The Use of the Strict Liability Principle by the Indonesian Courts in Solving Environmental Conflicts

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Abstract. The inclusion of strict liability provision in the Indonesian EMAs has a long history. Since the enactment of the first EMA of 1982 up to the third EMA of 2009, there have been 45 community environmental disputes submitted to the District Court, but the Court verdicts have torn the sense of the people’s justice. Furthermore, although the EMA has a provision on the strict liability principle, the Court has just applied the principle of strict liability. From the cases studied, the judges did not understand the strict liability principle. Lawyers, prosecutors, and judges do not comprehend this principle. In fact, the principle of strict liability can not be applied to all environmental disputes. For example, it is not applicable to pollution and environmental degradation. As a result, communities who are the victims of pollution and environmental degradation resulting from the industrial and palm activities are always in a weak position. Therefore, in the court trial, they are the looser. Under that condition, people will never get environmental justice as they expect from the existing environmental law. This paper discusses the development of the strict liability principle stipulated in the Indonesian Environmental Acts. In some cases, judges referred to that principle in resolving environmental conflicts.

Keywords: environmental disputes, environmental degradation, pollution, strict liability

INTRODUCTION

The strict liability principle was regulated in the Indonesian EMA of 1982 [1]. Although that principle was mentioned in the EMA of 1982, but it was not applied in WALHI [2] vs. PT. Inti Indorayon Utama case(1988) [3]. In other community environmental disputes brought before the District Court, the strict liability principle has never been referred to either by courts or lawyers or even by prosecutors. Furthermore, although it was recorded that from 1989 up to 2005 there were about 42 community environmental cases brought before the Courts, there was limited information regarding the use of the strict liability principle as the basis for the people’s reference to suing the industries [4]. Since the EMA of 1982 did not help to protect the people rights, the Indonesian Government replaced the first EMA of 1982 to the EMA of 1997. The Government also replaced the second EMA of 1997 with the 2009 EMA, no. 23 [5]. It is noted that although the strict liability principle has always been regulated in the EMA, the community environmental disputes do not lessen. Amongst the 42 cases that occurred during the application of the EMAs, there were only two cases in which the Courts utilized the strict liability to sue the perpetrator of environmental pollution [6]. Those cases are the Mandalawangi (2003) and the Land Fire (2015). The problem raised in this paper is why the lawyers, the judges, and the prosecutors did not apply the strict liability principle in all cases.

The Development of the Strict Liability Principle in the Indonesian Civil Code (KUHPERDATA)

Historically, the strict liability principle was derived from the Common law system in the Middle Age. At the time, the objective of strict liability was used for paying compensation to the victim. It was used to prevent the war among the tribes [7]. In its further developments, the provision of compensation was developed and associated with a responsibility for acts that were against the law [8]. According to Komar [9] “the actions, contrary to the law, cause harm to other parties require the perpetrator to pay damages.” This is called “No liability without fault,” which emphasizes the element of fault. Under this principle, the victim will get paid for the loss he or she suffered from if he or she can prove that the losses were due to the mistakes made by the doer. Then the element of “negligence” is considered as the element implemented in the dispute settlement. This causes the shifting of burden from “No liability without fault” to “liability based on fault.” Herein, even the loss based on the element of fault, the victim does not need to prove the damage suffered from the wrongful acts of the perpetrator. This is a new principle of compensation, namely "strict liability." This new principle is now in many common law countries applied in environmental matters requiring compensation.

In Indonesian civil law, the principle of wrongdoings is regulated in Article 1365 Civil Code [10]. Unfortunately, among the Indonesian scholars, there is no agreement on the use of the term "wrongdoings" or the "actions that conflict with the principles of law" and "acts against the law." This is because Article 1365 Civil Code provides a general formula that "every act that is
against the law, and therefore causes harm to others requires the doer to pay compensation." It is fascinating to highlight the decision of the Surabaya District Court on October 11, 1955[11] stating that "a claim based on an action against the law (wrongdoing) should have the element that the person who committed to the act is intentionally committed to it even though he understood the act"[12]. It will be interesting when it is related to the cases of land fires that often occur in Indonesia, causing plantation companies in a dilemmatic position. Although the strict liability principle is regulated in Article 88 in the EMA 2009[13], it was actually typical to the previous one. There is no explanation of "what is meant by the absolute responsibility" or the term strict liability as the basis for compensation. Here, there is no further explanation regarding the size of this particular limitation. The Lapindo Hot Mudflow and the pollution of Buyat Bay cases are examples of environmental issues which have significant impacts on environmental damages and extraordinary losses of property and other things to the community. These cases do not apply the principle of strict liability. It indicates that not all environmental cases implemented the principle of strict liability. Article 88 does not highlight the statement which mentions that actions can "...pose a serious threat to the environment ..." although there are many examples of activities that might pose a severe threat to the environment. They include a tanker carrying vast quantities of crude oil (Very Large Crude Carrier (VLCC) and Ultra Large Crude Carrier (ULCC)), nuclear reactors, exploration gas activities, and submarine cables. Unfortunately, the EMA does not accommodate actions above as a part activity possibly damaging the environment. Consequently, the judgment process is considered to limit people's access to obtain environmental justice reasonably [14]. The power imbalance between the perpetrators and the victims affect the court decision [15].

In Common law countries, an old case, Ryland vs. Fletcher (Nuisance), is always referred to by the judges in handling environmental cases. Nevertheless, if one observes environmental disputes, that principle can not be implemented in all environmental cases. In cases of land fires, where the fire originates from outside of the plantation, the owner of the plantation company cannot be sued as the one who is responsible for the damage of the land. In other words, not all cases of land fires can apply the principle of strict liability. Another country implementing Common law is Mackintosh vs. Mackintosh case[16]. Here, strict liability is associated with negligence. Nevertheless, in Scotland, negligence is considered as the basis for compensation. Nonetheless, in Tahsis Co. Ltd. vs. Canadian Forest Products Ltd, the principle of strict liability cannot be used.

The Development of Strict Liability in Environmental Law in Indonesia.

The principle of strict liability was an issue when the Malacca Strait was polluted by oil spills from the Sowa Maru tanker in 1975. There were no legal facilities the Government of Indonesia can use unless Article 1365 Civil Code[17], which emphasizes the element of fault to obtain compensation. The existence of the element of fault is a requirement for the doer to compensate for the victim. The problem is this Article requires the Indonesian Government as the victim country to prove that there were the ecological losses in the Malacca Strait caused by the fault of the Maru Sowa ship's captain. Article 1365 contains the principle of "liability based on fault." Nevertheless, the negligence element can also be applied as proof to obtain compensation. Thus, the compensation manifested the liability based on fault principle above becomes "No liability without fault." The compensation will not arise if there is no element of fault. Thus there has been a shift in the burden of fault from "liability based on fault" to a "no liability without fault." The shifting in the element of a fault has created another issue known as "the strict liability principle." In the context of risk, this principle emphasizes that "there must be knowledge of the actors to imagine a risk will occur."[18]Article 88 of the 2009 EMA terms absolute responsibility. Implicitly, the term "absolutely responsible" known in environmental law has the element of fault. Herein, it requires proof or the element of fault not to be confirmed by the plaintiff as a basis for compensation payments. The Article provides no opportunity for the defendant to defend himself.

In the US, there are some cases where strict liability is applied, such as Ryland vs. Fletcher (1868)[19]; Atlas Chemical Industries Inc. vs. Anderson (1974)[20]; Phillips Petroleum Co. vs. Hardae; Burn vs. Lamb and Biakanja vs. Irving[21]. It is noticeable that in Atlas Chemical Industries Inc. vs. Anderson (1974), the strict liability principle cannot be applied. On the contrary, there are two cases in Indonesia where the strict liability principle was applied by the Judges. The cases are the Mandalawangi case[22] about landslides, and land fire in the District of Ogan Ilir (KLHK vs. PT. Warigin Agro Wisata (WAJ)) (2015). What is interesting to notice that in the Mandalawangi case, the consideration of the Judge based on the statement of the Minister of Forestry who said that: "The Ministry of Forestry through his Minister Decree has changed the management of forest areas on Mount Mandalawangi from the status of the function of forest previously "a protected forest" become a "limited production forest." As a result, it reduced the number of trees and failure of reforestation so that landslide cannot be avoided. The plaintiffs' properties were buried in a pile of land. While in the KLHK vs. PT. WJ, the South Jakarta District Court on February 2017[23] decided WJ was obliged to pay compensation and recovery costs of Rp466.5 billion because the proof showed that PT. WAJ had burned out the land.

CONCLUSION

The environment is the bestowed of God directly linked to other elements of the environment. Thus, if the environmental damage occurs, it could create ecological imbalance. Therefore, everyone must protect the environment as well as other related elements. This is impossible to establish protection without human beings
Not all community environmental disputes are addressed the cases brought before the Court, one can notice that community physical and non-physical properties. From the environmental disputes causing losses in the liability principle was referred by the Court in addressing disputes, there were only some cases in which the strict liability principle may not be applicable to all cases. Among the 42 community environmental disputes, there were only some cases in which the strict liability principle was referred by the Court in addressing the environmental disputes causing losses in the community physical and non-physical properties. From the cases brought before the Court, one can notice that not all community environmental disputes are addressed with the strict liability principle.

REFERENCES

[1] Hereinafter cited as the first EMA; Art. 21 mentioned that "in some activities concerning the type of resource, the absolute responsibility arises to the destroyer or pollutant at the time of the occurrence of damage and pollution of the environment whose arrangement is regulated in the relevant legislation." Up to year 2009 Indonesian Government has enacted three EMAs. First the EMA of 1982, of 1997 and of 2009.

[2] WALHI stands for Wahana Lingkungan Hidup/Environmental Forum, as an Environmental NGO.

[3] This case was the first environmental case in Indonesia. The main issue was regarding the status of legal standing of WALHI as the Environmental NGO to sue on behalf of the community. Article deals with legal standing was not in the EMA 1982. This case also was seen as a test to the effectiveness of the EMA 1982.

[4] It is noted that amongst the 42 cases (1989-2004) were solved by using strict liability. It is still argued if the strict liability were also referred by the lawyers in the cases solved by using strict liability.

[5] Cited as the third EMA.

[6] Those cases were: the Mandalawangi case (2003) and land fire in the in the Pulau Meranti Riau Province in the case of the KLHK vs. PT. Waringin Agro Jaya (WAJ) as the defendant and KLK as plaintiff.


[10] Regulated from articles 1365 up to Article 1380 of the Civil Code.


[13] Article 88 says that: "Every person whose actions, business, and/or activities use hazardous and toxic materials (B3), produce and/or manage hazardous and toxic materials (B3) waste, and/or that pose a serious threat to the environment are absolutely responsible for the losses incurred without the need to prove the element of fault."


[16] (1864) 2 M 1357.

[17] KUHP (Kitab Undang-Undang Hukum Perdata) Civil Code as inheritance from the Dutch administration.

[18] It is noted that the "Strict liability principle," some Indonesian scholars translated it into "absolute responsibility" and "immediate responsibility."

[19] In Rylands v Fletcher (1868) LR 3 HL 330, A person who brings dangerous substances onto his property and allows them to escape to adjoining land and cause damage there will be held strictly liable. The defendant was responsible for damage caused by the escape of water from a reservoir on his land. (Retrieved: https://www.lawteacher.net/cases/Rylands-v-fletcher.php) (May 24. 2019). This case the laywers and the Courts refer the use the principle of absolute responsibility.

[20] Principle strict liability as applied in Ryland v. Fletcher cannot be involved for the Atlas Chemical Industries Inc. v. Anderson since the defendants in burning slash were acting under the forest service order authorized by provisions of the BC Forest Act.

