YURIDIKA
FAKULTAS HUKUM UNIVERSITAS AIRLANGGA
Volume 36 No 3, September 2021
DOI: 10.20473/ydk.v36i3.30383
Fakultas Hukum Universitas Airlangga, Jalan Dharmawangsa Dalam Selatan Surabaya, 60286 Indonesia, +6231-5023151/5023252
Fax +6231-5020454, E-mail: yuridika@fh.unair.ac.id
Yuridika (ISSN: 0215-840X | e-ISSN: 2528-3103)

Article history: Submitted 14 May 2021; Accepted 18 July 2021; Available Online 1 September 2021.

Legal Construction of Anti Eco-SLAPP Reinforcement in Indonesia

Mia Banulita[*] and Titik Utami[**]
mia_banulita@yahoo.com
[*]Chief of Legal Advisor at Legal and Foreign Affairs Bureau of Office of the Attorney General of the Republic of Indonesia
[**]Acting Chief Secretary of the Supervisory Board of the Indonesian Corruption Eradication Commission (KPK)

Abstract
A Strategic Lawsuit Against Public Participation (SLAPP) does not only occur in the environmental sector but in any situation in which an act aims to stop or eliminate the opposition of public participation to certain policies. In the environmental sector, Eco-SLAPP aims to use fear and intimidation to silence people who commit aggression against environmental policies and/or certain interests through reporting/filing complaints or lawsuits to court. Therefore, the Anti Eco-SLAPP concept in Law Number 32 of 2009 was formed to provide protection against the act of Eco-SLAPP as it harms people who fight for a good and healthy environment. Unfortunately, Law Number 32 of 2009 exhibits weakness regarding its substance and process in fulfilling Anti Eco-SLAPP. In terms of substance, Article 2(a) Law Number 32 of 2009 has not given the state responsibility to implement Anti Eco-SLAPP, and Article 66 Law Number 32 of 2009 has not regulated good faith as the reason a person cannot be prosecuted criminally or sued civilly. Neither has it regulated protection from administrative action, the motion strike/dismissal process, or SLAPP Back to prevent early Eco-SLAPP actions. In addition, the implementation of Anti Eco-SLAPP is often misinterpreted since it is unable to distinguish pure criminal acts and actions to fight for the environment based on good faith. Therefore, it is necessary to construct an Anti Eco-SLAPP law based on the weaknesses of the existing Law Number 32 of 2009, so as to reinforce the implementation of Anti Eco-SLAPP in Indonesia.
Keywords: Legal Construction; Reinforcement; Anti Eco-SLAPP.

Introduction

The manifesto of a democratic state law provides normative legitimacy for public involvement in overseeing the implementation of the constitution. Public participation plays a crucial role in realizing the constitutional rights of citizens, one of which is the right to a good and healthy environment. The public and the

environment as legal subjects have close social relations since each needs the other.[1] The public needs a good and healthy environment to live. On the other hand, the environment requires the public to manage it properly. This is not only a symbiotic mutualism problem, but an existential need. Hence, in the management of the environment, public control has a fundamental place in every decision in policymaking.[2]

The importance of public participation obtained legitimacy in the Aarhus Convention, namely, the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.[3] This convention allows for the right of the public to participate in decision-making related to environmental management through the expression of opinions on a plan or program by providing the space to express their views in an effective and adequate period of time.[4] Likewise the Law of the Republic of Indonesia Number 32 of 2009 concerning Environmental Protection and Management states that environmental protection and management are carried out based on participatory principles, which means that every community member is encouraged to play an active role in the decision-making process and implementation of environmental protection and management, either directly or indirectly.[5] The public participation in decision-making will reinforce the quality and implementation of environmental decisions.

---

[1] Abdurrahman Supardi Usman, 'Lingkungan Hidup Sebagai Subjek Hukum : Redefinisi Relasi Hak Asasi Manusia Dan Hak Asasi Lingkungan Hidup Dalam Perspektif Negara Hukum' (2018) 26 Legality: Jurnal Ilmiah Hukum.[1-6].

[2] M Syahri, 'Bentuk–Bentuk Partisipasi Warga Negara Dalam Pelestarian Lingkungan Hidup Berdasarkan Konsep Green Moral Di Kabupaten Blitar' (2013) 13 Jurnal Penelitian Pendidikan.

[3] *The United Nations Economic Commission for Europe (UNECE), Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, legalized on 25 June 1998 in Aarhus, Denmark.

[4] Feby Ivalerina, 'Demokrasi Dan Lingkungan' (2014) 1 Jurnal Hukum Lingkungan Indonesia. [55-73]. In Malgosia Fitzmaurice, 'Note on the Participation of Civil Society in Environmental Matters. Case Study : The 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters' (2010) 47 Hum. Rts. & Int'l Legal Discourse.

[5] *The Law of the Republic of Indonesia Number 32 of 2009 concerning Environmental Protection and Management*. Art l2(k).

The protection of public participation is regulated in Article 66 of Law Number 32 of 2009 which states "Everyone who fights for the right to a good and healthy environment cannot be prosecuted criminally or sued civilly." The elucidation explains that "this provision is intended to protect victims and/or reporters who take legal action due to environmental pollution and/or destruction. This protection is intended to prevent retaliation from the reported party through criminal prosecution and/or civil lawsuits while still taking into account the judiciary independence." As referred to in the elucidation of Article 66 of Law Number 32 of 2009, the retaliation from the reported party is known as a Strategic Lawsuit Against Public Participation (SLAPP) which is a retaliation strategy carried out by the reported party, usually the company or the authorities, to silence people who fight for the right to a healthy environment, aiming specifically to prevent them from reporting acts of environmental pollution and/or destruction. Article 66 of Law Number 32 of 2009 provides protection against SLAPP actions, which is called Anti-SLAPP.

Although Article 66 of Law Number 32 of 2009 has normative legitimacy, there are still certain people who fight for the right to a healthy environment who are then prosecuted criminally or sued civilly. As seen in the *H. Rudy vs. Willy Suhartanto* case in 2013,[6] the *Heru Budiawan* case in 2017,[7] and the *Sawin, Sukma,*

[6] H. Rudy is an administrator of the Community Forum for Spring Care (FMPA) who fought for the construction of The Rayja Batu Resort to be stopped because it is considered to have a negative impact on gemulo springs in Batu City. H. Rudy also sent complaints and reports to government agencies, members of the DPR, and educational institutions. Willy Suhartanto is Director of PT. Panggon Sarkaya Sukses Mandiri, who was responsible for establishing The Rayja Batu Resort, sued H. Rudy for suffering material losses due to H. Rudy's complaints and reports. Based on the Malang District Court Decision Number:177/Pdt.G/2013/PN.Mlg, H. Rudy won, and the activities of The Rayja Batu Resort were stopped.

[7] Heru Budiawan alias Budi Pego, an environmental activist, rejected gold mining in Banyuwangi, but in his protest action he used a flag bearing the communist symbol, and was thus accused of violating Article 107(a) of Law no. 27 of 1999 concerning Amendments to the Criminal Code Relating to Crimes Against State Security. Based on the decision of the Banyuwangi District Court Number: 559/Pid.B/2017/PN.Byw jo. Surabaya High Court Decision Number: 174/PID/2018/PT.Sby jo. According to the decision of the Supreme Court of the Republic of Indonesia, Heru Budiawan was found guilty and sentenced to prison for four years.

and Nato case in 2018,[8] the parties reported and sued in such cases should have good intentions to fight on behalf of the environment and against whom legal actions have been taken with the aim of silencing, intimidating, and preventing further opposition so that environmental advocacy may cease. This reality, as demonstrated by these cases, served as evidence that the Anti-SLAPP regulation was still weak and allowed criminal prosecution and civil lawsuits to be filed against public participation fighting for a good and healthy environment. Consequently, this paper will analyse the weaknesses of the application of Anti-SLAPP, which aims to construct a form of regulation to protect public participation from SLAPP actions. This paper is normative legal research with a statutory approach and a case approach to legal materials collected through a literature review and then analysed using grammatical, authentic, and doctrinal interpretation methods.

SLAPP and Anti-SLAPP Concepts

SLAPP and Anti-SLAPP were first introduced by George W. Pring and Penelope Canan in their book entitled *SLAPPs: Getting Sued for Speaking Out.* They wrote the book after researching the case of an environmental lawyer in Denver, United States, who fought for the rights of his client in a lawsuit filed against him by the government and polluting companies for fighting for the right to a healthy environment. In one of the deliberations the judge explained his horror regarding cases in America that could reduce the freedom of expression protected in the Constitution. The judge claimed that although they were only civil cases, their results could damage freedom of thought, which is considered a democratic right. Even in the decision, the judge stated that he does not view such cases within the

[8] Sawin, Sukma, and Nato are all three farm laborers who are members of the Indramayu Coal Smokeless Network (Jatayu) which rejects the coal-fired power plant construction project. However, in the implementation of the refusal action, the three were declared as the perpetrators who put the red and white flag upside down, so that based on the Indramayu District Court Decision Number: 397/Pid.B/2018/PN.IDM, the three were found guilty of committing the crime of Article 66 jo. Article 24a of the Law of the Republic of Indonesia Number 24 of 2009 concerning the Flag, Language and Emblem of the State, as well as the National Anthem jo. Article 55 paragraph 1 of the Criminal Code, and sentenced to imprisonment for five months each for Sawin and Sukma, with Nato for six months.

framework of a legal battle, but of a political battle.[9]

After that, Pring and Canan detailed many other cases where the government and other parties who benefited from government policies retaliated against individuals who fought for the right to a healthy environment. Almost all of the cases studied by Pring and Canan occurred when the public exercised their right to participate, either by writing objections or petitions personally or through newspapers, against government policies in environmental management. This phenomenon demonstrated the heightened potential for lawsuits in America against those fighting for the right to a healthy environment by making petitions, giving opinions, or criticizing government policies.[10] This is an unfortunate condition in the United States, known as the country that most upholds freedom of expression.

In describing this reality, Pring and Canan introduced the concept of SLAPP. According to Pring and Canan, SLAPP is an action based on court mechanisms to eliminate public participation by silencing, disturbing, and obstructing political opponents.[11] Furthermore, to determine an act including SLAPP, there are 5 (five) criteria as follows: 1) The existence of objections, resistance, lawsuits, and demands from the public; 2) The existence of communication made by the public to the government or authorized officials on the objections, resistance, lawsuits, and demands; 3) Such objections, resistance, lawsuits, and demands are based on issues concerning the public interest or public concern; 4) Government

[9] George W. Pring and Penelope Canan, *SLAPPs : Getting Sued for Speaking Out* (Temple University Press 1996). [1]. In *Hakim Dalam West Virginia Court of Appeals in Webb v. Fury, 282 S.E. 2d 28, 43* (WVa 1981). "We shudder to think of the chill … on … freedom of speech and the right to petition were we to allow this lawsuit to proceed. The cost to society … is beyond calculation … Competing social and economic interests are at stake. To prohibit robust debate on these questions would deprive society of the benefit of its collective thinking and, in the process, destroy the free exchange of ideas which is the adhesive of our democracy … It is exactly this type of debate which our federal and state constitutions protect; debate intended to increase our knowledge, to illustrate our differences, and to harmonize those differences. We see this dispute … as … more properly within the political arena than in the courthouse".

[10] Raynaldo Sembiring, 'Menyoal Pengaturan Anti Eco-SLAPP Dalam Undang-Undang Nomor 32 Tahun 2009' (2009) 3 Jurnal Hukum Lingkungan Indonesia.[1-18].

[11] The term was coined by Professors Penelope Canan and George W. Pring, as quoted by Dwight H Merriam and Jeffrey A. Benson, 'Identifying and Beating a Strategic Lawsuit Against Public Participation' (1993) 3 Duke Envtl. L. & Pol'y F.[17].

or interested parties fight back against non-governmental individuals or groups; and 5) Counter-resistance is carried out without a solid basis and contains hidden political or economic motives.[12] Pring and Canan's definition of SLAPP does not include criminal charges since criminal prosecution is not within the scope of their research, and the legal system in the United States renders civil lawsuits as the dominant means of resolving legal problems rather than strict and lengthy criminal prosecutions, which is different from Indonesia, where criminal trials are excellent since they are fast, simple, and low-cost. However, Pring and Canan state that criminal prosecution is a potential act of SLAPP.

SLAPP is used to inhibit, silence, or punish other parties who are protected by the Constitution to practice the right to speak in public. SLAPP can also be regarded as a lawsuit aiming to censor, intimidate, and put an end to public or consumer criticism. The purpose of SLAPP carried out by business actors is to use fear and intimidation to silence consumers and to weary them of the legal process.[13] Thus, it is not surprising if SLAPP alters the dynamic and complex interactions between the public, government, and polluting entities, where the law that should be used as an instrument to provide protection on the contrary hinders the enforcement of environmental law itself.[14] In order to provide protection to the public from SLAPP actions, Pring and Canan originated the Anti-SLAPP concept, which consists of making freedom of opinion in regard to public participation in issues of public interest part of the democracy the Constitution should protect. The Anti-SLAPP concept developed by Pring and Canan does not limit protection only to when the SLAPP victim has undertaken legal procedures. The provisions of Rules of Procedure

[12] Shine (Sean) Tu and Nicholas Stump, 'Free Speech in the Balance: Judicial Sanctions and Frivolous SLAPP Suits (February 13, 2020).' (2020) 54 Loyola Los Angeles Law Review <http://dx.doi.org/10.2139/ssrn.3537637>.

[13] Alvina Sony Putri Bambang Eko Turisno and Suradi, 'Akibat Hukum Strategic Lawsuit Against Public Participation Dalam Hukum Perlindungan Konsumen' (2016) 5 Diponegoro Law Review <https://ejournal3.undip.ac.id/index.php/dlr/article/view/10984>.[5].

[14] Catherine S Norman, 'Anti-SLAPP Legislation and Environmental Protection in the USA: An Overview of Direct and Indirect Effects' (2010) 19 Review of European Community & International Environmental Law.[28-34].

for Environmental Cases in the Philippines regulates Anti-SLAPP as follows:[15] "In a SLAPP filed against a person involved in the enforcement of environmental laws, protection of the environment, or assertion of environmental rights, the defendant may file an answer interposing as a defense that the case is a SLAPP and shall be supported by documents, affidavits, papers and other evidence; and, by way of counterclaim, pray for damages, attorney's fees and costs of suit." Additionally, the definition of SLAPP is also regulated in the Anti-SLAPP Advisory Panel Report to The Attorney General in Ontario (Canada), later adopted in Protection of Public Participation Act 2013,[16] stating that SLAPP is "a lawsuit initiated against one or more individuals or groups that speak out or take a position on an issue of public interest. SLAPPs use the court system to limit the effectiveness of the opposing party's speech or conduct. SLAPPs can intimidate opponents, deplete their resources, reduce their ability to participate in public affairs, and deter others from participating in discussion on matters of public interest".

The SLAPP concept proposed by Pring and Canan was originally related to environmental cases. Nonetheless, as can be observed in the SLAPP regulations in the two regulations above, SLAPP occurs not only in environmental cases but also in other cases involving public interest. As a result, Anti-SLAPP can be applied to various situations on the condition that the victim or public affected by SLAPP has exercised their right to participate in law enforcement and respond to a policy involving public interest. Especially for SLAPP that occurs in the environmental field, Pring and Canan popularized the term "Eco-SLAPP", that is, Ecological-SLAPP, which signifies SLAPP that occurs in cases related to ecosystem protection. The corresponding form of protection is called Anti Eco-

[15] *Republic of The Philippines Supreme Court, Rules of Procedures for Environmental Cases, Section 2 Rule 6*. See Raynaldo Sembiring (n 10).

[16] Fasken, 'Anti Slapp Legislation : The Ontario Protection of Public Participation Act' (*Fasken*, 2013) <http://www.fasken.com/anti-slapp-legislation-ontario-protection-of-public-participationact/> accessed 4 July 2021; see Raynaldo Sembiring (n 10).

SLAPP, or Anti Ecological-SLAPP.[17] In this paper, we limit the discussion to the regulations and weaknesses of Anti Eco-SLAPP in Indonesian laws and regulations since in reality, many Eco-SLAPP actions occur in the environmental sector, but often they are not addressed.

Anti-SLAPP Regulations in Environmental Law

The right to a good and healthy environment is human right guaranteed by the Constitution of Indonesia due to the symbiotic mutualism necessary to maintain the existence between humans and the environment.[18] Due to the interests of human rights, the state with all its instruments is obliged to provide protection to the public in the context of fulfilling the constitutional right to a good environment. It also must provide the public access to participation in environmental management to ensure that the determined policies will not harm the people directly affected by environmental policies taken by the government. Historically, the laws governing environmental management in Indonesia began with Law Number 4 of 1982 concerning Basic Provisions for Environmental Management, Law Number 23 of 1997 concerning Environmental Management, and lastly Law Number 32 of 2009 concerning Environmental Protection and Management.

The three laws and regulations governing environmental management provide the public access to participation in environmental management. Nevertheless, Law Number 4 of 1982 and Law Number 23 of 1997 have not provided legal protection for people who fight for the right to a good and healthy environment. Only UU 32/2009 regulates legal protection for public participation.

The regulation regarding Anti Eco-SLAPP was indeed first proposed in a Public Hearing Meeting (RDPU) by several environmental organizations during

[17] George W. Pring and Penelope Canan (n 9). [83]. See Elly Kristiani Purwendah, 'Sea Protection From Oil Pollution By Ship Tanker' (2020) 2 Ganesha Law Review <https://ejournal2.undiksha.ac.id/index.php/GLR/article/view/122>.[77-89].

[18] Art 28H para 1 of the 1945 Constitution.

the discussion of the Bill on Environmental Management.[19] This Anti Eco-SLAPP regulation was necessary due to the reality of the government or other authorized parties silencing people who fight for environmental interests as well as the frequent occurrence of back-reporting with the argument of defamation to the public who reported environmental cases to the authorities.[20] Consequently, the Anti Eco-SLAPP regulation was passed, and hence changed the title of the law, which previously limited the scope only to the form of management by adding the words "protection and management" to Law Number 32 of 2009 concerning Environmental Protection and Management.

Law Number 32 of 2009 regulates the environmental protection and management carried out based on the state responsibility and participatory principles.[21] What is meant by the state responsibility principle is that a) the state guarantees that the utilization of natural resources will provide the most significant benefit to the public welfare and quality of life, both present and future generations; b) the state guarantees the citizens' rights to a good and healthy environment; and c) the state prevents the utilization of natural resources from causing pollution and/or environmental damage.[22] Meanwhile, the participatory principle signifies that every community member is encouraged to play an active role in the decision-making process and implementation of environmental protection and management, either directly or indirectly.[23] Public participation is also regulated in Article 70 of Law Number 32 of 2009 which states that the public has the same and widest possible rights and opportunities to play an active role in environmental protection

[19] The Environmental Management Bill is an initiative of the DPR on the revision of Law no. 23 of 1997 concerning Environmental Management, which in its formulation became the Law on Environmental Protection and Management. See Raynaldo Sembiring, 'Kriminalisasi Atas Partisipasi Masyarakat: Menyisir Kemungkinan Terjadinya SLAPP Terhadap Aktivis Lingkungan Hidup Sumatera Selatan' (2014) 1 Jurnal Hukum Lingkungan Indonesia <https://doi.org/10.38011/jhli.v1i1.11>.

[20] Dewan Perwakilan Rakyat Republik Indonesia, *Risalah RUU Tentang Pengelolaan Lingkungan Hidup* (Dewan Perwakilan Rakyat Republik Indonesia 2009).[20].

[21] *The Law of the Republic of Indonesia Number 32 of 2009 concerning Environmental Protection and Management* (n 5). Art 2(a) and (k).

[22] *ibid.* Art 2(a).

[23] *ibid.* Art 2(k).

and management, where the public role can take the form of: a) social supervision; b) provision of suggestions, opinions, proposals, objections, complaints; and/or c) submission of information and/or reports. The public active role and right to participate in environmental management is present at all stages of activities related to the environment. These public rights are also explained in Article 65 of Law Number 32 of 2009, which are: 1) Everyone has the right to a good and healthy environment as part of human rights; 2) Everyone has the right to environmental education, access to information, access to participation, and access to justice in fulfilling the right to a good and healthy environment; 3) Everyone has the right to submit proposals and/or objections to business plans and/or activities estimated to have an impact on the environment; 4) Everyone has the right to play a role in environmental protection and management in accordance with the laws and regulations; and 5) Everyone has the right to make complaints due to allegations of environmental pollution and/or destruction.

Regarding the public actions to fight for the right to a good and healthy environment, Law Number 32 of 2009 has provided legal protection which previously is regulated in the prior law. Article 66 states that everyone who fights for the right to a good and healthy environment cannot be prosecuted criminally or sued civilly. This provision is intended to protect victims and/or whistleblowers who take legal action due to environmental pollution and/or destruction. This protection is intended to prevent retaliation from the reported party through criminal prosecution and/or civil lawsuits while still taking into account the judiciary independence.[24] Article 66 of Law Number 32 of 2009 is then a form of Anti Eco-SLAPP in the environmental sector applicable in Indonesia.

Since it was recognized that protection and regulation of Anti Eco-SLAPP in Article 66 of Law Number 32 of 2009 is still overbroad, the Supreme Court responded to the need for law enforcement practices against Anti Eco-SLAPP

[24] *The Supreme Court issued the Decree of the Chairman of Supreme Court Number: 36/KMA/SK/II/2013 concerning Enforcement of Guidelines for Environmental Cases Management*. [20].

by issuing the Decree of the Chairman of Supreme Court Number: 36/KMA/SK/II/2013 concerning Enforcement of Guidelines for Environmental Cases Management. KMA Number 36 of 2013 explains that "Anti SLAPP is legal protection for environmental fighters, SLAPP lawsuits can be in the form of counter lawsuits (counterclaims), ordinary lawsuits or in the form of reporting that they have committed criminal acts against environmental fighters (for example, deemed to have committed acts of 'insult' as regulated in the Criminal Code)".[25] From the explanation of KMA Number 36 of 2013, it can be seen that the Supreme Court has made the interpretation that Eco-SLAPP can occur at any time, when the public either has or has not undergone the trial process. This explanation is in accordance with the regulation in Rules of Procedure for Environmental Cases. Nonetheless, KMA Number 36 of 2013 still has limitations as it stated that "to decide as in Article 66 of Law of the Republic of Indonesia Number 32 of 2009 concerning Environmental Protection and Management that the plaintiff's lawsuit and/or reporting of criminal acts from the applicant is SLAPP which can be filed either in provisions, exceptions or counterclaims (in civil cases) and/or defense (in criminal cases) and should be decided first in an interlocutory injunction".[26]

A more concrete explanation of the implementation of Anti Eco-SLAPP to criminal charges and civil lawsuits is found in Number 36 of 2013, which provides instructions regarding the implementation of Anti Eco-SLAPP in civil and criminal trials, which previously in Law Number 32 of 2009 were still abstract. At least, the various regulations governing Anti Eco-SLAPP in Indonesia are currently improving since attention has begun to be directed to Anti Eco-SLAPP.

Construction of Anti-SLAPP Regulations in Environmental Law

Law Number 32 of 2009 has regulated Anti-SLAPP, which had never been the intention in the previous law. However, Anti-SLAPP regulation still has weaknesses and does not address the legal practice needs of the public. As a consequence, its

[25] *ibid.*
[26] *ibid.*

implementation is ineffective. The following are the weaknesses of Anti Eco-SLAPP in environmental law:

1. State Responsibility to SLAPP Victims

Systematically, Anti-SLAPP regulation in Article 2a of Law Number 32 of 2009 and Article 66 of Law Number 32 of 2009 has experienced *contradiction in terminis*. On the one hand, Article 66 of Law Number 32 of 2009 regulates that everyone who fights for the right to a good and healthy environment cannot be prosecuted criminally or sued civilly. However, Article 2a of Law Number 32 of 2009 does not regulate the state's responsibility to protect the public affected by Eco-SLAPP. Consequently, the interpretation can be made that the police, the Attorney General's Office, and the Supreme Court as state organs also have no responsibility.

2. Anti Eco-SLAPP against Administrative Actions

Anti Eco-SLAPP in Article 66 of Law Number 32 of 2009 should be applied in criminal and civil cases, even though it can also occur in the realm of administrative law, especially those related to whistleblowers. Law Number 13 of 2006 concerning Witness and Victim Protection Agency (LPSK) as amended by Law Number 31 of 2014 concerning LPSK regulates the right to protect civil servants or employees who act as whistleblowers from administrative actions in the form of mutations and dismissals. However, as a special law that regulates Anti Eco-SLAPP in the environmental sector, Article 66 of Law Number 32 of 2009 should also regulate the right not to be subject to administrative actions which harm people who fight for the right to the environment.

3. Good Faith as a Form of Anti Eco-SLAPP

Good faith is a principle often used in the implementation of agreements or contracts.[27] Article 1338 paragraph (3) of the Civil Code states that every agreement should be carried out in good faith. If not, then the agreement is null and void.[28]

---

[27] Luh Nila Winarni, 'Asas Itikad Baik Sebagai Upaya Perlindungan Konsumen Dalam Perjanjian Pembiayaan' (2015) 2 Jurnal Hukum.[89-102].

[28] Ifada Qurrata Ayun Amalia, 'Akibat Hukum Pembatalan Perjanjian Dalam Putusan Nomor 1572 K/Pdt/2015 Berdasarkan Pasal 1320 Dan 1338 Kuh Perdata' (2018) 1 Jurnal Hukum Bisnis Bonum Commune.

Systematically, several laws and regulations regulate good faith. Article 11 of Law Number 16 of 2011 concerning legal aid states, "Legal Aid Providers cannot be prosecuted civilly or criminally in providing legal aid for which they are responsible, carried out in good faith inside and outside the court session following Legal Aid Standards based on statutory regulations and/or the Advocate's Code of Ethics." Article 10 paragraph (1) UU LPSK states, "Witnesses, Victims, Perpetrators, and/or Whistleblowers cannot be prosecuted legally, both criminally and civilly for the testimony and/or reports that will be, are being, or have been given unless the testimony or report is not given in good faith." In the elucidation of Article 10 paragraph (1) of LPSK Law, it explains "what is meant by 'giving testimony not in good faith' among other things [is] giving false testimony, false oaths, and malicious conspiracy." Meanwhile, in Article 16 of Law Number 18 of 2003 concerning Advocate jo., Constitutional Court Decision Number 26/PUU-XI/2013 states that "Advocates cannot be prosecuted both civilly and criminally in carrying out their professional duties in good faith for the benefit of the client's defense inside and outside the court." In the elucidation, "what is meant by 'good faith' is to carry out professional duties for the sake of upholding justice based on the law to defend the interests of his clients". The three laws and regulations use good faith as a reason not to be prosecuted criminally or sued civilly. Good faith is used as a substantial element to ensure that advocates, legal aid providers, and witnesses are acquitted of criminal charges and civil lawsuits. Unfortunately, the formulation of Article 66 of Law Number 32 of 2009 does not regulate the element of good faith.

According to the Great Indonesian Dictionary, the definition of "good faith" is "trust, firm belief, intention, (good) will".[29] In addition, good faith, (*te goede trouvv*) according to Fockema Andreae Legal Dictionary is the intention, or the spirit that animates the participants in a legal act or is involved in a legal relationship.[30]

[29] Ery Agus Priyono, 'Peranan Asas Itikad Baik Dalam Kontrak Baku (Upaya Menjaga Keseimbangan Bagi Para Pihak)' (2017) 1 Diponegoro Private Law Review.

[30] Muhammad Syaifuddin, *Hukum Kontrak, Memahami Kontrak Dalam Perspektif Filsafat, Teori, Dokmatik Dan Praktek Hukum* (Mandar Maju 2012).[59-60].

In general, the definition of good faith is divided into two, namely the objective definition that the agreement should be carried out by taking into account the norms of decency and morality, and the subjective definition that the understanding of good faith lies in one's inner attitude.

By considering the definition of good faith, it can be easily concluded that good faith is the opposite of evil intentions, both of which lie in one's inner attitude which can be seen in the form of actions. If an act is based on good faith instead of bad intention and is not contrary to the laws and regulations, then the person cannot be subjected to criminal liability. On the other hand, if the act is not based on good faith, is contrary to the laws and regulations, and does not include the reason for the crime abolition, then the person should be subjected to criminal liability. The problematic question then is what if the act is done in good faith, but is contrary to the laws and regulations? Since there is good faith, are people who violate the law immediately released from criminal responsibility? According to the authors, this can be explained with the following case examples:

1) Person A conducts a demonstration to criticize the government in an anarchic manner that results in damaging property or injuring police officers. In this scenario, conducting a demonstration to criticize the government is an act based on good faith, but conducting it in an anarchic manner such as damaging property or injuring police officers is unlawful. Is committing anarchic acts by damaging property or injuring police officers an integral part of conducting demonstrations to criticize the government? No. Both are independent actions. Person A's act of protesting to criticize the government has its own intention and accompanying actions, while person A's anarchic act of damaging property or injuring police officers also has its own intention and accompanying actions. According to the authors, this first example is what happened in *Heru Budiawan*'s and *Sawin , Sukma, and Nato*'s cases. Heru Budiawan's act of using the flag bearing the communist symbol was an act that occurred in separation from his refusal to mine gold. Likewise, Sawin and others' act of using the red and white flag in reverse was an act that stood in separation from the act of rejecting the Coal

PLTU construction project. Accordingly, pure criminal acts should be subject to criminal liability and punished.

2) Company C reports company D for committing an environmental pollution crime. Based on the court decision that has obtained permanent legal force, company D is found not guilty of committing an environmental pollution crime. In a case like this, if company D reports company C for an alleged act of defamation, or files a civil lawsuit, then as long as company C reported company D in good faith and acted based on laws and regulations, then company C is released from criminal liability. On the other hand, if company C used fake documents or made accusations not supported by clear supporting evidence, then company C can be declared to have bad faith or bad intentions and should be subject to criminal liability. In the authors' opinion, this second example aligns with the *H. Rudy* case that fought to stop the construction of The Rayja Batu Resort since it was expected to negatively impact gemulo springs in Batu City. H. Rudy's actions were based on clear arguments, since apart from PT. Panggon Sarkaya Sukses Mandiri did not have a permit to build the resort, and it had a negative impact on the environment.
3) Person X reports company Y for committing environmental pollution crimes. Due to person X's report, company Y searches for problems and finds that person X has committed embezzlement crimes, thus reporting person X. In a case like this, even though there is a causal relationship between the appearance of company Y's report as a result of person X's report, each is an independent action. The embezzlement committed by X is standalone, should be subject to criminal liability, and has nothing to do with person X's actions in reporting company Y.

From the various examples of cases above, it is necessary to consider the methods to determine which actions of Eco-SLAPP carried out in good faith, hence Anti Eco-SLAPP, and which actions are carried out in bad faith and should be subjected to criminal prosecution. The accuracy of law enforcers, namely prosecutors, police, advocates, and judges, is needed to discern the intersection

between Eco-SLAPP actions and pure criminal acts. Good faith as part of one's inner attitude is the reason that some punishments are abolished, since acts that are against the law but are not based on evil intentions cannot be punished, as is the principle of no crime without guilt (*keine strafe ohne schuld atau geen straf zonder schuld atau nulla poena sine culpa*).[31]

4. Suboptimal Advocacy for SLAPP Victims

Regarding the marginal differences between SLAPP's actions and pure criminal acts, they are often confused or even deliberately obscured in practice. This often happens in cases like the third example. The report against person X is indeed a result of person X reporting on company Y, but then again, the two are independent acts. In the third case example, the Eco-SLAPP issue should have arisen at the investigation stage. Nevertheless, the reality is that the Eco-SLAPP issue sometimes does not appear in the investigation case files, especially in the suspect's statement, whereas in the minutes of suspect examination, the investigator always questions the suspect regarding whether there is anything that the suspect needs to convey to the investigators. The absence of the Eco-SLAPP issue at the investigation stage has implications for the prosecution and trial stages. From the experience of the authors themselves as practitioners, the Eco-SLAPP issue has never been discussed by the suspect/defendant or legal counsel at the trial. If the Eco-SLAPP issue does not arise, it will clearly affect the prosecution and sentencing decision against the defendant.

In this third case example, the advocacy carried out against the defendant frequently confuses Eco-SLAPP with pure criminal acts; the pure criminal acts are thereby concealed by the Eco-SLAPP issue. The alleged purpose is to seek sympathy for the defendant since in such a position the Eco-SLAPP issue is very dense; thus, if the defendant's legal understanding is lacking, the advocacy intentionally carried out to cover up the pure criminal acts committed by the defendant will be

[31] AA Ngurah Wirajaya and Nyoman A. Martana, 'Asas Tiada Pidana Tanpa Kesalahan (Asas Kesalahan) Dalam Hubungannya Dengan Pertanggungjawaban Pidana Korporasi' (2013) Jurnal Fakultas Hukum Univesitas Udayana.

successful. Consequently, this Eco-SLAPP issue turns into Anti Eco-SLAPP which should have been given to the defendant. This is the main goal of obscuring legal facts due to improper advocacy, whereas proper advocacy should provide correct legal explanations in accordance with criminal law theory and existing legal facts.

5. Suboptimal Anti Eco-SLAPP Legal Products

Note that KMA Number 36 of 2013 only regulates the implementation of Anti Eco-SLAPP in court and only applies to internal judges. If the implementation of Anti Eco-SLAPP is associated with the criminal justice system indirectly through the trial but begins formally with the investigation, inspection, and prosecution processes, this still leaves other problems which hinder Anti Eco-SLAPP from being applied to criminal prosecution. Suboptimal advocacy coupled with the quality of law enforcers still unfamiliar with Anti Eco-SLAPP is believed to have hampered the optimization of the implementation of Anti Eco-SLAPP. This has resulted in the increased possibility that the Eco-SLAPP issue is not entering into the thought process of law enforcers, especially investigators and public prosecutors, when handling criminal cases related to Eco-SLAPP.

6. Early Dismissal and SLAPP Back (Judicial Cures) Regulations

There are interesting developments in the anti-SLAPP legal regulations in California and other states in America. The defendant is allowed to submit motion to strike, namely a request from the defendant in the United States judicial process asking the presiding judge to order the withdrawal of all reports/lawsuits from other parties. This effort is rigorous, fast, and almost identical to the dismissal process in the Procedural Law of the State Administrative Court, which is that the Court will examine the case within 30 (thirty) days. During that period all lawsuits are postponed until the court rules on motion to strike. If the court declares the existence of Eco-SLAPP, the trial will not proceed. This decision requires the court to carefully ensure the existence of Eco-SLAPP in the lawsuit filed in court.

In addition to the dismissal process, the anti-SLAPP legal regulation in California also provides an opportunity for the defendant who has succeeded in proving that the plaintiff's lawsuit threatens or silences the defendant to file SLAPP

Back (countersue), namely to sue the party who files the SLAPP lawsuit to obtain financial compensation for the lawsuit. In this condition, the defendant who wins the motion to strike can sue the plaintiff to pay attorney's fees and other costs. On the other hand, if the court finds that the defendant makes a random motion to strike just to delay the judicial process, the plaintiff can also sue the defendant to pay attorney fees and other costs.[32]

According to Pring and Canan, a promising legal mechanism can prevent the SLAPP phenomenon by using SLAPP Back. SLAPP Back was first practiced in 1972 in *Sierra Clubbers v. Mc. Keon* (*Construction Company*). The reason that the Sierra Club filed a SLAPP Back lawsuit was the malicious prosecution's use of lawsuits for improper, ulterior purposes and abusive processes. In practice in the United States, many SLAPP Back actions have won, and judges sentenced up to 86 million USD to those who filed for SLAPP between the 80s and 90s. According to Pring and Canan, although SLAPP Back is not a panacea, it has proven to be a fairly effective mechanism in preventing SLAPP lawsuits whose purpose is to silence and violate the right to participate in the public decision-making process.[33]

Although KMA Number 36 of 2013 has regulated that the SLAPP issue can be submitted both in provisions, exceptions, and counterclaims (in civil cases) and/or defense (in criminal cases) and should be decided first in an interim decision, it has not discussed or regulated the motion strike/dismissal process and SLAPP Back.

7. Authority of State Attorney to File Lawsuits in Environmental Sector

Since there is a high risk that Eco-SLAPP victims will be sued civilly for fighting for the right to a good environment, this environmental lawsuit should be the state's responsibility. If in a criminal case, environmental fighters can report criminal acts in the environmental sector to the police or the ministry of the environment, then in the civil sector, to avoid Eco-SLAPP they can submit the

[32] Patrick C. File and Leah Wigren, 'SLAPP-Ing Back: Are Government Lawsuits Against Records Requesters Strategic Lawsuits Against Public Participation?' (2019) 1 The Journal Of Civic Information <https://doi.org/10.32473/joci.v1i2.119008>.

[33] George W. Pring and Penelope Canan (n 9).[101].

handling of civil lawsuits to the state through the government. This method should help prevent Eco-SLAPP actions.

Hence, the state institution that can represent the state or government to file a civil lawsuit in the environmental sector is the Attorney General's Office through the state attorney. The authority of the state attorney to deal with problems that intersect with civil issues already is justified in the existing laws[34] as the authority of state attorneys to cancel marriages based on Article 26 paragraph (1) of Law Number 1 of 1976 concerning Marriage.[35] The public can report if a marriage is performed in violation of Law Number 1 of 1976 and the state attorney can apply for marriage annulment to the district court for non-Islamic religions and to religious courts for Islamic religions.[36] Article 34 of Law Number 31 of 1999 concerning Corruption Eradication states, "If the defendant dies, in the interest of recovering state losses, the state attorney can file a civil lawsuit". The authority of the state attorney to file a civil lawsuit in Article 34 of Number 31 of 1999 is based on the interest of recovering state losses as part of the state interest.[37] Therefore, based on *ubi eadem ratio ibi idem lex, et de similibus idem et judicium* postulate, meaning that if there are the same thing, the same legal reason, the same law applies, then in the interest of recovering environmental losses as part of the state interest, the state attorney can also file a civil lawsuit.

If civil lawsuits and criminal charges against environmental crime perpetrators that harm the environment are the state's responsibility through the government, then Eco-SLAPP actions can be minimized. If an incident pollutes the environment,

---

[34] Abdul Mubin and Irwansyah, 'Hak Gugat Pemerintah Dalam Mengembalikan Kerugian Dan Pemulihan Lingkungan Melalui Sengketa Lingkungan Hidup' (2017) 1 Nagari Law Review <https://doi.org/10.25077/nalrev.v.1.i.1.p.1-15.2017>.[1-15].

[35] Hereinafter referred to as Law 1/1976. Article 26 paragraph (1) of Law 1/1976 states that marriages which are held in front of an unauthorized marriage registrar, illegitimate guardians or marriages which are held without the presence of 2 (two) witnesses, may be requested to cancel the marriage by the families in straight-up descent from husband or wife, attorney and husband or wife.

[36] Mardiyah and Azhari Yahya, 'Kewenangan Kejaksaan Dalam Mengajukan Permohonan Pembatalan Perkawinan (Suatu Penelitian Di Kabupaten Aceh Besar)' (2018) 7 Legitimasi: Jurnal Hukum Pidana dan Politik Hukum.[108-129].

[37] Abvianto Syaifulloh, 'Peran Kejaksaan Dalam Pengembalian Kerugian Keuangan Negara Pada Perkara Tindak Pidana Korupsi' (2019) 1 Indonesian Journal of Criminal Law.[47-64].

the public or environmentalist can report it to the law enforcers. This lightens the burden of environmental fighters. The reports of environmental fighters can neither be prosecuted criminally nor sued civilly since they are carried out in good faith, namely by reporting them to the law enforcers. The law enforcers should carefully examine the reports they receive before notifying the reported party in order to detect and prevent Eco-SLAPP problems as early as possible.

Based on the series of weaknesses in the application of Anti Eco-SLAPP as mentioned above, several aspects need regulation to reinforce Anti Eco-SLAPP and ensure that public participation for the right to a good and healthy environment is protected from Eco-SLAPP. First, the regulation of good faith and protection from administrative actions in Article 66 of Law Number 32 of 2009 should be revised to the following: "Everyone in good faith fighting for the right to a good and healthy environment cannot be prosecuted criminally, sued civilly, or be subject to administrative actions." The explanation should also provide the definition of good faith in the environmental sector, not contrary to the statutory regulations. Moreover, the meaning of fighting for the right to the environment should also be explained, namely that it entails conducting advocacy, filing complaints, reporting, and providing expert testimony and witness statements. Second, although the explanation of norms does not have binding legal force, at least for reinforcement, in Article 2(a) UU Number 32 of 2009 should regulate that one form of the state responsibility principle is the responsibility to provide protection to everyone fighting in good faith for the right to a good and healthy environment. The state should be present in providing legal protection for Eco-SLAPP. Third, internal regulations or guidelines and joint decisions between the police, the prosecutors, and the Supreme Court are needed to regulate the process of fulfilling Anti Eco-SLAPP, including regulations regarding motion strike/dismissal process and SLAPP Back. This will enable each law enforcer to detect and ensure in a timely manner the existence of any Eco-SLAPP actions. Fourth, the existence of the authority of the State Attorney can file a civil lawsuit for the purpose of recovering environmental losses in the state interest. This reinforcement form is considered able to minimize

the Eco-SLAPP actions and therefore is an active contribution from the state with its law enforcement tools to give the public the right to a good and healthy environment. These measures are essential, as the public truly needs a good and healthy environment to maintain quality of life and livelihood.

Conclusion

Eco-SLAPP is an action that aims to generate fear, silence, and intimidation. It aims to eliminate public criticism and participation that opposes policies in the environmental sector. Eco-SLAPP can take the forms of counter-resistance through criminal charges, civil lawsuits, and even administrative actions against people who report or criticize environmental policies. Law Number 32 of 2009 as a legal product in the environmental sector has addressed Anti Eco-SLAPP in Article 66 of Law Number 32 of 2009. Nevertheless, the regulation still has weaknesses in terms of its substance and process.

To resolve the various weaknesses contained in Law Number 32 of 2009, and in the context of reinforcing Anti Eco-SLAPP, it is necessary to regulate good faith as the reason for eliminating criminals in Article 66 of Law Number 32 of 2009 and the protection of the public from administrative actions. It is necessary to regulate the state's responsibility to provide Anti-SLAPP to everyone fighting for the right to a good and healthy environment in good faith in the elucidation of Article 2(a) of Law Number 32 of 2009; the internal regulations or guidelines and joint decisions between the police, prosecutors, and Supreme Court governing the process of fulfilling Anti Eco-SLAPP; motion strike/dismissal process and SLAPP Back, so that Eco-SLAPP can be detected earlier; and the authority of the State Attorney to file a civil lawsuit to recover environmental losses in the state interest, to minimize Eco-SLAPP events since they are carried out by the state.

Bibliography

AA Ngurah Wirajaya and Nyoman A. Martana, 'Asas Tiada Pidana Tanpa Kesalahan (Asas Kesalahan) Dalam Hubungannya Dengan Pertanggungjawaban Pidana Korporasi' [2013] Jurnal Fakultas Hukum Univesitas Udayana.

Abdul Mubin and Irwansyah, 'Hak Gugat Pemerintah Dalam Mengembalikan Kerugian Dan Pemulihan Lingkungan Melalui Sengketa Lingkungan Hidup' (2017) 1 Nagari Law Review <https://doi.org/10.25077/nalrev.v.1.i.1.p.1-15.2017>.

Abdurrahman Supardi Usman, 'Lingkungan Hidup Sebagai Subjek Hukum : Redefinisi Relasi Hak Asasi Manusia Dan Hak Asasi Lingkungan Hidup Dalam Perspektif Negara Hukum' (2018) 26 Legality : Jurnal Ilmiah Hukum.

Abvianto Syaifulloh, 'Peran Kejaksaan Dalam Pengembalian Kerugian Keuangan Negara Pada Perkara Tindak Pidana Korupsi' (2019) 1 Indonesian Journal of Criminal Law.

Alvina Sony Putri Bambang Eko Turisno and Suradi, 'Akibat Hukum Strategic Lawsuit Against Public Participation Dalam Hukum Perlindungan Konsumen' (2016) 5 Diponegoro Law Review <https://ejournal3.undip.ac.id/index.php/dlr/article/view/10984>.

Catherine S Norman, 'Anti-SLAPP Legislation and Environmental Protection in the USA: An Overview of Direct and Indirect Effects' (2010) 19 Review of European Community & International Environmental Law.

Dewan Perwakilan Rakyat Republik Indonesia, *Risalah RUU Tentang Pengelolaan Lingkungan Hidup* (Dewan Perwakilan Rakyat Republik Indonesia 2009).

Dwight H Merriam and Jeffrey A. Benson, 'Identifying and Beating a Strategic Lawsuit Against Public Participation' (1993) 3 Duke Envtl. L. & Pol'y F.

Elly Kristiani Purwendah, 'Sea Protection From Oil Pollution by Ship Tanker' (2020) 2 Ganesha Law Review <https://ejournal2.undiksha.ac.id/index.php/GLR/article/view/122>.

Ery Agus Priyono, 'Peranan Asas Itikad Baik Dalam Kontrak Baku (Upaya Menjaga Keseimbangan Bagi Para Pihak)' (2017) 1 Diponegoro Private Law Review.

Fasken, 'Anti Slapp Legislation : The Ontario Protection of Public Participation Act' (*Fasken*, 2013) <http://www.fasken.com/anti-slapp-legislation-ontario-protection-of-public-participationact/> accessed 4 July 2021.

Feby Ivalerina, 'Demokrasi Dan Lingkungan' (2014) 1 Jurnal Hukum Lingkungan Indonesia

George W. Pring and Penelope Canan, *SLAPPs : Getting Sued for Speaking Out* (Temple University Press 1996).

Hakim Dalam West Virginia Court of Appeals in Webb v. Fury, 282 S.E. 2d 28, 43 (WVa 1981)

Ifada Qurrata Ayun Amalia, 'Akibat Hukum Pembatalan Perjanjian Dalam Putusan Nomor 1572 K/Pdt/2015 Berdasarkan Pasal 1320 Dan 1338 Kuh Perdata' (2018) 1 Jurnal Hukum Bisnis Bonum Commune.

Luh Nila Winarni, 'Asas Itikad Baik Sebagai Upaya Perlindungan Konsumen Dalam Perjanjian Pembiayaan' (2015) 2 Jurnal Hukum.

M Syahri, 'Bentuk–Bentuk Partisipasi Warga Negara Dalam Pelestarian Lingkungan Hidup Berdasarkan Konsep Green Moral Di Kabupaten Blitar' (2013) 13 Jurnal Penelitian Pendidikan.

Malgosia Fitzmaurice, 'Note on the Participation of Civil Society in Environmental Matters. Case Study : The 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters' (2010) 47 Hum. Rts. & Int'l Legal Discourse.

Mardiyah and Azhari Yahya, 'Kewenangan Kejaksaan Dalam Mengajukan Permohonan Pembatalan Perkawinan (Suatu Penelitian Di Kabupaten Aceh Besar)' (2018) 7 Legitimasi : Jurnal Hukum Pidana dan Politik Hukum.

Muhammad Syaifuddin, *Hukum Kontrak, Memahami Kontrak Dalam Perspektif Filsafat, Teori, Dokmatik Dan Praktek Hukum* (Mandar Maju 2012).

Patrick C. File and Leah Wigren, 'SLAPP-Ing Back: Are Government Lawsuits Against Records Requesters Strategic Lawsuits Against Public Participation?' (2019) 1 The Journal Of Civic Information <https://doi.org/10.32473/joci.v1i2.119008>.

Raynaldo Sembiring, 'Menyoal Pengaturan Anti Eco-SLAPP Dalam Undang-Undang Nomor 32 Tahun 2009' (2009) 3 Jurnal Hukum Lingkungan Indonesia.

——, 'Kriminalisasi Atas Partisipasi Masyarakat: Menyisir Kemungkinan Terjadinya SLAPP Terhadap Aktivis Lingkungan Hidup Sumatera Selatan' (2014) 1 Jurnal Hukum Lingkungan Indonesia <https://doi.org/10.38011/jhli.v1i1.11>.

Republic of The Philippines Supreme Court, Rules of Procedures for Environmental Cases, Section 2 Rule 6.

Shine (Sean) Tu and Nicholas Stump, 'Free Speech in the Balance: Judicial Sanctions and Frivolous SLAPP Suits (February 13, 2020)' (2020) 54 Loyola Los Angeles Law Review <http://dx.doi.org/10.2139/ssrn.3537637>.

The Law of the Republic of Indonesia Number 32 of 2009 concerning Environmental Protection and Management.

The Supreme Court issued the Decree of the Chairman of Supreme Court Number: 36/KMA/SK/II/2013 concerning Enforcement of Guidelines for Environmental Cases Management

HOW TO CITE: Mia Banulita and Titik Utami, 'Legal Construction of Anti Eco-SLAPP Reinforcement in Indonesia' (2021) 36 Yuridika.