Dysfunctional Factors of Environmental Law on Strategic Lawsuit Against Public Participation and Developing Remedial Strategies Through Reconstruction Criminal Law System Model in Indonesia

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Abstract

The excessive criminalization of community and environmental enforcement activists has prolonged the problem of SLAPP (Strategic Lawsuits Against Public Participation) in Indonesia. This study explores the factors contributing to non-optimal protection for citizens and environmental law enforcement activists. It aims to develop an ideal model for formulating the criminal law system to address Indonesia's Strategic Lawsuit Against Public Participation (SLAPP). This study used a doctrinal juridical approach to analyze and identify the factors preventing environmental law from effectively providing legal protection to the community and activists advocating for a good, healthy, and safe environment or the occurrence of SLAPP. This research found that the new model should incorporate clear sentencing guidelines for law enforcement while addressing and reformulating conflicting legal instruments. The goal is to foster juridical harmonization, serving as a strategic approach to prevent SLAPP in the future.

Keywords: environmental activist, protection, SLAPP.

A. Introduction

The 1972 Stockholm Conference highlighted countries' need for sustainable development, emphasizing the importance of aligning environmental factors with developmental goals.[1] The prevailing development paradigm often neglects balancing natural resources, impacting environmental protection. Increased exploitation and industrial waste pose threats to sustainability, notably in North Lombok. Around 44 hectares of forest suffer harm due to land conversion in Pemenang District, marked by hotel and villa construction in hilly terrains. This emphasizes the urgent need for a sustainable approach.[2] The prosecution of

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[1] Soerjani*, Mengenal Hukum (Suatu Pengantar)* (Yogyakarta: Liberty, 1988), 134–135.

[2] Ahmad Viqi, "44 Thousand Hectares of Forest In North Lombok Damaged," accessed on 1 December 2022, https://www.detik.com/bali/nusra/d-6360019/44-ribu-hektare-hutan-di-lombok-utara-rusak.

environmental human rights defenders actively advocating for responsible natural resource use is a significant concern. ELSAM data (2020) reveals those attacks on these activists, including judicial harassment like Strategic Lawsuits Against Public Participation (SLAPP) amount to 178 cases.[3] These incidents are not limited to Indonesia but are observed globally.

For instance, in the case of Raub Australian Gold Mining Sdn Bhd (RAGM) against Hue Shieh Lee (13 February 2019) in Malaysia, charges of slander and lies were raised. This case, highlighted in two articles, involved health issues among residents of Bukit Koman, where the company operates. Despite dismissing the case as malicious, the Federal Court of Appeal acknowledged that the activists' allegations were motivated by health and safety concerns for their community. The court affirmed that the activists' work "contributed more to the general welfare of society at large" and no defamatory remarks were found in the statements, developed with transparency and accountability in mind.[4]

In Thailand, protests erupted against Watson Co's wastewater treatment facility construction by Mae Sai Environmental Protection villagers. Concerns focused on legal procedure neglect in contract bidding and potential river pollution, revealing a common issue: the absence of laws interpreting SLAPP.[5] Many individuals and institutions are UN-recognized Environmental Human Rights Defenders (EHRD) for their advocacy and protection of human rights (*Hak Asasi Manusia*-HAM) related to a safe, clean, healthy, and sustainable environment.[6] Examining EHRD (Environmental Human Rights Defenders) reveals risks in physical, digital, psychological, economic, and legal domains, posing challenges to environmental efforts and ecological rights advocacy. The 1998 Declaration of Human Rights Defenders was a milestone in recognizing and protecting these privileges.[7] SLAPP is an action carried out through the courts to eliminate public participation, which is one of the main pillars of environmental protection and good management.[8] This indicates that SLAPP is a global obstacle to environmental protection, affecting countries like Indonesia, the United States, Southeast Asia, Malaysia, and Thailand. Awareness of the significance of ANTI-SLAPP is emphasized in various international, regional, and national conferences. Internationally, it is regulated in the Universal

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3 Kemitraan Partnership, "Free Decision of Environmental Fighters, Momentum to Strengthen Anti-SLAPP Policy," accessed on 30 December 2022, https://www.kemitraan.or.id/kabar/putusan-bebas-pejuang-lingkungan-momentum-perkuat-kebijakan-Anti-SLAPP.

4 Environmental Law Alliance Worldwide, "Raub Australian Gold Mining Sdn. BHD v. Hue Shieh Lee (21 October 2016)," accessed on 1 January 2023, https://www.elaw.org/raub-australian-gold-mining-sdn-bhd-v-hue-shieh-lee.

5 Business Human Rights, "Based on the 2022 Report Strategic Challenges Against Public Participation: Cases in Southeast Asia & Recommendations for Government, Business, Civil Society," accessed on 3 January 2023, https://media.businesshumanrights.org/media/documents/SLAPPs_in_SEA_2020_March_13_Indonesian.pdf.

6 UN General Assembly A/HRC/40/L.22/Rev.1, 20 March 2019.

7 UN General Assembly A/RES/53/144, 8 March 1999.

8 Principle 10 of the Rio Declaration

Declaration of Human Rights (Articles 19 and 23)[9] and the International Covenant on Civil and Political Rights (ICCPR - Article 21).[10] In the ASEAN region, including the Philippines, the Supreme Court prioritizes the Rules of Procedure for Environmental Cases under Article 1 Rule 6. Thailand lacks a specific law defining SLAPP, but Article 161 Law Number 1 of 2019 on the Criminal Procedure Code allows immediate dismissal of a criminal case if it shows "bad intent" such as harassment, capitalization on people, obtaining unlawful advantage, or corrupt motives.

In Indonesia, human rights defense is guaranteed by the 1945 Constitution (Article 28C Paragraph 2) and Law Number 39 of 1999 on Human Rights (Article 100). General protection for activists is outlined in the National Human Rights Commission Regulation Number 5 of 2015. Environmental human rights and ANTI-SLAPP regulations are found in the second amendment of the 1945 Constitution (Article 28H Paragraph 1) and Law Number 32 of 2009 on the Protection and Management of the Environment (Article 65 Paragraph 1). According to Article 66 of the same law, individuals advocating for a healthy environment should not face criminal or civil prosecution, aiming to protect them from retaliation during legal actions against environmental pollution or damage. This measure aims to prevent retaliation through criminal prosecution or civil lawsuits, emphasizing the independence of the judiciary.

ANTI-SLAPP provisions in Indonesian Supreme Court Decree Number 36/KMA/SK/II/2013 on the Enforcement of Guidelines for Handling Environmental Cases have limited impact due to the dominance of Article 66 of the 2009 Protection and Management of the Environment Law. This decree lacks clarity on resolving ANTI-SLAPP cases outlined in Article 66. The presence of Article 66 doesn't effectively address prosecutions against companies accused of environmental harm. Companies often retaliate against environmental activists by claiming defamation. For instance, a recent case involving four women in Lombok questioning why a lawsuit about a thrown tin roof is processed faster than the company's environmental damage accusation. In Indonesia, legal cases against protesters proceed more smoothly than addressing the core issue of alleged organizational ecological harm. In Central Lombok, West Nusa Tenggara, four housewives face a trial for protesting air pollution caused by a cigarette factory, while the main concern of residents, the alleged environmental pollution by the company, remains uninvestigated.[11]

Globally, the lack of protection for environmental defenders undermines

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9 Articles 19 and 23 of the Universal Declaration of Human Rights (UDHR).

10 Article 21 of the International Covenant on Civil and Political Rights (ICCPR).

11 The story of four accused mothers of throwing tobacco factory roofs, taking toddlers to prison, now the case is adjourned BBC News. See Rachmawati, "The Story of 4 Accused Mothers of Throwing Tobacco Factory Roofs, Taking Toddlers to Prison, Now the Case is Adjourned," accessed on 30 December 2022, https://regional.kompas.com/read/2021/02/26/06070061/kisah-4-ibu-terdakwa-pelemparan-atap-pabrik tembakau-bawa-balita-ke-penjara?page=all.

fundamental rights like freedom of expression and peaceful assembly, often due to governments prioritizing economic interests over ecology. Legal attacks against human rights defenders expose weaknesses in ANTI-SLAPP norms. For instance, Article 66 of the 2009 Protection and Management of the Environment Law limits protection for those fighting for a healthy environment unless they undergo the trial process. Another problem lies in SK KMA 36/2013, supporting the use of ANTI-SLAPP arguments in criminal defense stages, creating conflicts with procedural law.

To address these issues, a normative writing approach with diagnostic and prescriptive characteristics was used, employing primary and secondary legal materials. A doctrinal-juridical approach, including conceptual, statutory, case, and comparative techniques was applied. Normative legal analysis, using deductive logic, considered legal philosophy, international law principles, and legitimate teachings as major premises with constitutional facts/events and statutory regulations as minors.

Two key questions emerged: why is environmental criminal law protection for human rights defenders not optimal through the ANTI-SLAPP mechanism, and how can the environmental criminal law policy model better protect human rights defenders for a healthy environment? The study aims to develop an ideal environmental criminal law system to counter strategic lawsuits against public participation in Indonesia.

B. Various Factors Causing Environmental Criminal Law Non-Optimal Protection to Human Rights Defenders for a Good, Healthy, and Safe Environment Through ANTI-SLAPP Mechanism

Many factors significantly shape the growth, development, and functioning of societal law. This is because the legislative process, encompassing the development, formulation, and determination of regulations, is intricately linked to influences beyond the legal realm, including personal and social factors.[12] Law not existing in isolation, but it is influenced by internal factors like personnel qualities and external factors such as political intervention, legal system dynamics, and conflicts of interest.[13] The analysis of suboptimal environmental law enforcement is based on Chambliss and Seidman's legal work, emphasizing that various factors, including inherent characteristics, impact law's operation in the community. The community, encompassing government officials, lawmakers, and the judiciary, is expected to comply with regulations and adhere to Article 28 H Paragraph (1) of the 1945 Constitution, granting citizens the right to a healthy environment. However, constitutional community roles have diminished, evident in reduced legislative participation and criminalization of opinions, particularly from environmental activists. This challenges democratic principles, as public participation is crucial in the

[12] William J. Camblis and Robert B. Seidman, *Law, Order, and Power, Reading* (Wesly: Mess Addison, 1971), 74.

[13] Hartiwiningsih, *Faktor-Faktor yang Mempengaruhi Proses Penegakan Hukum Pidana Lingkungan* (Surakarta: UNS Publishing and Printing, 2020), 1.

formation and implementation of state policies. The current approach lacks space for community involvement in advocating for a good environment through expressing opinions, deviating from democratic ideals.[14]

Law enforcement by officials is heavily influenced by socio-economic and political factors, prioritizing economic interests over ecology. This leads to a consistent undervaluation and sacrifice of the environment, contradicting the concept of sustainable development. In a case example, four women in Lombok faced criminal prosecution for protesting air pollution, while the responsible tobacco companies were not legally investigated. This highlights a questionable prioritization of side cases over allegations of organizational environmental destruction. During Jokowi's second administration, environmental protection weakened through regulations like the Water Resources and Agricultural Cultivation System Law, and the Minerals and Coal Mining Law in the Omnibus precept. The Water Resources Law introduces problematic privatization, limiting community access to clean water, contrary to the Dublin Principles emphasizing the importance of fresh water for sustainability.

The Minerals and Coal Mining Law results in the criminalization of those protesting corporate activities, violating constitutional rights, especially the right to a good and clean environment. Constitutional rights, notably the right to a healthy environment, are often neglected, limiting public participation in environmental issues during the formulation and implementation of regulations.

Economic and political factors are generally very influential in law enforcement, specifically in the scope of environmental policy empowerment, which is very visible in several cases, such as the following:

1. Heru Budiawan (Budi Pego) and community members sued the gold mines of Bumi Suksesindo (BSI) and Damai Suksesindo (DSI) near their residence, staging a demonstrative protest with a rejection banner featuring the hammer and sickle emblem. Heru Budiawan was criminally prosecuted and received a four-year prison sentence based on the court's judgment.[15]
2. In 2018, Nur Alam filed a lawsuit against Basuki Wasis, a former governor accused of improperly granting a mining exploration license. Basuki Wasis, an expert witness, testified about the environmental damage caused by the company, leading to Nur Alam countersuing, alleging illegal actions. Basuki Wasis invoked Articles 65 and 66 of Law Number 32 of 2009, providing Anti-SLAPP protection for individuals acting for environmental safety. The court dismissed the case in

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[14] Eko Riyadi and Sahid Adi, "Strategic Lawsuit Against Public Participation (SLAPP) A Legal Based Threat to Freedom Expression," *Padjadjaran Journal of Law* 8, no. 1 (2021): 155. https://doi.org/10.22304/pjih.v8n1.a7.

[15] Achmad Nasrudin Yahya and Diamanty Meiliana, "The Story of Budi Pego, Activist Accused of Communism: Still Rejecting the Gold Mine After Being Imprisoned," accessed on 30 December 2022, https://nasional.kompas.com/read/2019/12/16/07255421/kisah-budi-pego-aktivis-dengan-tuduhankomunis-tetap-tolak-tambang-emas-usai.

December 2018, asserting witness immunity. However, the statements were later deemed defamatory, raising concerns about judicial integrity. The immunity covered all expert statements, and the court ordered the plaintiff to pay IDR2.431.000,00 (US$ 171.69) to the defendant.[16]

3. In 2022, Sukarelajaya Village residents in Southeast Wawonii District, Konawe Islands Regency, Southeast Sulawesi, blocked Gema Kreasi Perdana Company's (GKP).[17] Heavy equipment, prompting the GKP manager to instruct police intervention. Legal justification was claimed under Article 162 of Law Number 3 of 2020 amending Law Number 4 of 2009 on Mineral and Coal Mining, allowing penalties for obstructing mining activities. Article 162, upon examination, qualifies as a SLAPP criminal offense, strategically penalizing citizens exercising political rights. It empowers license holders to prosecute communities disrupting their activities, conflicting with the ANTI-SLAPP concept and environmental rights. This provision contradicts the Indonesian Constitution and Article 66 of the 2009 Environmental Protection Law.

Criticism using critical legal studies dismantled central ideas in modern constitutional thought. The western legal tradition faces deep crises challenging neutrality, autonomy, and the law-politics distinction. According to critical legal studies, the constitutional process operates in a non-neutral reality influenced by subjective values. Environmental law enforcement, influenced by economic, political, and business interests, sacrifices ecological fighters despite legal protection. These fighters face attacks in physical, digital, psychological, economic, and legal realms.

Law's effectiveness, as per Lawrence M. Friedman's theory, hinges on three elements: structure, substance, and culture.[18] The effectiveness of law enforcement relies on three elements: structure, substance, and culture, as per Lawrence M. Friedman's theory. In this context, it involves law enforcement officials, legislation, and public living law. Despite these elements, there are weaknesses in law enforcement and environmental protection, as per Friedman's theory. These weaknesses include contradictions between ANTI-SLAPP and SLAPP elements in legal instruments, particularly in Article 162 of the 2020 Mineral and Coal Mining Law, and constitutional measures like Article 28 H Paragraph 1 of the Indonesian Constitution[19] to Article 66 of 2009 on the Protection and Management of the

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16 Friski Riana, "Cibinong District Court Frees IPB Lecturer Basuki Wasis from Nur Alam's Lawsuit," accessed on 3 January 2023, https://nasional.tempo.co/read/1155099/pn-cibinong-bebaskan-dosen-ipb-basuki-wasis-dari-gugatan-nur-alam.

17 Haluanrakyat.com, "Residents of Wawonii are Back to Procurement of Heavy Equipment Owned by GKP Company, the Company Calls Their Activities Legit," accessed on 5 January 2023, https://haluanrakyat.com/warga-wawonii-kembali-lakukan-pengadangan-alat-berat-milik-pt-gkp-perusahaan-sebut-aktivitasnya-sah.

18 Lawrence M. Friedman*, Sistem Hukum Perspektif Ilmu Sosial* (Bandung: Nusa Media, 2011), 75.

19 Article 28 H Paragraph 1 of the 1945 Constitution of the Republic of Indonesia.

Environment Law.

The legal instrument embodying SLAPP elements, specifically Article 162 of the 2020 Mineral and Coal Mining Law, is a criminal offense without a requirement for establishing causal relationships. The law lacks explanatory details, merely stating "quite clear," leading to two legal implications. Firstly, the term "hindering" lacks specific criteria, violating principles of *lex stricta* and *lex certa* in criminal offense determination. This vagueness poses a risk to legal certainty and emphasizes the need for clear formulation to avoid multiple interpretations.[20] Unclear offenses also confused citizens because they were unable to obtain or understand the exact intent of the legislator.[21]

Article 162 of the 2020 Mineral and Coal Mining Law is problematic as it extends beyond business actors, allowing them to file police reports against protesting residents. The vague language risks overcriminalization and lacks clarity in criminal law principles. Additionally, the "hindering" clause becomes a flexible tool for criminalization and human rights violations in conflicts between mining companies and communities, contradicting citizens' constitutional rights. This conflicts with Article 66 of the 2009 Environmental Protection and Management Law, leading to sentencing disparities in cases like Heru Budiawan (Budi Pego), Nanto, Sawin and Sukma, Nur Alam-Basuki Wasis, and Sukarelajaya Village Residents vs Gema Kreasi Perdana (GKP) Company lawsuits. It led to global[22] and causal legal uncertainty[23] when constitutionally applied.

Article 28H Paragraph 1 of the 1945 Indonesian Constitution guarantees citizens the right to a good and healthy environment, forming a constitutional mandate that should guide legal norms. However, Article 162 of the 2020 Mineral and Coal Mining Law creates hierarchical conflicts. The constitutional mandate emphasizes citizens' access and participation in environmental management, enforced by legislative, executive, and judicial branches. Despite these constitutional guarantees, legal instruments expose citizens to risks, including SLAPP tactics used against them. The profit-oriented policies favoring conglomerates hinder community participation, violating constitutional rights. This reveals two main issues: legislative authoritarianism restricting community input, leading to regulations misaligned with community values, and legal threats, including SLAPP tactics, undermining citizens' rights to a healthy environment.[24] The second issue involves government policies

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20 Eddy. O.S. Hieariej, *Asas Legalitas dan Penemuan Hukum dalam Hukum Pidana* (Jakarta: Erlangga, 2009), 5.

21 Chad Flandes and Desiree Austin Holliday, "Dangerous Instrument: A Case Study in Overcriminalization," *Missouri Law Review* 83, no. 2 (2018): 289, https://scholarship.law.missouri.edu/mlr/vol83/iss2/5/.

22 Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue*? (Chicago: Illinois Law School University Chicago, 2010), 254. Global uncertainty is an uncertainty that occurs in all cases. For example, there are many different sources of law that apply to different cases.

23 Brian Leiter. Causal legal uncertainty is uncertainty that occurs when legal reasoning does not provide sufficient capital for judges to make the same decision in the same case.

24 Robert Barros, *Constitutionalism and Dictatorship: Pinochet, the Junta, and the 1980 Constitution* (New York: Cambridge University Press, 2002), 14.

favoring investment over citizens' rights and environmental concerns, reflecting an authoritarian approach conflicting with constitutional principles. This aligns with Dixon and Landau's concept of the new authoritarianism within liberal democracies. The study "Abusive Constitutional Borrowing Legal Globalization and the Subversion of Liberal Democracy" highlights that constitutionalism has not effectively curbed power abuses, allowing authoritarians to exploit liberal democracy for decades.[25]

Article 66 of the 2009 Law on the Protection and Management of the Environment has proven insufficient in addressing legal actions by profit-driven companies accused of environmental harm. These entities often retaliate against environmental defenders through defamation suits or other legal maneuvers. Despite the law's provision stating that environmental defenders should not face criminal or civil prosecution, the reality has been different. To enhance justice for these defenders, future reforms are necessary. The Indonesian Supreme Court Chief Justice Decision 36/KMA/SK/II/2013 established guidelines for handling Anti-SLAPP environmental cases based on Article 66.

As stipulated in Article 66 of 2009 on the Protection and Management of the Environment Law, the ANTI-SLAPP legal system was highly adhered to in Indonesia. It was due to ANTI-SLAPP being a legal protection for environmental fighters, as lawsuits with SLAPP nuances were carried out by companies or conglomerates in the form of ordinary civil cases or counterclaims (reconvention lawsuits). It also encompassed other legal steps in the form of crimes and reports to the police, with the pretext of criminal acts against environmental fighters and community members. These are generally observed as "humiliation" acts, according to the stipulation in the Criminal Code. From these descriptions, the following question was considered, how is the system of civil and criminal procedural law implemented in ANTI-SLAPP? It had not been regulated in the Civil Procedural Law (HIR/RBG), the Criminal Procedure Code and judicial practice. According to Article 66 of 2009 on the Protection and Management of the Environment Law, the determination of a plaintiff's lawsuit or criminal report as a SLAPP needs to be decided in an interlocutory decision. It should also be applied to provisions, exceptions, and counterclaims in civil cases and implemented to defense in criminal lawsuits.

Compared to other countries, Canada's Anti-SLAPP law is regulated in Section 137 (1) of the Courts of Justice Act sets out Ontario's New Anti-SLAPP Law 2015. The Ontario anti-SLAPP provision essentially regulates as follows:

1. Section 137 (1) The Courts of Justice Act outlined Ontario’s New Anti-SLAPP Law permits a defendant to request the dismissal of a proceeding at any time after its commencement. To have a dismissal, the defendant should initially convince the judge that the proceeding arises from an expression made concerning a

[25] Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (United Kingdom: Oxford University Press, 2021), 12.

matter of public interest. The onus then shifts immediately to the plaintiff, who should satisfy the judge that there are reasonable "grounds to believe" both the proceeding holds substantial merit, and the defendant lacks a valid defense. The plaintiff should also show to the judge that they are likely or have experienced harm due to the defendant's expression, to the extent that permitting the proceeding outweighs the public interest in protecting that expression.

2. Section 137 (3) when a person facing legal proceedings makes a motion, a judge should, with the exception outlined in subsection (4), dismiss the proceeding when the person convinces the judge that the case arises from an expression on a matter of public interest.
3. A judge should not dismiss a proceeding under subsection (3) when the responding party satisfies the judge that a) there are grounds to believe; i) the proceeding has substantial merit, ii) the party making a motion has no valid defense in the proceeding, and b) the harm likely to be or have been experienced by the responding party due to the defendant expression, to the extent that permitting the proceeding, outweighs the public interest in protecting that expression.
4. The law states that the motion shall be heard within 60 days of filing the notice of motion. Second, it stops all steps in the proceeding until the Anti-SLAPP motion is decided. Third, there are unusual costs and consequences. It is presumed that successful moving parties (defendants) will get full indemnity costs, while responding parties (plaintiffs) are not entitled to charges. These presumptions are different from the usual rule that the losing party pays.

This legislation requires a judge to dismiss proceedings arising from an expression of public interest unless the plaintiff (defendant party) proves first that there is merit to the claim.[26] Second, proceeding with the matter is in the public interest. Also, there are several other features of the law warrant mentioned. Furthermore, there is the need to prove that individual actions are in line with the public interest, specifically the right to a decent environment for the community. Therefore, the Courts of Justice Act concept sets out Ontario's New Anti-SLAPP Law 2015 as an element of good faith in the actions taken by activists or community participation in fighting for the right to a healthy environment and expressing their opinions on government policies.

The Chief Justice of the Indonesia Supreme Court through Decree Number 36/KMA/SK/II/2013, established guidelines for handling environmental cases against SLAPP based on Article 66 of 2009 on the Environmental Law. Unfortunately, this decree lacks provisions for accessing good faith.[27] To address this gap, the Indonesian

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[26] Hilary Young, "Canadian Anti-SLAPP Laws in Action," *The Canadian Bar Review* 100, no. 2 (2022): 189, http://dx.doi.org/10.2139/ssrn.4136609.

[27] Mia Banulita and Titik Utami, "Legal Construction of Anti Eco-SLAPP Reinforcement in Indonesia," *Jurnal Yuridika* 36, no. 3 (2021): 711, https://doi.org/10.20473/ydk.v36i3.30383.

Supreme Court issued Supreme Court Regulation Number 1 of 2023 on Guidelines for Adjudicating Environmental Cases. In Supreme Court Regulation Number 1 of 2023, Article 48 Paragraphs (1), (2), (3) and Article 51 Paragraphs (3), (4) have regulated in detail the protection of environmental defenders. Regarding the element of good faith in fighting for a clean and healthy environment as regulated in 48 Paragraph (4), letters a and b state:

a. There is no other alternative or choice of action other than the act that has been committed.
b. The act is performed to protect the greater legal interests of the public at large.

On the other hand, Article 51 Paragraph (3) states that when the Plaintiff is a citizen or an environmental organization fighting for the right to a good and healthy environment, they cannot be criminally prosecuted and civilly sued as referred to in Article 66 of Law Number 32 of 2009 on Environmental Protection and Management.

Substantially, the provisions of Supreme Court Regulation Number 1 of 2023 have progressed, specifically on the proportionality of actions and the element of good faith as protection for environmental advocates. However, the Supreme Court Regulation in the hierarchy of statutory provisions of its legal force contains provisions relating to procedural law. Ni'matul Huda and R. Nazriyah stated that one type of legislation is institutional regulations that are internally binding. The implementation has a lot to do with other subjects outside the organization that will be binding when they perform certain legal actions related to the institution, one of which is PERMA, specifically for various regulations regarding procedural guidelines. Therefore, it is only as an additional regulation related to the implementation (formal law) to carry out the material law when it has entered the process of judicial examination. This is certainly different from the provisions of the Courts of Justice Act, which sets out Ontario's New Anti-SLAPP in Canada at the level of the act. The Supreme Court Regulation Number 1 of 2023 has not yet provided full legal protection to advocates, specifically the reporting of a corporate legal entity or other party when committing SLAPP actions in the police.

Another problem related to legal substance is the contradiction between Article 66 of the Environmental Protection Law as well as the Mineral and Coal Mining Law. Article 162 of the Mineral and Coal Mining Law states, "Any individual who obstructs or interferes with the Mining Business activities of the holders of Mining Business License, Special Mining Business License, People's Mining License, or Rock Mining License who have fulfilled the conditions as referred to in Article 136 Paragraph (2) shall be punished with a maximum imprisonment of one year or a maximum fine of IDR100.000.000."

With the phrase "obstructing or disturbing activities" in this formulation, it can certainly be based on an individual or community group, whether activists or not, when expressing their opinions due to a mining company's activities being hampered, the protesters can be subject to criminal charges. This contradicts the

provisions of Article 66 on the Environmental Protection, which states, "Everyone who fights for the right to a good and healthy environment cannot be prosecuted criminally or sued civilly." The existence of contradictory parallel regulations certainly causes problems in law enforcement, creating ambiguity in its application, especially legal uncertainty.

As a result of this legal uncertainty, since the enactment of the Mineral and Coal Mining Law, all decisions are determined by the central government. In addition, the law does not promise environmental restoration for affected areas. In article 162, the opportunity to criminalize is even strengthened. The police can use Article 162 to ensnare environmental activists for advocacy. A case in point is Wasrin Peantok, a Bosanyo Bunta, Banggai Regency, Central Sulawesi Resident. After rejecting the village's nickel mining activities, Wasrin was named a suspect and detained by Banggai Police, armed with Article 160 on the Criminal Code and Article 162 of Law Number 4 of 2009 on mineral and coal mining. The criminal sector is the most massive on the record, with 68 cases, followed by five civil and two cases of state administration. Among the 75 lawsuits, at least 198 individuals are victims of criminalization.[28]

From a legal structure perspective, the arrangements related to SLAPP were considered inadequate, with disparities observed in sentencing decisions by judges. This indicated that the judge assumably had high quality as the personification of judicial power. In this case, the judges' legal decisions in an examination, decision-making, and adjudication of lawsuits emphasized the consideration of living, natural, state, and knowledge law, as well as prioritizing the ethical and technical guidelines of the judiciary.[29] Therefore, a strong correlation was observed between the law and the judge. From this context, the judge embodied the law, which was subsequently incorporated into the constitutional actions performed.[30] Based on this description, the role of law enforcement officials should be promoted, specifically judges, as constitutional mouthpieces, and lawmakers. This was because the determination of law was very important in judicial practice. A provision was also observed in Article 5 Paragraph 1 of Law Number 48 of 2009 on Judicial Powers (2009 Judicial Law). This essentially stated that the judges of the Supreme and Constitutional Courts of Indonesia were obliged to investigate, follow, and understand the legal values and sense of public justice when obtaining, examining, and deciding a case.

The consequence of Article 5 Paragraph 1 of 2009 on the Judicial Law established

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[28] Haris Prabowo, "Negara Abaikan Korban Kriminalisasi Dalam Gugatan UU Minerba," accessed on 15 September 2023, https://tirto.id/gwCA.

[29] Hanif Fudin Azhar, "Muatan Hak Asasi Manusia dan Moral Hukum Putusan Hakim Dalam Perspektif Maqasid Al-Syari'ah Kajian Putusan Nomor 7P/HUM/2020," *Judicial Journal* 14, no. 2 (2021): 255, https://doi.org/10.29123/jy.v14i2.457.

[30] Sunaryo and Purnamawati, "Paradigma Hukum yang Benar dan Hukum yang Baik: Perspektif Desain Putusan Hakim Perkara Korupsi di Indonesia," *Journal of Criminal Law and Legal Development* 1, no. 2 (2019): 1-10, https://doi.org/10.25105/hpph.v1i2.5465.

the opportunity for judges to apply the unwritten laws living in a society (living laws). It also allowed the judges to develop legal discoveries or interpretations that are not nuanced by analogy interpretations. This was related to the principle attached to judges in the form of *iura novit curia*, due to the concretization contained in the provisions of Article 10 Paragraph 1 of 2009 on the Judicial Law. From this stipulation, the institution of judicial power refused to examine, adjudicate, and decide on a case filed due to the non-existence or unclear nature of the law. Irrespective of the refusal, the case had the obligation to be examined and adjudicated. This was in line with the norms of Article 50 Paragraph 1 of 2009 on the Judicial Law, where the judge's decision contained specific relevant or unwritten policies used as the basis for adjudicating.

In addition, the independence of the judiciary should be free from intervention and untainted by external influence, either by the government or other state institutions. As stated by Levitzky and Ziblatt, an independent judiciary is the last bastion of democracy.[31] Recall that authoritarian regimes often use the judiciary to their advantage. The judiciary helps to exercise social control, attract capital, maintain bureaucratic discipline, adopt unpopular policies, and legitimize the regimes.[32]

Based on the legal culture perspective, the constitutional custom was initially emphasized by Lawrence M. Friedman and developed by Daniel S. Lev. This was subsequently analyzed by Satjipto Rahardjo, which sparked legal and community research. Legal culture is also a public force rooted in tradition, whose value system is adopted with the determination of the law acceptance and implementation patterns.[33] This was in line with Hilman Hadikusuma, where legal culture was inseparable from the condition of society, the system, and the public structure.[34]

On the other hand, two legal sociologists, Blankenburg and Bruinsma stated that "the concept of legal culture included four components, namely (1) law on the books (written law), (2) law in action according to the institutional infrastructure (daily practice law), (3) patterns of legally relevant behavior, and (4) legal consciousness, specifically a distinctive attitude toward the law among constitutional professionals."[35] Daniel S. Lev also argued that legal culture consisted of two related parts, namely (1) procedural values, which emphasize social regulation and conflict resolution, and (2) substantive values which are based on the distribution and use of

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31 Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (Jakarta: Kompas Gramedia, 2018), 74.

32 Tom Ginsburg and Tamir Moustafa, *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge: University Press, 2008), 21.

33 Satjipto Rahardjo, *Peningkatan Wibawa Hukum Melalui Pembinaan Budaya Hukum* (Jakarta: National Legal Development Agency, Ministry of Justice, 1999), 45.

34 Hilman Hadikusuma, *Budaya Hukum dan Masyarakat (Dalam Antropologi Hukum Indonesia)* (Bandung: Alumni, 1986), 51.

35 Erhard Blankenburg and Freek Bruinsma, *Dutch Legal Culture* (Netherlands: Kluwer Law International, 1996), 122-123.

public resources. Since society changes periodically, the concept of substantive legal culture requires a dynamic element.[36] On the other hand, Lawrence M. Friedman defined legal culture as "the element of social attitude and value, which prioritized general cultural customs, opinions, as well as performance and thinking patterns. These variables are responsible for specifically directing social forces toward or against the law."[37]

Legal culture is observed as the direction of perception, belief, response, concept, and public opinion toward a constitutional phenomenon. This shows that people's lawful traditions determine their behaviors regarding the acceptance or rejection of the law. In this case, the acceptance and use of law by society are determined by its legal culture. In addition, Friedman also distinguished external and internal legal cultures. This indicated that "the external and internal legal cultures emphasize the general population and members of society performing specialized constitutional tasks, respectively. From this context, every society has a legal culture, although only those with lawful specialists have an internal tradition."

Differences in education, gender, ethnicity, nationality, and income are also factors affecting a person's constitutional custom. Furthermore, legal culture is the key to understanding the differences between one lawful system and another. This was supported by Friedman, who stated that "many cultures are observed in a country, because societies are complex, as well as contain random groups, classes, and strata." This explains that no country has a unified legal culture due to the complexity of society and the various types of groups and strata contained. Similarly, no two men or women have the same legal culture. In the modern era, legal theory is responsible for answering the world of globalization, namely the Triangular Concept of Legal Pluralism (the triangular concept of legal pluralism).

This theory was introduced in 2000 and modified in 2006 by Werner Menski, a law professor from the University of London, as well as an expert in the legal field of Asian and African Nations. Menski's Triangular Concept of Legal Pluralism theory reinforced Lawrence M. Friedman's theory of the third constitutional system element. This element is known as legal culture, which was introduced by Friedman in the 1970s. The existence of this element is precisely pluralistic, leading to the need for a relevant, realistic legal theory.

Based on Friedman, not all law enforcement officials had similar perceptions, views, and concepts regarding the importance of protecting environmental fighters. This was because their understanding focused on protecting the capital owners, entrepreneurs, and corporations carrying out business performances without considering environmental preservation. For example, the most actual case was the throwing of a cigarette factory tin roof by four mothers in Central Lombok, West

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[36] Daniel S. Lev, *Judicial Institutions and Legal Culture in Indonesia* (London: Cornell University Press, 1972), 247.

[37] Lawrence M. Friedman, *The Legal System from A Social Science Perspective* (New York: Russell Sage Foundation, 1966), 223.

Nusa Tenggara. These housewives are presently undergoing a trial with threats of up to five years and six months in prison for their actions against alleged air pollution, which is allegedly causing respiratory problems for residents. In the intervening time the main problem complained by the residents was the alleged environmental pollution by a tobacco company performing business operations without any legal investigation. In this case, law enforcement was clearly and heavily influenced by factors outside the law, such as economic variables, power intervention, judicial mafia, as well as the conflict between commercial and environmental interests.[38]

The numerous SLAPP cases in Indonesia are intricately linked to the suboptimal performance of the state's law enforcement apparatus. This situation is largely attributed to the inadequate understanding of legal construct within the law enforcement sector. This is not excessive, as stated by Lon Fuller, "that law be viewed as a purposeful enterprise, dependent for success on the energy, insight, intelligence, and consciousness of those responsible for its administration." [39]

C. Model of Environmental Criminal Law Policy to Provide Protection of Human Rights for a Good, Healthy, and Safe ANTI-SLAPP Environment in the Future (*Ius Constituendum*)

Based on the results, weaknesses such as substance, structure, and culture as well as external social and personal legal factors were still observed, regarding the non-optimal protection for environmental fighters in fighting for a clean, healthy, and safe environment. Therefore, the *ius constituendum* criminal law, specifically the environmental policy model, was reformed to protect human rights to a good, healthy, and safe ANTI-SLAPP environment. It indicated that several elements need to be considered in the renewal of the 2009 the Protection and Management of the Environment law, specifically the legal protection of community members or environmental activists. From this context, the protection patterns should be adequately strengthened, considering that only one stipulation regulated the protection of human rights defenders in fighting for the environment, namely Article 66 of 2009 on the Protection and Management of the Environment Law. When no explanation is observed in this law, urgent reformulation is immediately needed regarding the environment. This needs to be carried out by adding more detailed regulations related to legal protection for the public and environmental activists. In addition, the important issues that should be immediately considered and reformulated include:

a) ANTI-SLAPP actions;
b) Limitation of legal subjects for environmentalists;
c) Criteria for defense acts, which are not unlawful for environmental human rights

[38] Hartiwiningsih, *Faktor-Faktor yang Mempengaruhi Proses Penegakan Hukum Pidana Lingkungan*, 133.
[39] Satjipto Raharjo, *Ilmu Hukum* (Bandung: Alumni, 1986), 71.

or permissible, not criminalized, and should be clearly explained;
d) Criteria for acts that were criminalized for environmentalists; and
e) Regulate the mechanism of the legal process adopted by the environmentalists seeking legal action due to environmental pollution or damage.

The reformulation of Article 162 of 2020 on the Mining Law is consistent with the Indonesian constitution, specifically, Article 28H paragraph 1 on the 1945 Constitution and Article 66 of 2009 on the Environmental Law. Additional clarification and refinement are essential in both the norms and explanation of Article 162 of 2020 on the Mineral and Coal Mining Law, specifically regarding elements related to the elimination of criminal justification reasons, for example:
Reformulation Article 162 of the Mineral and Coal Mining Law 2020

1. Individuals who obstruct or interfere with the Mining activities of license holders, including Mining Business License, Special Mining Business License, People's Mining License, or Rock Mining License, provided they meet the conditions as stated in Article 136 Paragraph (2) shall be punished with an imprisonment of one year or a maximum fine of IDR100.000.000.
2. In the event that the act of obstructing or disturbing, as referred to in paragraph 1, is carried out due to reasons of environmental destruction that disturbs and damages the living environment of local residents, it shall not be deemed a criminal offense.

The Article 162 Paragraph (2) of the 2020 Minerals and Coal Mining Law represents a crucial re-evaluations and re-formulations aimed at preventing the misuse of other laws to criminalize environmental advocates. This reformation ensures that the laws do not inadvertently serve as instruments for SLAPP actions against environmental activists in Indonesia. Reformulation should also be carried out to the Criminal Procedure Code, through the following elements:

a. The Criminal Code Bill needs to be regulated or opened to the existence of procedural laws. These policies contain the *lex specialist* outside the Criminal Procedure Code.
b. There is a need to re-evaluate the Decision of the Chief Justice of the Supreme Court of the Republic of Indonesia Number 36/KMA/SK/II/2013 and the Regulation of the Supreme Court of the Republic of Indonesia Number 1 of 2023 on Guidelines for Adjudicating Environmental Cases which clearly regulates that SLAPPs are an administrative domain that cannot be processed within the realm of criminal law and its application will be broader, and be obeyed by all law enforcement officials. The legal basis is Article 1 in Supreme Court Regulation Number 1 of 1956. It states that "when conducting a criminal investigation and a civil matter arises regarding an item or the legal relationship between two parties, the case should be postponed. The postponement needs to be effective until a court ruling is conducted on the presence or absence of civil rights in the related case."

c. During the investigation stage, the police were provided with the authority to introduce experts and collaborate with universities to determine SLAPP category actions exhibited by an individual. In this case, the authority should be regulated in the Circular of the Chief of Police. Therefore, the police as the front guard are expected to determine the public complaint obtained by introducing experts and collaborating with universities.
d. Based on the comparative analysis of the countries adhering to the civil law legal system, such as the Netherlands and France, suspects need to be protected from arbitrary actions, with the police expected not to use force. In this case, a preliminary-examining official known as the commissioner judge is observed in the Netherlands. This judge has the authority to determine the conviction level of a person. From the results, the experts were already presented at the period the case began.

a) When the case is a crime, a diversion should be used for resolution, due to the transfer of settlement lawsuits from the criminal justice process to external procedures. The aims of diversion include achieving peace between victims and perpetrators;
b) prioritizing settlement through mediation with a win-win solution orientation;
c) proposing criminal use as a means of *ultimum remidium*;
d) obtaining legal safety from the Witness and Victim Protection Agency for public participation of community members and environmental activists; and
e) Instilling a sense of responsibility for environmental destroyers.

One decree from the Director General of Judicial Agencies underscores the importance of implementing Supreme Court Regulations and Circular Letters. These directives specifically address cases resolved through diversion, but the criteria for SLAPP are not included in the Director General's Regulations. Therefore, it is crucial to reformulate both the Supreme Court Regulations and Circular Letters and the Director General of Judicial Agencies' Decree to incorporate provisions for SLAPP.

In civil cases seeking compensation for environmental damage, a claim is made against the legal entities responsible for the harm. Mediation is then pursued for reconciliation, with a mediator chosen from a judge or someone registered with the Court. Notably, in the case of Mataram, an effective mediation institution was identified. This experience suggests the need for an internal Circular Letter from the Chief of Police, outlining the role and obligations of the National Law Enforcer in addressing SLAPP. This letter should emphasize the Police Force's careful execution of tasks and its collaboration with universities to assess SLAPP cases effectively.

D. Conclusion

The effectiveness of environmental criminal law in safeguarding the rights of human rights defenders falls short in ensuring a healthy and safe environment, particularly by the ANTI-SLAPP mechanism. This inadequacy can be attributed to several factors.

Firstly, contradictory legal regulations undermine environmental protection laws, notably Article 66 of Indonesia's Environmental Law, which fails to adequately shield the public and environmental activists from SLAPP actions during the passage of laws such as the Water Resources and Agricultural Cultivation Systems Law. Additionally, the approval of the Mineral and Coal Mining Law and the Omnibus Law disregarded public sentiments and aspirations.

Moreover, the Chief Justice's decision in Supreme Court Number 36/KMA/SK/II/2013 lacks clear guidelines for addressing SLAPP, and Supreme Court Regulation Number 1 of 2023 on Guidelines for Adjudicating Environmental Cases presents a weakness by being an institutional regulation that, while internally binding has extensive implications beyond the organization. Notably, the People's Consultative Assembly (PERMA), particularly in procedural guidelines during court examinations, still allows investigations and prosecutions against community and environmental activists advocating for a healthy environment.

To address these issues, this paper proposes substantive reconstruction through the reevaluation and reformulation of legislation. This involves creating synchronized laws aimed at preventing the misapplication of other laws to criminalize environmental activists, ensuring that legal instruments do not inadvertently support SLAPP actions against them in Indonesia. Cultural reconstruction is also emphasized, involving the harmonization of perceptions, beliefs, responses, concepts, and opinions among law enforcement officers and the public. This underscores the significance of protecting environmental activists defending the ecology. In this context, environmental crimes are deemed extraordinary due to their incredible impacts on human lives and the destruction of nature, the world, property, and hygiene.

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