Bankruptcy Application by Prosecutor on The Basis of Public Interest as Result of Environmental Destruction Sanction

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Abstract. Environment has a crucial role for living things. Law No.32 of 2009 has ruled various sanctions toward the environmental pollution. Yet, its effectiveness still remains questionable. This paper analyses the applicable sanctions for environment destructions in Indonesia and the possibility for the prosecutor to file for bankruptcy as consequence of damaging the environment to restore back the environment. In order to answer the questions, the writer used normative research method. The results found that for individual, the punishment for polluting the environment could be in the form of imprisonment and fine. Meanwhile for corporations, there are two possibility whether to punish the corporations itself in the form of fine or punish its representatives in the form of imprisonment and fine. For individual and representative of the corporations, the fine can be substituted into confinement. These provisions will obstruct the aim to restore back the damaged environment. As alternative, the authority given to prosecutors to file for bankruptcy on the basis of public trust can be utilized. The wide interpretation of public trust in Bankruptcy Law left possibility for the environmental pollution and destruction to be classified as one as it has massive impact toward the society and nation. This alternative will contribute more to the restoration and reparation of damaged environment should the payment is received instead of imprison or confine the convicts.
Keywords: Environmental Destruction, Sanctions, Bankruptcy

1 Introduction

Environment has a crucial role for living things.[1] Article 67 of Law No.32 of 2009 concerning Protection and Management of Environment emphasized that everyone has the obligation to maintain the sustainability of environment. Nevertheless, activities that cause damage and pollution towards the environment are still taken place. Forest and land deforestation, as well as other environmental damage has decreased natural productivity and obstruct environmental sustainability.[2] Based on the data from Ministry of Environment and Forestry of the Republic of Indonesia, during January-December 2022, there were 204,894 hectares of forest and land that were caught on fire. According to report from Greenpeace, forest and land fires

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are closely related to palm oil companies. Excessive exploitation and expansion have caused deforestation and forest degradation which triggers the use of fire to clear land.

Exploitation of natural resources and environment destructions have been conducted by individuals as well as corporations.[4] Law No.32 of 2009 has provided some legal consequences for environmental destruction and pollution in the form of administrative, civil, or criminal sanctions.[5] Nevertheless, its effectiveness still remain questionable. For instance, in 2019 Greenpeace reported that the compensation of 18.9 Trillion related to cases of fire and damage to forests were failed to be paid by several companies. This failure will certainly affect the effort to restore and repair the environment and damages that have been caused.

This paper will analyse the applicable sanctions for environment destructions in Indonesia and the possibility for the prosecutor to file for bankruptcy as consequence of damaging the environment to restore back the environment. In order to answer the questions, the writer used normative research method by analysing laws, regulations and other sources related to the topic.

2 Discussions

2.1 Sanctions for Environment Destruction and Pollution

The enforcement to protect the environment could be in the form of prevention or repressive.[4] Rio Declaration 1992 within principle 16 point up that "National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."

This principle is known as polluter pay principle (PPP). In accordance with this idea, it is imperative to hold the polluter accountable and ensure they assume financial responsibility for the incurred damages.[6] The manifestation of this principle is evident in Indonesia, as articulated in Article 87, paragraph 1, which mandates that individuals responsible for a business or activity engaging in an illicit act resulting in environmental pollution and subsequent harm to individuals or the environment are obligated to provide compensation and/or undertake specific remedial measures. This principle is also shown in court decision No.65/Pdt/2017/PT.JMB which sentenced the environment polluter compensation in the amount of 590.5 trillion rupiah as a result of a 1,500-hectare land fire.

Referring to Law No.32 of 2009 if the perpetrators are individual, the criminal sanctions are in the form of imprisonment and fine. In accordance with Article 116, paragraph 1, it has been determined that in cases where environmental pollution is caused by a corporate entity, the court has the authority to impose two potential sanctions. These sanctions involve the court issuing a sentence against the corporation itself, as well as against the individual responsible for issuing the directive to commit the offence or the individual assuming the role of the crime's activity leader.

Furthermore, the Supreme Court Rules No.13 of 2016 concerning the Procedure of Handling Criminal Cases Conducted by Corporation under Article 25 paragraph 1 ruled that the criminal sanctions for corporation consist of main penalty and additional penalty. Article 25 paragraph 2 further elaborate that the main penalty for corporation is in the form of fine. Article 28 paragraph 3 emphasized that should the convicted corporation do not pay the fine, then the prosecutor will confiscate its assets and conduct auctions and use the money to pay the fine.[8] It is also in line with Prosecutor Rule No.7 of 2020 pointing out that confiscation of

assets will be used as compensation of fine penalty or other additional penalties resulted from court decision with permanent legal force.

On the other hand, article 29 paragraph 3 elaborated that if the fine penalty is sentenced to the board of directors or management of the corporation, then should they not pay the fine, the boards will be confined as replacement counted proportionally with the sentenced fine. This provision is consistent with Article 30 paragraph 2 of the criminal code that gave an alternative, should the fine penalty is not paid, it will be replaced by confinement.[9] Confinement as substitution of fine is limited to maximum six months under article 30 paragraph (3) of criminal code.

Article 119 Law No.32 of 2009 stated that toward convicted corporation in environment pollution, additional penalties could be given, such as: confiscation of the profit achieved from the crime, closure of the entire or part of the business venue, reparation of the impact of the crime, obligation to fulfil its obligation without receiving rights and or placing the corporation into guardianship for maximum three years. These additional penalties are aiming to maintain and protect the environment sustainability.[4] Moreover, the law no.32 of 2009 and the existing regulations have not provided comprehensive explanations on how to execute the additional penalties if they are not fulfilled voluntarily by the perpetrators. This lack of regulations could cause the initial purpose of establishing these additional penalties not to be achieved.

For comparison and the purpose of analysing, here are three samples of court decisions on the matter of environmental destruction. The first one is Court Decision No.526/Pid.Sus-LH/2017/Pn.Trg found PT.Indominco Mandiri guilty of crime of environmental protection and management of dumping waste without permission. For that crime PT.Indominco Mandiri was sentenced 2 billion fine and if the corporation fail to pay the fine within one month, its assets will be confiscated and auctioned to pay those fines. The second one is Court Decision No.39/Pid.Sus-LH/2018/Pn.Sdw found the perpetrators guilty of crime transporting forest product without proper documents and sentenced with two years and six months imprisonment and one trillion rupiah with provision if the fine is not paid, it will be substitute with three months of confinement. The third one is Court Decision No.240/Pid.Sus-LH/ 2016/PN.Pwk found PT Indo Bharat Rayon represented by Sibnath Agarwalla guilty of crime producing B3 waste without proper management as required by law. For that crime, the defendant was sentenced with one year and six months imprisonment as well as one and half billion rupiah fine with provision if the fine is not paid, it will be substituted with six months confinement. On top of that, the defendant was also sentenced with additional penalties such as clean up the B3 waste that they created and restored the environment as before.

The first case punished the corporation. Consequently, there is no confinement substitution, instead the convict's assets will be confiscated and auctioned should the fine is not paid in order to receive payment. The second case punishing individual with fine and confinement as substitution. It becomes an issue. Because such penalty would not have any contribution towards the environment. So does the third case. It punished the representative of corporations with provision that should the fine is not paid it will be replaced with confinement.

Fine penalty that could be replaced with confinement considered to be not effective because the aim of the penalties itself might not be achieved, especially in the case of environment pollution. Penalties in the form of imprisonment and confinement might only be relevant if the victims are persons.[10] However, should the victim be environment, it becomes irrelevant as it will only give the repressive impact and will not restore the environment.

The impacts of environment pollution and destruction are massive and impacts many interests. It requires reparation and actions to recover what the environment have lost. Enforcement of environmental law is not only to punish the perpetrators but what is more important is the rehabilitation and the recovery of the damage. Imprisonment as sentence of environment de-

struction crime has no relevance with conserving the environment.[10] In addition, by simply confine the perpetrator who fail to pay the fine will not repair any lose and make the environment condition any better. Recovery of damaged environment is crucial as part of the legal liability of those who caused environment destruction and pollution.[12] Therefore, instead of replacing the fine with confinement, the options to apply bankruptcy for the perpetrator will offer better possible results and could actually give impacts towards the reparation of the damage environment.

Other issue arose when the assets of the convicted corporation have been used as collateral for debtor's debt. This condition will become the obstacle faced by the prosecutor in executing these assets. The mechanism of bankruptcy can be used as an alternative to receive payment from the convicted.

2.2 Prosecutor's Authority to File for Bankruptcy

Attorney is known for its role as prosecutors in criminal cases. Besides, attorney also has roles as state attorney. It is regulated under Rule of General Attorney of Republic of Indonesia No. Per-018/A/J.A/07/2014 concerning Standard Operational Procedures for Junior Attorney General for Civil and State Administrative Affairs.

According to Law No.32 of 2004, which pertains to Bankruptcy and Suspension of Obligation of Debt Payment, the option to initiate bankruptcy proceedings is available to both creditors and debtors. Furthermore, according to Article 2, Paragraph 2, the prosecutor is permitted to initiate bankruptcy proceedings in cases that are deemed to be in the public interest. Public interest, as elucidated in this context, pertains to the collective interest of a nation or state and its general populace. This encompasses situations such as a debtor absconding or evading their obligations, a debtor misappropriating a portion of their assets, a debtor owing debts to State-Owned Enterprises or other entities that gather funds from the public, a debtor incurring debt through public fundraising activities, a debtor displaying a lack of good faith or cooperation in address.

The authority of prosecutors to file for bankruptcy is also ruled within Government Regulation No.17 of 2000 concerning Bankruptcy Application for Public Interest. It is regulated that prosecutor could file for bankruptcy for the sake of public interest if the debtor has two or more creditors and do not pay at least one of the debts that has been fall due and collectable and there are no other parties who file for the bankruptcy.

Within its explanation, this government regulation also provides further explanations on the matter related to public interest. The document outlined various circumstances that may give rise to public interest, such as instances where a debtor absconds or evades responsibility, misappropriates a portion of their assets, owes debts to State-Owned Enterprises or other entities that gather funds from the public, possesses debts stemming from public fundraising activities, or demonstrates a lack of good faith or cooperation in addressing overdue debts.

These conditions are identical with the public interest explanation within Law No.32 of 2004. Nevertheless, the last part still creates unclarity as it said any other things that the prosecutors considered as public interest. In general, there are no standard regarding the public interest which fall under the authority of the attorney in filing bankruptcy applications.[14] It is open for interpretation. Consequently, it can have extended and broad meanings.[15] In relation to the previous explanations, the environment destruction and pollution could be classified as public interest as it affected society, the state, and many aspects of life. Therefore, on the basis of breadth interpretation of matters that prosecutors considered as public interest, it opens a

possibility for the prosecutors to file for bankruptcy for those perpetrators of environment destruction and pollution who fail to pay the fine penalty.

Prosecutors have the authority to act on behalf of public interest in accordance to the regulations mandated it, including filing for bankruptcy. In order to assess whether the measurement to be categorized as public interest will be left for the judges of the commercial court to decide.[16] It is in line with Law No.2 of 1986 concerning General Court within article 57 that gives the authority to the head of the court to decide whether a case is related to public interest or not.[14]

Prosecutors have exercised authorities given to them to file for bankruptcy in couple of cases. Yet, the cases are still considered insignificant[16] compare to other bankruptcy applications filed by creditors. Some of them are case no. 02/Pailit/2005/PN.Niaga/Mdn and case no.23/Pdt/Sus/2013/PN.Niaga/Jkt.Pst. The first of was file by Lubuk Pakam District Attorney. The debtor on this case was PT. Aneka Surya Agung. Prosecutor acted on behalf of public interest as there are 420 employee of debtor who have not been paid. The latter was filed by Cibadak District Attorney. The debtor was PT.Qurnia Subur Alam Raya and Ramli Araby as the director. The reason behind the bankruptcy application was that the debtors had debt to 6,480 people resulted from public investment. The courts declared the debtors bankrupt for both cases. Upon analysing the aforementioned examples in light of the provisions outlined in Law No.32 of 2004 and Government Regulation No.17 of 2000, it becomes apparent that despite both cases including bankruptcy filings in the name of public interest, they exhibit distinct circumstances with regards to the utilisation of public interest terminologies.

2.3 Environment Destruction as Public Interest

The provision of a favourable and sustainable environment is an inherent entitlement bestowed upon each Indonesian individual, as stipulated in Article 28H of the 1945 Constitution of the Republic of Indonesia. The aforementioned event served as the foundation for the enactment of Law No.32 of 2009, which pertains to the safeguarding and administration of the environment. The aforementioned legislation provides a comprehensive definition of the environment as a geographical entity encompassing many elements such as objects, power dynamics, circumstances, and living organisms. This definition includes individuals and their actions, which have an impact on nature, the perpetuation of life, and the well-being of both humans and other living beings. The concept of prioritising human beings for sustainable development is also emphasised in the Rio Declaration on Environment and Development of 1992, which is part of the international legal framework. Principle 1 of this declaration underscores the significance of human beings in the pursuit of sustainable development. Individuals has the entitlement to have a fruitful and salubrious existence that is harmoniously aligned with the natural surroundings. These definitions serve to validate the substantial role and functions of the environment.

Environmental pollution refers to the alteration of the natural state of the environment as a result of human actions or natural phenomena. This alteration leads to a decline in the overall quality of the environment, hence impeding its normal functioning.[1], [17] According to Law No.32 of 2009, environmental pollution is characterised as the introduction or incorporation of live organisms, substances, energy, or other constituents into the environment by human activities, resulting in the surpassing of predetermined environmental quality benchmarks. The improper disposal of waste, especially hazardous waste, is a significant threat to environmental integrity since it has the ability to degrade the overall quality of the environment and cause harm to ecosystems.[1]

The crimes of environment destruction have caused severe injuries to the whole country and affected many parties and aspects. The damages do not only have impacts on the present time but way further to the future.[18] Environment destruction have numerous direct impacts towards the public such as financial lose, unemployment, health problems such as infertility, disability, many diseases and even loss of life.[14] Furthermore, longer impacts of environment destruction will cause damages to the environment, temporary and permanent damage.[18] Consequently, matters related to environment destruction should be classified as public interest as it is mandated in our constitution and the effects of its degradation affecting many aspects of life. This opens a possibility for the Prosecutor to file for bankruptcy on the basis of public interest as result of environmental destruction sanction that can be used as an alternative to gain payment from the convicts particularly individual and management of corporations.

3 Conclusions

It can be concluded that prosecutors have the authority to file for bankruptcy based on public interest. It is ruled within Article 2 paragraph 2 Law No.37 of 2004. Its explanations as well as Government Regulation No.17 of 2000 left a wide interpretation on what is considered as public interest. Referring to the mandate of 1945 Constitutions and Law No.32 of 2009, environment has vital role on human life. Environmental destruction and pollution could cause severe damage towards the environment itself, people's health and have social and economic impacts. The environmental destruction does not only cause direct impacts but also long impacts for the future generations. Therefore, it should be classified as public interest and be the basis for the prosecutor to file for bankruptcy as long as the main requirements have been fulfilled which are debtor has two or more creditors and do not pay at least one of the debts that has been fall due and collectable. In addition, there are no other parties who file for the bankruptcy.

In relation to the punishment of damaging and polluting the environment, bankruptcy can be an alternative solution for those convicts who fail to pay the fine. Particularly, the convicted individuals who commit environmental pollution and corporation's management or person in charge who are convicted over environmental pollution exercised by corporations. Imprisonment and or confinement as substitution of fine will contribute no use for repairing the damaged environment. Thus, should all the requirements be fulfilled, the prosecutors could file for bankruptcy instead. It provides better opportunity to achieve optimization of restoring the environment which are the main goal. Empower the functions and roles of prosecutor as state law enforcement in order to protect public interest is essential.

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