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Documenting Land-Combustion and Progressive Law Enforcement in Indonesia

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Abstract

The right to obtain a good and healthy environment is a constitutional right of citizens expressly regulated in the 1945 Constitution of the Republic of Indonesia. However, this right has not been fully felt due to forest and land burning activities that occur every year in Sumatra and Kalimantan. For this reason, a condition for law enforcement is needed to solve the problem. This study basically answered two questions on how important is progressive law enforcement in burning forests? What is the concept of progressive law enforcement as intended?. Therefore, the findings stated that first, progressive law enforcement on forest-burning cases has a philosophical and sociological urgency. Second, in efforts to progressively enforce law-burning cases, judges need to get out of the confines of the text in the law by always paying attention to the concept of the strict liability and precautionary principle to bring justice to every citizen who is negatively affected by the burning of forests.

Keywords: Burning, enforcement of progressive law, forest, land

Introduction

As a legal state, the right to get a good and healthy environment is one of the many constitutional rights that have been expressly guaranteed in the 1945 Constitution of the Republic of Indonesia. It is stated in Article 28H paragraph (1) that everyone has the right to live in physical and spiritual prosperity, and to get a good and healthy environment and to receive health services. In this article, one perspective can be interpreted that the state has full responsibility to create a healthy environment, and in another perspective, there is also responsibility for every citizen to keep the environment good and healthy.

The major question occurred is has every citizen fully obtained a good and healthy environment as mandated by Article 28H paragraph (1)?. In one case, this was due to the fact that forest and land fires which caused threats to the good and healthy environment were still in quite high level. The data noted that forest and land fires were in quite high level in Indonesia occurred in 1982-1983, 1987, 1991, 1994, 1997-1998, 2002, and 2006 (Cahyono et al., 2015). Finally, forest and land fires were in quite large in Indonesia in 2015 which caused state losses reached 221 trillion rupiahs and caused 503,884 people in 6 provinces affected by ISPA such Jambi, Riau, East Sumatra, West Kalimantan, Central Kalimantan and South Kalimantan. If calculated, the loss occurred two times greater than the loss (economy) due to the earthquake and tsunami occurred in Aceh in 2004 (Fadillah, 2016).

With regard to these data, one of the many purposes for which forest and land fire is carried out in the context of land clearing banned by Law Number 32 in 2009 concerning environmental protection and management, specifically in Article 69 paragraph (1) letter h (Angraini et al., 2016). *Wahana Lingkungan Hidup Indonesia (Walhi)* noted that there were at least 423 companies allegedly directly involved in forest and land burning in 2015. The high rate of forest combustion occurs because modern capitalistic civilizations driven humans are too greedy for environmental resources. Modern humans are infected with hedonism, which is never satisfied with material needs. The basic cause of greed for this environment is material exploited for the sake of fulfilling consumptive material needs (Bram, 2014).

However, in other perspectives, several problems occurred such first, regulatory aspects with the spirit of strict liability or those familiarly known as absolute responsibilities are predicted as a powerful way to resolve the problem of comprehensive environmental damage related to content material of Law Number 32 in 2009 concerning environmental protection and management. The spirit of strict liability only applies limits to certain environmental issues. Second, the difficulty of proof in overcoming forest and land burning, and third, law enforcement that is still felt half-hearted. This can be seen when the perpetrators of forest and land fires are sentenced to not be worth on the actions they have committed, even declared innocent because of the lack of progression of the judges in enforcing the law on the issue of forest and land burning in Indonesia.

Regarding this issue, environmental law should play a role in strengthening the bargaining position of the community victims of pollution or environmental damage by providing guarantees of their constitutional rights (Hardjosoemantri, 2006). In resolving the issue of forest and land combustion which still occurs, a condition is needed to force the parties involved to care and do something to solve the problems caused. This condition can be realized by first encouraging judges to implement progressive law enforcement in cases of forest and land burning in Indonesia. To see how important progressive law enforcement in burning forests and land, what the concept of progressive law enforcement as intended, both of these studies have been carried out by the researchers in this study by doing study focused on land-combustion and progressive law enforcement.

Discussion

The urgency of progressive law enforcement in the case of forest-land burning

Basically, Law as an embodiment of values implies that its presence is to protect and promote values that are upheld by the people (Raharjo, 2010). It can be considered to exist if the law can bring justice. However, it is necessary to know that the law is only a text or scheme and becomes a living institution if it is driven by humans. In other words the law becomes meaningless when the order cannot be implemented. Human effort and action are needed so that the commands and coercion potentially existed in the law become manifest. Hence, this business in its development is known as law enforcement (Raharjo, 2010)

Law enforcement is the Indonesian word for law enforcement. In the Dutch language it is known as *rechtsoepassing* and *rechthandhaving*. Some experts think that law enforcement is a logical process that follows the presence of a legal regulation. While in the eyes of legal sociology, law enforcement is interpreted as a process involving the community in it. That

means that law enforcement cannot be seen as a logical linear process, but something complex. So it is not wrong Sadjipto said that if law enforcement is not only an interesting matter of a straight line that connects regulations and events in the field, for him law enforcement is a process to realize legal wishes into reality. The desire of law referred to here is the mind of the legislators formulated in the legal regulations.

Discussing more deeply on the law enforcement, all of us know that judges are one of the few advocates in law enforcement in Indonesia. In carrying out the duties of law enforcers, judges are required to have guidelines, including certain written regulations covering the scope of their duties. This is because in carrying out their duties, it is very likely that the judges will face the following problems as mentioned by Soekanto and Abdullah (1978) as follows.

1. To what extent are judges bound by existing regulations?
2. To what extent are judges allowed to give "wisdom"?
3. What kind of example should the judge give to the community?
4. To what extent is the degree of synchronization of assignments given to the judge so as to provide strict limits on his authority?

The general problems mentioned are in line with reality today that not a few judges are confused about how to behave in a case confronted with them. Evidently, the disparity of decisions still occurs in two or more cases where the object of the case is the same. These disparities are divided into two major groups, progressive decisions because they are decided by progressive judges, and positivist decisions because they are decided by a judge who only serves as a "legal funnel". In the case of forest and land burning, what happened was that not a few judges' decisions actually showed their position as "the mouthpiece of the law". Judges should be able to be progressive to end the problem of forest and land burning like closing eyes and not caring about the social problems that are now happening. This indifference indicated by the presence of decisions punished the perpetrators of forest and land fires with penalties that are not worth the actions they have committed. In other words, indifference is indicated by the presence of decisions that are very far from the word progressive.

This is certainly a big problem. Judges in court are the last door for justice seekers to get the real justice. When judges acted in this way, where should the Indonesian people depend on their hopes of obtaining justice?, especially for justice seekers for right to obtain a good and healthy environment. For this reason, it is time to direct the pattern of law enforcement by judges on cases of forest and land burning towards progressive law enforcement. Courts should be the right place for justice seekers. The legal culture of judges should also be directed no longer to act only as "funnel laws".

Moreover, realizing progressive law enforcement is now a necessity. Because of this necessity, philosophically, we know that a good and healthy environment is one of the state's constitutional rights which are regulated in the constitution and should be fulfilled by the state. In addition, realizing progressive law enforcement is also a necessity because sociologically, forest and land burning has occurred repeatedly. Additionally, the perpetrators of the arson are difficult to get caught in the law because of the weak legal instruments that regulate this matter. The estuary of all is the economic loss for the country of Indonesia. According to data from the National Development Planning Agency (Bappenas), forest and land fires have caused economic losses of at least 9.3 billion USD to 20.1 billion USD, with

an estimated 35 million people affected and involved 176 companies, and as 133 as plantation companies. In 2015, the state's losses reached 221 trillion, and no less than 2.61 million hectares of land and forests were burned (Cahyono et al., 2015).

Furthermore, the characteristics of progressive law enforcement will certainly be expressed well when the judge verifies the reality by using the "rules and logic" creed (Raharjo, 2010). The role and duties of judges in progressive law enforcement are not only as readers of a series of texts in laws made by the legislature. Meanwhile, its decision to assume responsibility becomes the voice of common sense and articulates the soul of justice in the complexity and dynamics of people's lives. Progressive judges will use the best law in the worst conditions (Syamsudin, 2012).

In addition, judges who are progressively thinking of making themselves part of the community will always ask "What role can I give in this period of reform?", "What does my nation want with this reform?". Thus, they will refuse if its job only spells the law. A progressive judge will always put his ear to the heartbeat of people. In addition, moral commitment and courage are needed to create a progressive law enforcement atmosphere. Implicitly, for instance, the Panel of Judges consisting of Rahma Novatiana (Chief Judge), Muhammad Alqudri and M. Fahril Ikhsan in the Meulaboh Court Decision Number 54 / Pid.Sus / 2014 / PN.MBO on the case of land burning by PT. Surya Panen Subur (PT. SPS) has shown the profile of judges who are courageous to be different from other judges, especially in handling cases of forest and land burning. In its decision, the assembly of judges built the argument with consideration based on the doctrine of strict liability by arguing that the fact that land burned in the area of PT. SPS is enough to make PT. SPS criminally responsible without taking into account errors (Nurhidayat & Rusman, 2018). Similarly, the case with the panel of judges consisting of Prim Haryadi (Chief Judge), Ratmoko and Achmad Guntur who in Decision Number.456 / Pdt.G-LH / 2016 / PN.Jkt.Sel. partially granted the lawsuit of the Ministry of Environment and Forestry (KLHK) by punishing PT. Waringin Argo Jaya (WAJ) with a compensation penalty reached 466 billion rupiahs based on the doctrine of strict liability.

The factor that distinguishes these judges from other judges in upholding the law is the predisposition of their individual attitudes which in reality are able to always refer to conscience and that is what causes courage to arise (Raharjo, 2010). In the verdict which was decided by the judges, at least it has been shown that hope in eradicating forest and land burning still exists. If all judges have the same paradigm of thought in deciding cases of forest and land fires, surely this can be a cure for public disappointment with the decisions of forest and land fires that have been decided previously.

For this reason, it makes sense that the two decisions should be used as benchmarks for other judges in imposing sanctions on the perpetrators of future forest and land fires. In order for the law to be benefited, the services of legal actors needed to be creative in translating the law into the fora of social interests indeed had to be served (Tanya, 2013).

The progressive law enforcement model in the case of forest-land burning

Along with the development of progress and technology today, there are many human activities that can no longer run continuously with the functions of nature. In the beginning, environmental problems were natural problems occurred as a result of natural processes.

Moreover, its development is longer, greater, broader and more serious the problems occurred as a result of intentional actions by humans. One of these actions is forest and land burning as the author mentioned in the previous discussion. In terms of the seriousness of the matter, serious law enforcement (in this case is progressive law enforcement) is certainly a necessity that cannot be negotiable.

Moreover, law enforcement is the center of all legal life activities such legal planning, legal formation, law enforcement, and legal evaluation. It is essentially an interaction between various human behaviors representing different interests in a mutually agreed framework of rules. Therefore, law enforcement cannot be regarded solely as a process of applying the law as the legalists argue. However, its process has a broader dimension than those perspectives because it will involve human behavior. With this understanding, we can find out that the legal problems standing out are the problem law in action, not the law captured in the books (Bram, 2014). In the context of law enforcement in the environment, Bram (2014) also emphasizes that there are several main characteristics and constraints in the enforcement process. First, the process of law enforcement in environmental disputes has a cumulative approach, which means that in the dispute resolution process using one instrument of enforcement of civil and criminal or administrative law, it does not make law enforcement with other mechanisms fall. Thus, in the mechanism of enforcement of environmental law, three forms of settlement consist of criminal law enforcement, civil law enforcement, and administrative law enforcement. Second, the dispute of resolution mechanism through enforcement of civil law and in environmental law, there is possible to use the concept of accountability without proving the element of error or known as strict liability as a form of exclusion forms of accountability against the law in general. Third, the process of law enforcement in environmental disputes should require a comprehensive approach that is not only dominated by legal optics in touching normative justice to reach ecological justice.

Furthermore, regarding the enforcement of environmental law, when we had agreed to state that progressive law enforcement is one thing attempted to resolve the issue of forest and land burning in Indonesia. Hence, the question occurs on 'how is the progressive law enforcement model relevant to practice?. With regard to this matter, at least three decisions covered the decision of the Bandung District Court Number 49 / Pdt.G / 2003 / PN.Bdg, decision of the Meulaboh District Court Number 54 / Pid.Sus / 2014 / PN.MBO, and the decision of the South Jakarta District Court.

In addition, the regulation Number.456 / Pdt.G-LH / 2016 / PN.Jkt.Sel can be used as a guide for other judges in deciding cases of forest and land burning in Indonesia. In other words, the author would like to say that the model of progressive law enforcement in case of forest and land burning in Indonesia can be practiced by paying attention to the concept of strict liability every time. The judge will decide the case of forest and land burning in Indonesia even though the reality is strict liability only limitively applied to certain environmental issues in Law Number 32 in 2009 concerning Environmental Protection and Management.

In the progressive legal paradigm, the limitation of strict liability concept is not a problem for judges in making decisions fulfilled the element of justice for every citizen who is directly or indirectly affected by forest and land burning. In progressive law, judges are required not to be confined by legal texts, while to get out of confinement. The way to be free

from legal confinement does not necessarily nullify the existing legal text by progressively interpreting the text of the law (Raharjo, 2015, cited in Aulia, 2015). In this phase, the services of legal actors creatively translated the law in social interests as the authors mentioned earlier are applicable in real life.

Properly, interpreting the law needs to be carried out because legal texts are closed and financial schemes (closed-scheme schemes of permissible justification), while nature and social life are not closed-scheme finances. To accommodate "something dynamic" in the "static container", the static scheme should be interpreted progressively. Progressively, interpreting legal texts should be creatively and innovatively, and sometimes even a leap out of the rules of logic. Progressive interpretation is very likely to rule of logic. This is very possible because the interpretation (enforcement) of the law is progressively based on the determination of concern for social life (social reasonableness, examination, and evaluation of life). In brief, that the law should be pro-people, pro-justice, prosperous and happy people. Progressive law means law that uses feelings or conscience (compassion) (Raharjo, 2015).

Returning to strict liability, theoretically strict liability is defined as an absolute obligation with the main characteristics with no need for further evidence. The error remains while it does not have to be proven "dependent can be convicted on professional by prosecutor of act only" (Huda, 2006). The defendant can be found guilty only by proving and committed a crime without having to see the motive for the crime. In contrast to the general criminal liability system that requires intentions or negligence (principle of accountability), the system of absolute liability only need the knowledge and deeds of the defendant. This means that in carrying out these actions, when the accused knows or he is aware of the potential harm to other parties (state, community, etc.), this situation is sufficient to demand criminal responsibility. Hence, there is no need for an intentional or negligent element from the defendant, while merely an act has resulted in environmental pollution that causes people/corporations to be held to hold criminal responsibility (Huda, 2006).

In the field of civil law, strict liability is a type of civil liability (Salim, 2008, cited in Afriana & Fakhriyah, 2016). Civil liability in the context of environmental law enforcement is a civil legal instrument to obtain compensation and environmental recovery costs due to pollution and environmental damage. Civil liability recognizes two types of accountability that require proof of the element of fault-based liability based on Article 1365 of the Civil Code and absolute liability, which is an accountability without having to prove the element of error (Salim, 2008, cited in Afriana & Fakhriyah, 2016).

In the Indonesian legal system, the first strict liability was known in Indonesia through ratification of the 1969 Civil Liability Convention for Oil Pollution Damage by Presidential Decree No. 18 of 1978 . Furthermore, the concept was accommodated in Law Number 23 of 1997 concerning Management Environment which is currently amended by Law Number 32 of 2009 concerning Environmental Protection and Management. Article 88 of the law stated that every person in terms of actions, business, and/ or activities uses B3 (Hazardous and Toxic Materials), produces and manages B3 waste posed a serious threat to the environment that is absolutely responsible for the losses that occur without the need proof of the element of error.

In the explanation of Article 88, it is said that what is meant by "absolute responsibility" or strict liability means that the element of error does not need to be proven by

the plaintiff as the basis for compensation payments. In addition to accommodating strict liability, the Law Number 32 Year 2009 also regulates compensation and environmental restoration, expiration for filing a claim and the right to file a claim in the law enforcement process (Sunar, 2005).

However, even though strict liability has been known since 1978 as a new concept, it was implemented in a court ruling in 2003 through the Bandung District Verdict Number 49 / Pdt.G / 2003 / PN.Bdg. confirmed by the Court of Appeal to finally win the Cassation and finally the decision was known as the Mandalawangi Decision (Sunar, 2005). The second decision was based on strict liability occurred in the Meulaboh Court Decision Number 54 / Pid.Sus / 2014 / PN.MBO. sentenced y PT. SPS with a fine of Rp. 300 billion. Meanwhile, the third decision was based on strict liability occurred in Decision Number.456 / Pdt.G-LH / 2016 / PN.Jkt.Sel. sentenced by PT. WAJ with compensation penalty reached Rp. 466 billion.

Furthermore, in addition to the judge, it is expected to pay attention to strict liability every time in deciding on a case of forest and land burning. In progressive law enforcement, the judge is also expected to pay attention to one principle that applies universally in international law, familiarly known in Indonesia as a precautionary principle.

With regard to this, the precautionary principle is actually accommodated in Law Number 32 of 2009. In Article 2 letter f, it is emphasized in essence that environmental protection and management is carried out based on principles, one of them is the prudence principle. Theoretically, the precautionary principle is thr 15th principle legalized in the United Nation Conference on Environment and Development in Rio de Jenaero in 1992. In this principle, the precautionary principle is an instrument to prevent pollution or damage related to problems faced by policy makers, the uncertainty of science in estimating environmental impacts. In the development of environmentally sound policies, policy makers should make decisions, even though they are faced by scientific uncertainty in practicing environmental impacts. The precautionary principle reflects the actions before the loss arises, and also before conclusive scientific evidence is obtained. We need to wait for conclusive scientific evidence and evidence of a certain level of risk, even in preventing environmental losses (Imamulhadi, 2013).

In defining this principle, there are three things to consider. First, when the threat of environmental damage is very serious and cannot be recovered, the resources cannot be replaced. Second, there is uncertainty related to scientific evidence as explained above. Third, efforts to prevent environmental damage are collided with cost effectiveness criteria. Based on the precautionary principle, these three considerations are not an excuse for not seriously addressing environmental issues that arise, even as a compelling reason to be more careful in preventing environmental impacts (Santosa, 2016).

In foreign legal practice, the precautionary principals have been recognized in the form of court decisions (the Supreme Court), among others in Pakistan (the vice president's case against Zehla Zia in 1994) and in Australia (the Leatch case against the National Parks and Wildlife Sevice and Shoalhaven City Council in the Land and The Environment of New South Wales, equivalent to the Supreme Court or state high court in 1993) (Santosa, 2016).

In Indonesia, the application of the precautionary principle has actually been implemented in the settlement of environmental cases along with the implementation of strict liability in the Decision of the Bandung District Court Number 49 / Pdt.G / 2003 / PN.Bdg

confirmed by the High Court to finally win the Cassation known as the Mandalawangi verdict as the author previously mentioned. Historically, the verdict began with the suing of Perum Perhutani and the Government when the landslide occurred on Mount Mandalawangi. The lawsuit was filed by Dedi et al (year) through a classaction because the landslide incident eradicated property and claimed the lives of the relatives of the plaintiffs. In this case, the Bandung District Court Judge in his consideration stated four important points. First, in a state of lack of knowledge, including the existence of conflicting perspectives which exclude each other, while the environment has been damaged, the court in this case has chosen and guided the principles of environmental law known as the early prevention of the 15th precautionary principle in sustainable development principle (United Nation Conference on Environment and Development). Although this principle has not entered into Indonesian legislation, however Indonesia as a member of the conference, the spirit of this principle can be guided and strengthened in filling the legal vacuum in practice.

Second, considering the form of responsibility, the proof of error on the plaintiff's claim so that the defendants were declared to have committed an unlawful act becoming unreasonable because the implementation of the "precautionary principle" accountability is absolutely "strict liability." The most important thing is the determination of who is responsible for the impact of landslides in several corners of Mount Mandalawangi, and the arena in "notair feit" has caused a loss, then how to recover from the loss.

Furthermore, judges at the appeal level give consideration by stating that *Judex factie* is not wrong in implementing the law because based on the legal facts that Perum Perhutani is the manager of forest areas in West Java, including Mt. Mandalawangi, where there have been landslides resulted in the loss of life of property. From the results of this study, the landslide incident was caused by environmental damage or pollution because the use of land did not match its function and designation as a protected debt area. This fact has a causal relationship with the occurrence of landslides resulted in casualties and property. These facts rise to strict liability accountability for the defendant and its defendant cannot prove the truth.

Moreover, the judge did not misappropriate the law if he adopted the provisions of international law. The application of the precautionary principle in environmental law is to fill the legal vacuum (*rechtsvinding*), the perspective of the cassation applicant argued that Article 1365 BW can be applied in this case cannot be justified, because the enforcement of environmental law is carried out with international legal standards. That a provision of international law can be used by national judges, if it is seen as "ius cogen".

From the judge's consideration, the interesting point that we can observe is the courage of judges not to be the mouthpiece of the law by coming out with strict liability in Law Number 23 in 1997 concerning Environmental Management at that time as the basis for the settlement of Mt. Mandalawangi landslide cases. The judge in responding the case of compensation for the landslide of Mt. Mandalawangi, did not interpret Article 35 of Law Number 23 in 1997 grammatically, while by using a conscience to find justice based on the precautionary principle. Courage of judges in finding justice by releasing themselves from the law is a wisdom that is rarely carried out by judges in general (Imamulhadi, 2013).

Although not all judgments considered progressive are contextual with the burning of forests and land, in reality the various decisions can provide lessons for judges to decide the issue of forest and land burning by first functioning as a legal inventor (*rechts vinding*). In

progressive law enforcement, judges should be required to be able to explore the sense of justice in society. The judge should leave the law when the law is not in line with the sense of justice. As the author has previously described, in understanding law, judges may not only read legal texts, but also see the cause and purpose of the law and its relation to the other law. The lack of progression of judges in enforcing the law will only make judges get lost in the text of the law alone.

Conclusion

Based on the results previously discussed. The conclusions were drawn as follows. First, It is a necessity to realizing progressive law enforcement in the case of forest and land burning. Philosophically, a good and healthy environment is one of the country's constitutional rights which are regulated in the constitution and should be fulfilled by the state. In addition, sociologically, forest and land burning has occurred repeatedly. the perpetrators of the arson are difficult to get caught in the law due to the weak legal instruments that regulate this matter. The major estuary is economic and social losses for the country of Indonesia. Second, in progressive law enforcement efforts on cases of forest and land burning, judges need to get out the confines of the text in the law by always paying attention to the concept of strict liability and precautionary principles to bring justice for every citizen who is negatively affected by forest and land burning.

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