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Implications of Renewal in Enforcement of Environmental Law in Indonesia Through Criminal Sanctions as the Ultimum Remedium Post Omnibus Law

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Abstract

The change of criminal sanction scheme from primum remedium to ultimum remedium after the passage of the Omnibus Law, brought a new impact on environmental law in Indonesia. Because, according to some parties, this change can improve the investment climate in Indonesia, but on the other hand it considers this as a step in weakening environmental law enforcement in Indonesia. This type of research uses the method of Juridical-normative approach that will be analyzed in a qualitative descriptive in reviewing and analyzing the enforcement of Environmental Law in Indonesia through the change of criminal sanctions into ultimum remedium in the Omnibus law. Environmental law enforcement scheme that prioritizes administrative sanctions over criminal sanctions raises a problem for this country, because criminal sanctions are still seen as one of the most appropriate sanctions in reducing the level of destruction and environmental problems that occur in Indonesia. This is inseparable from the enforcement of Environmental Law as an important aspect in maintaining environmental sustainability in accordance with the mandate of the Constitution.

Keywords: *Environmental Law Enforcement; Criminal Sanctions; Ultimum Remedium; Omnibus Law*

Introduction

According to the view of **Prof. Mr. St. Munadjat Danusaputro** who is one of the professors of environmental law, he gave the view that the environment is everything be it power, object or condition, which also includes humans and their behavior and deeds, which are contained in the space where humans are located and affect the survival and well-being of humans and living bodies (Danusaputro, 1987, p. 67). In relation to this environment in the state constitution, it has been affirmed that as a form of application of human rights in the environmental field, everyone has the right to a good and healthy living environment, this is stated in article 28H paragraph (1) of the 1945 Constitution (Priyanta, 2010, p. 114). Moreover, if we refer to article 1 paragraph (3) of the 1945 Constitution which states that *"the Indonesian state is a state of law"*, and based on the conception of the state of law itself which makes the law a tool to

prevent and provide restrictions on rulers and individuals so as not to cause chaos and arbitrariness. So, it is appropriate to say that the enforcing of environmental law in Indonesia is an important urgency for Indonesia.

If we look at history, then Indonesia's role in environmental sustainability both for the world and for Indonesia itself has been done for quite a long time, this is proven by the participation of the Indonesian state in various world environmental conferences, such as the world environmental conference in 1972 which was held in Stockholm. The conference gave rise to a declaration on the human environment containing 7 main considerations, 26 principles and 109 recommendations for human environmental action plans, as well as establishing a World Environment Day which falls on every June 5 (Hardjasoemantri, 2017, p. 21). With Indonesia's participation in various existing environmental conferences, there must be rules that are arranged in such a way as to achieve goals in the environmental field itself (Devara et al., 2021, p. 114). This is what prompted the government to form a clear regulation in the enforcement of environmental law in Indonesia, until in 1982 Law Number 4 of 1982 concerning the Basic Provisions of Environmental Management was formed, but in 1997 this law was repealed and replaced with Law Number 23 of 1997 concerning Environmental Management (UUPLH) and changed again to Law Number 32 of 2009 concerning Protection and Environmental Management (UUPPLH). However, in 2020 there was a draft law called the Ominibus Law using a drafting technique called omnibus. This preparation technique has several characteristics including *First*, covering many sectors in its formulation, *Second*, the result of many sectors being covered, then resulting in there are also many articles to be regulated, *Third*, consisting of many new laws and regulations, *Fourth*, without being bound by other regulations, in this case it can be said to be independent, *Fifth*, as with any new legal product, there will be repealed and reaffirmed, be it in whole or in part of the existing regulations (Redi et al., 2019, p. 8). With this omnibus method, the Draft Law (RUU) contains updates for at least 79 pre-existing laws, including updates to Law Number 32 of 2009 concerning Environmental Protection and Management.

And finally, October 5, 2020, it became a momentum for the House of Representatives of the Republic of Indonesia (DPR-RI) which approved the Ominibus Law, amid various responses and turmoil that arose in the community, including for environmentalists, the presence of laws that were considered to weaken the enforcement of environmental law in Indonesia. However, for some parties, this is the right step in overcoming the existence of overlapping regulations to improve the investment climate and provide convenience in doing business. The move by the board members the House of Representatives of the Republic of Indonesia (DPR-RI) was also supported by President Jokowi by ratifying and signing the final draft of the Ominibus Law approved by the DPR-RI previously, so that the Ominibus Law has officially become Law Number 11 of 2020 concerning Ominibus Law starting november 2, 2020. In this law, there is an interesting thing to study together, namely related to environmental law enforcement schemes in the form of criminal sanctions which were changed to ultimum remedium instead of as a primum remedium like Law Number 32 of 2009 concerning Environmental Protection and Management, before being amended in the Ominibus Law.

Regarding the punishment sanction in Law Number 11 of 2020 concerning Ominibus Law also provides a new understanding that punishment can only be applied if there is an act of pollution and environmental effort that results in the emergence of victims, be it to safety, health, security or the environment, this is one form of implications of changing the criminal sanction scheme which is changed to ultimum remedium. In addition, this step is also seen as a setback in the protection of the state against the community and the enforcement of environmental law in Indonesia in order to reduce and eliminate crimes against the environment.In fact, we have clearly known together from the various implementations of the world environment conference ranging from the Stockholm conference of 1972 to the Rio+20 Conference of 2012, from all of which the conference encouraged countries to be able to use the criminal punishment scheme of primum remedium in the enforcement of their environmental law.

This is certainly something that is urgent and must be viewed as a high priority for the state considering that currently there are still many problems and environmental destruction carried out by both corporations and individuals. And also the consequences caused by this environmental problem will not only have an impact on some sectors, but wider than that which is in accordance with the character possessed by the environment, namely being interconnected in all sectors (Hakim, 2020, pp. 44–45).

With the increasingly massive and in fact the impacts caused by these various environmental problems, the environmental law in its enforcement must also be in line and more solid in reducing the possibility of environmental destruction again. Because it is seen from the nature of environmental law itself as a juridical instrumentarium for environmental management (Hardjasoemantri, 2017, pp. 38–39). But instead of strengthening the enforcement of environmental law, the state prefers to change them into new rules that are currently a polemic in society. In fact, if we look back at the enforcement of environmental law related to the criminal provisions in Law Number 32 of 2009 concerning Environmental Protection and Management, then it appears that the criminal provisions are intended to be able to maintain the ecology that is applied in the environment by providing a way through a criminal sanction that is sufficient to block. As well as in the perspective of the conception of environmental law itself, criminal is likened to one of the solutions for control in terms of environmental destruction or as an "*environmental proctection*" for the community, not only that the state in this case must also have a great burden and obligation in order to provide a sense of security, and legal justice for all communities and the environment in Indonesia. One form of the country's task can be realized through the protection of environmental ecosystems for the benefit of future generations in order to achieve the environmental-related goals in our country's constitution. So that the change in criminal sanctions from primum remedium to ultimum remedium against environmental law enforcement in Indonesia has brought a new problem in the country.

Methods

The method carried out uses a juridical-normative approach which is legal research through literature which is carried out by examining literature materials or mere secondary data (Soekanto & Mahmudji, 2003, p. 13). This normative legal research is based on legal materials that are primary and secondary, which means that this research will refer to the norms and legal rules contained in laws and regulations (Soekanto, 1984, p. 20). Therefore, in this study using data in the form of primary legal materials including the 1945 Constitution, Law Number 32 of 2009 concerning Environmental Protection and Management, Law Number 11 of 2020 concerning Omnibus Law, the Criminal Procedure Code (KUHAP), the Criminal Code (KUHP), and Law Number 48 of 2009 concerning Judicial Power. Furthermore, secondary legal materials are legal materials that are useful in terms of strengthening primary legal materials, as well as providing information related to existing primary legal materials (Soekanto, 1984, p. 25). This secondary legal material consists of books, articles, and journals.

The data obtained will be analyzed normatively qualitatively by utilizing descriptive methods, in order to study and examine the implications of environmental law enforcement in Indonesia through the change of criminal sanctions to ultimum remedium in Law Number 11 of 2020 concerning Omnibus Law.

Problem Identification were 1) what is the conception of criminal sanctions enforcement in environmental law in Indonesia? 2) What are the implications of changing the criminal sanction from primum remedium to ultimum remedium on the direction of environmental law development after the Omnibus Law Law?

Results and Discussion

Conception of Criminal Sanctions Enforcement in Environmental Law in Indonesia

If you look at the understanding of the law itself according to **E. Utrecth**, he is of the view that the law is the set of life instructions, be it orders or prohibitions to regulate the order in a society that should be followed by members of society and if violated it can cause action on the part of the government of that society (Arrasjid, 2000, p. 21). With this law, there must also be an enforcement of the law as an activity to protect and maintain the relationship between each cadaver in society (Soekanto, 1983, p. 24). This is expected so that later the law can run as the purpose of the existence of the law, namely legal certainty, legal justice, and legal expediency as stated by **Gustav Radbruch**. So, it is appropriate that law enforcement is seen as one of the important factors for the existence of the law, including the existence of environmental law.

Environmental law itself is considered as one of the laws that is not only focused on one aspect but is connected to various aspects both in criminal law, civil, administrative, to aspects outside of the law itself as well as the environment, as the name implies environmental law. With the many aspects covered in environmental law, it must also be regulated in various existing regulations. In the conception adopted by the state, making various legal regulations binding both between individuals and between other individuals and between state organs in a row and vertically by using authority as a power possessed based on the upper limit or referred to as legislation, of course this will also have an impact on environmental law which is specifically and in detail regulated into a legal product issued by the agency the existing legislature, named Law Number 32 of 2009 concerning Environmental Protection and Management and some of its articles were changed back into a new legal product called Law Number 11 of 2020 concerning Omnibus Law. In terms of criminal-based environmental law enforcement, we will not be separated from the name of the Criminal Law (KUHP), the Criminal Procedure Code (KUHAP), Law Number 48 of 2009 concerning Judicial Power, and also other regulations related to environmental law. If we examine and look at one by one of these regulations that use social engineering, then we will find that efforts in enforcing environmental criminal law have three main problems consisting of the formulation of a criminal act about the presence or absence of a violation of a crime, criminal liability for both individuals and corporations that commit environmental destruction and pollution as well as existing sanctions both criminal and order.

The formulation of a criminal act will make this offense an urgent one, because in the absence of a violation of the offense in the relevant law, a person who commits pollution or destruction of the environment cannot be subject to criminal sanctions. This is a result of the use of the "Principle of Legality" contained in article 1 paragraph (1) of the Criminal Code, this principle brings the understanding that no act or act is threatened with criminality if there is no one who regulates it, this is also one of the views of **Prof. Dr. Mr. Moeljatno**. Similarly, environmental evidence has 3 (three) substances consisting of proof on the evidence, the burden contained in the proof, and the tools used in the proof (Wijoyo, 2005, p. 31). The proof of this offense is based on the Law on The Power of Justice No. 48 of 2009, which in article 6 paragraph (2) states that *"No person can be sentenced to a criminal offence, unless the court, because of the lawful means of proof, has confidence that a person who is deemed liable, has been guilty of the acts charged against him"* (Undang-Undang Republik Indonesia, 2009). This means that the judge in deciding must first be based on valid evidence and also based on the judge's own conviction. This arrangement also clarifies the formulation of the previous article which already exists in the Code of Criminal Procedure which in article 183 states *"A judge may not sentence a person unless with at least two valid pieces of evidence he obtains a conviction that a criminal offence actually occurred and that it is the accused who is guilty of committing it"* (Undang-Undang Republik Indonesia, 1981). So that the use of this offense becomes increasingly important in the imposition of criminal penalties in environmental law.

Not only that, criminal liability is also an important thing and will be related to the element of guilt, because this element of guilt is a mandatory or absolute thing in the criminal law, this aims so that later someone who is considered to have committed pollution or destruction of the environment can be subject to criminal liability. In terms of determining whether there is an error or not, it must first be fulfilled several elements by the subject of the law itself, namely (Wirajaya, 2013, p. 3): There is the ability of the maker of the offense to be responsible. The existence of intentionality (dolus) or forgetfulness (culpa) with his deeds, which is related to the mind of the delinquent. There are no forgiving reasons and reasons for error whether contained in the Criminal Code or in other special regulations.

Meanwhile, according to **Pompe**, of the three elements mentioned above, there is still one more element, namely the element of unlawful acts, it's just that he said that the element against him is outside of him. However, this element must exist because it explains that the act is contrary to the law, and can be categorized as a despicable act (Wiyanto, 2012, p. 183).

This of course also applies to corporations, although literally corporations and people have a difference, but this difference is not a barrier. According to **Suprapto**, corporations can also be blamed just like humans, these errors can be obtained in terms of if there has been a *culpa* or *dolus* found in the people who are its tools (Muladi & Priyatno, 2010, p. 105). As well as both incorporated corporations or unincorporated corporations are also included in the subject of corporate criminal law as stated in the Supreme Court of the Republic of Indonesia Regulation Number 13 of 2016 concerning Procedures for Handling Criminal Cases by Corporations which in article 1 number 1 reads *"A corporation is an organized collection of people and/or wealth, whether it is a legal entity or not a legal entity"* (Peraturan Mahkamah Agung RI, 2016). This is intended so that later there will be no loopholes for anyone in committing criminal acts such as destruction or environmental pollution.

After talking about the offense, the use of the principle of legality, and criminal liability, it is not appropriate if we do not discuss the sanction in environmental law, because with this sanction, it is this sanction that makes the regulation obeyed by the wider community. **Sangsi** itself can be said to be an act or punishment in order to force people to be subject to the law, which in general this punishment has various types of actions or punishments that a person gets depending on what he violates and from what regulations govern it. In environmental law based on the law that regulates it, there are two types of punishment, namely administrative punishment and criminal sanctions. According to **J.J. Oostenbrink**, administrative sanctions are sanctions that arise as a result of a relationship between the ruler in this case the government and citizens and are carried out without justice as a third party, so that they can be carried out in direct proceedings (Oostenbrink, 1967, p. 8). Meanwhile, criminal punishment according to **Ted Honderich** is a punishment given by the authorities as a punishment for its violations given to an offender (Muladi & Nawawi, 1984, p. 30). So there is a difference between these two types of punishment where the administrative sanction focuses more on their actions, in contrast to the criminal sanction which focuses on the person who committed the offense or criminal act. However, if you look at it again, it is felt that criminal sanctions can further have a significant impact compared to administrative sanctions, but in fact criminal law is a bad law, but until now there is no law that can replace criminal law in the field of national law, including the environment.

Implications of Changing the Criminal Sanction from Primum Remedium to Ultimum Remedium on the Direction of Environmental Law Development After the Omnibus Law

Various changes that occur in the body of several institutions, especially lawmaking institutions, in this case the DPR-RI, also have an impact on the emergence of renewals in several legal products issued, with the aim that the existing laws can be in accordance with the developments that live in society. Likewise with the renewal of several articles in Law Number 32 of 2009 concerning Environmental Protection and Management which has been updated into Law Number 11 of 2020 concerning Omnibus

Law. One of them is a criminal conviction change that ultimum remedium is no longer a primum remedium. The criminal sanction as ultimum remedium itself means that the criminal sanction is used as the last act in providing a deterrent effect through suffering and restriction of freedom on the deliker. This was also supported by one of the first originators of the term ultimum remedium, **Mr. Modderman**, who at that time served as the Dutch Minister of Justice, he stated in principle that the use of this principle made that the punishable were violations of the law which according to parktek could not be dispensed with in any other way (P.A.F, 1997, pp. 16–17). Meanwhile, the criminal sanction that is primum remedium means that the criminal sanction is used as an effort to resolve and provide the most important action in overcoming violations of the law that occur by providing suffering and restrictions on freedom for the offender.

If we look at Law Number 11 of 2020 concerning Omnibus Law, in the section that regulates environmental law, there is a striking difference in the application of criminal sanctions from Law Number 32 of 2009 concerning Environmental Protection and Management. As the abolition of article 102 of Law Number 32 of 2009 concerning Environmental Protection and Management (UUPPLH), even though it has been clearly and unequivocally explained that if a person or corporation manages B3 waste without the permits as in article 59 paragraph (4), it will be subject to a criminal sanction in the form of imprisonment of at least 1 (one) year and a maximum of 3 (three) years and a fine of at least Rp. 1.000.000.000,00 (one billion rupiah) and a maximum of RP. 3.000.000.000,00 (three billion rupiah). However, if we look at the Omnibus Law law, article 102 is abolished and replaced by the addition of article 82A, which essentially states that everyone who conducts business without a license as contained in article 59 paragraph (4), will therefore be subject to administrative sanctions. Of course, there is a difference in which a criminal sanction was previously imposed but in a new arrangement imposed by an administrative sanction. Not only that, the abolition of this criminal sanction also has the effect that in the case of supervision later there is no firmness, this is because in the provision of administrative sanctions in article 82A of the Omnibus Law law it is not accompanied by the provision of criminal sanctions if the administrative sanctions are not implemented, so in other words that in the application contained in article 82A it is more partial to business actors than to the environment.

Apart from the abolition of article 102, there is also a waiver of the use of the principle of *strict liability* contained in article 88, even though in the article it has been clearly explained that in the event that the activities carried out are related to B3 and pose a serious threat, the person or corporation carrying out these activities is required to be absolutely responsible for the occurrence of losses without any proof on the element of guilt, especially before, which is a specificity related to the accountability in the UUPPLH. However, in Law Number 11 of 2020, this specificity is eliminated by deleting the sentence *"without the need to prove the element of guilt"*. Of course, this can bring two aspects, both positive and negative. The positive is that this is indeed in accordance with the requirements of criminal liability, namely that there must be an element of guilt first, but the negative is that with the number of irresponsible individuals in the criminal justice system, it will result in the passage of a person or corporation that has committed a crime. Even though the problem that permeates this environment is classified as an *extraordinary crime* or commonly known as extraordinary crime. Thus, the need for a firm and absolute arrangement as in article 88 of the previous UUPPLH, so that people or corporations who wish to conduct deliberations can think twice as an implication of the absence of proof of the element of error.

The above certainly reflects that the renewal of the regulations contained in the Omnibus Law law in the environmental law section is something that is seen as an inappropriate step, especially in changing criminal sanctions. Because the criminal charge as Primum remedium is the most appropriate. Although in its own concept criminal punishment is an act that can be said to be special, which in its use is also as much as possible to be limited while there are other legal sanctions that can be used. However, in the case of the criminal sanction environment, this must be used as the main action because when

viewed from the conditions of criminal punishment in order to be used as a Primum remedium, which is the condition, namely: 1) Irreversible losses, If we associate it with environmental crimes, then the losses caused by pollution and destruction of the environment are largely unrecoverable, so this first condition is felt to have been met; 2) Cause a lot of losses or casualties, In terms of losses or casualties caused by environmental destruction or pollution activities, it can be said that it is very much a challenge that this environment is connected to various aspects of life, so that this second condition has been met; 3) Much needed, the use of criminal sanctions as primum remedium is very much needed, because enforcement using other laws is viewed as having no deterrent effect on the maker of the offense.

This is also supported by **Remmelink** opinion, that criminal law can be dismissed as a sharp sanction if in the application and use through other lighter law enforcement can no longer accommodate or solve existing problems. The impetus for why the use of criminal law as primum remedium is inseparable from the many environmental cases that occur in Indonesia. Referring to data collected from the Directorate General of Law Enforcement of the Ministry of Environment and Forestry, judging from existing data from 2015 to 2019, there were more than 2,052 complaints and supervision of companies suspected of pollution, destruction, or in carrying out their activities did not have an environmental permit, which at that time Indonesia was still applying criminal sanctions as a primum remedium in uuplh before some articles were changed into Omnibus Law law and became ultimum remedium. This gives an understanding that by still applying the criminal sanction as a primum remedium there are still many violations that occur, especially if applying the criminal sanction as ultimum remedium in environmental law, it is not impossible that the number of cases against environmental offenses will be higher, suing in applying criminal sanctions as ultimum remedium prioritize public awareness in terms of maintaining and orderly in carrying out activities that have a relationship and impact on the environment.

So if we connect this with the concept of sustainable development, which has the goal as a development concept to act in ending poverty, hunger, AIDS, and discrimination against women and girls so that everyone can enjoy peace and prosperity by 2030 (United Nations Development Programme, 2022). Which in realizing sustainable development must be supported by three main milestones, namely economic, social, and environmental. These three major milestones must all be met, which if one of them is not met then it cannot be said to be sustainable development. In other words, in order to achieve sustainable development, of course, there needs to be economic development, social development, and environmental development (ecology), which is an absolute element and must exist in order to realize a sustainable development that will later also be oriented towards the development of national laws (Hanley et al., 2001, p. 5).

Towards the development of the national law itself, which aims to achieve the mandate contained in the constitution such as welfare and progress, be it a sense of justice, and a sense of security for the community and also the environment. There are many ways that can be done to realize legal development based on sustainable development is by having good laws in each sector as well as environmental law which is an important part of sustainable development.

By looking at the conception of the Indonesian state in enforcing environmental law using criminal sanctions placed as ultimum remedium and by prioritizing public awareness, which in general the awareness contained in the Indonesian community can be said to be very minimal, it is appropriate that Indonesia cannot be said to have realized the concept of legal development based on sustainable development because one of its main elements in sustainable development i.e. the development of the environment in its law enforcement has not been able to be in line with its intended purpose. Although is indeed a concept offered in Law Number 11 of 2020 concerning Omnibus Law, is a good and good breakthrough, but for now seeing the lack of awareness of the Indonesian people, it can be said that the current use of this concept is not appropriate. However, if later the government insists on sticking to the establishment by using the concept contained in it, it must first increase the quality of awareness

contained in the Indonesian people, because accompanied by high self-awareness and the use of the concept offered by the A Quo law in law enforcement its context, this allows Indonesia to become a great and strong country in the eyes of the world, especially in its commitment to carry out good legal development in the context of sustainable development for the preservation and preservation of the environment not only for the Indonesian country but also contribute widely to the world. As well as in the use of the A Quo law as a law must always be in the same direction as the life of the people, in accordance with the opinion of **Prof. Mochtar Kusumaatmadja** who stated that the law cannot be separated from the system of values that exist and are embraced in society (Kusumaatmadja & Sidharta, 2000, pp. 49–50).

Conclusion

The change in the scheme in the enforcement of the environment law, which was amended through Law Number 11 of 2020 concerning Omnibus Law, brought a new implication, echoing the conception of the Indonesian state that adheres to the law as a basis in accordance with article 1 paragraph (3) of the 1945 Constitution. This means that every action carried out by legal subjects, both humans and corporations (legal entities / not legal entities) must be in accordance with the regulations contained in the law, this is intended so that the purpose of the existence of law is to achieve certainty, expediency, and legal justice. Likewise, environmental law is an important factor in the survival of the community, with the functions and aspects it covers that are so crucial. In terms of the application of environmental law, it must also be based on the law, which if we relate to the enforcement of environmental law based on criminal sanctions, in determining whether a person deserves the sanction must be based on several factors, First, whether there is a violation in environmental law or not, Secondly, whether the person can be subject to criminal liability or there is an element of removal in it, Third, the criminal sanction used whether it is appropriately used in overcoming environmental problems that occur. So that the application of environmental law is not used incorrectly.

As well as to the application of the criminal sanction which was changed to ultimum remedium in the A Quo law, through the abolition of article 102 and replaced by the addition of article 82A, as well as the abolition of the *strict liability* principle, this can all be said to be a mistake made by the legislature, suing the importance of this environment must also be accompanied by the application of a fairly prohibitive sanction for the offender by using a criminal sanction as primum remedium, instead of making criminal sanctions a last resort and placing administrative sanctions as the main effort. Although the concept presented has been good by prioritizing public awareness, but with minimal community awareness of the importance of the environment, this is a form of degradation of law enforcement, preservation and protection of the existing environment. Later this will also have an impact on hampering the development of national laws that orientate on sustainable development, because one of the main factors is environmental development.

The government should not be in making a change to the existing legal rules, especially environmental law, should not focus too much on good and good concepts, but should also think about the readiness and ability of the community itself in accepting the change. Prosecuting while still using the criminal sanction as a primum remdium alone there are still a lot of deviations from environmental law. Moreover, with the change of criminal sanctions as ultimum remedium which is more concerned with public awareness which is considered to be lacking, this will allow for a greater deviation to occur. In other words, the government must immediately take appropriate and strategic steps to overcome this problem, the step that the government can try is to make changes to Law Number 11 of 2020 concerning Omnibus Law in the section that regulates environmental law, in order to re-establish criminal sanctions as primum remedium. Not only that, the public can also make various efforts such as conducting a Judicial Review to the Constitutional Court on the grounds that the use of criminal sanctions as ultimum

remdium in environmental law contained in law A Quo is contrary to article 28H paragraph (1) of the 1945 Constitution related to the guarantee of being able to get a good living environment.

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