

# Imposing Criminal Liability on Government officials for Haze in South Kalimantan, Indonesia

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**Abstract**— *The background of this research is based on the Haze that happens almost every year in South Kalimantan. Society are questioning the Government's Responsibility of this annual disaster in South Kalimantan. The purpose of this research is to analyze the reasons underlying the possibility to Impose Criminal Liability for Haze in South Kalimantan to the Government Officials, and to describe the form of criminal liability of the Government as environmental policy stakeholders on haze in South Kalimantan. This research is a normative legal research using statute approach and conceptual approach. The results of this study are: **First**, as a legal/law subject, the Government of South Kalimantan Province also has rights and obligations. Therefore, the Government is classified as a legal/law subject that can also be asked for its criminal liability. In addition, the negligence of the Government in South Kalimantan related to Haze could be criminalized based on the criminalization theory. **Second**, according to the Act Number 32/2009 on the Environmental Protection and Management, it has not been regulated about criminal sanction for the negligent government which resulted a repeated environmental pollution that harms the society. Thus, if then formulated in the Act Number 32/2009 on Environmental Protection and Management, then a criminal act that can be imposed is a material crime committed by the Government in the form of an impure passive criminal action with imprisonment and fine as sanction.*

**Keywords**— *Criminal Liability, Haze, Criminalization, Environment.*

## I. INTRODUCTION

### A. Background

A good and healthy environment is the basic right of every Indonesian citizen. It is mandated in the Constitution of the Republic of Indonesia Year 1945, in Article 28H Paragraph (1) which states; "Everyone has the right to live a prosperous

and spiritual life, to live, and to get a good and healthy environment and have the right to receive health services".

Thus the importance of the role of the State in this matter is represented by the Government to maintain and ensure that the environment remains good and sustainable. The developed countries incorporated in The Organization for Economic Cooperation and Development (COECD) also gave a big focus for the development of institutional authority of environmental management. It stated that "institutional frame work is an interest part of the environmental management system. It facilitates and supports the environment policy making process, and ensures the implementation and enforcement of policies ".<sup>1</sup> It can be concluded that the environmental management system can facilitate and support the formulation of environmental policies and ensure the implementation and enforcement of the policy.

Nowadays, most countries in the world have poured environmental policies in the constitution, albeit to varying degrees. In 2004-2005 over 100 countries have contained environmental provisions in the Constitution. <sup>2</sup> In this case, Indonesia is also one of the countries in the world that have incorporated human rights related to the good environment in the Indonesian constitution.

The concept of an ideal environmental directs these changes toward the improvement of the quality of the system. Such changes are in addition important to maintain the stability of the system process, in a practical order as well as to maintain the stability of life as well as its sustainability. Changes in the quality of ecosystem components, such as air, water, soil,

<sup>1</sup> Magda Lovei and Charless Weiss, Jr, *Environmental Management and Institution in COECD Countries: Lessons* (Washington DC : World Bank Technique paper No 391, 1998) , 31-32

<sup>2</sup> Muhammad Akib, *The Environment Politic of Law* ( Jakarta:Raja Grafindo Persada, 2012) 10

forests etc. individually / group will degenerate the quality of the environment, the life process and ultimately life itself.<sup>3</sup>

In everyday life, many of us encounter legal cases related to the environment either licensing issues, waste management, or environmental pollution due to certain efforts. As Findley states in his Environmental Law; "Almost all environment litigation involves disputes between government parties, rather than disputes between private parties, such litigation typically takes one of two persons".<sup>4</sup> Which means, it is related to the issue of environmental law disputes always involve the government, rather than with the private sectors

According Koesasi Hardjosoemantri, the material of the field of the environment is very broad that concerns on the terms of space to the bowels of the earth and the seabed, and includes human resources, biological resources, non-physical resources, artificial resources, it is not possible that all the material is regulated completely in a single law.<sup>5</sup> In Indonesia, many legal instruments related to the management and conservation of the environment. And the latest as the revision of the previous act is The Act Number 32 Year 2009 on The Environmental Protection and Management.

From many environmental law cases, the author is interested in researching the haze occurring annually in South Kalimantan.

Data from LAPAN (National Aeronautics and Space Agency) and National Disaster Management Agency (BNPB) mentioned that 148,194 hectares of land in South Kalimantan has burned. A total of 18,665 hectares of burned land is peatland. While Walhi (The Indonesian Spacecraft Environment) monitors in 2015 there are 2,418 hotspots in South Kalimantan. A total of 1,830 hotspots were located in the peat swamp area. A total of 771 hotspots are located in the permit area of the plantation company. According to Walhi Kalsel, there are 12 companies whose territory suffered land fires. Uniquely, some oil palm plantation companies that have seized and damaged peat swamps in South Kalimantan are untouched by the law enforcement. The latest is the ruling of the Rantau District Court released by the Supreme Court on July 28<sup>th</sup> 2016. Rantau District Court acquitted PT Platindo Agro Subur (PAS) from accusation for committed the environmental crimes. According to Walhi Kalsel analysis, the destruction of peat swamp in Banua is supported by regulation such as South Kalimantan RTRWP Number 9 / Year 2015 paragraph (1)

letter (b) stating that about 1,255,721 hectares is for plantations spread over five districts which are also national peat swamp areas Prone to fire. South Kalimantan provincial government should change the existing governance model of development into a policy that interests the people, guarding the landscape of South Kalimantan by no longer giving permission for coal mining activities and oil palm plantations.<sup>6</sup>

Haze in South Kalimantan is a form of smog contaminated the environment. According to The Act Number 32 of 2009 on The Environmental Protection and Management Article 1 number (14) "Environmental pollution is the entry or inclusion of living things, substances, energies, and / or other components into the environment by human activities so that it exceeds the quality standard of the environment. "

The haze that occurred in South Kalimantan has occurred since the 1990s until 2015. As a result of the haze, South Kalimantan Provincial Health Office noted, people with Upper Respiratory Tract Infection (ISPA) in South Kalimantan is already at the level of dangerous. The city of Banjarmasin is the most common case of ARI. In the period January - September 2015, people with ISPA in South Kalimantan as many as 289,334 inhabitants. Banjarmasin contributed 73,693 people, Banjar District 37,020 people, and Barito Kuala District 32,656 inhabitants. Children under five who suffered from ISPA were 125,942 people and more than 5 years old were 163,392 people. Meanwhile, when compared with the number of patients with ISPA in 2014, it is still below it, which is 404,863 inhabitants.<sup>7</sup>

According to Nugroho, haze occurs because of the primary air pollutant, the air pollutant component covers 90% of the total air pollutant components. The shape and composition are similar to those emitted, for example Carbon Monoxide (CO), Nitrogen Oxide (NO), Hydrocarbons (HC), Sulfur Dioxide (SO), as well as various particles. The toxicity of the five groups of pollutants varies. The most harmful pollutants for health are the particles, followed respectively by NO, SO, Hydrocarbons and the lowest toxicity is CO.<sup>8</sup>

When tracing the cause of the haze, More than 50 percent of the smog is caused by the negligence of palm oil and rubber plantation companies. A total of 2,682 hectares of burning land is the area of oil palm and rubber plantations, of a total of 5,622 hectares of land fires. Apparently there are two

<sup>6</sup> [www.walhi-kalsel.co.id](http://www.walhi-kalsel.co.id), Accessed July 10<sup>th</sup> 2017

<sup>7</sup> "Haze in Borneo-People with Upper Respiratory Tract Infection (ISPA) in South Kalimantan is already at the level of dangerous", 2015, Accessed July 10<sup>th</sup> 2017, <https://m.tempo.co/read/news/2015/10/10/206708234/kabut-asap-penderita-ispa-di-kalimantan-sudah-di-level-mencemaskan>

<sup>8</sup> Astri Nugroho, *Bio Air Quality Indicator*, (Jakarta : Universitas Trisakti, 2005) 9

<sup>3</sup> Ida Bagus, *The Institutional Law of Environment* (Bandung:Rafika Aditama., 2003) 3

<sup>4</sup> Roger W. Findley and Daniel A.Faiber, *The Environmental Law* (USA: West Publishing Company, 1999) 1

<sup>5</sup> Soejono, *The Environmental Law and Its Design in Development* (Jakarta: Rineka Cipta, 1996) 12

areas that become the main source of this haze. These areas are Tapin and Banjar Subdistrict. These two areas have large amounts of palm and rubber plantations, and due to the company's negligence caused 2,682 hectares of burning land. As a result of a thick haze occurs in South Kalimantan. Until now the efforts that can be done by the government is limited to efforts to extinguish in the area of land and forest fires. The efforts taken include bringing a water bombing helicopter from Russia, with pilots and a technician also from the country was named the Soviet Union. Artificial rain was not effective because several times goes to the wrong target. So, It cannot dispel the land and forest fires quickly.<sup>9</sup>

In 2016, South Kalimantan Governor, H Sahbirin Noor began to take a stand in preventing and responding to the haze disaster in South Kalimantan. The Governor focuses on the prevention of haze which pays attention to mobilize all elements such as society and government agencies, private sector including Indonesian National Army and Indonesian Republic Police in various action activities of environment care. The real action in rescuing the environment due to the haze is also a follow-up of President Joko Widodo's direct order of the joint movement to tackle the smog. If the year 2015 and the spreading point of fire according to the Regional Disaster Management Agency (BPBD) of South Kalimantan Province as many as 1,291 hotspots, then in 2016 successfully derived and only recorded 56 hotspots. Another factor in the reduction of fires in South Kalimantan throughout 2016 is also due to the factor of normal weather relatively, in addition the increased of public awareness and measured prevention socialization.<sup>10</sup>

The interesting point to be examined here is on whether or not the Government is accountable for the haze that occurs annually in South Kalimantan according to criminal law. If we observe that civic responsibility has become common thing in cases of environmental pollution when it is associated with the Government. As an example of the decision from the Palangkaraya District Court Number 118 / Pdt.G / LH / 2016 / PN-Plk which provides decisions related to the class action of the public against the Government including the President of the Republic of Indonesia. The authors wish to examine further whether in this case the government can also be held criminally liable in connection with the issue of environmental pollution in this case haze in

South Kalimantan. The civil responsibility of the Government has become common thing in environmental cases, but related to criminal liability, it should be explored more deeply.

According to the description of the case above, the authors are interested to conduct a research related to how the Government criminal liability of the haze that occurred in South Kalimantan is.

## **B. Research Questions**

The problems were studied in this paper are as follows:

1. What is the underlying reason that the Government is punishable for the Haze occurs in South Kalimantan according to The Act Number 32 Year 2009 on The Environmental Protection and Management?
2. What is the form of criminal liability for the Government as an environmental policy stakeholder over haze in South Kalimantan?

## **C. Resarch Methods**

The type of research used in this study is the normative legal research which collecting and analyzing the legal materials related to the problems studied. According to Peter Mahmud Marzuki legal research is a process to find the rule of law, legal principles, and legal doctrines in order to answer the legal issues faced. This corresponds to the prescriptive character of jurisprudence. Legal research is conducted to generate arguments, theories or new concepts as prescriptions in solving the problems encountered. In legal research is righth, appropriate, inappropriate, or wrong. It can thus be said that the results obtained in legal research already contain values.

This study uses statutory approach (approach statute) and conceptual approach. The legislation approach is used to analyze how the policy in The Act Number 32 Year 2009 on Environmental Protection and Management relates to the extent of government responsibility in pollution and environmental damage. While to examine the rationale of imposing the government for a criminal liability on haze in South Kalimantan is using the conceptual approach.

This study uses a prescriptive analysis. The nature of prescriptions in the field of legal scholarship is trying to study and seek answers about what should be of every problem. In this case It will be examined to what extent the government accountability of haze in South Kalimantan. Prescriptive analysis can also be interpreted as a research

<sup>9</sup> "Oil Palm Company Causes the Haze", 2014, Accessed July 10<sup>th</sup> 2017, <http://www.beritabanjarmasin.com/2014/12/perusahaan-sawit-dalang-kabut-asap.html>

<sup>10</sup> "South Kalimantan Overcome the Haze Successfully", 2016, Accessed July 10<sup>th</sup> 2017 <http://kalsel.antaranews.com/berita/43050/kalsel-sukses-tanggulangi-kabut-asap>

aimed to obtain suggestions as to what should be done to solve a particular problem.<sup>11</sup>

The legal material used is Primary Legal Material. Covering the 1945 Constitution of the State of the Republic of Indonesia, The Act Number 32 Year 2009 on Environmental Protection and Management. The legal materials are all publications about law that are not official documents. Legal publications include textbooks, legal dictionaries, legal journals, and comments on court decisions.<sup>12</sup>

The method of analysis used is the method of interpretation with reference to the theories used. The interpretive method used is grammatical interpretation<sup>13</sup> (interpretation by language). Language interpretation is used because a sentence in the text of the Act plays an important role in determining the meaning of a Undang-Undang provision. In this case, the provisions in Law Number 32 Year 2009 on Environmental Protection and Management will be explained according to everyday common language.

## II. LITERATURE REVIEW

### A. The Criminal Liability on Environmental Law

Criminal law is essentially a law followed by sanction whose function is to regulate and establish public order in society, ensuring state security and safety. Criminal law is a means of coercion to protect citizens against harmful acts or that cause suffering on the other side. (In this case environmental pollution).<sup>14</sup>

The term environmental law is a novel conception of law, it grows in tandem along with the growing awareness of the environment. With the growth of understanding and awareness to protect and preserve this environment then grow legal attention to it. Thus, It grows and develops of a branch of law called as the environmental law.<sup>15</sup>

The pure environmental law is that an administrative law which has the support of civil and criminal law. Therefore, in the world of law, environmental law has a complex problems that sometimes must be solved not only in one legal domain only.

In Indonesia, The Act Number 32 Year 2009 as the main provision accommodates environmental policy in Indonesia. The responsibility for environmental management rests with the government in the sense that it is not submitted to

individual citizens or become civil law. The responsibility of environmental management lies with the government which has consequences for the institution and authority for the government to manage the environment<sup>16</sup>

As an administrative law with its instrumental character, the prominent function in administrative environmental law is preventive form of pollution and / or environmental damage.<sup>17</sup>

The application of criminal law in environmental cases must be addressed carefully. Van De Bunt in his paper at a meeting of environmental law associations in the Netherlands argued that there were some signs in choosing the application of administrative instruments and criminal law instruments or both at once with several criteria. The criteria are:<sup>18</sup>

- a The Normative Criteria holds that criminal law can only be applied to offenses which have very negative and very socially discouraging negative ethical values.
- b Instrumental Criteria that are pragmatic more oriented to the detention of suspects, or the restoration of the situation or the repair of damage. In this case, the administrative instrument is better applied. However, if it is felt that the application of administrative law will go through a very long procedure, then applying the penal law will be better.
- c Opportunistic criteria may be included if the application of administrative instruments cannot work, for example administrative coercion or forced money (*dwangsom*) cannot be imposed because the violator has been bankrupt, then it is better to apply a criminal law instrument.

In the opinion of Andi Hamzah, the criminal law is as *ultimum remedium*, means there are three kinds, the first is the criminal law as *ultimum remedium* because the application of the criminal law can only be done against people who violate the heavy law ethically, the second is the criminal law as *ultimum Remedium* because criminal penalties are heavier and tougher than other sanctions, and the third is criminal law as an *ultimum remedium* because the administrative official knows in advance that the offense is actually prioritized in taking steps and actions rather than law enforcement.<sup>19</sup>

The formulation of environmental offenses is always associated with criminal sanctions (threats), because theoretically this criminal sanction aims to run the norms of environmental law. This criminal sanction arose in response

<sup>11</sup>Soerjono Soekanto, *The Introduction to the Legal Research*, (Jakarta: UI Press, 2012) 10

<sup>12</sup> Soekanto, *Legal Research*, 10

<sup>13</sup> Sudikno Mertokusumo, *The Invention of Law*, (Yogyakarta: Liberty, 2007) 56

<sup>14</sup> Ninien Suparni, *The Conservation, Management, and Law Enforcement of Environmental Law*, (Jakarta: Sinar Grafika, 1994) 191

<sup>15</sup> M. Hadin Muhjad, *The Introduction to the Environmental Law in Indonesia*, (Yogyakarta: Genta Publishing, 2015) 1

<sup>16</sup> Hadin, *The Introduction*, 36

<sup>17</sup> Hadin, *The Introduction*, 36

<sup>18</sup> Hadin, *The Introduction*, 215

<sup>19</sup> Hadin, *The Introduction*, 222-223

to disobedience to environmental law norms, as Gustaaf Biezeveld puts it in his Criminal Enforcement of Environmental Law: General Introduction, Investigation, and Prosecution.<sup>20</sup>

Criminal law enforcement in environmental cases cannot be regarded as the final law in an environmental case if other areas of the law cannot solve it, since this criminal law only resolves unilaterally yet reaches the affected party / affected group in the form of recovery to its original state.

The criminal law does not stand alone as an instrument of law enforcement. It depends on the administrative law imposed by administrative officials. No criminal law will be imposed if an irreparable or recoverable damage, such as tree felling or the killing of protected animals / birds, including irreparability. The repair or recovery of the problem cannot be done physically.<sup>21</sup>

In a foreign language, criminal liability is referred to as "Toerekenbaarheid", "criminal responsibility", "criminal liability". That criminal responsibility is intended to determine whether a suspect / defendant is held liable for a crime committed or not. If he is convicted, it should be found that the act is unlawful and the defendant is responsible. This capability shows the errors of a deliberate act or *omission*. This means that the actions are reprehensible accused of aware of the actions taken.<sup>22</sup>

A person who commits a crime, is not always punishable. It depends on whether the person in doing the crime has an error or not. Because to be able to impose a criminal against a person is not enough with only a criminal act, but other than that there must also be a mistake or according to Moeljatno disgraceful attitude of heart. Who makes mistakes, then he is responsible. In this case is known as a principle "no crime without error" (*geen straf zonder schuld*).<sup>23</sup>

In the idea of *mens rea*, it must be proved first the inner attitude or the mental ability of the perpetrator whether the perpetrator committed a criminal act in the form of intentional or negligent. The difference between intentional and negligent is the deliberate attitude of one's inner self is violated, whereas in the neglect of the attitude of this person only ignores the prohibition of the law so as not to be careful in doing an act that leads to prohibited circumstances.<sup>24</sup> As a

form of error in criminal law, they differ only "gradual" or only in quality.<sup>25</sup>

There is a passive criminal act called *delicta omissionis*. The omissionist offender (*delicta omissionis*) is divided into actual (pure) omission deliberations, commonly called *delicta omissionis* and impure omissionist offenses, often called *delicta commissists per omissionem commissa*. *Delicta omissionis* (delict omissionis pure), is the offense, criminal offense or criminal acts that is formulated by the lawmakers that can only be realized by passive action, do not do or ignore the legal obligation, where he should be actively do so. While the pure omission offense, commonly called *oneigenlijke omissidelicten* or *delicta commissionis per omissionem commissa*, is a delict that can be realized by active deeds or passive deeds in other words can occur due to deed (handeling) or neglect (nalaten).<sup>26</sup>

Van Hamel states that: a person who does not act, he can not be considered to cause a result, if he has no legal obligation to do (*als de dader de rechtsplicht heft om te doen*). The legal obligation of a person who at a certain time and circumstances is required by law must do so. If by law a person is obliged to do, and then he does not do that cause a consequence, then the cause of that result lies in the possession of that legal obligation.<sup>27</sup>

## B. The Theory of Identification (*Alter Ego Theory*)

According to E. Utrecht, a legal entity (*rechtspersoon*), is a body which, according to the law of authority, becomes the supporter of rights, it is further explained that the legal entity is any supporter of the right that is not soulless or more precisely non-human.<sup>28</sup>

Legal entities consist of public legal entities and private legal entities. Private legal entities consist of Limited Liability Company (PT), Foundation and Cooperative. While public legal entities may take the form of State, Province, Regency, State Institution, State Bank, etc.<sup>29</sup>

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cause "reproach". *The Basics of Indonesian Criminal Law in The Reformation of Law Perspective*, (Malang: UMM Press, 2012) 244

<sup>25</sup> Theoretically, if the form of error is sorted from the form of the most severe quality errors to the form of error of the lightest quality, then the hierarchy of qualitative order of the form of error is as follows: 1). The deliberate as a purpose, 2). Purpose as a certainty, 3). Deliberation as a possibility, 4). A conscious omission, and 5). Unconscious neglect. It is also stated that between intent and omission is very close, especially Deliberate as a possibility with conscious omission". So the thought arises to include the conscious neglect as deliberate. Tongat, *The Basics* 244

<sup>26</sup>Zainal Abidin Farid, *Criminal Law Volume I*, (Jakarta: Sinar Grafika, 2010) 213-214

<sup>27</sup> Adami Chazawi, *Criminal Law Part 2*, (Jakarta: PT RajaGrafindo Persada, 2011) 228.

<sup>28</sup> Chidir Ali, *The Legal Entity*, (Alumni, Bandung, 1999) 18-19.

<sup>29</sup> Chidir, *The Legal*, 18

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<sup>20</sup> Dr. Muhammad Akib, *Environmental Law on Global and National Perspective*, (Jakarta:Raja Grafindo, 2014)

<sup>21</sup> Prof. Dr. Jur. Andi Hamzah, *The Environmental Law Enforcement*, (Jakarta: Sinar Grafika, 2005)

<sup>22</sup> Roeslan Saleh, *The Main Idea of Criminal Liability*, (Jakarta: Ghalia Indonesia, 1982) 250

<sup>23</sup> Moeljatno, *The Principle of Criminal Law*, (Jakarta: PT Rineka Cipta, 1993) 153

<sup>24</sup> In general, jurists agree that there is no substantial difference between "intentional" and "negligence". Both show the inner connection between the "actor" and his "deed" in such a way that it can

Theory of Identification or *Alter Ego Theory* (Instrumental Rule) states that a criminal offense is committed by a corporation if it is committed by persons who have a functional position in the structure of a corporate organization, acting for and on behalf of a corporation or for the benefit of a corporation based on employment or other relations, Within the scope of the corporation itself both individually and collectively.<sup>30</sup>

The behavior of the corporation is actually an attribute or identification or instrument of the will of those who have such a functional position. In the case of a crime perpetrated by the corporation, the corporation is represented by the board, who may be able to appoint others. The judge in this case may also order that the caretaker be brought to court. The indictment for the corporation is separate from the indictment against the board.<sup>31</sup>

The theoretical shifts in corporate criminal liability as well as those occurring in some countries are due to the growing awareness of the dangers posed by corporate crime, both to the state (eg tax evasion, terrorism and corruption), rival firms (unfair competition), consumer protection, (Environmental pollution), shareholders (due to business closure sanctions), as well as to labor (lack of job security protection), due to corporate-oriented anomic behavior that is only profit-oriented and overriding the principles of good corporate governance and business ethics.<sup>32</sup>

Governments can be categorized as a legal subjects. The subject of law is a party based on the law of having rights, a certain duty and power over something. In accordance with the definition expressed by Algra,<sup>33</sup> the subject of law is any person who has rights and obligations, which gives rise to legal authority (*rechtsbevoegheid*), while the notion of the authority of the law itself is the authority to be the subject of rights. Thus, the Government as the stakeholders of the environment-related policy also has obligations and responsibilities that must be implemented.

Direct liability doctrine for legal entities, for example officials / errors of senior officials identified as corporate actions / errors. Also referred to as the *alter ego theory* or organ theory. The officials referred to in this case are the ones who control the company, both alone and together, for example the "directors and managers".

According to the theory of common law, that everyone including the Government must be held accountable for any action, whether by mistake or without a strict liability. From

this theory further emerged a legal responsibility in the form of criminal liability, civil, and state administration. The legal liability of such a government is done in court.<sup>34</sup>

According to Jimly Asshiddiqie<sup>35</sup>, accountability has two personal or personal responsibilities and institutional or occupational responsibilities. It further said that if an official in carrying out his duties and authorities in accordance with applicable norms or rules of law, then his actions are accounted for (institutional). On the contrary, if an official performs his duties and authority violates the applicable norms or rules of law, then the exercise of his actions is personally accountable or personal liability.

According to Brautigam<sup>36</sup>, government liability can be divided into 3 (three) types, namely; First: political liability, second: legal liability, and third: economic liability. Legal liability implies that both the government and the local government in administering the government that harms the interests of the people or other parties must be accountable and accept the lawsuit for his actions. Legal responsibility by the government can be done through 3 (three) means, namely through administrative law, through civil law, and criminal law. Based on the legal instrument, it is known that there is administrative responsibility, civil liability, and criminal liability.

In relation to legal liability, Hadjon said that the actions of officials must be observed, whether the action includes the responsibility of institutional or personal responsibility.<sup>37</sup> Basically every government official in the conduct of the government is charged with the responsibilities of private positions and responsibilities. The distinction between the responsibilities of institutional and personal responsibility for the actions of the government brings consequences related to criminal liability, civil liability, and administrative responsibility. Legal accountability of government / local government in the administration of governance, can be done at any time without having to wait for the end of his term of position.

<sup>34</sup> Munir Fuadi. *The Theory of a Modern Law State*, (Bandung:Refika Aditama, 2009) 147-148

<sup>35</sup> Jimly Asshiddiqie, "Islam and Its Tradition in Constitutional Country" (The paper is presented at the annual meeting of Indonesian-Malaysia Seminar, Uin/IAIN Padang, 2010)

<sup>36</sup> Anis Zakaria Kama, "The Essence of Government Accountability in the Governance" (PhD diss, University of Indonesian Islam, Makassar, 2012) 258.

<sup>37</sup> Philipus M. Hadjon, *The Governance According to Law*, (Surabaya: Universitas Airlangga, 1992) 6.

<sup>30</sup> Chidir, *The Legal*, 152

<sup>31</sup> Chidir, *The Legal*, 152

<sup>32</sup> Chidir, *The Legal*, 152

<sup>33</sup>Zainal Asikin, *The Introduction to Law*, (Jakarta: Raja Grafindo Persada, 2012) 12-13

### C. The Theory of Criminalization

The definition of criminalization can be seen from various literatures, such as the meaning of Criminalization in Indonesian Big Dictionary (KBBI) is defined as a process that shows behavior that was not originally considered as a crime, but later classified as a crime by the public.<sup>38</sup>

Based on this it can be understood that criminalization is a process undertaken by the forming of a criminal law norm to make an action categorized as a criminal action with rational foundations arranged in such a way as to combat crime.

The policy of criminalization is a policy in determining an act which was not originally a criminal act into a criminal offense (criminal grievances). Thus, in essence, criminalization policy is part of criminal policy by means of criminal law (penal), and therefore includes from (criminal law policy), especially formulation policy.<sup>39</sup>

Sudarto said that in the process of criminalizing an action, we must pay attention to four things. First; The use of criminal law should pay attention to national development objectives, namely to create a just and prosperous society that is equally material and spiritual based on Pancasila; In relation to this, the aims using the criminal law is to tackle crime and to reduce the countermeasures themselves, for the welfare and protection of society. Second; Acts attempted to be prevented or dealt with by criminal law shall be "undesirable deeds," for example acts that bring harm (material and or spiritual) to the citizens. Third; The use of criminal law should also take into account the principle of cost benefit principle. Fourth; The use of criminal law should also take into account the level of capacity or the ability of the work of law enforcement agencies that do not let the *overbelasting* task overload.<sup>40</sup>

Salman Luthan argues that the criminalization theories that have developed so far in criminal law include morals and individualistic liberal theory, Feinberg theory, theoretical *strafrecht* theory, and joint theory. First, the moral theory put forward by Lord Devlin. This theory states that criminalization stems from the opinion that the act that should be viewed as criminality is any act that is destructive or moral action. This is because common morality has a sensible role to defend society. If the moral bonds that bind the society are lost, the community will experience disintegration. Therefore, society has the right to invite morality that can guarantee its unity. If society is entitled to

do so, then there is a practical limit on the maximum number of individual freedoms that correspond to community integration. But if individual freedom goes beyond the permissible limits, then immoral acts that generate noise, anger, aggravation and disgust are worth receiving arrangements with various instruments of the criminal law.<sup>41</sup>

Second, individualistic liberal theory. The starting point of this theory is the antithesis of moral theory is the principle of loss. It is said by Jhon Stuart Mill that the power of the state to govern society is limited by the freedom of citizens. States may only interfere with the private life of the citizen, if the citizen concerned harms the interests of others. If one's actions do not harm others, then there can be no restriction on his freedom. Based on this opinion, a particular act is prohibited because the act is harmful to others. A certain act is prohibited as long as it is harmful to others. As long as a certain act does not harm others, the state has no right to interfere with the lives of citizens in the life of society.<sup>42</sup>

Third, the theory of *paternalism*. This theory is a reaction to the weakness of individualistic liberal theory that cannot provide protection to groups of people who have physical, mental, and mental weaknesses such as children and drug users. The main task of the theory of *paternalism* is the protection of not harming oneself. Criminal law legitimizes the prohibition of the actions of a person who can harm himself.<sup>43</sup>

Fourth, Feinberg's theory put forward by Joel Feinberg. This theory is not merely adding to the principle of John Stuart Mill, but also clarifying the concept of loss as the basis for criminalizing an act of being forbidden. If Mill establishes that the sole justification of criminalization is the act of a person harming others, Feinberg proposes two reasons as a basis for criminalization, first is to prevent or reduce harm to others and second is to prevent serious attacks against others.<sup>44</sup>

In relation to the principle of assault, Feinberg gives an example of a person's actions in public that are very offensive to others and which cannot easily be avoided by the person being attacked. The act is related to lewd acts by two passengers on a bus, which is quite attacking even though the perpetrators are married couples. In this case, criminalization is done on the basis of assault rather than on the basis of show immorality, and will not change if the act will become immoral if the show is private. Beyond the context of loss

<sup>38</sup> The Minister of Cultural and Arts Republic of Indonesia, Indonesian Big Dictionary Online, Accessed on August, 17<sup>th</sup> 2017, <http://bahasa.kemdiknas.go.id/kbbi/index.php>.

<sup>39</sup> Barda Nawawi Arief, *The Criminal Law Reform from Comparative Law Perspective*, (Bandung : PT. Aditya Bakti, 2011) 126.

<sup>40</sup> Mahrus Ali, *The Basics of Criminal Law* (Jakarta : Sinar Grafika, 2012), 240.

<sup>41</sup> Mahrus, *The Basics*, 240-241

<sup>42</sup> Mahrus, *The Basics*, 240-241

<sup>43</sup> Mahrus, *The Basics*, 242 - 243.

<sup>44</sup> Mahrus, *The Basics*, 243.

and assault, the individual must be left free by the state to pursue its own goals and what the priorities of its desires.<sup>45</sup>

Fifth, the theory of *strafrecht ordenings* put forward by Roling and Jesseren d'Oliveira-Prakkan. According to this theory criminal law is a tool or instrument of government policy. The use of criminal punishment as an instrument of government policy is a new trend in the development of modern criminal law. There are three main premises of the theory of *strafrecht's ordenings*. First, the criminal law is not shown to the free individual, nor to the act of law seen socially and psychologically, but rather directed against the human being as the player of certain roles, which is required to confirm himself with the forms of action appropriate to his role. Second, the determination of criminalization is not what the people perceive as a criminal act such as in the fields of economy, health, environmental protection and traffic. Thirdly, the criminal law is no longer a criminal law concerning an act, or a criminal law concerning his actions, but a criminal law concerning the rules.<sup>46</sup>

The sixth is the *combined theory*. Combined theory is not the name of a theory but a term to describe two theories combined into one to form a new theory of criminalization. The idea of merging the two theories is grounded by the weaknesses in each period of the criminalization theory in searching for justification to justify an action.<sup>47</sup>

### III. ANALYSIS AND DISCUSSION

#### A. The reasons for the Government to be punished because of The Haze that Occurs in South Kalimantan according to The Act Number 32 Year 2009 on the Environmental Protection and Management

By realizing the Government's crucial role in the protection and management of the environment, the Government should respond more quickly in handling a pollution case or environmental damage. The government not only serves as the supervisor but also as a responsible person for the activities that have an impact on the environment both done by the Government itself, as well as by the public and private.

In the framework of the implementation of the mandate from the Constitution of the Republic of Indonesia 1945, Article 28H Paragraph (1) which states "*Everyone has the right to live a prosperous and spiritual life, to live and to get a good and healthy living environment and the right to receive a health services*" It is the government's duty to work harder in

fulfilling the Indonesian people's right to a good and healthy environment.

As mentioned earlier, there are so many government duties and responsibilities for the environment as regulated in The Act Number 32 Year 2009 on Environmental Protection and Management such as;

1. Pollution control and / or environmental damage shall be carried out by the Government, regional government, and the party responsible for the business and / or activities in accordance with their respective authorities, roles and responsibilities. (Article 13)
2. In the protection and management of the environment, the Government has the duty and authority to establish national policies; Establishing norms, standards, procedures, and criteria; Coordinate and implement pollution control and / or environmental damage; Conducting guidance and supervision on the implementation of national policies, regional regulations, and regulations of regional heads; Conducting guidance and supervision of the compliance of the party responsible for the business and/or activity on the provision of environmental licensing and legislation; Develop and apply environmental instruments; Develop and implement public complaints management policies. (Article 63 paragraph (1))
3. In the protection and management of the environment, the provincial government is tasked and authorized: establish provincial policies; Establish and implement SEA at the provincial level; Establish and implement policies on provincial RPPLH; Coordinate and implement control of pollution and / or environmental damage across districts / municipalities; Conduct guidance and supervision on the implementation of policies, regional regulations and regulations of regency / municipality heads; Conduct guidance and supervision of the compliance of the party responsible for the business and/or activity on the provision of environmental licensing and legislation in the field of environmental protection and management; Develop and apply environmental instruments; Enforce environmental law at the provincial level. (Article 63 paragraph (2))
4. The minister, governor, or regent / mayor in accordance with his / her authority shall supervise the compliance of the party responsible for the business and/or activity on the provisions stipulated

<sup>45</sup> Mahrus, *The Basics*,. 243-245.

<sup>46</sup> Mahrus, *The Basics*,. 245.

<sup>47</sup> Mahrus, *The Basics*, 245

in the legislation in the field of environmental protection and management. (Article 71 paragraph (1))

Of the many duties and responsibilities of the government mentioned above, related to the haze in South Kalimantan, the government should participate in the control of environmental pollution of haze by forming norms and policies related to the problem. If you look at the cause of the haze, then there are two main causes of natural forest fire due to very hot climate, and the burning of forests / lands conducted by several companies or individuals.

In relation to the government's duty and authority over haze in South Kalimantan, the Government referred to the Regional Government, more specifically the Provincial Government based on the principle of Regional Autonomy, namely clarity on the distribution of central and regional authorities. Unfortunately, the haze occurs in South Kalimantan is not a one-time haze, but it has become an annual problem that has not only affected South Kalimantan but also national and even international problems (since the haze often reaches neighboring countries).

From some articles related to haze in South Kalimantan we can see that the government tends to be less care and less focus in regulating and managing this sector. The fragmentation of functions associated with haze prevention and control in many institutions that cause disorganization becomes one of the indicators. The government should integrate the functions of the Office of the Environment, Regional Disaster Management Agency, Indonesian National Army, The Police of The Republic of Indonesia and the community.

The inclusion of regulation on criminal liability in The Act Number 32 Year 2009 on The Environmental Protection and Management is as *ultimum remedium* and *primum remedium*. The enforcement of criminal law in this Act introduces the threat of minimum penalties in addition to the maximum, expansion of evidence, criminalization for quality offenses, integration of criminal law enforcement, and corporate criminal arrangements. Enforcement of environmental criminal law is concerned with the principle of *ultimum remedium* which requires the application of criminal law enforcement as a last resort after the implementation of administrative law enforcement is considered unsuccessful. The application of the *ultimum remedium* principle applies only to certain formal criminal acts, namely punishment for violations of waste water quality standards, emissions, and disruptions. While the *primum remedium* principle is applied as a preventive business before a result occurs, for example punishment for the person

making the Analysis of Environmental Impact but not competent or not being certified.

In environmental criminal liability related to the government duties and responsibilities for pollution and environmental damage has not been regulated. What is regulated is only the obligation of supervision over the permits granted to the company related to activities that affect the environment. So far, the regulation on government accountability as responsible for the people who are victims of environmental pollution (in this case because of the haze) has not been regulated in the Act.

According to the theory of common law, that everyone including the government must be held accountable for any action, whether by mistake or without strict liability. From this theory further emerges the legal responsibility of criminal, civil, and state administration. The legal liability of such a government is done before the court.<sup>48</sup>

To achieve legal objectives such as the objectives of law according to Sudikno above, it is necessary to be connected with the theory of legal ideals by Gustav Radbruch, where there are 3 basic values which should ideally serve the basis in operating the law in Indonesia, namely:<sup>49</sup>

1. The value of justice;
2. The value of benefit; and
3. The value of legal certainty.

This theory teaches that there is a scale of priorities that must be done in the law enforcement. With the request of government criminal liability for haze in South Kalimantan, for example in the form of a fine, the benefit and justice for society can also be fulfilled. The fines can be used for the recovery of environmental and social conditions from haze. On the other side, the deterrent effect of a punishment can be felt by the government so that in the future it can prevent the occurrence of haze repeatedly.

In Article 112 relating to the mention of government as a person who can be convicted in the case of intentionally not supervising the company in the implementation of its environmental permit is one example of the recognition of the Act on the status of government which is also one of the legal subjects. The subject of law is a party which by law has certain rights, obligations, and powers over something. According to the definition described by Algra the subject of law is that every person who has rights and obligations, which gives rise to legal authority (*rechtsbevoegheid*), while the definition of the law authority itself is Authority to be the subject of rights. Thus, as a legal subject, the government

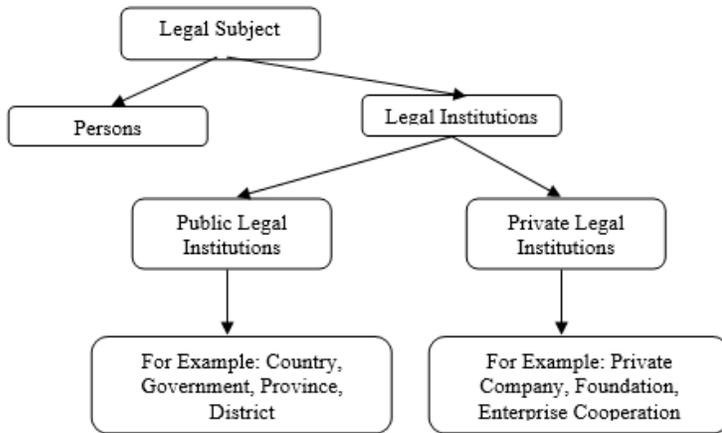
<sup>48</sup> Munir, The Theory, 147-148

<sup>49</sup> Marwan Mas, *The Introduction to the Science of Law*,

(Jakarta: Ghalia Indonesia., 1997) 73-74

also has obligations and responsibilities that must be implemented.

For further explanation for the position of government as a legal subject can be seen in the following figure:



By understanding the status of the government as one of the criminal law-abiding subjects, the author will attempt to establish a criminal law policy analysis in the case of criminalization. Attempts to criminalize the actions of the government in relation to its duties and responsibilities for pollution and environmental damage that have not been used as a form of criminal offense shall be based on rational and objective considerations. Because of that It will be presented some theoretical foundation that can be used as a basis in criminalizing the government that does not carry out its duties and responsibilities for pollution and environmental damage.

As a basic theoretical foundation, we must first understand that the criminalization process should at least pay attention to four basic things. As Sudarto puts it in Mahrus Ali, that the first criminalization must consider the use of criminal law should take account of the national development goal of creating a just and prosperous society equally material and spiritual based on Pancasila. Second, it is noticed that the act which is attempted to be prevented or overcome by criminal law must be "undesirable deed," which is the act of bringing harm (material and or spiritual) to the people. Third, considering the use of criminal law must also take into account the principle of cost benefit principle. And fourth, considering the use of criminal law should also take into account the level of capacity or the ability of the work of law enforcement agencies that do not let there is an *overbelasting* task overload. 50

Based on the four basic elements that must be considered before criminalizing an act then can be described some argumentation. First, a healthy and good environment is the

fundamental guarantee contained in the constitution and part of the national goal. Therefore, efforts to criminalize irresponsible governments and carry out their functions to safeguard the environment from pollution and destruction become an important part of legal policy to achieve national goals.

Second, pollution and environmental degradation are things that bring harm to society. Disadvantages due to pollution and environmental damage make the community will be distracted to do activities or even experience health disruption, for example due to haze that can cause respiratory infection. In order to ensure pollution and environmental damage the government must be fully responsible, therefore if the government deliberately and neglected to its related duties and functions then the government as one of the legal subjects can be criminalized.

Thirdly, the costs incurred to carry out the action against the irresponsible parties and not perform their functions if compare to the damage and pollution of the environment are certainly still within the rational limitations. Therefore, the principle of cost and benefit in the criminalization process will be maintained in this case.

Fourth, the capacity of law enforcement agencies to carry out actions that will be criminalized will not experience an overbelation of tasks or overbelasting. This is because, as long as this law enforcement agencies have the ability to run the prosecution of violations of criminal provisions in the law of the environment. Therefore, basically law enforcement apparatus has had an understanding in environmental criminal prosecution.

In the literature review section, several criminalization theories have been described. So, in the context of this study, one of the theories of criminalization that can be used is Feinberg theory proposed by Joel Feinberg. This theory suggests that the reason for an action to be criminalized is that it harms others. It is also to prevent or reduce harm to others and to prevent serious attacks against others. Based on this theory, to prevent the emergence of losses due to pollution and environmental damage as well as the emergence of various tensions of society who are disadvantaged against the government and have a negative impact on the life of the nation and state, it is necessary to create a conception of criminal law policy that accommodates criminal sanctions for governments that do not perform the duties and Its function in maintaining the environment clean and healthy. The forms of criminal sanctions that w can give such as fines and imprisonment.

<sup>50</sup>Mahrus Ali, *The Basics*, 240.

## B. The Government's Criminal Liability for Haze in South Kalimantan

The enforcement of criminal law in The Act Number 32 Year 2009 on The Environmental Protection and Management introduces the threat of minimum penalties in addition to the maximum, extension of evidence, criminalization for quality violations, integration of criminal law enforcement, and corporate criminal law. Enforcement of environmental criminal law still observes the principle of *ultimum remedium* which requires the application of criminal law enforcement as a last resort after the implementation of administrative law enforcement when it is considered unsuccessful. However, the application of the *ultimum remedium* principle applies only to certain formal criminal acts, namely the prosecution of violations of waste water quality standards, emissions, and disturbances.

The government liability concerning the environment is actually already regulated in The Act Number 32 Year 2009 on The Environmental Protection and Management. The existence of the principle of government liability is actually one of the balancer in positioning between the position of government and society in running the wheel of the state organization. The government has the authority to regulate, collect taxes, enforce the law, impose sanctions, and so on, which is a series of "powers" in achieving the goals of living the state. On the other hand, the community also has the right to obtain legal protection from various government actions that may cause harm to the community. Therefore, the existence of this responsibility actually provides enough space for the emergence of community participation that is needed by the democratic government.

The implementation of the principle of responsibility should be consistent, will also increase the dignity of the government in the eyes of its people. This is because if the government is willing to uphold this principle then at least some important things will be achieved: (a) enforcement of the principles of the rule of law, the rule of law, the supremacy of law and equality before the law in the administration of government, because the government is not only respected but also Law-abiding; (b) considering that in general the people of this nation are still adhering to paternalistic culture then the existence of accountability of this government encourages the emergence of voluntary compliance of public law; (c) strengthening reform commitments to achieve good governance in line with the strengthening of civil society; (d) to strengthen government accountability in order to ensure legal certainty, justice and legal protection, it is necessary to think about establishing a State Liability Act (called the State Liability Act 1981 in Japan called the Government Liability Act, 1946). In addition, the Act on

Compensation (in Korea is called the National Compensation Act, the Administrative Compensation for Injury and the Administrative Compensation for Loss).

In general, the definition of Governmental Responsibility is a compulsory compliance obligation of a state or government or a government official or other official performing a governmental function as a result of an objection, a lawsuit, a judicial review, filed by a person, a public, Through the settlement of the courts or outside the court for the fulfillment of: (a) payment of money (subsidies, compensation, benefits, etc); (b) issue or cancel / revoke a decision or regulation, and; (c) other acts which are the fulfillment of its obligations, for example to conduct more effective and efficient oversight, to prevent any harm to humans or the environment, to protect the property of the people, to manage and maintain public facilities and infrastructure, to impose sanctions on an offense etc. .

The definition is clear that governmental liability is more emphasized on civic and administrative responsibility, whereas criminal liability is attached to the personal actions of the official concerned, such as corruption, murder, adultery, etc., in accordance with criminal provisions. In the context of governmental liability, in the field of civilization is generally based on an act against the law done by the authorities (*onrechsmatige overheidsdaad* or unlawful acts of the government) as specified in Article 1365 of the Civil Code. The settlement of this civil action can be done through court or out of court through the ADR mechanism (inter alia: mediation and arbitration).

One of the duties and responsibilities of the government of South Kalimantan Province to the environment is to seek the Protection and Management of the Environment in South Kalimantan. One of the most perennial environmental cases in South Kalimantan is the haze. In carrying out its duties and responsibilities, the provincial government of South Kalimantan should be able to analyze the causes and minimize the impacts as much as possible. So, in every year there is progress made by the government and preventing haze in South Kalimantan.

The duties and responsibilities of the Regional Government on the environment-related policies in their respective regions are not yet formulated into the form of criminal offense if the government fails to do so. Among the many duties and responsibilities of the government to the environment such as the control, prevention and restoration of environmental pollution as stipulated in The Act Number 32 Year 2009 on Environmental Protection and Management, have not provided criminal sanctions if the government neglects or intentionally does not do so. Right now, civil action is the only way available.

If it is associated with the idea of *mens rea*, it must first be proved in the attitude of the soul or the soul's ability of the government of South Kalimantan Province whether the government is not immediately take action to the annual haze that occurred in South Kalimantan, whether in the form of intentional or negligent. The difference between intentional and negligent is the deliberate attitudes of one's inner person is indeed violating, whereas in the neglect of the inner attitude of this person simply does not heed the legal prohibition so as not to be careful in doing an act that causes a prohibited circumstance.<sup>51</sup> As a form of error in criminal law, they differ only "graduul" or only in quality.<sup>52</sup>

As the provincial government of South Kalimantan responsible for the good and healthy environmental feasibility, the environmental conditions must meet the standards of hygiene and environmental health. Therefore, the provincial government of South Kalimantan that does not immediately overcome the haze in South Kalimantan almost every year can be said to be negligent in carrying out its duty to guarantee human rights to a good and healthy environment.

Based on the opinions of Van Hamel and Bertens, the government of South Kalimantan Province has the ability to be responsible for:

- The South Kalimantan Provincial Government is able to understand and be aware of the true intentions of what it does, for example; not immediately overcome the haze or preventing the recurrence of haze in South Kalimantan and it cannot be justified by the community.
- The Provincial Government of South Kalimantan is able to determine the will if He does not immediately Overcome the haze or prevent the recurrence of haze in South Kalimantan so that he is responsible for what caused it.

Thus, in the case of haze in South Kalimantan, the Government of South Kalimantan Province has the ability to be responsible, this is because the Provincial Government of South Kalimantan is negligent in terms of:

- Not supervising the companies or people who burn the forests without permits
- Not trying to analyze the occurrence of haze in South Kalimantan that almost happens every year so that no efforts to prevent the occurrence of haze repeatedly
- Not providing haze-related preventive solutions in South Kalimantan
- Not conducting environmental maintenance and recovery of haze that occurs quickly, causing a

lot of people who are affected by their health and activities due to haze

- No law enforcement related to the company or people suspected to be the cause of the haze.

According to Jimly Asshiddiqie,<sup>53</sup> accountability has two personal responsibilities and institutional or occupational responsibilities. It further said that if an official in carrying out his duties and authorities in accordance with applicable norms or rules of law, then his actions are accounted for (institutional). On the other hand, if an official performs his duties and authority violates the prevailing norms or rules of law, the exercise of his or her actions is personally accountable or personally liable.

According to Brautigam,<sup>54</sup> government accountability can be divided into 3 (three) types, namely; First: political accountability, second: legal accountability, and third: economic accountability. Legal liability implies that both the government and the local government in administering the government that harms the interests of the people or other parties must be accountable and accept the lawsuit for his actions. Legal responsibility by the government can be done through 3 (three) means, namely through administrative law, through civil law, and criminal law. Based on the legal instrument, it is known that there is administrative responsibility, civil liability, and criminal liability

In relation to legal liability, Hadjon said that the actions of officials must be observed, whether the action includes the responsibility of office or personal responsibility. Basically, every government official in the conduct of the government is charged with the responsibilities of private positions and responsibilities.<sup>55</sup> The distinction between the responsibilities of office and personal responsibility for the actions of the government brings consequences relating to criminal liability, civil liability, and administrative responsibility. Legal accountability of government / local government in the administration of government can be done at any time without having to wait for the end of his term of office.

Basically the responsibility attached to the government / local government in performing governmental acts is a limited responsibility. This means that the responsibility depends on the actions of the government / local government performed on the basis of his position, thus raising the responsibility of office. Or, on the contrary, the act in fact has used its authority with other purposes as defined in its basic rules of arbitrary action or the misuse

<sup>51</sup> Tongat. *The Basics*, 244

<sup>52</sup> Tongat, *The Basics*, 244

<sup>53</sup> Jimly Asshiddiqie, "Islam and Its Tradition in Constitutional Country" (The paper is presented at the annual meeting of Indonesian-Malaysia Seminar, Uin/IAIN Padang, 2010)

<sup>54</sup> Anis Zakaria Kama, *The Essence*"

<sup>55</sup> Philipus, *The Governance*, 6

of authority, then the responsibility arising is personal responsibility.

From the above description can be concluded that, civil and administrative responsibility is the responsibility of position. Whereas criminal liability is the personal responsibility of the official concerned in accordance with criminal provisions. The criminal liability of the South Kalimantan Provincial Government of haze in South Kalimantan is a form of legal liability for violation of legal obligations set forth in The Act Number 32 Year 2009 on The Environmental Protection and Management, so that such violations may be punishable by criminal sanctions.

The existence of shifting paradigm punishment, where previously criminal sanction is the last alternative (*ultimum remedium*), but now criminal sanctions serve as the main effort (*primum remedium*). Criminal sanctions imposed if an act is considered really harm the interests of both the State and the people According to the applicable law as well as the sociological feelings of the community, the criminal sanction becomes the main choice (*primum remedium*).

According to the theory of identification or *alter ego theory* (instrumental rule), that all the actions of the Government of South Kalimantan Province is always manifested through the actions of its leader, in this case related to the environment is the Governor of South Kalimantan that can be represented by the Head of Environmental Agency of South Kalimantan Province. Because of its position carrying out all legal obligations as stipulated in The Act Number 32 Year 2009 on the Environmental Protection and Management, can be charged with criminal liability if negligent in carrying out duties and obligations.

It should be remembered that based on the theory of identification, the actions and attitudes of the body of law that can be accounted for in the criminal law is the actions and attitudes of the people who are identified or equalized with a legal entity called directing mind of legal entity. Directing mind of legal entity is people who have authority and ability to influence policy in a legal entity. In the case of the accountability of the South Kalimantan Provincial Government above, He is the directing mind of the Environmental Agency of South Kalimantan Province. Therefore, both the Governor and the Head of the Environment Agency are the highest authority in South Kalimantan regarding to the policy of haze in South Kalimantan.

The act of the Provincial Government of South Kalimantan that is not immediate and appropriate to tackle and prevent the annual haze in South Kalimantan is a passive act, so it includes a passive criminal act called *delicta omissionis*. The omissionist offender (*delicta*

*omissionis*) is divided into actual (pure) omission deliberations, commonly called *delicta omissionis* and *impure omissionist* offenses, often called *delicta commissists per omissionem commissa*. *Delicta omissionis (delict omissionis pure)*, is the offense, criminal offense or criminal acts that by the lawmakers formulated so in other words declared can only be realized by passive action, do not do or ignore the legal obligation, where he should be doing . While the pure omission offense, commonly called *oneigenlijke omissidelicten* or *delicta commissionis per omissionem commissa*, is a delict that can be realized by active deeds or passive deeds in other words can occur due to deed (handeling) or neglect (*nalaten*).<sup>56</sup>

Based on the above description, it can be said that the act of South Kalimantan Provincial Government which is not immediately and deserves to overcome and prevent the occurrence of annual haze in South Kalimantan is the act of neglect (*nalaten*) to his obligation protecting and managing the environment in South Kalimantan. Thus, the actions of the Provincial Government of South Kalimantan is categorized as the deliberate omission offense (*delicta commissionis per omissionem commissa*). If then we want to formulate the criminal provision related to the government's responsibility for environmental pollution, then the possible criminal form is a form of material penalty. In the case of the material realization of material offenses, three essential conditions are required:

- a The realization of behavior;
- b The realization of the consequences (due to constitutive or *constitutief gevolg*);
- c There is a causal relationship (causal verband) between behavioral forms and the constitutive consequences.

Van Hamel states that: a person who does not act, he cannot be considered to cause a result, if he has no legal obligation to do so (*als de dader de rechtsplicht heft om te doen*). The legal obligation of a person to do something a certain time and in certain circumstances is required by law. If the law is obliged a person to do something, and then he does not do any cause, then the cause of that result lies in his or her legal obligation.<sup>57</sup>

The legal obligations held by the Provincial Government of South Kalimantan are the obligations established by law, namely obligations under The Act Number 32 of 2009 on the Environmental Protection and Management. This means that the Provincial Government of South

<sup>56</sup>Zainal, *Criminal Law*, 213-214

<sup>57</sup> Adami Chazawi, *Criminal Law Volume 2*, (Jakarta: PT RajaGrafindo Persada, 2011) 228

Kalimantan has an immediate and deserved obligation to recover from the haze in South Kalimantan and analyzes and assesses the causes of haze in South Kalimantan as a form of preventive effort. Thus, the legal obligation of the South Kalimantan Provincial Government is the cause of the repeated haze in South Kalimantan.

However, in formulating the provision to impose criminal liability to the Provincial Government of South Kalimantan, it is necessary to note that there should be justification reasons that can eliminate the criminal characteristic. Where if the Provincial Government of South Kalimantan has made a proper and quick effort in tackling the haze that occurred in South Kalimantan as evidenced by the small number of victims of haze as well as has been taken the action to the company / people who burn the land without permission.

Therefore, based on the above description in case of haze in South Kalimantan, the Governor of South Kalimantan or the Head of Environment Agency of South Kalimantan Province must be punishable (could be an imprisonment or fine) due to pollution of the environment, the fall of victims of haze, The disruption of the public activities and these are all the responsibility of the Provincial Government of South Kalimantan in The Act Number 32 Year 2009 on The Environmental Protection and Management. And This is also to fulfill the public sense of justice.

#### IV. CLOSING

##### A. Conclusion

The conclusions in this paper are as follows:

1. The underlying reason to impose criminal liability on Haze in South Kalimantan to the Government officials is according to The Act Number 32 Year 2009 on The Environmental Protection and Management, the South Kalimantan Provincial Government meets the qualifications as a legal subject, and the Government of South Kalimantan Province has a national responsibility to the environmental management as stipulated in The Act Number 32 Year 2009 on The Environmental Protection and Management.
2. The form of criminal liability that can be imposed to The government as the environmental policy stakeholder on haze in South Kalimantan is in the form of imprisonment and/or fine.

##### B. Suggestions

The writer's suggestion related to the criminal provision formula on the criminal liability on haze to the

government officials based on the case study in South Kalimantan is as follows:

*"The government official who is not immediately coping the environmental pollution that occurs repeatedly or annually, causing the victim suffering from diseases caused by the contamination of the pollution should be imprisoned for a maximum of 5 years or a minimum fine of 1 billion rupiah".*

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