

CRIMINALIZATION POLICY ON THE ACT OF MAKING, PRODUCING, AND TRADING ILLEGAL FISHING CAPTURE EQUIPMENT

Ida Farida^a, R. Herman Katimin^b

ABSTRACT

The widespread use of illegal fishing capture equipment in the form of drag nets and drag nets which harm and endanger the sustainability of fish resources and the environment in Indonesian waters, cannot be separated from the act of making, producing, and trading. The research method used is a sociological juridical approach which is qualitative in nature, where this research uses a normative approach with a sociological approach as support. Based on the results of the research, criminalizing the act of making, producing, and trading becomes a crime, formulated in article 85A, which reads "Whoever deliberately brings, produces and trades illegal fishing equipment or illegal fishing aids that are not in accordance with the provisions referred to in Article 7 shall be punished with a maximum fine of Rp.250,000,000.00 (two hundred and fifty million rupiah)". So that law enforcers comprehensively apply the elements of the intended crime, including proving the elements of intentional wrongdoing, Actus Reus and Mens Rea, as well as excuses that eliminate a crime.

Keywords: Illegal Fishing Capture Equipment; make; produce; trade.

INTRODUCTION

Indonesia is an archipelagic state according to United Nation Convention on the Law of the Sea in 1982 ("UNCLOS 1982").¹ The concept of Indonesia as an archipelagic is also explicitly state stated in Constitution of Republic Indonesia, particularly on Article 25a of 1945 Constitution. The legal basis for the concept of an archipelagic state in Article 25A of the 1945 Constitution is a conception that has been agreed upon by the international community in the UNCLOS 1982, which concerns the boundaries of territory and patterns of international interaction related to maritime law.² As an archipelagic state among the 19 countries³ with the world's largest and most numerous islands, Indonesia consists⁴ of 17,508 islands with a coastline stretching 81,000 km and a total area of approximately 3.1 million km² (0.3 million km² of territorial waters and 2.8 million km² of archipelagic waters).

^a Master of Law Universitas Galuh, Jl. R.E. Martadinata No. 150 Mekarjaya, West Java Indonesia, idafarida.galuh@gmail.com

^b Master of Law Universitas Galuh, Jl. R.E. Martadinata No. 150 Mekarjaya, West Java Indonesia.

¹ Achmad Rifai, Septian Dwi Nurwanto, et.al, *Pertanggungjawaban Pidana Terhadap Pelaku Penangkapan Ikan Secara Ilegal Menggunakan Setrum Ditinjau Dari Undang-Undang Nomor 45 Tahun 2009 tentang Perikanan (Criminal Responsibility Towards Performers Of Illegal Catching Fish Using Setrums, Reviewed From Law Number 45 of 2009 regarding the Fisheries)*, Jurnal Lex Suprema, Vol. II, No. 2, September 2020, p.2.

² Tahegga Primananda Alfath, Radian Salman, and Sukardi Sukardi, "Derivasi Konsep Negara Kepulauan Dalam Undang-Undang Dasar Negara Republik Indonesia Tahun 1945," *Bina Hukum Lingkungan*, Vol. 4, No. 2, 2020, p. 233.

³ Dikdik Mohamad Sodik, *Hukum Laut Internasional dan Pengaturannya di Indonesia*, PT. Refika Aditama, 3rd Edition, 2016, hlm 42 yang dikutip dari: Ety R. Agoes, "Praktik Negara-Negara Atas Konsepsi Negara Kepulauan", *Jurnal Hukum Internasional*, Vol. 1, No. 3, 2004, p. 447.

⁴ Rokhmin Dahuri, et.al, *Pengelolaan Sumber Daya Wilayah Pesisir dan Lautan Secara Terpadu*, Pradnya Paramita, Jakarta, 1st Edition, 2001, p.1.

Indonesia has enormous⁵ maritime potential that supports its economy⁶ and grants it full sovereignty to manage, conserve, and utilize natural resources, including fishery resources. Therefore, the fisheries sector is one of the sectors that contribute to the welfare of society. However, in reality, Indonesia's fisheries production is relatively lower compared to countries that do not have fisheries potentials, such as China, Cambodia, India, and Bangladesh.⁷ The low fisheries production is caused by various factors, one of which is the use of fishing technologies that do not consider preserving the aquatic environment.

In essence, all potential fishing tool can threaten the environment if not controlled.⁸ Marine environmental damage caused by actions that do not consider the environment⁹, such as using explosive materials, can have significant side effects, such as coral reef damage and the death of non-target organisms. Therefore, the use of explosive materials (bombs) and toxic substances potentially causes extensive damage to coral reef ecosystems.

In addition to using bombs, fishermen often use illegal or banned fishing capture equipment, such as trawl nets or those that resemble or have been modified from trawls.¹⁰ Trawl is a net operated with the help of one or two boats that pull the gear so that it can sweep the waters. Based on their position in the water, trawl nets are divided into three groups: surface trawl (pelagic trawl), mid-water trawl (semi-pelagic trawl), and bottom trawl.¹¹ The construction of the trawl net consists of an Otter Board (opening board) and a mesh size of 2.5 (1 inch). In Indonesian waters, especially in West Java, the use of modified trawl nets can still be found under the local name "jaring arad¹²". Trawling, especially bottom trawling, is also commonly found in coastal areas of Kalimantan, especially in the eastern part, the Malacca Strait, the northern coast of Java, the Bone Bay, the Tomini Bay, the Arafura Sea, and the coastal areas of Papua. Social conflicts often arise with traditional fishermen.¹³

⁵ Kementerian Sekretariat Negara Republik Indonesia, "Wujudkan Indonesia Jadi Poros Maritim Dunia, Perlu Peran Semua Pihak," Kementerian Sekretariat Negara Republik Indonesia, 2021, https://www.setneg.go.id/baca/index/wujudkan_indonesia_jadi_poros_maritim_dunia_perlu_peran_semua_pihak 8 Oktber 2021, accessed on 20 March 2023.

⁶ Desia Rakhma Banjarani, "Illegal Fishing dalam Kajian Hukum Nasional dan Hukum Internasional: Kaitannya dengan Kejahatan Transnasional", *Jurnal Kertha Patrika*, Vol. 42, No. 2, 2020, p.151.

⁷ Lukman Adam, "Kebijakan Pengembangan Perikanan Berkelanjutan di Indonesia, *Jurnal Ekonomi dan Kebijakan Publik*, Vol 4, No. 2, December 2013, p. 196-197.

⁸ Sepri, Slamet Budi Prayitno, "Kajian Penggunaan Alat Penangkap Ikan Cantrang di Wilayah Pengelolaan Perikanan Republik Indonesia", *Jurnal Airaha*, Vol. VIII, No. 2, December 2019, p. 148 – 160.

⁹ Elvinda Rima Harliza dan Tomy Michael, "Penegakan Hukum Illegal Fishing, *Mimbar Keadilan*", *Jurnal Universitas 17 Agustus Surabaya*, Vol. 13, No. 1, February-July 2020, p. 123.

¹⁰ Furthermore, it is emphasized in the Director General of Fisheries' Decision Number: IK.340/DJ.10106/97 regarding the Implementation Guidelines for Minister of Agriculture's Decree Number: 503/Kpts/Um/7/1980.

¹¹ Rudy C Tarumingkeng, M F, Zahrial Coto dan Hardjanto, Makalah Pribadi Falsafah Sains (PPS 702) Sekolah Pasca Sarjana (S3) Institut Pertanian Bogor, *Menuju Upaya Penangkapan Ikan Yang Ramah Lingkungan*, http://www.rudyct.com/PPS702-ipb/09145/andi_assir.pdf © 2005 Andi Assir: Posted: 3 January, 2005, accessed on 18 January 2022

¹² The results of the Arad net study in Cirebon, conducted by the Department of Marine and Fisheries, Directorate General of Capture Fisheries, Center for Development of Fish Capture, Semarang, on July 5th, 2006, with reference number 1020/BBPPI/M.320.T.I/VII/06, explain that the Arad net, based on its technical specifications, falls under the category of trawl gear (drag net) with a small scale size (mini otter trawl). Therefore, the use of Arad nets as a fishing capture equipment is prohibited.

¹³ *Ibid.*

The use of trawl nets or those that have been modified is hazardous in terms of social and economic environment because this fishing capture equipment has an impact on the environment¹⁴, including overfishing or exceeding the maximum sustainable yield and damaging the sea floor, such as plankton or coral reefs, and hindering the growth and reproduction of marine biotas such as fish, shrimp, and others. As a result, these various impacts will lead to an imbalance in the ecosystem in the coastal waters. Using trawl nets can damage the marine environment or marine resources because fishing is carried out without considering environmental aspects.¹⁵

The prohibition of using illegal fishing capture equipment such as trawls and similar types has been regulated in criminal law in Article 84 and Article 85 of Law Number 45 of 2009 on the Amendment of Law Number 31 of 2004 on Fisheries (“**Fisheries Law**”). However, in reality, the criminal law application is ineffective because only the act of fishing, possessing, controlling, carrying, and/or using illegal fishing capture equipment can be prosecuted.

Therefore, there is a need for criminalization policy towards the functionalization of criminal law as an effort to make criminal law function, operate or work and materialize concretely.¹⁶ It is because criminal law policy (*penal policy/criminal law policy/strafrechtspolitik*) is an effort to realize criminal legislation suitable for the conditions and situations at a particular time and for the future.¹⁷

Given the vast potential of Indonesia's fisheries, it is in line with the mandate of the Fisheries Law and the Strategic Plan of the Indonesian Ministry of Marine Affairs and Fisheries 2020-2024, which states that Indonesia's fisheries management is based on three pillars: sovereignty, sustainability, and welfare to achieve optimal and sustainable benefits and the sustainability of fish resources. Therefore, the identified problems are: (i) How to implement criminalization policy towards the act of making, producing, and trading illegal fishing capture equipment? and (ii) How to apply criminal law policy towards the act of making, producing, and trading illegal fishing capture equipment?

METHODS

The legal research method used is socio-legal or empirical/non-doctrinal research, which examines the law through an interdisciplinary approach by combining legal and social sciences.¹⁸ There are two disciplines used in this study: First, legal science was used to examine the criminal policy against the acts of making, producing, and trading illegal fishing capture equipment. Second, social science was used to examine law enforcement efforts against the criminal acts of making, producing, and trading illegal fishing capture equipment.

¹⁴ Marhaeni Ria Siombo, *Hukum Perikanan Nasional dan Internasional Yang Dilengkapi Dengan Perundang-Undangan Dalam Rangka Pengelolaan Perikanan Yang Berlanjut*, PT. Gramedia Pustaka Utama, Jakarta, Kompas Gramedia, 2010, p. 15-16

¹⁵ Arisandi, *Inkonsistensi Kebijakan Penggunaan Jaring Trawl (Studi Kasus Penggunaan Jaring Trawl Oleh Nelayan Wilayah Perairan Gresik)*, (Graduate Program in Police Science – Universitas Surabaya, Jl. Airlangga 4-6 Surabaya 60286, JKMP (ISSN. 2338-445X), Vol. 4, No. 1, March 2016, p. 1-18, 2.

¹⁶ Muladi dan Barda Mawawi Arief, *Bunga Rampai Hukum Pidana*, Alumni, Bandung, 2007, p. 157.

¹⁷ Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana, Citra Aditya Bakti*, Bandung, 3rd Revision Edition, 2005, p.28.

¹⁸ Muhammad Chairul Huda, *Metode Penelitian Hukum (Pendekatan Yuridis Sosiologis)*, PT. Mahmud Ridwan Institute, Jateng, December 2021, p.29.

DISCUSSION

1. Criminalization Policy Against the Act of Making, Producing, and Trading Illegal Fishing Capture Equipment

The criminalization policy is a stage of criminal law formulation or establishing an act as a criminal offense, also known as criminalization. Conversely, eliminating a criminal act that was previously a criminal offense is known as decriminalization.¹⁹ Therefore, the criminalization policy establishes an act that was not previously a criminal offense as a criminal offense in legal regulation.²⁰

Furthermore, according to Sudarto, the criminal policy is a rational effort of society to combat crime. Therefore, any rational effort within the framework of combating crime is included in criminal policy.²¹ Thus, the policy or effort to combat fisheries crimes, especially against illegal fishing capture equipment, is a criminal policy that uses penal means or criminal law because several criminal acts and sanctions can be imposed on perpetrators who violate them, as formulated in Article 84 and Article 85 of Fisheries Law. This article is essentially an integral part of efforts to protect aquatic communities, preserve fish resources and their environment, and develop sustainable fisheries.

Explicitly, the criminal acts under Article 84 are capturing fish and/or cultivating fish using chemicals, biological substances, explosives, equipment, and/or methods and/or structures that could harm and/or endanger the sustainability of fish resources and/or their environment. Meanwhile, Article 85 criminalizes possessing, controlling, carrying, and/or using fish-capture equipment and/or fishing gear in the form of types of trawl nets (*dogol*, *Scottish seines*, *pair seines*, *candrang* and bottom lamps) and hauling nets (bottom trawl nets with crosses, shrimp trawl nets, twin nets with boards, two-ship mid-haul trawl nets and fish trawl nets) as stipulated in Article 7 of the Fisheries Law and specifically regulated in Ministry of Marine Affairs and Fisheries Regulation Number 18 of 2021 on the Placement of Fish Capture Equipment and Fishing Capture Equipment in the Territory of the Indonesian Fisheries Management Area and Offshore Waters as well as the Arrangement of Fishing Vessels ("**MoMAFR 18/2021**").

The formulation of these two articles begins with the policy formulation process, often referred to as legislative policy.²² The legislative body carries out the formulation stage, which is the abstract enforcement of the law. This stage can also be referred to as the legislative stage²³, and it is a crucial stage for the following stages²⁴, as it determines which actions will be considered criminal acts. Therefore, comprehensive efforts to prevent and combat illegal fishing capture equipment use in Indonesian waters can be carried out, starting with criminal law formulation policy. This stage can

¹⁹ John Kedei, *Kebijakan Hukum Pidana (Penal Policy) dalam Sistem Penegakan Hukum di Indonesia*, Pustaka Belajar, 1st Edition, Yogyakarta, November 2017, p. 13

²⁰ Barda Nawawi, Arief, *Op.Cit.*, p 2-3.

²¹ Teguh Prasetyo, *Kriminalisasi Dalam Hukum Pidana*, Musa Media, Bandung, 1st Edition, 1 March 2010, p. 25.

²² Barda Nawawi Arief, *Bunga Rampai..... Op.Cit*, p. 223.

²³ Teguh Prasetyo, *Kriminalisasi..... Op.Cit*, p. 111.

²⁴ Arief Amrullah, *Politik Hukum Pidana dalam Perlindungan Korban Kejahatan Ekonomi di Bidang Perbankan*, Malang Bayumedia Publishing, 2007, p. 21.

produce regulations that can function, operate, and be implemented by both the community and law enforcement agencies in a concrete and real manner.

The policy formulation in Article 85 constitutes both formal and material offenses. The formal offense that is prohibited is the act of intentionally possessing, controlling, and carrying fishing capture equipment and/or fishing aids that are on fishing vessels. In contrast, the prohibited material offense is the effect of criminal penalties for using such equipment that disturbs and damages the sustainability of fish resources in the Indonesian Republic's fisheries management area. The article is weak in the elements of criminal acts, which must be on fishing vessels, so it cannot be prosecuted against anyone who intentionally produces and trades illegal fishing capture equipment and/or fishing aids.

Furthermore, the first requirement to take action against a reprehensible act is the existence of a provision in criminal law that formulates the reprehensible act and provide a sanction for it, which is called the state legality in criminal law.²⁵ The two main principles in the policy of criminalization using penal means (criminal law) are the problem of determining which acts should be considered criminal offenses and what sanctions should be imposed on the violator.²⁶ Departing from the dissenting approach to that policy, Sudarto believes that in facing the first central problem above, which is often referred to as the problem of criminalization, attention should be paid to things that are essentially one of them:²⁷ the use of criminal law must consider national development, namely the realization of a just and prosperous society that is materially and spiritually equitable based on Pancasila; in relation to this, the use of criminal law aims to prevent crime for the welfare and protection of society; and the act attempted to be prevented or dealt with by criminal law must be an undesirable act, namely an act that causes (material and/or spiritual) harm to society.

As studied by the author, the attitude and perspective of fishing communities towards using illegal fishing capture equipment remain a longstanding and unresolved issue. In fact, it often results in social conflicts between fishermen and government officials, physical violence, property damage, and other unlawful acts. Therefore, in formulating a criminal act under criminal law, one of the factors to consider is that the act must truly be a wrongful act and not be desired or detrimental to society. In other words, it must be harmful or attack society's legal interests (whether individual, societal, or national).

Based on these considerations, the rationale for criminalizing the act of manufacturing, producing, and trading fishing capture equipment considers the social conflicts that tend to result in loss of life, property damage, and depletion of fishery resources and the environment, thereby affecting the sustainability of fisheries development. Criminalization is not merely for punishment but also to deter individuals and to meet the social consensus for eradicating illegal fishing capture equipment.

²⁵ Teguh Prasetyo, *Op.Cit*, p. 37

²⁶ Barda Nawawi, Arief, *Kebijakan Legislatif Dalam Penanggulangan Kejahatan Dengan Pidana Penjara*, Universitas Diponegoro, Cetakan Ketiga, Semarang, 2000, p. 35

²⁷ Sudarto, *Hukum dan Hukum Pidana*, Jakarta, 2007, p. 44-48

Thus, the act of making, producing, and trading fishing capture equipment can be criminalized and formulated in the Fisheries Law to meet the principle of legality, which states that no action should be prohibited (required) and punished if it is not previously declared in a legal provision. Criminal acts are prohibited by a legal rule, which is accompanied by a certain punishment for anyone who violates the prohibition. The elements of a criminal offense include formal elements in the form of human acts prohibited by a legal rule, the prohibition of which is accompanied by a specific punishment, and the violation of which is committed by a human being. The material elements include that the act must be unlawful and perceived by society as an act that should not be done or is not appropriate.

The formulation of the criminal sanctions for the illegal acts of making, producing, and trading are as follows:

a. Legal subject

In essence, anyone who is considered a legal subject with rights and obligations, as described in Article 55 and Article 56 of the Criminal Code and Articles 20 and 21 of Law Number 1 of 2023 regarding the Criminal Code, includes legal entities or corporations themselves or their management who profit from the company and do not make any effort to prevent or even allow the crime to occur; Any person refers to the perpetrator of a crime who is capable, sane, and accountable for a criminal act, and there is no *mens rea* and no justifications or excuses that eliminate criminal liability.

b. Intentionally

The Criminal Code does not provide a formulation of intention, but according to the *Memorie van Toelichting*, intention means “willing and knowing” (*willens en wetens*).²⁸ The application of the element of intention in criminal law theory includes (i) intention aimed (*opzet als oogmerk*), meaning that the act committed or the consequence that occurred is indeed the goal of the perpetrator; (ii) intention with certainty or necessity (*opzet bij zekerheids of noodzakelijkheidsbewustzijn*), meaning that the act committed or the occurrence of a consequence is not the intended goal, but in order to achieve the intended act or consequence, the perpetrator must perform the act or cause the consequence; and (iii) intention with the possibility or conditional intention (*opzet bij mogelijkheidsbewustzijn or voorwaardelijk opzet or dolus eventualis*), meaning that the perpetrator is aware of the possibility that another consequence may arise from the act committed or the occurrence of the intended consequence.²⁹

c. Criminalization

Criminalization means creating, producing, or trading using the Indonesian language dictionary as follows:³⁰ (i) creating means doing something, creating, producing; (ii) producing

²⁸ Sofjan Sastrawidjaja, *Hukum Pidana 1*, Penerbit CV. Armico, Bandung, 1990, p. 193

²⁹ *Ibid*, p. 1997-1999.

³⁰ Indonesian Dictionary, <https://oldi.lipi.go.id/public/Kamus%20Indonesia.pdf>, pg. 225, 1215, 303, accessed on 15 February 2023.

means being able to produce (in large quantities, bring, benefit); and (iii) trading means trading, selling commercially (usually at a lower price than the purchase price).

d. Illegal fishing capture equipment and/or fishing aids

The provisions for illegal fishing capture equipment and/or fishing aids are regulated in the MoMFAR 18/2021. The prohibited capture equipment are types of trawl (*dogol*, *Scottish seines*, *pair seines*, *candrang*, and bottom lampara) and purse seine (bottom trawl with a cross, shrimp bottom trawl, twin boards, two-ship bottom purse *seine*, and fish purse *seine*), as stipulated in the MoMFAR 18/2021.

e. Criminal sanctions

Barda Nawawi Arief stated that the addition of criminal sanctions to existing crimes also constitutes criminalization.³¹ Therefore, the act of making, producing, and trading illegal fishing capture equipment is considered an offense because it does not impact on certain criminal elements and is burdensome. The formulation of the penalty is regulated in Article 7 of the Fisheries Law, which stipulates a maximum fine of IDR.250,000,000.00 (two hundred and fifty million rupiah).

From the formulation of criminalization above, and in order to tackle criminal acts, a political concept of criminal law is needed, namely the selection to achieve criminal legislation under the conditions and situations at a particular time and for future periods. Criminalization must be embodied in written regulations in the form of legislation. The rules must be synchronized with legal principles and not conflict with higher-level regulations.³² The process of criminalization can occur in acts that were previously not threatened with criminal sanctions but can also occur in acts that were previously threatened with criminal sanctions by increasing the severity of the sanctions.³³

Therefore, from the criminalization policy towards the formulation of criminal acts, in the Fisheries Law, there is a need to add a provision that was previously not regulated, which is Article 85A with the following formulation:

“Anyone who intentionally brings, produces, and trades illegal fishing capture equipment or illegal fishing aids that do not comply with the provisions referred to in Article 7, shall be punished with a maximum fine of IDR.250,000,000.00 (two hundred and fifty million Indonesian Rupiah)”.

2. The Criminal Law Enforcement Policy Against the Criminal Acts of Carrying, Producing, and Trading Illegal Fishing Capture Equipment

The functionalization of criminal law not only discusses policy issues in formulating criminal law but also addresses policy issues in the application of criminal law, or what is known as the judicial phase. The application phase is the stage of criminal law enforcement that begins with the level of investigation and investigation by the police, the level of prosecution by the prosecution, and the level of examination and decision-making in court. These three law enforcement elements are part

³¹ Barda Nawawi, Arief, *Kebijakan Legislatif.... Op.Cit*, p.240.

³² Teguh Prasetyo, *Op.Cit.*, p.139

³³ Vivi Ariyanti, “Kebijakan Penegakan Hukum Dalam Sistem Peradilan Pidana”, *Jurnal Yuridis*, Vol. 6, No. 2, December 2019, p.46.

of the criminal justice system, whose performance cannot be separated from the effort to enforce the law to realize legal aspirations.

Satjipto Rahardjo explains law enforcement as a series of processes to articulate abstract values, ideas, concepts, and ideals into legal objectives.³⁴ Furthermore, it is explained that a sufficiently complex organization and state involvement are needed to realize the law as these ideas. The judiciary, prosecution, police, society, and legislative bodies are all involved in realizing the objectives of criminal law.

The success of law enforcement is certainly not only based on the fulfillment of the legal structure, legal substance, and legal culture components in a legal system but also on the synchronization of each component. It is considered that in the criminal justice system, there is a need for integration or harmony. This is explained by Muladi, where integrated criminal justice is synchronization or harmony that can be distinguished in: (i) structural synchronization, which is the harmony or alignment in the framework of the relationship between law enforcement agencies; (ii) substantial synchronization, which is the vertical and horizontal alignment and harmony in relation to positive law; and (iii) cultural synchronization, which is the alignment and harmony in understanding legislation, attitudes, and philosophies that comprehensively run the criminal justice system.³⁵

At the policy level of criminal law enforcement in the field of fisheries, one of the factors that influence the effectiveness of law enforcement against the use of illegal fishing capture equipment in Indonesian waters is the law itself, where Article 85 of the Fisheries Act only emphasizes the possession, control, possession, and/or use of such tools while on board, making it difficult to prosecute anyone or any person who intentionally makes, produces, and trades them. This fact has ultimately led to fishermen's rampant use of illegal fishing capture equipment in Indonesian waters.

Law enforcers must consider the elements of the crime in determining a criminal act. The objective element is an element that exists outside of the perpetrator of the criminal act, including the act or behavior of a human being that has been formulated in legislation, the existence of a consequence that is an absolute requirement of the offense, the existence of an element of illegality that is threatened with punishment, other elements that determine the nature of the criminal act, and elements that aggravate the punishment. The next element, the subjective element, is an element that exists within the perpetrator of the criminal act, namely intent (*dolus*) and negligence (*culpa*) which are elements of guilt.

In the Common Law system (United Kingdom Law), anyone who violates the law must meet the following elements:³⁶ (i) The accused has committed the alleged act, also known as Actus-Reus; and (ii) The accused committed a violation of the law with malicious intent, also known as Mens-Rea.

³⁴ Sri Mulyani, "Penyelesaian Perkara Tindak Pidana Ringan menurut Undang-Undang Dalam Perspektif Restoratif Justice", *Jurnal Penelitian Hukum De Jure*, Badan Penelitian dan Pengembangan Hukum dan HAM, Jakarta, Vol. 16 No. 3, September 2016, p.340.

³⁵ *Ibid*, p.342.

³⁶ Romli Atmasasmita, *Perbandingan Hukum Pidana Kontemporer*, Penerbit Fikahati Aneska, Jakarta, 2009, p.72-73.

According to United Kingdom Criminal Law, Actus-Reus contains the principle that:³⁷

- a. The accused must directly commit the alleged act. In principle, a person cannot be held responsible for the actions of another unless they persuade someone else to commit the offense, or the accused has the same intention as the offender;
- b. The alleged act must be committed voluntarily by the accused (without coercion from others) or the act and its consequences must be desired by the accused;
- c. Ignorance of the applicable law is not a justifiable excuse.

Law enforcers pay attention to the elements of a criminal act or *Actus-Reus*, such as bringing, producing, and trading illegal fishing capture equipment or illegal fishing aids that do not comply with the provisions formulated in legislation, making it a formal criminal offense that is prohibited. Therefore, law enforcement officials can prosecute any goods violating these provisions.

In addition, law enforcement officials not only prosecute someone based on the elements of a criminal act but must also prove the element of fault because not everyone who commits a criminal act can be prosecuted. It depends on whether the person who committed the crime has fault or not. In this case, there is a principle of no punishment without fault, which is known as *geen straf zonder schuld* (Dutch), *ohne schuld keine strafe* (German), *actus non facit reum, nisi mens sit scia an act* does not make a person-guilty unless the mind is guilty (United Kingdom). This principle is not found in the Criminal Code (KUHP) and other legislation but is found in the written law.³⁸

Fault in the context of criminal law (*schuld in strafrechtelijkezin*) refers to various forms of fault, one of them is intention (*doluz/opzet*). The intention is the will to commit an act and the will to cause the consequences of that act. In other words, intention exists when the consequences of an act are desired, and it can be said that the consequences are genuinely the intended purpose of the action taken. The theory of will, both for the act and the consequences of the act, can be desired by the perpetrator. In contrast, the theory of knowledge/imagination means that the act's consequences cannot be desired by the perpetrator but only imagined. Only the act itself can be desired so that the perpetrator's intention can only be directed towards the act itself.³⁹ The nature of intention is *boos opzet/dolus malus*, meaning that the perpetrator must desire the act and know or realize that the act is prohibited and punishable by law. In addition, *keurloos opzet* means that a person can be punished simply by desiring the act itself without knowing that it is prohibited and punishable by law.⁴⁰

In relation to the element of intent or *opzet*, Dutch Criminal Law adheres to the principle of Colorless Intent. This principle means that not every element of intent implies the act is unlawful. The meaning of intent/*opzet* is related to: (1) Conduct or action means the manifestation of the perpetrator's desire or will; (2) Result or consequence means that a person who commits an act will have the intention of involving the consequences of that act; and (3) Circumstances or accompanying

³⁷ *Ibid.*

³⁸ Sofjan Sastrawidjaja, *Op.Cit.*, p.181.

³⁹ *Ibid.*, p.194-195

⁴⁰ *Ibid.*, p.196

conditions. It means that the perpetrator of the criminal act is fully aware of the circumstances accompanying his/her action.⁴¹

From the explanation of the elements of the offense above, the act of carrying, producing, and trading illegal fishing capture equipment requires law enforcement to prove the criminal offense of the element of intent, where any person or entity who willingly and knowingly engages in such acts, even if they are aware that the act is prohibited by law, must be proven guilty. Law enforcement must investigate the perpetrator's malicious intent to prove the *men rea*, as in English Criminal Law, which is⁴² (i) Intention or purposely, meaning that the perpetrator is aware of and desires the consequences of their actions; (ii) Recklessness, meaning that the perpetrator can anticipate or suspect the consequences that will occur, but does not intend for those consequences to happen; and (iii) Negligence, meaning that the perpetrator does not anticipate the consequences that will occur, but the law requires them to be careful about the consequences of their actions in certain circumstances.

Furthermore, in proving malicious intent, law enforcement must also consider the Model Penal Code of the United States, which has developed four classifications as follows:⁴³ **First**, Purpose with desire, meaning that a person performs an act intentionally if they desire to perform the act or desire to cause a consequence from the act; **Second**, Knowledge or awareness with certainty, meaning that a person performs an action while knowing or realizing the nature of their action and understanding that their action can certainly cause a consequence; **Third**, Reckless, meaning that a person is aware and has suspected the consequences that will occur from their actions in certain circumstances; and **Fourth**, Negligence or existence of high risk, meaning that a person must have anticipated the direct consequences that will occur and could not be calculated beforehand.

Therefore, the fulfillment of the elements of making, producing, and trading illegal fishing capture equipment is met if the elements formulated in Article 85A of the Fisheries Law are fulfilled and if there is a deliberate criminal offense. It means that any individual or corporation who intentionally knows, understands, and realizes their actions and desires the purpose and consequences can be prosecuted.

Law enforcement officials not only consider or consider the fulfilled criminal elements and elements of fault but also must prove whether there are grounds for criminal deletion, such as justifying and excusing circumstances. Justifying circumstances negates an act's unlawful nature so that it becomes an unjustifiable act. In contrast, excusing circumstances are circumstances that negate the fault of the perpetrator. The act remains unlawful, but the perpetrator cannot be prosecuted because there is no fault. The act of making, producing, and trading cannot be prosecuted if someone orders or commands, or has a relationship with their job position. Those who

⁴¹ Romli Atmasasmita, *Op.Cit.*, p.78-79.

⁴² *Ibid*, p.74.

⁴³ *Ibid*, p.75-77.

order and are commanded are responsible for criminal acts as stated in Article 51 of the Criminal Code, namely an invalid official order (*onbevoegd gegeven ambtelijk bevel*).

The act of making, producing, or trading, by a corporate entity has been listed as one of the criminal offenders in various special criminal laws, one of which is in the illegal fishing crime.⁴⁴ In addition to the criminal subjects being the captain, crew, company owner, and ship owner, it can also be imposed on the management and corporation, as stated in Article 101 of the Fisheries Law, which stipulates in Article 84 paragraph (1), Article 85, Article 86, Article 87, Article 88, Article 90, Article 91, Article 93, or Article 94, carried out by a corporation, the criminal demand and sanction are imposed on its management and the corporation is fined with an additional 1/3 (one-third) of the imposed sentence.

Observing the criminal articles in the fisheries law, especially regarding criminal liability for corporations, the corporation acts and operates in the interests of the corporation through a structured management system based on that view and supported by several theories such as Strict Liability and Vicarious Liability, and the corporation is convicted as a responsible party because, without corporate criminal liability, the company can avoid punishment and not only its supervisor is demanded but also the board of directors, commissioners, and shareholders because they have committed a crime which is actually a mistake from the company's business activities. Companies that have earned profits should also be subject to sanctions.⁴⁵ Furthermore, in Supreme Court Regulation Number 13 of 2016 regarding the Handling of Corporate Criminal Cases, it is stated that corporations that obtain benefits or profits for corporate interests allow the occurrence of criminal acts and do not take preventive measures. Therefore, a legal entity or corporation that engages in the act of making, producing, and trading illegal fishing capture equipment or illegal fishing capture equipment can be criminally prosecuted.

CLOSING

The use of illegal fishing capture equipment and/or illegal fishing aids has been formulated in Article 7 of the Fisheries Law and specifically regulated in the Ministry of Marine Affairs and Fisheries Regulation No. 18 of 2021 regarding the Placement of Fishing Capture Equipment and Fishing Aids in the Territory of the Republic of Indonesia Fisheries Management and High Seas as well as the Arrangement of Fishing Operation. However, the criminal provisions are stipulated in Article 85 of the Fisheries Law, but their operationalization is still found and rampant in Indonesian waters. Therefore, criminalizing the acts of making, producing, and trading illegal fishing capture equipment and/or fishing aids as criminal offenses with the formulation in Article 85A of the Fisheries Law, which states "Anyone who intentionally brings, produces, and trades illegal fishing capture equipment or fishing aids that do not comply with the provisions as referred to in Article 7 is punished by a maximum fine of IDR 250,000,000.00 (two hundred and fifty million rupiahs)."

⁴⁴ Oksimana Darmawan, "Pertanggungjawaban Pidana Korporasi dalam Illegal Fishing di Indonesia, Kajian Putusan Nomor 01/Pid.Sus/PRK/2015/PN.AMB", *Jurnal Yudisial*, Vol. 11, No. 2 August 2018, p. 181.

⁴⁵ Rodliyah, et.al, "Konsep Pertanggungjawaban Pidana Korporasi (Corporate Crime) dalam Sistem Hukum Pidana Indonesia", *Jurnal Kompliasi Hukum*, Vol. 5, No. 1 2020, p. 204.

By criminalizing the acts of making, producing, and trading as formal criminal offenses, the policy of criminal law enforcement can be carried out comprehensively from upstream to downstream, making it easier for law enforcers to apply Articles 85 and 85A of the Fisheries Law for the eradication of illegal fishing capture equipment in Indonesian waters. In addition, law enforcers must also pay attention to the elements of Actus-Reus and Mens-Rea as well as the grounds for pardon that remove the criminal offense so as not to cause conflict with the fishing community.

REFERENCES

Book

- Arief Amrullah, *Politik Hukum Pidana dalam Perlindungan Korban Kejahatan Ekonomi di Bidang Perbankan*, Malang Bayumedia Publishing, 2007.
- Barda Mawawi Arief, *Kebijakan Legislatif Dalam Penanggulangan Kejahatan Dengan Pidana Penjara*, Universitas Diponegoro, Cetakan Ketiga, Semarang, 2000.
- _____, *Bunga Rampai Kebijakan Hukum Pidana*, Citra Aditya Bakti, Bandung, 3rd Edition, Revision, 2005.
- Dikdik Mohamad Sodik, *Hukum Laut Internasional dan Pengaturannya di Indonesia*, Refika Aditama, Bandung, 3rd Edition, 2016.
- John Kedei, *Kebijakan Hukum Pidana (Penal Policy) dalam Sistem Penegakan Hukum di Indonesia*, Pustaka Belajar, 1st Edition, Yogyakarta, November, 2017.
- Marhaeni Ria Siombo, *Hukum Perikanan Nasional dan Internasional yang dilengkapi dengan perundang-undangan dalam rangka Pengelolaan Perikanan yang Berkelanjutan*, PT. Gramedia Pustaka Utama, Jakarta, Kompas Gramedia, 2010.
- Muhammad Chairul Huda, *Metode Penelitian Hukum (Pendekatan Yuridis Sosiologis)*, PT. Mahmud Ridwan Institute, Jateng, Desember 2021.
- Muladi dan Barda Nawasi Arief, *Bunga Rampai Hukum Pidana*, Alumni Bandung, 2007
- _____, Barda Nawawi Arief, *Bunga Ranpai Kebijakan Hukum Pidana*, Citra Aditya Bakti, Bandung, 3rd Revision Edition 2005.
- Rokhmin Dahuri, *Pengelolaan Sumberdaya Wikayah Pesisir dan Lautan Secara Terpadu*, Pradnya Paramita, Jakarta, 1st Edition, 2001.
- Romli Atmasasmita, *Perbandingan Hukum Pidana Kontemporer*, Penerbit Fikahati Aneska, Jakarta, 2009.
- Teguh Prasetyo, *Kriminalisasi Dalam Hukum Pidana*, Penerbit Musa Media, Bandung, 1st Edition, March, 2010.
- Sofjan Sastrawidjaja, *Hukum Pidana 1*, CV. Armico, Bandung, 1990.
- Sudarto, *Hukum dan Hukum Pidana*, Jakarta, 2007.

Journal

- Achmad Rifai, Septian Dwi Nurwanto, *et.al*, "Pertanggungjawaban Pidana Terhadap Pelaku Penangkapan Ikan Secara Ilegal Menggunakan Setrum Ditinjau dari Undang-Undang Nomor 45 Tahun 2009 tentang Perikanan (Criminal Responsibility Towards Performers of Illegal Catching Fish Using Setrums, Reviewed from Law Number 45 of 2009 regarding Fisheries)", *Jurnal Lex Suprema*, Vol. II, No. 2, September, 2020.
- Arisandi, "Inkonsistensi Kebijakan Penggunaan Jaring Trawl (Studi Kasus Penggunaan Jaring Trawl Oleh Nelayan Wilayah Perairan Gresik)", (Program Pascasarjana Ilmu Kepolisian - Universitas Airlangga Surabaya Universitas Airlangga Jl. Airlangga 4-6 Surabaya 60286, JKMP (ISSN. 2338-445X), Vol. 4, No. 1, March 2016.
- Desia Rakhma Banjarani, "Illegal Fishing dalam Kajian Hukum Nasional dan Hukum Internasional: Kaitannya dengan Kejahatan Transnasional", *Jurnal Kertha Patrika*, Vol. 42, No. 2, 2020.
- Lukman Adam, "Kebijakan Pengembangan Perikanan Berkelanjutan di Indonesia", *Jurnal Ekonomi dan Kebijakan Publik*, Vol 4, No. 2 Desember 2013, hlm 196-197
- Elvinda Rima Harliza dan Tomy Michael, "Penegakan Hukum Illegal Fishing", *Mimbar Keadilan, Jurnal Universitas 17 Agustus Surabaya*, Vol. 13, No. 1, February-July, 2020.
- Oksimana Darmawan, "Pertanggungjawaban Pidana Korporasi dalam Illegal Fishing di Indonesia", *Kajian Putusan Nomor 01/Pid.Sus/PRK/2015/PN.AMB, Jurnal Yudisial*, Vol. 11, No. 2, August, 2018.
- Rodliyah, *et.al*, "Konsep Pertanggungjawaban Pidana Korporasi (Corporate Crime) dalam Sistem Hukum Pidana Indonesia", *Jurnal Kompliasi Hukum*, Vol. 5, No. 1 2020.
- Sepri, Slamet Budi Prayitno, "Kajian Penggunaan Alat Penangkap Ikan Cantrang di Wilayah Pengelolaan Perikanan Republik Indonesia", *Jurnal Airaha*, Vol. VIII, No. 2, December, 2019.
- Sri Mulyani, "Penyelesaian Perkara Tindak Pidana Ringan menurut Undang-Undang Dalam Perspektif Restoratif Justice", *Jurnal Penelitian Hukum De Jure*, Badan Penelitian dan Pengembangan Hukum dan HAM, Jakarta, Vol. 16, No. 3, September 2016.
- Tahegga Primananda Alfath, Radian Salman, and Sukardi Sukardi, "Derivasi Konsep Negara Kepulauan Dalam Undang-Undang Dasar Negara Republik Indonesia Tahun 1945," *Bina Hukum Lingkungan*, Vol. 4, No. 2, 2020.
- Vivi Ariyanti, "Kebijakan Penegakan Hukum Dalam Sistem Peradilan Pidana", *Jurnal Yuridis*, Vol. 6, No. 2, December, 2019.

Legislations

1945 Constitution.

Code Conduct for Responsible Fisheries, (FAO 1995)

Indonesian Criminal Code

Law Number 1 of 2023 regarding the Criminal Code.

The Republic of Indonesia Law No. 45/2009 regarding Amendments to Law No. 31/2004 regarding the Fisheries.

Minister of Marine Affairs and Fisheries Regulation Number 18/2021 regarding the Placement of Fish Capture Equipment and Fish Catching Aids in the State of the Republic of Indonesia Fisheries Management Area and Offshore Fisheries Management Area, as well as the Arrangement of Fishing Andon

Director General of Fisheries Decision No. IK.340/DJ.10106/97 regarding the Implementation Guidelines for Minister of Agriculture Decision No. 503/Kpts/Um/7/1980.

Other Resources

Indonesian Dictionary, <https://oldi.lipi.go.id/public/Kamus%20Indonesia.pdf>,

Kementerian Sekretariat Negara Republik Indonesia, "Wujudkan Indonesia Jadi Poros Maritim Dunia, Perlu Peran Semua Pihak," Kementerian Sekretariat Negara Republik Indonesia, 2021, https://www.setneg.go.id/baca/index/wujudkan_indonesia_jadi_poros_maritim_dunia_perlu_peran_semua_pihak 8 Oktober 2021

Marhaeni Siombo, *Pengaruh Metode Penyuluhan dan Motivasi Nelayan terhadap Pengetahuan tentang Penangkapan Ikan Ramah Lingkungan (Eksperimen Pada Nelayan di Tempat Pelelangan Ikan (TPI) Muara Angke, Jakarta Utara, 2008)*, Sinopsis Disertasi, Program Pascasarjana, Universitas Negeri Jakarta, tahun 2009, Jakarta.

Rudy C Tarumingkeng, M F, Zahrial Coto dan Hardjanto, Makalah Pribadi Falsafah Sains (PPS 702) Sekolah Pasca Sarjana (S3) Institut Pertanian Bogor, *Menuju Upaya Penangkapan Ikan Yang Ramah Lingkungan*, http://www.rudyct.com/PPS702-ipb/09145/andi_assir.pdf © 2005 Andi Assir: Posted: 3 January, 2005.

The results of the Arad net study in Cirebon, conducted by the Department of Marine and Fisheries, Directorate General of Capture Fisheries, Center for Development of Fish Capture, Semarang, on July 5th, 2006, with reference number 1020/BBPPI/M.320.T.I/VII/06, explain that the Arad net, based on its technical specifications, falls under the category of trawl gear (drag net) with a small scale size (mini otter trawl). Therefore, the use of Arad nets as a fishing capture equipment is prohibited.