STRICT LIABILITY: A SOLUTION TO HOLD PEATLAND DESTROYERS ACCOUNTABLE

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Abstract

In 2019, burned forests and peatlands reached 328 thousand hectares. The World Bank estimates that the total loss from this event reached 5.2 billion USD. At least, until September 2019, there were 900,000 residents who experienced respiratory health problems, and hundreds of schools in Indonesia, Malaysia, and Singapore had to stop teaching and learning activities due to the haze. One of the factors that ‘fertilize’ problems for the destruction of forests and peatlands that continue to grow is difficult to account for the perpetrator. This paper will attempt to answer and solve these problems with the concept of strict liability. This research will answer two problems, how can the concept of strict liability solve the issues for peatland law enforcement? And how does the application of strict liability rules compare with the Netherlands and United States? The government has pursued a moratorium policy. Starting from Presidential Instruction (Inpres) No. 10 the year 2011 and extended by Inpres No. 6 the year 2013 also Inpres No. 8 the year 2015. However, this policy is considered unsatisfactory because there are still forestry and plantation permits issued by the government and massive forest and land burning. Therefore, there needs a solution from a repressive approach to provide a deterrent effect on forest fire perpetrators. The strict liability concept means that the defendant will still be responsible even though his activities were lawful and carried out carefully. Furthermore, strict liability is an accountability that not only eliminates elements of subjective error but also objectively. Some countries have practiced strict liability, namely the Netherlands and the United States.

Keywords: Forest Fire, Law Enforcement, Moratorium, Peatland, Strict Liability
1. Introduction

The constitution guarantees the accommodation of a good and healthy environment for growth and development. This provision is guaranteed in Article 28H paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which reads, "Every person has the right to live in physical and mental well-being, to have a place to live, and to have a good and healthy living environment and the right to obtain health services" The right to live and have a good and healthy living environment can be juxtaposed with Article 25 of the Universal Declaration of Human Rights (UDHR) which regulates the right to an adequate standard of living for the health and well-being of both himself and his family. In addition, Article 12 paragraph (1) of the International Covenant on Economic, Social and Cultural Rights provides that States Parties recognize the right of everyone to enjoy the highest standard of physical and mental health. This means that the necessities of life, including life support for Indonesian citizens, must be fulfilled (Faiz 2015, 711).

However, in practice, the trend of pollution and environmental damage tends to increase, especially on peat soils. This is because peat has a unique character, which is that it can store embers to a certain depth in the form of wood scraps in the presence of oxygen in the pore space of the peat. (BRG, Indonesia, 2020). In 2019 there were 329,722 hectares of forest and burned land in Indonesia (BPS 2019, 288). This figure is almost twice the total area of forest and land burned in the previous two years (BPS 2019, 288). During the last ten years, the largest area of forest and land fires occurred in 2015, with a total area of 2,611,411.44 hectares (BPS 2019, 288). The forest and land fires that occurred in 2015 were man-made, with more than 100,000 fires being burned to prepare agricultural land. (Global Fire Data, 2020). Based on World Bank calculations, the losses for the country due to the fires in 2015 were estimated at IDR221 trillion (World Bank 2016).

To deal with forest and land fires, the government has taken preventive measures, namely the moratorium. The moratorium itself is a legal policy to postpone obligations for a specified time limit (Dictionary). Mortarium policy has existed since the era of President Susilo Bambang Yudhoyono's administration starting from Presidential Instruction No. 10/2011, was extended by Presidential Instruction No. 6/2013, then Jokowi continued the moratorium with Presidential Instruction No. 8/2015. However, during the period, the moratorium did not appear to be effective. First, the government still granted forestry and plantation permits through the revision of the moratorium area and the release of forest areas (Mongabay 2017). Second, there is still massive forest and land burning in the opening of oil palm plantations (Mongabay 2017). Reflecting on the moratorium policy, it seems that repressive law enforcement is not effective enough, so the author offers a solution, namely the concept of strict liability as a solution with a concept of repressive law enforcement.

Based on the background explanation above, the author will review from the side of legal enforcement effectiveness with the formulation of the question: How can the concept of strict liability solve the issues for peatland law enforcement? And how does the application of strict liability rules compare with the Netherlands and United States?

2. Literature Review

There are several reasons why it is important to carry out civil accountability in order to enforce environmental laws. First, to provide an opportunity for victims to compensate those who caused the losses. In short, civil suit/liability will provide a legal basis which obliges polluters, in the sense of those who caused pollution or loss, to pay compensation to victims (Wibisana 2017, 2). Second, lawsuit/accountability can provide an opportunity for
victims to request a court decision in the form of a court order. In literature, a court order
decision like this is referred to as a mandatory injunction, namely a court order requiring the
defendant to rectify the damage that has occurred.

Third, van Dam stated that civil accountability could also have a function as
recognition and satisfaction. In this case, civil liability serves to show legal recognition that
someone is guilty or responsible for a loss (Dam 2006, 302-303). Fourth, civil liability can
also function as a punishment for an injurious act. This is especially true if the detrimental
act was committed on purpose. The purpose of this punishment can be seen from the
punitive damages (Dam 2006, 303).

There are at least two theories or models used in the context of civil liability, namely
unlawful acts (perbuatan melawan hukum) or strict liability. Judging from its nature,
basicallly court decisions can be divided into declarative decisions, constitutive decisions, and
condemnatory decisions. (Hukumonline 2020) Declaratory or declarative decisions (declatoir
vonnis) are statements of judges that are contained in the decisions they render. The statement
is an explanation or determination of a right or title or status, and the statement is included in
the injunction or dictum of the decision. A constitutief verdict is a decision that ensures a
legal condition, either negating a legal condition or creating a new legal condition. Meanwhile, the condemnation verdict is a verdict which contains punishing one of the
parties in a case. A condemnatory decision is an inseparable part of a declarative or
constitutive rule (Harahap 2016, 877). The type of decision that is more often related to
criminal liability in the context of environmental law is the condemnatoir decision. In this
case, the court decided to sentence the defendant to pay compensation and/or to commit or
stop certain acts (Wibisana 2017, 8). This is in line with van Dam's view that civil liability
can only be effective if the law provides remedies, either in the form of damages or in the
form of injunction in the form of a court order to commit or stop certain acts (Dam 2006,
302-303). In the context of damages, it is known in various literature that there are several
types of compensation. The compensation includes nominal compensation, compensation for
punishment, actual compensation, and mixed compensation (Nugroho 2012, 568).

Meanwhile, in relation to the injunction, the Black's Law Dictionary defines this term
as an order from a court to a certain party (usually the defendant) to take certain actions or to
prevent or stop certain actions from being carried out. More clearly, the term "Injunction"
refers to a court order to order or prevent an action from being carried out (Garner, 855).
Thus, basically, the injunction is a court order, which instructs someone to do something or
prohibits someone from doing something. In another sense, the injunction is also a writ that
orders to do or not do something, including an order issued by a court of equity (Garner,
855)

3. Research Methods

The research method used in this paper is normative juridical legal research, or often
referred to as dogmatic legal research or theoretical legal research. This normative legal
research provides written emphasis on research on library law materials. In analyzing legal
materials, this study uses descriptive qualitative analysis, which describes existing data or
cases descriptively to draw conclusions from the data. Drawing conclusions using the
deductive method, namely by drawing conclusions from general questions to reach specific
conclusions. The legal materials used consist of primary and secondary legal materials.
Primary legal materials are binding legal materials such as basic norms or rules, while
secondary legal materials are legal materials that provide an explanation of primary legal
materials.
4. Results and Discussions

a. Concept of strict liability to solve the issues for peatland law enforcement

Strict liability is one of the bases of civil liability, which is different from Unlawful Acts. In strict liability, the defendant will still be responsible even though the activities are lawful and carried out carefully. Furthermore, strict liability is the responsibility that not only eliminates elements of subjective error but also objectively. Strict liability is a model of civil liability for losses arising from activities that pose a serious threat to the environment or abnormally dangerous activities.

Whereas a serious threat is the occurrence of environmental pollution and/or damage, the impact of which has the potential to be irreversible and/or environmental components that are very widely affected, such as human health, surface water, groundwater, soil, air, plants and animals (Chief Justice Decree No. 036/KMA.SK/II/2013). Conclusions can be drawn in the form of two elements of serious threats, which are a requirement for an activity called an abnormally dangerous activity. First, a serious threat is the potential to cause irreversible losses. Second, a serious threat can also be demonstrated by the presence of a potential multidimensional impact. On this basis, activities related to peat and forest fires can be classified as activities that pose a serious threat, so that they are subject to strict liability (Wibisana 2017). In the case of Minister of Environment v. PT Kalista Alam, the plaintiff often argues that forest or peatland fires have the potential to cause irreversible losses. In addition, forest or peatland fires can cause disruption to the lives of many people, for example, in the form of disruption of flights, which can also cause multidimensional impacts. It becomes clear that the problem of peat destruction can be subject to strict liability.

It must be emphasized that the concept of strict liability is not the same as res ipsa loquitur or inverse proof of the element of error. Goldberg and Zipursky concluded that the enforcement of res ipsa loquitur must meet the following requirements. First, an event that was detrimental to the plaintiff could only have occurred because of someone's carelessness; second, that the instrument of injury is completely under the control of the defendant. Third, the loss occurred without the active participation of the plaintiff himself, so it can be said that the plaintiff in the res ipsa loquitur is a passive plaintiff. (Goldberg and Zipursky 2010, 153-154)

Meanwhile, Harpwood expressed a slightly different opinion. Harpwood stated that the requirements to apply the res ipsa loquitur doctrine are: a) the loss is a loss that is difficult to prove the cause. In this case, the "unknown cause" element must be met; b) losses are deemed to only occur due to lack of prudence or because of negligence; c) the defendant must have complete control over the situation. This last element is an explanation as to why the defendant is assumed to have been proven to have committed negligence. (Vivienne Harpwood, 2000, 153-154). Meanwhile, Judge Phillips confirmed in John B. Wells v. Norfolk Southern Railway Company, et al. (2005) stated that the research report is not a rule about accountability, but about proof.

The opinions of the scholars above regarding the reverse proof show that the creditors’ resistance is not yet a strict liability because, basically, it is still a liability based on error. This conclusion is based on two reasons. First, strict liability does not subscribe to reverse evidence. In strict liability, the plaintiff still has to prove the existence of a loss and a causal relationship between the loss and the defendant's activities. Second, in strict liability, the defendant still has to be responsible even though he is able to prove that his activity/act was not an act against the law, whereas, in reverse evidence (especially in the case of a legal claim), the defendant will be free from responsibility if he is able to prove that his actions were not against the law.

So in strict liability, there only a necessity to prove loss and causality without the need
to prove error at all. What is meant by causality is whether there is a relationship between the potential perpetrator and the losses incurred, while what is meant by error is: (Rosa Agustina 2003, 36-37)

a. Violating the subjective rights of others. This subjective right is defined as both individual rights and as the right to property;

b. Contrary to the legal obligations of the perpetrator, whether the obligations are written in written law, or those formulated in unwritten law;

c. Contrary to the norms of decency, namely contrary to the norms recognized as legal norms.

This is emphasized in the basic concept of strict liability. The strict liability concept does not care that an entrepreneur has carried out his business prudently or has taken preventive measures in such a way and is in accordance with the law, if there is a loss and the causality, the business actor can be held accountable.

b. Comparison of the application of strict liability rules with other countries

i. Netherlands


From these cases, van Dumme concluded that by implementing the obligation to conduct research, the obligation to warn, the obligation to take action for loss prevention, and the obligation to consider the losses and their limitations, there had been a tacit shift from error (schuldbeginsel) to the principle of responsibility without error (risicobeginsel). This is what Van Dunne termed as pseudo-absolute responsibility (Dumme 1989, 11).

Furthermore, the tort professors in Europe who are members of the European Group on Tort Law, include the application of strict liability into the principles of European civil liability (Principles of European Tort Law). In these principles, strict liability is formulated in Article 5: 101 paragraph (1), which states that “[a] person who carries on abnormally dangerous activity is strictly liable for damage characteristic to the risk presented by the activity and the results from it.”. In fact, especially with regard to environmental issues, strict liability has also been adopted in the Environmental Liability Directive (ELD), Directive 2004/35 / CE. According to this Directive, those who carry out certain activities are responsible for bearing the costs of preventing and restoring environmental losses that occur from these activities. A person will be free from responsibility if losses are caused by an act of armed conflict, hostilities, civil war, insurrection, and exceptional natural disasters, which are inevitable, and cannot be inhibited (irresistible).

ii. United States

One of the forerunners of the uses of strict liability in the US can be considered in the court of Appeals of New York judgment in Hay v. Cohoes Co. (1849). In this case, the court stated that even though the defendant legally owned his property, and even though the defendant's activities were not illegal, the defendant was still responsible for the losses suffered by the plaintiff. As the reason for this decision, Judge Gardiner argues that property rights are not absolute rights because the use of these rights is limited by the rights of others. This decision is considered as the initial application of strict liability because the defendant is considered responsible for the losses suffered by the plaintiff, even though the defendant's activities are not illegal. In addition to explosives, judges also apply strict liability for losses
arising from mining, in this case, oil drilling.

Strict liability is increasingly being applied in the US to harm arising from dangerous activities (abnormal dangerous or ultra-hazardous activities) after the American Law Institutes published this liability rule in Restatements of Torts. According to Restatement (second) of Torts 519 (1977) subsection (1), everyone who engages in dangerous activities is responsible for the losses incurred, even though that person has taken very careful measures to prevent losses. Whether or not it is intentional or negligent is not the basis for strict liability. Accountability, in this case, arises because of the danger from an activity and not from the way the activity is carried out. Thus the condition for this accountability is the existence of dangerous activities with losses incurred.

Restatement (second) of torts expressly states that liability based on strict liability is limited to activities that are extremely dangerous (abnormally dangerous). To provide guidance to the court in determining what activities are subject to strict liability, the Restatement (second) of torts provides a testing tool to determine whether an activity is considered a very dangerous activity or not. Here are these factors (Restatement of Torts 520)

“In determining whether an activity is abnormally dangerous, the following factors are to be considered: (a) existence of a high degree of risk of some harm to the person, land, or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes.”

From these factors, the American Law Institute basically considers that the six factors/criteria are equally important and should be considered. However, the American Law Institute opens up the possibility for judges to emphasize certain factors, particularly those related to the large degree of danger from the activity, as well as the mismatch between the activity and the place where the activity is carried out. For this reason, the locality factor is the most determining factor in assessing whether an activity is a dangerous activity or not (Mabane 1979, 79).

The American Law Institute, as Jones follows, refers to “abnormally dangerous activities” in these cases (Jones 1992, 1710):

1. Manufacture, storage, transportation, and use of explosives, except in areas that are sparsely populated
2. The use of atomic energy, regardless of where the activity is carried out
3. Oil and hash drilling, except in areas where this activity is the main economic activity
4. Collecting large amounts of water in reservoirs located on hillside areas, either in the city center or in a mining area
5. Storage tanks for gas or gasoline or other flammable materials in populated areas
6. High voltage network?

As previously stated, after the issuance of this Restatement of Torts, many courts in the US began to use strict liability based on testing in this restatement of reports, one of which was in the case of Yommer v. McKenzie (Court of Appeals of Maryland, 1969), Judge Singley mentioned six factors that should be considered in the examination based on Restatement (Second) of Torts 520. However, Judge Singley saw the locality factor as a very determining factor in this test. Judge Singley stated that storing gasoline, in general, was not a dangerous activity, but because in this case the defendant's gasoline storage was carried out in large quantities and in a place near a residential area, the defendant's gasoline storage activities were not included in "common usage". It can be concluded that the locality factor and "common usage" in this case were the determining factors for the "abnormally dangerous test".

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In Ann Spano v. Perini Corporation, et al. (Court of Appeals of New York, 1969), Judge Fuld stated that in the case of the use of explosives, which is included in activities subject to strict liability, the relevant question is not whether the use of explosives is illegal activity or not, or whether the detonation has been carried out by observing the precautionary principle or not, but who must bear the risk of the explosion. From this statement, it can be seen that the element against the law of the defendant's activities is not an element that needs to be considered in strict liability.

Something similar happened, in Siegler v. Kuhlman (Supreme Court of Washington, 1972), Judge Hale stated that the reason for applying strict liability, in this case, was that the defendant's activity of transporting gasoline, which is a flammable and explosive material, in large quantities and at high speed on the road, was an activity that could pose a very big danger. The risk of emergence is even greater when the trailer is released, rolled over, and then spilled gasoline on the road. This spill can cause a violent explosion and fire just because a tiny spark can come from anything. Judge Hale further referred to the Restatement (Second) of Torts 520 (Draft 1964) and stated that the transportation of gasoline by the defendant was an extremely dangerous activity that met all the criteria for an "abnormally dangerous test". Even so, Judge Hale, in determining the applicability of strict liability, emphasized on the first three factors Restatement (Second) of Torts 520 (Draft 1964), which refers to the magnitude of the danger of an activity.

The formulation of civil liability for highly hazardous activities can be found not only in the Restatement (Second) of Torts, but also in several legislative products in the US, for example, the Clean Water Act (CWA), Oil Pollution Act (OPA), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This shows that the development of strict liability in the US occurs in two ways. First, the adoption of strict liability in Restatement (Second) of Torts 1977. The enforceability of this strict liability model really depends on whether the defendant's activities fall into the category of abnormally dangerous activities or not. In this case, the judge will determine whether an activity is subject to strict liability or not (Wibisana 2017, 87).

Second is the adoption through statutory regulations, as previously mentioned. Related to the second model, there are several characteristics of the use of strict liability in the second model. First, strict liability in this model is regulated more firmly, but on the one hand, it is limited in scope by this law (Wibisana 2017, 87). Then, there is a channeling of responsibility (channeling liability). The canalization of liability occurs when the law identifies a particular party and then determines that that party will be exclusively responsible for the losses incurred (Liu Jing 2013, 65). Third, there is a limitation on the amount of accountability (financial caps), which Faure has criticized because it is considered a serious interference to the rights of victims (Faure 1996, 94). Fourth, there is a mandatory financial responsibility.

5. Conclusions and Recommendations

Based on the article above, it can be concluded that strict liability can be effective as a form of civil liability for peat. Strict liability is one of the bases of civil liability, which is different from Unlawful Acts. In strict liability, the defendant will still be responsible even though the activities are lawful and carried out carefully. The application of strict liability in the case of peat can be seen in the case of the Minister of Environment v. PT Kalista Alam. One thing that is important to understand is that strict liability is not the same as resistance claim or inverse proof of the element of error.
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