Rethinking the ultimum remedium principle to support justice and strong law enforcement institutions in environmental crimes

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Abstract. Environmental crimes are increased, according to the information launched by the official institutions. Furthermore, the law enforcement process of environmental cases received a lot of attentions and discussion among environmental law enforcement scholars and practitioners. Disagreements also occurred when justice seekers and environmental law fighters argue that the resolution of various cases in the field of environmental law did not give satisfaction to the public. This paper used doctrinal research, which analyzes the problem qualitatively by using secondary data sources from primary and secondary legal materials. The research results show that the settlement of existing cases has not been able to prevent similar violations and give appropriate punishment to the offenders. Thus, the use of the ultimum remedium principle is important, so that the accuracy of determining and implementing optimal sanctions for violations in the case of environmental law become the ultimate ways in encouraging the strengthening of environmental law enforcement to reduce environmental crimes as well as supporting environmental preservation.

1. Introduction

Environmental law enforcement to resolve factual cases has various legal instruments, starting from licensing supervision, prevention and security, administrative sanctions, claims for environmental damage, and environmental criminal charges. This legal instrument is also supported by implementing various laws (multidoors) that can provide deterrence, which reduces environmental damage in Indonesia. Against law enforcement, using various legal instruments is supported by the imposition of sanctions, both administrative sanctions, and criminal sanctions equivalent.

In practice, while dealing with factual environmental cases, Wibisana [19] found that in certain cases of environmental law, precisely in the case of waste pollution related to toxic, hazardous materials, the administrative sanctions imposed were very light, disproportionate to the violation, and it was impossible to cause a deterrent effect on the perpetrator. According to Wibisana, the used of punitive administrative sanctions cumulated with administrative sanctions in the form of government coercion, which are only legal actions without any real action, can make administrative sanctions lose their power. Meanwhile, Hadjon argues that using criminal law in the field of administration is a need to support the administrative law. Unfortunately, law enforcement officers do not truly understand the meaning of ultimum remedium principles. The lack of understanding of the principle caused while handling cases in the field of administrative law often prioritize criminal law [26]. Hadjon suggested, both the government officers who works in the ministry and the police can do consultation and coordination.
because the main goal of the environmental provisions is environmental restoration, therefore, the criminal sanctions can be used as the last resort to tackle the cases [26]. From the viewpoint of these two scholars, both punitive administrative sanctions, and criminal sanctions, can be used equally in environmental law enforcement. Thus becomes relevant to the principle of multidoor approach, promoted by the Ministry of Environment and Forestry of the Republic of Indonesia, which shows that the collaboration of various existing legal measures can be used according to the priority scale of law enforcement through multidoor approach such as administrative procedures, civil law procedures, security and recovery of forestry area, and criminal law [23].

Historically, Modderman used the term *ultimum remedium* while answering Mackay’s questions in the Dutch parliament’s presence because Mackay felt that he had failed to find a legal basis for the need to sentence criminal offenders [10]. Modderman replied that acts of lawlessness, which are punishable and which, according to experience, cannot be eliminated by any other means, should be punished. However, punishment (criminal law sanction) should be the last attempt [10]. In this situation, criminal law is considered the last resort to improve human behavior and is restricted as tightly as possible to heal rather than exacerbate lawlessness.

Discussion on *ultimum remedium* cannot be separated from the issue of criminalization as a legal action that prohibits an act and threatens criminal sanctions for the act, which is starting now referred to as a criminal act. In the formation of the law, it seems that criminal sanctions are the only means of tackling crime when considering general. This impression is in line with the assumption that the criminal law is prioritized as a solution to social problems. In a word, criminal law seems to be a *primum remedium* (the primary solution) and not an *ultimum remedium* (the final solution). Regarding the prioritization of criminal law as *primum remedium* in the context of criminalization, Sudarto doubts the accuracy of this impression even though in cases in the environmental field, if the act results in massive losses (pollution or environmental damage), is carried out and has a serious impact, then criminal sanctions can be immediately used. Sudarto also argued that criminal law could have a filtering effect that selects and sorts out the many despicable acts in society, such as immoral acts or other actions that harm society [24]. Following this, Kidron has distinguished what is meant by “wrongdoing” according to criminal law and administrative law [14], as below:

| Body of Law               | Criminal Sanctioning                      | Administrative Sanctioning                    |
|--------------------------|-------------------------------------------|-----------------------------------------------|
| Normativity              | denial of public right                     | the excessive risk to the public right         |
| Rationale                | corrective justice                         | corrective justice                             |
| Definition of the Wrong  | objective and subjective infringement of the public right | the objective manifestation of an excessive risk to the public right |
| Purpose of the Sanction  | ex-post retribution                        | ex-ante prevention                            |
| Type of Sanction         | denial of liberty (e.g., by imprisonment or fine) | limitation of liberty (e.g., by injunction)    |
| Moving Party             | the state                                  | the state                                      |
| Evidentiary Rules        | beyond reasonable doubt                    | clear and convincing evidence                  |

**Figure 1.** The distinction between criminal and administrative law [14].

Kidron explained, from a criminal law perspective, it is necessary to have errors related to the perpetrator’s psychological condition, whereas, in administrative law, this is not a strict requirement as long as the offender’s actions have met the objective element aim of the act. For example, in the case of firearms, administrative law is prevented by the ownership permit, whereas in criminal law, what is concerned is the gun owner’s mentality so that ownership of the firearm is not related to the public...
community interest. As for criminal and administrative sanctions, according to Kidron, criminal sanctions aim to punish actions after an incident occurs as an example of types of imprisonment and fines, while administrative sanctions are more to prevention by taking into account the balance between sanctions and risks that are expected and have occurred, for example with an order to fix something that has been damaged.

When connected with criminalization, which is a process of selecting which actions will be categorized as criminal acts, it can be seen that criminalization does not necessarily mean that all acts need to be regulated under criminal provisions. On the contrary, what happens is where harmful actions found in society are regulated to have a further negative impact on the community itself. The two principles, namely ultimum remedium and primum remedium, are relevant in determining a criminal act’s criteria. The nature of the crime as “ultimum remedium” (the last resort) requires that the crime is not used as a means if it is not necessary. If an action can be resolved effectively by another law enforcement mechanism, then the determination of the settlement of an action in an area intersecting with other areas of law will be more complicated. Then merely determining the resolution of murder cases, maltreatment, or rape in which these acts are criminalized in almost all criminal systems globally—theoretically determining sanctions in environmental law that intersection with civil, administrative, and criminal law is not an easy thing. In the latest literature, the principle of ultimum remedium originating in the Netherlands is termed the ultima ratio [25].

The discussion put forward by Roxin, as cited by Jareborg, in his 1976 article in the article “Einfuhrung in die grundprobleme des strafrechts” [introduction to the fundamental problems of criminal law], Roxin states that criminal law is not the only appropriate means of protecting values. Legitimate values and interests. On the other hand, all the means of legal order must be used for this, and thus, in fact, criminal law must be considered the last means to protect various values and interests. Roxin also emphasized that criminal law can only be used when other means (such as civil suits, administrative settlements, non-criminal sanctions, etc.) are unsuccessful. That is why criminal punishment is called the “ultima ratio of social policy” or the ultimate weapon of social policy.

Furthermore, Jareborg shows why criminal law’s duty can be called subsidiarity or the protection of legitimate values and interests. Criminal law can only protect a part of those legitimate interests, and its protection tends to be selective and not protect the interests in general, such as protecting personal assets [25]. The debates about the ultimum remedium principle become a dilemma when a reaction arises that questions the existence of criminal law as an ultimum remedium and tests criminal sanctions when administrative law has been enforced with administrative sanctions. This article aims to think again about the existence of the ultimum remedium principle in environmental law enforcement.

2. Method
This article used doctrinal research. The aim is seeking a theoretical basis that lies upon the inclusion and application of criminal sanction and administrative sanctions in environmental cases. The data that will be used is secondary data from the library, either in the form of primary legal or secondary. The analyzed and studied primary legal material provisions formulating criminal sanction and administrative sanctions within the law in environmental cases containing criminal sanction. Thus, secondary legal material is in books on relevant law and reports of research results related to discussion topics. To maintain the validity of research results, data that will be obtained later will be processed qualitatively. The data is obtained in this research consists of secondary data in various types of documents such as regulations, various writings about administrative sanction and criminal sanction, and its progress and case analysis in the form of court ruling supported by an interview with resource people.

3. Results and discussion

3.1. Justification of environmental crimes
Historically, the establishment of Law no. 32 of 2009 concerning Protection and Management of the Environment [4] brings fresh air in regulating Indonesia’s environment. In order to provide optimal protection for the environment, preventive and repressive measures are continuously carried out. Preventive measures in controlling environmental impacts need to be carried out by making maximum use of monitoring and licensing instruments. If environmental pollution and damage have occurred, it is necessary to undertake repressive measures in practical, consistent, and consistent law enforcement against pollution and environmental damage. This law also uses various legal provisions, both administrative law, civil law, and criminal law. Civil law provisions include the settlement of environmental disputes outside the court and inside the court. The settlement of environmental disputes in court includes class action suits, environmental organizations’ lawsuit rights, or the government’s right to sue [9]. This method hopes that besides having a deterrent effect, it will also increase all stakeholders’ awareness about the importance of environmental protection and management [11].

Meanwhile, criminal law enforcement in this law introduces the threat of minimum and maximum punishment, expansion of evidence, penalties for violations of quality standards, integrated criminal law enforcement, and regulation of corporate crime. Enforcement of environmental criminal law still observes the principle of ultimum remedium, which obliges the application of criminal law enforcement as a last resort after the application of administrative law enforcement is deemed unsuccessful. The ultimum remedium principle only applies to certain formal crimes, namely punishment for wastewater quality standards, emissions, and disturbances. The most exciting part of this law is that, in the end, there are provisions that clarify the application of ultimum remedium in environmental crimes (which generally adhere to premum remedium) to become apparent [22]. Article 78 determines that the administrative sanctions, as referred to in Article 76, do not exempt the person in charge of a business and activity from the responsibility for recovery and punishment. Article 78 is an example of an article adhering to premum remedium, while only one article adheres to the ultimum remedium in Article 100. With the provisions of Article 78 and Article 100, it is thus emphasized that the ultimum remedium only applies to acts that fulfill the formulation of Article 100 [22]. Furthermore, there will be no confusion in handling cases in the environmental sector through the criminal justice system. Because in significant cases, for example, the Buyat Bay case in Minahasa, civil and administrative law enforcement processes are not possible because the impact of an activity that causes environmental damage is enormous and needs to be addressed immediately. Even law enforcement officers are no longer reluctant to handle environmental cases because administrative or civil processes have not been carried out. The Environmental Law Act could be an ideal provision when there are arguments about which sanctions should take precedence, even when the principle of ultimum remedium is questioned.

3.2. The use of the ultimum remedium principle in environmental crimes
Criminal sanctions are used to support compliance with administrative law norms, both purely criminal law (independent/generic crimes) without being preceded by violations of related administrative law norms, or in the form of purely administrative crimes (dependent / specific crime), which preceded by violations of administrative, legal norms [20]. In further, criminal offenses in the field of administrative law (such as in the fields of taxation, forestry, the environment, etc.) are essential “mala prohibita”, which are only considered despicable after being prohibited by law, and their enforcement is proper “ultimum remedium”. On the other hand, Faure and Svatikova stated that under certain conditions, administrative sanctions that are punitive are more optimal than criminal sanctions. This is especially when the act’s harm is not so great that the perpetrator will still have sufficient assets to pay the penalty and fine. Administrative sanctions that are punitive are felt to be superior to criminal sanctions because they are preventive and require a lower standard of evidence, and the cost will be cheaper than criminal ones [12]. These two opinions certainly open a discussion about the existence of the ultimum remedium principle in environmental law enforcement.

Factualy, the choice between administrative sanctions and criminal sanctions can also be based on the ultimum remedium principle. In this context, criminal law enforcement can be applied as an option in administrative law enforcement if the administrative process does not work. On the other hand,
criminal law enforcement can also be applied cumulatively with administrative law enforcement. Furthermore, criminal law enforcement can also be applied when administrative law enforcement is not sufficient, related to the element “if administrative sanctions that have been imposed are not complied with …..”, as formulated in Article 114, thus; in this case, the enforcement of criminal law functions as an ultimum remedium. Following the provisions in the Indonesia Environmental Law Act (PPLH Law), it can be simulated in a scheme of choice between administrative and criminal sanctions, which can be observed through the Struiksma scheme below [17].

This choice has been described by Struiksma and explained by answering the questions as follows: Administrative and criminal sanctions are put together in an optional form. In this case, the determination choice of sanctions is based on two questions: Can the violation be corrected and whether the consequences resulting from the act can be recovered? If the answer is no, then the penalty is criminal, whereas if yes, then the sanction is administrative. Furthermore, if the answer to this question leads to administrative sanctions’ imposition, further questions should be asked: Is it still necessary if the administrative sanction added with a criminal sanction? It is necessary to give reasons under what conditions could administrative sanctions be imposed together with criminal sanctions. To answer this question, Struiksma et al. ask four alternative questions.

First, is the environmental damage having serious consequences? Second, are there any economic benefits for offenders in running their business? Third, were the violations planned or repeated? Fourth, was the action done on purpose? If the answer to the question is yes, then the penalties can be imposed together with administrative sanctions, cumulatively. However, if the answer is no, then only administrative sanctions can be imposed. However, regarding the administrative sanctions that have been imposed, the final question still needs to be asked, namely whether the sanctions or administrative law enforcement carried out have been running effectively. If the answer is yes, then administrative sanctions are deemed sufficient to be the only sanctions that need to be imposed. However, if the answer is no, it means that administrative law enforcement is ineffective because the offender does not comply with the fines that have been imposed so that criminal sanctions can also be imposed [17].

In this last section, Indonesia Environmental Law Act (UU PPLH) formulates the ultimum remedium in Article 100 paragraph (2) and Article 114. Article 100 paragraph (2) states that criminal sanctions are imposed if “administrative sanctions that have been imposed are not complied with”. Meanwhile, Article 114 states that “[s] he person in charge of a business and activity that does not implement government coercion will be punished with imprisonment for a maximum of 1 (one) year and a maximum fine of Rp1,000,000,000,00 (one billion rupiahs). From the description of this, Struiksma, it is clear that the nature of the person’s caution is authorized to impose sanctions because guidelines are used as a reference when he wants to apply the choice of sanction. Responding to the criminal sanctions in the Indonesia Environmental Law, Rahmadi emphasized that the sanctions in these provisions aim to frighten people and give warrant to the public, especially in business activities that they are not allowed to do harmful activities to the environment [27]. Rahmadi stated, if administrative sanctions went well, there will be no problem in practice, unfortunately the problem in Indonesia is that the existence of administrative sanctions and criminal sanctions is not working smoothly. It is realized there is lack of supervision, competence staffs and permit-issuing officials that have led to violations in the environmental sector.

Moreover, Rahmadi explained, environmental problems mostly a matter of individuals and criminal liability against corporations and ideally it should be administrative sanction process. Unlucky, the process of criminal sanctions in environmental cases is slow because there is irreversible environmental damage. Rahmadi added that administrative enforcement needs to be prioritized, especially in the field of supervision except for the very harmful activities and the impact to the environmental and community. If the problem continues and the criminal law process begin, basically it will be even more complicated because it is related to the evidence and take a long process; even so, the criminal process must still be carried out if it fulfills the elements of a criminal act that is threatened by the law [27].
Is the environmental damage serious?  
OR  
Are there economic benefits for offenders?  
OR  
Was the violation planned / repeated?  
OR  
Was the action done on purpose?

**Figure 2.** Options for administrative and/or criminal sanctions [17].
3.3. Proposal guidelines to apply ultimum remedium in the legislation process

In the legislative process and practice, administrative sanctions and criminal sanctions need to be selected according to the considerations as follow [7]. First, criminal law can be applied if sanctions in the form of threats of deprivation of liberty are more desirable than administrative ones. Several factors determine this; one of the factors that should be considered is how the public view the seriousness of the actions committed and the level of deterrence of the sanctions imposed. Second, if criminal law enforcement is considered necessary if the sanctions required are punitive. Third, if the expected sanctions are reparatory ones, then the more appropriate sanctions are administrative ones. However, if the sanctions to restore are closely related to criminal sanctions, then it is better to apply sanctions in the realm of criminal law.

Fourth, if a norm violation occurs on public law that involves violence or harm to individuals, then criminal law enforcement takes precedence. In this case, it should be noted that special arrangements regarding compensation can occur in criminal or civil law, but not in state administrative law. Fifth, if the violation that occurred was a serious one, then criminal law enforcement can be more applicable. The measure of this seriousness can be subjective and depends on several factors such as the nature of the violation, the perception of the possibility of the violation being repeated, the intention underlying the violation, or the law enforcer’s desire to protect values that are considered fundamental from the violation. Sixth, if the imposition of sanctions increasingly requires an open decision-making process by a third party, namely the court, criminal sanctions take precedence over administrative sanctions. On the other hand, administrative law enforcement is enforced when there is no need to involve prosecutors and judicial institutions in imposing sanctions. Seventh, if the central government wants more uniform law enforcement to make local differences less desirable, then criminal law enforcement will be possible than administrative law enforcement.

The eighth, enforcement of criminal law, is more desirable than administrative law enforcement if it requires the use of force that has broad impacts (far-reaching coercive measures) and the power to carry out investigations (investigative power). The extensive use of force can have implications for human rights violations, and therefore need to be monitored by a body specially created for this, namely the criminal justice system. On the other hand, administrative sanctions, such as administrative fines, are imposed when far-reaching coercive measures are not required, and the power of the court is not required to make decisions on imposing sanctions. Ninth, sometimes, law enforcement may only be effective if carried out through criminal law enforcement, so administrative law enforcement is not appropriate to enforce. These nine things can be used as indicators and justifications in considering when a case is faced with a choice of sanctions. Although recommended for countries in Europe, Jansen’s nine criteria can also be used as guidelines by law formators, administrative, and law enforcement officials when faced with a situation to decide what procedures and sanctions will be imposed in certain factual cases. By following the criteria proposed by Jansen [7] and the scheme by Stuiksma [17], difficulties in applying the ultimum remedium can undoubtedly be avoided so that the polemic about this principle, both in terms of regulation and application so that it does not become a barrier to optimal environmental law enforcement, even both can be used as guidelines in legal practice in Indonesia.

4. Conclusion

From the analysis of literature studies, data and interview, it can be concluded that the criteria to determine which sanction shall be applied for some instances of environmental crimes to answer the polemics and debates among law enforcement officers about the implementation of the ultimum remedium principle in practice. The guidelines could be used for legal drafters, administrative officials, and law enforcement officers in resolving cases in the environmental sector by applying these principles appropriately to strengthen environmental law enforcement institutions and provide justice to the community for a sustainable environment.
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