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THE ESSENCE OF PRIMUM REMEDIUM PRINCIPLE IN THE ENFORCEMENT OF ENVIRONMENTAL CRIMINAL LAW

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Abstract

Environmental law enforcement is aimed at the return of the environment into an ecosystem in the sense that the environment lies in an order of environmental elements which is a whole-whole unity and influences each other in shaping the balance, stability, and environmental productivity. When the ecosystem is problematic because of pollution and environmental damage, so having their own characters, because enforcement of environmental law is a bit fairly complicated law enforcement because environmental law occupies a cross between the various fields of classical laws.

Seeing the increasing of widespread damages and environmental pollution, the criminal sanction in law enforcement experiences a shift from the principle of ultimum remedium to primum remedium.

Essential essence of primum remedium in enforcement of environmental criminal law, is that on enforcement of environmental law puts criminal sanction as the main choice with the aim to give more protection to the environment.

Keywords: Primum Remedium, Enforcement, Environmental Criminal Law

A. Introduction

Discussing about criminal law enforcement is begun by understanding what the meaning of the Criminal Law itself. According to Pompe, Criminal Law is all the rules of law that determine what actions should be criminalized, and what kind of criminal it is.[1]Meanwhile, according to Moeljatno, that criminal law is part of the whole law applied in a State which provides the basics and rules to:

1. Determine which unauthorized and prohibited acts, accompanied by threats or sanctions in the form of a specific penalty for any person who violates the prohibition.
2. Determine when and in what matters to those who have violated the prohibition may be liable or criminally charged.
3. Determine in such a way how the imposition of a criminal can be exercised if any person is suspected of violating the prohibition.[2]

Thus the Criminal Law is the whole of the rules that determine what actions are prohibited and included in the offense, and determine what penalties can be imposed on those who do.[3]Sudarsono says basically the Criminal Law which regulates the crime and violation of the public interest and the act is threatened with criminal which is a suffering.[4]

The purpose of criminal law is not solely accomplished by the imposition of a criminal, but it is a strong repressive measure of security measures. It is also necessary to distinguish between criminal and criminal

***Pengajar Matakuiah Hukum Lingkungan di Program Magister Ilmu Hukum Universitas Lambung Mangkurat Banjarmasin, Kalimantan Selatan,Indonesia**
[1] Andi Hamzah, ***Asas-asas hukum pidana,***Rineka Cipta. Jakarta, hal.5
[2]Moeljatno ,***Asas Asas Hukum Pidana***, Rineka Cipta, 2008, Jakarta, hal. 1
[3] Muchsin,,***Ikhtisar Ilmu Hukum***,Badan Penerbit Iblam, 2006, Jakarta, hal. 84
[4]Titik Triwulan Tutik, ***Pengantar Ilmu Hukum***,Prestasi Pustaka, 2006, Jakarta,hal. 216-217

terms. Criminal penalties protect both the interests exercised by private law as well as interests held by the law of the public. We must also remember that the criminal provision does not necessarily mean that all of its violations end in criminal detention and criminal detention of the perpetrators.

Related to the environmental case, there is the real meaning of environmental law enforcement which directed to the return of the environment into an ecosystem, meaning the environment in an order of environmental elements that is a whole-whole and affect each other in shaping the balance, stability, and environmental productivity. When the ecosystem is being problematic due to pollution and environmental damage, enforcement of environmental law is not addressed to a matter of one's behavior, but to an environmental condition. Therefore, enforcement of environmental law has its own character, because enforcement of environmental law is a bit fairly complicated law enforcement because environmental law occupies a cross between the various fields of classical law. Environmental law enforcement is the last link in the policy planning cycle of environmental policy in the following order:

1. Legislation,
2. Determination of standards,
3. License granting,
4. Application,
5. Law enforcement.[1]

M. Daud Silalahi mentions that enforcement of environmental law including compliance and prosecution including state administration law, civil law field and criminal law field.[2] Law No.32 in 2009 provides three types of environmental law enforcement namely administrative law enforcement, civil law and criminal law. Among the three forms of law enforcements, enforcement of administrative law is considered the most important law enforcement effort. This is because the enforcement of administrative law much more directed to prevent the occurrence of pollution and environmental destruction. In addition, administrative law enforcement also aims to punish perpetrators of pollution and environmental destruction

Related to this matter by looking at the nature of the enforcement of environmental law above, then enforcement of criminal law aimed at the imposition of criminal to perpetrators would be less relevant. That is why criminal sanctions in relation to environmental cases applied on the basis of the principle of ultimum remedium or in terms used by Law no. 23 in 1997 as the principle of subsidiarity in the sense of enforcing environmental law pursued through administrative sanctions and civil sanctions, if it is not sufficient the criminal sanctions will be applied. However, later seeing the widespread of damage and environmental pollution, then the criminal sanctions have shifted from the principle of ultimum remedium to primum remedium. The problem needed to be understood is what the essence of primum remedium principle in the enforcement of environmental criminal law is.

B. Result And Discussion

1. Character of Criminal Sanctions

Van Bemmelen argues that the distinction between Criminal Law and other areas of law is sanction of Criminal Law as the deliberate giving of threats of suffering and often also the imposition of suffering, which is done even if there is no crime victim. The distinction is the reason to regard the Criminal Law as ultimum remedium, the last attempt to improve the behavior of humans, especially criminals, and to provide psychological pressure to prevent others from committing crimes. Since sanctions are of special suffering, the application of criminal law should be restricted or the use applied if other legal sanctions are inadequate.[3]

Based on the aforementioned matters, the Criminal Law is known as the ultimum remedium principle. The principle of ultimum remedium is one of the principles contained in Indonesian criminal law which says that criminal law should be the last effort in law enforcement. Sudikno Mertokusumo means ultimum remedium as the last tool. [4]

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[1]Andi Hamzah*, **Penegakan Hukum Lingkungan,*** Sinar Grafika, Jakarta, 2005, hal. 52

[2] Andi Zainal Abidin Farid, ***Hukum Pidana I*, C**etakan Kedua, Sinar Grafika, Jakarta, 2007, hal. 16

[3]Sudikno Mertokusumo, ***Penemuan Hukum Sebuah Pengantar*,** Cahaya Atma, Yogyakarta, hal. 128

[4]*https://restatika.wordpress.com/*

The term ultimum remedium was first used by a Dutch Minister of Justice to answer the question of a member of parliament named Meckay in the context of the drafting of the Criminal Law (KUHP), which among others states that:

“The principle is that those who can be punished are those who create" onregt "(acts against the law). This is a condito sine qua non. Second, the requirement to be added is that the act of against the law based on experience cannot be suppressed in any other way. The penalty must remain the last effort. Basically there are objections in every criminal threat. Every intelligent human can also understand even without explanation. It does not mean that punishment should be abandoned, but one must make judgments about its advantages and disadvantages, and must guard against the occurrence of drugs that are given more evil than disease”. [1]

It should be admitted, however, that not all law scholars view the criminal as ultimum remedium. For example L.H.C. Huleman in his acceptance speech as Professor in Rotterdam in 1965 and A. Mulder in his farewell speech in Leiden argued that the Criminal Law is the same as any other law aimed at defending the law, and therefore the Criminal Law does not have an independent character.[2]Therefore, the ultimum remedium proposition is necessary to consider the use of other sanctions before the imposition hard and sharp criminal sanctions, if other legal functions are less, Criminal Law is used.

Regarding to the characteristics of the Criminal Law in the context of this ultimum remedium that the enforcement of the Criminal Law with harsh and sharp sanctions should still be attempted to make it possible to reduce suffering to the perpetrator as much as possible. And on the application of ultimum remedium in the imposition of criminal sanctions by judges can accommodate the interests of perpetrators of crime, every activity that refers to the application of the principle of imprisonment of prison as a last resort (ultimum remedium) is very supportive to the perpetrators of criminal acts, because before severe criminal sanctions are imposed, the use of other sanctions such as administrative sanctions and civil sanctions are take precedence over so when the functions of legal sanctions are less, they are imposed by criminal sanctions. But , looking at the other side through Van Bemmelen's view that the application of ultimum remedium should be defined as "effort" (middel), not as a means to restore injustice or to restore harm, but rather to restore a state of restlessness in society, if there is nothing done against the injustice, it can cause people to take their own judges.

Ultimum remedium is one of the principles contained in Indonesian criminal law which says that criminal law should be a last resort in law enforcement. This has a meaning when a case can be resolved through other channels (kinship, negotiation, mediation, civil, or administrative law) let the path first pass.

Then, Wirjono Prodjodikoro says that the norms or rules in the field of constitutional law and state administrative law must be first responded by administrative sanctions, as well as norms in the field of civil law must first be responded with civil sanctions. But, if the administrative sanctions and civil sanctions are not sufficient to achieve the goal of rectifying the balance sheet, the criminal sanction is also done as the ultimate (ultimate) or ultimum remedium. [3]Furthermore, Wirjono Prodjodikoro says that the nature of criminal sanctions as ultimate weapon or ultiimum remedium when compared with civil sanctions or administrative sanctions. This trait has created a tendency to save on criminal sanctions. So, from here we know that ultimum remedium is a term that describes a nature of criminal sanctions. [4]

Van de Bunt's opinion cited by Andi Hamzah argues that the criminal law as ultimum remedium means three kinds, namely the first, the Criminal Law as ultimum remedium because the application of the criminal law can only be done against people who violate the law in a very ethical weight. The second is the criminal law as an ultimum remedium because criminal penalties are heavier and harder than other sanctions in the field of law, and often with side effects, it should be applicable if sanctions in other legal fields are unable to resolve the issue of lawlessness. Thus, here the criminal law is actually applied as the last drug, meaning that if other laws are not able to overcome the violation of the law, then the criminal law can be applied. Thirdly, the criminal law is as an ultimum remedium because administrative officials know in advance the offense. So, they are given priority to take steps and actions rather than criminal law enforcers.

[1]*Ibid*.
[2]Wirjono Prodjodikoro “***Asas-Asas Hukum Pidana di Indonesia***”. Bandung, Refika. Aditama, 2003, hal. 17,
[3]*Ibid*, hal. 50
[4] M. Hadin Muhjad, ***Hukum Lingkungan, Sebuah Pengantar untuk Konteks Indonesia***,Yogyakarta ,Genta Publishing,2015, hal. 222

Van de Bunt refutes the adapted ones with the situation in Indonesia, so we can see as follows that in the case of mining for example, Official Mining Officials who have issued prior permission to know the occurrence of a violation, therefore they should first get a chance to correct the violation or the deviation. If they cannot afford it, then they submit the matter to law enforcement officers. Another Van de Bunt's argument talks how if the administrative official is involved in the violation (eg corruption), whether the criminal law can still be retained as an ultimum remedium or not. How if the offender is a recidivist, meaning that it has committed the same offense? ..., How if the administration official does not want to act? How if the person who committed the violation has gone bankrupt so that it can no longer pay the administrative fine? ...., How if the violation is very serious and the damage cannot be repaired or recovered? ...., In such a case the criminal law can be a primum remedium.[1]

The conclusion that can be drawn from all the above problems is that criminal law can be an ultimum remedium, if we consider that the criminal law sanction is merely imprisonment. In the opinion of the author, who is placed as an ultimum remedium is a criminal prison rather than a criminal law. Criminal penal sanctions are not only a prison sentence, but also penalties that are sometimes lighter than other sanctions of the other areas of law, especially if the settlement of legal matters can be resolved outside the procedural law that can be further developed.(discretion and the principle of opportunity).[2]

2. Enforcement of Environmental Criminal Law

In Law Number 32 Year 2009 concerning Protection and Management of Environment as stipulated in general explanation of 6 that:

> The enforcement of environmental criminal law keeps considering principle of *ultimum remedium* that require the implementation of enforcement of criminal law as the last effort after implementation of enforcement of administrative lawi is considered to be failed. This implementation of principle of *ultimum remedium* is only applied for certain formal criminal acts, which are criminalization of violation ofthe quality standard of waste water, the quality standard of emissions or the quality standard of disturbance.

Concerning the general explanation of Law Number 32 Year 2009 above, the construction of law in arrangement of Law Number 32 Year 2009 there is no provisions that forbid the use of criminal law as *primum remidium* (main effort). If it is necessary. In certain things for example if pollution and damage of environment really happen, so the criminal law can be used without waiting another sanction of law first.

According to Hamdan, the use of sanction of criminal as a sanction of subsider or *ultimum remedium* in the matter of pollution of environment causes some weaknesses that are:[3]

a. Generally the process of civil case relatively needs quite long time, because it is likely the contaminant party will extendthe time of court or time of implementation of execution bylodging cassation appeal, while the pollution goes on with all the consequences.
b. A period of dignification is difficult to be done immediately, as it happened on the pollution of ricefield in Tangerang.
c.without implementing criminal of sanction, the pollution may happen, in another word "*detter effect*" (effect of avoidance) of other sanctions cannot be expected properly.
d. the implementation of administrative sanction can cause the closing of industrial company that bring the effect also to the workers, the number of unemployment will be bigger, can cause crime and another social-economic discrepancy.

In Law Number 32 Year 2009it does not requirecriminal sanction as alternative sanction and also does not forbid the implementation of cumulative sanction(implementation of criminal sanction besides another sanction), implementation of principle *ultimum remidium* is only applied for certain formal criminal act beyond that so *premium remidium* is applied.

Article 100 states;

(1) Any person who violates the quality standard of waste water, the quality standard of emissions or the quality standard of disturbances shall be criminally punished with maximum imprisonment of 3 (three) years and a maximum fine of Rp3,000,000,000 (three billion rupiah).

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[1] *Ibid*, hal. 223
[2] M. Hamdan, ***Tindak Pidana Pencemaran Lingkungan Hidup***, Bandung ,Mandar Maju, 2000, hal. 40.
[3] Harsanto Nursadi dan RM Andri Gunawan Wibisana, *Penegakan Hukum Pidana Lingkungan*, *bem.law.ui.ac.id/fhuiguide/uploads/.*

(2) The criminal violation as cited in paragraph (1) shall be imposed in case that the administrative sanction that has been imposed is not accomplished or the violation is committed more than once.

According to Article 100 paragraph 2 it can be known that there is an implementation of principle *ultimum remedium*, in which criminalization in Article 100 paragraph 1 can be executed if administrative sanction that had been decided by the government is not obeyed by businessmen and activity that utilize environment.With construction of Article 100 as mentioned above, so it is clearly seen the principle of *ultimum remedium* that is stated limitatively so the rest of it is *a contrario* that *primum remedium* is applied.

According to Harsanto Nursadi and RM Andri Gunawan Wibisana that the principle of subsidiaritas is only foradministratively-dependent crimes that depends on the violation of requirement of administration that happen, as the division of criminal act in Eropa that divide Administratively-dependent crimes, as follows:[1]

1. Abstract Endangerment
   - Administratively-dependent crimes
   - thing that is criminalized is not the pollution, but the violation of administrative provision
2. Concrete endangerment
   - Administratively-dependent crimes→ illegal emissions
   - There is a threat of pollution/damage of environment

Law Number 32 Year 2009 does not give definition of what is meant by the principle *ultimum remedium*, but explicitly mention another principle. However, in criminal provision, there is (one) paragraph that implicitly explain the implementation of principle *ultimum remedium*, that is Article 100 paragraph 2 of Law Number 32 Year 2009 as mentioned above.

Sanction that is implemented do not prioritize leery effect but how to make awareness for businessmen and activity that utilize environment that had brokeneither standardquality of waste water,standard quality of emission, or standard qualityof disturbanceto do recovery towards environment that had been polluted or damagedeither standard quality of waste water, standard quality of emission, or standard quality of disturbance.

Each implementation of *Ultimum Remedium* Principle related to enforcement of environmental criminal law, it has several obstacles, that are stated as follows;

1. It is interesting that the last drug / the harshest drug with high doses turns out in practice in Indonesia to be the first drug to repair or heal / restore norms that are raped by an act that is categorized as a crime.
2. So by looking at above, that in its development the implementation of *ultimum remedium* is difficult to apply because there are still many obstacles - constraints, and other factors; one of them is because the Criminal Law has law that regulate every crime and offense and of course in the implementation of sanctions of Criminal Law does not accept a compromise or a word of peace.
3. As has been pointed out that criminal sanctions are the “last medicine” (*ultimum remedium*) of a series of enforcement stages of a rule of law. This “last medicine” is the ultimate stance if enforcement mechanism in other areas of law does not work effectively. However, in the development of criminal law in Indonesia, positions of criminal sanctions in certain cases are shifted. No longer as *ultimum remedium* but as a *primum remedium* (the main drug). This can affect the process of investigating environmental violations due to the above situation, which is the handling of another crime that is shifted into the principle of *remedium primum*.

Based on a study conducted by Febriani Rahmawati, regarding the Implementation of Criminal Law Principles as *Primum Remedium* in Law Enforcement of Environmental Lawsuits According to Law Number 32 Year 2009 on Protection and Environmental Management states: [2]

1) The implementation of criminal sanctions as the principle of *primum remidium* in the practice of the District Court in the matter of environmental criminal act is still very minimal that happen, it is more prioritizing administrative and civil sanctions.
2) The problems that occur in the implementation of criminal sanctions as *primum remidium* are, the untouched corporate crime that do environmental criminal act, moral integrity of law enforcement

[1] *repository.unpas.ac.id/14677/*
[2] Takdir Rahmadi , *Hukum Lingkungan di Indonesia*, Jakarta: Rajagrafindo, Persada, 2014. hal.30-44

officers, lack of public and government awareness, the necessity of integrity between penal policy and non penal polcy, criminal policy and social policy.

Due to the existence of *primun remedium* principle, the existence of environmental criminal sanction is no longer as the last medicine but becomes the first medicine to make the deterrent to commit a criminal offense. *Primun remedium* is defined as the primary choice in imposing the sanction.

Criminal penalties are made important to punish offenders who can harm or disrupt public peace. From the sociological perspective of the implementation of *primum remedium* due to the actions regulated in the Act is an “extraordinary” action and has a great impact to society. Therefore, in this case it no longer consider the use of other sanctions, because it may feel appropriate if directly use or impose criminal sanctions on the perpetrators of the criminal,

Muladi quotes August Bequai’s thought, that environmental criminal act is categorized into one of white collar crime form, besides securities related crime, bankruptcy frauds, bribes, kickbacks and political frauds, consumer related frauds in government contracts and programs, insurance frauds, insider related frauds, antitrust and restraint of trade practices, crime by computer dan tax frauds. In environmental crimes even trend to injure, maim or destroy on a larger scale than the acts of the traditional felon.Therefore, according to Muladi in all those frameworks, do we keep seeing law as subsidiaritas that now become *ultimum remedium*? Does it necessary for the importance of national civil law and administrative law as a main medicine/ *premium remedium.*[1]

Fangman stated that, opinion that states, the implementation of criminal law is *ultimum remedium* that had been left in Netherland, because it causes dispute there between administrative officer and public prosecutor about when the time of the use of last medicine is (criminal law).[2] In Law Number 32 Year 2009 some environmental criminal acts that implement *primum remedium*, which are:

a. Bring forbidden B3
Article 107
Every person who brings B3 into the territory of the Republic of Indonesia, of which is prohibited by the prevailing laws and regulations and as cited in Article 69 paragraph (1) letter b, shall be punished with imprisonment for minimum 5 (five) years and maximum 15 (fifteen) years and a fine of at least Rp5,000,000,000 (five billion rupiah) and at most Rp15,000,000,000 (fifteen billion rupiah).

b. Bring waste of outside the territory of the Republic of Indonesia
Article 105
Every person who brings waste into the territory of the Republic of Indonesia as cited in Article 69 paragraph (1) letter c, shall be punished with imprisonment for minimum 4 (four) years and maximum 12 (twelve) years and a fine of at least Rp4,000,000,000 (four billion rupiah) and at most Rp12,000,000,000 (twelve billion).

c. Bring B3 waste into the territory of the Republic of Indonesia
Article 106
Every person who brings B3 waste into the territory of the Republic of Indonesia as cited in Article 69 paragraph (1) letter d, shall be punished with imprisonment for minimum 5 (five) years and maximum 15 (fifteen) years and a fine of at least Rp5,000,000,000 (five billion rupiah) and at most Rp15,000,000,000 (fifteen billion rupiah).

d. Dispose of waste into environmental media
Article 104
Every person who dispose of waste and/or substance to environmental media without a permit (approval) as cited in Article 60, shall be punished with imprisonment for minimum 3 (three) years and a fine of maximum Rp3,000,000,000 (three billion rupiah).

e. Release genetically engineered products
Article 101

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[1] Rumbadi, *Analisis Terhadap Premium Remedium Terkait Sanksi Hukum Lingkungan*, journal.unrika.ac.id/index.php/ jurnaldms/article/download/17/15

[2] Muladi, *Demokratisasi, Hak Asasi Manusia, dan Reformasi Hukum di Indonesia*, The Habibie Center, Jakarta. hal. 106

Every person who releases and/or distributes genetically engineered products to the media of environment, of which is contrary to the prevailing laws and regulations or the environmental permit as cited in Article 69 paragraph (1) letter g, shall be punished with imprisonment for minimum 1 (one) year and maximum 3 (three) years and a fine of at least 1,000,000,000.00 (one billion rupiah) and at most Rp3,000,000,000 (three billion rupiah).

f. Cultivating landby burning
Article 108
Every person who clears the land area based on a slash-and-burn method as cited in Article 69 paragraph (1) letter h, shall be punished with imprisonment for minimum 3 (three) years and maximum 10 (ten) years and a fine of at least Rp3,000,000,000 (three billion rupiah) and at most 10,000,000,000 (ten billion rupiah).

g. Prepare AMDAL without a certificate of competency
Article 110
Every person who prepares AMDAL without having a certificate of competency in AMDAL preparation as cited in Article 69 paragraph (1) letter i, shall be punished with imprisonment for maximal 3 (three) years and a fine of at most Rp3,000,000,000 (three billion rupiah).

h. Provide false and misleading information, lose information, spoil information, or provide incorrect information.
Article 113
Any person who provides false and misleading information, lose information, spoils information, or provides incorrect information as required for the sake of monitoring and law enforcement in regard of the protection and management of environment as cited in Article 69 paragraph (1) letter j, shall be punished with imprisonment for maximum 1 (one) year and a fine of at most 1,000,000,000 (one billion rupiah).

Although it is agreed by Muladi but it is noted that:

..... even in cases of pollution and serious damage of environment, the characteristic as "*primum remedium*" is more apparent. However, the effectivity largely depends on the quality of mental and intellectual of law enforcers, especially to understand spirit and substance of environmental criminal law that is quite complicated.[1]

C. Conclusion

From this study, it can be concluded:

1. In criminal law the principle of *ultimum remedium* is applied
2. In enforcement of environmental criminal law, the implementation of principle of *ultimum remedium* is only in certain criminal act.
3. Law Number 32 Year 2009 there is a displacement from the principle of *ultimum remidium*into principle of *primum remedium,* based on widespread and serious pollution and damage of environment.

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