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The Urgency of Establishing an Environmental Court in Resolving Environmental Cases in Indonesia

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Abstract

Environmental cases that have been processed in court, in their decisions are not in favour of the environment, are not oriented towards environmental sustainability and are considered often disappointing and do not provide a sense of justice for the community and justice for the environment itself. With this situation, it is very urgent for the Environmental Court to resolve environmental cases that are oriented towards environmental sustainability. The purpose of the research is to describe the urgency of the existence of an environmental court. This research is studied using normative legal studies, qualitative research specifications, secondary data sources and using qualitative data analysis. Environmental cases have special characteristics. The characteristics of environmental cases are often scientific and require special expertise in handling, so it is urgent to establish a special environmental court. Environmental cases resolved in the general court have not been able to provide ecological justice and have actually resulted in acquittals for the perpetrators. for the perpetrators, it is very urgent to have an environmental court.

Keywords: *Sustainability; Environment; Courts; Urgency*

Introduction

Environmental cases have special characteristics so that the handling must also be special and cannot be equated with other legal offences. One example is the specificity of scientific evidence so that it needs experts who can formulate the scientific evidence into legal evidence.[1] Likewise, the rise of environmental cases that have been increasing lately, both from the impact caused, the mode used to the character of the perpetrators who often involve large corporations, has implications for increasing demands that these cases be handled specifically and accountably. The facts show that in recent cases involving large corporations and individuals, the courts have often made decisions that do not fulfil the public's sense of justice. Thus, considering the level of urgency and emergence of environmental problems is so alarming, the purpose of this research is to describe the urgency of

[1] Prayekti Murharjanti, Dkk, 2009, *Menuju Peradilan Pro Lingkungan*, Indonesia Center for Environmental (ICEL).

special and more serious handling of environmental damage by establishing an environmental court.

From the environmental cases that have been processed in court, the decisions are not pro-environment, not oriented towards environmental sustainability and are often considered very disappointing and do not provide a sense of justice for the community and justice for the environment itself. Below are examples of environmental cases whose decisions do not pay attention to environmental sustainability or are not pro-environment. The Lapindo mudflow case filed by WALHI was rejected by a judge at the South Jakarta District Court on 27 December 2006. The panel stated that the Lapindo mudflow was a natural phenomenon. Likewise, at the appeal level, the judge found the defendants not guilty.

The Court Decision (No. 1131/Pid/B./2009/PN. Smg) stated that Defendant I and Defendant II were acquitted of all charges because they were not proven guilty of committing the criminal offence as charged by the public prosecutor in both the primair and sumbsidair charges. The opinion of the expert witness who testified that the company's activities produced B3 waste was not considered in the trial. The settlement of the environmental pollution case in Buyat Bay by PT Newmont Minahasa Raya at the Manado District Court resulted in a verdict that acquitted the company and the head of the company (initiator). Similarly, the civil lawsuit by the Government of the Republic of Indonesia through the Ministry of Environment only resulted in a settlement with the willingness of PT Newmont Minahasa Raya to pay an additional community development fund of $US 30 million. The settlement of an environmental case at the Medan District Court in the case of illegal logging in the forests of Mandailing Natal, North Sumatra resulted in a verdict of acquittal from illegal logging charges. The evidence was strong enough that the damaged forest, 58,000 (fifty thousand) hectares, was strongly suspected to be due to the actions of the defendant company. This was not taken into consideration by the judge in making the decision.

Seeing the fact that environmental cases resolved in the general court cannot provide ecological justice and instead result in acquittals for the perpetrators, it is very urgent to have an environmental court that handles environmental cases.

Research Method

The study used in this research is normative legal research to find the law for a case in-concocreto.[2] In this research, the existing legal norms in the legislation are required as major premises, while the relevant facts in the case (legal facht) are used as minor premises. Through the process of syllogism, a conclusio (conclusion) in the form of positive law in concreto will be obtained. By describing the actual problem, namely that in the last few cases involving large corporations and individuals, the courts often make decisions that do not fulfil a sense of justice for the environment and society, for this reason it is urgent to deal specifically and more seriously with environmental damage by establishing an environmental court.

The research specification used in this research is descriptive legal research. The research is intended to describe in detail certain legal phenomena, namely that the courts often make decisions that do not fulfil a sense of justice for the environment and society, for this reason it is urgent to deal specifically and more seriously with environmental damage by establishing environmental courts.

[2] Ronny Hanitijo Soemitro, 1985, *Metodologi Penelitian Hukum*, Cetakan ke dua, Ghalia Indonesia, Jakarta. H.12-13.

The data sources used in this research are: secondary data. Secondary legal materials can come from scholarly works of scholars, journals related to the issues discussed, and research results.

The method of data collection in this research is done by means of literature study. The literature study in this research revolves around the environment, the handling of environmental disputes both in Indonesia and in other countries as a reference for handling environmental disputes in Indonesia. The method of data presentation is presented in the form of descriptions of the urgency of special and more serious handling of environmental damage by establishing an environmental court.

The method of data analysis is carried out by qualitative analysis by examining data and concepts, theories and doctrines as well as laws and regulations related to the urgency of special and more serious handling of environmental damage by establishing environmental courts.

Discussion

1. Environmental Court and the Urgency of Its Establishment

According to R. Subekti and R. Tjitrosoedibio, the terms "judiciary" and "court", that the court (rechtbank) or court refers to the body, while the judiciary (rechtsprak) or judiciary refers to the function. Rochmat Soemitro distinguishes between judiciary, court and judicial body. The focus of the judiciary is on the process, the court on the method, while the court body is on the board, judge or government agency.[3] In the opinion of Sjachran Basah, the use of the term court is aimed at the body or forum that provides justice, while the judiciary refers to the process of providing justice in order to uphold the law or "het rechtspreken".[4] So the court is closely related to the judiciary, but the court is not the only place that organises justice. [5]

Rochmat Soemitro placed the judiciary within the theoretical framework of John Locke and Montesquieu with his trias politica theory. After that it is stated: "the judiciary is a power (in the sense of "functie"), which stands alone alongside other powers".[6] Furthermore, Rochmat Soemitro quoted and analysed the definition of judiciary from several experts, such as Van Praag, Van Apeldoorn, P. Scholten, Bellefroid,

G. Jellinek and Kranerburg which finally concluded the elements of justice, namely[7]:

1. The existence of an abstract rule of law that binds the public, which can be applied to a problem;
2. The existence of a concrete legal dispute;
3. The existence of at least two parties;
4. The existence of a judicial apparatus authorised to decide the dispute.

[3] Sjachran Basah, 1989, Eksistensi dan Tolok Ukur Badan Peradilan Adminstrasi di Indonesia, Alumni, Bandung,H.22-23.
[4] J.H.T. Logemann, 1954, *Het Staatsrecht van Indonesia, het formele system*, NV. Uitgeverij W. van Hoeve's-Gravenhage, Bandung, p.135.
[5] Sjachran Basah, *Op.Cit*, H.23-24.
[6] Rochmat Soemitro, 1976, *Masalah Peradilan Administrasi Dalam Hukum Pajak di Indone*sia, disertasi, P.T. Eresco, Jakarta, H.10.
[7] Wirjono Prodjodikoro, 1960, Hukum Acara Pidana di Indonesia, Sumur Bandung, H.87-90. Karni, 1952, *AcaraPidana Berpedoman HIR*, Pustaka Islam, Jakarta, H.126-128.

In environmental justice, the elements of justice are adjusted to the needs of environmental justice. The need in environmental justice is the creation of justice that pays attention to the protection of the environment. Thus, the elements in environmental justice need to pay attention to

In environmental justice, it is not only humans as litigants but also the environment itself that must be protected. In environmental justice, what is to be protected is not only humans as litigants but the environment itself which is also obliged to receive protection. So what is protected is not only humans but also non-humans. If the judicial elements in environmental justice are not oriented towards the environment, this is a weakness in environmental justice to be able to realise protection of the environment for its sustainability. The weaknesses of the judicial elements will affect the legal culture of judges in resolving environmental cases that are oriented towards environmental sustainability.

Pollution and/or destruction of the environment continues to occur and according to the Environmental Quality Index (IKLH) the environment in Indonesia is increasingly damaged and many parties are harmed both humans and the environment itself but effective environmental case resolution has not been found. Thus it is necessary to think about being able to resolve environmental cases effectively and pay attention to the environment itself. A good and healthy environment should be realised. This desire can be realised by establishing an effective court institution to resolve environmental cases. The court institution is an environmental court to resolve environmental cases. Thus, every settlement of environmental cases is expected to pay attention to the environment itself which is the object in environmental cases. The environmental court is expected to be able to accommodate every environmental case that must be resolved.

With the weaknesses in the elements of justice, both elements; judges, procedural law, parties to disputes, environmental disputes and material law which have an impact on court decisions that are not oriented towards environmental sustainability, it is very urgent to establish an Environmental Court. Looking at other countries that have established Environmental Courts and have succeeded in resolving environmental cases effectively, adds to the urgency of establishing an Environmental Court in Indonesia. The number of cases of environmental violations that have been less accommodated in the settlement through the general court system, strengthens the urgency of establishing an Environmental Court in Indonesia. The large number of cases of environmental offences that have been poorly accommodated in the general court system has strengthened the desire to establish a court that specifically handles and resolves environmental cases.

Basing the law can function to control society and can also be a means to make changes in society.[8] In line with Satjipto Rahardjo that law as a means of change, Roscoe Pound's theory of law as a social engineering tool emerged.[9] Roscoe Pound's theory wants to organise the interests that exist in society. The strength of Roscoe Pound's theory lies in that law needs to be utilised as a means towards social goals and as a tool in social development. The main focus of Roscoe Pound's theory with the concept of social engineering is interest balancing, therefore the most important thing is the ultimate goal of the law that is applied and directs society in a more advanced direction. The life of law lies in the work it produces for the social world, so the main goal in social engineering is to direct social life in a more advanced direction. Law is not to create satisfaction, but only to give legitimacy to human interests to achieve that satisfaction in balance.[10]

[8] Satjipto Rahardjo, 1996, *Ilmu Hukum*,PT Citra Aditya Bakti, Bandung, H. 189.
[9] Roscoe Pound, *Contemporary Jurisdic Theory,* dalam D. Llyod, 1965, *Introduction to Jurisprudence,* Stecens, London
[10] Dragan Milovanovic, 1994, *A Premiere in the Sociology of Law*, Harrow and Heston Publisher, New York. Bernard L.Tanya,dkk, *Op.Cit.* H.155-16

Law as a means of social engineering, means the conscious use of law to achieve order or the state of society as aspired or to make the desired changes.[11]

Roscoe Pound proposed that jurists need to take into account social facts in their work, whether lawmaking, interpretation, or application of regulations. For Roscoe Pound, the life of the law lies in its implementation. Roscoe Pound rejected the study of law as the study of rules, but rather went beyond that and looked at the effects of law and the operation of law.

In relation to the operation of law, Seidman explains as follows:

> "How a law enforcement agency will work in response to legal regulations is a function of the regulations addressed to it, its sanctions, the overall complex of social, political and other forces acting upon it, and the feedback coming from role accupants".

The operation of law enforcement agencies is, first of all, determined and limited by formal benchmarks that can be recognised from the formulations in various legal regulations. Relying on the formal design alone is far from sufficient to understand and explain the organisational behaviour of these institutions.[12] In the legal system there are elements of the legal system, one of which is the legal structure.[13] According to Lawrence M. Friedman, The legal structure is the totality of existing legal institutions and their apparatus, including the courts and their judges.

The structure referred to in this paper is the court institution. The general court institution in resolving environmental cases has not optimally carried out its functions because it does not accommodate environmental violations. For this reason, it is urgent to reconstruct the court institution by establishing an Environmental Court.

The establishment of the Environmental Court can be carried out based on statutory regulations. According to Article 24 paragraph (1), paragraph (2) and paragraph (3) of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) regulates judicial power. Paragraph (1) states, "Judicial power is an independent power to administer justice in order to uphold law and justice". Paragraph (2) explains, "Judicial power shall be exercised by a Supreme Court and the judicial bodies subordinate thereto within the general judicial system, the religious judicial system, the military judicial system, the state administrative judicial system, and by a Constitutional Court". Paragraph (3) stipulates that, "the judicial bodies whose function is to exercise judicial power shall be based on law". Likewise, Article 27(1) and (2) of Law No. 48/2009 on Judicial Power also regulates the establishment of courts. The law states, "Special courts can only be established in one of the judicial circles under the Supreme Court" and "Provisions regarding the establishment of special courts shall be regulated by law". Likewise, Article 8 of Law No. 49 of 2009 on General Courts stipulates, "special courts may be established in the general judicial environment as regulated by law".[14] Specialised courts are courts that have the authority to examine hear and decide on certain cases that can only be established in one of the judicial bodies under the Supreme Court as regulated by law. Thus, it is juridically permissible to establish a special environmental court. Environmental cases are special cases, so their resolution requires special judicial institutions to resolve them, so that they can accommodate environmental cases that require special resolution. Furthermore, Article 25 paragraph (1) states, "Judicial bodies under the Supreme Court include general courts, religious courts, military courts, and state administrative courts".

[11] Satjipto Rahardjo, 1983, *Hukum dan Perubahan Sosial,* Alumni, Bandung
[12] Satjipto Rahardjo, 2009, *Penegakan Hukum Suatu Tinjauan Sosiologis*,Genta Publishing, Yogyakarta, H. 29-30.
[13] Lawrence M. Friedman, *Op.Cit*. H. 11
[14] Pasal 1 butir 5, UU No. 49 Tahun 2009 tentang Peradilan Umum, Pasal 1 butir 8, UU No. 48 Tahun 2009 tentang Kekuasaan Kehakiman.

In the short term, the plan to establish an Environmental Court can be carried out by paying attention to and considering the existence of a four judicial environment system referred to in Article 24 paragraph (2) of the 1945 Constitution and Article 27 paragraph (1) of Law No. 48 of 2009 concerning Judicial Power. In the establishment of the Environmental Court so as not to conflict with the provisions of these laws and regulations, it is necessary to place the Environmental Chamber system in the structure of the District Court for civil cases and criminal cases and there is also an Environmental Chamber. Judges assigned to the Environmental Chamber in each court are judges who have competence in the environmental field and have Environmental Certification from the Supreme Court. Likewise, other law enforcers, be it advocates, police, prosecutors and expert witnesses who handle environmental cases also have competence in the environmental field.

In the long term, Indonesia should ideally have a stand-alone Environmental Court outside of the existing judicial bodies. The existing judicial bodies are the general court, religious court, military court, and state administrative court. If there is to be one more court, namely the environmental court, it is necessary to amend Article 24 paragraph (2) of the 1945 Constitution of the Republic of Indonesia. In the amendment to Article 24 paragraph (2) of the 1945 Constitution of the Republic of Indonesia adds one judicial body within the judicial system, namely the environmental court. Article 25 paragraph (1) of Law No. 48/2009 on Judicial Power is also amended by adding one judicial body that already exists, namely environmental judicial bodies. Likewise, amendments need to be made to Law No. 32/2009 on Environmental Protection and Management to include plans for the establishment of an Environmental Court and the regulation of its procedural law. The use of ad hoc judges in the Environmental Court is also included in the amendment of the law.

Considering that industrial companies every year the quantity of environmental damage has increased and the quality of the environment is increasingly according to and the settlement of environmental cases in court has not been oriented towards environmental sustainability, it is urgent to establish an Environmental Court. Article 25 paragraph (1) stipulates that the Environmental Court must be established so that it can accommodate environmental cases that require specialised resolution. Furthermore, Article 25 paragraph (1) states, "Judicial bodies under the Supreme Court include general courts, religious courts, military courts, and state administrative courts".

2. Environmental Courts in Various Countries

a. Environmental Court in Thailand [15]

The Supreme Court of Thailand established the Environmental Law Division as a new specialised division within the Supreme Court and Court of Appeal. The purpose of establishing this new division is to create "awareness" of judges in environmental matters, in this case, the establishment of a specialised environmental division is expected to enhance the role of the judiciary in addressing the growing environmental problems. The Environmental Division consists of a Chairperson, Secretary, and 14 trained judges and judges with expertise in environmental matters.

The establishment of the Environmental Law Division was also followed by other programmes in line with the development of the human resources capacity of the judges, such as by conducting study visits on the Environmental Justice Process conducted by several groups of senior judges, in several countries including the USA, Canada, Australia, Europe and India and also conducting intensive training programmes for two weeks as in 2006 conducted by 45 judges at Kyushu University, Japan. Green Judges and Green legeslation were also developed. Green Judges was developed through training for judges and the preparation of the Environmental Bench Book as a guideline for handling environmental cases.

[15] Rino Subgyo, ICEL 2006, http://www.roap.unep.org/program/Documents/Law08_presentation/Day1/Green_Bench_THA.pdf. dan . Prayekti Muharjanti dkk, 2009, *Menuju Peradilan Pro-Lingkungan, ICEL*, Jakarta, H.16

b. Environmental Court in Filipina [16]

The Supreme Court of the Philippines in 1993 issued Administrative Order No. 15-13-93 appointing several special courts to deal with offences against the Forestry Code. This was prompted by the increasing number of cases involving offences against forestry laws. The Special Courts were placed in areas where forestry offences were most prevalent. This determination is based on the results of monitoring cases using the Court Administration Management Information System. Other environmental cases are mostly resolved by administrative agencies that have been given quasi judicial mandates. This is because the awareness and knowledge of prosecutors and judges in relation to environmental issues is limited to a few laws and regulations (e.g. forestry). Based on this situation, there is a need to increase the role of the judiciary in addressing environmental issues. This role is mainly related to criminal offences against environmental laws and regulations, namely to create more 'toothy' law enforcement. Often decisions issued by administrative bodies do not achieve maximum enforcement.

In 1998, the Philippine Judicial Academy (PHILIJA), a training school for judges, clerks and judicial candidates, was established through Republic Act 8557. Since its establishment, PHILJA has conducted several environmental trainings for judges. In 2007, PHILJA in collaboration with The United Nations Environment Programme (UNEP), The Asia Pacivic Jurist Association (APJA), The United States Environmental Protection Agency (USEPA) and The Supreme Court Project Management Office (PMO), organised The Asian Justices Forum on the Environment. At this forum, details of the framework for building a green bench in the Philippines were presented as input to other participating countries. Senior judges from Indonesia, India, Thailand, Sri Lanka, Australia and the U.S. responded with different approaches. Several recommendations from the Forum provided impetus to strengthen environmental judgements in the ASEAN region including the Philippines.

With the assistance of several donor agencies, an action programme was established that resulted in a strategy to establish a green bench in the Philippines. In an effort to accelerate institutional change, several options were developed for consideration by the Supreme Court, namely:

1. To identify different types of offences against environmental laws and regulations;
2. To direct the Supreme Court for the appointment of environmental courts;
3. To improve the data grouping system for environmental cases.

The data showed a total of 2,353 cases pending in various courts including offences against forestry and fisheries legislation. All of this data formed the basis for the Green Bench Establishment Commission established by the Supreme Court in establishing the Green Bench. Acting on the recommendations of the Commission, the Supreme Court in its resolution dated 20 November 2007 as amended on 22 January 2008 (A.M.No.07-11- 12-SC), appointed 117 environmental courts comprising courts of first and second instance to deal with all types of environmental cases, at least 14 environmental laws and regulations.

Courts designated as environmental courts do not necessarily lose their jurisdiction to handle non-environmental matters. They will continue to have jurisdiction as general courts. There are three factors that led to the successful establishment of the Green Bench in the Philippines namely:

1. The leadership and strong desire of the Chief Justice of the Philippines to promote a clean environment. This is reflected in his active role in encouraging the reform of the judiciary to be more responsive to environmental issues and sending judges for training in environmental law.

[16] Makalah Designation of "Green Benches" I Philippines: Regional Exchange in Support Improved Judicial Institutions and Capacity, Candelararia, Sedfrey, Ballesteros, Maria Milagros. Prayekti Muharjanti dkk, 2009, *Menuju Peradilan Pro-Lingkungan, ICEL*, Jakarta, H. 18-21.

2. Organisation of judges' education and training. Since 1998 PHILJA has conducted several environmental trainings so that judges can understand the complexities of environmental cases.
3. Strong cooperation from various parties such as PHILJA, advocates, environmental activists, grassroots communities and donor agencies.

c. Environment Court in New South Wales (NSW), Australia [17]

In the State of New South Wales (NSW), Australia, environmental and land matters are resolved in the Land and Environment Court which was established in 1979 under the Land and Environment Court Act 1979. The court has the jurisdiction to hear cases/objections relating to development, development permit decisions from both the Local Councils and State Agencies.

In the State of New South Wales (NSW), Australia there is a special court in the field of environment, development and natural resources, namely The Environment, Recource and Development Court which was formed under The Environment, Recource and Development Court Act 1993.

The jurisdiction of the court is to resolve issues relating to development and the environment and also has Criminal and Civil Enforcement Powers, particularly offences against environmental conservation and management laws.

The Environment, Resource and Development Court is comprised of; 2 (two) District Court judges, 1 (one) magistrate, 3 (three) full-time Commissioners, and 24 (twenty-four) part-time Commissioners. The Commissioners are not jurists but are appointed based on specialisation and expertise related to the court's jurisdiction.

Environmental Court in New Zealand 18

The Environmental Court in New Zealand was previously called the Environmental Court of New Zealand Planning Tribunal. The Environmental Court of New Zealand is a special court separate from the general court. This court also functions as an “appellate court”, which means it has the right to review other court decisions.

Based on "The Resource Management Act 1991", this Court has jurisdiction to handle cases, including the following:

1. Utilization of water resources for dams, waste disposal permits and mining permits;
2. Land use;
3. Controlling environmental impacts due to exploration and mining;
4. Statement regarding the legal status of an activity that has an impact on the environment.

The Environmental Court of New Zealand consists of 8 (eight) judges, 5 (five) judges assistant judge, 15 (fifteen) commissioners and 6 (six) Deputy Commissioners. Usually environmental issues will be decided by 1 judge, but the composition of the panel can consist of 1 Environment Judge and 2 Environment Commissioners when it comes to appeals against policies and permits for the use of natural resources. In cases that are considered major cases, the composition of the panel consists of 1 judge and 3 commissioners.

[17] Prayekti Muharjanti Dkk ,*Op.Cit.*
[18] Prayekti Murharjanti, dkk, *Op.Cit.* http//www.court.govt.nz/environment/about/how-cases-court.asp. http://www.courts.govt.nz/environment.asp.

Parties in a lawsuit can be represented by lawyers, but each person can also represent himself or be represented by someone else who is not a lawyer. These courts are not burdened by complicated evidentiary laws and their procedures are less informal than those of general courts. Complex issues result in verbal decisions being rarely given, which means that decisions are given in writing at the next court session.

Conclusion

The urgency of establishing an environmental court in resolving "Settlement" of environmental cases in Indonesia is:

Strengthen the ability to determine the qualifications of judges who are recruited as people who have competence and integrity in the environmental field.

The time required to resolve environmental cases at the Environmental Court is relatively faster, because the court only handles environmental cases.

So that the resolution of pro-environmental environmental cases can be accommodated in environmental court decisions.

Can produce ecological and societal justice.

Court decisions that pay attention to environmental sustainability.

Judges can impose sentences for the restoration of damaged environments even if they are not required.

Ideally, Indonesia would have an Environmental Court that stands alone outside the existing judicial bodies. In the short term, a special environmental court can be formed within the general court as stated in Article 8 of Law no. 49 of 2009 concerning General Courts.

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