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# The Concept of Ultimum Remedium in the Regulation of Environmental Crimes

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**ABSTRACT**

How to cite (APA Citation Style): Limonu, R., Ismail, Dian Ekawaty, Abdussamad, Zamroni. (2023). The Concept of Ultimum Remedium in the Regulation of Environmental Crime. This study aims to analyze the conception of the principle of ultimum remedium in the regulation of environmental crimes in the current Environmental Law. The type of this article is normative legal research with a statutory approach and a conceptual approach. The findings of this research show that except for Article 100, environmental crimes are applied primum remedium. Even though environmental crimes are included in the realm of administrative law, so that criminal sanctions must function to enforce administrative law and be positioned as a last resort after administrative and civil sanctions have been carried out. This is in line with the spirit of criminal law reform which places greater emphasis on corrective, restorative and rehabilitative justice. Apart from that, to avoid excessive criminalization in environmental crimes. The novelty offered by this research is by changing several criminal articles which are formulated as formal offenses into material offenses which are more oriented towards the impact or victims caused by the act and explicitly regulate the use of administrative sanctions and civil sanctions as a first step in enforcing environmental law. An act that is punished is an act that has resulted in loss of life, has a massive and widespread impact on society, environmental pollution or damage cannot be restored, and the perpetrator failed and was unwilling or unable to carry out environmental restoration.

**Keywords:** Ultimate remedy; criminal law; environmental crime; administrative law.

## 1. Introduction

Criminal law is one of the instruments to tackle crime. Criminal law is used in the judicial process to enforce the criminal law itself and become a rational policy in tackling crime to achieve justice and human welfare. The judicial process is a process that involves various elements that influence each other on the legal process.[1]

In relation to justice, John Rawls argues that there are two important principles in terms of justice. The first is equality in rights and freedoms (*the greatest equal principle*), and the second is the regulation of inequality that focuses on maximizing benefits for the disadvantaged, especially in economic matters (*the different principle* and *the principle of fair equality of opportunity*).[2]

Criminal law is characterized by sanctions that are harsher, sharper, and cause pain to the person convicted. Criminal law is also often used to encourage compliance with other legal norms, such as in the areas of administrative and civil law. However, in its implementation, criminal law is positioned as the main legal instrument in law enforcement, including those relating to administrative law and civil law (*primum remedium*).

H.G de Bunt and Remmelink expressed their opinion regarding the primum remedium of criminal law. According to them, if you want to make criminal law as the primum remedium, it must be when it is really needed and other legal instruments are no longer effectively used (*mercenary*), the victims caused are very many, the consequences of the act are difficult to recover (*irreparable*), and the perpetrator is a *recidivist*.[3]

The regulation of criminal offenses in Indonesia, apart from being contained in the Criminal Code (KUHP), is also regulated outside the Criminal Code, especially criminal offenses in the field of administration. This is referred to as *Administrative Penal Law*. Criminal arrangements in administrative law are intended as a means to enforce the administrative provisions in the law. The regulation of criminal offenses outside the Criminal Code is possible considering that Article 103 of the old Criminal Code and Article 187 of the national Criminal Code have provided space for it. So that in our country a

[1] Dian Ekawaty Ismail and Avelia Mantali. (2021). *Criminal Procedure Law, An Introduction*. UII Press Yogyakarta. Page. 2.
[2] Muhammad Taufiq (2014). *John Rawls' Philosophy of Justice Theory*, Journal of Islamic Studies Mukaddimah, Volume 19 No. 1. 51
[3] Titis Anindyajati, Irfan Nur Rachman, Anak Agung Dian Onita. (2015). *Constitutionality of Criminal Sanction Norms as Ultimum Remedium in the Formation of Legislation*, Journal of the Constitution, Constitutional Court of the Republic of Indonesia. Vol. 12 No. 4. Page. 877

phenomenon arises where most laws always regulate criminal provisions in them. It is as if it is incomplete and imperfect if a law product does not include criminal sanctions. Whereas the nature of criminal law that can cause suffering must be used carefully and not arbitrarily include criminal sanctions in legislation.

The rise of this phenomenon causes the formulation of administrative law to tend to place criminal law as the first tool in sanctioning (*primum remedium*) and reduce and ignore the existence of human rights or constitutional rights of citizens. One of the administrative laws that regulates criminal provisions is Law Number 32 of 2009 concerning Environmental Protection and Management or known as the PPLH Law. In environmental criminal cases, criminal sanctions are applied to violations of administrative provisions which are in fact only related to procedural aspects. Some examples of environmental cases illustrate this phenomenon to us, the act of discharging waste into the environment without a permit, storing hazardous and toxic waste without a permit, or not storing hazardous and toxic waste properly is directly applied to criminal sanctions. These violations may occur due to a lack of education from the government, so that the perpetrators of violations unconsciously commit the act. Even though these administrative violations do not cause extraordinary consequences that threaten people's lives and the environment (*abnormally dengerous activities*).

As the opinion of Prof. Mardjono Reksodiputro regarding efforts to prevent environmental pollution in relation to criminal law enforcement. According to him, criminal sanctions should be positioned as an alternative sanction to administrative sanctions. Criminal sanctions are only given if there is an element of guilt in the form of intent from the perpetrator who commits a violation and results in environmental pollution that threatens public health. In cases of environmental pollution involving corporations, the directors should be responsible for representing the company.[4]

Placing ultimum remedium or primum remedium against criminal law in positive legal norms must also be understood as a form of legal politics of the PPLH Law. This can be seen in several criminal provisions of the PPLH Law after it was amended by the Job Creation Law. The issuance of the Job Creation Law has implications for other norms, for example related to the division of authority between the central government and local governments, policies related to Amdal and UKL-UPL, and also affects the regulation of the imposition of administrative sanctions and criminal sanctions that existed in the previous PPLH Law.[5] The Job Creation Law amends several criminal provisions in the PPLH Law. There are two articles that are deleted, namely Article 102 relating to activities to manage hazardous and toxic waste without a permit and Article 110 relating to people who conduct EIA preparation without having a certificate of competence. Furthermore, Article 109 which was previously a formal offense was changed to a material offense. The Job Creation Law also added 3 (three) articles to the Chapter on Supervision and Administrative Sanctions, namely Article 82A, Article 82B, and Article 82C and amended several other articles due to the abolition of Environmental Permits and replaced with Environmental Approval which is one of the prerequisites for issuing Business Licenses or Government Approval. Then the question arises whether the amendment of several criminal provisions of the Environmental Law by the Job Creation Law makes the regulation of criminal acts in the Environmental Law has adhered to the ultimum remedium principle or not?

This is what will then be examined in this paper, namely regarding the ultimum remedium in the regulation of environmental crimes.

## 2. Problem Formulation

Based on the above problems, the prospective researchers formulate the problems that will be studied in this study, namely:

a. How is the ultimum remedium setting for environmental crimes in the PPLH Law after being amended by the Job Creation Law?

b. How is the conception of environmental crime regulation based on the ultimum remedium principle in line with the objectives of criminal law reform in the future?

## 3. Research Methods

This research is a normative legal research that uses *statute* approach and *conceptual* approach. The sources of legal materials used in this research are primary legal materials in the form of laws and regulations and secondary legal materials in the form of books, legal journals, and the internet, as well as other relevant materials.

## 4. Discussion

### *4.1 Ultimum Remedium in the Regulation of Environmental Crime Provisions After the Job Creation Law*

Criminal provisions in the PPLH Law are regulated in Chapter XV starting from Article 97 to Article 120. The formulation of articles regulating criminal sanctions in the PPLH Law can be seen from several aspects.

***First,*** Subject Formulation (*addressaat norm*). In addition to recognizing the legal subject of person (*natuurlijke persoon*), the PPLH Law also recognizes the legal subject of entity (*recht persoon*) including corporations. The PPLH Law also regulates legal subjects with certain qualities. This

[4] Isya Anung Wicaksono & Fatma Ulfatun Najicha. (2021). *Application of the Ultimum Remedium Principle in Law Enforcement in the Environmental Field*. Pagaruyuang Law Journal. Volume 5 No. 1. Page 54

[5] Helmi (2021). *The Position of the Job Creation Law Against the Environmental Law and its Implications*, Journal of Legal Sciences, Faculty of Law, Riau University. Vol. 10 No. 2. Page. 273

means that the person must meet these qualities so that if the person does not meet these qualities then it is not the target (*addressaat norm*) of the criminal regulation. The legal subjects are the Official granting the Environmental Approval (Article 111), the Official authorized to conduct supervision (Article 112), and the person in charge of the business and/or activity (Article 114).

***Second***, the formulation of criminal offense (*strafbaar feit*). Criminal offenses in the PPLH Law are formulated in material offenses and formal offenses. Before the existence of the Job Creation Law, the material offense in the PPLH Law could be found in Article 98, Article 99, and Article 112. While the formal offense is found in Articles 100 to 111, then Article 113 to Article 115. Regarding the aspect of fault, the PPLH Law distinguishes the principle of criminal fault / material offense into intentional (*dolus*) and unintentional (*culpa*) acts as in Article 98, Article 99, and Article 112.

After the issuance of the Job Creation Law, there are 2 (two) criminal provisions of the Environmental Law that were deleted, namely Article 102 and Article 110, and 1 (one) criminal provision was changed to material offense, namely Article 109. In addition, there are also criminal provisions that are changed due to adjusting the licensing policy in the PPLH Law which substantively actually has not changed. The provisions in question are Article 111 and Article 112 which have used the term Environmental Approval to replace Environmental Permit and the term Business Licensing or Government Approval as a substitute for business and/or activity licenses.

The Job Creation Law also adds 3 (three) articles relating to administrative sanctions to the Environmental Law, namely Article 82A, Article 82B, and Article 82C as a consequence of changes and deletion of several articles governing criminal offenses. Sanctions for the act of managing hazardous waste without a license regulated in Article 102 and preparing an EIA without a certificate of competence in Article 110 are changed to administrative sanctions. We can see this in Article 82B. Meanwhile, the criminal provisions in Article 109, which are in the form of formal offenses, have changed to material offenses. Meanwhile, the sanctions for the formal offense have been changed to administrative sanctions, the arrangements of which can be seen in Article 82A of the Environmental Law which has been amended by the Job Creation Law.

The regulation of administrative offenses with criminal sanctions in administrative laws is separated between primary norms and secondary norms, or if the primary norm is to be formulated in criminal provisions, the article containing the primary norm must be referred to.[6] In the PPLH Law, primary norms and secondary norms are separated. The formulation of actions in the form of primary norms in the form of orders, obligations, and prohibitions is regulated in separate articles or administrative provisions. Actions in the form of obligations are regulated in Article 67 and Article 68, and the prohibition is regulated in Article 69. In addition to the formulation of prohibited actions, orders or obligations are also scattered in several other articles. For example, related to the obligation to have an EIA (Article 22) and UKL-UPL (Article 34), to have a certificate of competence for EIA compilers (Article 28), to allocate a budget for the environment (Article 45 and Article 46), to conduct environmental audits (Article 49), to mitigate pollution or environmental damage (Article 53), to restore the environment (Article 54), to manage hazardous waste (Article 59), and many other articles. Likewise, we can find prohibitions in Article 60 (dumping waste without a permit), and Article 74 (obstructing environmental supervision). Meanwhile, secondary norms in the form of penalties for non-compliance with the primary norms are regulated in the Criminal Provisions Chapter in Articles 97 to 120. Thus, according to Chairul Huda as quoted by Septa Chandra, it can be said that the formulation of criminal acts is intended to secure administrative provisions and become the core part (*bestanddeel*) of criminal acts.[7]

**Third**, Criminal Formulation and Punishment (*strafmaat*). The provisions of criminal sanctions in the PPLH Law have the following characteristics:

1) Adopting the ultimum remedium principle is limited. The application of ultimum remedium to environmental crimes is only limited to violations of wastewater quality standards, emission quality standards, and nuisance quality standards. While other criminal offenses adhere to the principle of primum remedium.
2) Formulated cumulatively. The cumulative nature is not only limited to combining criminal sanctions of imprisonment and fines. Perpetrators may also be subject to administrative sanctions and civil sanctions in addition to criminal sanctions for the same offense.
3) Using a pattern of special minimum and special maximum punishment.
4) The aggravation of criminal sanctions against corporate crime is to the person who gives orders or leaders of criminal acts.
5) Corporations that commit criminal offenses may be subject to additional criminal sanctions or disciplinary measures.

Regarding punishment, the PPLH Law does not specifically regulate the guidelines for punishment of environmental crimes. However, judges may be able to make futuristic interpretations by using the existing sentencing guidelines in the national Criminal Code.

From the description of the 3 (three) aspects above, it can be seen that the PPLH Law that has been amended by the Job Creation Law has adopted the ultimum remedium principle. The Job Creation Law decriminalizes several criminal offenses contained in the PPLH Law, including the formal criminal offenses in Article 102, Article 110, and Article 109. However, the ultimum remedium in the PPLH Law after being amended by the Job Creation Law is only imposed on:

1) Criminal offenses related to violations of wastewater quality standards, emission quality standards, and nuisance quality standards.
2) Crimes related to conducting business and/or activities without a license.
3) Crimes related to managing hazardous waste without a license.

[6] Septa Candra. (2021). *Formulation of Criminal Provisions in Administrative Criminal Law*. Kencana. Page. 69.
[7] *Ibid.* pp. 67.

The ultimum remedium for criminal offenses of violations of wastewater quality standards, emission quality standards, and nuisance quality standards is to apply criminal sanctions when violations have been committed more than once or do not implement administrative sanctions. As for criminal offenses related to business licenses and hazardous waste management licenses, criminal sanctions will only be imposed if the act has resulted in victims/damage to health, safety, and/or the environment. If it has not resulted in this, then administrative sanctions will be imposed.

Thus, the ultimum remedium in the PPLH Law after the Job Creation Law is limitedly applied to :

1) Non-compliance with administrative sanctions,
2) Recidivist, or
3) Conducting business and/or activities without a license that results in victims/damage to health, safety, and/or the environment.

### *4.2 Ultimum Remedium in the Future Regulation of Environmental Crimes.*

Nigel Walker once reminded that there are *limiting principles* that should receive attention when applying criminal law or when criminalizing an act, namely: 1) Do not use criminal law to carry out retaliation; 2) Do not use criminal law to punish an act that does not cause harm or danger; 3) Do not use criminal law if there are other means that are more effective and less severe; 4) Do not use criminal law if the harm from imposing punishment is greater than the criminal act itself; 5) The nature of the prohibitions related to criminal law should not be more dangerous than the act to be prevented; and 6) Do not make prohibitions that do not have strong support from the community.[8]

In line with the concept of punishment in the current criminal law reform, Prof. Eddy O.S. Hiariej argues that the concept of punishment in the new Criminal Code emphasizes the achievement of 3 (three) aspects of justice, namely corrective justice, rehabilitative justice, and restorative justice. Corrective justice is oriented towards the perpetrator, namely to correct the actions or mistakes of the perpetrator and therefore he must be sanctioned. Then restorative justice is oriented towards the victim through restoring the rights of the victim. Meanwhile, rehabilitative justice is oriented towards victims and perpetrators, meaning that the application of criminal sanctions is intended to rehabilitate the perpetrator so that he does not repeat his actions and when he returns to society he can be well received as well as to restore the conditions and rights of crime victims.[9] Criminal sanctions are not simply to retaliate against the perpetrator's actions as in absolute theory, or not only as a means to prevent crime, but more than that. Criminal sanctions are used to achieve a balance of recovery for victims and perpetrators of crime.

In the context of environmental crimes, the sanctions given should also be aimed at restoring environmental conditions as well as being able to provide punishment and foster awareness to the perpetrators of environmental damage or pollution to care for the environment. This awareness will be achieved if the person concerned is charged with the responsibility to restore the condition of the polluted or damaged environment due to his actions. This is in line with the *polluter pay principle*, the 15th principle of the Rio De Janeiro Declaration and the principle of sustainability and sustainability that animates the PPLH Law. So that the choice that is considered appropriate is to utilize administrative sanctions.

The question then is why administrative sanctions? Is it possible that the imposition of administrative sanctions can restore environmental conditions. To answer that question, we need to look at the nature and types of administrative sanctions in the context of environmental law enforcement. As existing regulations, administrative sanctions are preventive (prevention), repressive (action), and reparatoir (repair). Types of administrative sanctions related to environmental violations are in the form of written warnings, government coercion (*bestuursdwang*), administrative fines, license suspension, and license revocation. The mechanism for applying administrative sanctions can be carried out in stages, freely, or cumulatively depending on the level of violation. The reparatoir nature of administrative sanctions is a form of recovery effort carried out by the perpetrators of environmental violations. Even the last step of administrative sanctions is license revocation which results in the closure of business activities. This is the same as the death penalty for businesses run by perpetrators of environmental damage and pollution. So that in addition to being effective in restoring environmental conditions, administrative sanctions are also efficient in terms of costs and procedures. Even the application of administrative sanctions in the form of administrative fines can increase state revenue.

Therefore, the ultimum remedium in environmental crimes must be applied not only to the 3 (three) criminal offenses mentioned above, but also to other environmental crimes. The ultimum remedium principle must also be contained in the provisions of the criminal article or other articles related to the crime in the PPLH Law. Therefore, this mechanism must be taken by reformulating the criminal provisions in the PPLH Law into an ultimum remedium to provide legal certainty. So that there is no disparity in judges' decisions or handling of environmental crimes by other law enforcement officials related to environmental cases.

However, the ultimum remedium does not necessarily deny the principles of environmental protection and management. Therefore, the ultimum remedium in the PPLH Law must balance these principles with the concept of criminal law reform. So that there needs to be a limitation of criteria regarding what types of criminal acts are applied as ultimum remedium and when the utilization of criminal sanctions against perpetrators of environmental damage and pollution is carried out.

Therefore, the concept of ultimum remedium in the regulation of environmental crimes in the future needs to be improved as follows:

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[8] Ajie Ramdan. (2018). *Death Penalty Policy in RKUHP Viewed from Political Aspects of Law and Human Rights.* Journal of *Arena* Hukum Vol.11. No.3. Page. 9

[9] FH UPNVJ (2020, September 29). Public Lecture on Criminal Law Policy Direction / New Paradigm: Corrective, Rehabilitative and Restorative Justice [Video]. *Youtube.* https://www.youtube.com/watch?v=qNsLCBz3-no accessed on October 27, 2023

1) Environmental crimes must be material offenses. This is done by decriminalizing formal crimes in the PPLH Law into administrative violations, for which administrative sanctions are sufficient.

2) Because it is material, environmental criminal sanctions should only be imposed on perpetrators who commit acts that meet one of the following criteria, namely:

a) Resulting in the death of people,

b) Massive pollution and/or damage to the environment, causing widespread human safety hazards,

c) The environmental pollution and/or damage is irreversible, or

d) The perpetrator of environmental pollution and/or damage fails and is unwilling or unable to carry out environmental restoration.

3) Reorganize the placement of prohibition, command, and obligation norms that are scattered across several chapters into specific chapters so that they are easy to understand.

In this regard, in addition to Article 100 and Article 109 which have been amended by the Job Creation Law, there are also several formal criminal acts of the PPLH Law that need to be reformulated as the conception offered by the author above. The act is in the form of:

1) Releasing and/or distributing genetically engineered products to environmental media in contravention of laws and regulations or environmental permits,

2) Managing hazardous waste without a license,

3) Generating hazardous waste and not managing it,

4) Dumping waste and/or materials into environmental media without a permit,

5) Entering waste into Indonesian territory,

6) Entering hazardous waste into Indonesian territory,

7) Entering B3 that is prohibited according to laws and regulations into the territory of Indonesia,

8) Burning land; and

9) Actions of the person in charge of the business and/or activities that do not implement administrative sanctions;

In connection with this, the utilization of administrative sanctions is important and must be done optimally. This effort can be done through :

1) Impose severe sanctions on administrative officials who do not perform their functions in enforcing administrative sanctions.

2) Impose fines and *dwaangsom* proportionally to the perpetrators of environmental pollution or damage.

3) Strengthen the environmental supervision system through structuring environmental supervisory human resources, providing facilities and infrastructure and allocating an adequate budget.

Making environmental crime as the ultimum remedium as the concept offered by the author above, is expected to provide justice for all parties, both perpetrators and victims. As according to the figure of the utilitarianism school, Jeremy Bentham, every choice of action we take should be able to provide benefits, goodness, happiness, and comfort, which in turn can prevent the emergence of suffering, pain, evil or uselessness.[10] The polluted or damaged environment can be restored to its function by imposing its responsibility on the perpetrator through the fulfillment of the administrative sanctions imposed, either by carrying out certain actions, carrying out environmental restoration, paying fines or the imposition of forced money. The perpetrator will also not experience excessive criminalization from law enforcement officials for an act that can actually still be handled with an administrative approach rather than using criminal instruments. As long as the act does not cause casualties, does not have a massive and widespread impact on society, can be restored with available technology, and there is a real commitment from the perpetrator, then the right choice is the ultimum remedium. To support this, it is necessary to strengthen the administrative law enforcement system carried out by administrative officials including environmental supervisory personnel.

## 5. Cover

From the above discussion, the author draws the following conclusions:

1) The regulation of environmental crimes in the PPLH Law after being amended by the Job Creation Law has adopted the principle of limited ultimum remedium. The ultimum remedium is only imposed on perpetrators of violations of wastewater quality standards, emission quality standards, disturbance quality standards if they are repeated or do not comply with administrative sanctions, as well as on

[10] Endang Pratiwi.et al (2022). *Jeremy Bentham's Utilitarianism Theory: The Purpose of Law or the Method of Testing Legal Products?* Journal of the Constitution, Volume 19 No. 2. 277

perpetrators who conduct business and / or activities without a license that do not cause victims / damage to health, safety, and / or the environment. For other environmental crimes, the primum remedium principle is still applied.

2) The conception of environmental crimes in the PPLH Law in the future should place administrative sanctions as an initial instrument in enforcing environmental law (ultimum remedium) except if the act has caused casualties, has a massive and widespread impact on society, pollution or environmental damage cannot be restored, and the perpetrator fails and is unwilling or unable to carry out environmental restoration. So that the formulation of environmental crimes must be formulated as material offenses.

The importance of placing the ultimum remedium in regulating environmental crimes in the PPLH Law is not only because environmental laws are administrative laws, but also in line with the concept of criminal law reform which emphasizes more balance in providing justice to victims and perpetrators so that it will be expected to provide a sense of justice for all parties, both perpetrators and victims of society and the environment.

## Reference

**Books**

Candra, Septa. (2021). *Formulation of Criminal Provisions in Administrative Criminal Law*. Kencana.

Ismail, Dian Ekawaty & Mantali, Avelia. (2021). *Criminal Procedure Law, An Introduction*. UII Press Yogyakarta.

**Journal**

Endang Pratiwi.et al (2022). *Jeremy Bentham's Utilitarianism Theory: Legal Objective or Legal Product Testing Method?* Constitutional Journal, Volume 19 No. 2

Helmi (2021). The Position of the Job Creation Law Against the Environmental Law and its Implications, Journal of Legal Sciences, Faculty of Law, Riau University. Vol. 10 No. 2

Isya Anung Wicaksono & Fatma Ulfatun Najicha. (2021). *Application of the Ultimum Remedium Principle in Law Enforcement in the Environmental Field*. Pagaruyuang Law Journal. Volume 5 No. 1

Muhammad Taufiq (2014). *John Rawls' Philosophy of Justice Theory*, Mukaddimah Journal of Islamic Studies, Volume 19 No. 1

Ramdan, Ajie. (2018). Death Penalty Policy in RKUHP Viewed from Political Aspects of Law and Human Rights. Journal of Arena Hukum Vol.11. No.3

Titis Anindyajati, Irfan Nur Rachman, Anak Agung Dian Onita. (2015). *Constitutionality of Criminal Sanction Norms as Ultimum Remedium in the Formation of Legislation*, Journal of the Constitution, Constitutional Court of the Republic of Indonesia. Vol. 12 No. 4.

**Legislation**

Law Number 32 of 2009 concerning Environmental Protection and Management.

**Website**

FH UPNVJ (2020, September 29). Public Lecture on Criminal Law Policy Direction / New Paradigm: Corrective, Rehabilitative and Restorative Justice [Video]. Youtube. https://www.youtube.com/watch?v=qNsLCBz3-no accessed on October 27, 2023.