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CRIMINAL SANCTION IN ADMINISTRATIVE LAW: A RIGHT WAY TO GO?(APPLYING CRIMINAL SANCTION IN ADMINISTRATIVE ACT)

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Abstract

This article is questioning the problems of formulating criminal sanction in administrative act to solve legal problems in economic activities. This discussion is important, particularly with respect to the heterogeneity of regulations in economic activities. This research argues that this heterogeneity creates legal uncertainty which in turn broader discretion in resolving legal problems in economic activities. This paper will identify the criteria of the offense, which should have criminal sanctions and/or administration in practice law by conducting a review of development of the offenses and sanctions that will influence criminal law in the future.

Keywords: *Administrative Acts; Administrative Sanction; Criminal Sanction; Economic Activities; Legal Problems*

INTRODUCTION

The formulation of a criminal sanction may be found from the various provisions in the legislation pertaining to administrative law. We can observe several legislations that define criminal or administrative sanctions in their formulation. Environmental and forestry acts, for example, detail the imposition of such sanctions as a consequence of violating the concerned regulations. The arrangement and application of criminal sanctions and/or administrative sanctions has been effected in certain cases for a long time. However, academicians and practitioners still debate the regulation and implementation of the sanctions. There is also evidence regarding the existence of preventive efforts in criminal law. On the contrary, an atmosphere of penalization prevails in administrative law with regard to the objective of applying the sanctions.

Criminal sanctions are generally known as penalties that naturally cause suffering due to the type of the punishments meted out. Apparently, administrative sanctions also espouse the purpose of causing perpetrators experience hardship. In this case, the element of the mistake plays an important

role. However, it can be said that regardless of the purpose of sanctions, administrative sanctions are generally lighter than criminal sanctions. For example, the actions committed in a criminal case, even if they end merely with the imposition of criminal penalties, contain elements of crime greater than the violation of administrative norms.

METHODS

The article will give attention to the criminal sanctions and administrative arrangements within the Act and its application in practice law by conducting a review of the history and development of the sanctions, so as to identify the criteria of the act/offense, which should have criminal sanctions and/or administration, as well as the selection the criteria of criminal sanctions/administrative penalties, in the settlement of various cases, so as to give recommendations on regulation and its implementation in the future. Act that will be explored are provisions in the economic field (administrative Act containing criminal sanctions). This article is a doctrinal research which used several acts in administrative and criminal law, books, articles in representative journal, theory and doctrine from legal scholars and court decisions as materials of analysis to answer the research question. Particularly this article using library research and interview as a complement.

MAIN ISSUE

The central question examined in this paper is why should criminal sanctions concerning economic activities be formulated in the administrative acts? This paper will focus only on criminal sanctions imposed in cases of economic activities that are considered administrative acts.

ANALYSIS AND DISCUSSION

JUSTIFICATION OF PUNISHMENT

In the opinion of Pecker, there are two different conceptual views toward criminal punishment, which have dissimilar moral impact[1]. The first view is retributive; it illustrates punishment as negative reprisal for any deviant behavior committed by members of the community. In this view, people are held responsible for their moral choices. If the choice made is right, they would get a positive result in the form of praise, reward, etc. If the choice is wrong, the person should be responsible and be given negative retribution. The rationale of the penalty lies in the view that one is given negative retribution for a mis-

[1]Herbert L. Packer (1968), *The Limits of The Criminal Sanction*, California: Stanford University Press, pp. 11-12.

take. This view is backward-looking because the criminal penalty applied tends to be corrective and repressive. This view considers that punishing criminals is a good act because people perpetrating any acts would be required to take responsibility for their actions and would have to accept the consequences emanating from their conduct[2].

The second view is the utilitarian view that sees crimes from the cost and benefit perspective. Instead of retribution, it is the outcome or benefit of the situation or circumstance to be gained by the punishment or penalty that is to be considered. Punishment should be viewed in terms of objectives, benefits, and usefulness. Thus, criminal penalty is intended to improve the offender's behavior so that in the future, the person will not repeat the transgression. It should also be designed to prevent other people from committing similar errors in judgment. This view has the purpose of prevention and is forward-looking and, therefore, is generally considered more ideal in terms of the justification of criminal punishment. However, according to Pecker, whatever criminal philosophy one chooses, the selection cannot be expected to entirely solve the existing problem.

Similarly, the justification of formulating penal provisions in the administrative law in the form of threats of criminal penalty may not be able to solve the existing problems and are sometimes considered unjust to the people seeking justice. Hence, it is necessary to note and identify the context of such inclusion in the Act and its application in existing cases. Pecker (as cited in Arief, 1994) concluded his treatise on the justification of punishment as follows:

a. Penal sanctions are necessary. We cannot live without penal sanctions today or in the future.
b. Penal sanctions are the best tools we have to face large and immediate dangers, as well as the threats of harm.
c. A penal sanction can be "the best guarantor" one day and "the main threat to human freedom the next day. It is a guarantor if imposed humanly and carefully but a threat to freedom if forced carelessly and imposed unjustly.[3]"

Criminal penalty, which is determined and implemented for economic transgressions by administrative acts, aims

[2]Samosir (1994), *Fungsi Pidana penjara dalam Sistem Pemidanaan di Indonesia*, Bandung: Binacipta, First printing, pp. 27.

[3]Barda Nawawi Arief (1994), *Kebijakan Legislatif dalam Penangulangan Kejahatan dengan Pidana Penjara*, Semarang: Badan Penerbit Universitas Diponegoro, Second Edition, Second Printing, pp. 48.

at restoring balance in socioeconomic development and at securing funds for the welfare of the people. It is understood that the purpose of any governmental act is to ensure the welfare of the people; however, it is necessary to understand the rationale of the law makers/legal drafters who formulated the different types of sanctions. This study explores the theory/purpose followed by legislators when formulating a sanction in an act that law enforcement officers are to adopt when imposing sanctions with regard to a relevant case.

The development of various theories on criminal penalty is basically derived from society's view of the crime itself. Duff and Garland[4], divide the theory of punishment into two major categories, consequentialist and non-consequentialist. For consequentialist theorists, a criminal sanction is the result of a behavior that caused losses, and thus the perpetrator deserves to experience loss in the form of criminal sanctions and the prevention of crimes in the future is the main purpose of criminal sanction (forward-looking).

Moreover, in the consequentialist view, the justification of criminal sanctions requires proof for the following[5]:

a. the sanction brings goodness;
b. the sanction could prevent worse incidents;
c. there are no other alternatives are equivalent to the sanction.

For Non-consequentialist theorists, on the other hand, assume that an appropriate response toward a crime is the justification of criminal sanction. The view, that the imposition of penalty is retaliation for a crime, is held by retributive theorists who argue that punishment needs to be inflicted on perpetrators (backward-looking). The question of proportionality (balance in sentencing), however, remains to be addressed by adherents of non-consequentialist justice.[6]

ULTIMUM REMEDIUM

The term *ultimum remedium* was first used by Modderman to answer questions asked by Mackay (a member of the Dutch parliament) in the presence of the Dutch parliament because Mackay felt that he had failed to find a legal basis for the need to sentence criminal offenders[7]. Modderman answered that acts of lawlessness, which are punishable and which, according to experience, cannot be elimi-

[4]Antony Duff and David Garland (1994), *A Reader on Punishment*, Oxford: Oxford University Press, pp. 6-onward.

[5]Harkristuti Harkrisnowo (2003), *Rekonstruksi Konsep Pemidanaan: Suatu Gugatan Terhadap Proses Legislasi dan Pemidanaan di Indonesia* (Oration speech at the Inauguration Ceremony of Permanent Professor in Criminal Law FHUI), Depok, 8 Maret 2003, pp. 11-12.

[6]*Ibid.*

[7] P.A.F. Lamintang (1997), *Dasar-Dasar Hukum Pidana Indonesia*, Bandung: Citra Aditya Bakti, pp. 17-19.

nated by any other means, should be punished. However, punishment ought to be the last attempt (*ultimum remedium*). In this case, criminal law is considered the last resort to improve human behavior and is restricted as tightly as possible in order to heal rather than to exacerbate the problem of lawlessness [8].

Not all criminal law experts share the same view as Modderman. For instance, van Bemmelen argued that *remedium* should be interpreted as a means to restore the state of peacefulness in the community rather than as a means to recover damages or to restore justice. This is because when nothing is done to ensure justice, this omission may trigger chaos in the society as people will be encouraged to take the law into their own hands[9] . Although he disagrees, Bemmelen stated that Modderman's opinion should be accepted because when criminal law is believed to be the *ultimum remedium*, in practical terms, it accords extensive authority to police and prosecutors to resolve concrete/factual cases in society.

In harmony with Modderman's opinion, Remmelink believes that criminal law that is known as carrying the heaviest sanction will, in principle, only be imposed if the enforcement mechanism of lighter sanctions is not adequate[10]. This view can be interpreted to mean that the tools of non-criminal laws such as regulations in the areas of civil, administrative, and disciplinary law, or other social rules may be used before resorting to the statutes of criminal law[11].

SANCTION IN CRIMINAL LAW AND ADMINISTRATIVE LAW

According to Arief[12], the issue of using criminal punishment/sanction in administrative law is, in principle, a part of the criminal law policy that could be functionally assessed starting from the formulation, application, and execution of such regulations. Barda Nawawi identified the lack of uniformity in the formulation of criminal sanctions in various criminal provisions in the legislation policy that contains the aspects of administrative law. These dissimilarities include the following, among others[13]:

a. Some administrative sanctions stand alone, but some are applied and integrated within the criminal punishment/prosecution system.

[7] *Ibid.*
[8] Jan Remmelink (2003), *Hukum Pidana (Komentar atas Pasal-Pasal Terpenting dari KUHP Belanda dan Padanannya dalam KHUP Indonesia)*. Jakarta: PT. Gramedia Pustaka Utama, pp. 7-8.
[9] *Ibid.*
[10] Ibid.
[11] Barda Nawawi Arief (2010), Kapita Selekta Hukum Pidana, Bandung: Citra Aditya Bakti, 2010, pp. 16-18.
[13] Ibid

b. If the administrative sanctions stand alone, the terms used are administrative sanctions or actions.
c. In terms of administrative sanction being applied through the criminal legal system, some formulate it as an additional punishment and some specify it as disciplinary action.

In criminal law science, the terms sanction, punishment, or penalty may hold different meanings in correlation with the legal specialist's perspective. Sudarto[14], for instance, defines criminal punishment as an affliction deliberately imposed on an individual undertaking any deed that conforms to particular conditions. According to Muladi and Arief, sanctions against crimes consist of the following elements or characteristics[15] :

1. Criminal punishment is principally the imposing of affliction or misery or any other unpleasant effects.
2. Criminal punishment is meted out by an authorized person or agency.
3. Criminal punishment is enforced upon a person who commits an offense against law.

Administrative sanction is defined by Indroharto[16] cited from van Wijk/W. Konijenbelt, as the public, legal, and powerful means applicable by a State Administration Agency or Office in reaction to those disrespectful to the State's Administrative legal norms. According to Rangkuti[1718], administrative sanctions, particularly those aimed to protect the interests maintained by the violated provisions, have an influential function. In environment law, for instance, they become instrumental in controlling prohibited deeds. The means of such helpful punishments are government compulsions or forced action; fines; the shutting down of places of business or of the activities of business machineries; or even the retraction of business licenses by means of a staged process that comprises warnings, government compulsion, shutting down, and forced payment.

Various administrative sanctions have the following aims:

[14] Muladi and Barda Nawawi Arief (1998), *Teori-Teori dan Kebijakan Pidana*, Bandung: PT. Alumni, 2nd edition and printing, p. 2.
[15] *Ibid*. pp. 4.

[16] [16] Indroharto (2000), Usaha Memahami Undang-Undang Tentang Peradilan Tata Usaha Negara Buku I Beberapa Pengertian Dasar Hukum Tata Usaha Negara, Jakarta: Pustaka Sinar Harapan, pp. 238.
[17] Sri Sundari Rangkuti (2008), *Hukum Lingkungan dan Kebijaksanaan Lingkungan Nasional. Surabaya*: Airlangga University Press. 2nd edition, pp. 211; and Philipus M Hadjon, et. al, Pengantar Hukum Administrasi Indonesia, Yogjakarta: Gadjah Mada University Press, pp. 245.
[18] Philipus M. Hadjon dkk (2008), *Pengantar Hukum Administrasi Indonesi*a, Yogyakarta: Gadjah Mada University Press, pp. 245-247

1. support the enforcement of law where the application of the sanction is expected to ease the enforcement of the norms concerned. In turn, this bolstering will result in the effectiveness of the regulations;
2. punish whoever violates the norms of a regulation or law in an attempt to ensure compliance to the legal norms concerned. In this case, the person deserves the punishment;
3. make the transgressor wary of repeat violations of the law; and
4. prevent any other parties from violating the law[19].

With regard to differentiating criminal and administrative sanctions at certain instances, Drupsteen, Gilhius, Kleijs-Wijnnobel, De Leeuw, & Verschuuren[20] feel that administrative sanctions may also include the element of the imposition of suffering, such as in the case of economic crimes by forced effort applied by the government or the closing down of business. Therefore, they believe that both the types of sanctions are approaching each other toward a common ground and that they may even assimilate with each other.

In reality, indistinguishable sanctions for criminal acts and for administrative offenses would result in certain consequences, such as the following:

1. It might not be able to practice the priority principles, in the sense of utilizing law enforcement efforts by way of administrative law prior to legal efforts by means of criminal law instruments. Therefore, offenses should be assessed case by case by considering the seriousness of the crime committed and considering the possible former conditions before the damage took place, so that the type of sanction most appropriate may be determined and applied. Determining factors for priority could be the gravity of the crime, the character of the misdeed, and the possible law enforcement avenues available to the government or the prosecution agency.
2. With respect to the *ne bis in idem* principles, moreover, if the sanction application intention is retributive, the opinion is still debatable by experts[21].
3. The time frame for the resolution of the case and suggestions to the judge

[19] Wicipto Setiadi (2009), Sanksi Administratif sebagai salah satu instrumen penegakan hukum dalam peraturan perundang-undangan, *Jurnal Legislasi Indonesia*, Jakarta: Direktorat Jenderal Peraturan Perundang-undangan Departemen Hukum dan HAM RI, Vol. 6, pp. 606.

[20] D. Schaffmeister, et. al (1994). *Kekhawatiran Masa Kini Pemikiran Mengenai Hukum Pidana Lingkungan Dalam Teori dan Praktek* (Diterjemahkan oleh Tristam P. Moeliono). Bandung: PT. Citra Aditya Bakti,, pp. 19.

[21] *Ibid.*

for evaluating the compliance and maintaining a balance between criminal deeds and the sanctions that might be applied, considering good governance principles[22]

In accordance with the above opinion, Muladi[23] elaborates four variables of criminal law enforcement as the parameters of criminalization, criminal policy, conviction, and the administration of justice. Criminal law enforcement is a matter of criminal policy. In an attempt to overcome crimes, criminal policy is a part of social policy, namely the effort of a community to improve its welfare. Muladi evaluates the two issues in terms of absolute separation between criminal law enforcement and administrative law enforcement. In fact, they are both subsystems that support and do not oppose each other.

Conformed to Muladi's opinion, two visions have been developing in the Netherlands with regard to the relation between criminal law and the laws of other sectors[24]:

1. *Autonomous vision*: the proponents of this view believe that criminal law has its own regulations, principles, and functions. It also has its own strong characteristics that distinguish it from the laws of other fields, particularly from administrative law in the context of sanctions. One of them is the *ultimum remedium* principle.
2. *Heteronymous vision*: the advocates of this group believe that criminal law is not a special field of law. It is simply a governmental activity just like any other field of legislation. Criminal law does not differ very much from other forms of law enforcement and the character of criminal law is not definitely distinguishable from any other types of legal sanctions because administrative law and disciplinary law also possess a punitive nature.

Remmelink also subscribes to the view that particular aspects of administrative sanctions have punitive objectives and the tendency of forcing hardship on law breakers[25] It is presently worth saying that criminal law is related to other fields of law and bears sanctions of equal punishment effects, which is understandable according to the opinions of the *heteronymous vision* group as follows:

"Criminal law ... is not a special part of the law, but simply a governmental ac-

[22] *Ibid*, Schaffmeister (1994).
[23] Muladi (2000), *Kapita Selekta Sistem Peradilan Pidana*, Semarang: Badan Penerbit Universitas Diponegoro, Cetakan ke-2., pp. 39
[24] Idlir Peci (2006), *Sounds of Silence* (A research into the relationship between administrative supervision, criminal investigation and the nemo-tenetur principle), Nijmegen: Wolf Legal Publisher, pp. 7-8.
[25] Remmelink (2003), pp. 16.

tivity … the substantive criminal law does not have its own norms and its function is … that it guards the norm – through punitive sanctions – of other fields of law"[26].

Indonesia is experiencing a transformation of thought similar to the developments in the Netherlands as reported by Peci[27]. Muladi states that recently, there has been much legislation in administrative law that includes criminal sanctions to strengthen the administrative sanctions. Logically, criminal sanctions are applied if the provisions of administrative law are not effective anymore (as the final means to the solution of the case). Nevertheless, such so-called *shock therapy* as effected in the case of taxation, environment, copyright, etc. is both pertinent and necessary because such crimes are becoming pervasive and can inflict extremely great damage[28].

Hadjon elucidates the differences between criminal penalties and administrative sanctions as follows:

1. The purpose of sanctions itself is different. Administrative sanction action aim at violation while criminal sanctions aim at providing the offender with the penalty of sorrow.
2. The two punishments have different natures. The intention of imposing sanctions for administrative violations of the act was to stop and restore or repair the violated object to its original condition.
3. The enforcement of the two penalties is discrete. Administrative sanctions are applied by the State Administration officials without judicial procedure while criminal penalties can be imposed only by a judge and only through the criminal justice process[29].

There are circles in which it is argued that in cases relating to extortion and corruption committed by law enforcement officials of particular institutions when dealing with a criminal case, administrative sanctions are not enough because administrative mutation, demotion, suspension of pay raise, and dismissal from office do not carry an adequate deterrent effect for the perpetrators.

In addition, the designs of the formulation of criminal sanctions in the law, as proposed previously, contain a deficiency. Apparently, there are also problems in determining who may be considered an officer or a law enforcement authority in taking decisions regarding the settlement of cases in the economic field.

[26] Peci (2006), pp. 7
[27] *Ibid.*
[28] *Ibid.*
[29] Hadjon (2008), et. al., pp. 247

APPLICATIONS OF THE LAW

Turning to the problems in the field of environmental law, the cases that attracted the attention of justice seekers in mid-2007 may be exemplified in terms of the Manado District Court ruling No.284/Pid.B/2005/PN.Mdo of April 27, 2007, on an environmental pollution case alleged to PT. Newmont Minahasa Raya (represented by Richard Bruce Ness) and Richard Bruce Ness in Buyat Bay Manado, North Sulawesi. In this case, the two defendants were accused of a crime, i.e., destruction and environmental pollution, as defined by the Act No.23 of 1997 on Environment Management (PLH Act).

In the decision, Silalahi, SH, an environmental law expert who was a member of the drafting team of the PLH Act, and who also stood as an expert witness in the case, opined that with the existence of subsidiary principles in the PLH Act, according to the LH (Lingkungan Hidup/ Environmental) law, the case would be known as a dispute, which implies that criminal sanctions merely support administrative laws. According to him, administrative sanctions, civil lawsuits, and the settlement of mediation/Alternative Disputes Resolution (ADR) must be applied before using the criminal law instrument (*ultimum remedium*). This opinion was recognized by the criminal law expert Andi Hamzah, and Muladi who contributed to the case as expert witnesses and who were also members of the drafting team of the Environment Act of 1997.

The third expert admitted that utilizing criminal law in the enforcement of environmental laws should be the last effort of law enforcement (*ultimum remedium*), employed only after the implementation of administrative remedies, civil law, and mediation, and only if the administrative penalties, civil law, and mediation/ADR have been set to verdict but are still ignored by the concerned business party. In Newmont's case, the judge considered that the subsidiary principle mandated by the PLH Act was not applied. In other words, the judges who heard this case concluded that it was not proven that Newmont had met the criteria of the sanctions imposed by other fields of law having been ineffective and ignored by the PT. Newmont Minahasa Raya. Finally, the judges decided that the charges were not established and the defendants were released and entitled to redress with regard to their capabilities, status, prestige, and dignity. This decision had then drawn protests and had been deemed not to mete justice for the victims of Buyat Bay and their families. From this instance, we find

a difference of opinion between the experts and law enforcement officials in handling cases having criminal and/or administration sanctions.

In the case of forestry, and specifically in the case of illegal logging, a controversy occurs in the case of Adelin Lis, Finance Director of PT Keang Nam Development Indonesia, and the defendant in an illegal logging case. Lis was acquitted by a District Court of Medan presided by Judge Arwan Byrin. This decision was considered contentious. Many parties regretted the decision and some even asked for the judge to be examined or demanded that the existing verdict should be overturned because it did not satisfy the community's sense of justice having been served.

Based on the views of the forestry law enforcement, the system of sustainable forest management deals with the interplay of two interests, i.e., the interests of forest utilization and the concerns for the protection of the forests, influencing each other. In the interest of forest use, the government, in this case, the Forestry Department, provided licenses to certain parties as governed by the current forestry legislations. The protection of forests is part of the supervisory duties set out in the forestry legislation. Some contend that only civil and administrative sanctions are required for law enforcement in this sector. However, ever-increasing instances of wildly illegal logging suggest criminal sanctions are extremely required.

In practice, officials/officers may be authorized to resolve concrete cases in the community. In the member countries of the European Union, when handling tax cases that indicate criminal offense, the prosecutors are not the only the authorized agency because the tax authorities (authorized tax officials) and the police (if required) also work hand in hand with the prosecutors to resolve the case. In such cases, the competent tax authorities also report the necessary subjects to the prosecutor and a consultative forum can be created to avoid the occurrence of *ne bis in idem*[30].

This discussion gives us an indication of the strengths and weaknesses of the formulation and the implementation of the concept of criminal sanctions and/or administrative penalties in the Act. The decision-making of the cases reported in this paper, coupled with the sense of dissatisfaction among the general public on the resolution of those matters, make fur-

[30] Michiel Luchtman (2008), *European Cooperation Between Financial Supervisory Authorities, Tax Authorities and Judicial Authorities*, Netherlands: Intersentia, pp. 93-96.

ther and more in-depth research on this issue both interesting and vital.

First, in terms of legislation/regulations, the criteria relied upon by the legislators in determining the applicability of criminal sanctions and/or administrative sanctions can perhaps be ascertained. However, the formulation of the law does not clearly describe the pattern in which sanctions may be imposed. Second, in terms of implementation, clarity is required with regard to the application of criminal sanctions and/or administrative sanctions against a criminal act, especially in the domain of economic crimes. Third, lucidity is needed in the determination of the authority of administration officials to enforce sanctions in certain cases and in the knowledge of which officials/law enforcement officers are competent to pass decisions on concrete cases that occur in the field of economic activities.

CONCLUSIONS

There is a need to justify why criminal sanction is required to be formulated within the administrative act in order to address legal problems arising due to economic activities. The current research initiative discovered that in such cases, there is a lack of coherency and of consistency in formulating criminal sanctions in the acts of administrative law. This deficiency of cogency results in heterogeneity in sentencing. The author of this paper has provided a detailed explanation or the problems and issues and has offered suggestions that could become guidelines for law enforcement officers and/or administrative officers/agencies/authorities while determining sanctions with respect to the administrative act to exercise in cases related to economic activities such as customs, excise, environment protection, and forestry. There are some circumstances that need to be considered in order to regulate and enforce the sanctions pertaining to economic activities. They are the gravity, seriousness, or nature of the infringement; the intention or fault of the offender (except for strict liability violations); the previous conduct/record of the offender (the repetition of an offense generally leads to the imposition of higher sanction); the economic situation or capacity of the offender (solvency); the estimated economic benefits derived from the infringement; the type of goods involved in the infraction; and the damage caused to natural resources because of the violation.

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