Reformulation of the Ultimum Remedium and Primum Remedium Principles in the Legislation Policy of Handling Illegal Fishing

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Abstract

Criminal sanctions are one of the most effective means used to tackle crime. Still, in administrative legislation, criminal sanctions are the last effort applied when administrative sanctions are not obeyed. Based on the criminal classification, subjects of criminal acts and other violations in fisheries need to be reformulated in the principles of criminal law as *ultimum remedium* and *primum remedium* in the Fisheries Law. The problems that will be studied and analyzed in this paper are related to the existing conditions of criminal law policies in fisheries and the reformulation of the *ultimum remedium* and *primum remedium* principles in the legislation policy of handling illegal fishing. By the problems discussed in this research, the method in this research is doctrinal legal research with a statutory approach. The study results show that criminal law policies in the field of fisheries can be seen in criminalization policies related to several articles that classify as crimes and violations. The reformulation of the *ultimum remedium* and *primum remedium* principles in the legislation policy for handling illegal fishing includes the subject/perpetrator of illegal fishing positioned in administrative sanctions as *primum remedium*, especially for violations by corporations, and optimizing promptly released actions against foreign fishers as *primum remedium*.

Keywords: *Ultimum Remedium, Primum Remedium,* Illegal Fishing, Legislation Policy.

Introduction

The practice of illegal fishing in Indonesian seas raises great losses in the fisheries sector to realize society welfare (Ningsih and A. Sulistyono, 2019). Therefore, the enforcement of criminal law in fisheries is one of the efforts that concerns the livelihood of many people (Lewerissa et al, 2020). The nature, function, and purpose of criminal law in legislation policy is known as *the ultimum remedium* and *primum remedium* (Abdurrachman, 2021). *Ultimum remedium* means that criminal sanctions are used when other sanctions are powerless. In other

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words, criminal law sanctions are listed as the last sanction, after civil sanctions and administrative sanctions. While *primum remedium* means that criminal sanctions are used as the primary weapon which first threatened in the law provision. (Hapsari, 2019).

In principle, criminal law cannot be placed as the main instrument (*primum remdium*) in regulating society but as the final instrument (*ultimum remedium*) (Luthan, 2009). However, in its development, criminal law is used as the main means (*primum remedium*) in handling the crime, as in criminal law in handling illegal fishing in Indonesia. Although the use of criminal sanctions is considered to have a deterrent effect on illegal fishing actors, there is still a gap between expectations and reality in its development. The use of criminal sanctions as a *primum remedium* has not been able to protect Indonesia's fishery resources from illegal fishing practices. Many society activities abuse fisheries for personal gain without thinking about the ecosystem, such as using prohibited fishing gear and damaging marine ecosystems. Currently, fisheries crime is in the public spotlight because of the rise of fisheries crime. Fish bombing, illegal fishing business and many more cases related to fisheries crime in Indonesia (Monita et al., 2020). According to research by the Indonesian Forum for the Environment (WALHI), in the last 20 years, fishing crimes in Indonesian waters have continued (Nurcahyawan dan Leonardo S., 2017). Throughout 2018, 106 illegal fishing vessels were arrested in Indonesian waters (Kemala, 2018). Furthermore, until April 2019, the Ministry of Maritime Affairs and Fisheries arrested 38 illegal fishing vessels (Gesha, 2019). Even with the impact of illegal fishing, Indonesia has lost up to Rp. 2,000 trillion (CNBC Indonesia, 2018).

The use of criminal law as a *primum remedium* in handling illegal fishing must consider the need for criminal law in the administrative law field, in this case, the Fisheries Law. To not have obstacles in terms of application and execution, the use of criminal law in handling illegal fishing must pay attention to the provisions of international legal instruments. Criminal law policies have an essential role in implementing illegal fishing prevention (Oktoza, 2015). Therefore, the principle of criminal law as the *ultimum remedium* and *primum remedium* in the legislation policy handling illegal fishing needs attention. The use of criminal sanctions in administrative legislation, such as the Fisheries Act, is one of the most effective means (Honderich, 2006) used to tackle crime. Still, criminal sanctions are the last effort applied when administrative sanctions are not obeyed. Therefore, based on the criminal classification (crimes and violations), the subject of criminal acts and other actions related to violations in the field of fisheries, the Fisheries Law needs to reformulate the principles of criminal law as *ultimum remedium* and *primum remedium*.

The problems that will be studied and analyzed in this paper are related to the existing conditions of criminal law policies in fisheries and the reformulation of the *ultimum remedium* and *primum remedium* principles in the legislation policy in handling illegal fishing. To analyze the problem under this study, certain methodologies are used according to the nature of the research. By the problems discussed, this research uses doctrinal legal research with a statutory approach (Fajar and Yulianto Achmad, 2013). The primary data in this study is secondary data sourced from literature studies and legislation. Data collection techniques are carried out by conducting data searches by reading and reviewing books, scientific articles and reviewing legislation in fisheries. Furthermore, the data were analyzed descriptively-qualitatively.

Discussion

A. Existing Conditions of Criminal Law Policy in the Fisheries Sector

The principle of criminal law as the *ultimum remedium* in the Fisheries Law is limited to Article 35A Paragraph (3). It is related to violations of the Use Crews Ship (ABK) on foreign fishing vessels and Article 41 Paragraph (4), related to violations of loading and unloading activities of the caught fish at the port. To the implementation of administrative sanctions, in the era of Minister Susi Pudjiastuti there were strict actions in imposing administrative sanctions in the form of freezing and revocation of Fishery Business Permits (SIUP), Fishing Permits (SIPI) and Fish Transport Vessel Permits (SIKPI) as well as warnings written against the perpetrator *IUU Fishing* (Santosa, 2016). Administrative sanctions are related to licensing issues (extension of permits) in carrying out fishery management activities, especially catch fisheries, as stipulated in several Minister of Marine Affairs and Fisheries Regulations.

Furthermore, the criminal law principle as the *primum remedium* in the field of fisheries is formulated explicitly and cumulatively (Ali, 2020) in Articles 84 to 101 of the Fisheries Law, with a maximum imprisonment of 10 years and a fine of up to Rp. 20,000,000,000.00 (twenty billion rupiah). It shows that criminal sanctions are no longer as *ultimum remedium* but as *primum remedium*. Criminal sanctions are currently considered the most effective legal instrument for the government and legislators to tackle crime (Anindyajati, 2015). The working meeting treaties discuss the Fisheries Law between the government and Commission IV of the DPR RI. The use of criminal law as a *primum remedium* is an effort to protect the potential of Indonesia's fisheries which are vulnerable to various actions that threaten the sustainability of fisheries, such as overfishing, marine pollution, degradation of coastal habitats, and fish theft (Naskah Akademik RUU Perikanan, 2017). In addition, as the Working Meeting Treaties of

Commission IV DPR RI with the Government in the Discussion of the Fisheries Law, the criminal law is also intended to provide a deterrent effect to perpetrators, especially foreign people who commit illegal fishing in the Fisheries Management Area of the Republic of Indonesia (WPP RI).

The formulation of criminal sanctions as *primum remedium* in the Fisheries Law seems to provide protection and justice in the management of fishery resources. However, it turns out to have implications at the level of application and execution, both juridical implications and non-juridical implications. As stated above, the Fisheries Law adheres to a cumulative punishment system, namely applying imprisonment and fines simultaneously (Shafira *et al.*, 2021). However, the Fisheries Law does not contain a mechanism for the execution of criminal penalties. Thus, if the fine is not paid, it will be replaced with imprisonment as stipulated in Article 30 of the Criminal Code. In other words, every decision of the fishery court judge will lead to the deprivation of freedom, both imprisonment and confinement.

The formulation of cumulative criminal sanctions, namely imprisonment and fines, is imposed together. Of course, it contradicts the provisions of UNCLOS 1982. Basically, UNCLOS 1982 only prohibits imprisonment for illegal fishing perpetrators in the ZEEI (Sunatri, 2017). As stipulated in Article 73 Paragraph (3), UNCLOS determines that:

> *"Coastal state penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the state concerned, or any other form of corporal punishment."*

When translated into Bahasa, imprisonment means prison sanctions, and corporal means body. Thus, imprisonment is the same as a prison, because based on its form and nature, imprisonment is a punishment related to placing the body in a particular place (Oktoza, 2015). This UNCLOS provision was also adopted by Article 102 of the Fisheries Act, which states that:

"The provisions for imprisonment in this law do not apply to criminal acts in the field of fisheries that occur in the fishery management area of the Republic of Indonesia as referred to in Article 5 paragraph (1) letter b. Unless there has been an agreement between the Republic of Indonesia Government and the concerned country government."

Furthermore, Article 5 Paragraph (1) letter b stipulates that the fishery management area of the Republic of Indonesia for fishing and/or fish cultivation covers the Indonesian Exclusive Economic Zone (ZEEI). Thus, based on the provisions of point 3 of the Circular Letter of the Supreme Court Number 3 of 2015, convicted perpetrators of illegal fishing in ZEEI can only

be sentenced to a fine without imprisonment. In addition, if one observes the use of criminal law as a *primum remedium* to prevent illegal fishing as stipulated in the Fisheries Law, it does not have a precise size in determining the criteria for criminal sanctions. For example, the provisions of Article 84 Paragraph (3) and Paragraph (4) of the Fisheries Law stipulate that fishery business actors in fishery business using chemicals and explosives that threaten environmental sustainability are threatened with imprisonment for 1-5 years and a fine of Rp. 2.000.000.000 (two billion rupiahs). The sanctions are disproportionate to small fishers, who still use traditional fishing gear, which is often not up to standard. However, the threat of sanctions for small fishers is equated with sanctions for fishery business actors. Hence, the criminal sanctions are too severe compared to traditional fishers' income (Shafira *et al.*, 2021).

Harkristuti Harkrisnowo states that the problem arises when the policymakers or legislators (legislators) never put forward the basis for the legislature to determine criminal sanctions X for crime Y (Harkrisnowo, 2003). In this case, it also is said that there is no strong basis (philosophically, sociologically, juridically) for a reason of the need criminal sanctions as the law that is prohibited in the provisions of the law (e.g. administrative law with criminal sanctions) and as an effort in handling the crime, both preventive and repressive purposes (Logman, 1999).

It is what happens in the legislation policy in fisheries, where there are no definite criteria in determining the appropriate sanctions and the number of criminal sanctions. Criminal sanctions for crimes and violations are both imprisonment and fines formulated cumulatively (Anggraeny, 2020). However, there are several types of violations that are only sanctioned to fine. The use of criminal law as a *primum remedium* in handling illegal fishing makes local fishers more vulnerable to being punished than foreign perpetrators (Shafira *et al.*, 2021). This is because international legal instruments limit criminal sanctions for illegal fishing actors who are foreign. Thus, the principle of *primum remedium* has not provided a sense of justice for local fishers, especially tiny fishers. In this case, law enforcement against the perpetrators of illegal fishing must also pay attention to the interests of national law, international law, and existing regulations (Leroy, 2016).

Several juridical and non-juridical implications resulting from criminal law being used *primum remedium* require that the provisions of criminal law must also be evaluated regarding their effectiveness, especially the use of imprisonment and confinement. As for the changes to the law, add more to the criminal threat. Without any evaluation of the old sanctions are less effective, and if not, why are they not. As it is known that the Fisheries Law is one of the

administrative laws with criminal sanctions which special external criminal law. As a consequence of external special criminal law, the nature and characteristics of criminal sanctions are as an *ultimum rimedium*. Also, they contain *una via* principle, which means that if economic recovery has been met, the possibility of criminal law enforcement is closed (Hiariej, 2019).

B. Reformulation of the *Ultimum Remedium* and *Primum Remedium* Principles in Handling Illegal Fishing Legislation Policy

The policy of using criminal sanctions in administrative legislation certainly aims to strengthen and enforce norms in administrative law. Because criminal sanctions are one of the most effective means (Honderich, 2006) to tackle the crime, criminal sanctions are not the only means, so it needs to be used in combination with other efforts. Therefore, the Fisheries Law needs to reformulate in the criminal law principles as *ultimum remedium* and *primum remedium* based on the criminal classification (crimes and violations), the subject of criminal acts and other actions related to violations in the field of fisheries.

As described above, the Fisheries Law explicitly classifies crimes and violations in the provisions of its articles. In this case, the principle of criminal law as an *ultimum remedium* can be classified as violations as mentioned in Article 87, Article 89, Article 90, Article 95, Article 96, Article 97, Article 98, Article 99, Article 100 Article 100C. Furthermore, the principle of *ultimum remedium* can also be accommodated by Article 93 Paragraphs (3) and (4). While the principle of criminal law as *primum remedium* still be determined against Article 84, Article 85, Article 86, Article 88, Article 91, Article 92, Article 93 Paragraphs (1) and (2), Article 94 and Article 94A with the formulation of alternative sanctions and accompanied by a firm determination of the articles that determine criminal sanctions in the *ultimum remedium* or *primum remedium*.

The Fisheries Law is a law in the field of administrative law with criminal sanctions. So ideally, administrative sanctions are formulated first before criminal sanctions (*ultimate remedium*) (Madjid, 2017), even if criminal provisions are needed (Sinaga, 2020), but the formulation still as an alternative. This is related to the criminal actions related to licensing issues but prioritizes criminal sanctions against the violators (this can also be seen in several decisions of the Constitutional Court, which have reconstructed the conception of *primum remedium* into *ultimum remedium*). In this case, the Constitutional Court uses justice, legal

certainty and the principle of legal expediency in examining several articles in the Medical Practice Act, Health Law and Plantation Law (Anindyajati, 2015).

Furthermore, the use of criminal law against environmental crimes categorized as administrative dependent crimes still functions as an *ultimum remedium* because the substance relates to administrative violations of requirements or obligations (Ali, 2020). In certain laws, it is clear that the principle of *ultimum remedium* is stipulated, as specified in General Provision Law Number 6 of Law Number 32 of 2009 concerning Environmental Protection and Management that the principle of *primum remedium* is applied. It means that this law adheres to the *primum remedium* principle; except for certain formal criminal acts, the criminal law is the *ultimum remedium* (Akib, 2018). Until now, it can be said that Law Number 32 of 2009 is a product of legislation that ultimately formulates criminal sanctions in various ways (alternative and cumulative). There are particular maximum and minimum provisions, provisions about formal crimes and material crimes, adhere to the idea of a double-track system (crimes and actions) and adheres to the principles of *ultimum remedium* and *primum remedium* in the sanctions provisions. Although in the development is show that there is an over-penalization.

Based on the description above, ideally, administrative sanctions as a form of administrative law enforcement which can be applied in the requirements of the license to prevent violations; efforts to force the perpetrator to repair the result of their actions; provide a deterrent effect for perpetrators of violations; to create an economic burden for the perpetrators to pay a sum of money for the costs of recovery and compensation; to cause the effect of fear for other parties to violate the law; protect the rights of the community and at the same time encourage the improvement of community law compliance; minimize losses and victims; as well as securing and enforcing government policies, plans and programs (Rifki, 2019).

The formulation of what criminal sanctions are appropriate for violators is also one of the central problems in criminal law besides criminal liability. Based on the classification of an act that can be categorized as a crime or a violation in the Fisheries Law above, it can be considered the nature of *mala in se* or *mala prohibita*. In this case, it is based on the action/delict of pollution, destruction of fish resources and catching fish using explosives, crimes of managing fish resources and crimes of fishery business without a permit are truly *mala in se* and *mala prohibita* (Muladi dan Diah Sulistyani, 2016), so it can formulated the appropriate sanctions.

As for the perpetrators who can be held criminal responsibility if they did the crime under the Fisheries Law, as follow:

1) Everyone, both individuals and corporations;
2) The captain or leader of the fishing vessel, fishing expert, and crew of the ship;
3) Fishing Vessel Owner, Fishing Company Owner, Fishery Company Person in Charge, and/or Fishing Vessel Operator; and
4) Owner of Fish Cultivation Company, Owner Authority of Fish Cultivation Company, and/or Person in Charge of Fish Cultivation Company.

Furthermore, in its development based on the subject/perpetrator of criminal acts in the Fisheries Law, reformulation of the *ultimum remedium* and *primum remedium* principles can also be carried out from criminals perpetrators where the perpetrators of illegal fishing involve local fishers as well as foreign fishers (Chapsos, 2019), small fishers and entrepreneurs and even corporations. In this case, of course, the actions of the perpetrators can be distinguished. As previously stated, there is a gap in the sanctions imposed on these perpetrators. The principle of *ultimum remedium* can be considered against local fishers (including small fishers) about the violations described above. Reformulation of this principle will certainly give a sense of justice, especially to local fishers, because in this case, the value of justice can be prioritized over achieving equality. In this case, there is a different spirit towards the treatment of local fishers and foreign fishers. Local fishers are more for coaching, while foreign fishers are for deterrence.

As described above, the two principles are not generalized between foreign actors and local actors. There is a balance principle in which criminal law is used as the *ultimum remedium* and *primum remedium*. This will return to the political will of law enforcement officials to realize justice, certainty and applicable law (Zulfa, 2011). There are national/people's interests that must also be protected apart from international interests.

Reformulation of the *primum remedium* principle can be prioritized by administrative sanctions, especially against illegal fishing actors involving corporations. So, administrative sanctions are the *primum remedium* against corporations that commit criminal acts in the field of fisheries (Rifki, 2019). This is certainly expected to provide a deterrent effect than giving the criminal sanctions against corporations. Currently, the Fisheries Law does not provide specific sanctions/responsibilities to corporations. Article 101 of the Fisheries Law only determines the liability of the corporation, which is to return to the management with the addition of 1/3 fine of the sentence imposed. The reformulation of administrative sanctions into

primum remedium as *ius constituendum* can certainly fulfil a sense of justice and benefit in the sustainable management of fishery resources.

Further formulation of the principle of *primum remedium* can also be emphasized in the provisions of Article 104 of the Fisheries Law related to the provision of security deposits for foreign fishers who commit criminal acts in the field of fisheries. This is known as a "promptly released." Article 104 or the term "promptly released" is currently not popular among law enforcement officials. This article has never been used to ensnare foreign illegal fishing actors because of its limitations and implications (Shafira et al., 2021). In fact, if this promptly released is implemented, it can balance the coastal state and the flag state in realizing justice, benefit, and sustainability in managing fishery resources.

Based on the explanation above, there is a view in criminal law principle that cannot be placed as the main instrument (*primum remedium*) to regulate society, but as the last instrument (*ultimum remedium*) (Luthan 2009). Moreover, the administrative law has criminal sanctions. As stated by Eddy OS Hiariej, in principle, there are characteristics of special criminal law. In this case, the administrative law with criminal sanctions, a special criminal law, is external where criminal law (criminal sanctions) is formulated in *ultimum remedium* and alternative (Hiariej, 2020). The principles of proportionality (balance), benefit and humanity can be applied in formulating these two principles so that the legal goal of achieving justice and order based on Pancasila can be realized in the sustainable management of fishery resources. In connection with this principle, Philipus M. Hadjon argued that punishment based on the Pancasila philosophy applies the *ultimum remedium* into the Indonesian criminal law system, where the judiciary is the last effort if deliberation fails (Marbun, 2019).

Applying the *ultimum remedium* principle (including the *primum remedium*) to the use of criminal law in legislation policy is a moral principle, namely to provide guidance, especially to legislators, regarding the need for the use of criminal law or not. In this case, the parties drafting the criminal law should prioritize other means besides criminal law to prevent and handle problems or conflicts in society both non-legally and legally outside of criminal law (Minkkinen, 2013).

The use of criminal law as the *ultimum remedium* and *primum remedium* means that criminal law is an effort to handle illegal fishing. It is an effort to overcome crime through penal facilities, which at each stage must pay attention to the objectives of social policy, namely social welfare (community welfare) and social defence (protecting society from crime), which is oriented towards justice and social welfare (Arief, 2008). The application of the *ultimum*

remedium and *primum remedium* principles can prevent illegal fishing. On the other hand, social control from the community in informal supervision needs to be seen as strengthening the capacity of state supervision against illegal fishing. The principle of *ultimum remedium* and *primum remedium* should be the perspective of legislation policy in the field of fisheries because of community social control (Faisal and DP. Rahayu, 2021).

Conclusions

The criminal law policy (penal policy) in the legislation policy in fisheries can be seen in the legal politics of the Fisheries Law, which is oriented towards eradicating the practise of illegal fishing in Indonesia. The criminal law policy on the use of penal facilities (criminal law) is also seen in the criminalization policy related to several articles that classify criminal acts/crimes as crimes and violations. The reformulation of the use of criminal sanctions as the *ultimum remedium* and *primum remedium* in the legislation policy for handling illegal fishing is guided by the principles of proportionality (balance), practicality and humanity in order to achieve legal objectives, justice and order based on Pancasila in sustainable management of fishery resources. The reformulation of these principles is also related to the subject/perpetrator of illegal fishing involving foreign fishermen, local fishermen (small fishermen), entrepreneurs and corporations so that the value of justice can be prioritized over achieving equality. Furthermore, reformulation can also be carried out by positioning administrative sanctions as the *primum remedium*, especially for violations by corporations. Optimization of promptly released actions against foreign fishers as a *primum remedium* to balance the coastal state and the flag state.

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