

# **Legislative Policy and Accountability for Pollution Crimes by Ship Operations in Indonesian Waters**

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**ABSTRACT:** Every nation in the world is concerned about the sea as a means of international transportation. Indonesia is a maritime nation with a large sea. Indonesia is at a critical geopolitical position. Due to Indonesia's location along a strategic and viable maritime route, numerous ships go through Indonesia's shipping channels. The objective of this paper is to examine the legislative policies regulating criminal acts of pollution in Indonesian waters based on the environmental law and the Shipping Law as well as criminal responsibility for perpetrators of pollution in Indonesian waters. The study used normative juridical methods with law enforcement approaches by examining all regulations that are relevant to the legal problem being studied. Next use the case approach, namely by examining several incidents for reference to legal issues, as well as comparisons by making comparisons between two regulations. Obtained through news from the media and court decisions relevant to the matter to be studied. The results of the research are legislative policy on pollution in waters regulated in the environmental law with the Shipping Law, there has been a disharmony of norms related to criminal acts of pollution in waters carried out by ship operations, different provisions for criminal penalties or fines so that in its application it becomes multi-interpreted and will have an impact on

uncertainty. According to the principle of *systematische specialiteit* between the environmental law and the Shipping Law, those who operate ships that cause pollution of the waters are subject to criminal liability under the Shipping Law. The benchmark is the regulation's purview, which includes shipping activities in the waters, individual subjects, such as each ship, and prohibited objects, such as the disposal of hazardous waste.

**KEYWORDS:** Legislative policies, criminal acts of pollution in the waters, criminal acts liability.



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## I. INTRODUCTION

The sea is a means of global transportation which is a concern for every country in the world. Indonesia is a maritime country that has a expansive sea. Indonesia's geo-political position has a strategic position. Indonesia's existence a strategic and potential shipping lane that makes Indonesia's shipping lanes pass by many ships. In addition, Indonesia's maritime potential is marine resources consisting of various kinds of marine ecosystems, coral reefs, fisheries, and marine biota. In terms of natural resources and environmental services, Indonesia's sea, which is 2.5 times larger than

its land area, has a lot of potentials to improve local, regional, and national economic welfare.<sup>1</sup>

Besides having a beneficial effect on the development of the country's economy, the density of shipping lanes by ships crossing Indonesian waters also has a bad effect, namely pollution in the waters. Pollution will cause a decrease in water quality in such a way that it will disrupt the metabolic and physiological functions of marine species.<sup>2</sup> Therefore it will result in the death of marine biodiversity which will eventually reduce the population.<sup>3</sup>

Pollution is defined as the insertion of certain substances, energy, creatures, or parts into the environment, as well as changes in the composition of the environment so that the quality of the environment is not optimal which results in the environment being damaged or unable to operate as it should.<sup>4</sup> Pollution of water, air, and soil are three types of pollution. Water pollution is caused by human activities, and industry discharges waste through pipes or leaks from storage tank pipes. Contaminated water can occur, when seawater seeps and is contaminated with chemicals, production process residue, and excavated waste.<sup>5</sup> According to J. Barros and J.M. Johnson, environmental damage and pollution are closely related to human development activities, which include waste, and critical

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<sup>1</sup> Andrizal, John Dirk Pasalbessy & Arman Anwar, "Aspek Interoperabilitas Antara Lantamal IX Dengan Kamla Zona Bahari Timur Dalam Penegakan Hukum Di Laut Maluku Ditinjau Dari Perspektif Harmonisasi Hukum Conferences on the Standardization of Geographical Names ( UNCSGN ) dan United Nations Group of Expert" (2021) 1:2 PAMALI Pattimura Magister Law Rev 121–146.

<sup>2</sup> Asep Suherman, "liability under the Shipping Law" (2020) 5:1 Bina Huk Lingkungan 133–152.

<sup>3</sup> Ni Putu Suci Meinarni, "Upaya Hukum Dalam Penyelesaian Sengketa Pencemaran Lingkungan Laut Dalam Kasus Tumpahan Minyak Montara Di Laut Timor" (2016) 5:4 J Magister Huk Udayana 833–870.

<sup>4</sup> Joko Subagyo, *Hukum Lingkungan Masalah dan Penanggulangannya* (Jakarta: Rineka Cipta, 2005).

<sup>5</sup> H R Mulyanto, *Ilmu Lingkungan* (Yogyakarta: Gramata Publising, 2007).

waste substances such as heavy metals, radioactive substances, oil, and others.<sup>6</sup>

Regulations regarding pollution at sea are instructed in Law Number 32 of 2009 Regarding Environmental Protection and Management, here in after referred to as the environmental law, and Law Number 17 of 2008 Regarding Shipping, here in after abbreviated as the Shipping Law. Pollution caused by waste disposed of by ship operations is increasingly threatening the condition of Indonesian waters. Pollution is not only when a ship accident occurs, but also the intentional factor,<sup>7</sup> namely the activities of operating ships and tankers directly contribute to pollution in the waters, certain ballast water that is inside the ship, must be disposed of when loading, one of the actions they often take is dumping waste in a certain dose, concentration, time and location into the sea.<sup>8</sup> In addition, pollution of the marine environment that also often occurs is Oil spills, the accident namely oil spills resulting from tankers.

Pollution in the sea that is carried out continuously will disturb and damage the ecosystem along with the diversity of biological resources and marine biota in it, and it can be dangerous for everyone.<sup>9</sup> Dissolved oil components allow direct poisoning of marine animals, while components of oil that are inserted will cover the main sedimentation of the water, disrupting the survival of the biological

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<sup>6</sup> Subagyo, *supra* note 4.

<sup>7</sup> Mujiono & Fanny Tanuwijaya, "Formulasi Korporasi sebagai Subjek Hukum Pidana dalam Regulasi Lingkungan Hidup di Indonesia" (2019) 6:1 *Lentera Huk* 55–70.

<sup>8</sup> Suyartono, "Lebih Jauh Tentang Tumpahan Minyak di Laut," *Kementerian Energi dan Sumber Daya Miner Direktorat Jenderal Minyak dan Gas Bumi* (2014) 1, daring: <<https://migas.esdm.go.id/post/read/Lebih-Jauh-Tentang-Tumpahan-Minyak--di-Laut>>.

<sup>9</sup> Ni Kadek Eny Wulandari Putri & Kadek Agus Sudiarawan, "Karakteristik Pertanggungjawaban Korporasi Pada Tindak Pidana Perusakan Lingkungan Hidup Di Indonesia" (2020) 8:11 *Kertha Semaya J Ilmu Huk* 1717–1728.

environment of the water at the bottom.<sup>10</sup> Environmental pollution in the sea is an event that can cause losses to various sectors such as tourism, the fishing sector, as well as the ecosystem for the living creatures in it.<sup>11</sup>

In 2009, Indonesian Government issued the environmental law, which is integral in nature and has regulated sanctions against criminal acts of pollution both on land, waters, and also in the air as an update from previous regulations related to environmental management. The environment is the continuity of a place that includes all objects, forces, conditions, and living things, as well as humans and their actions, which have an impact on nature, survival, the prosperity of humans and other living things, by Article 1 (1) of the environmental law. Next, what is meant by environmental depravity is a direct or indirect transition to the character, chemistry, or biology of the environment which exceeds the requirements for environmental depravity by Article 1 point 17 of the environmental law. Pollution from the operation of ships is defined as damage to the sea caused by spills or release of liquid hazardous materials, waste products, or oil without permission from certain competent authorities, by Article 1 point 1, Minister of Transportation Regulation Number 29 of 2014 Regarding the Prevention of Maritime Environmental Pollution (abbreviated as PM 29/2014), this regulation is the implementer of environmental law at the ministerial level whose position is under environmental law. The criminal penalty provisions of the environmental law are contained in article 104 where the penalty is 3 years and a fine of up to three billion rupiahs if the activity is carried

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<sup>10</sup> BL Hentri Widodo & Eni Tri Wahyuni, “Manajemen Penanggulangan Tumpahan Minyak Di Laut Akibat Dari Pengoperasian Kapal” (2020) 22:1 Maj Ilm Gema Marit 60–66.

<sup>11</sup> Komar Kantaatmadja, *Ganti rugi Internasional Pencemaran Minyak di Laut* (Bandung: Penerbit Alumni, 1981).

out by someone who deliberately disposes of certain waste without a license, to environmental media.

Pollution carried out by the operation of ships will cause fractural damage to the Shipping Law, but on the other hand, there are also rules governing environmental pollution, namely the environmental law, where there are differences between the two provisions in terms of the criminal aspect, this will have an impact on its application. Pollution in the waters will not only disrupt sea transportation traffic but also disrupt the ecosystem of marine biota which supports the livelihoods of most Indonesian people. Provisions in the Shipping Law, in which acts of pollution at sea carried out by ship operations are lighter in terms of criminal provisions and fines.

Differences in criminal provisions in the environmental law and the Shipping Law, give the impression that pollution in the sea carried out by ship operations is relatively mild, even though the sea is a very important ecosystem as well as its transportation routes. It is hoped that the policies of the executive branch and the legislature in compiling a written rule will be in line with this to minimize the occurrence of various normative conflicts between these rules.

The importance of policies carried out by legislators, especially regarding pollution in waters carried out by ship operations as an effort to form legal certainty in being accountable. For this reason, authors intend to conduct a study based on several cases of marine pollution carried out by ships, including the release of ballast water to release waste into the sea without operating the engine. Oil Water Separator as an oil filter so that the disposal of the wastewater mixes with oil which is classified as B3 waste with a critical level, this incident has been decided by the Batam District Court with number: 234/Pid.Sus/2021/PN. Btm, in 2021. Recently there was an oil spill from a ship carrying Masbos Diaz fuel oil in the area of South Hagu

Village, Lhokseumawe, Aceh, in 2022.<sup>12</sup> Furthermore, in 2021, the MT Wanda ship sank in Johor, causing an oil spill in the Nongsa area of Batam, Riau Province.<sup>13</sup> The sinking of a Suction Ship Production owned by PT Timah, the Riau work location, in 2019.<sup>14</sup>

In previous research by Sumaniar A., “Maximizing criminal penalties for violators of environmental quality standards from waste”, the author focuses on the implementation of criminal penalties on the application of norms for violating waste quality standards that have not been carried out optimally, and different system that should be done.<sup>15</sup> Another research by Elly K. P., “The impact of flags on tanker oil pollution incidents”, focuses on the responsibility for oil spilled at sea due to tanker accidents and the fair value of compensation.<sup>16</sup>

Novelty in the research, the authors focus on legislative policies regulating criminal acts of pollution in Indonesian waters based on the environmental law and the Shipping Law and criminal responsibility for pollution perpetrators carried out by operating ships in Indonesian waters. The aim is to study and analyze legislative policies and forms of accountability for perpetrators of

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<sup>12</sup> Rahmad, “In Picture Tumpahan Solar Cemari Pesisir Desa Hagu Selatan Lhokseumawe,” (2022), daring: *REPUBLIKACOID* <<https://www.republika.co.id/berita/rauu4k314/tumpahan-solar-cemari-pesisir-desa-hagu-selatan-lhokseumawe>>.

<sup>13</sup> Ajang Nurdin, “Perairan Batam Tercemar Limbah Minyak dari Kapal Tenggelam,” (2021), daring: *Liputan6* <<https://www.liputan6.com/regional/read/4449203/perairan-batam-tercemar-limbah-minyak-dari-kapal-tenggelam>>.

<sup>14</sup> Hadi Maulana, “PT Timah Gunakan Oil Booms Atasi Pencemaran Laut Akibat KIP 10 Karam,” (2019), daring: *Kompas.com* <<https://regional.kompas.com/read/2019/09/02/16185291/pt-timah-gunakan-oil-booms-atasi-pencemaran-laut-akibat-kip-10-karam>>.

<sup>15</sup> Sumaniar Alam, “Optimalisasi Sanksi Pidana Terhadap Pelanggaran Baku Mutu Lingkungan Dari Limbah (Criminal Sanctions towards Environmental Quality Violations from Waste)” (2020) 20:1 J Penelit Huk Jure 137–151.

<sup>16</sup> Elly Kristiani Purwendah, “Pengaruh Bendera Kapal Bagi Kasus Pencemaran Minyak Kapal Tanker” (2020) 2:2 Ganesha Civ Educ J 52–65.

pollution carried out by ship operations in Indonesian waters based on the environmental law and the Shipping Law. From previous research, there is no emphasis on efforts to harmonize regulations as a step in policy development so that rules related to environmental law in marine areas are conformity because of the same material content.

## II. METHODS

The type of research used is in the form of normative legal research by utilizing a statutory approach by examining all regulations that are relevant to the legal problem being studied. Next use the case approach, namely by examining several incidents for reference to legal issues, as well as comparisons by making comparisons between two regulations. Obtained through news from the media and court decisions relevant to the matter to be studied. There are two sources of legal material used by researchers, namely primary legal material sources that are binding such as the environmental law, the Shipping Law, and relevant regulations, and secondary sources, namely books, research results, legal expert opinions, and journals that discuss shipping law. method of tracing legal materials through the study of laws and regulations and literature studies. After obtaining the required data, then the legal material will be analyzed to obtain a conclusion which is an answer from the research.

## III. LEGISLATIVE POLICY REGULATION OF POLLUTION CRIMINAL ACTIONS IN INDONESIAN WATERS



From top to bottom, policies are tools or instruments used to manage the population.<sup>17</sup> Policy, according to Heinz E. and Kenneth P., in Leo A.'s book is a long-term choice characterized by the persistence and repetition of those who follow the rules.<sup>18</sup> The policy is a set of guidelines for activities that lead and influence the behavior of those affected by decisions. Policies are deliberately formed and mixed to shape the exact patterns of the target community based on the formulation of the policy.<sup>19</sup> Policy refers to planning, formulating, and implementing decisions, as well as evaluating the effect of these decisions on a large number of individuals who are the target audience of the policy.

Theoretically, the party making the decision has the authority to enforce it.<sup>20</sup> While the legislature is a body that functions to formulate regulations. Parliament is another name that emphasizes the representation of its members or the people's representative council, a word that emphasizes the components of discussing and negotiating.<sup>21</sup> Thus, the legislative policy is a decision in establishing and initiating something in statutory regulations.

Legislative policy is closely related to the study of national legal politics, with the conceptual arrangement of legislative decisions as an expression of affirmation of national legal politics.<sup>22</sup> According to Abdul H. G. N., national legal politics can be considered as regulatory

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<sup>17</sup> Sulistina et al, "The Pathway of Adopting Omnibus Law in Indonesia's Legislation: Challenges and Opportunities in Legal Reform" (2022) 2:2 J Kaji Pembaharuan Huk 155–182.

<sup>18</sup> Leo Agustino, *Dasar-Dasar Kebijakan Publik* (Bandung: Alfabeta, 2016).

<sup>19</sup> Amri Marzali, *Antropologi dan Kebijakan Publik* (Jakarta: Kencana Prenada Media Group, 2012).

<sup>20</sup> Miriam Budiardjo, *Dasar Dasar Ilmu Politik* (Jakarta: Gramedia Pustaka Utama, 2008).

<sup>21</sup> *Ibid.*

<sup>22</sup> Adil Lugianto & Arief Hidayat, "Politik Hukum Dalam Upaya Pengendalian Pencemaran Bahan Berbahaya Dan Beracun Di Wilayah Laut Yang Berada Dibawah Kedaulatan Indonesia" (2012) 7:2 Law Reform 43–74.

decisions that will be determined or realized on a national scale by the government, which include:<sup>23</sup>

1. Consistent implementation of current legal provisions;
2. Legal development is defined as the renewal of existing regulatory mechanisms, and those that have passed and the establishment of new norms to adapt to claims of societal change;
3. The functions of law enforcement or implementing agencies, as well as the instructions of their members, are affirmed;
4. Increasing public legal awareness, in the opinion of certain policymakers.

The following definition of legal politics is comprehensive because it covers all areas of legal politics, and includes plans for reform and the creation of norms that result in responsive attitudes to the norms of the current scale, as well as developing the expected dimensional norms.<sup>24</sup>

The formulation of laws must study the values that run in society.<sup>25</sup> Thus, carrying out the politics of criminal law requires the creation of criminal norms that are in line with current and future events and conditions. The criminal norm policy is basically how criminal norms can be mixed properly and leave a benchmark to the originators of rules to be implemented by the executive branch and supervised by the judiciary.<sup>26</sup> Legislative policy is a critical stage in the law-making process, as it ensures that the law keeps pace with societal rapid

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<sup>23</sup> Abdul Hakim Garuda Nusantara, *Politik Hukum Indonesia* (Jakarta: Yayasan LBHI, 1988).

<sup>24</sup> *Ibid.*

<sup>25</sup> Mia Kusuma Fitriana, "Peranan Politik Hukum Dalam Pembentukan Peraturan Perundang-Undangan Di Indonesia Sebagai Sarana Mewujudkan Tujuan Negara ( Laws and Regulations in Indonesia As the Means of Realizing the Country ' S Goal )" (2015) 12:02 J Legis Indones 1–27.

<sup>26</sup> M Arif Amrullah, *Tindak Pidana Pencucian Uang (Money Laundering)* (Malang: Bayumedia Publishing, 2004).

development, as well as advances in information and technical complexity. The direction of the application of state authorities by administrators is determined by politics, but decisions to develop legislative policies must be based on general understanding and the conscience of the people.

The formulation of norms and sanctions in regulation needs to be evaluated, reviewed, and harmonized which abstracts the legal principles in it appropriately and is relatively easy to apply. Law is built on principles that include the basic standards of judgment found in a legal system. Paul Scholten formulates, legal principles are ideas that exist within and underlie the legal system and are individually stated in laws, regulations, and assessments.<sup>27</sup> In this regard, the essence of the principle as a rule of judgment must be realized in a positive legal system, this is simply because legal principles contain benchmark values and only provide indirect guidance or direction, and are not always normative in the sense of the rule of law. Therefore, it can be difficult to determine when a legal theory loses its validity. These factors may include the ability of legislatures, governments, or law enforcement agencies to collectively enforce rules that are conditioned by values and serve as guidelines for human behavior.<sup>28</sup> The Shipping Law will of course apply to pollution caused by the operation of ships, environmental contamination is, nevertheless, subject to laws, specifically the environmental law. The difference between the two provisions in terms of the sentencing aspect will affect the way it is applied.

The principal position is needed as a follow-up to legislative policies in evaluating, reviewing, and harmonizing regulations. *Lex superior*

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<sup>27</sup> Paul Scholten, *De Structuur Der Rechtswetenschap (Struktur Ilmu Hukum)*, terjemah ed, Arief Sidharta, ed (Bandung: Alumni, 2013).

<sup>28</sup> Alam, *supra* note 15.

derogate legi inferiori is a principle that explains a norm with a position at the level above it and replaces the legitimacy of the norm below it.<sup>29</sup> Identify whether one norm stands higher than another standard. Of course, since state statutes usually have building rules, it's not a difficult thing to do, since laws are written in a hierarchical order.<sup>30</sup> Next is the principle Lex specialis derogat legi generalis is the special norm that proceeds the general. A principle of norms known as "principle preference" indicates which law will be enforced if another law is related to or violated.<sup>31</sup> There is also Lex posterior derogat legi priori is the principle of asserting that the new rule supersedes the previous rule. This principle can only be used if the latest law has a position equal to or above the previous one in terms of legal standards.<sup>32</sup> Therefore, it is unlikely that the rules below conflict with the rules above. The use of this principle, as well as the application of the principle lex superior, is not difficult to determine because there is a clear criterion in setting the latest rules by paying attention to the time they are published chronologically.

Other principles of criminal law are "systematische specialiteit" or systematic specificity, a criminal determination is considered special if it fulfills the requirements of the legislators whose aim is to enforce criminal provisions that have existed since they were made.<sup>33</sup>

#### A. Pollution Rules According To Environmental Law

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<sup>29</sup> Jerzy Stelmach & Bartosz Brożek, *Methods of Legal Reasoning* (Dordrecht: Springer, 2006).

<sup>30</sup> Nurfaqih Irfani, "Asas Lex Superior, Lex Specialis, Dan Lex Pesterior: Pemaknaan, Problematika, Dan Penggunaannya Dalam Penalaran Dan Argumentasi Hukum" (2020) 16:3 J Legis Indones 305–325.

<sup>31</sup> Shinta Agustina, "Implementasi Asas Lex Specialis Derogat Legi Generali Dalam Sistem Peradilan Pidana" (2015) 44:4 Masal Huk 503–510.

<sup>32</sup> Irfani, *supra* note 30.

<sup>33</sup> Triana Dewi Seroja & Winda Fitri, "Implementasi dan Implikasi Asas Kekhususan Sistematis pada Tindak Pidana Telekomunikasi" (2019) 4:2 J Law Policy Transform 104–122.

Pollution in the marine environment comes from four different sources: ship operations, discharges, seabed activities, and land-based activities. Ship pollution originates from the operation of ships such as releasing waste directly into the waters, from cargo carried by ships, and spills during loading and unloading at ports. Dumping is a disposal by inserting waste in a certain grade, focus, tempo, and area with the condition that you obtain permission from the government at a certain location.<sup>34</sup> other hazardous materials. Pollution originating from seabed activities is a result of mining and utilization of oil and natural gas on the seabed. Land-based pollution is mostly caused by the release of industrial waste into the sea and the use of fossil fuels, pesticides, and fertilizers that are used in abundance in agriculture to pollute groundwater.<sup>35</sup>

In order to achieve the purpose of controlling the environment by limiting and taking action against the perpetrators, an appropriate legal approach is needed in resolving the problem of pollution at sea carried out by the operation of ships, by making optimal use of the existence of the environmental law and the Shipping Law. Pollution regulations in the environmental law, including: Anyone is prohibited disposing of waste without permission so that it pollutes the environment, illegally inserting B3<sup>36</sup> materials and releasing materials that have been genetically altered. All such activities must obtain prior permission from the competent agency.

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<sup>34</sup> BL Hentri Widodo & Eni Tri Wahyuni, "Manajemen Penanggulangan Tumpahan Minyak Di Laut Akibat Dari Pengoperasian Kapal" (2020) 22:1 Maj Ilm Gema Marit 60–66.

<sup>35</sup> Lugiarto & Hidayat, *supra* note 22.

<sup>36</sup> *The term "hazardous and toxic substances," sometimes known as "B3," refers to substances that have the potential to harm humans, other living things, or the environment due to their nature, concentration, or amount, either directly or indirectly., 2009.*

Provisions for fines and imprisonment can be imposed on the offender. Starting from 1-15 billion rupaih and 1-15 years in prison. Environmental law tries to prevent and prosecute anyone involved in pollution crimes, because it can result in the quality of the environment that decreases and threatens the survival of other creatures. So it is necessary to protect environmental management seriously and consistently by all stakeholders Interests, so that the environment is far from pollution that can damage the current and future environmental order. These provisions are contained in articles 98-109 of the environmental law.

Then what is meant by waste is the former of an activity and/or activity, it can be in the form of waste (B3)<sup>37</sup>. As for what is meant by dumping is a disposal by placing or inserting waste in certain levels, concentrations, tempos, and areas with the requirement to obtain permission from the government in certain locations according to the environmental law.

*B. Regulation Of Pollution According To The Shipping Law.*

The safe maritime environment section is a shipping safety and security method that has an important role to play in preventing and controlling pollution that has an impact on the aquatic environment related to shipping operations, while maritime environmental regulations are under the Shipping Law, as follows: Safety, security, and protection of the maritime environment are mandatory requirements for every ship and port operation. The government is tasked with monitoring and evaluating the safety of the maritime environment ranging from restrictions to pollution control from shipping and port activities including waste disposal in water.

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<sup>37</sup> *Ibid.*

Furthermore, each crew member is responsible for controlling the pollution caused by the ship. Therefore, ships of certain types or scales must be accompanied by equipment, materials and control patterns that have received permission from the government to avoid oil pollution sourced from ships.

Regarding the disposal of waste, ballast water, sewage, debris, hazardous chemicals, toxins and exhaust gases that exceed the threshold for water are prohibited from being disposed of by all ships, unless the distance, release size, and quality of release are based on predetermined conditions. If there is pollution caused by the ship or its activities is the responsibility of the master or executor of other units in the waters, for that it is mandatory to insure it, and must immediately inform the authorized unit for follow-up.

For ships carrying waste (B3)<sup>38</sup> must meet the requirements determined by the government by having operational standards and emergency response procedures based on applicable legal provisions. Port authorities are responsible for providing waste collection facilities to collect waste sourced from ships in ports. Waste management is carried out based on applicable rules.

Meanwhile, the criminal provisions related to pollution in Indonesian waters according to the Shipping Law are as follows:

Anyone can be sentenced to 2-15 years imprisonment and fines ranging from 300,000-2.5 billion rupiah if they violate the criteria of safety, shipping security and protection of the marine environment. Among them are marine pollution caused by ships, sewage disposal, ballast water, waste into the water so as to damage the environment. Does not insure the pollution caused by

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<sup>38</sup> *Ibid.*

the ship. This provision is contained in articles 303-329 of the Shipping Law.

Furthermore, what is meant by waste in the Shipping Law can also be in the form of residual oil, dirt and garbage including the skeleton of a ship that sank in the waters.

Comparative between shipping law and environmental law related to the disparity of provisions:

Table 1

Environment Law	Shipping Law
Anyone is prohibited from dumping waste into the environment without permission from the competent authority (Article 60).	Anyone is prohibited from disposing of ballast water, garbage dumped into the sea by boat, and other forms of marine pollution that damage the environment without permission (Article 229).
A fine of 3 billion rupiah and imprisonment can be imposed on the perpetrator for 3 years (Article 104).	A fine of 300 thousand rupiah and imprisonment can be imposed on the perpetrator for 2 years (Article 325).

Dramatically, there are two regulatory provisions related to the criminal act of pollution in Indonesian waters, there are also differences regarding the criminal threat where Article 104 of the environmental law is a criminal offense for a period of 3 years and a fine of up to 3 billion rupiahs. Meanwhile, in Article 325 of the Shipping Law, a criminal offense for a length of 2 years and a



maximum fine of three hundred million rupiahs. The case that occurred in MT. FREYA which has been decided by the Batam District Court. In his indictment, the public prosecutor only charged the defendant with article 104 in conjunction with article 60 of the environmental law regarding the chapter on pollution in waters. Of course the shipping law was overridden by this decision, This will have an impact on the implementation related to pollution carried out by ship operations in Indonesian shipping orders because there are two regulations related to pollution in Indonesian seas carried out by ship operations. When prosecutors apply environmental law rather than shipping law, the perpetrator will be more burdened because the sentence is longer.

The philosophical foundation in the environmental law states that organisms are a gift from God for the nation and must be cared for and maintained for their ability to continue to provide a source and support of life for all of us, as well as for the other living environment. This is none other than for the sustainability and optimization of the quality of life together. In biotic terms, living things and other abiotic objects are in a bond that is interdependent and interconnected. As a result, all living things and other things must attain equal dignity. Because humans and the environment have a mutually beneficial relationship that must always be maintained and cared for to remain harmonious, as well as balanced with the process of maintaining organisms and the social environment, it is necessary to have national policy arrangements that regulate environmental control that is integrated between growth and population dynamics. As well spatial planning that adheres to the principles, is the sociological foundation. Juridically, the norms for the environment, in addition to referring to national norms, also study the principles of norms that apply internationally regarding the environment.

Considering the legal policies of the Shipping Law, one of its scopes is the safeguarding of the maritime area to create safe and secure conditions for Indonesian shipping, which must continue to improve its capabilities and role, just in case to create an effective system and an efficient transportation system through prevention efforts. Against pollution of the marine environment caused by oil and other hazardous materials caused by shipping operations.

In order to examine the provisions on pollution in the sea instructed by these two provisions, it is important to know the hierarchy of laws and regulations and their principles. Between the environmental law and the Shipping Law, they have an equal position, namely as a law. This knowledge is important for understanding the principle *Lex superior derogat legi inferiori*. Based on this principle, if there is a contradiction between legal rules that are hierarchically at the level above and below, then the rule below must be set aside. Besides that, you need to understand the principle *Lex specialis derogate legi generali*. This principle is based on two hierarchically equivalent norms, but the fields and substance of the material between the two are different, where there are specificities from the other. If one looks at the provisions between the environmental law and the Shipping Law, the scope of the contents of the environmental law starts from the conception, use, control, maintenance, monitoring, and application of the law. Within the scope of the content material there is also the application of administrative, civil to criminal law as a last resort, which has the aim of controlling the environment in:

1. Towards harmony and harmony between humans and the environment;
2. Ensuring the importance for the successors of posterity in the future;
3. Controlling the wise use of natural resources;

4. Defending the nation zone from environmental pollution or destruction;
5. Caring for the continuity of the role of the environment;
6. Realizing development that is consistent with environmental insight.

While the scope of the Shipping Law includes the:

1. All sea transportation activities, starting from ports, safe and secure shipping and guarding the Indonesian maritime area;
2. All foreign ships crossing the Indonesian territorial sea;
3. All Indonesian ships that are outside the Indonesian territorial sea.

In the general elucidation of the Shipping Law, it is stated that various requirements related to shipping also include rules regarding environmental management before amendments to the environmental law, if related to shipping, especially security and safety factors, are subject to the Shipping Law. The condition of achieving safety and security criteria related to transportation at sea, ports, and guarding the sea area is known as a factor of safe and secure shipping.

The explanation above shows that the Shipping Law applies specifically when it is related to the factor of safe and secure sailing in which there is guarding the maritime area. This means that if the pollution carried out by ship operations results in disruption of shipping traffic, then this act is part of the Shipping Law as a reference for law enforcement.

The next principle is *Lex posterior derogate legi priori*, which means the most recent rule overrides the old one. The existence of this principle is understandable considering that the most recent regulations reflect more current needs and conditions. This can be seen in the birth of the Shipping Law which was effective on May 7,

2008, with the environmental law which was promulgated on October 3, 2009. If viewed based on time, the PPLH Law was born after the Shipping Law, which means that the environmental law is more recent. Explanation of the general provisions of the Shipping Law which also takes into account environmental interests where in its considerations the Shipping Law refers to the rules related to previous environmental management which have now been amended by the environmental law, where criminal provisions in the environmental law specifically related to pollution at sea can be used as a reference by the Shipping Law, aligned with the academic text in the environmental law. Where the presence of the environmental law is a harmonization concept framework that is a reference for every action that has an impact on the environment. Thus, all rules governing environmental activities such as maritime environmental protection in the Shipping Law need to be formulated and implemented in harmony with the environmental law, especially those related to the criminal provisions of article 60 in conjunction with 104 of the environmental law with articles 229 in conjunction with 325 of the Shipping Law.

This is also followed by the principle of certainty of intent, concept, usability, and effectiveness so that it can inherit legal certainty and benefits as the principle of forming rules based on Pancasila. The formulation of criminal norms and sanctions is very important to study and review, so that they do not have an impact on the application of juridical, sociological, ecological, and philosophical terms for judges and other law enforcers in realizing their applicable policies in real terms, as an example in the decision of the Batam district court. In addition, in 2020 the government has taken the initiative to issue regulations related to Job Creation, in which one of the clusters in the regulation also revises shipping, but related to

pollution in waters carried out by operating ships has not been harmonized so it is unclear about the legal substance and criminal provisions for pollution in special waters caused by ships or due to ship operations. As well as future harmonization plans related to the latest Criminal Code which compiles the contents of norms and criminal provisions for pollution in waters in chapter 31 related to shipping crimes and part eight related to environmental crimes.

Pollution by the operation of ships can be subject to criminal provisions based on the Shipping Law because the explanation states that as long as it is related to shipping safety and security, it is subject to the Shipping Law. It can be concluded that indirectly the Shipping Law becomes a regulation that applies specifically to anything caused by ships, including pollution that falls within the scope of maritime environmental protection. The need for harmonious formulation and implementation related to criminal provisions due to pollution in waters carried out by ships operating under article 229 jo 325 of the Shipping Law and the environmental law, namely article 60 jo 104.

Considering that pollution in waters has a more widespread impact on marine biota ecosystems which are the backbone of the majority of Indonesian people's livelihood. Criminal norm policy in essence is how these norms can be properly conceptualized and become the basis for drafting rules to be implemented by the executive branch and supervised by the judiciary. It is necessary to explain in detail about pollution in Indonesian waters starting from the scope, consequences, elements of the act, and punishment for the perpetrators, to provide legal certainty, and not cause multiple interpretations in its application. As was the case with MT. FREYA which has been decided by the Batam district court. In his indictment, the public prosecutor only charged the defendant with article 104 in conjunction with article 60 of the environmental law regarding

pollution in waters. Whereas in the provisions of the Shipping Law article 325 jo 229, similar matters have also been regulated which could be an alternative to the public prosecutor's indictment. Therefore, it is necessary to clarify which provisions are used when pollution is carried out by ship operations in Indonesian waters.

To determine which specific rules apply, the principle of systematic specificity is applied. This principle is the development of the principle of "special law/Lex specialist". If crimes can be prosecuted under two or more statutes, this approach is used. Which rule is more systematic, in terms of the scope of the act, who is the subject of the violation, and what is the object of the violation, must be carefully evaluated.

According to the formulation of the environmental law regarding pollution, article 60 jo 104 of the PPLH Law. First, the scope of Article 4 of the environmental law is environmental security and control in general. Second, based on the subject who commits a violation anyone can be held responsible, from these provisions it can be said that the subjects in the environmental law are not limited. Third, so objects are prohibited from these provisions, namely the disposal of hazardous waste or materials into the media without being equipped with certain requirements.

The formulation in Article 229 of the Shipping Law. The release of waste, ballast water, sewage, debris, hazardous chemicals, poisons, and exhaust gases that exceed the threshold for water is prohibited from being disposed of by all ships, unless the distance, size of the release, and quality of release are based on conditions that have been set. Then the criminal provisions for anyone who throws away anything that is not allowed according to the rules are punished with a maximum of 2 years and a fine of not more than three hundred million rupiahs. First, the scope of Article 4 of the Shipping Law

covers all activities in the waters, starting from transportation, ports, safe, and secure shipping, and the security of the maritime area in Indonesia. Thus the scope of the enactment of the Shipping Law does not apply freely, but only relates to shipping activities in the waters. Second, based on the subject that commits the violation is every ship, from this provision it can be said that the subject in the Shipping Law is a legal subject representing a ship or someone responsible for the ship. In other words, someone who is not related to ships, cannot become a legal subject of the formulation of Article 229 of the Shipping Law. Third, some are prohibited from these provisions, namely the disposal of hazardous waste or materials into the waters without being equipped with certain requirements. Based on the object of the prohibition in the Shipping Law, it has similarities with the environmental law.

Based on the “*systematische specialiteit*” principle of the two laws, namely between the environmental law and the Shipping Law,<sup>39</sup> if the benchmark is the scope of the application of these rules, namely shipping activities in waters, personal subjects, namely each ship, and prohibited objects are the disposal of hazardous waste, then the Shipping Law should be implemented, even though there is an environmental law which has an element of the offense which can also include it. The “*systematische specialiteit*” principle determines the environmental law and the Shipping Law which apply to pollution in waters carried out by ship operations, both crew members and anyone who originates from ship operations by the scope, personal subject, and object of the delict. Legislative policies regulating criminal acts need renewal,<sup>40</sup> review in determining and

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<sup>39</sup> Seroja & Fitri, *supra* note 33.

<sup>40</sup> Fifink Praiseda Alviolita & Barda Nawawi Arief, “Kebijakan Formulasi Tentang Perumusan Tindak Pidana Pencemaran Nama Baik Dalam Pembaharuan Hukum Pidana Di Indonesia” (2019) 15:1 Law Reform 130–148.

formulating laws including criminal acts of pollution in Indonesian waters committed by ship operations. Polluter by the operation of ships can be subject to criminal provisions based on the Shipping Law even though there is an environmental law which has an element of delict which can also include it.

Legislative policies on pollution in waters regulated in the environmental law and the Shipping Law have resulted in disharmony of norms related to criminal acts of pollution in waters carried out by ship operations, where acts of pollution are regulated in two different provisions, namely the environmental law and the Shipping Law, with provisions for penalties different criminal penalties or fines, so that in its application it becomes multiple interpretations and will have an impact on uncertainty.

#### IV. CRIMINAL LIABILITY FOR POLLUTION IN INDONESIAN WATERS

The imposition of a sentence must carry out the condition that a person's actions can be asked to bear the responsibility for his actions. It is important to have the condition that a person can take responsibility based on the criminal liability formula. The notion of bearing criminal responsibility is not only related to legal issues, but also the principles, morals, and decency that are chosen by groups of people, and society, to achieve criminal responsibility through justice.<sup>41</sup> Roeslan Saleh defines it as a continuation of the rational consequences contained in criminal offenses and subjectively creates standards for being punished for these crimes.<sup>42</sup> Several definitions of criminal responsibility can be found in the Indonesian criminal law

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<sup>41</sup> Hanafi & Mahrus, *Sistem Pertanggung Jawaban Pidana* (Jakarta: Rajawali Pers, 2015).

<sup>42</sup> Roeslan Saleh, *Pikiran-Pikiran Tentang Pertanggung Jawaban Pidana* (Jakarta: Ghalia Indonesia, 1982).



literature, including in the quote Hilaman Hadikusuma, Simons claims the ability to assume responsibility can be seen as a psychological condition that ensures the implementation of a criminal step, from a broader public and individual perspective, and accountability it can be carried by someone.<sup>43</sup>

Criminal responsibility refers to the process of assessing whether a suspect or defendant is to blame for the crimes that have occurred.<sup>44</sup> A person will have the nature of criminal responsibility if he commits an act that violates the norm, but he can abort his responsible character if there are factors within him that cause him to miscarry his capacity to assume responsibility. The basis of a criminal act, according to Chairul Huda, is the concept of legality, while the maker can be punished for his mistakes.<sup>45</sup>

In addition, in the common law system, criminal responsibility is based on a state of mind known as *mens rea*, which means that criminal responsibility depends on a state of mind known as a bad mind. The term "guilt thinking" refers to a pang of subjective guilt for which a person is found guilty because the maker was determined to have the wrong thought and therefore must be held accountable. The violator will not be punished even though he has committed a criminal offense by justifying or pardoning reasons.

Accountability is demanded based on the principles of criminal norms for someone who violates criminal rules.<sup>46</sup> The legal principle of "nullum delictum nulla poena sine praevia lege poenali" is termed

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<sup>43</sup> Hilaman Hadikusma, *Bahasa Hukum Indonesia* (Bandung: Alumni, 1992).

<sup>44</sup> Moh Khasan, "PRINSIP-PRINSIP KEADILAN HUKUM DALAM ASAS LEGALITAS HUKUM PIDANA ISLAM" (2017) 6:1 *Rechts Vinding Media Pembina Huk Nas* 21–36.

<sup>45</sup> Chairul Huda, *Dari Tiada Pidana Tanpa Kesalahan Menuju Kepada Tiada Pertanggungjawaban Pidana Tanpa Kesalahan* (Jakarta: Prenada Media, 2006).

<sup>46</sup> Lidya Suryani Widayati, "Perluasan Asas Legalitas Dalam RUU KUHP" (2011) 2:2 *Negara Huk* 307–328.

the principle of legality which is the basis that no act can be punished without fault.<sup>47</sup> The groundwork is about holding someone accountable for their actions. That is, a person can only be held accountable if the crime has been designed in advance.<sup>48</sup> No one can be punished or prosecuted if the regulation arises after the unlawful act has occurred. It is forbidden to use figurative language to determine the existence of a crime, and criminal law norms do not allow it to apply retroactively. In this example, if it is determined that a person has an element of criminal wrongdoing, many conditions must be met to establish that person can be held liable. The elements are:

1. There is a criminal offense;
2. There are errors whether intentional or due to negligence;
3. Some makers can be held accountable;
4. And there is no reason for criminal elimination.

Criminal law exists to provide the value of justice to all groups of people. The law is also a supervisor for action because people who carry out evil actions are educated and given punishment based on the criminal acts they have committed. This is so that someone who commits a crime can experience the consequences of his actions and not repeat them. Sanctions embedded in the rules will leave pressure on other groups not to commit acts against the law.

Pollution of the environment is an act that according to the environmental law. Pollution in water is one type of environmental pollution because water is a component of life in the environment. In the Shipping Law, there is no specific explanation related to the

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<sup>47</sup> Khasan, *supra* note 44.

<sup>48</sup> Rio Admiral Parikesit, "PENERAPAN ASAS LEGALITAS (LEGALITEIT BEGINSSEL/WETMATIGHEID VAN BESTUUR) DALAM KEBIJAKAN SENTRALISASI PENGHARMONISASIAN PERATURAN PERUNDANG-UNDANGAN" (2021) 18:4 Legis Indones 450–459.

definition of pollution, but pollution is included in the scope of maritime protection article 1 point 57, which in essence is a step to inhibit and limit environmental pollution in waters originating from activities related to shipping.

Administrative and civil penalties, as well as options for solving environmental problems, are not yet effective,<sup>49</sup> then the elucidation of the environmental law stipulates that criminal law should be used, if:

1. The perpetrator's level of negligence is high;
2. Impact of significant actions; And
3. The activities surely occur to provoke public concern.

Against such actions in criminal provisions according to the environmental law contains a principle formulation "ultimum remedium" namely the sentencing provisions make the ultimate effort in the environmental law. According to Soedarto, legal protection functions as a tool for social control, and the role of punishment can be interpreted as an "ultimum remedium" which indicates that criminal norms can only be enforced if other measures fail.<sup>50</sup> Hulsman said that regarding everything that is outside the law (even those subject to criminal law sanctions) as much as possible it is resolved outside the criminal law.<sup>51</sup> The use of law must be limited, if there is another option do not use the criminal justice system.

Based on that opinion, it is clear that the issue of the concept of subsidiarity is solely intended to be more functional and to make use of methods outside of criminal law. This influence arises not only

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<sup>49</sup> Muhammad Ridwansyah, "Pengaturan Tindak Pidana Dalam Undang-Undang Nomor 32 Tahun 2009 Tentang Perlindungan Dan Pengelolaan lingkungan Hidup (Tinjauan Fiqh Al- Bi'ah)" (2017) 6:2 J Huk dan Peradil 173–188.

<sup>50</sup> Soedarto, *Hukum Pidana I* (Semarang: Badan Penyediaan Bahan-bahan Kuliah FH Undip, 1998).

<sup>51</sup> Saleh, *supra* note 42.

when punishment is imposed on certain criminal acts, but also because it is determined or stated in laws and regulations. This is the hallmark of this criminal consequence acting as a deterrent by intentionally causing misery to uphold legal standards. When compared with the existing penalties in other areas of law, criminal sanctions are more severe. The purpose of this topic is to protect legal interests from action on illegal matters.

Criminal provisions casually contained in the Shipping Law, there is no relation to the principle of *ultimum remedium*. In his explanation as long as it relates to shipping safety and security, all provisions in the Shipping Law apply to legal subjects. Thus all legal remedies contained in shipping rules apply as stated.

Meanwhile, regarding dumping referred to in the environmental law and its derivative regulations, they include:

A. Regulation of the Minister of Environment and Forestry Number P.12/MENLHK/SETJEN/KUM.1/4/2018, regarding the terms and methods for dumping waste into the sea, article 2 paragraph (1) is prohibited dumping waste into the sea without permission for anyone who produces waste. Paragraph (2), B3 and non-B3 waste are examples of waste that can be disposed of into the sea. Paragraph (3), B3 waste originates from activities:

1. Tailings in the form of mineral mining;
2. Drill cuttings that use drill mud made from synthetic materials related to the exploration or exploitation of oil and natural gas at sea.

Paragraph (4), non-B3 waste originating from exploration or exploitation activities in letter b above is in the form of:

1. The use of drilling mud with water as the main ingredient in the form of drilling dust;

2. The use of drilling mud with the main ingredient of water in the form of waste drilling mud.
- B. Article 3 of Regulation of the Minister of Environment and Forestry P.12/2018, anyone who releases waste into the sea must fulfill the following conditions:
1. Before release;
  2. Region of release;
  3. Release method; and
  4. Environmental monitoring.
- C. Article 9 Regulation of the Minister of Environment and Forestry P.12/2018, Disposal of waste into the sea fulfills the following requirements:
1. Reduction of poison content;
  2. Waste type;
  3. Waste quantity;
  4. Waste discharge intervals from sensitive sites;
  5. Release tempo;
  6. Discharge debt;
  7. Release method;
  8. Steps and types of mining activities, to waste originating from mineral mining in the form of tailings.
- D. Article 19 paragraph (1) Regulation of the Minister of Environment and Forestry P.12/2018, the minister must issue a permit to anyone who dumps (dumping) waste that meets the requirements.
- A. Pollution originating from ship operations according to article 3, PP 21/2010, can be in the form of:
1. Oil;
  2. Liquid components containing poisons;

3. The form of packaging of the precarious components being transported;
4. Garbage disposal;
5. Ballast water;
6. Hazardous products and materials for the ship's environment.

While the provisions related to the release of waste caused by shipping operations that may not be carried out without a permit in Article 5 PP 21/2010, are:

1. Residual dirty oil;
2. Rubbish;
3. Human waste;
4. Ballast water;
5. Dangerous and toxic components of chemicals;
6. Components that can damage the ozone.

Based on PM 29/2014, pollution from the operation of ships and products and hazardous materials contained on ships include:

1. Ship tank washing activities;
2. Transportation of hazardous and poisonous waste by ship;
3. Disposal of waste in the waters;
4. Oil pollution coming from ships
5. Pollution of liquid components containing toxins from ships
6. Pollution forms the packaging of precarious components transported by ships
7. Pollution by ships such as sewage, garbage dumps, air, and engine exhaust;
8. Pollution caused by the spillage of cargo and products from ships;
9. Barnacle control;

10. Management of ballast water on board.

Shipping rules for every sailing ship must be followed by the Shipping Law and its derivative regulations, including:

- A. Article 80 paragraph (3) PM 29/2014, requires that hazardous and toxic waste (B3 waste) must be equipped with at least:
1. Format of several types of cargo (manifest) carried by ship;
  2. Stowage (labeling, labeling positioning);
  3. Rule-based loading technique;
  4. Pollution control equipment and safety equipment.
5. PM 29/2014 Article 48 paragraph (1), every ship carrying ballast water and traveling in the international maritime territory with a gross tonnage of 400 GT or more must follow the provisions of the ballast water management convention. Paragraph (2) Every ship transporting ballast water and sailing in the Indonesian territorial waters with a capacity of 1500 m<sup>3</sup> or more must comply with the water management rules set out in a Ministerial Regulation. Paragraph (3) For ships that have fulfilled the requirements in paragraphs (2) and (3) a ballast water management certificate is issued by the director general;
6. PM 29/2014 Article 49, provisions for ballast water regulation for ships article 48 paragraph (2):
1. With ballast water detail document and ballast water control scheme book. Authorized officials approve the ballast water management plan, which is then submitted to Syahbandar at the local port;
  2. Carry out ballast water control for ships with a water size of 1500 m<sup>3</sup> and an interval of at least 25 miles from the nearest continent, exchange ballast water up to 95 percent of the ballast size;

3. When letter b has not been implemented, the return water release must be treated with a tool first;
4. Ballast water is released by being treated. Guided by the provisions in the release of ballast water, namely no more than 10 living organisms/m<sup>3</sup> with a scale of 50 M or greater and a minimum of 10 organisms with a scale ranging from 10 M to a minimum of 50 M, in addition to these requirements must fulfill the stipulation of indicator release microbes, based on general guidelines for human health;
5. Ships that have a ballast water size of 5000m<sup>3</sup> or more must have control devices that meet the requirements in accordance with letter d;
6. The government must approve the ballast water management equipment system installed under letter c and letter e, guided by the criteria issued by the International Maritime Organization.

Based on the criminal provisions of the environmental law and the Shipping Law. A person deemed to have committed a criminal act of pollution in the waters is someone who intentionally or because of his negligence caused pollution in the waters based on the Shipping Law and the environmental law. From the various descriptions above, the criteria for pollution caused by the operation of ships can be sourced, one of which is from the discharge of ballast water which could be contaminated with oil from the ship. Included in pollution under the Shipping Law. Because it is regulated in the Shipping Law and its derivative regulations regarding pollution originating from the operation of ships. Whereas in the environmental law, the disposal or dumping of waste into the sea without approval is waste originating



from B3<sup>52</sup> and non-B3 from mineral mining activities or exploration and exploitation of oil and natural gas in the sea, in the form of drill bits from drilling activities using drilling mud with components main synthesis. Not caused by the operation of a ship in a voyage.

Thus specifically for pollution carried out by the operation of ships, the criminal provisions are based on Article 325 in conjunction with 229 of the Shipping Law. This is because the act of pollution complies with what is regulated by the Shipping Law and its derivative regulations concerning the disposal of ballast water without a permit which results in pollution in the waters which is the scope of maritime environmental protection. The substance of the criminal provisions in the Shipping Law is consistent with its derivative regulations. It can also provide an overview for law enforcement in analyzing a fact based on the applicable legal provisions by its scope. There is an effort to harmonize criminal provisions related to pollution in waters carried out by ship operations with the environmental law.

For actions that cannot be carried out according to the applicable legal rules that are public in nature, then if someone violates them, that person can be held responsible for the actions he has taken. In order to be charged with criminal responsibility, based on the principles of criminal law, such as having to fulfill the principle of legality which implies that there has not been an activity that is not permitted or threatened with punishment unless it has been stated first in a rule. Some conditions must be met to determine that the person can be held criminally responsible.

Based on the results of the application of criminal provisions for pollution in waters carried out by ship operations. The author focuses

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<sup>52</sup> The term "hazardous and toxic substances," sometimes known as "B3," refers to substances that have the potential to harm humans, other living things, or the environment due to their nature, concentration, or amount, either directly or indirectly., *supra* note 36.

on criminal provisions by article 325 of the Shipping Law. This decree does not stand alone, but there are previous acts of prohibition regulated in article 229 of the Shipping Law. Article 1 number 27 PM 29/2014, the disposal of waste in question is the disposal of garbage or other objects originating from airplanes, ships, or other constructions at sea with the intention. This does not include waste or other goods arising from the normal operation of the ship or the positioning of goods for a purpose other than disposal. The act of dumping waste includes dumping, and placing, it in waters without a permit. Looking at the formulation in the provisions of Article 325 of the Shipping Law, it is a formal offense, namely an offense that prohibits certain activities from being carried out,<sup>53</sup> in this case dumping waste into waters without a permit. Therefore, committing the prohibited actions mentioned above is deemed to have completed the crime related to Article 325 of the Shipping Law.

Next is to determine whether the criminal act can be held accountable by the person concerned. To prove whether the perpetrator has met the requirements in order to be able to bear his responsibility according to law, he has committed a criminal act as referred to in Article 325 of the Shipping Law with the following factors:

1. Related to the existence of a criminal offense, it implies that an action has not been sanctioned if there are no rules that do not allow it.<sup>54</sup> This has been formulated in article 325 in conjunction with 229 of the Shipping Law, regarding the prohibition of pollution in the waters carried out by ship operations;
2. Mistakes, also referred to as normative errors, are defined as mistakes that occur when a person acts in violation of criminal

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<sup>53</sup> PAF Lamintang, *Dasar-Dasar Hukum Pidana* (Jakarta: Sinar Grafika, 2007).

<sup>54</sup> Moeljatno, *Asas-Asas Hukum Pidana* (Jakarta: Renika Cipta, 2008).

provisions related to the ban on disposal of waste or ballast water, such as intentional mistakes and negligence;

3. To have a manufacturer who can be responsible, the skipper must meet the educational, training, talent, and skills qualifications, as well as his health in Article 137 paragraph (6). In accordance with this stipulation, a person has a check regarding the personal condition of a skipper, which then determines whether the skipper can be held responsible or not;
4. There are reasons for criminal abolition, and reasons for justification and forgiveness are two types of justification that fall into the category of criminal abolition. The reason for justification is justification for criminal acts that are against the law. If the skipper dumping in Indonesian waters has obtained a permit based on certain requirements that have been met, then the captain's actions cannot be categorized as a criminal act of pollution. Next is the reason forgiveness leads to forgiveness even when someone has broken the law for the crime he has committed.<sup>55</sup> If the soul of a skipper is in good health then this excuse cannot eliminate the criminal act of pollution.

The elements of pollution in the waters formulated in Article 325 of the Shipping Law must then be explained, namely:

1. Whoever means anyone who can become a legal subject by being able to bear responsibility for his actions;
2. Doing, disposing of ballast water into the water by violating laws and regulations or without a permit, prohibiting certain activities, in this case disposing of waste into waters without a permit.

Next is related to who will bear the responsibility for the act of pollution in the waters by the operation of the ship. Based on the

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<sup>55</sup> Hanafi & Mahrus, *supra* note 41.

Shipping Law article 1 number 41, the captain is a ship's personnel with the highest command of the ship and is given certain rights and obligations according to the law. Article 227 of the Shipping Law, every crew member must limit and control the implementation of environmental pollution originating from the ship. The same thing is also confirmed by article 230 of the Shipping Law, every crew member, including the captain, is officially responsible for avoiding pollution caused by the operation of the ship. When pollution from a ship occurs, everyone, the crew, including the captain, automatically fails to fulfill their commitment to take preventive measures. In terms of criminal liability, it falls on the party that did it, as well as other parties that support or participate in pollution caused by the operation of ships, including shipping corporations. Given the captain's position as the supreme commander of the ship, the captain has a very high possibility of being involved in pollution caused by the operation of the ship. The next possibility is the ship owner who can be held responsible for pollution originating from his ship based on article 231 of the Shipping Law.

Thus the criminal responsibility for the perpetrators of pollution in Indonesian waters carried out by the operation of the ship based on the results of the author's research lies with who is most responsible for the operation of the ship. Then based on the Shipping Law which specifically regulates related to all ship operations, including the protection of the maritime environment. Criminal responsibility for pollution in waters must first ensure the formulation of criminal provisions based on the scope of rules related to pollution in waters by ship operations. Based on the Shipping Law, the skipper is the most relevant person to assume responsibility for pollution caused by the operation of his ship. This accountability must be consistent with

the criminal provisions of Article 325 in conjunction with 229 of the Shipping Law.

It is necessary to pay attention to the difference between pollution originating from a ship and that which is not, because the consequences of applying the criminal provisions are also different. Pollution originating from ships is contained in the provisions of articles 3 and 5 of PP 21/2010. Not found in detail regulation of pollution originating from outside the ship. There are exceptions in the general provisions that pollution can originate from the release of waste in the waters, the exception is the release originating from the normal operation of the ship, article 1 point 7. Pollution originating from outside the ship can be considered pollution from the operation of the ship outside the normal course, or caused by factors others that do not come from the ship. If the pollution that occurs is not intentional but the ship's crew is negligent in preventing it, the formulation that is considered appropriate according to the author is the formulation of article 324 in conjunction with 227 of the Shipping Law.

Criminal responsibility for perpetrators of pollution in waters can be applied based on the Shipping Law based on the *systematische specialiteit* principle of the two laws, namely between the environmental law and the Shipping Law, if the benchmark is the scope of the enactment of these rules, namely shipping activities in waters, personal subjects that is every ship, and the object that is prohibited is the disposal of hazardous waste, then the Shipping Law that should be applied is article 324 in conjunction with 227 or 325 in conjunction with 229 in the Shipping Law.

## V. CONCLUSION

Legislative policies on pollution in waters regulated in the environmental law and the Shipping Law have resulted in disharmony of norms related to criminal acts of pollution in waters carried out by ship operations, where acts of pollution are regulated in two different provisions, namely the environmental law and the Shipping Law, with provisions for penalties different criminal penalties or fines, so that in its application it becomes multiple interpretations and will have an impact on uncertainty.

According to the principle of *systematische specialiteit* between the environmental law and the Shipping Law, those who operate ships that cause pollution of the waters are subject to criminal liability under the Shipping Law. The benchmark is the regulation's purview, which includes shipping activities in the waters, individual subjects, such as each ship, and prohibited objects, such as the disposal of hazardous waste.

### ACKNOWLEDGMENTS

None

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