

ESTABLISHING OMNIBUS LAW IN INDONESIA: STRICT LIABILITY IN ENVIRONMENTAL LAW

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ABSTRACT

Various disasters in Indonesia, such as forest fires, floods, and other environmental damage, are inseparable from the actions of the capital owners who pollute the environment. This study aims to reconstruct the obscure meaning of strict liability in the Omnibus Law and the correlation between oligarchic interests and Indonesia's environmental destruction. This type of research is qualitative research using a statutory approach. This research is descriptive, and the material analysis technique used is the deduction syllogism technique, namely by concluding the rules of law and legal facts. This study's results indicate a significant impact on obscuring the meaning of strict liability in the Omnibus Law. The changes in the omnibus law will make it more difficult for environmental destroyers and polluters to be held accountable because the government has to prove the mistakes made by corporations first. When proof of error must take precedence in environmental destruction and pollution, what happens is a regression and ends in conventional proof. It contrasts to the Anglo-Saxon countries, which have expanded the object of string liability.

Keyword: Strict Liability, Environment, Omnibus Law

INTRODUCTION

The environment became a central issue as the world as a whole develops (Ferronato & Torretta, 2019). Human developments should have been based on three things: humans, the economy, and the environment (Mensah, 2019). Many developing countries were collaborating to develop their economies so that they become industrialized countries (Gurtner, 2010). This situation should have also been balanced with regulations following the conditions of world development in the aspect of the concept of environmental law.

The concept of environmental law was growing, and so was the regulation of norms. During the development of the concept of environmental law protection, Indonesia looked backward from the point of view of regulatory arrangements, especially regarding the concept of responsibility or strict liability. The Law Number 11 of 2020 concerning Job Creation or known as the Omnibus Law was established. This law eliminated the article of absolute liability without error that previously existed in the environment. It meant a massive setback for environmental law enforcement in Indonesia.

Strict liability was one of the instruments to ensnare companies that cause environmental impacts and damage that were difficult to prove (Ali, 2020). The community could see that so many companies, from mining, plantations, marine, forestry, and others, had a tremendous environmental impact. One example of the environmental impact deeply felt was logging for clearing mining land and oil palm plantations in various provinces, especially in Kalimantan.

The island of Kalimantan, which was one of the world's lungs, has now lost a lot of its forest area (Profauna, 2021). South Kalimantan Province was an area that shows that environmental damage results in disasters. The disasters were closely related to the presence of mining and deforestation. Data showed that South Kalimantan is 3.7 million hectares, 33 percent of which was equivalent to 1.2 million hectares controlled by coal mining, and the area of oil palm plantations reached 618 hectares or the equivalent of 17 hectares. The vast area of mining and oil palm plantations in this province had an indirect impact on the destruction of the ecosystem and environment, as seen from the floods in January 2021 (Abdi, 2021).

The same data was also submitted by an environmental organization, namely Greenpeace Indonesia. It was indicated that the flash floods that hit South Kalimantan due to the watershed had lost around 304,225 hectares of forest cover during 2001-2019, most of which had turned into oil palm plantations (Ramayanti, 2021). Environmental impacted on a national scale due to a consistent decrease in forest cover in various regions. Besides, data from the Directorate General of Environmental and Forestry Law Enforcement showed that in the 2015-2018 period as a whole, 567 criminal cases were submitted to the court, 18 lawsuits against companies with a value of Rp. 18.3 trillion, and 132 out-of-court settlement agreements (Utami, 2019).

These data provided a clear picture that Indonesia's environment significantly impacted mining and oil palm plantation companies. Previously, it was still clear what is meant by strict liability, that was, the company could be held accountable, which arises immediately at the time of the act, without questioning the error (Akib, 2016). With the new regulation, absolute accountability without error did not have the same meaning anymore, and law enforcement.

This issue was critical because new regulations had become a matter of debate about the existence of the concept of Strict Liability in environmental law. Removing one element of the article could have a significant impact on environmental law enforcement in Indonesia. Many had raised the concept of strict liability from various literature, and this paper examines explicitly the obscuring of the meaning of strict liability in the Omnibus Law.

METHODOLOGY

This research is qualitative with a statute approach. This research is descriptive, which means that it provides a view of what should be a consequence of legal research. (Marzuki, 2013) The source of legal research used is in the form of primary legal materials such as law Number 32 of 2009 concerning Environmental Protection and Management, Law Number 11 of 2020 concerning Job Creation, Law Number 3 of 2020 concerning Mineral and Coal Mining, and several other laws relating to the environment. And secondary legal materials in the form of legal journals, books, and court decisions. The author's material analysis technique is the deduction syllogism technique, namely utilizing the rules of law and legal facts, and a conclusion is drawn.

LITERATURE REVIEW

Strict Liability on Environmental Law

Law studies recognize 2 (two) types of accountability, namely liability Based on Fault and Liability without fault or what is also called strict liability. (Wulandari & Wahyuningsih, 2020) Besides adhering to accountability based on error, environmental management and protection laws impose strict liability, namely activities that use hazardous and toxic materials and pose a severe threat to the environment (Salam et al., 2019). Strict liability is defined as a criminal responsibility by not requiring that the perpetrator is guilty of one or more actus reus. Strict liability is a liability without fault. It can be emphasized that liability only requires suspicion or knowledge from the

perpetrator in a tough criminal act. It is sufficient to demand criminal responsibility from him (Hanafi, 2010).

In practice in the field, it is challenging to prove that there is an element of error in the corporation and the element of error in someone who works in a corporate environment to facilitate the corporation's criminal liability system. The principle of no crime without error can be overridden from the principle general by using the principle of strict liability or absolute responsibility. The principle can be a solution in order to be still able to criminalize corporations (Rodliyah, 2020).

People who cause environmental damage are responsible for compensating for the damage caused by them (Khalatbari & Abbas, 2019). Here, the social costs must be borne by the perpetrator. In order to prevent the perpetrator from bearing high social costs, the perpetrator should take preventive measures. In this strict liability, the perpetrator must still be responsible even though he has optimally applied the precautionary principle.

The strict liability principle application is critical in some instances involving social or anti-social harm, endangering safety, health, safety, and public morals. Environmental pollution, consumer protection, and illegal drugs are very likely cases to apply strict liability. So strict liability is closely related to specific and limited provisions.

The principle of strict liability arises from the doctrines that have been practiced in the Netherlands, England, the United States, and in several international conventions (Ryngaert & Hora Siccama, 2018). Therefore, there are three understandings about strict liability, namely:

1. The principle of strict liability is understood as responsibility related to reverse evidence in court, as responsibility without regard to any element of error.
2. The principle of strict liability is understood as direct and immediate responsibility without paying attention to the element of error.
3. The principle of strict liability is understood as total absolute responsibility. The value of the losses incurred is not limited depending on the evidence the Burden of Proof in Strict Liability.

According to Koesnadi Hardjasoemantri, an essential factor related to the strict liability doctrine is the burden of proof. One of the criteria that determines the distribution of the burden of proof should be given to the party that has the most extraordinary ability to provide evidence about a matter concerning environmental damage and pollution by industrial activities, destroyers/polluters (corporations) that have the more extraordinary ability to provide evidence. Based on the polluter pays principle and the mutual responsibility principle, a legal procedure of proof was developed, which is called shifting (or alleviating) of the burden of proofs (Kurniawan & D, 2014). Coleman (Goldberg & Zipursky, 2016) said that the plaintiff's strict liability has the burden of proving that the defendant has carried out an activity, the plaintiff has suffered a loss, and that the defendant's activities caused the loss. On the other hand, the defendant can also release himself from the lawsuit if he can prove that there are excuses for forgiveness. The reasons for forgiveness, in general, are the state of force majeure, the victim's fault, and the fault of third parties.

In the strict liability doctrine, the plaintiff is not burdened with the obligation to prove the element of error. The plaintiff is only required to prove that the defendant's actions or activities are included in an abnormally dangerous liability.

According to N.H.T Siahaan (Siahaan, 2014) that the destruction and knowledge of environmental pollution carried out in the abnormally dangerous category, namely:

1. Activities that contain or pose a high risk to humans, land, or movable property.
2. Activities with a very high likelihood of creating a hazard.
3. Inability to eliminate risk by taking reasonable precautions.
4. Including not a matter or everyday activity (not a matter of common usage).

5. The nature of the activity does not match the place/area where the activity is carried out.
6. The value or benefit for society is insignificant compared to the level of harm from the activity concerned.

DISCUSSION

Reducing the Principle of Strict Liability in the Omnibus Law In-Law Number 32 of 2009 concerning Environmental Protection and Management in article 88 it states that:

"Everyone whose actions, business, and/or activities use hazardous and toxic materials, produce and/or pose a serious threat to the environment, are absolutely responsible for the losses incurred without the need to prove the elements of error" (Undang-Undang Nomor 32 Tahun 2009 tentang Perlindungan dan Pengelolaan Lingkungan Hidup, 2009).

This article is a legal instrument for the application of the principle of strict liability. The affirmation of the article element that absolute responsibility for losses without the need to prove the element of error is a scourge for companies that commit violations, but it is challenging to prove. Then the birth of Law Number 11 of 2020 concerning Job Creation or what is known in Indonesia as the Omnibus Law Law is a sign that the economic sector's interests provide a red carpet towards environmental destruction, immensely freeing those who damage the environment.

It can be seen from Article 88 in the Omnibus Law, which eliminates the element "without the need to prove the element of error." The obfuscation of norms in this regulation distracts from the principle of strict liability. Strict liability is a concept that makes corporations liable for criminal responsibility, which is a consequence of developments that occur. This accountability falls into the category of liability without fault. It means that the maker can be convicted if he has committed an act as defined in the law regardless of his inner attitude. This concept also means a deviation from the principle of error, which states that a person cannot be convicted without error (Haritia & Hartiwingsih, 2019).

According to Richard A. Posner's view (Riswanti et al., 2013), relying on the doctrine of liability based on fault, environmental law enforcement through the courts will face various obstacles. It is due to the crucial requirements that must be met in the element of negligence or fault. So that if the defendant (polluter) manages to show his caution even though he has caused losses, he can be free from responsibility. To overcome this problem, the principle of absolute responsibility was developed in Article 88 of Law Number 32, the Year 2009. The concept of strict liability forces a person to be responsible whenever losses arise. It means that first, the victims are released from the burden to prove that there is a causal relationship between their losses and the individual defendants' actions. Second, polluters will pay attention to both the level of prudence and the level of activity.

As stated by Muhammad Erwin (Erwin, 2015), omitting the elements of the article "without the need to prove the element of error" confuses the meaning of the concept of strict liability in this article. This strict liability principle means when a person carries out activities that can be categorized as ultra-hazardous (very dangerous). He is obliged to bear all the losses incurred even though he has acted very carefully to prevent these dangers or losses, even though they were carried out accidentally (Amania, 2020). Eliminating the phrase "without the need for proof of guilt" becomes a setback in environmental law enforcement and returns to the traditional doctrine of liability based on the difficult to overcome environmental challenges.

Eliminating the element "without needing to prove the element of error" becomes the basis for obscuring the meaning of strict liability. The absence of these elements means that proving a case must first be proven wrong. The principle of reverse proof that was previously attached to article 88 of the law on environmental protection and management is no longer there.

The regulation of the Strict Liability Principle in Article 88 of Law Number 32 the Year 2009 concerning Environmental Protection and Management.

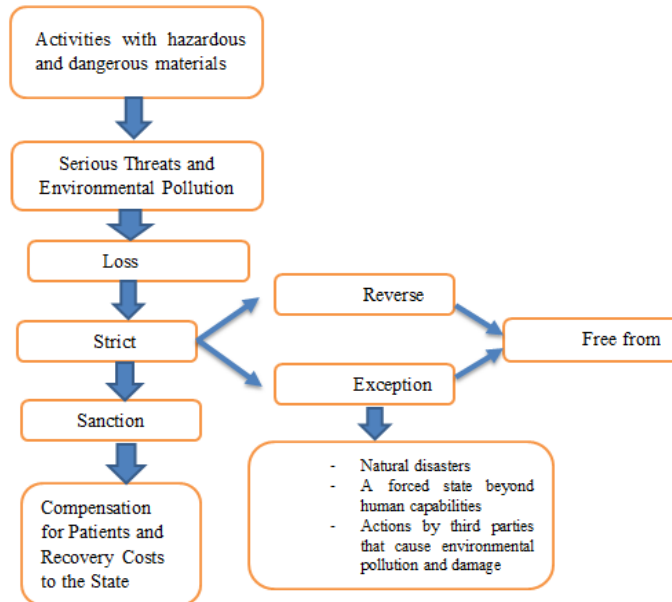


FIGURE 1
THE REGULATION OF THE STRICT LIABILITY PRINCIPLE IN ARTICLE 88 OF LAW NUMBER 11 OF 2020 CONCERNING JOB CREATION

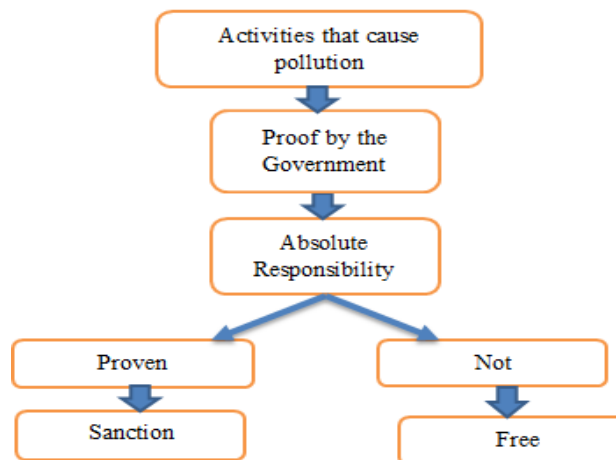


FIGURE 2
LAW ENFORCEMENT IN THE ENVIRONMENTAL SECTOR

The two charts above Figure 1 and Figure 2 really show the differences in law enforcement in the environmental sector. Before eliminating the faultless element in Article 88 of the Environmental Management Law, any company that is indicated to have polluted or damaged the environment can be immediately held accountable without proving its fault. The new regulation is inversely proportional; any environmental damage or pollution must be proven first. To prove there

are no mistakes in the company, it will be challenging to prove, which indicates conventional responsibility.

L.B Curzon outlines the actualization and benefits of the principle of strict liability. According to Curzon (Ulfah, 2018), these principles are needed concerning:

1. The importance of guarantees to comply with specific important rules necessary for the welfare of society.
2. Evidence of conflict is very difficult to obtain for violations of regulations relating to the welfare of society.
3. A high level of social danger arising from these actions.

Conflict of Interest and Environmental Damage

The Omnibus law's presence is a hope for the government to attract investors to invest in Indonesia (Hernawati & Suroso, 2020). Foreign investment to do business in Indonesia is considered a means of improving the country's economy and reducing unemployment. On this side, it certainly provides good things for the state in tax revenue and reducing unemployment (Sutrisno & Poerana, 2020).

Mining data, until the end of 2020, there was an additional mining service business license (IUJP) from 691 IUJP in the previous year (Umah, 2021). On the other hand, some mines do not have permits and reach more than 1000 locations in Indonesia's various regions. This mining does not pay royalties and, of course, causes social unrest and damages the environment (Nugroho, 2020).

The issuance of the Law of the Republic of Indonesia Number 3 of 2020 concerning Mineral and Coal Mining is a controversy. This regulation is full of the interests of mining corporations. As in Article 169 letter A, this article regulates the extension of work contracts and work agreements for coal mining companies without going through an auction. Both work contracts are guaranteed an automatic extension of 2 x 10 years without having to reduce their area expansion. The previous law stipulates that the area must be returned to the state after each contract and re-auctioned. (Amendment to Law Number 4 Year 2009 concerning Mineral and Coal Mining, 2020) The article is full of large corporations' interests in smoothing out contracts of work without a re-auction process.

Various indications ranging from eliminating or obscuring the meaning of strict liability provide a clear fact that investment interests take precedence over the environment's quality. Another fact shows that the constituents of the Omnibus Law are mining company owners. Records from one of the environmental organizations such as the Indonesian Forum for the Environment (WALHI) and Greenpeace show that 57% of the working committee members and task force compiling the Omnibus Law are business actors. They have direct and indirect links to the coal mining and dirty energy business (Walhi, 2020).

Greenpeace Indonesia, on its website, reports that the conflict of interest in the drafting of the Omnibus Law benefits big business people who have elite political affiliations. Actions in changing policies based on a few elite people's interests are categorized as oligarchic that no longer serve the public interest (Green peace Indonesia, 2020).

Interests that are not on the side of environmental protection can be seen clearly from the Omnibus Law's preparation. For this reason, it is not wrong for environmental activists to say that in the Omnibus Law, environmental law enforcement is no longer transparent. One of the indications is that the meaning of the strict liability principle is visible. The unclear form of proof against polluting companies is the victory of environmental oligarchs in Indonesia.

The principle of strict liability in the existing laws should be strengthened from the existing criticisms and facts, and its meaning expanded. Because if not, what happens is severe environmental damage in Indonesia in the next few years. The need for a review and review of the

Omnibus Law, especially the regulation of strict liability norms, is the most critical and urgent matter because the impact is very extraordinary on law enforcement and very full of interests in protecting companies that pollute and destroy the environment.

When Indonesia deliberately obscures the strict liability principle, other countries think ahead by expanding the object of this strict liability principle. The expansion of the object of the principle of strict liability can be seen in America. Activities that fall into the strict liability category in Anglo American law are in the form of:

- Business activities producing the management and transportation of hazardous and toxic waste.
- Flammable gas drifts in large quantities in urban areas.
- Nuclear installations.
- Oil drilling.
- Use of pile driving machines which generate extraordinary vibrations.
- Overflow of water.

Countries that adhere to the Anglo-Saxon legal system have also started to adhere to the principle of strict liability in the positive provisions of their criminal law (Darma & Redi, 2018). Strict liability; in this case, a person has no-fault (*men's rea*) for a particular crime. In England, the principle of strict liability crimes applies only to acts of minor offenses and does not apply to serious offenses. However, the United States' criminal law applies it to moral crimes, regardless of whether they were committed deliberately or by negligence.

The two Anglo-Saxon countries show an expansion of the objects that can be held responsible. The application of the principle of strict Liability in Indonesia began in 1982. It can be seen from the existing regulations. It was starting from Law Number 10 of 1982 concerning Basic Provisions for Environmental Management, Law Number 10 of 1997 concerning Nuclear Energy, Law Number 10 of 1997 Environmental Management, and most recently in Law Number 32 of 2009 concerning environmental management and protection.

In its enforcement, the enforcement of the concept of strict liability in its implementation still faces obstacles, among others, the lack of simplicity of legal instruments and statutory instruments. The legal means must be comprehensive, systematic, and synchronous both vertically and horizontally in such a position. Then, the existing environmental law regulations turn out to be partial, sectoral, and environmental crimes are spread in various legislative products. Of these obstacles alone are quite heavy in law enforcement, then added to environmental oligarchs' games by deliberately changing policies that benefit their own groups.

CONCLUSION

Reducing the meaning of the principle of strict liability in the Omnibuslaw Law will significantly impact environmental law enforcement in Indonesia. Environmental law enforcement will fall back on past law enforcement. It will be more difficult for polluters and destroyers of the environment to be held accountable because they have to prove the mistakes made beforehand while proving mistakes in environmental law is very difficult because of technological advances. Oligarchic games within the scope of policymakers worsen environmental law enforcement. Many regulations and articles in the Omnibus Law show very much interest for investors compared to the protected environmental interests.

On the other hand, while Indonesia is experiencing a setback, especially the regulation of the principle of strict liability, other countries are consistent and broaden the strict liability object. It indicates that there is a considerable setback for environmental law enforcement in Indonesia. The government and the House of Representatives should produce policies or regulations that are on the side of sustainable environmental management. Investigating environmental pollution and

destruction that are detrimental to natural resources must be accompanied by strong regulations. Also, in the formation of regulations, policymakers avoid conflicts of interest to produce regulations that are genuinely in the interests of the environment.

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