

Patterns of Corporate Criminalization as Perpetrators of Environmental Crimes in Nickel Mining

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ABSTRACT

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This study addresses the following issue: what is the pattern of corporate punishment for environmental criminals? This issue is related to administrative and criminal laws, referring to the general laws and regulations. The former addresses the concept of corporate pollution and environmental damage, as well as administrative sanctions. The latter are environmental crimes, such as corporate criminal acts, as defined in the criminal provisions of Law No. 32 of 2009 on Environmental Protection and Management. The urgency of corporate criminal liability – environmental criminals face widespread and complex repercussions. For instance, causing direct harm to society and the environment, as well as jeopardizing the country's financial and economic stability. Despite the fact that those crimes have a financial motive. The pattern of sentencing corporations, committing environmental crimes should be written in the PPLH (environmental management and protection) and be based on environmental conservation, such as aggravating criminal fines, regulating the implementation of criminal fines, and sanctions for disciplinary action.



Introduction

Indonesia is well-known for its vast natural resources, which extend from Sabang to Merauke. There are green forests as the planet's lungs, as well as various mineral materials hidden beneath the earth's surface. The mining industry is one of the largest revenue generators in a country, providing a significant portion of the human needs, such as job creation and community unemployment reduction. Nickel is a valuable mining commodity with a high global market value. It has numerous advantages in everyday life, such as making stainless-steel, stainless-steel alloys, nickel metal hydride batteries, and other products.

Nickel ore are made of laterite nickel deposits which formed by weathering of rocks containing 0.2 to 0.4% nickel. Nickel laterite is typically found in the tropics due to weathering, topography, drainage, tectonic forces, source rocks, and geological structures. In Indonesia, there are several nickel ore producing areas, including Pomala (Southeast Sulawesi), Sorowako (South Sulawesi), Gebe (Halmahera), Tanjung Buli (Halmahera) and Tapunopaka (Southeast Sulawesi). Nonetheless, nickel laterite has an uneven distribution and will be completely excavated one day. Exploration is thus required prior to nickel mining. Exploration refers to the process of gathering detailed and comprehensive data about the presence of natural resources in a specific location. At this stage, capital, failure risk, material losses, workplace accidents, and environmental damage will be reduced.

Mining is a natural resource-based activity. Natural resources can be used to achieve the desired mining results through liquefaction, excavation, or even blasting. Mining operations are typically carried out in potentially forested areas. Unbalanced mining has turned a number of mining areas into death zones, despite efforts to preserve environmental

functions. Mining activities in a forest area have a negative impact on forest ecosystems, resulting in environmental damage such as water, soil, and air pollution. As a result, the environment no longer functions as it once did due to waste heat disposal from nickel industrial area.

In addition, the traffic of barges transporting coal for electricity and nickel ore disrupts fishermen's activities. The final waste (tailings) ends up in the sea, complicating fishing. Fishermen face similar challenges as a result of polluted seas, such as decreased catch in several villages, which requires them to travel further out to sea, resulting in higher production costs. Meanwhile, the cumulative impact in areas surrounding nickel mining, ranging from land loss to air and environmental damage, creates a tremendous destructive power that future generations will feel. Since the company has actually committed environmental crimes, it is not calculated by country or company.

One type of corporate crime is pollution caused by industrial activities. Corporations play an undeniable role in societal economic development. It has both positive and negative consequences, one of which is that corporations develop deviant behavior. They differ in their characteristics and mode of operation from traditional crimes, necessitating the use of specialized tools to enforce the law. This is in line with the Supreme Court Regulation of the Republic of Indonesia No 13 of 2016 (Procedures for Handling Criminal Cases by Corporations), which states that while corporations as legal subjects contribute significantly to economic growth and national development, corporations can also commit various criminal acts that harm the state and society. Related to this, Article 1 number 1 defines a corporation as "an organized group of people and/or assets, whether they are legal entities or not legal entities".

The environmental pollution caused by nickel mining activity shows the impact of corporate crime, which is both financially and non-financially detrimental. Furthermore, the complexity of proving the crime makes the law enforcement process to be slower and more difficult than in conventional crime. Accordingly, a legal instrument that accommodates the certainty of law enforcement, corporate criminal acts in the environmental sector, is highly required. This is done to strike a balance between industrialization and environmental preservation. In this regard, Law No. 32 of 2009 on Environmental Protection and Management (UU PPLH) was drafted. According to Article 116 paragraph (1) letters a and b of the PPLH Law, a corporation or business entity committing environmental crimes has the following 3 (three) models of criminal responsibility:

- (1) If a business entity commits an environmental crime, criminal charges and criminal sanctions will be levied against:
 - a. business entity; and/or
 - b. the person who gives the order to commit the crime or who acts as the crime's leader.
- (2) If the environmental crime referred to in paragraph (1) is committed by a person with whom the business entity has a work relationship or another relationship, criminal sanctions are imposed on the person who gave the order or the leader, regardless of whether the crime was committed individually or collectively.

In practice, when enforcing environmental crimes committed by a corporation or business entity, the criminal responsibility is frequently imposed on the company's management, while the company is rarely held criminally liable. In several cases, corporations were not prosecuted for environmental crimes, despite the fact that the

defendants committed the environmental crimes for and/or on behalf of the corporation/company where they worked. If this is linked to the previous description, more research on the importance of corporate criminal liability is required. Its purpose is to demonstrate the effectiveness of law enforcement in combating environmental crimes. Furthermore, in order to achieve economic justice, an applicable and appropriate sentencing pattern must be examined (the economic conception of justice which states that law is able to create efficiencies, regulating and accommodating human needs).¹ Keeping in mind that corporations also play an important role in societal economic development, or, in other words, the enforcement of corporate criminal acts in the environmental sector do not impede national development. What is most ideal sentencing pattern for corporations committing environmental crimes?

Research Methods

As stated in the claim, it was a descriptive study because it described a number of variables related to the problem and the unit under study. In other words, this study was limited to describing one or more indicators without requiring a causal explanation. with the goal of better understanding the urgency and sentencing patterns of corporate environmental crimes. In contrast, the analysis of sentencing patterns was more focused on the *ius constituendum* perspective. The primary source was library materials, which include primary, secondary, and tertiary legal materials. The former consists of Laws and regulations. The middle covers references to criminal law, articles, scientific papers, and journals, as well as relevant research findings. Meanwhile, the latter includes legal dictionaries, crime and justice encyclopedias, and other relevant dictionaries.

Results and Discussion

The corporation that commits an environmental crime will face criminal charges. In this regard, the purpose of corporate punishment entails an integrative objective which includes²:

- a. General and specific prevention. General prevention aims to keep others from committing the crime. Meanwhile, specific deterrence is to educate and correct the criminal. If it is linked to a corporation, the goal of criminalizing a corporation is to stop it from committing another crime, and to prevent other corporations from doing the same. This is done for the sake of protecting society.
- b. Society protection. It has a very broad dimension because it is fundamentally the goal of all punishments. Simply put, this is a court discretion to seek a solution through criminal acts. Community protection is frequently defined as the inverse of prevention and includes the so-called incapacitated. Linked to corporation, it aims to make the corporation to no longer capable of committing a crime.
- c. Maintain community solidarity, particularly community customs, and to avoid individual or unofficial vengeance. Solidarity is frequently associated with the issue of state victim compensation. In corporate punishment, victims are compensated by the corporation

¹ Fajar sugianto, *Economic Approach to Law*, Jakarta: Prenada Media, Cetakan Kedua, 2015, p. 98.

² H.Setiyono, "Kejahatan Korporasi Analisis Viktimologi dan Pertanggungjawaban Korporasi Dalam Hukum Pidana", Edisi kedua, Cetakan Pertama, (Malang: Banyumedia Publishing, 2003), p. 121-123 quoted from Sutan Remi Sjahdeini, "Pertanggungjawaban Pidana Korporasi", (Jakarta: Grafiti Pers, 2006), p. 162-163 dikutip dari Kristian Urgensi Pertanggungjawaban Pidana Korporasi, quoted from the website: jhp.ui.ac.id/index.php/article/36

itself, with funds taken from the corporation's assets. Thus, the social solidarity can be maintained.

- d. Compensation or balance, that is, a balance between the crime and the individual liability of the crime perpetrators by considering several factors. Suffering associated with the crime must aid the convict's reintegration into society. Even if there are general preventive reasons, the severity of the sentence should not be harsher than the accused's guilt.

Corporate penalties, according to PPLH (Environmental Protection and Management) law, are fines and additional punishments or disciplinary measures, such as profit deprivation, closing all or part of business premises and/or activities, and repairs as a result of criminal acts. Furthermore, the obligation to do what is neglected without rights, and/or the company being placed under guardianship for a maximum of 3 (three) years. Nonetheless, its expansion has had no effect on the effectiveness of its law enforcement. As previously stated, the form/type of sanction for a corporation committing environmental crime is a one-third fine plus an additional penalty or disciplinary action imposed on the giver of the order or the crime's leader. In fact, a number of cases of corporate pollution demonstrate the ineffectiveness of enforcing corporate criminal acts in the environmental field, as it suggests several ideas on the appropriateness and applicability. In other words, the regulated punishment pattern of the PPLH (Environmental Protection and Management) Law still has several flaws that contribute to its ineffectiveness. As a result, a number of provisions related to environmental sentencing patterns, such as aggravating criminal fines, regulating the implementation of criminal fines, and environmental restoration measures, are required.

1) Fines Weighting

Initially, fines were civil relations; that is, if a person is harmed, he may seek compensation for damages, the amount of which is determined by the amount of loss suffered as well as the social position of the person being harmed.³ Fines are the third type of primary punishment in Indonesian criminal law, and they can primarily be imposed on adults.⁴ Principle 16 of the Rio Declaration on the Concept of Sustainable Development states⁵:

“National authorities should endeavor to promote the internalization of environmental costs and the use of economics instruments, taking into account the approach that the polluter should, in principle, bear the costs of pollution, with due regard to the public interest and without distorting international trade and investment.”

The polluter pays principle (PPP) states that criminal perpetrators must be held accountable and must pay, referring to distributive consideration. When polluters are wealthy individuals (industry) and their victims are low-income individuals (general public), the principle of "deep pocket" or "ability to pay" known as PPP emerges.⁶ Meanwhile, polluters must pay implies the penalty imposed should not be viewed as a cost of doing business. To ensure full accountability in cases of environmental violations, the sentence

³ Syaiful Bakhri, *Perkembangan Stelsel Pidana Indonesia*, Ctk.Pertama, Total Media, Yogyakarta, 2009, hlm. 129-130

⁴ P.A.F. Lamintang, *Hukum Penitensier Indonesia*, Armico, Bandung, Edisi Pertama, p. 80

⁵ Michael Faure dan Göran Skogh, *The Economic Analysis Of Environmental Policy And Law An Introduction*, Edward Elgar Publishing Limited, United Kingdom, 2003, p 26

⁶ *Ibid*, p. 26-27

must consider both the interests of the direct victims who suffer losses and the general public's interests.⁷

The imposition of fines is expected to reduce environmental crime. Accordingly, the fines must be greater than the profit obtained by the perpetrator from the crime's proceeds. In this regard, the PPLH (Environmental Protection and Management) Law stipulates that corporate actors face a one-third penalty. Because of this provision, fines are not imposed, despite the fact that the maximum threat of fines under the PPLH Law is only IDR 15 billion.

According to Michael Faure and Göran Skogh, in determining the amount of fines, the level of seriousness of a crime, the deterrent effect of a criminal sanction, and the costs of sentencing in the interests of society and the convict must all be considered.⁸ In an environmental crime, the perpetrators face a large fine if it has a broader impact on the environment. As a result, the greater the damage, the higher the penalty.⁹ This is intended to deter criminals while also repairing a polluted and/or damaged environment. The imposition of fines based on the level of environmental damage makes perpetrators aware of the gravity of their actions, allowing perpetrators to repent and refrain from repeating them. In this case, the costs of punishment refer to the expenses incurred by the state to fund the process of imposing sanctions on perpetrators, which includes operational costs in court proceedings. This is due to the fact that the social loss caused by a crime is both direct and indirect.¹⁰

In addition, the amount of criminal sanctions must also be based on the perpetrator's profit (actual cost), the cost of investigation, and the cost of restoring the polluted and/or damaged environment. The greater the profit that a person is expected to make from a crime, the harsher the punishment. This is because higher profits necessitate a larger sanction to provide a deterrent effect.¹¹ This is due to the fact that criminal perpetrators, business entities, commit criminal acts to make a profit. When such profit is not obtained as a result of large fines and the sanctions, including confiscation of the proceeds crime; the perpetrator is deterred from committing another crime and the potential criminal offenders are prevented. As a result, the amount of sanctions should be increased to reduce the possibility of sanctions evasion.¹²

The fine must also include the costs of the investigation, which are the expenses incurred by the State while investigating the case or crime. Furthermore, the polluted and/or damaged living environment necessitates restoration efforts in order to realize environmental conservation, for which funds are required. To overcome its ineffectiveness, according to the previously stated explanation, a change in the fine's regulation imposed on corporations that commit environmental crimes is required. Consider the fines weighting; instead of determining exact fines in each article, a multiplier system is suggested. This means that, as stated in the theoretical assumptions; theory of deterrence, the fine that the perpetrator must pay must be greater/heavier than the gravity of the crime committed.¹³ Furthermore, a

⁷ Hartiwingsih, *Hukum Lingkungan Dalam Perspektif Kebijakan Hukum Pidana*, Ctk. Pertama, Surakarta: UPT Penerbitan dan Percetakan UNS (UNS Press), 2008, p. 43

⁸ Ibid

⁹ Steven Shavell, *Economic Analysis of Public Law Enforcement and Criminal Law*, Chapter 21-Page 6, dikutip dari website: http://papers.ssrn.com/abstract_id=382200

¹⁰ Ibid, Chapter 22 – Page 4

¹¹ Ibid, Chapter 21 – Page 5

¹² Ibid, Chapter 20 – Page 13

¹³ Herbert Hovenamp, "Rationality in Law and Economics", *George Washington Law Review*, No. 60, Tahun 1992, p. 293; Thomas J. Miles, "Empirical Economics and Study of Punishment and Crime", University of

regulation must be in place to ensure that the amount of the fine paid by the perpetrator to the state is used directly for environmental conservation. If there is no regulation, the pattern of aggravating criminal penalties with the multiplied system will have nothing to do with environmental conservation.¹⁴

2) Disciplinary Action

Due to the consequences of imperative criminal acts, criminal law is more than just imposing a sentence; it is also sometimes used through actions. Action is also a sanction, but it has no repercussions. The goal of the action is to keep society safe from people who are perceived as dangerous and are likely to commit criminal acts.¹⁵ Sanctions for action depart from the fundamental idea of "what is the punishment for?" in order to be more preventive against criminal perpetrators. The emphasis of these sanctions is on assisting the perpetrator in changing his ways.¹⁶ Action differs from punishment in that the goal of action is social, whereas punishment is focused on the punishment meted out for the crime committed.¹⁷ Furthermore, sanctions for action stem from the fundamental idea of protecting society and coaching or caring for the maker.¹⁸ Thus, the purpose is more educational.¹⁹ The environmental law is ambiguous in distinguishing the types of criminal sanctions, specifically in the act containing additional punishment. Additional punishment in Indonesia's development is as a social action, so it is not a punishment and was originally used in Java and Madura.²⁰

Additional punishments cannot be imposed separately; instead, they must be combined with the primary punishment and imposed in a distinct manner. In addition, the concept of criminal aggravation is geared toward environmental preservation. It incorrectly includes "profits deprivation from criminal acts," "closing all or part of business entities and/or activities," "improvement," "obligation to do what is neglected without rights," and/or "companies' placement as additional punishment; the Environmental Protection and Management Act. In terms of quality, these sanctions are more severe than imprisonment, confinement, and fines. For example, if someone is given an obligation sanction to repair all the consequences as a result of causing severe environmental damage, the costs that must be incurred are far greater than a fine of IDR 5 billion. Accordingly, action sanctions should not be regulated as additional punishments, but rather as stand-alone sanction. Thus, the application/imposition of sanctions does not have to be cumulative with the main punishment, in this case fines.

Disciplinary action is one of the action sanctions regulated in environmental crimes. Judges can impose direct action on convicted polluters under several environmental laws, such as the obligation to repair the damage they have caused,²¹ In this case, it aims to make the criminal perpetrators realize their mistakes and can improve themselves so that they

Chicago Legal Forum, 237, 2005, p. 238 dalam Mahrus Ali, Pola Pemberatan Ancaman Pidana Berbasis Konservasi Lingkungan Hidup: Kajian atas Undang-Undang di Bidang Lingkungan Hidup dikutip dari website: aifisdigilib.org/uploads/1/3/4/6

¹⁴ Ibid

¹⁵ Roeslan Saleh, *Stelsel Pidana di Indonesia*, Cetakan Kelima (Jakarta: Aksara Baru, 1987), p. 47

¹⁶ M. Sholehuddin, *Sistem Sanksi Dalam Hukum Pidana*, Edisi Pertama, (Jakarta: Rajagrafindo Persada, 2004), p. 17

¹⁷ J.E Jonkers, *Buku Pedoman Hukum Pidana Hindia Belanda*, Cetakan Pertama (Jakarta: Bina Aksara), p. 350

¹⁸ Sudarto, *Hukum Pidana Jilid I A*, dikutip dari M. Sholehuddin, *Loc. Cit*

¹⁹ Utrecht, *Rangkaian Sari Kuliah Hukum Pidana II*, dikutip dari Ibid

²⁰ Syaiful Bakhri, *Op. Cit*, p. 216

²¹ Michael Faure dan Göran Skogh, *Op. Cit*, p. 299

become law-abiding citizens. This type of sanction also makes them fully aware of the difficulty in restoring the environment to its original state, as well as the negative impact of the act, so they do not repeat the same mistake. River water polluters, for example, must restore river water to its original state to understand how difficult it is. Furthermore, they can witness the damage done to the river's water ecosystem, such as the numerous dead fish discovered in the river, which could be a source of income for residents living along the river's banks. The magnitude and gravity of their actions will prompt them to reflect and realize that they must improve and not repeat their actions. This is known as facultative sanction under PPLH (Environmental Protection and Management) law. In fact, this sanction can stymie environmental conservation efforts. This is because disciplinary sanctions are not always imposed on environmental crimes perpetrators, but they are included in prioritize sanctions as they directly aim to repair and/or restore the environment to its original state. Disciplinary sanctions should be imposed in an imperative manner so that environmental conservation sanctions can be implemented.

Conclusion

To summarize, the PPLH (Environmental Protection and Management) Law's sentencing corporations' pattern has several flaws that make its implementation ineffective as a number of corporations have been caught committing environmental crimes. This fact prompts a number of thoughts about appropriate and applicable punishment, such as environmental sentencing, which includes aggravating fines, fine implementation, and disciplinary sanctions. The criminal weighting system should be multifaceted, which means not formulating exact fines in each criminal threat article. The PPLH Law's fines necessitate a specific implementing regulation, so that the general rules of the Criminal Code do not apply where the penalty is too light. In addition, action sanctions should not be regulated as additional crimes, but should stand alone. As a result, their application does not have to be cumulative with the primary punishment. Furthermore, corporate disciplinary sanctions should be imperative. It is for the purpose of completing a criminal pattern on environmental conservation.

Suggestion

There is a need to amend Law No. 32 of 2009 on Environmental Protection and Management, including changes to the provisions for aggravating criminal fines, regulations for the implementation of criminal fines, and the application of sanctions for disciplinary actions resulting from imperative criminal acts. These changes are expected to improve law enforcement's effectiveness and help it achieve its goal.

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