

Criminal Sanctions as the Answer of the Vacuum in Administrative Law Enforcement

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Abstract

Administrative sanctions are considered not sufficient to meet the legal needs of state administration so that they require assistance with criminal sanctions in law enforcement. However, the clarity regarding the transition in the use of administrative sanctions to criminal sanctions has not been regulated with clear boundaries. The varied and subjective implementation certainly causes injustice and legal uncertainty for the community, especially those who receive sanctions. This study uses a juridical normative approach. This paper explains the role of criminal sanctions to fill the legal vacuum that cannot be provided by administrative sanctions, causing the importance of the existence of criminal sanctions in every administrative law. This paper also finds that there is no legal certainty to regulate the structure of the use of sanctions in administrative law. The urgency of the formation of rules that meet the structure, substance, and clear legal culture in its implementation will provide legal certainty and justice in the enforcement of state administrative law.

Sanksi administrasi dianggap belum cukup memenuhi kebutuhan hukum administrasi negara sehingga memerlukan bantuan sanksi pidana dalam penegakan hukumnya. Namun kejelasan mengenai transisi dalam penggunaan sanksi administrasi ke sanksi pidana belum diatur dengan batasan yang jelas. Pelaksanaan yang bervariasi dan subjektif tentu menyebabkan ketidakadilan dan ketidakpastian hukum bagi masyarakat terutama pihak yang

mendapatkan sanksi. Penelitian ini menggunakan pendekatan normatif yuridis. Tulisan ini menjelaskan peranan sanksi pidana untuk mengisi kekosongan hukum yang tidak bisa diberikan oleh sanksi administrasi menyebabkan pentingnya keberadaan sanksi pidana di setiap hukum administrasi. Tulisan ini juga menemukan bahwa belum adanya kepastian hukum untuk mengatur struktur penggunaan sanksi di dalam hukum administrasi. Urgensi pembentukan aturan yang memenuhi struktur, substansi, dan budaya hukum yang jelas dalam pelaksanaannya akan memberikan kepastian dan keadilan hukum dalam penegakan hukum administrasi negara.

Key words: *Administrative; Criminal Law; Criminal Sanction.*

Introduction

According to Friedman, effective law enforcement can be judged from 3 things, namely the legal structure, legal substance and legal culture.¹ The legal structure concerns the legal apparatus, the legal substance includes statutory instruments and legal culture is a living law that is adhered to in a society. The officials as legal structure need supervision and clear procedures in carrying out their duties. Legal substance should contain rules that serve as guidelines for law enforcement officials when carrying out their duties.² Legal culture is a habit in the implementation of the law and without clarity of the structure and substance of the law; a good legal culture will also be difficult to form.

The role of criminal law and administrative law as the law substance in practice, concerning punitive administrative sanctions still in the “gray area” in its development. The challenge to formulate clear argumentation, consideration, and justification on why the criminal sanction is required within the administrative act to address legal problems arising due to economic activities. 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.³

The uncertainty rises as the practice of using criminal sanction and administration sanction in most administrative law is still not specified by the law. The application of *primum remedium* and *ultimum remedium* is still not unified and different according to the cases. The structure of the transition between

¹Lawrence M. Friedman, *Hukum Amerika: Sebuah Pengantar*, Translated from American Law An Introduction, 2nd Edition, Alih Bahasa: Wisnu Basuki, (Jakarta: Tatanusa, 2001), p. 6-8.

²Derita Prapti Rahayu, Faisal, Yokotani, Rafiqqa Sari, Ndaru Satrio, *Law Enforcement in the Context of Legal Culture in Society, Law Reform*, Volume 16, No.2, (2020), p.11.

³Nathalina Naibaho, Harkristuti Harkrisnowo, Suhariyono AR, Andri Gunawan Wibisana, *Criministrative Law: Developmentsand Challenges In Indonesia*, Indonesia Law Review, Volume 11 No.1 (2021), p 12.

Criminal Sanctions as the Answer of the Vaccum ...

Jennifer, Anastasia Maria Gabriela & Kezia Linardi

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administrative sanction to criminal sanction is also not specified as yet by the regulation.

For example in the general explanation number 6 of the Law Number 32 of 2009 Concerning Protection and Management of the Environment Law which states as follows:

“Enforcement of environmental criminal law still pays attention to the *ultimum remedium* principle which requires the application of criminal law enforcement as a last resort after the implementation of administrative law enforcement is deemed unsuccessful. The application of the *ultimum remedium* principle only applies to certain formal criminal acts, namely punishment of violations of waste water quality standards, emissions, and disturbances.”

This article contains uncertainty in which administrative law enforcement is considered unsuccessful. The limits on which administrative sanctions are deemed unsuccessful and when criminal sanctions may take over law enforcement duties have not been regulated in most existing legal substances. The certainty of when to use administrative sanction and criminal sanction is still very subjective according to the appointed government agency as the law structure. There is a potential for abuse of the authority held by the administrative officials and law enforcement officers, because they are given too much discretion. This is exacerbated by the weak or lack of supervision over their discretionary authority. This is ironic, as the administrative officials and law enforcement officers would be violating the same rules they are enforcing.⁴

The transparency of the procedure is also being questioned as the government hardly opens the access to public. The representative of WAHLI (Wahana Lingkungan Hidup Indonesia) mentioned that Ministry of Environment and Forestry of the Republic of Indonesia has not been transparent in taking action against environmental and forestry violations. The transparency is also in the spotlight, for example, there are cases of palm oil plantation companies undergoing administrative sanctions, but the public does not know to what extent.⁵

Criminal sanction could be one of the solutions to fill the problems in the enforcement of administrative law above. Criminal law uses a judicial process so public can follow the case as it is being processed by the court. The other role that criminal sanction gives in administrative law is to give sanction to the corporation's management. Administrative sanction can only reach the corporation and the

⁴Nathalina Naibaho, dkk, *Criministrative Law: Developmentsand Challenges...* p.4.

⁵Yogi Eka Sahputra , “Catatan Awal Tahun: Berbagai Persoalan dalam Penegakan Hukum Lingkungan Hidup”, Mongabay, <https://www.mongabay.co.id/2022/01/10/catatan-awal-tahun-berbagai-persoalan-dalam-penegakan-hukum-lingkungan-hidup/> accessed on 12 June 2022.

Criminal Sanctions as the Answer of the Vacuum ...

Jennifer, Anastasia Maria Gabriela & Kezia Linardi

DOI: 10.35673/al-bayyinah.v4i2.2848

permit, while criminal sanction can also reach the people in charge as well the corporation. Criminal sanction can provide deterrent effect to the person who has the *mens rea* in the criminal act, while administrative law can give the sanction to the company as whole.

The specification of the role of the sanction, both criminal sanction and administrative sanction is expected to provide the appointed officers in government agency references in the practice. The *primum remedium* and *ultimum remedium* practice in administrative law should be regulated specifically and be used according to the case consideration and priority. That is also why the role of each sanction should be clear so that law enforcement can be effective and consistent. The urgency of the regulation to specify those variables is important so that the usage of criminal sanctions in the acts of administrative law can be coherent and consistent.

Method

This type of research uses normative juridical research. Therefore, in this study, library materials are basic data which in research science is classified as primary data.⁶ This article focuses more on Indonesian Administrative law which regulate both administrative and criminal on its sanction. The research uses library research; the main point is to seek a theoretical basis that lies upon inclusion and application of criminal sanction and administrative sanction in current existing laws. The primary legal material will be analyzed in the regulations formulating criminal sanction and administrative sanction within administrative law. Meanwhile, secondary legal material is in form of books, journals, and other researches related to the discussion topic.

Discussion

The vacuum of law enforcement to be filled by criminal sanction

Administrative law sanctions in terms of targets are divided into 2 (two) types of sanctions, namely reparatory sanctions and punitive sanctions. "*Onder reparatoire sanctie worden dan verstaan de reacties op normovertreding, die strekkern tot het (zo goed mogelijk) herstellen of bewerkstellingen van de legale situatie, dat wil zeggen van de toestand die zou zijn ontstaan best of wasred wannieegt over wasted*". Through this explanation, it can be understood that reparatory sanctions are sanctions that are applied as a reaction to violation of norms aimed at returning or restoring to their original state before the violation occurred. While the punitive sanctions are

⁶Soekanto dan Mamudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat* (Jakarta: Rajawali, 2003), p. 23-24.

Criminal Sanctions as the Answer of the Vaccum ...

Jennifer, Anastasia Maria Gabriela & Kezia Linardi

DOI: 10.35673/al-bayyinah.v4i2.2848

uitsluitend de sancties die ortoe strekken om een persoon te 'straffen'" or are sanctions that are solely intended to give punishment to someone.⁷

The application of sanctions in administrative law can be given in conjunction with other legal sanctions, namely through internal accumulation and external accumulation. Internal accumulation is the application of two or more administrative sanctions simultaneously. Meanwhile, external accumulation is the application of administrative sanctions along with other legal sanctions such as criminal or civil sanctions.⁸ For this reason, in its practice, administrative law provides space for other jurisdictions such as civil law and criminal law. Within the scope of state administration, civil sanctions are reserved for the government in its capacity as a legal entity, to be able to defend its rights. Meanwhile, criminal sanctions can be imposed simultaneously with administrative sanctions because they have different characteristics and objectives.

Administrative sanctions have the aim of stopping acts that are considered unlawful and have the potential to harm society or the state, while criminal sanctions have the aim of providing a deterrent effect and focusing on perpetrators of criminal acts. The provision of sanctions in administrative sanctions is aimed at restoring to its original condition the damage/pollution caused by business actors, while criminal sanctions are aimed at punishing the *mens rea* and *actus reus* of the perpetrators. This is also in line with the nature of administrative sanctions, namely to restore it to its original state without going through a judicial process, while criminal sanctions only provide a deterrent effect for perpetrators through the judicial process.⁹

The difference in characteristics between administrative sanctions and criminal sanctions further emphasizes that both have their respective roles and duties in adjudicating in the scope of state administrative law. Even though the enforcement of criminal law as a sanction is a last resort within the scope of administrative law, in the scope of imposing sanctions, there is a part that administrative sanctions cannot reach, namely corporate management.

The imposition of sanctions as a deterrent effect must be carried out not only against business entities or corporations that have been proven to have violated the laws and regulations, but also to their management or organizational

⁷Ridwan HR. *Hukum Administrasi Negara* (Jakarta: PT. Raja Grafindo Persada, 2006), p. 17-18.

⁸Nina Herlina, *Penerapan Sanksi Administrasi Dalam Hukum Perlindungan Konsumen* (Jurnal Online Universitas Galuh, (2019), p. 5.

⁹Sri Nur Hari Susanto. *Karakter Yuridis Sanksi Hukum Administrasi: Suatu Pendekat Komparasi*. *Administrative Law & Governance Journal*. Volume 2 No.1, (2019), p. 137.

Criminal Sanctions as the Answer of the Vaccum ...

Jennifer, Anastasia Maria Gabriela & Kezia Linardi

DOI: 10.35673/al-bayyinah.v4i2.2848

structure. Given that the nature of the administrative sanction is to restore it to its original state, when the purpose of the sanction has been fulfilled, the responsibility for the business entity/corporation is completed.

As an example, the administrative sanctions regulated in Article 4 of the Regulation of the Minister of the Environment of the Republic of Indonesia Number 2 of 2013 concerning Guidelines for the Implementation of Administrative Sanctions in the Field of Environmental Protection and Management, Article 3 paragraph (1) consist of:

1. Written warning;
2. Government coercion;
3. Suspension of Environmental Permits and/or Environmental Protection and Management Permits; and
4. Revocation of Environmental Permit and/or Environmental Protection and Management Permit

From each of the sanctions mentioned above, there is no sanction that can ensnare the management personally. Administrative sanctions are only regulated to bring order to the corporation, so there is a possibility for the management to release responsibility and leave the corporation responsible for the mistakes that have been made. Individuals who escape by imposing sanctions on corporations can start new corporations and cause new damage in the future. Criminal law is special in that it entails a component of social condemnation. Corporations suffer none of the more dramatic bodily or psychological traumas routinely visited on real persons convicted of crimes; by removing even the societal expression of moral condemnation inherent in a criminal conviction, we leave corporations in a fundamentally different position relative to criminal law.¹⁰ Corporations that have the responsibility to fulfill administrative sanctions can be left by the perpetrators who should be responsible for damage created by the corporation. This is a void that needs to be filled by criminal sanctions that can provide a deterrent effect to individuals and corporations.

The Deputy Attorney General Sally Quinn Yates wrote to all federal prosecutors promoting about individual accountability policy stated that:

“One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their

¹⁰Gregory M. Gilchrist. *Individual Accountability For Corporate Crime*, Georgia State University (2018), p. 1.

actions, and it promotes the public's confidence in our justice system.

¹¹

In the Legislation concerning the Protection and Management of the Environment, stipulates the imposition of administrative sanctions on the person in charge of the business and/or activity. In other words, when one of the management and the corporation has complied with the provisions of the sanctions, the administrative sanctions are over. It is different from the regulation of criminal sanctions which can be imposed simultaneously on the management of corporations and corporations if they are proven to have committed crimes that have been regulated in laws and regulations.

Administrative sanctions are completed by only imposing obligations/orders and/or withdrawal of state administrative decisions to the person in charge of the business and/or activity. Because that is the goal or "goals" of administering administrative sanctions without remembering that if there is an element of "error" then there must be *mens rea* and *actus reus* which can only be proven or reflected by the management of the corporation or business entity. So it can be understood that in this case, administrative sanctions are not able to ensnare the "mistakes" of corporations or business entities. However, through the implementation of criminal sanctions, it is possible to be held accountable for the "mistakes" of the corporation or business entity as well as its management.

The fusion of criminal sanction in administrative law enforcement

Several regulations that contain administrative sanctions as well as criminal sanctions do not contain provisions that emphasize the subsidiarity of criminal sanctions over administrative sanctions.¹² According to Rangkuti, administrative sanctions have an instrumental function, namely controlling prohibited acts and especially aimed at protecting the interests that are protected by the violated provisions.¹³

Idlir Peci differentiates administrative law to criminal law, including the actor who holds the power to exercise the law and the goals and objectives of penalty applications in the following:¹⁴

¹¹Sally Quillian Yates, *Individual Accountability for Corporate Wrongdoing*, Office of the Deputy Attorney General, U.S. Department of Justice, p. 1.

¹²Lidya Suryani Widayati, *Ultimum Remedium dalam Bidang Lingkungan Hidup*, Jurnal Hukum IUS QUIA IUSTUM, (2015), p. 24.

¹³Sri Sundari Rangkuti, *Hukum Lingkungan dan Kebijakan Lingkungan Nasional*, Airlangga University Pers, Surabaya (2000), p. 211.

¹⁴Idlir Peci, *Sounds of Silence: A Research Into the Relationship Between Administrative Supervision, Criminal Investigation and the Nemo-Tenetur Principle* (Nijmegen: Wolf Legal Publisher, (2006), p. 7-8.

Criminal Sanctions as the Answer of the Vaccum ...

Jennifer, Anastasia Maria Gabriela & Kezia Linardi

DOI: 10.35673/al-bayyinah.v4i2.2848

Progress		Criminal Law	Administrative Law
Actors	Past	Presiding Judge	Administrative Officer
	Present	Presiding Judge, Public Prosecutor Police and Police (cooperate and coordinate with each other)	Administrative Presiding Judge, General Admin Law Act (GALA), cooperate and coordinate with each other
Goal	Past	Retributive (backward looking-past)	Reparative, Constructive (forward looking-future)
	Present	Prevention, protecting the public order and society	Punitive sphere in Administrative Law

The sequence of criminal sanction application in administrative law hasn't been uniformed as the *ultimum remedium* is not always applied. According to De Bunt, the *ultimum remedium* has three meanings, namely: First, criminal law is only applied to acts that are very ethically wrong. In this case, the notion of *ultimum remedium* is defined classically; Criminal law in particular is a special law enforcement instrument. It must be prevented that drugs do not outweigh evil. Second, the *ultimum remedium* according to De Bunt is in the literal sense, namely the last resort. Criminal law becomes the last remedy because it brings adverse side effects. Third, the definition of *ultimum remedium* is that administrative officials must first be responsible.¹⁵ If administrative officials are seen as the first to be responsible, and therefore it means that judicial power is placed as an *ultimum remedium*. Administrative officials must react first. The official who gives the permit must first give sanctions if the permit is violated.¹⁶

In most cases, the legislative products used are criminal sanctions, as if the legislators are not satisfied if the laws they produce are without criminal law. The existence of criminal law which was originally an *ultimum remedium* in its current development has become a *primum remedium*¹⁷. Criminal law enforcement can use the *Primum Remedium* concept, if one of the following three things occurs:¹⁸

1. If the perpetrator's offense rate is relatively heavy
2. If the consequences of the actions of the perpetrators are relatively large
3. If the perpetrator's actions cause public unrest.

In reality, criminal sanctions and administrative sanctions cannot be clearly distinguished so that they carry specific consequences. According to G. Drupsteen

¹⁵Lidya Suryani Widayati, *Ultimum Remedium dalam Bidang Lingkungan...* p. 13-14.

¹⁶Andi Hamzah, *Penegakan Hukum Lingkungan* (Jakarta: Sinar Grafika, 2008), p. 69.

¹⁷See prolog in Maroni, *Pengantar Hukum Pidana Administrasi*.

¹⁸Masrudi Muchtar, *Sistem Peradilan Pidana di Bidang Perlindungan dan Pengelolaan Lingkungan Hidup* (Jakarta: Prestasi Pustaka, 2015), p. 170.

Criminal Sanctions as the Answer of the Vaccum ...

Jennifer, Anastasia Maria Gabriela & Kezia Linardi

DOI: 10.35673/al-bayyinah.v4i2.2848

and C.J. Kleijs Wijn Nobel (1994), the principle of priority cannot be enforced, in the sense of prioritizing law enforcement efforts through administrative law over law enforcement efforts through criminal law.¹⁹ The vary application has not stopped just in the practice of *primum remedium* and *ultimum remedium* but also the regulation of transition from administrative sanction to criminal sanction in *ultimum remedium*.

As an example, Law Number 32 of 2009 Concerning Protection and Management of the Environment use the principle *ultimum remedium*. It mentioned that government officials apply administrative sanctions to the person in charge of the business and/or activity if a violation of the environmental permit is found under supervision in article 76. While in article 99 to 115, it regulates about the criminal provisions and its sanctions in the violation of environment law too. The switchover from administration sanction to criminal sanction has not been regulated in detail.

According to Gustav Radbruch, in the principle of legal certainty basically expects and requires the law to be made definitively in written form. The existence of this principle is important because it will guarantee the clarity of a positive legal product that exists.²⁰ Legal certainty refers to the application of a clear, permanent and consistent law where its implementation cannot be influenced by subjective conditions.²¹ Law in the positivistic school requires the existence of "regularity" and "certainty" in order to support the working of the legal system properly and smoothly.²²

Legislation as a written norm (law), in the context of the Indonesian legal state, becomes the basis for the administration of the state and as a guideline for administering the government.²³ Legal certainty requires the availability of statutory regulations that are operational and support their implementation. Empirically, the existence of laws and regulations needs to be implemented consistently and

¹⁹Yus Rizal and Zudan Arief Fakrulloh. 2021. "Application of *Ultimum Remedium* Principle in Tax Criminal Law", In: MIC 2021, Jakarta, Indonesia, p.3.

²⁰Mario Julyano, Aditya Yuli Sulistyawan, *Pemahaman Terhadap Asas Kepastian Hukum Melalui Konstruksi Penalaran Positivisme Hukum*, *Jurnal Crepido*, Volume 01, Nomor 01, (2019), p.1.

²¹R. Tony Prayogo, *Penerapan Asas Kepastian Hukum Dalam Peraturan Mahkamah Agung Nomor 1 Tahun 2011 Tentang Hak Uji Materiil dan dalam Peraturan Mahkamah Konstitusi Nomor 06/Pmk/2005 Tentang Pedoman Beracara dalam Pengujian Undang-Undang*, *Jurnal Legislasi Indonesia*, Vol. 13, No. 2, (2016), p.194.

²²Mirza Satria Buana, *Hubungan Tarik-Menarik Antara Asas Kepastian Hukum (Legal Certainpi) Dengan Asas Keadilan (Substantial Justice) Dalam Putusan-Putusan Mahkamah Konstltusi*, Yogyakarta: Tesis Magister Ilmu Hukum Universitas Islam Indonesia, (2010), p. 34

²³R. Tony Prayogo, *Penerapan Asas Kepastian Hukum dalam Peraturan...* p.194.

Criminal Sanctions as the Answer of the Vaccum ...

Jennifer, Anastasia Maria Gabriela & Kezia Linardi

DOI: 10.35673/al-bayyinah.v4i2.2848

consistently by the supporting human resources.²⁴ The legislation in administrative law especially related to the fusion with criminal sanction as the substance that creates the certainty of law enforcement needs more explication. The legal structure and legal culture may go deviated if the substance does not provide the conviction first.

Conclusion

The fusion of criminal law and administrative law that have different characteristics and objectives creates a full and complete sanction that facilitates the violation in administrative law. The presence of criminal law, especially as a sanction, has important roles that are needed and cannot be carried out by administrative law alone. Criminal sanction can fill the void of administrative sanction especially in giving deterrent effect to the person in the company management such as imprisonment, confinement, and fine.

The implementation of the coherence between criminal sanction and administrative sanction need certain disposition. The lacking of coherency and consistency in sequence of the criminal sanctions in the acts of administrative law is the violation of right for the people who has the right to receive legal certainty and justice. The legal certainty should start from the regulation as the substance; continue with the government officials as the structure and legal culture will follow next. This research urgently suggest clear disposition for criminal sanction in administration law substance so that the law enforcement can be carried by the officials as structure of law without subjective interpretation.

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²⁴Maria S.W. Sumardjono, *Kepastian Hukum dalam Pendaftaran Tanah dan Manfaatnya Bagi Bisnis Perbankan dan Properti*, "Makalah disampaikan dalam seminar kebijaksanaan baru di bidang pertanahan, dampak dan peluang bagi bisnis properti dan perbankan", Jakarta, 6 Agustus 1997, p. 1.

Criminal Sanctions as the Answer of the Vaccum ...

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