

Punishing Environmental Offenses Without Guilty Mind: Regulatory Framework and Judicial Responses



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ABSTRACT

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This paper explores the legal considerations and the scope of application of criminal liability without guilty mind in environmental offenses in Indonesia. Under the existing Environmental Law, liability without fault has been applicable exclusively in civil cases. This paper combines literature and induction research methods. The first method dives into the legal provision in Environmental Law containing the formulation of the offenses, while the induction method refers to the analysis on judicial decisions in the application of liability without fault. The findings of the study show that most of the prohibited offenses in environmental legislation deal with the *malum prohibitum crime* tied to the violation of a permit. The mental element is not explicitly stated in these offenses. Hence, the culpability of the defendant is presumed to be displayed in the evidence of the prohibited conduct. Waste or emissions discharged into the environmental media without authorisation is prohibited and pertaining the potential to harm the environment. These offenses are included as formal offenses by removing the element of culpability in the structure of the offense. It is also sufficient for the court to rule that the defendants have committed the prohibited conduct as the basis for imposing criminal sanction.

1. INTRODUCTION

This article presents a critical analysis on the punishment without culpability which is known as criminal liability without guilty mind in the offenses of environmental legislation and its relevant judicial decisions. It is argued that the concept of 'liability without fault' under existing Environmental Law has been applicable exclusively in civil proceeding as stated in Article 88 that 'every person whose action, business and/or activity using hazardous and toxic materials, producing and/or managing hazardous and toxic waste and/or causing serious threats to the environment shall be absolutely responsible for the incurred losses without the need to prove the fault'. This provision has therefore removed the possibility of applying the liability without fault in criminal cases [1]. Hence, the culpability of the offender is still required in the imposition of criminal sanction. Meanwhile, the majority of offenses under this law is substantively administrative in nature and do not include a mental element of crime in their formulation [2]. This formulation enables the public prosecutor to establish that the defendant has committed a prohibited conduct without having to prove his intention or negligence [3].

Although the previous researches on the liability without fault has been conducted in Indonesia, none of them focused on the application of this liability in criminal matters and judicial decisions. Wulandari and Wahyuningsih argued that the concept of liability without fault known as strict liability is indirectly an embodiment of legal protection for society, which is the part that has the potential to be harmed as a result

of industrial activities. Strict liability arrangement by corporations as stated in Article 88 of Law No. 32 of 2009 limits the scope to private cases [4]. Faizal also stated that the elimination of strict liability in resolving environmental disputes is considered a shift, which in the provisions of Article 88 of the Job Creation Law seems to provide an opportunity for corporations to pollute the environment without firm accountability. The government appears to protect the sustainability of a corporation more than the interests of the community [5].

The present study aims to explore the legal considerations and the scope of application of criminal liability without fault in the environmental law. To support the authors' arguments, this study is accompanied by judicial responses toward environmental cases in which it is sufficient for the judges to rule the prohibited conduct by the defendant without considering the culpability of the actors in imposing the criminal sanction.

The structure of this paper is as follow: the concept, characteristic and the constituent elements of criminal liability without fault is presented in the first section of this study; the second section of this paper argues why this particular criminal responsibility should be applied to environmental offenses. Environmental offenses necessitate a connection between administrative and criminal law, while the majority of environmental offenses are also related to administrative infractions like permission [6]. The final section of this study examines how the principle of culpability without fault is applied in environmental offenses. The concept of *res ipsa loquitur* (thing speaks for itself), according to the authors, is

no longer an adequate foundation to applying the culpability without fault in environmental crimes. In materially constructed environmental offenses, the Environmental Management and Protection Law (EMP Law) has a purposeful element. Instead, the authors propose that this liability be applied in the context of classification of environmental offenses particularly abstract and concrete endangerment. In both models, criminal penalties are usually associated with administrative offenses that do not necessitate the occurrence of losses and the culpability of the defendant.

2. METHODOLOGY

This paper combines literature and induction research methods. The first method dives into legal provision in EMP Law containing the formulation of the offenses and link them to scientific literatures by the scholars on the conception of criminal liability without fault. The induction method refers to the analysis on judicial decisions focusing on the legal facts and the legal consideration of the court. Several court decisions were examined to support this viewpoint. The court merely need to establish that the defendant has committed an illegal act. It is then enough for the court to impose punishment without having to prove the culpability or the guilty mind of the defendant.

3. RESULT AND DISCUSSION

3.1 Theory of criminal liability without fault

A criminal offense consists of the concurrence of a guilty act with the guilty mind. The physical (*actus reus*) and culpability of an actor (*mens rea*) become the prerequisite and cumulative element in most modern criminal laws. Because punishment requires blameworthiness of a conduct, a criminal act requires that a defendant engages in prohibited conduct with a culpable state of mind. Thus, crime entails culpability [7]. Normally, crimes are prosecuted on the basis of the moral guilt of the defendant. To be found guilty and punished, a person must act with criminal intent [8]. Under particular circumstances, the actor's state of mind is not needed as the crucial element for the imposition of criminal sanction. The perpetrator's guilty mind is no longer relevant as a part of whole of the offense [9].

Criminal liability without fault as stated by Bohan, 'imposes liability without any demonstrated culpability, and therefore without any *mens rea* requirement, with respect to one or more material elements of the offense' [10]. Heaton defined criminal liability without fault as criminal accountability in which the culprit is not required to demonstrate guilt against one or more of the *actus reus* [11]. The perpetrator's guilt is no longer relevant as a part or whole of the offense. What must be displayed is that the crime carries out commission or performs the deed that he was capable of [12]. It also argued that the definition of criminal liability without fault is that if one or more material elements of a crime do not need the state to prove intent, forethought, recklessness, or criminal negligence as related to that element. Crimes include several aspects, the severity of responsibility is a matter of degree, depending on how many material elements of the offense are not subject to the *mens rea* requirement. A crime may not require *mens rea* for any element at all. However, there may

be grounds to dispute the voluntariness, though not the culpability, of the defendant's action [13]. In this sense, no proof of guilt is required beyond that which is necessary to ensure that an actor is not convicted for entirely innocent behaviour. This viewpoint encompasses much of what legislators and courts consider to be the normatively acceptable and preferable punishment-to-culpability relationship. The primary, and often sole, aim of culpability is to distinguish innocent from guilty actors [14].

Brink has distinguished between the narrow and the broader scope of offenses that pertains liability without fault. The narrow scope refers to the types of liability with narrow culpability—in which no element of *mens rea* is required in at least one aspect of the wrongdoing. The offenses are rather unusual in the criminal law and commonly seen as ethically problematic. The broader scope of offenses, on the other hand, would refer to the types of liability without broad culpability—in which there would be no necessity of responsibility or possibility of justification. The offenses which do not occur due to the explanations of incompetence and duress are generic defences that apply to all sorts of misbehaviour [15].

The constituent elements of criminal liability without fault particularly in environmental legislations are as follow; 1) the offenses are merely as public welfare offenses in which the conduct deals with the regulatory offenses; 2) the activities at least pose threat of harm to the environment; and 3) the proof of causation only applies in the result offenses. The element of culpability of an actor in the provision is intentionally eliminated by the legislature. If the clause links to 'without the need to prove fault', it will lead to the interpretation that 'fault' should be proven, even for the cases of criminal liability without fault [16].

The use of liability without fault in criminal law is based on a number of factors, including: (1) the characteristics of a criminal offense; (2) threatened punishment; (3) the absence of social sanctions; (4) certain damage caused; and (5) the scope of activities carried out (6) a law's formulation of law in certain areas and their context. These demonstrate the importance of public awareness regarding behaviours that should be avoided by enacting liability without fault in order to protect public safety, environment, and public economic interests including consumer protection [17].

Stuart Green as argued by Simmler presents six senses of liability without fault as follow: '(a) offenses omitting the requirement of *mens rea*, (b) schemes bearing *mens rea*-negating defences, (c) procedural devices requiring presumption of the defendant's intent, (d) offenses requiring a less serious form of *mens rea*, (e) offenses requiring less serious forms of harmfulness, and (f) offenses with lower levels of wrongfulness' [18]. In addition, most no criminal liability without fault offenses have minimal penalties, thus imposing harsh penalties for offenses that do not need a guilty mental state would seem contradictory [19]. When the sanctions are often small, such as fines and short imprisonment, liability without culpability is most commonly applied to 'public welfare offenses' [20]. People who are convicted of public welfare violations are not punished in the usual sense, which is an appealing justification for their legitimacy. The violations usually include misdemeanours with fines, restitution, and other civil penalties as the punishments. In many ways, they are similar to traffic infractions, which are frequently prosecuted by criminal courts yet are essentially civil in origin. As a result, typical criminal law requirements and justifications do not apply to public welfare offense [21].

Public welfare offenses concern health and welfare standards that date back to the industrial revolution and place additional responsibilities on individuals in charge of specific industries and trades. These offenses differ from crimes in general in which the fines and the reputational consequences of the conviction are less severe, and the goal is to protect the public health and welfare rather than to punish the wrongdoers [22]. There are two considerations to apply to these offences. First, liability without fault is necessary to improve the application of regulatory infractions. The necessity to prove individual culpability weakens the administration of criminal justice system. Second, proving liability in many regulatory violations is difficult. As a result of the advent of numerous new sorts of illegal acts that do not require intentionality, legislators have begun to introduce regulatory offenses, even if they are limited to selected affairs [23].

According to Robinson, the imposition of criminal liability without fault will encourage people to be more cautious in their actions, reducing the likelihood of criminal risk-taking. The use of such liability is still just because it is generally limited to offences in which the negligence is most probably found in that infractions [24]. The primary purposes of applying this kind of liability is to safeguard the society from harm. The criminal justice system attempts to penalize the socially 'abnormal' behaviours [25]. The utilitarian argument, which attempts to foster effective control of activity in a variety of public and significant sectors, underpins the liability without fault in this context [25]. As a result, people will be more cautious in their conduct. It focuses on the preventive implications of (one's) actions in the future. It also helps to develop a high standard of public behaviour. The public will take more responsibility and act more cautiously in order to prevent harm to others [3].

3.2 Legal considerations for the application of criminal liability without fault

Environmental offenses frequently employ liability without fault and its use is justified for a number of reasons. Environmental offenses have the potential to cause long-term and difficult-to-repair dangers to the people and the environment. This threat shifts the attention away from the individual interests toward the greater good. In this instance, adopting criminal liability without fault would then direct the full responsibility for these risks to those who have the ability to prevent the losses [26]. For instance, hazardous and toxic materials (B3) discharged into the environment without a permission have the potential to have unpredictable consequences, and the nature of B3 migration, particularly below the surface, has a detrimental influence on human health and the environment. The storage and disposal of B3 waste without a permit can result in huge environmental losses in the form of surface and water contamination [27].

A person conducting such activities bears sole responsibility for assuming that his action has the potential to harm the people or the environment, such as ecological destruction and degradation, species extinction, climate change and global warming, pollution, and animal harm [28]. Hazardous waste disposed of into the environment without going through environmentally safety procedures and processes increases the incidence of respiratory diseases and lowers the overall quality of the earth's atmosphere. The consequences of such conduct can be suffered long after the perpetrator disposed of the material [29]. Liability without

fault in environmental offense is likewise based on the notion that legal interests to be protected encompass not just human and environmental interests, but also the interest of the future generations. Despite the fact that the current generation has complete sovereignty over all of the natural resources, future generations should not be denied the same rights or access to a healthy environment [30]. The environment has also been defined as an autonomous legal interest as a result of the concept that the environment is a victim of crime and that humans must obey nature or the environment [31].

Several offenses promulgated from Article 100 to 104, Article 109 to Article 111 as well as Article 114 of the EMP Law which regulate violations of administrative obligations such as violations of permits that rely on fulfilling the requirements set by or provisions contained in administrative regulations. The offenses are classified as administrative offences for three reasons. To begin with, these are formal offenses with the intent of committing the forbidden act rather than the consequences. In addition, the prohibited offenses deal with the *malum prohibitum crime* in which the offenses under these articles are tied to a permission violation such as permit. In order to categorize a conduct as an offense, a person must meet specific requirements. Violation of this stipulation is considered a criminal offense [32]. The mental element was not explicitly stated in the offenses, so that the culpability of the defendant is presumed to be shown by the proof of the prohibited conduct. As a result, the public prosecutor is not required to prove the mental element of an offense [33].

The court decisions on environmental offenses also appear to have applied the criminal liability without fault. The accused was found guilty of environmental offense only by proving the prohibited conduct without having to establish his guilt. In court decision number 1752/Pid.Sus.LH/2016, Ali Muchtarom and Maskurin were charged with conducting, ordering to do, and participating in hazardous and toxic waste (B3) management operations without authority under Article 59 paragraph (4) of the EMP Law. According to the Supreme Court, the defendant acquired a quantity of aluminium ash. The B3 waste was then processed and filtered before the fine ash has been disposed in a heap surrounding the defendant's home. The defendants' actions meet the elements of Article 102 of the EMP Law when they conduct B3 waste management efforts without permission. The central focus of the panels of the judge in their legal considerations is on the proven prohibited action, such as performing B3 waste management initiatives without a license [34]. The judges made no acknowledgement of the defendant's guilt, which is an ethical requirement of criminal punishment [35]. Without having to prove the guilt further, the defendant is decided to have committed an offense based on the proven prohibited act.

In other cases, the Supreme Court argued that Karawang Prima Sejahtera Steel Company (KPSS) has been found to dump wastes and/or materials into environmental media without permission. Based on several legal considerations, KPSS was deemed to have broken the requirement in Article 104 of EMP Law. According to the legal facts presented during the trial, KPSS engaged in activities related to the metal, steel, and aluminium industries. Producing its products with coal fuel resulted in leaving Aero Slag waste, iron smelting waste, steel, Bottom Ash and fly Ash waste from coal combustion in the Power Plan (Power Plant). These wastes included B3 waste, which must be stacked at a specific B3 waste storage site in compliance with applicable regulation. KPSS has been granted permission to manage waste, but its

capacity is insufficient to handle the waste products causing B3 waste to flow into the Kretek river causing pollution to the waters [36, 37]. According to the judges' legal consideration, as the director, the defendant has caused these aero slag and bottom ash waste. In performing this activity, KPSS does not have a permit and this is sufficient for the judges to have proven guilty of the accused. In this case, the accused is found guilty only on the basis of proving that a prohibited conduct was committed without showing his culpability.

The Supreme Court similarly punished Udi Hartono for violating Article 102 of the EMP Law. The defendant was a director of Tri Perkasa Company which involved in the transportation of Waste B3 located at Sidoarjo Regency. As the director, the defendant's duties and responsibilities include overseeing all company activities and hiring vehicle drivers. Suhudi was ordered by the defendant to transport B3 waste type fly ash to Tjiwi Kimia Tarik Sidoarjo Company using a tronton hino truck with the license plate W 9363 US and replace it with W 9104 UZ. Members of the police investigators secured the load of B3 waste type fly ash as much as 27 (twenty-seven) tons. When the waste was transported, it was discovered that the B3 Waste Transport Permit using Truck Police Number W 9363 WS had expired [38, 39]. In this case, it was proven that the B3 Garbage Transport Permit issued under Police Number W 9363 WS had expired, and it is sufficient to argue that the defendant committed a prohibited act without proving whether the defendant can be blamed or not for his actions. Intention or even recklessness as one or more aspects of *mens rea* in this case is not required [40].

In Court Decision No. 2112K/Pid.Sus/2014, defendant violated Article 36 paragraph (1) and Article 109 of the EMP Law by conducting business and/or activities without an environmental permission. On December 28, 2012, the defendant paid IDR 120,000,000.00 (one hundred and twenty million rupiah) to witness Efrat Tio, the owner of Garden of Eden, Tbk and Inti Alam Kimia, Tbk for 25 (twenty-five) kilograms of NaCN micro drums. The police had previously obtained information from the public that commodities in the form of dangerous and harmful materials (B3) are frequently shipped to the Lombok Island area via expeditions. The defendant confirmed during questioning that he owned 25 (twenty-five) small barrels of hazardous and dangerous materials (B3) in the form of NaCN planned to resell to gold miners in the Sekotong district of West Lombok.

Based on the legal facts presented above, it is found that by referring to Article 109 of the EMP Law, every business or activity has to have an Environmental Permit. In this case, the defendant failed to provide such permit. In addition, in doing business and/or activities to sell Sodium Cyanide, the Defendant lacks a Trade Business License (SIUP), Interference Permit, and Environmental Permit. According to the Regulation of the Minister of Trade of the Republic of Indonesia Number: 44/M-DAG/PER/9/2009 dated September 15, 2009, defendants carrying out business from the business license side must have SIUP B2. Finally, the defendant's company and/or operation units involving the sale and procurement of Sodium Cyanide (NaCN) also require an Environmental Permit [41]. The fact that the defendant in the NaCN is not equipped with Environmental Management Efforts and Environmental Monitoring Efforts (UKL-UPL) is sufficient for the judge to rule that the defendant has committed a criminal offense without the need to prove his guilt [42]. The culpability of the defendant becomes irrelevant as part or all of the offenses [43].

In the judicial decision Number: 171 K/Pid.Sus/2015, Fadly and Lahmuddin Massa were found to have been engaging in business and/or activities without an Environmental Permit. Both defendants were found to have stockpiled or carried out coastal reclamation activities without document of analysis of environmental impact or environmental management and monitoring measures in Lalong Bay, Luwuk Village, Luwuk Subdistrict, Banggai Regency. They did not pose any environmental permissions from authorized officials when carrying out beach reclamation activities [44]. According to the panel of judges, the conduct of the defendants is included in the activities that must be equipped with UKL-UPL. In fact, when undertaking business or operations such as hoarding or lowering the beach of Lalong Bay behind Luwuk Shopping Mall with an area of 85 m x 20 m, the defendant lacked an environmental permission. The panel of judges made no attempt to prove the culpability of the defendants as an integral component of an offense or as an ethical need for criminal conviction. Because of the forbidden act was proven, the panel of judges confirmed that the accused had breached the law. The focus of the ruling in this case is solely on *actus reus* by eliminating the guilty mind of the actors. The proven *actus reus* is regarded as the proven element of *mens rea* [45].

Based on the above explanation, it is indicated that the courts have applied the criminal liability without fault. All of the offenses committed by the defendants were primarily *malum prohibitum* (wrongful because they were prohibited) rather than *malum in se* (wrongful or evil in themselves) such engaging in activities without an environmental permit as referred to in Article 109 of EMP Law. This kind of offense deals with the violation of administrative requirement as the nature of public welfare offenses [46]. A crime that is wrong merely by law does not require culpability because the violation of the law, regardless of intent, is part of the harm to be protected against [47]. Only objective elements in the form of unlawful activities are utilized as the evidence. Eliminating culpability becomes a necessary element to form criminal liability without fault [48]. The offenders are proven guilty of violating the charged offense without having to show his guilt further. Their state of mind is irrelevant to be an important factor in the imposition of criminal sanction [49]. In such offense, the court went on to state that the violation of some criminal status may occur without a defendant's criminal intent [50]. W. Robert Thomas argued that 'the state need only show that the accused 'engaged in a voluntary act, or an omission to perform an act or duty which the accused was capable of performing'. As a result, consideration of the perpetrator's moral blameworthiness is ruled out [51].

3.3 Applying the criminal liability without guilty mind in environmental legislation of Indonesia

The EMP Law regulates two sorts of environmental offenses: formal and result offenses. Articles 100 to 111, as well as Articles 113 to 115 cover for the formal offenses. Administrative offences indeed make up for the majority of environmental criminal law violations. As for the material offences are addressed in Articles 98, 99, and 112 of the law. The criminal provision of the first two paragraphs has been freed from the administrative reliance on criminal law (administrative independency of environmental criminal law). Even though the perpetrator's actions are legal, criminal penalties might still be enforceable if they cause environmental damage or contamination.

Formal offenses involving violations of administrative requirements such as permits can be prosecuted without the finding of guilt. However, when this method is applied to result offenses, it will lead in a number of problems. Several years after the defendant has committed the prohibited conduct, further environmental damage or pollution can still occur. Due to the numerous, interconnected, and complex nature of the cause, proving causality in environmental problems is particularly challenging. It is difficult to establish causality in criminal cases, especially when it comes to environmental deterioration because there is a lot of variables involved [52]. For result offences, the EMP Law provides significant criminal penalties, such as imprisonment for a minimum of 5 years and a maximum of 15 years, as well as a fine of at least 5 billion and a maximum of 15 billion. The gravity of this criminal threat contrasts sharply with the nature of no-fault responsibility, which is often connected with regulatory infractions.

Classifications of environmental offenses as stated by Michael Faure need to be addressed when applying the culpability without fault, so that it is obvious which offenses do not require the perpetrator's fault to be proved. According to Faure, environmental crimes can be classified into four models, namely abstract endangerment, concrete endangerment, concrete harm, and serious environmental pollution. These classifications are based on the harm or threat of harm to be protected, the severity of punishment and the element of an offense needs to prove [33]. In this research, the application of criminal liability without fault is limited to abstract and concrete endangerment considering both models contain formal violations that are prohibited, with the nature being a violation of administrative rules.

The first model causes the unlawfulness of the violation of administrative regulations [53]. Even if there is no real or threatened harm as a result of the infringement, the new criminal law takes effect immediately after an administrative offense. This paradigm only applies to crimes that do not include direct contact with polluted items or the environment [54]. The first model includes environmental offenses such as 'performing a business and/or activity (UKL-UPL) without having an environmental permit in Article 109,' "performing an analysis of environmental impact assessment without possessing a certificate of competence in Article 110," and "issuing environmental permits without being equipped with UKL-UPL or issuing business and/or activity permits without being equipped with environmental permits in Article 111". These charges do not require proof of environmental harm or that polluting objects have direct contact with the environment.

The second model does not require proof of actual losses; rather, it is sufficient to demonstrate that there is a possibility of loss and that the act is prohibited [54]. The conduct is criminalized in order to safeguard the people and the environment [55]. In this model, two issues are brought to the surface. The first is that pollution or emissions which can cause harm must be proven. The second type is unauthorized pollution or emission. As long as administrative conditions are met, an act that is carried out legitimately is not considered a crime. If the act is conducted in violation of the law, it is to be considered as criminal offense as well as a potential danger [33]. Despite the fact that this model explicitly protects the natural values, it is nevertheless reliant on administrative constraints to exist. Releasing and/or distributing genetically engineered products to environmental media violated the environmental permit in Article 101', 'violating the wastewater

quality standard, emission quality standard, or disturbance quality standard in Article 101. 100', 'managing B3 waste without a permit in Article 102', 'producing B3 waste and not managing it in Article 103', and 'dumping of B3 waste in violation of the environmental permit in Article 101'. These offenses entailed direct contact between polluting material and the environment, proof that the act was illegal and posed a risk of environmental damage or pollution.

With the understanding that all of these offenses are formed as formal offenses, liability without fault can be applied. The administrative requirements determine whether or not there is a criminal offense, therefore the administrative nuance is very dense, as it is typical in regulatory offenses. The offense does not include any elements of culpability, such as intentional or negligent behaviour. As a result, if it is established that the defendant conducted a banned act without permission, he might already be sentenced to a criminal offense. The manner in which a prohibited act was formed also shows that the perpetrator's intention was present at the time of the conduct, even though it is not necessary to be proven, such as managing B3 waste without a permit or dumping waste into environmental media without a permit [56]. These offenses are frequently carried out by corporations, so that individuals and the environment may be harmed as a result of these violations [57].

4. CONCLUSIONS

Acts affecting the protection of the public interest that pose risks to human and environmental safety and health are commonly subjected to the criminal liability without fault. The application of this liability to environmental offenses is linked to the environment's standing as a distinct legal interest that prioritizes environmental risk mitigation. Liability without fault should be limited to violations that are administratively dependent on criminal law, such as the abstract and concrete endangerment models. The offenses in these two models are primarily related to waste/emissions poured into the environment without permission and are structured as a formal offense in which the element of culpability is excluded in the formulation of the offense, and thus does not need to be demonstrated. In addition, the judicial decisions over the environmental cases have applied such liability by proving to the prohibited conduct without the need to prove the culpability of the defendants. This research is limited to examining legal standards in environmental legislation and judicial decisions. However, it is critical to investigate how the criminal liability without fault is applied to legislations and court ruling in the field of health and consumer protection.

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