Environmental Law Dispute Resolution Based On Positive Law

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Abstract

Environmental problems as a relatively new field have the potential to cause differences in views, interests or perceptions among stakeholders. environmental dispute resolution is expected to create solutions in environmental management. This research uses a normative juridical approach, the results of the research obtained indicate that the Application of Environmental Dispute Resolution in Law No.32 of 2009 complements the previous law, as stated in Chapter XIII of Law No. 32 of 2009 it says that Environmental Dispute Resolution Life can be pursued through the court or outside the court (article 84 paragraph 1). In the second part about the settlement of environmental disputes outside the court as well as factors that affect the nature of environmental dispute resolution, among others, law enforcement factors, because there is no uniformity of steps with sectoral agencies and local local governments, as well as experts, facility factors, because laboratories to support proof, sufficient finance, community factors, the public is still unfamiliar with the knowledge of environmental pollution.

Keywords: Enviromental law; Dispute Resolution; Positive Law;

1. Introduction

The nation and state of Indonesia is a nation that was born "by the grace of Allah the Almighty", and this recognition is officially stated in the highest document of the Preamble of the 1945 Constitution, and God Almighty is included in Chapter XI on Religion Article 29 paragraph (1) of the Constitution. NRI 1945. This statement carries the understanding and recognition that the existence and origin of the Indonesian nation is due to the intervention and will of Allah Almighty, not produced by a society agreement of free individuals such as the concept of a liberal state. For the Indonesian people there is a close relationship between the state and religion that rests on the One and Only Godhead which is the first principle of Pancasila, and thus the Indonesian nation has a noble legal instrument as the foundation of national and state life, namely Pancasila

and the 1945 Constitution.[1]

The Unitary State of the Republic of Indonesia is a country rich in natural and human resources. The abundant natural wealth is in the form of mining products (such as gold, tin, nickel, etc.), marine products (fish, pearls, seaweed, etc.), forest products (rattan, wood, resin, etc.) -Other), as well as other natural resources that are utilized for the welfare of the Indonesian people.

This is in accordance with the provisions of Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia which states: "*"Bumi dan air dan kekayaan alam yang terkandung di dalamnya dikuasai oleh negara dan dipergunakan untuk sebesar-besar kemakmuran rakyat*".[2] This natural wealth is used to build the welfare and prosperity of the Indonesian people in order to avoid deprivation and poverty through national development. This natural wealth is used to build the welfare and prosperity of the Indonesian people in order to avoid deprivation and poverty through national development. That the verse seems to want to reinforce the notion of the Welfare State, in Giddens' terms, this definition is included in the 'social investment state' (*social investment state*).[3]

A good and healthy living environment is a gift from God Almighty that is given to all mankind without exception. Therefore, the right to a good and healthy environment is the same for all human beings, even living things in the world. Behind the equality of rights, of course, is the obligation of all humans to protect and preserve the functions of this environment. The obligation here refers to all actions, efforts and activities carried out by humans individually or in groups in order to protect and preserve the environment. This is necessary and obligatory to be implemented because the environmental conditions from day to day show a significant decrease in quality.

Not only in Indonesia, the problem of pollution and environmental destruction has transformed into a global issue that is believed to be internationally. This condition of course forces every country in the world to pay more attention than usual to this problem of pollution and environmental destruction. One of the ways that is done by the international community is through forms of cooperation between countries, including by holding international meetings related to environmental issues. The Indonesian government has started paying attention to environmental management since 1972. In that year the Government of Indonesia welcomed the First World Environment Conference which was held in Stockholm, Sweden in June 1972, but at that time the Government of Indonesia did not recognize a special institution dealing with

1. Sri Endah Wahyuningsih, Urgensi Pembaharuan Hukum Pidana Materiel Indonesia Berdasarkan Nilai-Nilai Ketuhanan Yang Maha Esa, *Jurnal Pembaharuan Hukum*, Volume I No.1 Januari-April 2014, hlm.17-23
2. Sekretariat Jenderal MPR RI, *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*, MPR RI, Jakarta, 2002, hlm. 78.
3. Djauhari, Pergeseran Pemikiran Negara Kesejahteraan Pasca Amandemen UUD 1945, *Jurnal Pembaharuan Hukum*, Vol I No. 3 September-Desember 2014, hlm.318-327

environmental issues. [4]

The Stockholm Conference has begun to seek to involve all governments in the world in the process of environmental assessment and planning, unite the opinions and concerns of developed and developing countries to save the earth, promote public participation and promote development with respect to the environment. In this regard, the Stockholm Conference reviewed conventional development patterns that have tended to damage the earth which are closely related to poverty, economic growth rates, population pressure in developing countries, excessive consumption patterns in developed countries, and imbalances in international economic order. Changes in laws and regulations will affect the form of environmental institutions. The amendment is intended to improve the existing laws and regulations.[5]

Efforts to resolve environmental problems that occur in Indonesia are to ensure legal certainty in law enforcement.[6] This condition is due to the fact that there are still a lot of various kinds of pollution and damage to the environment that have occurred in our country. To resolve problems against parties who have polluted and damaged the Environment, it is carried out through legal channels in accordance with the existing laws and regulations in the State of Indonesia.

In Indonesian law itself, environmental disputes can be resolved in various ways. Starting from settlement through the judicial route and outside the judicial route, starting from criminal offenses to other forms of violations committed in civil law. These various ways provide opportunities and options for citizens to determine legal processes related to various forms of pollution and environmental destruction activities.

Various ways have been attempted by the government, including by improving legal instruments, especially those related to the environment. One of the newest legal products passed by the government is Law Number 32 of 2009 concerning Environmental Protection and Management. This law, which came into force since October 2009 and is recorded in the State Gazette of the Republic of Indonesia Year 2009 Number 140, replaces the role of Law Number 23 of 1997 concerning Environmental Management. Law Number 32 of 2009 is believed to have a more comprehensive level of completeness and discussion when compared to Law No. 23 of 1997, this is because there are still many legal gaps left by Law No. 23 of 1997. One of the most anticipated things from the implementation of Law No. 32 of 2009 is in the context of solving problems of pollution and environmental destruction, on how to solve it up to various criminal threats against the violators.

4. Handri Wirastuti Sawitri, Rahadi Wasi Bintoro, Sengketa Lingkungan dan Penyelesaiannya, *Jurnal Dinamika Hukum,* Vol. 10 No. 2 Mei 2010, hlm.163-174
5. *Ibid.*
6. Komang Trie Krisnsari, I Ketut Mertha, Penerapan Undang-Undang Nomor 32 Tahun 2009 Tentang Perlindungan Dan Pengelolaan Lingkungan Hidup Dalam Upaya Penegakan Hukum Lingkungan Di Indonesia, *Kerthasemaya*, Vol. 01, No. 03, Mei, 2013, hlm. 2,

In realizing this right to justice over natural resources and the environment, it is necessary to carry out an integrated and integrated environment between the sea, land and air. This is in line with the mandate of Article 2 letter d of Law Number 32 Year 2009 concerning Environmental Protection and Management, which states that environmental protection and management must be implemented based on the principle of state responsibility; sustainability and sustainability; harmony and balance; cohesiveness; benefits; caution; justice; ecoregion; biodiversity; polluter pays; participative; local culture; good governance; and regional autonomy. In addition, it must also be held based on the principles of sustainable and environmentally sound development as contained in the weighing section of Law Number 32 of 2009.[7]

The purpose of this research is to know and analyze The settlement of environmental disputes in the context of implementing political and legal environmental protection and management has not been maximized because in accordance with the political objectives of the law, existing natural resources cannot be used for the greatest prosperity and welfare of the people. In addition, there are still a lot of water pollution, air pollution, deforestation and other actions that damage the environment

2. Research Method

The method used is a normative juridical approach. normative juridical approach. Namely, research that explains the provisions in the prevailing laws and regulations, related to the realities in the field, then analyzed by comparing the demands of ideal values that exist in laws and regulations with the reality in the field.[8] This type of research is descriptive analysis, because the researcher desires to describe or explain the subject and object of the study, which then analyzes and finally draws conclusions from the results of the study.[9] It is said to be descriptive because this research is expected to obtain a clear, detailed, and systematic picture, while it is said to be an analysis because the data obtained from library research and case data will be analyzed to solve problems in accordance with applicable legal provisions.

3. Result and Discussion.

1. The application of Environmental Law Dispute Resolution in positive law

Indonesia is the country with the fastest rate of forest destruction among countries that have 90 percent of the world's remaining forests. Indonesia is destroying an area of forest

7. Effendi, Penerapan Prinsip Pengelolaan Lingkungan Hidup Dalam Peraturan Perundang-Undangan Bidang Sumberdaya Alam (Kajian Dari Perspektif Politik Pembangunan Hukum), Kanun Jurnal Ilmu Hukum No. 58, Th. XIV (Desember, 2012), pp. 345-359.
8. Ronny Hanitijo Soemitro, *Metodologi Penelitian Hukum dan Jurimetri*, Ghalia Indonesia, Jakarta, 1990, hlm. 33.
9. Mukti Fajar ND dan Yulianto Achmad, *Dualisme Penelitian Hukum Normatif dan Empiris*, Pustaka Pelajar, Yogyakarta, 2010, hlm. 183.

the equivalent of 300 football fields every hour. As much as 72 percent of Indonesia's original forest has been destroyed and half of what remains is threatened by commercial logging, forest fires and forest clearing for oil palm plantations. Other phenomena can prove to us that floods occur everywhere, landslides, not to mention the Lapindo mud that doesn't stop gushing, then forest fires that are confirmed to be the nation's regular guests when the dry season arrives.

As a response to these various environmental disasters, environmental disputes have arisen and people who are victims and who care about the environment try to prosecute environmental law enforcement as part of an effort to claim their rights.[10] The Indonesian environment must be protected and well managed based on the principles of state responsibility, the principles of sustainability and the principles of justice. In addition, environmental management must be able to provide economic, social and cultural benefits based on the principles of prudence, environmental democracy, decentralization, as well as recognition and respect for local and environmental wisdom. This recognition is a form of responsive law as put forward by Philippe Nonet and Philip Selznick.[11]

Environmental law has adopted many legal principles to provide broad access to society to be responsive, participatory, and applicable to the various environmental rights they have. Among others, the right to obtain a healthy environment with an actively participatory concept mechanism for community members and environmental organizations (NGOs), which in turn gives birth to legal standing, citizen suits, class actions, and so on.[12]

Environmental management is a very important thing to do, given that humans always try to maximize all the manifestations of their desires and often in the fastest possible way, so they tend to sacrifice the interests of their environment.[13] In reality, environmental management in Indonesia still faces the same problem, namely the existence of a clash between various laws and regulations, especially between sectoral laws related to natural resources (which are more oriented towards the utilization of economic resources and environmental laws (which considered too emphasizing the aspects of protection of life.) As a result, the management and control of the environment under government control through the provisions of legislation as the umbrella provision has not been able to achieve the objectives of environmental management, the realization of the preservation of environmental functions and the achievement of people's welfare.

10. Absori, Penegakan Hukum Lingkungan pada Era Reformasi, *Jurnal Ilmu Hukum*, Vol. 8, No2, 2005, hlm. 221.
11. Philippe Nonet dan Philip Selznick, *Hukum Responsif*, terjemahan Raisul Muttaqien, Cet. Ke-2, Nusamedia, Bandung, 2008, hlm. 84.
12. Nommy HT Siahaan, Perkembangan Legal Standing Dalam Hukum Lingkungan (Suatu Analisis Yuridis Dalam Public Participatory Untuk Perlindungan Lingkungan), *Jurnal Syiar Hukum UNISBA*, Vol. XIII. No. 3 November 2011, hlm.232-244.
13. Hartuti Purnaweni, Kebijakan Pengelolaan Lingkungan Di Kawasan Kendeng Utara Provinsi Jawa Tengah, *Jurnal Ilmu Lingkungan*, Vol 12 (1) April 2014, hlm.53-65

Environmental dispute resolution in Law No.32 of 2009 complements the previous law, as stated in Chapter XIII of Law No. 32 of 2009 it says that Environmental Dispute Resolution can be pursued through the court or outside the court (article 84 paragraph 1) . In the second part regarding the settlement of environmental disputes outside the court, it is stated in article 85 paragraph (1) that the settlement of environmental disputes outside the court is carried out to reach an agreement regarding:

The form and size of compensation;

1. Actions for recovery due to pollution and / or damage;
2. Certain measures to ensure that pollution and / or damage will not be repeated; and / or
3. Actions to prevent negative impacts on the environment.

The forms of environmental settlement outside the court adhere to the concept of Alternative Dispute Resolution (ADR), which is carried out in the form of mediation or arbitration. And in this part, the role of the Police can enter and participate as a mediator in the implementation of mediation. This form of dispute resolution does allow for the presence of a third person as an intermediary and not a policy maker. Meanwhile, dispute resolution through the judiciary is regulated in the third part of Law No. 32 of 2009 and consists of:

1. Compensation and Environmental Restoration
2. Absolute Responsibility
3. The Government's and Local Government's Right to Claim
4. Community Rights to Claim
5. The right to sue the Environmental Organization
6. Administrative Lawsuit

However, behind all this, Law No. 32/2009 recognizes the so-called Ultimum Remedium principle, which requires the application of criminal law enforcement as a last resort after administrative law enforcement is deemed unsuccessful. The application of this principle only applies to certain formal crimes, namely the punishment for violations of wastewater quality standards, emissions and disturbances.

When viewed from the application of civil law, the right to sue the government and local governments, the right to sue the community and the right to sue environmental organizations are forms of practicing the concept of axio popularis, class action and legal standing. These concepts are excellent legal breakthroughs. The application of civil law is also followed by various requirements such as the implementation of the right to sue by the government which can be carried out by the Prosecutor's Office, the implementation of class actions that can be carried out by a person or group of people and the implementation of the right to sue by environmental organizations which must meet the organizational requirements in accordance

with what is regulated in the Law -Law No. 32 of 2009. The threat of punishment offered by Law No.32 of 2009 is also quite comprehensive, for example regarding the Articles that regulate criminal and civil provisions that threaten any violation of regulations in the field of environmental protection and management, both individuals, corporations, and officials. The most concrete example is the portion given to the AMDAL issue. There are at least 23 articles that regulate AMDAL, but the meaning of AMDAL itself differs between Law No. 32 of 2009 and Law No. 23 of 1997, namely the loss of major impacts. The new things regarding AMDAL contained in this latest law, among others:

1. AMDAL and UKL / UPL are instruments for preventing environmental pollution and / or damage;
2. Preparation of AMDAL documents must have a competency certificate for AMDAL document compilers;
3. National, provincial, and district / city AMDAL assessment commissions are required to have an AMDAL license;
4. AMDAL and UKL / UPL are requirements for controlling environmental permits;
5. Environmental permits are issued by the Minister, Governor, Regent / Walokota according to their respective authority.

Law 32 of 2009, if we look at it, gives broad authority to the government, in this case the Minister, to carry out all government authorities in the field of environmental protection and management as well as coordination with other agencies. This is not found in Law No. 23 of 1997, so if we look at the elements of regional government here, it includes natural resources owned and located in certain regions in Indonesia.[14] Apart from that, with regard to the issue of regional autonomy, this law also gives regional governments very broad powers in protecting and managing the environment in their respective regions. In addition, as explained in the explanation section of the Law No.32 of 2009 on point 8 of the first part, it is said that this Law also regulates:

1. The integrity of the elements of environmental management;
2. Clarity of authority between the center and the regions;
3. Strengthening efforts to control the environment;
4. Strengthening instruments for preventing pollution and / or environmental damage, which include instruments for strategic environmental studies, spatial planning, environmental quality standards, environmental damage standard criteria, amdal, environmental management efforts and environmental monitoring efforts, permits, instruments environmental economics, environmental-based laws and regulations,

14. Rina Suliastini, *Perbandingan UU No 23/1997 dengan UU No 32 /2009*, Fakultas Hukum Universitas Sebelas Maret, Surakarta, 2009, hlm.3

environmental risk analysis, and other instruments in accordance with the development of science and technology;

5. To make efficient use of licensing as an instrument of control;
6. Utilization of the ecosystem approach;
7. Certainty in responding to and anticipating developments in the global environment;
8. Strengthening environmental democracy through access to information, access to participation and access to justice as well as strengthening of community rights in environmental protection and management;
9. Clearer civil, administrative and criminal law enforcement;
10. Strengthening institutions for environmental protection and management that are more effective and responsive; and
11. Strengthening the authorities of environmental supervisors and civil servant environmental investigators.

Apart from the things mentioned above, there are strict regulations that are contained in Law No. 32 of 2009, namely the imposition of criminal sanctions and civil sanctions related to violations in the AMDAL field. Matters related to these sanctions include:

1. Sanctions against people who carry out business / activities without having an environmental permit;
2. Sanctions against people who compile AMDAL documents without having a competency certificate;
3. Sanctions for officials who issue environmental permits without being equipped with AMDAL or UPL / UKL documents.

The settlement of environmental disputes outside the court is a choice of the parties and is voluntary. The parties are also free to determine service providers that help resolve environmental disputes. Service providers provide environmental dispute resolution services using the assistance of an arbitrator or mediator or other third party. If the parties have chosen an environmental dispute settlement effort outside the court, the lawsuit through the court can only be pursued if the effort is declared unsuccessful in writing by one or the parties to the dispute or one or the disputing parties withdraws from the negotiation.[15]

To ensure legal certainty so that people have the awareness to participate in preserving their environment, the government has prepared legal instruments, especially environmental law, to ensnare environmental polluters and destroyers. The law in question is Law Number 4 of 1982 concerning the Environment (UULH) and Law Number 23 of 1997 concerning Environmental Management (UUPLH) and has been enhanced by the latest Law, namely Law

15. La Ode Angga Alternatif Penyelesaian Sengketa Lingkungan Hidup Di Luar Pengadilan (Non Litigasi), *Jurnal IUS kajian Hukum dan keadilan*, Vol VI No.2 Agustus 2018, hlm.266-273

Number 32 of the Year. 2009 concerning Environmental Protection and Management (UUPPLH). The existence of this law is expected to be a reference material for law enforcement officials to take action against parties who have deliberately or unintentionally polluted the environment. Law enforcers can resolve cases of environmental crimes that occur, especially the problem of water pollution by industrial waste, which often occurs especially in big cities.[16]

2. Affecting Factors In Environmental Dispute Resolution

Law Number 4 of 1982 concerning Basic Provisions for Environmental Management (hereinafter referred to as UUPPLH) is the initial policy step for environmental law enforcement. The UUPPLH contains the principles of environmental management which function to provide direction for the national environmental law system, and after 15 years this law was finally revoked because it was deemed unsuitable so that sustainable development could be realized as stated, namely by the Law concerning Environmental Management Law Number 23 Year 1997 and is replaced again by Law Number 32 Year 2009 on the grounds that it is to better guarantee legal certainty and provide protection for the rights of everyone to have a good and healthy living environment, through the imposition of severe criminal sanctions in Law Number 32 of 2009.[17]

The orientation of legal development that deals with environmental and community aspects must change towards the basic idea of progressive law, which is based on the basic assumption that law is for humans and not the other way around, law is not as an absolute and final institution, but as a moral and conscientious institution.[18]

The old UUPPLH placed criminal law enforcement in environmental law enforcement only as an ultimum remidium, so that the content of criminal sanctions enforcement was not dominant. The principle of ultimum remedium in the explanation of the old UUPPLH turned out to be very unclear and firm. The general explanation is actually an attempt to clarify the meaning of the preamble of a law. The preamble contains philosophical values of a law. Thus in fact the general explanation is an attempt by the legislators or legislators to reinforce the philosophical values contained in a preamble. The philosophical values in the preamble of a concretized law on the body in the form of articles of the law.[19]

16. Dani Amran Hakim, Politik Hukum Lingkungan Hidup Di Indonesia Berdasarkan Undang-Undang Nomor 32 Tahun 2009 Tentang Perlindungan dan Pengelolaan Lingkungan Hidup, *Fiat Justisia Jurnal Ilmu* Hukum, Volume 9 No. 2, April-Juni 2015, hlm.114-132
17. Yulanto Araya, Penegakan Hukum Lingkungan Hidup di Tengah Pesatnya Pembangunan Nasional, *Jurnal Legislasi Indonesia*, Vol. 10 No. 1 Tahun 2013, hlm. 50
18. Setyo Utomo, Pengaruh Pembangunan di Era Globalisasi Terhadap Pemenuhan Hak Asasi Manusia Atas Lingkungan Hidup Yang Baik dan Sehat, *Jurnal Pembaharuan Hukum*, Volume I No. 3 September-Desember 2014, hlm.258-266
19. Soo Woong Kim. Kebijakan Hukum Pidana dalam Penegakan Hukum Lingkungan Hidup, *Jurnal Dinamika Hukum* Vol 13, Nomor 3, September 2013

Juridical environmental disputes according to the General explanation of Article 1 number 25 UUPPLH 2009, namely environmental disputes are disputes between two or more parties arising from activities that have the potential and / or have an impact on the environment, environmental disputes that occur are caused by It is important that environmental pollution and destruction be handled properly and seriously and encourage the establishment of institutions for environmental dispute resolution that are free and impartial as well as professional and independent, both government agencies, provincial, district and municipal governments, as well as institutions formed by the community.

The following are the factors that influence environmental dispute resolution, among others: [20]

1. Law Enforcement Factors

   For judges, the legal factor of a law is very obstructing because the implementing regulations of a law are not entirely in place, even though the judge must apply truth and justice. The interpretation of the law or the discovery of a new law cannot be implemented because the problem is already regulated, but the regulation is not yet complete.

   Law enforcement facilities and facilities are very hindering. It is said to be inhibiting because there are no independent equipment to prove environmental pollution (such as laboratories). In addition, there are no (inadequate) enforcers who are experts in the field of the environment, so that the problem of proof also experiences difficulties in taking valid environmental pollution samples. So that in making decisions about environmental pollution disputes is not wise because law enforcers always make decisions or make policies that often harm the community and always benefit certain entrepreneurs or agencies, for example regarding decisions regarding environmental pollution compensation.

2. Facility Factor

   What is meant by means / facilities in this research include experts from law enforcers, especially those dealing with environmental issues, adequate equipment and sufficient finance. The equipment here is intended as equipment in the application of the law to test environmental pollution because it is related to decision making for judges.

3. Cultural Factors

   That a culture is a pattern and the result of human behavior in society. This will affect law enforcers in terms of decision making in resolving environmental disputes. These factors, for example, because of association.

20. Edy Lisdiyono, Penyelesaian Sengketa Lingkungan Hidup Haruskah Berdasarkan Tanggung Jawab Mutlak Atau Unsur Kesalahan, *Jurnal Spektrum Hukum*, Vo.11/No.2 Oktober 2014, hlm.67-76

4. Community Factors

Law enforcers come from society, and aim to achieve peace in society. Therefore, from a certain point of view, society can influence law enforcement.

It seems clear that this must have something to do with previous factors, namely laws, law enforcement and facilities. Requirements used as a measure for the acceptance of a pollution lawsuit on behalf of the community, NGOs, environmentalists. This is also based on their quality as "Persona Standi in Judicio", which gives authority in law to act as parties in a case process, both as the accused and the accused..

4. Conclusion.

The application of Environmental Dispute Resolution in Law No.32 of 2009 complements the previous law, as stated in Chapter XIII of Law No. 32 of 2009 it says that Environmental Dispute Resolution can be pursued through the court or outside the court (article 84 paragraph 1). In the second part about the settlement of environmental disputes outside the court as well as factors that affect the nature of environmental dispute resolution, among others, law enforcement factors, because there is no uniformity of steps with sectoral agencies and local local governments, as well as experts, facility factors, because laboratories to support proof, sufficient finance, community factors, the public is still unfamiliar with the knowledge of environmental pollution.

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