

Criticism of the Strategy of Criminal Law Formulation in the Law Number 22 Year 2009 Concerning Traffic and Road Transport

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Abstract— Order in Traffic to a certain extent reflects the moral, mental, and personality of the nation, and this is an indicator of the dignity of a nation. Indonesia has enforced The Law Number 22 Year 2009 concerning road traffic and transportation (UULLAJ). UULLAJ is an administrative nuance, but the norms in UULLAJ do not only include administrative sanctions but also criminal sanctions. Criminal sanctions are in articles 273 to Article 313 The Law number 22 Year 2009 while administrative sanctions are imposed on 18 articles. The formulation of criminal law in this Law is important to be investigated because there are obstacles in terms of law enforcement and the urgency of harmonizing with criminal law policies. The purpose of the study is to analyze criminal law policies in the traffic and road transport laws associated with the principles in the formulation of criminal law. The research method used is normative juridical, with data collection is a literature study and is analyzed prescriptively. The results of the research and discussion show that based on losses on administrative domain traffic violations that have an indirect impact, national public issues regarding traffic management and engineering and complex transportation systems, tolerance for losses due to actions is still large because of some fundamental things, the majority of people think fairness traffic violations, excess administrative sanctions compared to criminal sanctions, formulation of multiple interpretations and large discretion on law enforcement so that law enforcement is ineffective and inefficient and does not affect prevention of offenders to repeat their actions. The conclusion is the traffic and road transport law does not meet the requirements as a law which contains the formulation of criminal law and is stated as part of over criminalization.

Keywords— traffic violation, administrative sanction, criminal sanction

I. INTRODUCTION

Sociologist Watanabe¹ assesses the level of national discipline of a nation as measured by the extent to which the community obeys traffic laws on the highway. To see the national discipline of a nation is not difficult, which is enough to stand for about an hour or two without traffic violations can be ensured that the nation's discipline is good, so traffic discipline reflects national discipline and culture. Traffic discipline is a behavior that obeys the law and rules that regulate the movement or return of vehicles and people on the road to be safe, fast, smooth, orderly and orderly. The indicators of society being disciplined are: (1) because of the high awareness of the community, someone knows and behaves or behaves obediently, obeys the rules that apply (law) because of awareness of oneself. (2) Second is someone behaving or behaving obediently, obeying the applicable regulations because of sanctions that will be accepted if they violate the applicable rules.

If the community tries to harmonize between the Law Number 22 Year 2009 concerning traffic and road transportation (hereinafter referred to UULLAJ), for the sake of public order, this requires enforcement of the Law because enforcement is needed when a violation occurs. The number of violations that occurred in Indonesia was 23,200 cases per day, the following table is the prosecution carried out by Kepolisian Republik Indonesia (the Indonesian Republican Police). In Jakarta and surrounding areas represent 5 percent of that amount. Traffic violation data in Indonesia².

TABLE I. The number of violations from 2012-2016

Year	Number of traffic violations
2012	5.790.191
2013	6.238.869
2014	12.009.060
2015	7.965.214
2016	8.497.779
Totally	40.501.113

Based on the table above shows that the number of traffic violations that occur in Indonesia increase from year to year. From 2012 to 2016, the number of violations jumped to 47 percent. From data on traffic violations belonging to the Indonesian Police Corps, seen since 2012, the number of violations has never dropped. In fact, in 2014 the number of violations had more than doubled compared to 2012.

UULLAJ is actually an administrative law, but the norms in UULLAJ do not only include administrative sanctions but also criminal sanctions. Criminal sanctions are in articles 273 to Article 313 UULLAJ while administrative sanctions are in Articles 76, 91, 92, 136, 199 and 244 with the imposition of administrative sanctions on 18 articles. This is what needs to be examined more deeply about the politics of criminal law for UULLAJ by discussing the formulation of criminal law in UULLAJ

II. RESEARCH METHOD

The research method used is normative juridical legal research³, data collection is carried out a literature study on legal materials, both primary, secondary and tertiary legal materials or non-legal materials. Processing of legal materials by holding systematics of written materials. Material processing is done by selection, classification and systematic in a logical way. Data analysis uses qualitative, which produces descriptive data because researchers not only reveal the truth but also understand the truth. The conceptual approach is used because the researcher makes legal arguments in answering the legal problems that are proposed.

III. RESULT AND DISCUSSION

Criminalization is an actor determination of a ruler concerning certain actions which the community or groups of society deem as an act that can be punished as a criminal act⁴, while labeling perspective, criminalization is the decision of the criminal law-making body to label human behavior as a crime or a criminal act⁵.

The finalization of the ULLAJ began when The Law Number 14 the Year 1992 concerning traffic was later replaced by The Law Number 22 Year f 2009 concerning road traffic and transportation. Both of these laws contain criminal acts, whereas, in fact, criminalization is a complex and separate problem⁶, the complexity of criminalization lies in so many factors that are related and need to be considered in the process of criminalization. The complexity is related to the types of actions that can be criminalized, in which the types of criminalized acts do not only include actions that are essentially evil but also include neutral actions that do not contain evil elements.

The important point is that the act in the form of a violation in UULLAJ must contain evil nature or even a neutral act because UULLAJ contains actions that are threatened with criminal sanctions. The discussion about UULLAJ requires the fulfillment of the principles regarding the formulation of criminal law as a strategy for the formulation of criminal law⁷, namely:

The principle that the loss described by the act must be reasonable, while this loss can have a moral aspect (morality), individual-group-collectivity), but always must be a "public issue"

An important feature of a criminal law is that it attracts a punishment or sanction. With the civil law, damages are imposed with the aim to compensate the injured party for loss suffered by criminal law. The aim is to punish the offender and deter others from carrying out the same acts⁸.

Ali's opinion⁹ that community legal awareness is not synonymous with compliance or legal observance of the community itself. This is because the legal awareness of the community does not guarantee that the community will obey a rule of law or legislation. Violations of UULLAJ can cause losses, one of which is in the form of accidents that result in the emergence of casualties, or loss of objects or material. The result of this accident is that it can cause trauma to the person himself or others.

Traffic violations can only be in the form of administrative violations that have an indirect impact, but if the violation causes an accident, the loss is in the form of soul, body, and property, so the loss is related to the basic rights of someone. Losses are moral aspects, namely violations that show a person's character in the form of discipline, tolerance, and responsibility. The loss in the moral aspect has an indirect impact if it is caused by the administrative domain, but when the violation causes a person's fear after experiencing or knowing an accident violation due to the behavior of others who also use the traffic.

Public issues related to traffic can be illustrated by the state's loss in the form of disruption of the nation's economy or threats to national security, public welfare in the form of traffic order. Public national issue more about management and traffic engineering and transportation system that is not optimal, so that air traffic due to poor performance, with substantial fuel consumption and vehicle technology outdated, it is all the result of environmental pollution. World Health Organization (WHO) affirming the indication of the cause of the accident, basically the error is based on several reasons intertwined with many dominant factors, among others disciplines pass-traffic by road users, the role of stakeholders in providing support for the implementation of transport comfortable and safe, adequate transportation system, the role of law enforcement, and adequate infrastructure support.

The principle of tolerance of these actions is an assessment of the occurrence of losses, closely related to being or not tolerance; tolerance is based on respect freedom for individual and responsibility

In determining the behavior to be criminalized, a proper behavior can be submitted to private ethics or if it has become part of the public domain. The behaviors that enter

the private area do not need to be criminalized, while the behavior that enters the area can be criminalized if it is very detrimental to the interests of the community.

This Guide refers to the meaning of tolerance defined in Article 1 of the UNESCO. Declaration of Principles on Tolerance. Thus, Tolerance consists of respect, acceptance, and appreciation of the rich diversity of the cultures of our world, our forms of expression and the ways of being human. It is fostered by knowledge, openness, communication, and freedom of thought, conscience, and religion. Tolerance consists of harmony in difference. It is not only a moral duty but also a political and legal requirement. Tolerance, the virtue that makes peace possible, contributes to the replacement of the culture of peace. Tolerance is not concession, condescension or indulgence. Tolerance is, above all, an active attitude prompted by the recognition of universal human rights and fundamental freedoms of others. In no circumstances can it be used to justify these fundamental values. Tolerance is to be exercised by individuals, groups, and States. Tolerance is the responsibility that upholds human rights, pluralism (including cultural pluralism), democracy and the rule of law. It involves the rejection of dogmatism and absolutism and affirms the standards set out in international human rights instruments. Consistent with respect for human rights, the practice of tolerance does not mean that the toleration of social justice or the abandonment is weakening of one's convictions. It means that one is free to adhere to one's own convictions and accepts that others are to theirs. It means accepting the fact that human beings, their naturally diverse appearance, situation, speech, behavior, and values, have the right to live in peace and to be as they are. It also means that one's views are not to be imposed on others¹⁰.

Traffic conditions are an expression of social solidarity that develops in society. Law reflects solidarity. The majority of people have considered that traffic violations are acts that have an indirect impact on the loss of the State or society so that public tolerance is so great, this also happens to law enforcers who also provide considerable tolerance to violators for traffic violations that occur.

Law enforcement and community tolerance for losses suffered by traffic victims is too large due to the following : amount of police as the traffic violation action coordinator does not have the same amount as the community so that they cannot handle all violations occur, losses have an indirect effect except on someone's death, The police prioritize the settlement of violations that lead to the death of a person first rather than the reduction of property rights in the form of, The norm contained in UULLAJ too much so that it requires a comprehensive understanding of law enforcement and society, some norms in UULLAJ have fuzzy interpretations, and the traffic utilization is carried out by all levels of society so that as long as the community does not question the loss experienced, the violation is considered as something natural.

The principle of subsidiarity (before the act is declared a criminal act, it is necessary to note whether the legal interests violated by the act can still be protected in other ways because the criminal law is *ultimum remedium*.

The intention here is not to embark on any grand tour of subsidiarity, as this principle has already been extremely well dissected in the legal doctrine¹¹. Criminal law must be placed as *ultimum remedium* (weapon ultimate) in tackling crimes that use a reasoning instrument, not as a *primum remedium* (main weapon) to overcome criminal problems. The other meaning of the principle of *ultimum remedium* is when the implementation of the formal criminal law must wait until the ineffectiveness of administrative law is enforced. Criminal law must be used sparingly because criminal sanctions are the most severe legal sanctions and can cause stigma for people who are subject to these sanctions. Criminal law must be used sparingly if social order runs well, and can be used excessively if social conditions are not orderly.

The application of the principle of subsidiarity in the policy of criminalization and decriminalization requires an investigation of the effectiveness of the use of criminal law in overcoming crimes or acts that harm society. The main problem that needs to be examined is that the objectives to be achieved by using criminal law cannot be achieved by using other methods that are less social and individual costs. This requires that we know about the consequences of using the criminal law, and can guarantee that the interference of the criminal law is indeed very useful.

The background to the increasing need to use the principle of subsidiarity in determining illicit actions is driven by two factors. First, the use of the subsidiarity principle will encourage the birth of criminal law a just. Secondly, the practice of legislation has an impact negative on the criminal law system due to the existence of "over criminalization" and "overproduction" so that criminal law becomes a loss of influence in society. In addition, over criminalization of over penalization and over-recognition further exacerbates the workload of the legal apparatus in the criminal justice process.

The legal interests that are protected in the UULLAJ promulgation are the interests of the State, the community and the personal. This interest is related to the protection of property, independence, soul, and body, so when there is a violation that results in an accident there is a seizure of legal protection for all of these things but the majority of violations in UULLAJ are about the administration. This is the reason that the administrative law should be more instrumental than criminal law.

This Act is also regulated regarding administrative sanctions imposed on transport companies in the form of warnings, suspension of licenses, revocation of permits, granting fines. Provisions concerning criminal and administrative sanctions are also threatened by road officials or organizers but are limited to a number of matters relating to the corporation.

In the explanation of this Law, it is stated that the regulation and application of criminal sanctions are regulated more firmly. For violations that are mild, are subject to criminal sanctions or relatively lighter fines. However, against serious violations and there is an element of intentionally imposed a much heavier criminal sanction. This is intended to have a deterrent effect on perpetrators by not too much burden on society.

Based on the explanation from UULLAJ, the aim of giving criminal sanctions is to provide a deterrent effect, even though all the objectives of sanctions are also a deterrent. Then, to the knowledge of the author, before the formation of this UULLAJ, an investigation into the effectiveness of the use of criminal law in overcoming crimes or acts that harm the community never existed, so the use of criminal sanctions was not preceded by investigation or research. The following are differences in administrative sanctions and criminal sanctions¹².

TABLE II
Differences in administrative sanctions and criminal sanctions

Differences in	administrative sanctions	Criminal sanctions
purpose of imposing	acts of violation	actors
a form of sanctions	<i>bestuurdwang</i>	sorrow (and fines)
actions	administrative officer	law officers
process imposition	without going through judicial procedures	through judicial procedures
an objective of sanctions	restoring original conditions	improving the offender

The table above shows that the process of imposing administrative sanctions is faster than the imposition of criminal sanctions because the judicial process requires that the dimensions of space and the time of the criminal sanctions are ineffective in suppressing losses caused by traffic violations. UULLAJ violations are mostly administrative problems and should be subject to administrative sanctions. Administrative sanctions in the form of administrative fines that can be directly applied in the form of *dwangsom*.

There is no reason for the category of law violations that are threatened with administrative sanctions or criminal sanctions so that the purpose of granting sanctions becomes absurd. The principle of *ultimum remedium* is also that if the administrative law enforcement is not effective then the criminal law is applied, so another alternative in dealing with traffic violations is to use administrative sanctions beforehand associated with the analysis of costs and results.

The discussion on cost analysis and the results show that the rule of law to criminal law requires a cost much greater while the purpose of the rule is in order to give deterrent effect to offenders who sometimes do not fit den purpose of criminal sanctions was given, while the administrative law with an administrative fine show that requires a smaller fee and the results will depend on the offender itself. In practice, the attention of law enforcement officials to traffic violations is limited to administrative violations and is subject to criminal sanctions in the form of criminal fines, while criminal and administrative law enforcement against corporations is rarely carried out.

The principle of proportionality (there must be a balance between the losses described by the limits given

by the principle of tolerance and with the reaction to the crimes given);

The principle of proportionality imposes certain restrictions on law-making and enforcing authorities. The principle of proportionality which, due to its complexity and significance for the process of establishing and applying the law, requires detailed and separate discussion. The essence of the assumption of the penalty must be commensurate with the seriousness of the liver, thus indicating that it is derived from a guaranteed function of criminal law¹³.

The balance between the losses, tolerance limits with the reaction or criminality given is never a consideration in the formulation of criminal law in UULLAJ. The loss to the State has an indirect impact and requires a long time to find out the loss concretely, while the loss is more experienced by the victim or other people affected by the act. The following is a table on the comparison of losses, boundaries of laws and reactions to crimes given

Table III
comparison of losses, boundaries of laws and reactions to crimes given

Year	Losses	The limits of tolerance	reactions of the giving of sanction
2015	Administration 225 billion IDR	Violations without death victims or judicial proceedings	regretful, or just accept a judge's decision or repeat violations
2016	Administration 212 billion IDR 25.859 people died	Violations without death victims or judicial proceedings	regretful, or just accept a judge's decision or repeat violations
2017	Administration 24.213 people died seriously injured 22.939 people	Violations without death victims or judicial proceedings	regretful, or just accept a judge's decision or repeat violations

Table describes the losses suffered by the State in the form of conversion in the form of a currency and the number of victims who died, while the tolerance limits are given when a victim dies, the tolerance is limited, and the reaction to the crime is given It shows that people consider traffic violations to be a reasonable violation so that recidivism is still easy to find, except for violations that cause someone's death.

The principle of legality, if the previous principle is considered, it still needs to be seen whether the act can be formulated properly so that the legal interests to be protected are covered and also clearly related to the principle of error, which is the main joint of criminal law;

The principle of legality, namely, the principle whose essence is contained in the expression *nullum delictum nulla poena sie praevia lege poenali* proposed by Von Feurbach. The expression implies that "there is no act that can be punished except for criminal legislation that already existed before the act was committed". The principle of legality is the most important principle in criminal law, especially the basic principle in the determination of criminalization, according to classical flow, the principle of legality has a function to limit the scope of criminal law. Whereas in the modern flow the principle of legality is an instrument to achieve the goal of community protection.

Mens rea means that the offense must be committed knowingly and with an intent to evade the prohibition or restriction. Kingsmill Moore J. in *Melling v. O Mathghamna* stated: "where is the *mens rea* is made an element of an offense is generally an indication of criminality." *Mens rea* is generally an essential ingredient of crime but there are exceptions where offenses do not require *mens rea*.

Yet in the context of criminal law, the principle of legality is more complex than a simple prohibitive retroactive criminal law, as it is a conjunction of intertwined principles. The most relevant function of the principle of legality in the context of criminalization is to secure the legal position of the people against the state and the function to protect community members from arbitrary actions by the government is the legal political dimension of the principle of legality.

The requirements of a criminal act are in line with the principle of *lex scripta* (formulated as a written criminal law), the principle of *lex certa* (the formulation of clear and not multiple interpretations), and the principle of *lex stricta* (the rule must be interpreted narrowly and not used analogically), then the violation traffic that imposes criminal sanctions does not fulfill the two principles, namely the *lex certa* principle and the *lex stricta* principle.

According to Rummelink's opinion¹⁴ that the error indicator is the denunciation directed by the public against humans who actually can be avoided while in the opinion of Mezger it is a whole condition that provides a basis for personal prosecution of perpetrators of criminal acts. Comparison of the formulation of actions in UULLAJ with the scope of protected legal interests and the principle of error that formulation of Article 273 to Article 313 UULLAJ with the legal interests of the right to life, body, and property and the principle of error is that can be deemed an act and can be avoided.

Criminal acts listed in UULLAJ is still multi-interpretation, this is evidenced by the many norms in UULLAJ whose formulation requires further implementing regulations or norms that are still interpreted differently in the law enforcement agencies themselves as well as the community, this is evidenced during the law enforcement stage. Violations are complex and involve discretion committed by law enforcement. The quantity of actions listed is too large so the community needs to be informed in a sustainable and comprehensive manner. Socialization of UULLAJ along with implementing regulations does not reach the community as a whole, even though the whole community is a traffic user and there is an overlapping authority of the police so that the supervisor of the police performance does not yet exist, this can have an impact on chaotic law enforcement.

The principle of practical use, and effectiveness with regard to the possibility of its enforcement and its impact on the general of the prevention (practical use and effectiveness).

The principle of effectiveness in criminal law is a matter with deep philosophical underpinnings. It encompasses a restrictive policy stating that the criminal law should not be used if it is not effective in controlling conduct, and expansive policy stating that the criminal law should be

used if it is the most efficient and cost-effective means of controlling conduct. Generally, effectiveness is discussed in terms of positive or negative legitimacy. In this way, the effectiveness is viewed as a presumed filter where the limiter claims that no criminalization can be justified if it cannot be expected to be effective. Nevertheless, the very notion of effectiveness as a template for criminalization is generally considered as a difficult parameter when justifying legislation. First, and in extremely general terms, it is often stated that ineffective provision would undermine the respect for criminal law systems as prevention in the question would lose much of its function. Secondly, if a criminal law is too severe, as noted, it would render itself ineffective as the citizens would find it unfair (fair labeling)¹⁵.

Law enforcement is an indispensable element for social life, in the protection of rights and freedoms in a society and in providing public security. The mission of law enforcement is executed in accordance with the Constitution, international conventions, laws, and legislation concerned. When the formulation of criminal acts in UULLAJ should have had predictions in the practice of law enforcement, and up to now law enforcement is forced when there are violations that occur. This is evidenced by the absence of violation categories that fall into the domain of administrative violations or criminal offenses.

The law enforcers who are the coordinators are the police, meanwhile act want the UULLAJ explanation that Kepolisian Republik Indonesia (Indonesian Republican Police) is authorized for government affairs in the field of registration and identification of motor vehicles and drivers, law enforcement, management operations and traffic engineering, as well as traffic education. This is not fully in accordance with Article 3 The Law Number 2 Year 2002 concerning the police that the function of the police is one of the functions of the state government in the maintenance of public security and order, law enforcement, protection and service to the community. Its compatibility is only with the authority of the Police for law enforcement and not in other fields especially in administrative matters. Law enforcement will not be effective because law enforcers have a heavy burden in forced their obligations to undergo a criminal justice process. This is done for the sake of harmonization between the authority of the police in the UULLAJ and the KUHP and the police law.

The impact on public prevention when law enforcement does not go as it should, this can be evidenced by the absence of a preventive motivation from someone before committing a violation because the tolerance of law enforcement and society is so great and losses on traffic violations have an indirect impact on society.

IV. CONCLUSION

A. Conclusion

The political of criminal law on UULLAJ to discuss the formulation of criminal law in the Law Number 22 Year 2009 on traffic and road transport is based on the fulfillment of the principles concerning the formulation of criminal law as strategy formulation of criminal law that is the harm principle regarding the moral and public issue aspects, the

principle of tolerance for the loss of such actions, the principle of subsidiarity, the principle of proportionality and the principle of legality for legal interests that will be protected and have clarity on the relationship with the principle of error and practical use and effectiveness principles and their impact on general prevention. That based on losses on administrative domain traffic violations that have an indirect impact, national public issues regarding traffic management and engineering and a complex transportation system, tolerance for losses due to actions is still large because of some fundamental things, and the majority of the people are justified in traffic violations, the excellence of administrative sanctions rather than criminal sanctions in the field of traffic, the formulation of multiple interpretations of criminal acts, the number of law enforcers that are not commensurate with the number of people and the great discretion of law enforcers so that law enforcement is not effective and efficient impact on preventing offenders from repeating their actions. The conclusion is that the formulation of criminal acts in UULLAJ is a manifestation of over criminalization because it promotes criminal law rather than the administrative field, especially for administrative violations for both individuals and corporations.

B. Recommendation

Police have the authority to the police law to act as law enforcement officers only without being an administrator in management, traffic engineering, and transportation systems so that the resolution of traffic problems can be handled more quickly.

ACKNOWLEDGEMENT

The author would like to thank you to Allah SWT for everything in this life. I would like to thank you for all parties that make this research possible, University state of Surabaya and the school of law, colleagues and student who involved in this research paper.

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