Research Article



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# Criminal Policy on Environmental Crimes: Indonesia's Perspective

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***Abstract***

*This study aims to analyze Indonesia's perspective in criminal policy towards environmental crime considered as malum prohibitum offense. Almost all academics agree that environmental crime is known as malum prohibitum offense because of its form of regulation which is usually driven by the absence of mens rea and its evil nature. However, the results of some studies subsequently oppose the status of environmental crime as malum prohibitum offense because the criteria are not fulfilled. Indonesia regulates environmental crimes in administrative law, which are classified into malum prohibitum. Furthermore, they are classified into malum in se offense based on serious sanctions.*

***Keywords:*** *criminal policy, environmental crime, Indonesia's perspective, malum prohibitum, malum in se*

## 1. Introduction

Generally, environmental crimes are usually categorized as malum prohibitum in most countries, including Indonesia (Ali & Setiawan, 2022). This condition is common because almost all academics agree with the categorization of these crime forms (Parker, 2009). In a regulatory context, it is considered to be included in the malum prohibitum category because its regulation is embodied in administrative law (Susilawati, 2012) and not the provisions that specifically regulate criminal order. Also, the most visible style of regulation is showed from the form of environmental crime considered to be violation dominated by administrative law compared to the criminal form which is only complementary (Maroni, 2015).

At a glance, the categorization of a crime as malum prohibitum or malum in se is often considered as a differentiator between crime (*misdrijf*) and violation (Hiariej, 2014). This is a distinction between the wrongful act, which is not a crime but is considered a criminal offense because the law regulates it (Green, 2016). Furthermore, in discussing environmental crimes, some may not realize that the categorization has a significant impact on several important aspects of criminal law. This involves the burden of sanctions, law enforcement mechanisms, ways of proving, and even the authority of certain institutions in overcoming these forms of crime (Parker, 2009). However, environmental crimes are currently considered as a form of administrative violation. Therefore, it is common for the crimes to be accommodated in the form of Malum Prohibitum (Dressler, 2009).

Following the above conditions, it is important to conduct this study because the issue of criminal policy related to environmental crime in Indonesia is fully regulated by the policy of Malum Prohibitum. Furthermore, most countries regulate environmental crime policies as malum prohibitum (Parker, 2009). On the contrary, Indonesia treats these crimes more than administrative violations by placing several mechanisms and forms of sanctions which are quite heavy like malum in se. This may include imprisonment and fines with cumulative burdens as well as adopting a minimum policy like a form of very dangerous special crimes using an unfamiliar approach (Environmental Protection and Management Law, Republic of Indonesia, 2009).

## 2. Literature Review: The Nature of Environmental Crimes, Malum in se or Malum Prohibitum?

The concept of malum prohibitum and malum in se is a framework always used as a basis in understanding the nature of an offense (Morgan, 2009). Simply stated, the difference between both is the nature of an action that makes it an offense. Malum prohibitum is a wrong action just because there is a rule that prohibits it, while malum in se is wrong because of the nature of the action performed (Dimock, 2016; White, 2013) even though the laws do not regulate it (Duff, 2002). However, the concept of a criminal group asserts that a crime has its legal basis.

First, as part of the regulation development, malum prohibitum is closely related to the perspective of the law about an act considered as a crime with reasons other than its nature (Duff, 2002). This offense is usually not a wrong action (Duff, 2002), but it is related to the interests of the state to protect the public from danger for certain reasons. The sentence imposed as punishment for the perpetrators of malum prohibiting offense is not retributive (Duff, 2002). However, the wrong nature does not mean that it is not included in the criteria of criminal law (Young, 2009). The provisions are criminalized because the basis of concern is aimed at developing the wrong nature of an action in the future (Green, 2016; Sadma, 2021).

To learn more about malum prohibitum, Joshua Dressler (2006) described the five criteria for its offense. First, the crime does not have a strong foundation in general law. Second, on the assumption of crime being committed, the effect is damage or the emergence of many victims. Third, the standards for the regulation of offenses are based on general standards that are reasonably applied to other conventional criminal acts. Fourth, the punishment attached is to this type of offense is usually mild. Fifth, when violated, the reputation of the perpetrator is rarely damaged (Dressler, 2006). The five criteria are absolute requirements that need to be fulfilled cumulatively. Therefore, when an offense classified as Malum Prohibitum does not meet one or more of these criteria, the question should be asked again as to which type is believed to be relevant.

Second, the malum in se offense is related to the idea of retributivists, which was stated that criminal punishment should only be imposed for acts that can be blamed (Green, 2016). In principle, this offense is inherent in the evil nature which is philosophically known as “inherently nefarious” or “evil in itself” (Dige, 2012). In contrast to the malum prohibitum offense which is based on the interests of the state to protect its citizens from danger, malum in se is usually followed the wrong behavior which is not justified according to society and certain moral values (Garbow, 2001). The characteristics are simply described as offenses that have an inverse nature with malum prohibitum. On the assumption that malum prohibitum is famous for the absence of an evil inner attitude (Duff, 2005), malum in se will be closely related (mens rea) (Duff, 1930). As a retributivist representation, this offense usually tends to regulate severe punishment commensurate with the criminal acts committed (Green, 2016).

Furthermore, objections have been raised against the division of the two types of crimes (Duff, 1930), the distinction is considered very important because the state's interest in the criminalization policy of action deemed relevant is determined as a crime with criminal sanctions which are also proportional (Garbow, 2001). Besides the objection to the division of this offense type, the existence of the division provides a more accurate assessment of the moral substance of a crime, and its

implementation in law enforcement practices (Green, 2016).

## 3. Research Method

This study aims to analyze and test the relevance of environmental crime policies to the development of legal needs and practices in Indonesia. For this reason, the nature of malum prohibitum and malum in se, as well as their characteristics and differences were explained. Subsequently, the status of environmental crime as malum prohibitum or malum in se was analyzed. In the end, Indonesia's perspective in examining the relevance of policy positions on environmental crime regulation was discussed.

This study applied the normative research methodology. It also applied the statutory and conceptual approach to provide comprehensive analysis with regard to the issue of environmental crime policies.

## 4. Results and Discussion

### *4.1 Criminal Policy on Environmental Crimes in Indonesia's Perspective*

The definition of environmental crime has not yet been widely accepted (Luttenberger & Luttenberger, 2017). Therefore, it is natural that there are different definitions to understand this crime. Most studies agree that the term "environmental crime" basically describes an illegal activity that damages society and performs by certain individuals or groups to obtain benefit from result (Luttenberger & Luttenberger, 2017). However, not all damaging activities are an environmental crime. Michael Parker explained that there are also appeals made by the government only to remind them not to carry out environmental damage, such as a motto advocating for "reduction, reuse, and recycling". In contrast to the appeals which are not binding, these activities can only turn into environmental crimes when the government or the competent authority regulates them in a statutory ordinance (Parker, 2009; Andriansyah et al., 2021).

Furthermore, the various forms of environmental crime that are accommodated in each country do not tend to be the same. This is because each country has a basis of their respective interests in regulating criminal policies (Lynch et al., 2019). Some factors that are usually considered by the state in making public policy are at least the relevant juridical, sociological, political, and historical basis for the country concerned (Gunarto, 2013), especially in the context of criminal policy, which at least has given a new nuance in the realm of law. However, it is interesting to be further examined, especially relating to the criminalization form of environmental crime which is considered as a new type (Uhlmann, 2009). As previously stated, almost all academics agreed to accommodate environmental crime with the regulation of offense as malum prohibitum. Therefore, the general criteria need to be fulfilled by this environmental crime.

However, in its development, there are various counter-arguments about environmental crime as malum prohibitum. As stated by Michael Parker (Dressler, 2006), three of the five criteria were not fulfilled by stating: first, even though environmental crime has no strong foundation in general law, it does create a moral dilemma since its position can be pushed into a prohibition condemned by law and morale at the same time. Second, environmental crime does have a broad impact on many individuals, but it does not mean the crime cannot harm them. Third, reasonable legal standard criteria are also not fulfilled in this context, considering these crimes which tend to have a very large impact are not comparable on the assumption that they only provide a reasonable punishment. Fourth, although the light punishment is fulfilled, the unreasonable legal standard does not indirectly prove this crime is not appropriate to fulfill the criteria of light punishment. Fifth, the last measure is that there has been a misunderstanding, which often affects the reputation of perpetrators of environmental crimes. Instead, the reputation is damaged because some people considered the actions as a crime (Parker, 2009).

Apart from the above arguments about the non-fulfillment of the malum prohibitum criteria, the development over its emergence can at least be used as a basis in which environmental crime has a close relationship with malum in se. Genuinely, environmental crime was once qualified as malum prohibitum at the beginning of its emergence. Criminalization objective standards that are currently applied are only intended for the idea of recovering the wrongdoing of perpetrators due to pollution of environmental damage (Morgan, 2009). Conversely, pollution caused has long been attached as a record of moral error which is opposed by many parties. For example, the Old Testament maintained a ban on distributing waste and unclean objects, the Athens Inscription from 430 BC prohibited the disposal of waste into a river adjacent to the holy temple, St. Augustine openly asserted that Christians need to protect nature by not using it for human greed (Morgan, 2009), as transmitted by Abu Daud, the Prophet Muhammad (PBUH) said that "whoever cuts down trees, then the God will dip he/she in hell" (Heyne, 1987), and many other bases expressly forbid environmental damage.

At the beginning of the 19th century, environmental crime was changed to malum prohibitum (Morgan, 2009). The context which was originally a moral offense has been successfully misled at this time to later be changed into ordinary violations because only the law regulates it. In addition, mens rea as the basis for criminalization against malum in se offense is also explained in this discussion. In this context, environmental crimes considered as malum prohibitum are formulated in the form of negligence, and absolute accountability is assumed to have fulfilled the requirements of offense inner intention (Morgan, 2009). However, there are many critics on current environmental crime regulations having a misunderstanding about the traditional concept of "mens rea". This is easily adjusted to mistakes made by modern environmental laws only to provide criminal sanctions (Morgan, 2009). Also, environmental crime has a morally destructive nature (Skinnider, 2013), therefore, the mens rea requirement needs to remain inherent even though the regulation is made criminal liability. In this case, the assumption of environmental crime as malum prohibitum offense is deemed inappropriate since it tends to be malum in se offense.

Not much different from Michael in the previous discussion, assuming it is related to the perspective of the malum prohibitum criteria, the regulation of environmental crime in Indonesia also seems problematic. However, environmental crime is categorized as malum prohibitum, and it seems the form of countermeasures with criminal law tends to lead to malum in se. The following table illustrates some statutory provisions regarding environmental crime, which does not fulfill the criteria as malum prohibitum and instead tend to lead to malum in se:

**Table 1:** Laws on Environmental Crimes in Indonesia.

| Law | Article Provisions | Sanction |
|---|---|---|
| **Law 32/2009 (Environment)** | Article 97-120 | Imprisonment from 1 year to 15 years.<br>Fines of 500 million to 15 billion rupiah. |
| **Law 18/2013 (Forest Destruction)** | Article 82-109 | Imprisonment from 3 months to 20 years or for life.<br>Fines of 500 thousand to 1 trillion rupiah. |
| **Law 39/2014 (Plantation)** | Article 103-113 | Imprisonment for up to 10 years.<br>Fines of up to 10 billion rupiah. |
| **Law 37/2014 (Soil and Water Conservation)** | Article 59-66 | Imprisonment for up to 18 years.<br>Fines up to 100 billion rupiah. |
| **Law 18/2008 (Waste Management)** | Article 39- 43 | Imprisonment for up to 15 years.<br>Fines up to 5 billion rupiah. |

It has been illustrated that while environmental crimes are classified as malum prohibitum, only a few meet the criteria for obtaining the status of regulation, and the others are treated as malum in se (Table 1). In terms of not fulfilling the first and second criteria regarding the absence of a legal basis and having a broad impact on many individuals as described by Michael Parker (2009), it has justified that these two elements are also not fulfilled. Furthermore, since damage issue is increasingly

massive (The Jakarta Post, 2018), environmental crime is not only outlined as an ordinary administrative violation but a morally reprehensible offense since it takes the life of each individual. In addition, the third criterion of adequate legal standards and the fourth regarding light punishment also failed to be fulfilled as the malum prohibitum. Fairness is reflected in the nature of administrative sanctions in the form of fines and the cost of recovery (Lynch et al., 2019). It is also reflected in imprisonment with a short time (Luttenberger & Luttenberger, 2017) which should be more highlighted than repressive sanctions. Genuinely, the entire sanctions stipulated in the overall provisions of the law have very severe prison penalties and even almost all of them regulate it with a cumulative mechanism (Suhartono, 2017). Therefore, both imprisonment and fines can be imposed simultaneously. For the last criterion, the reputation of the perpetrator has rarely been damaged. However, environmental crime is considered to be dangerous (Banks et al., 2008) and includes a priority in its countermeasures (Ministry of Foreign Affairs of the Republic of Indonesia, 2013). With sanctions that cannot only be applied to individuals but also to corporations, additional penalties for the agency are also able to have a significant impact on the sustainability of the business. Furthermore, a very large fine often leads to bankruptcy of the company as well as sanctions such as dissolution and freezing (Environmental Protection and Management Law, Republic of Indonesia, 2009) also become its repressive container.

The explanation above shows that the regulation of environmental crime in Indonesia is unclear in the offense of malum prohibitum or malum in se. Conversely, the regulation of environmental crime is regulated using administrative laws as malum prohibitum offense. However, it provides very severe criminal sanctions as malum in se offense. This condition shows that even though environmental crime is regulated with the qualification Malum Prohibitum, it is treated as malum in se.

## 5. Conclusion

An environmental crime which tends to be considered as malum prohibitum offense cannot be fully justified in both the theory and practice of regulation in a country. Theoretically, it fails to fulfill the five criteria as malum prohibitum offense. It states that (1) the criterion does not have a strong foundation from the general law, but crime in the environmental field has historically been regulated as a prohibition; (2) in addition to having a broad impact, environmental crimes also harm certain individuals personally; (3) legal standards used to criminalize are not reasonable because sanction policies are not equivalent to environmental crimes, which are considered very dangerous; (4) as a result of improper legal standards imposed, light punishments are irrelevant to be applied; and (5) in fact, environmental crimes often damage the reputation of perpetrators and even bankrupt their businesses.

The practice of criminal policy concerning environmental crime did little to illustrate the theory that the Malum prohibitum criteria are not fulfilled. Most environmental crime regulations do not comply with the spirit of regulating malum prohibitum offense. The burden of severe criminal sanctions by grouping environmental crimes in administrative law makes the position to be unclear, where it is considered as malum prohibitum but the regulation and law enforcement policies tend to treat as malum in se offense.

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