PROBLEMS OF COMPENSATION FOR ENVIRONMENTAL POLLUTION IN THE LEGAL SYSTEM IN INDONESIA

Dr. Edy Lisdiyono
Lecturer of Faculty of Law, Study Program of Science of Law,
Pawiyatan Luhur Street, Bendan Dhuwur Semarang – Indonesia
E-mail: edylisdiyono@gmail.com

ABSTRACT

Problem of environmental pollution of air, water, and natural environment has been a concern of Indonesia. With the establishment of the Environmental Act No. 32 of 2009 over amendments of the Act No. 23 of 1997 and Act No. 4 of 1982 the environment should be good. But some environmental pollution events in Indonesia that resulted in the pollution of air, water, and destruction of the natural environment has not been conducted in a serious and consistent action to replace the losses in order to restore environmental conditions.It is proved that the community faced problems in obtaining compensation, for examples, the cases of the impact of environmental pollution of PT. Inti Indorayon in North Sumatra, PT. Newmon Minahasa Raya in North Sulawesi, and PT. Lapindo Brantas in Sidoarjo, East Java. This paper will discuss why the public have difficulty in demanding compensation, and what indicators to obtain compensation due to pollution. With the procedure of application to the compensation which is clear and definite in value, the perpetrators of pollution will be cautious and it is expected that the environment will be kept preserved.

Key words: compensation, environmental pollution, the legal system in Indonesia

Introduction

Each country always has problems in environmental management, both developing countries and developed countries or industrialized countries. However, environmental problems faced are not the same from one country to another, especially between developing countries and developed countries. Environmental problems faced by developed countries are caused by the pollution of natural resources and production processes that use energy in industry, transport and communication activities as well as other economic activities. While environmental problems in developing countries, especially Indonesia, mostly rooted in underdevelopment.[1]

Talking about environmental issues, it means that it is related to the living space of the nation in all aspects and its dimension. Environmental problems involve to many aspects such as the exploitation of natural resources that tend to be excessive, the emergence of pollution coming from factory smoke, motor vehicle and industrial waste, as well as more increasing global warming as a result of the green house effect leading to higher sea surface temperatures.

Through Act No. 4 of 1982 is amended by Act No. 23 of 1997 and then amended again by Act No. 32 of 2009 the so-called "Act of Environmental Protection and Management" is expected to be a legal basis for the completion of environmental cases. The law enforcement officials necessarily must take new breakthroughs in order to fill legal gaps in the completion of the environmental cases so that the environment condition can be maintained.

Natural resources owned by Indonesia must not be exploited continuously without regarding to the environmental capacity and it eventually lead to uncontrolled environmental pollution though some legislations have been set, so that the environmental issues now has become a universal problem, because of the aspect of the environment itself is owned by all nations, in which each state is required to preserve it as set forth in the Declaration of Nairobi and Declaration of Stockholm.

In the Act No. 32 of 2009 it has been established that the protection and management of the environment are based on preservation of the harmonious and balanced environment ability to support the sustainable development for the improvement of human welfare.

The existence of natural resources is not spread evenly, but it varies, each space has a limited capacity to support the use of existing space on it. To anticipate this matter it has been mandated in the Ketetapan Majelis Permusyawaratan Rakyat No.

[1] Daud Silalahi, 1992, *Hukum Lingkungan Dalam Sistem Penegakan Hukum Lingkungan Indonesia*, Alumni, Bandung, page 45.

IX/MPR/2001(Decree of MPR) on "Agrarian Reform and the Management of Natural Resources which philosophically stated: that the management of natural resources which is equitable, sustainable, and environmentally friendly must be done in a coordinated, integrated manner and accommodate dynamics, aspirations and community participation and resolve the conflict. Expressly provided in Article 4 of the MPR Decree it is stated that natural resource management must be carried out in accordance with the following principles:

a. To nurture and maintain the integrity of the Unitary State Republic of Indonesia;
b. To respect and uphold human rights;
c. To respect for the rule of law to accommodate diversity in the unification of law;
d. To make welfare of the people, especially through improving the quality of Indonesian resources;
e. To develop democracy, legal compliance, transparency and optimization of public participation;
f. To realize justice including gender equality in the control, ownership, use, utilization, and maintenance of agrarian resources / natural resources;
g. To maintain sustainability that can provide benefits optimally, both for present generation and the future generations, while regarding to the capacity and support of the environment;
h. To implement a social function, sustainability, and ecological functions in accordance with the local socio-cultural conditions;
i. To improve integration and coordination between sectors in the areas of development and implementation of agrarian reform and natural resource management;
j. To recognize, respect, and protect the rights of indigenous people and cultural diversity of the nation upon the agrarian / natural resources;
k. To find a balance of rights and obligations of the state, government (central, province, regency / city, and village or equivalent), community and individual;
l. To decentralize through dividing authority at the level of national, provincial, regency / city and villages or equivalent, with regarding to the allocation and management of agrarian / natural resources.

The decline of environmental quality due to the use of space is not in accordance with the environmental conditions and the potential of the region. Environmental degradation can also occur if the use of space and utilization of natural resources exceeds the capacity of the environment, including the diversion of space function. The diversion of space function as it also occurs in the development of the area, where the areas that should be conserved precisely are converted for development of industrial zones, trade, public housing and others.[2]

Conflict between the need for preserving environmental capacity and demand to boost economic growth occurs such as through industrialization, residential areas, and agricultural land interests. Conflicts also occur between weak economic groups of marginal communities in urban and the dominant economic forces that require vast lands for a wide variety of business purposes such as industrial, real estate, mining, plantation and so on.

Regarding to this matter, the development of the environment can only be successful if government administration functions effectively and integrated. One of the administrative judicial tools used to prevent and mitigate environmental pollution is a licensing system.[3]Permits issued by the government agency are the duty of every person who carries on business to maintain and preserve the ability of the harmonious and balanced environment to support the sustainable development.

But the business license issued by the government to every businessman is not in the manner intended. Businessman only pursue maximum profit but ignore the environmental conditions that leading to problems of environmental pollution as national and global issues, which finally cause a reaction law both from the legal experts, community, NGO (Non Governmental Organization) as well as among environmentalists.

Some cases of environmental pollution has occurred as giving rise to the protests or demonstration from the community, NGOs and environmentalists either through mediation or through the courts as the last bastion in the context of environmental law enforcement. Even some cases in which the lawsuit filed by the public carries less result than expected that is about the compensation process which has become its own problems in the legal system in Indonesia.

Statement Of The Problems

The problem of compensation against environmental pollution is becoming increasingly complicated lately especially with regarding to its law enforcement while it is also difficult for the polluted to prove its case in court. Because of a lot of complaints or reports from the community who get loss of their livelihood or physical suffering due to the parties who do destruction or environmental pollution, law enforcement is not as what expected by the suffered party. This paper will discuss the following issues:

[2] Edy lisdiyono, 2008, *Legislasi Penataan Ruang Studi Tentang Pergeseran KebijakanHukum Tata Ruang Dalam Regulasi Daerah Di Kota Semarang*, hasil penelitian disertasi Program Doktor, Universitas Diponegoro, Semarang, page 9.
[3] Siti Sundari Rangkuti, 1986, *Hukum Lingkungan dan Kebijaksanaan Lingkungan*, *Hasil Penelitian Disertasi*, Fakultas Hukum UNAIR, Surabaya, page 92.

1. Has the issue of compensation against environmental pollution been implemented properly in the legal system in Indonesia?
2. What solutions and targets can be expected by the suffered-party as a result of the impact of the environmental pollution?

Discussions

1. Compensation against environmental pollution cases in the legal system in Indonesia

People in their life have to protect and secure natural in order the balance of human life and natural can be executed properly and regularly and can be followed and adhered to by all parties. Regarding to the matter it is necessary for protection and security as outlined of legislation, so that it will create a law to consider the interests of the nature or interest-oriented law (Nature's interest-oriented law). Laws that protect and secure the interests of nature are a must to protect and secure nature against the decadency of the quality and the damage, in other words, nature and environment can be maintained continuously their preservation.

Munadjat Danusaputro distinguishes between Modern Environment Law that oriented to the environment or "Environment-Oriented Law" and Classical Environment Law that oriented to the use of the environment or "Used-Oriented Law".[4] Modern Environmental Law establishes rules and norms to regulate human actions with the aims at protecting the environment from damage and decadency of quality in order to ensure preservation to be used directly and continuously by the present generation and next generations. On the contrary Classical Environment Law establishes rules and norms with the purpose to ensure the use and exploitation of environmental resources with human various sense and intelligence to achieve maximum results and within the shortest period of time.

According to Koesnadi Hardjasoemantri, environmental law is influenced by the development of the world economy which has been dominated by a classical and neo-classical view.[5] According to the classical view due to the environmental extinction and damage is not perceived as a loss because it is considered that they do not have economic value, in other words only economical value thing that has a loss. While neo-classical according to this view is considered something that is valuable if only has economical value solely, that is, the individual property. Because air, water, rivers, and forests are not individual property, they are considered as no economical value and to be ignored.

But this view more extremely said that by-products such as garbage, waste and sewage are not included in the company cost and all is just thrown away for free on earth so that many companies are reprimanded for disposing waste resulting in pollution. From the two opinions above if we associate with the Environmental Management Law, Danusaputro Munadjat opinion leads more to legal firmness, while Koesnadi Hardjasoemantri regards to the political policy issues.

In contrast to John Rawls's view, that legal order and legal institutions should be placed in a neutral position of any substance, it is referred to as the formal justice. [6]Thus the law must be neutral without any interference with the political policy so that law can run effectively, in this regard, including the environmental law.

Indonesia has established acts governing environmental namely Act No. 4 of 1982 was later changed by the Act No. 23 of 1997 and amended again with Act 32 of 2009. In this Act it is known as the "principle of polluter pays" in relation to compensation as provided for in Article 87 Clause (1) states that “Every person in charge of business and/or activities that perform illegal actions in the form of pollution and/or destruction of the environment causing harm to other people or to the environment must pay compensation and/or perform certain actions.” The article expressly requires the perpetrator of the pollution to pay compensation to others, which means that other people do not have to prove whether the acts committed by the person in charge of business and/or activities are on purpose or not.

But the problems occurring are a few cases of environmental pollution related to compensation, neither of which has not been processed by law or that have been submitted by the public to the courts, there is no decision as the expectations of the public affected by the pollution and even it leads to conflict and prolonged suffering both materially and immaterially. Here for example, PT. Newmon Minahasa Raya is only able to pay 30 million US dollars, and this non-litigation completion way was regarded as the right solution. But in 2005, this case is processed through the criminal law. On April 24th, 2007 the Assembly of Judges of District Court of Manado *acquitted* pure Defendant I PT. Newmont Minahasa Raya and Defendant II Richard B. Ness of the lawsuit of environmental pollution. In the Decision Command, the Assembly of Judges stated that the Defendant I PT. Newmont Minahasa Raya and Defendant II, Richard Bruce Ness *are not proven legally and convincingly guilty* of committing a crime in the primary indictment, subsidiary indictment, the over subsidiary indictment, the over subsidiary indictment again.

Next is the case of hot mudflow of Lapindo Brantas in Sidoarjo, East Java, which result in a very large impact so that people are suffering from loss of material and immaterial, including the destruction of rice fields, and environment is being

[4] St.Munadjad Danusaputro, 1980, *Hukum Lingkungan Buku I*, Umum, Bina Cipta, Bandung, page 34
[5] Koesnadi Hardjasoemantri, Op. Cit., page 14
[6] John Rawls, A Theory Justice , 2006, *Teori Keadilan*, Pustaka Pelajar, Yogyakarta, page 70.

damaged. Then YLBHI filed a lawsuit against the Indonesian Government cq. President of Indonesia cq. Minister of ESDM (Energy and Mineral Resources) cq. State Minister of the Environment et al., PT. Lapindo Brantas Incorporated as the defendant as registered in the case No. 384/Pdt.G/ 2006/PN.JKT.PST District Court of Central Jakarta. Apparently the filing of compensation was rejected. Thus the provision of Article 87 Clause (1) of Act No. 32 of 2009, about compensation is significantly still having problems to be applied properly in the Judicial Institutions in Indonesia.

2. Solutions for Public to Get Compensation Due to the Environmental Pollution

Communities as the victims affected by environmental pollution as two examples above, show how weak the Judicial Institutions in Indonesia in making legal considerations for deciding cases of environmental pollution. In the civil law is known a term of *Ius Curia Novit* meaning that the judge is not allowed to reject the case and the judge should be able to find the law or the blank law (rechtvinding), moreover it has been arranged in an act clearly and definitely, so the judge continues to maintain the legal system and correct values in the society.[7] System of polluter pays principle in the issue of compensation relating to environmental pollution has been clearly set out in Article 87 Clause (1) of Act No. 32 of 2009 and absolute responsibility is borne to the perpetrators of pollution. Therefore, the provision of compensation, in fact is no longer the responsibility of the communities affected by pollution to prove their argument, but it is required for the person in charge of business and/or activities to pay compensation without postulating their fault.

Thus in the provision of Article 87 Clause (1), there are words "compulsory" to pay compensation to people (affected by pollution), or the environment is a must for paying compensation which is not negotiable.
As the example of the compensation issue of hot mud flood of Lapindo Brantas in Sidoarjo East Java, which has been sued by environmental activists at the District Court of Central Jakarta, whose decision was rejected, eventually the people affected materially, prolonged social and psychological impact, not include losses due to deadly environmental pollution for living creatures and plants as well as rice field as their livelihood has not been resolved completely until now. Although the Indonesian government has taken over the handling of mudslide including payment of the loss, but the people do not feel satisfied in handling it, as it turns to the present the compensation payments process of the loss for the people affected by mudflow still have not completed yet.

To every problem it is expected the best and fair solution and the environmental law system in Indonesia has been set up expressly and absolutely about compensation but in practice, people affected of pollution still have to fight hard until the stage in court. In fact even at the highest level through the political power to expect the most ideal solution, but we have to realize that sometimes there is no ideal solution. But a more reasonable solution is feasible.[8] Starting from that point, then we invite all parties to be more realistic. If the Government specifies how the settlement of compensation to victims of Lapindo Brantas hot mudflow using pattern 20-80 it means; the first compensation is paid 20 percent and the rest in installments over two years in which it is considered as a feasible form. Only with that pattern Lapindo Brantas can fulfill their obligations for paying compensation to the community. The example of such a case, it turns out the process of compensation against environmental pollution cases, cannot be as expected as the provision of Article 87 Clause (1) of Act 32 of 2009. Thus, the solution is firstly to establish communication between the concerned parties to mount the case and secondly to find a mutually beneficial settlement.[9] But according to the author, these two things do not abolish the acts, that is, criminal sanctions, so that in the future they do not repeat their acts again and they should always keep the environment sustainable.

Closing

From the description above it can be concluded as follows:

1. About compensation in the principle of polluter pays against environmental pollution in Indonesia has not been implemented properly in the legal system in Indonesia and the communities affected by the pollution are still in a weak position.

2. Although the law and the legal system have been set but solutions for people to obtain compensation due to environmental pollution which is effectively done is to establish communication between the concerned parties to settle their case and to find a mutually beneficial solution.

[7] . Lawrence M. Friedman, 2009, *The Legal System A Social Science Perspectiv* (system Hukum Perspektif Ilmu Sosial diterjemahkan M. Khozim), Nusa Media, Bandung, page 19.
[8] *Banjir Lumpur Banjir Janji Gugatan masyarakat dalam kasus Lapindo*, 2007, Penerbit Kompas, Jakarta, page 429.
[9] Ibid, page 429.

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