

Risk Aversion of Special Penalties against Illegal Fishing

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Abstract—The applicability of the financial penalties single on a criminal offense Illegal Fishing in the Fisheries court in Tanjungpinang years 2015 - 2017 cause problems its own in process of the execution conducted by The Prosecutor General (or in Indonesia Jaksa Penuntut Umum). Based on data obtained no inmates willing to pay fines has decided and only hope in the process of returning to the country of origin. The problem in this study is risk aversion criminal penalties against the perpetrator criminal offense Illegal Fishing in the Fisheries Tanjungpinang years 2015 - 2017. The research used in this study is the research in juridical normative empirical. The nature of the research used in this study is the descriptive analysis. The conclusion in this study, the criminal fines who decided over the last 3 years ineffective, after the defendant terminated with the criminal fines defendants cannot be executed, in a period of time that are not defined defendants returned to the state of origin without have serving time the slightest or returned to the country of origin without undergo any sanctions.

Keywords—illegal fishing; criminal fines; criminal

I. INTRODUCTION

The Food and Agriculture organization (FAO) referred to Indonesia as a producer country the second largest fish in the world. Ironically, Indonesia has not become a country of exporters of fishery the largest, not even entered on the ranking of 10 large countries exporters of fish. Allegedly the rampant activities of illegal, Unreported, and Unregulated (IUU) Fishing to be the cause [1].

The criminal act of Illegal Fishing is processed in the Court of Fishery affairs Tanjungpinang since the years 2015 until 2017 chart shows increased. In fact, the Illegal Fishing not only occurred in the territorial sea but also occur in the waters of the Exclusive Economic Zone of Indonesia (ZEEI), The problem of illegal fishing by foreign vessels is not an issue of loss of fisheries resources alone, but also about the violation of the sovereignty of the state which is the very principle, for it is the enforcement of law and our sovereignty should be strictly enforced [2].

Aditya Taufan Nugraha and Irman said that area of Indonesian seas that places in ZEEI is a region of the ocean that have the potential of wealth for Indonesia [3]. Based on this, the importance of the potentials sources of wealth in the sea the government has issued various types of legal products

organize, protect as well as perform law enforcement in the region the waters of Indonesia, especially in the region of the Exclusive Economic Zone of Indonesian ZEEI. This geographic condition will certainly require various forms of policy and laws and regulations that have a pattern of maritime [4].

The provisions of Article 73 Paragraph (3) of the United Nations Convention On the Law of The Sea (UNCLOS) 1982 Has been ratified in Law number 17 year 1985 on ratification of the 1982 UNCLOS confirms that the Special for the perpetrators of Illegal Fishing in the Indonesian Exclusive Economic Zone ZEEI should not be done confinement loss if there is no existing agreement between the realted countries. Although the defendant is not able or not willing to pay the penalty, or any form of punishment other entities then it should only be given criminal sanctions fines against the perpetrators of illegal fishing in the region of the Indonesian Exclusive Economic Zone (ZEEI).

From the perspective of the Book of Law Criminal Law mentioned in limitedly in article 10 letter A to be a problem among law enforcement agencies, in particular among the Prosecutor's office and the scope of judicial fisheries. Criminal fines becomes a polemic when handed down to the convicted person in he absence of criminal replacement as in Article 30 paragraph 2 of the Ciminal Law Legislation (Penal Code) which stated "If a criminal fine is not paid, he was replaced with imprisonment". The criminal fine imposed without criminal replacement is called with a maximum fine of a single namely a maximum fine of without accompanied bye a penal substitute.

Realton of criminal penalties with the legal status of the convicted person of the crime of Illegal Fishing ZEEI is when the penalty fines are imposed and the convicted person is not able to pay it by reason of no money to pay the fine and only existed as an ordinary fisherman who worked on the ship owner.

While on the other side of the criminal fine is not allowed by a penal substitute so that the arguments are very telling for convicted of illegla fishing, especially foreigners to escpae from the laws of Indonesia. The following submitted data for the application of sanctions of fines on criminal offences of

illegal fishing in court fisheries Tanjungpinang Yeras 2015 - 2017.

TABLE I. CRIMINAL FINES OF ILLEGAL FISHING IN THE COURT OF FISHERY AFFAIRS TANJUNGPINANG YEARS 2015 – 2017

No	Criminal Fines	Years			Total
		2015	2016	2017	
1	30.000.000			2	2
2	50.000.000			12	12
3	100.000.000			5	5
4	150.000.000			2	2
5	200.000.000			14	14
6	250.000.000	1		3	4
7	300.000.000			8	8
8	500.000.000		2	5	7
9	1.000.000.000	7	16		23
10	1.500.000.000	9	3		12
11	2.000.000.000	4	8		12
12	3.000.000.000	1			1
13	6.000.000.000	1			1
Total		23	29	51	103

Sources : SIPP fisheries court in Tanjungpinang years 2017.

A. Problems

The problems in this study is ineffective criminal fines for the perpetrators of the criminal act of Illegal Fishing in the Court of Fishery Tanjungpinang Years 2015 – 2017.

B. Method

This type of research is normative juridical empirical [5]. The nature of research used in this research is descriptive analysis [6]. The source of the data used in this research is taken from primary data and secondary data:

- Primary Data is Data obtained directly from the first source related to the problems that will be discussed [7]. Source data obtained from the field directly with an interview to the prosecutor and the Judge of the court of Fishery affairs Tanjungpinang
- Secondary Data is data obtained from books and regulations as as supplementary data source primary data.

II. RELATED LAWS AND REGULATIONS

Article 73 Paragraph (3) of the United Nations Convention Of The Law Of The Sea (UNCLOS) 1982 which states “The Punishment of the state Beach that is meted out against the violation of the Laws and Regulations of fisheries in the Exclusive Economic Zone may not include confinement, if there is no agreement to the contrary between the countries concerned or any form of punishment other entities”.

Article 55 United Nations Convention Of The Law Of The Sea (UNCLOS) 1982 which states Exclusive Economic Zone (EEZ) is a certain outer area adjacent with territorial sea, that obeys a certain law regime that is set based on which privileges and jurisdiction of a coast country as well as privileges and freedom of other nations.

Law Article 2 Number 5 1983 About Indonesia Exclusive Economy Zone stated that Indonesia Exclusive Economy Zone

is the lane outside that is contiguous with Indonesia’s sea territory as how it is established based on the law bestowed about Indonesia’s territorial waters which include the seabed, the soil beneath and the water above with the outermost boundary of 200 miles of sea measured from the sea boundary line of Indonesia’s territory.

The Supreme Court Circular Letter Number 3 2015 About The Plena Meeting Room of The Supreme Court Year 2015 Result Proposition Execution As A Duty Implementation For Court Guideline that stated “in Illegal Fishing problem in Indonesia Exclusive Economy Zone towards the convicted can only be fined criminally without being charged of imprisonment for fine exchange”.

Criminal Procedure Code (KUHP) Article 10; first Primary Punishment, that consists of: 1) Death Penalty. 2) Prison (*temporary or a lifetime*), 3). Imprisonment, 4). Fine. *Second*, Additional Punishment, that consists of: 1). Annulment of several certain privileges, 2). Expropriation of certain belongings, 3). Announcement of Judge’s Decision. Criminal Procedure Code (KUHP) Article 30 Number 2 that states “If criminal amercement is not paid, it will be exchanged with criminal imprisonment”.

III. ILLEGAL FISHING CRIMINAL ASSESSMENT PROCEDURE

Criminal Procedural Law *Illegal Fishing* using a short examination procedure, identified from investigation, prosecution, and Illegal Fishing criminal action adjudication process which is brief compared with common criminal law process [8]. Fishing Criminal Judicial Process can be seen as followed:

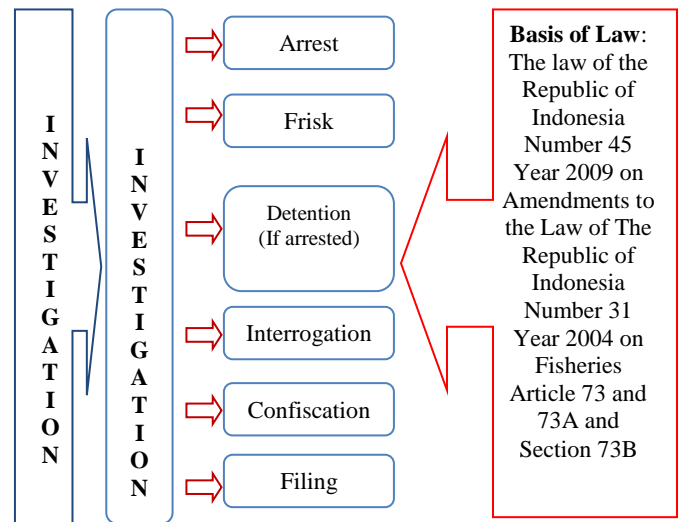


Fig. 1. The investigation (stage I).

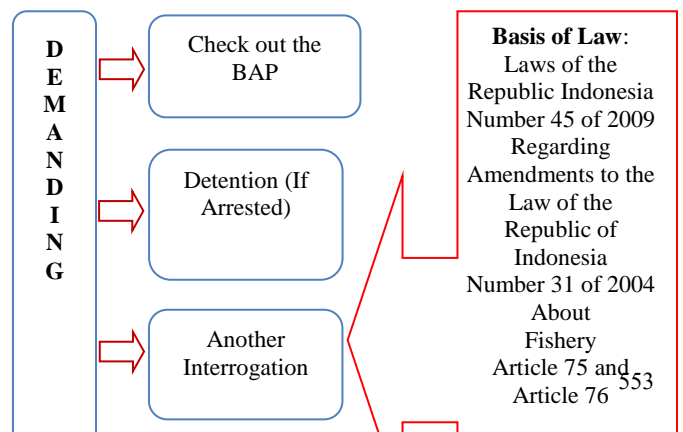


Fig. 2. The prosecution (stage II).

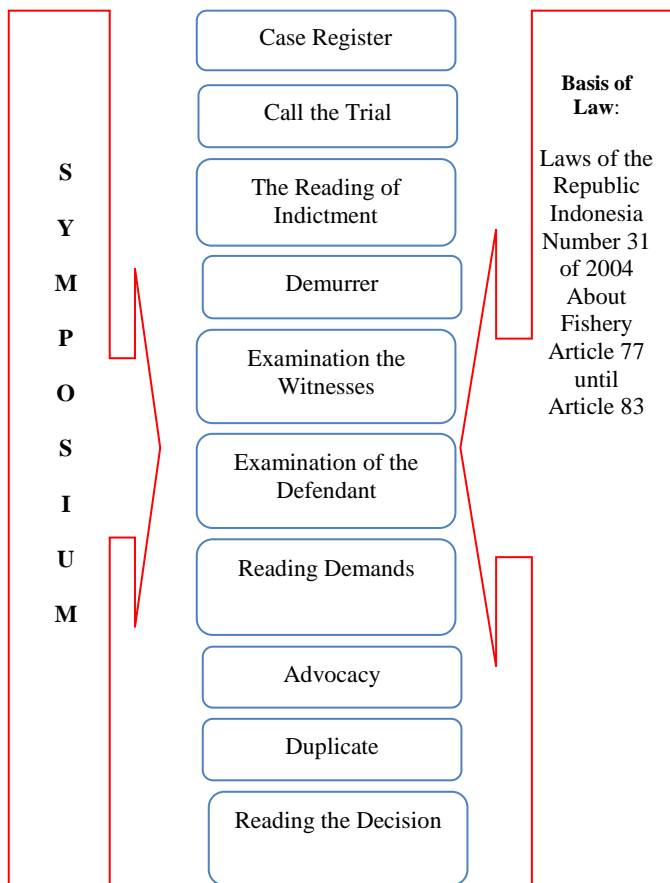


Fig. 3. Stage of proceedings (stage III).

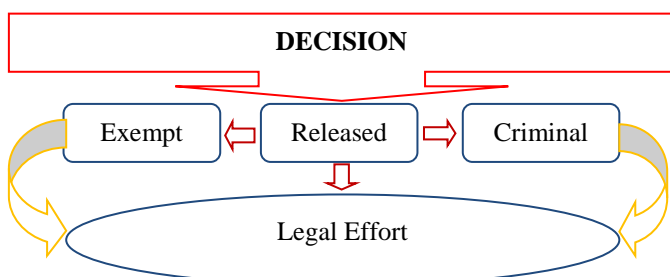


Fig. 4. Last stage (stage IV).

IV. DISCUSSION

Criminal of act *Illegal Fishing* at the Court of Fisheries affairs Tanjungpinang Years 2015-2017 experienced an increase as shown below.

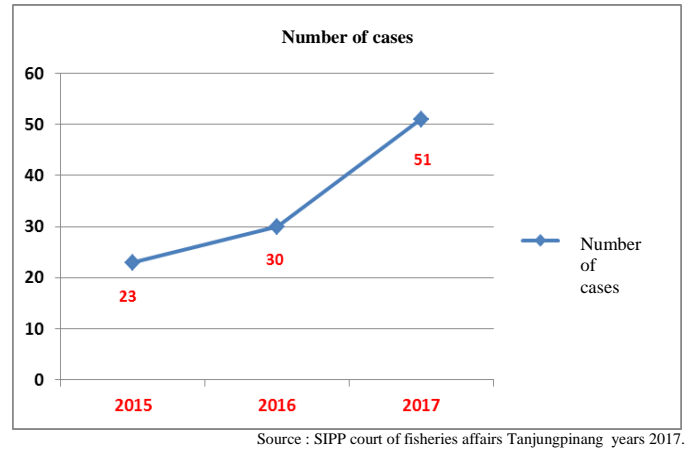


Fig. 5. The applications of criminal penalties in the last 3 years.

The tendency of decrease in the value in the application of sanctions for perpetrators of criminal acts of *Illegal Fishing* in Court Fisheries Tanjungpinang as shown below. The imposition of fines with a value of billions of high in 2015 and 2016 and be down in 2017. The year 2017 the value of criminal fines only range from hundreds of millions of this.

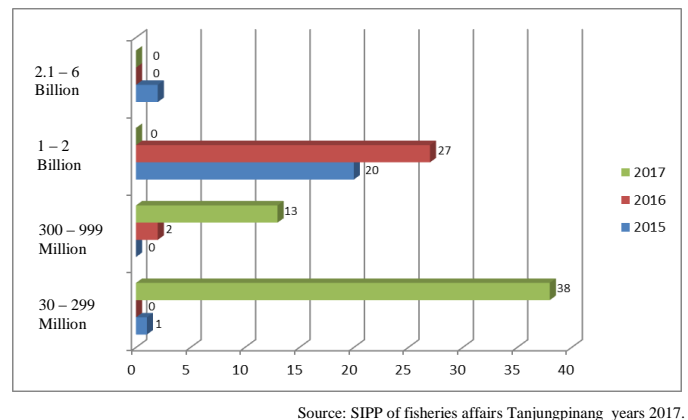
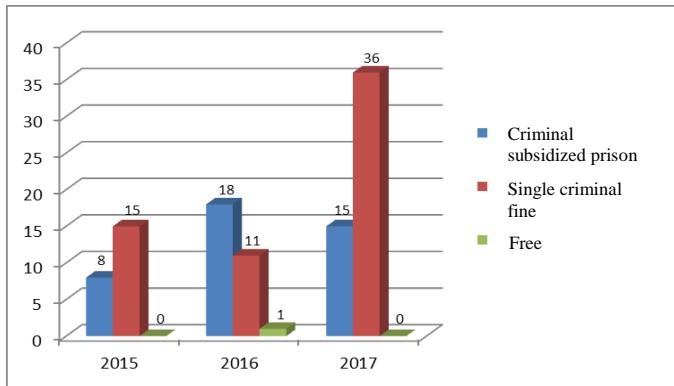


Fig. 6. Maximum fine *illegal fishing* seen from fines given in court of fisheries Tanjungpinang years 2015 – 2017.

The results of the interview with the Prosecutor, the absence of a criminal substitution for the fine imposed on the defendant was a finding by the Supreme Audit Agency (BPK) of the Prosecutor due to unpaid fines being receivable from the

State included in the Non Tax State Revenue (PNBP). Another matter conveyed by the Prosecutor that the criminal sanction imposed on the defendant was not effective when it was not accompanied by a criminal in lieu of a fine, so that the Prosecutor had difficulty in executing the defendant whose decision was legally binding. (*inkracht van gewijsde*). Based on the experience of handling cases in the fisheries, the prosecutor stated that the problem of every fishery case that occurred in the Indonesian Exclusive Economic Zone (ZEEI) was the issue of sanctions imposed, namely in the form of fines without a penalty for fines.



Source: SIPP court fisheries in Tanjungpinang years 2017.

Fig. 7. The verdict of criminal illegal fishing given in court fisheries Tanjungpinang years 2015 – 2017.

Based on field data 62 cases convicted of a single fine are difficult to execute because none of the defendants were able to pay a fine, the prosecutor had difficulty executing the defendant, as a result the State was harmed by the perpetrators of illegal fishing, the obvious loss is the country's economic loss by feeding the defendant, on the other hand the country loses resources in the fisheries sector, the defendant does not cause a deterrent effect and in the end every year illegal fishing at Tanjungpinang Fisheries Court continues to increase as illustrated in figure 5.

The results of interviews with Batam PSDKP Base Investigators within the last 3 years no one convicted was able to pay the fine imposed by the Judge, so that the penalty fine cannot be executed, when the fine cannot be paid and there is no substitute for the fine the Public Prosecutor does not can carry out executions, therefore it becomes a case arrears and findings by the BPK against the Prosecutor who handles the case. Besides that there is no legal certainty (*rechtszekerheid*) for the defendant to be in Indonesia for a long time, with the existence of the defendant without legal certainty (*rechtszekerheid*) being a big burden for the State of Indonesia because they have to bear the cost of living of the defendant in Indonesia.

If the fine imposed on the defendant is accompanied by a criminal in lieu of fines as referred to in Article 30 paragraph (2) of the Criminal Code, it will not cause problems where the defendant can impose a sentence if he is unable to pay the fine, with Article 30 paragraph (2) of the Criminal Code being a solution for a defendant who is unable to pay the fine, the provisions of Article 30 paragraph (2) of the Criminal Code require that if the fine and fine are not able to be paid, then the

imprisonment shall be replaced. The imposition of a fine without imposing a penitentiary in lieu of a fine creates a legal problem if the defendant does not want to pay or has no ability to pay.

According Suhariyono AR "Criminal penalties specified in the law or criminal fines imposed by judges at the court have not received attention for criminal law experts". This type of crime is not as attractive as the lost crime of independence, such as imprisonment or life imprisonment which is considered to have the most effective deterrent effect, even though there are many problems and questions arising from the prison system (*Penitentiary*), people do not count and law enforcement not much has considered how efficient and effective the penalty fine is if it is applied fairly and appropriately to the defendant [9].

A. Judge's Consideration

An interview through the judge revealed that the judge's consideration was related to the application of a fine without a penalty for a fine with the basis that the Indonesian state had ratified UNCLOS into Law Number 17 of 1985 on UNCLOS 1982's approval of not being "The Penalty of Imprisonment of a fine", then the Defendant charged with a fine can not be replaced by "The Penalty if Imprisonment of a Substitute" even though the Defendant is incapable or unwilling to pay a penalty, in accordance with Article 73 Paragraph (3) of the United Nations Convention Of The Law Of The Sea (UNCLOS) Year 1982

There are at least 3 (three) legal grounds so that the Judge can not impose criminal penalties in the case of fishery offenses at ZEEI : First, Article 73 paragraph (3) United Nations Convention Of The Law Of The Sea (UNCLOS) years 1982, Second, Article 102 The Law Number 31 Years 2004 about Fishing, dan Third, Supreme Court Circular Letter Number 3 of 2015 Regarding the Formulation of the Results of the 2015 Supreme Court Room Plenary Meeting As Guidelines for the Implementation of Tasks For the Court stating that "in the case of Illegal Fishing in the territory of the Indonesian Exclusive Economic Zone (ZEEI) against the Defendant can only be subject to criminal fines without being given a penalty for a fine".

B. The Responsibility of the Ship Owner

Regarding shipowners, investigators have attempted to arrest and inspect shipowners to be tried in a fishery court, but constrained by access to the country concerned so as to weaken and slow Indonesian law, another difficulty is the unknown whereabouts of the ship owner, even if the state is known the person concerned will not easily give the ship owner to the Indonesian government.

As the time goes by, since then Marin and Fisheries Ministry lead by Susi Pudjiastuti, have been scuttled almost 151 fishing vessels illegally in various regions in the country. The number mostly comes from a number of neighboring countries, including 50 Vietnamese ships, 43 Philippine ships, 21 Thai ships, 20 Malaysian ships, two Papua New Guinea ships, and one Chinese ship and 14 Indonesian-flagged ships (<https://m.tempo.co>) [10].

Whereas for foreigners who are convicted in cases of *illegal fishing* at the Tanjungpinang Court, they only hope that the return process will be returned to their home country without paying the fine. The following is the process of returning foreigners who are convicted of illegal fishing.

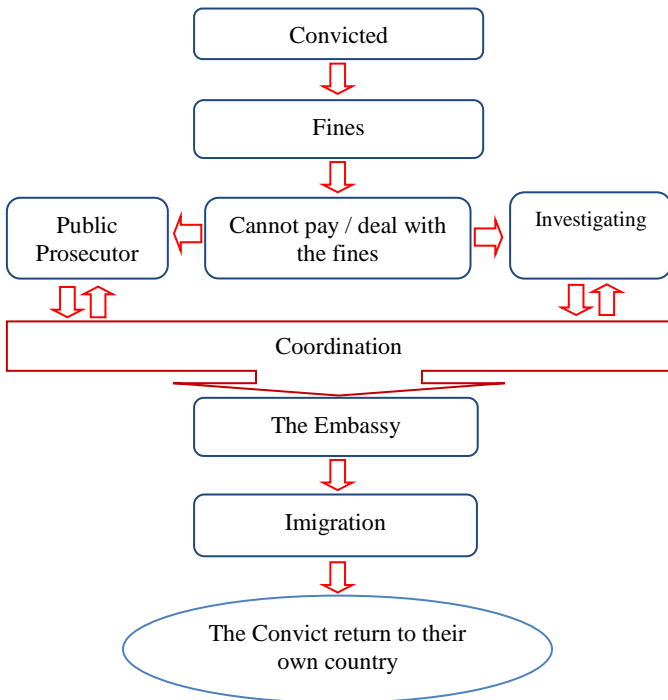


Fig. 8. The flow of repatriating convicted foreigners *illegal fishing* in court of fisheries Tanjungpinang.

V. CONCLUSION

- In Juridicial there is differences between the right and the duty as well as the treatment at the correctional against defendants, his imprisonment with the criminals confinement substitute fines.
- Criminal penalties imposed over the past 3 years are not effective, after the defendant has been sentenced to a fine of the defendant cannot be executed, in an indefinite period the defendant is returned to his home country without having to undergo any punishment or returned to his home country without undergoing any sanctions.
- The imposition of criminal fines without being accompanied by imprisonment in lieu of fines for illegal fishing does not solve the problem, because there are no legal instruments that can be used to execute criminal fines by confiscating the defendant's assets but with subsidized criminal law or fine, so the imposition of a

criminal in lieu of a fine in the form of confinement does not conflict with the provisions of Article 73 paragraph (3) of *UNCLOS*.

VI. SOLUTION

- Bilateral agreements need to be made between Indonesia and the countries of origin of the defendants of illegal fishing so that Indonesia is not harmed by the presence of foreign convicts in Indonesia.
- The Investigator suggested that the solution for criminal acts that occurred in the EEZ must refer to Article 30 paragraph (2) of the Criminal Code which stipulates that a criminal substitute for a fine due to criminal sanction in lieu of a fine is not included in the category of imprisonment or criminal body, so that it does not contradict Article 73 paragraph (3) *UNCLOS* and Article 102 of Law Number 31 of 2004 concerning Fisheries

REFERENCES

- [1] M. Z. Mochtar, Presented in "Seminar on IUU Fishing: the current Status and Context with substainable Development Goal 14" at Bale Sawala , Rectorate Bulding UNPAD, Jatnangor , 31st March 2017.
- [2] Z. Rahman, "Ship sinking as efforts to combat Illegal Fishing", *Rechtsvinding Journal*, 2015.
- [3] A. T. Nugraha and Irman, "The Legal protection of the Exclusive Economic Zone (EEZ) of the Existence of Indonesia as a Maritime country", *Jurnal Selat*, vol. 2(1), Study program of Law Science of University of Maritim Raja Ali Haji, Tanjungpinang October 2014, pp. 156-157.
- [4] O. Adhayanto, "Maritime Constitution", *Jurnal Selat*, vol. 2(1), Study program of Law Science of University of Maritim Raja Ali Haji, Tanjungpinang, October 2014, pp. 135-145.
- [5] S. Soekanto, *Normative law Research a brief overview*, Jakarta: PT. Raja Grafindo Persada, 2012, pp. 14.
- [6] B. Sunggono, *Legal Reseach Methods*, Jakarta: PT. Raja Grafindo Persada, 2008, pp. 36.
- [7] Amiruddin, *Introduction to legal research methods*, Jakarta, PT. Raja Grafindo Persada, 2006, pp. 30.
- [8] Y. Istanto, "The sinking ship Illegal fishing as an attempt law enforcement fishing in Indonesia (study verdict number 4/PID.SUS-PRK/2014/PN TPG District court Tanjungpinang)", *Proceedings of the National Seminar Multi Disciplined Science & Call For Papers Unisbank (SENDI_U)*, Semarang, August 2015.
- [9] A. R. Suhariyono, *Criminal Renewal of Fines in Indonesia*, Jakarta: Papas Sinar Sinanti, 2012, pp.13.
- [10] C. Nasirin and D. Hermawan, "Controversy on the Implementation of the Ship Sinking Policy in the Eradication of Illegal Fishing in Indonesia", *Journnal of Spirit Publik*, vol. 12(1), April 2017, pg. 17.