Advances in Social Science, Education and Humanities Research, volume 590
Proceedings of the 2nd International Conference on Law Reform (INCLAR 2021)

Efforts to Protect *Adat's* Communities in the Settlement of Environmental Criminal Cases in Indonesia

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ABSTRACT
Indonesia as a country that has a strategic geographical location, not only has a charming natural beauty but also abundant natural resources. The abundance of Indonesia's natural resources is aimed as much as possible for the prosperity of the people, including indigenous peoples as part of the people who live in the territory of Indonesia. Environmental utilization efforts are vulnerable to conflict due to environmental damage caused. There needs to be a new effort in the effort to resolve environmental cases that can provide guarantees for the protection of *adat* community in Indonesia. Article 85 paragraph (1) of the EPM Code opens the possibility of resolving environmental cases through non-judicial (non-litigation), but in paragraph (2) precisely limiting criminal cases cannot be resolved through non-judicial. The formulation of the issue raised is about how the concept of resolving environmental cases is to guarantee the protection of the rights of indigenous peoples in Indonesia? This research uses legal research methods that are normative research methods. The source of primary legal material is obtained from related laws and regulations and the source of secondary legal material from related legal literature. This study obtained the results that as an effort to resolve environmental criminal cases as well as a means of achieving the values of justice, improving the impact of crime, and as an effort to protect the rights of *adat* community in Indonesia, it can be achieved through a restorative justice approach.
Keywords: *Indonesia; Criminal Settlement; Environment; Adat Community.*

1. INTRODUCTION

The abundance of Indonesia's natural resources must be aimed as much as possible for the prosperity of the people as mandated by the Indonesia Constitution Article 33 paragraph (2). On the other hand, the abundance of natural resources will actually be a threat to life, if its use is not done wisely which can cause damage to nature and the environment which also has a detrimental impact on the community.

The Indonesia Law Number 32 year 2009 concerning Environmental Protection and Management (EPM Code, in Indonesian is UU PPLH) is a follow-up to the mandate of the Indonesia Constitution article 28H, as well as a reaction to the decline in the quality of the environment that threatens the lives of people and other living things. The EPM Code in principle has been in accordance with the development of International conventions ratified by Indonesia, although it still has weaknesses in terms of criminal provisions which are imbued with retributive purposes so that it has implications for the lack of protection and restoration of community rights[1], no exception for *adat* community (indigenous peoples). Article 85 paragraph (2) of the EPM Code which emphasizes that criminal cases cannot be resolved outside the judiciary, can actually limit the settlement of environmental criminal cases outside the judicial route. Whereas the settlement of cases outside the judicial route is a space to obtain (what is commonly referred to as) restorative justice, which is identical to the principles of deliberation, consensus, kinship which are the hallmarks of the life of *adat* community (indigenous peoples) in Indonesia [2].

The existence of *adat* community as part of Indonesian society has been recognized in various libraries, where juridically recognized in Articles 18B paragraphs (2) and 28I paragraphs (3) of the Indonesia Constitution as well as in various other laws and regulations. Not a few violations of the law in the environmental field that harm the interests of *adat* community, thus placing them as the party (victim) most affected. The rights of *adat* community to a good, clean and healthy environment will be ignored as a result of a violation of the law in the environmental field. Given the existence of *adat* community in Indonesia, environmental protection efforts need to pay attention to the interests of *adat* community as part of Indonesian citizens.

Considering the background, there needs to be the idea of solving environmental criminal cases by prioritizing the protection and return of *adat* community

rights, one of which is through efforts with a *restorative justice* approach. Therefore, researchers raised two problems in this study, namely first, how to resolve environmental cases according to Indonesia's positive law, and second, how is the concept of solving environmental cases as a guarantee of protection of the rights of *adat* community in Indonesia?

2. METHOD

The type of legal research used in research is doctrinal legal research or dogmatic, also called normative research methods, or literature law research. The focus of its study lies in the application of rules or norms in positive law [3]. The focus of the research to be studied on this study is the EPM Code, as well as more customary provisions in unwritten form. The approach used is the statutory approach by placing the laws and regulations as the object. In addition to the legislative approach, this research also uses a conceptual approach that is a legal concept approach to provide new ideas offered to answer existing legal problems.

3. RESULT AND DISCUSSION

I. SETTLEMENT OF ENVIRONMENTAL CASES ACCORDING TO INDONESIA'S POSITIVE LAW

The EPM Code defines the environment as "*kesatuan ruang dengan semua benda, daya, keadaan, dan makhluk hidup, termasuk manusia dan perilakunya, yang mempengaruhi alam itu sendiri, kelangsungan perikehidupan, dan kesejahteraan manusia serta makhluk hidup lain*" (the unity of space with all objects, forces, circumstances, and living things, including humans and their behavior, that affect nature itself, the survival of life, and the well-being of humans and other living things). The environment is a holistic concept that exists on this Earth in the form, structure, and interactive function of all beings, influencing and determining each other in a life (biosphere).

The EPM Code Article 1 point 14 and point 16 distinguish environmental problems into two forms: first, environmental pollution; and secondly, environmental destruction. Regarding criminal provisions, it is regulated in Chapter XV starting from Article 97 to Article 119, and what attracts attention is the provision of Article 97 which reads:: "*Tindak pidana dalam undang-undang ini merupakan kejahatan*" (The criminal act in this code constitutes a crime). The provision is based on the development of environmental law which refers to the theory of rights influenced by ethics or moral philosophy, which views pollution and destruction of the environment as evils. Based on that view, pollution and environmental destruction must be sanctioned by the community and the state.[1]

The environmental law enforcement process according to the EPM Code can be carried out through several law enforcement efforts including: state administrative court lawsuits, civil lawsuits (*perdata*), and criminal legal processes. The General Explanation section of the EPM Code emphasizes the principle of subsidiarity to the three efforts to settle environmental cases, which places the settlement of criminal cases as the *ultimum remidium* (last option) in law enforcement efforts. The principle of *ultimum remidium* for the settlement of environmental criminal cases is specifically for certain criminal acts, including: violations of waste water quality standards, emissions, and interferences. [1]

The use of the *ultimum remidium* principle in the EPM Code which is intended only for certain environmental crimes, is different from the *ultimum remidium* principle contained in the previous law (ie The Indonesia Law Number 23 year 1997). According to Law 23 year 1997 criminal law is used in the settlement of environmental cases when the process or other legal sanctions (administrative sanctions, civil sanctions, or alternative dispute resolution out of court) are not effective in solving an environmental case. Criminal law can also be used if the level culpability of the perpetrator is relatively severe, or the negative consequences / impacts are relatively large and cause unrest for the community.

The shift in the principle of *ultimum remidium* in the EPM Code with The Indonesia Law Number 23 year 1997, has implications in the form of increasingly narrow opportunities for resolving environmental cases outside court procedures, or limited settlement of environmental criminal cases through a restorative justice approach. Even outside of the three specific crimes in the environmental field, the criminal approach actually becomes the *premum remidium* (the earliest option, or the most important choice) which can provide opportunities for the interests of the victims to be neglected (which in this case are the interests of the *adat* community).

The three law enforcement instruments have the same legal issue, namely regarding violations in the environmental field, but with different objects, namely:

1) Enforcement of administrative law relating to the object of abuse of permits;
2) Enforcement of civil law (*perdata* law), relating to the object of an acts against the law;
3) Enforcement of criminal law, relating to the object of a crime that has a broad impact.

The three instruments for solving environmental cases, each of them have weaknesses, especially in relation to corporations as perpetrators of crime.

Administrative law enforcement that has sanctions in the form of revocation of permits, suspension of permits, and government coercion (*bestuursdwang*). Enforcement of administrative law in environmental issues involves the participation of the community in filing lawsuits against state administrative decisions (can be in the form of environmental permits). Public lawsuits over state administrative decisions are an effort by the community to influence government policies if they cause harm to the community.[4]

As for the settlement of environmental cases through civil law procedures, recognize the principle of *actori incumbit probatio* in Article 163 of the Indonesia civil procedural law. The *actori incumbit probatio* principle actually weakens the position of the plaintiff/victim (the victim who suffers losses due to environmental violations), because the community (as the plaintiff/victim) is asked to prove the form of the violation and its relation to the loss received. The existence of such a burden of proof requires technology as well as good human resources, so that it has implications for the complexity and high cost of solving environmental cases.

The weakness of criminal instruments nestled in the retributive nuances that the Indonesian criminal law system still has today. The retributive nuance in criminal law is able to negate victims who are outside the justice system, thus placing the victim only as a passive participant. The lack of an active role for the victim will result in a less than optimal goal of protecting the community through criminal law instruments[1]. The retributive nuance is increasingly felt by the existence of Article 85 paragraph (2) of the EPM Code which contains provisions that environmental crimes cannot be resolved outside the court, which further closes the possibility of peace between the perpetrator and the victim.

Basically, the EPM Code currently in force differs from the previous law (The Indonesia Law Number 23 year 1997), one of which is the application of the *ultimum remidium* principle. This principle only applies to certain criminal acts, so it can be interpreted that apart from certain crimes, the principle of *premum remidium* applies. There is no harm in using this interpretation *a contrario*, even though the EPM Code itself does not explicitly explain the principle of premium remidium.

II. SETTLEMENT ENVIRONMENTAL CASES AS A GUARANTEE OF PROTECTION THE RIGHTS OF ADAT'S COMMUNITY IN INDONESIA

The ideals of Pancasila are to realize Indonesia as a country with social justice for all Indonesian people, to be able to create national development goals in the form of social defense and social welfare. The communal character of Indonesian society (including *Adat*'s community), opens up opportunities for the use of a "*musyawarah mufakat*" (deliberation and consensus) approach to resolve a legal problem (legal conflict/dispute), as reflected in Pancasila principle, the 4th precept. Practical implementation in the settlement of a criminal law case is through a restorative justice approach through alternative dispute resolution (ADR), it is possible to apply it to environmental criminal cases.

The provisions of Article 85 paragraph (2) of the EPM Code which reads: "*Penyelesaian sengketa di luar pengadilan tidak berlaku terhadap tindak pidana lingkungan hidup sebagaimana diatur dalam Undang-Undang ini*" (Dispute settlement out of court does not apply to environmental crimes as regulated in this Code), in fact closes the space for the settlement of environmental criminal cases outside the court. If the provisions of Article 85 paragraph (2) do not exist, then it opens up opportunities for efforts to resolve environmental disputes/criminal cases through the mechanism of merging civil and criminal case settlements outside the courts as the idea of Yaris Adhial Fajrin in his previous writing[1].

Restorative justice is the value of justice that emphasizes the cooperative process by all litigants, for the repair of damage or loss caused by criminal acts. Restorative justice can also be interpreted as a restoration of relations and redemption of culpability made by perpetrators of crimes against victims of criminal acts through peace efforts outside the court so that legal problems that arise can be resolved properly by reaching an agreement between the parties [5].

The United Nations in the Report of the Twelfth United Congress on Crime Prevention and Criminal Justice, in Brazil 12-19 April 2010, recommended to all member states to evaluate and implement criminal justice policy reforms, by developing comprehensive strategies, and reforms by reducing the use of prison sanctions and increasing the use of alternative punishments other than imprisonment, including restorative justice programs [5]. Until now, Indonesia does not have rules (at the level of Code) that specifically regulates Restorative Justice, but in terms of the value of the life of the Indonesian people, it has great potential to implement restorative justice. As Braithwaite argues: "Indonesiais a nation with wonderful resources of intracultural restorative justice. Traditions of musayawarah (musyawarah) decision by friendly cooperation and deliberation-traverse the archipelago. Adat law at the same time allows for diversity to the point of local criminal laws being written to complement universal national laws"[2]. Braithwaite's view above provides an overview of the existence of Indonesian customary law (and is also recognized by the international community) so that the restorative justice approach will be easier to apply because it already exists in the legal culture of the Indonesian people.

Adat law communities are groups of individuals who are bound by the rules of customary law as citizens of a legal alliance based on the same place of residence or because of the basis of descent. Ter Haar describes *adat* law communities as an organized group and has a permanent nature with an independent government and control over material and immaterial objects[6]. The definition of *Adat* law communities as stated in the 1st *Kongres Masyarakat Adat Nusantara* (The 1st Adat's Communities Congress of the Nusantara) in March 1999, defines adat community as a group of people who have ancestral origins (from generation to generation), in a certain geographical area, and have ideological, value, political, economic, and social systems. cultural, social and territorial independence [7].

Recognition of the existence of indigenous peoples in Indonesia is stated in Article 18B paragraph (2) and Article 28I paragraph (3) of the Indonesian Constitution. This recognition is in line with the recognition of the rights of indigenous peoples by the United Nations

Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007, which includes the rights[8]:

1) Free and equal to all community groups and other citizens;
2) Participate in the decision-making process with regard to matters that will have an impact on the rights of indigenous peoples;
3) The right to the lands of the territories and all the resources they have;
4) Obtain compensation, in the form of proper and fair restitution or compensation for the land, territory and resources they traditionally own or vice versa;
5) Restoration and protection of the environment and productive capacity of land, territory and all natural resources.

Restorative justice as part of the process of resolving environmental cases as well as protecting the rights of indigenous peoples in Indonesia, there are several things that can be done: *First*, the involvement of Adat's community (indigenous peoples) participation in the settlement of environmental criminal cases, is not only involved in the preparation of legal products. The support and participation of Adat's community have been proven by the number of regional regulations that involve Adat's community in their discussions, namely in the range of the year 2015 to 2016 there are around 21 districts/cities and 3 provinces in Indonesia [6].

Second, returning cases of environmental violations to indigenous peoples as entities who are more aware of the rights that have been violated. The recognition of the Indonesian Constitution on the existence of the Adat's community philosophically implies the recognition of what they have, including the ownership of Adat's land rights and resources that exist and, are managed by these Adat's communities.

Third, providing compensation both materially in the form of restitution and compensation, as well as immaterially in the form of restoration of natural resources as a guarantee of legal protection for the rights of the Adat's community who are distractions due to a violation of criminal law in the environmental field.

4. CONCLUSSION

That the settlement of environmental cases in a positive legal view in Indonesia based on the EPM Code contains a provision that criminal acts in environmental cases can only be resolved through court. That the concept of settlement of environmental cases as a guarantee of the protection of the rights of indigenous peoples in Indonesia should use the concept of restorative justice.

REFERNCES

[1] A. F. Triwijaya, Y. A. Fajrin, and C. M. Nurrahma, "Dual Mediation : Penyelesaian Perkara Lingkungan Hidup yang Melibatkan Korporasi Sebagai Pelaku Melalui Pendekatan Restorative Justice," *J. Magister Huk. Udayana (Udayana Master Law Journal)*, vol. 9, no. 2, pp. 401–428, Jul. 2020.

[2] G. Acciaioli, "Finding Tools to Limit Sectarian Violence in Indonesia: The Relevance of Restorative Justice," *Am. J. Econ. Sociol.*, vol. 76, no. 5, pp. 1219–1255, 2017.

[3] P. M. Hadjon and T. S. Djamiati, *Argumentasi Hukum*. Yogyakarta: Gadjah Mada University Press, 2005.

[4] S. Sodikin, "Penegakan Hukum Lingkungan menurut Undang-Undang Nomor 32 Tahun 2009 tentang Perlindungan dan Pengelolaan Lingkungan," *Kanun J. Ilmu Huk.*, vol. 12, no. 3, pp. 543–563, Dec. 2010.

[5] K. Prayitno, "Restorative Justice Untuk Peradilan di Indonesia (Perspektif Yuridis Filosofis dalam Penegakan Hukum In Concreto)," *J. Din. Huk.*, vol. 12, no. 3, pp. 407–420, 2012.

[6] H. Nurcholis, "Undang-Undang Nomor 6 Tahun 2014 Tentang Desa Dilihat Dari Pasal 18 B Ayat 2 Uud 1945," *Masal. Huk.*, vol. 43, no. 1, pp. 149–159, 2014.

[7] M. Syamsudin, "Beban Masyarakat Adat Menghadapi Hukum Negara," *J. Huk. IUS QUIA IUSTUM*, vol. 15, no. 3, pp. 338–351, 2008.

[8] ELSAM, "United Nations Declaration On The Rights Of Indigenous Peoples (UNDRIP)," *ELSAM*, 2014. [Online]. Available: http://referensi.elsam.or.id/wp-content/uploads/2014/10/Deklarasi-PBB-Tentang-Hak-hak-Masyarakat-Adat.pdf. [Accessed: 21-Sep-2021].