).

3.2. Analysis of Law Enforcement Officers' Opinions on the Enforcement of Formal Crimes

Formal crimes of criminal law utilization must pay attention to the principle of ultimum remedium, namely that criminal law should be utilized if sanctions in other legal fields, such as administrative law sanctions, are ineffective. Such as 13 environmental cases filed by public prosecutors which turned out to use criminal law or criminal law that was utilized in a primum remedium manner, including filing charges using formal crimes of Article 43 or 44 of the UUPPLH without considering the principle of ultimum remedium. Properly, in utilizing formal crimes of environmental criminal law, it must be the last resort or final effort after other legal efforts (administrative law) are declared null and void(Asiva Noor Rachmayani, 2015).

However, in reality, the public prosecutor's indictment in court is still always compiled with a mixture of formal and material crimes. For example, case number 161/Pid.B/2003/PN.BB where in this case the public prosecutor attached the results of laboratory tests stating that the waste disposed of by the defendant had exceeded the permitted environmental quality standards, without any evidence of environmental damage or human casualties. If we look closely at the way the public prosecutor drafted his indictment, it turns out to be very careless and imprecise, aka careless, this is because the indictment concerning material crimes of Article 41 and Article 42, in his indictment still uses the word "can" even though for material crimes the word "can" cannot be used because what is intended in material crimes is the result of an act, not the act itself(Firdaus et al., 2022).

Meanwhile, the word "can" contains the meaning that environmental pollution or damage does not necessarily occur and this is part of a formal crime. Because formal crimes do not discuss the consequences of an act but only discuss the act itself, namely in the form of violating administrative laws and regulations.

The preparation of the indictment against this kind of material crime clearly illustrates the lack of understanding of the public prosecutor and his judge regarding the existence of material crimes in the UUPPLH. For this kind of indictment, the panel should declare the indictment obscuur libel or vague and can have implications for the cancellation or nullification of the public prosecutor's indictment. When the public prosecutor charges with a formal crime, it should be clear that administrative legal action has been taken previously but the defendant remains stubborn, so that it is necessary to continue with criminal action. Therefore, this kind of public prosecutor's charge clearly violates the principle of ultimum remedium(Ma'Ruf, 2021).

CONCLUSION

The Code of Practice adopted in environmental supervision emphasizes the importance of community participation in decision-making related to the regulation and supervision of environmental management. The community is expected to be aware of its rights and obligations to actively participate in the process.

However, this does not reduce the government's responsibility to take action against violations of existing laws and regulations. The government has the authority to implement regulations that are of a regulatory nature, which aim to prohibit or limit activities that can damage the environment, as well as to enforce environmental law.

Enforcement of environmental law involves efforts to achieve compliance with applicable regulations and legal requirements, both generally and individually. This is done through supervision and the application of administrative, criminal, and civil sanctions. The application of these sanctions is important to maintain the reciprocal relationship between humans and the environment, as well as to uphold the values expected in environmental law.

The development of environmental law shows a shift from simple nuisance law to more complex administrative law, along with the increasing role of the authorities in regulating people's lives. Environmental law is not only influenced by administrative law and civil law, but also by the moral and customary values adopted by the local community.

Criminal sanctions are considered an effective solution to address the increasing environmental crimes. The state has a responsibility to maintain security and order, as well as provide legal protection for its citizens. In this case, it is important to apply the principles of rationality and proportionality in law enforcement, so that the sanctions given are in accordance with the level of violation committed.

Law Number 32 of 2009 concerning Environmental Protection and Management (UUPPLH) emphasizes the commitment to protect the environment through strict sanctions for violators. Article 98 and Article 99 of the UUPPLH provide a clear legal framework for prosecuting violations that harm the environment, whether committed intentionally or through negligence.

However, in practice, there is a tendency for law enforcement officers to prioritize the application of the primum remedium principle over the ultimum remedium principle. This shows the need for better affirmation and understanding of the application of formal and material crimes in the enforcement of environmental criminal law. The application of the ultimum remedium principle should be a guideline in using criminal law as a last resort after other legal measures are deemed ineffective.

Overall, environmental law enforcement requires a comprehensive and integrated approach, involving all parties, including government, society and the private sector, to achieve the goal of sustainable environmental protection.

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