

Strict Liability Principle In Environmental Legal System

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Abstract

Implementation of Strict Liability Principle in environmental legal system not based on the proving aspect of the fault form factor of negligence or misconduct of intent. In addition to the legal approach, risk management considerations also underlie the problems and or environmental risks posed by various factors that is difficult and expensive to prove. The MT Natuna Sea case on 3 October 2000 spilled 40,000 tons of crude oil or 60% of the total load of 523,088 barrels, to date Indonesia has not received any compensation. The purpose of this paper is to understand the application of Strict Liability Principle in the environmental legal system. The method used is normative legal research conducted by basing to the materials of the library or secondary data. Comparative legal approach is used to find matters relating to the problem of sea oil pollution compensation claims. The results show that Indonesia as a country that has ratified CLC 1969/1992 has applied provisions on insurance obligations. Neither into the provisions of legislation nor in practice in the field. However, the application into the legislation still requires improvements, namely with compensation claims for compensation and environmental restoration costs.

Keywords: insurance liability, environment, tanker, protection, marine environment.

I. Introduction

Reform era that many want to realize the condition of legal certainty, social justice, climate and democratic atmosphere, the upholding of human rights, as well as the benefits of National Development in public life, is actually a strategic opportunity and potential to realize the implementation of the Strict Liability Principle effectively and optimally in the legal arrangement and environmental management by utilizing the role, ability and support of the people's voice.

The effectiveness phenomenon of National Environmental Law is factually still underestimated, this situation gives a bad image for legal certainty, social justice, and the benefits of National Development, and even in chronic circumstances will form unexpected conditions such as decreasing the authority of the government in implementing the various norms and requirements specified in the law of the Environment, the decrease of legal obedience and order in the life of society which in the lowest point will form a dangerous anomic atmosphere for the sustainability of development and the condition of national resilience; the waning of the power of law that can lead to a sense of community dissatisfaction and disobedience to the law imposed; as well as creating a bad stigma for the national economy that can reduce the attractiveness of foreign investment and the formation of a pessimistic feeling of the national economic actors in the interaction in the arena of competition on the media global market economy.

Taking into account these conditions and considering the nature of Environmental Legal System is very specific in practice law, it is necessary to arouse the willingness and ability to optimize and dynamize the legal effectiveness of every juridical aspect which is formalized in the Environmental Legal System, so that the norms and or environmental requirements applied in the Environmental Legal System can be used as self regulation in the attitude and behavior of citizens and or become self motivation for the development process in improving the welfare of society.

The above efforts should also be made in realizing the implementation of the Strict Liability Principle as a legal aspect of the Environmental Legal System by using various tools contained in various aspects of community life.

To optimize and dynamicize the application of the legal aspects of the Strict Liability Principle in legal arrangement and environmental management it is necessary to conduct research and assessment on various forms and/or legal forms (legal control) covering the place and or its legal form, the content of rules and/or techniques of legal application (legal content), as well as legal conduct which reflects the legal ideology. Based

on the description, then the problem to be discussed in this paper is how is the application of international provisions on the Strict Liability Principle in the environmental legal system?

II. Discussion

The purpose of strict liability, i.e. the element of fault does not need to be proven by the plaintiff as a basis for payment of compensation, this provision is a *lex specialis* in the formality of a lawsuit against unlawful conduct in general.

The Strict Liability Principle in Legal Studies through the approach of legal culture as a legal aspect in Environmental Law namely:

1. The Strict Liability Principle which has been agreed as a legal aspect in the Environmental Legal System must be implemented according to the values, culture, spirit and life pattern of the national community;
2. The Strict Liability Principle is a legal alternative that was originally enacted to find solutions to problem solving and/or environmental disputes, as well as providing attention or advocacy in legal compliance and environmental management that require immediate and complex handling;
3. The application of the Strict Liability Principle as a legal aspect in the Environmental Legal System is implemented by taking into account various success factors, including the following:
 - a. This legal aspect should be designed as a demand requirement in production operational activities;
 - b. Implementation The legal aspects must be supported by the readiness of legal institutions and funding agencies;
 - c. The application of legal aspect is done with the principle of partnership, agreement and togetherness between parties.
 - d. The meaning of Strict Liability is not connoted as a sanction or burden by its legal subjects, but rather defined as self regulation for the activity of the object of its subject activities of law; and
 - e. The application of such legal aspects must give broad roles to each party, so and its potential in practice law.

The Strict Liability Principle in Environmental Law

The application of Strict Liability Principle as a legal aspect in the Environmental Legal System is based on the demands of development in people's lives,¹ although in the meanings and mechanisms and or forms of legal practice is still limited, it can be observed in various ways as follows:²

- 1) The implementation of Strict Liability Principle is only temporarily applied to various project development activities and industrial business activities, trade and transportation that are

¹ Daud Silalahi, *Hukum Lingkungan dalam Sistem Penegakan Hukum Lingkungan Indonesia*, Bandung: Alumni, 1996, p.129-132.

² Mochtar Kusumaatmadja, *Fungsi dan Perkembangan Hukum Lingkungan dalam Pembangunan Hukum Lingkungan dalam Pembangunan Nasional*, Paper in the Establishment of Environmental Law Provisions, Jakarta, 1972.

considered to have the potential to create an abnormally dangerous environmental risk with the following characteristics:¹

- a) Its activities may have an impact on human survival, natural ecosystems and/or material rights;
 - b) The risk of danger is quite large and/or difficult to overcome in various ways that are commonly done (unreasonable care);
 - c) The existence and/or results of its activities are less beneficial to the surrounding community; and or
 - d) The activity is a high risk production activity and the type or location of its activities is deemed unfeasible to be carried out or continued.
- 2) The application of the legal aspects is limited to the matters set out in the 1969 Civil Liability Convention;² and
 - 3) Legal aspects are applied to various industrial business activities, trade, and or transportation that are considered potential to pose an environmental risk.

The application of the Strict Liability Principle as a legal aspect in the environmental legal system is based on the following thought results:³

- a) The legal principle is applied as a means to apply various provisions established to safeguard and/or utilize various natural resources and spatial efforts effectively and efficiently;
- b) The principle of law is applied as a strategy and or politics to overcome various difficulties and or various weaknesses in legal arrangement and environmental management;
- c) The application of the legal aspects in the environmental law which is a positive legal element is expected to become a model reference in an effort to realize the conditions of social justice, legal certainty, the establishment of a climate of democratization, the upholding of human rights, as well as the benefits of national development in the life of the community;
- d) Application of such legal aspects in the provisions of environmental law legislation may serve as the basis for the establishment of funding institutions for legal arrangement and environmental management.

The benefit of applying strict liability principle as legal aspect in legal arrangement and environmental management is as follows:⁴

- 1) Establish a guarantee of coverage from each party to the various risks of the impact and/or environmental crisis occurring;
- 2) Creating a form of togetherness and nuance of democratization and social justice in the development of the sector of environmental management, especially in relation to the increasing demands of needs and interests in people's lives;

¹ National Environmental Policy Act (NEPA), Comprehensive Environmental Response, Compensation, and Liability Act of 1980, As Amended for Restatement of Torts, Superfund Deskbook 1986, p.601-675.

² Rudiger Lummert, Changes in Civil Liability Concept in Trend Environmental Policy and Law, IUCN, Gland, Switzerland, 1980.

³ Mas Achmad Santosa, et.al., Penerapan Asas Tanggungjawab Mutlak di Bidang Lingkungan Hidup, Lembaga Pengembangan Hukum Lingkungan Indonesia (ICEL), Jakarta, 1997, p. 27-28.

⁴ Heinhart Steiger, et al., The Fundamental Right to A Decent Environment in Trends in Environmental Policy and Law, Erich Schmidt, Berlin, 1980, p.1-27.

- 3) Increasing the credibility of the government and the community in the effort to realize the climate of democratization, as well as the enforcement of human rights in the regulation of law and environmental management; and
- 4) Create conditions of stability required in national development as well as efforts to achieve sustainable national security.

The application of strict liability principle as legal aspect in legal arrangement and environmental management contains various patterns of action, among others, as follows:¹

- 1) The pattern of applying the legal liability burden in the form of payment of fines (restitution and or penalties) associated with the occurrence of loss of right events from the community;
- 2) The pattern of enforcement of the provisions and or legal sanctions in connection with the occurrence of an environmental risk that contains the claim of responsibility to the source of the cause;
- 3) Pattern of punishment in the form of corporal punishment (incarceration), penalties, and/or the revocation of certain rights in connection with the occurrence of a violation and or crime that has been legalized in the provisions of environmental law legislation;
- 4) The pattern of applying the obligation to repair and/or restore (remedy requirement) of environmental media in connection with the occurrence of environmental impact as a result of an activity that requires a certain amount of funds for recovery (clean-up cost) and or for closure requirement (cost closure requirement);
- 5) Compensatory, punitive, and/or voluntary compensation requirement patterns relating to environmental risks resulting from the construction of the project and/or certain business activities; as well;
- 6) Provision of authority to the government as a regulatory agency to be able to apply the principle of absolute responsibility in political and national development activities in the sector of environmental management through various instruments of legal arrangement.

The application of strict liability principle as a legal aspect in the Environmental Law System is essentially various forms of fulfillment of legal interest as follows:²

- 1) Implement strategies to establish self-help, self-preservation, and self-defensed in the handling and resolution of various environmental problems;
- 2) Installing signs to establish the order in the construction of projects and or business activities that have potential impacts and or environmental risks; and
- 3) Establish procedures for performing and realizing individual injury against various forms of material losses and demands from groups or public parties to improve environmental conditions in relation to the occurrence of risks to the environment in the ecology of his life.

From various judicial decisions (Restatement of Torts) can be selected various types of activities that can and have been imposed provisions contained in the legal aspects of the principle of absolute responsibility, which are as follows:³

¹ J. Gordon Arbuckle, et.al., *Liabilities and Enforcement*, Environmental Law Handbook, Government Institutes, MC.Roc.

² *Ibid.*, p.372-379

³ Lembaga Pengembangan Hukum Lingkungan Indonesia (ICEL), *Penerapan Asas Tanggung Mutlak (Strict Liability) di Bidang Lingkungan Hidup*, Jakarta: Sangkarmadu, p. 42-43.

- 1) Types of activities that contain and/or have high risks to human life, natural ecological conditions, and/or property (existence of a high degree of some harm to the person, natural, or chattel of others);
- 2) Possible activities may result in very high levels of danger (likelihood that harm result from it will be a great);
- 3) Activities that are not accompanied by the manager's ability to eliminate the risks, both in the prevention efforts and their responsibilities (liability to eliminate risk by the exercise of reasonable care);
- 4) Activities that have a value of benefits, but not a common activity (extent to which the activity is not a matter of common usage);
- 5) The location of activities is not in accordance with the conditions of carrying capacity and or environmental capacity (inappropriateness of the activity to the place where it is carried on); and
- 6) The nature of the hazards contained in its production activities discourage the meaning and/or benefits of such activities (extent to which its value to the community is outweighed by its dangerous attributes).

The application of strict liability principle as legal aspect in Environmental Legal System is based on the following matters:¹

- 1) The International Convention concerning the material content of third party responsibility in the field of nuclear energy (Paris, 1960), civil liability for nuclear damage (Vienna, 1963), civil liability for losses from oil pollution (Brussels, 1969), international responsibility for damages caused by space objects (Geneva, 1972), civil liability for losses from environmentally harmful activities (Lugano 1993), and responsibility for environmental impacts related to the production, transport and management activities of hazardous toxic waste (Bassel 1994);
- 2) Market share liability theory applied in the aspects of legal arrangement and environmental management, especially in the program of environmental damage and pollution control;
- 3) The interest of the community in its desire to form a joint power and ability to simultaneously protect, preserve and/or manage the environment simultaneously; and
- 4) Alternative mechanisms, capabilities, containers, and funding agencies in the form of liability trust funds, superfunds, closure liability trust funds, and/or readily available funds that can support and or support the implementation of legal arrangements and environmental management programs.

The application of the strict liability principle as a legal aspect in the Environmental Legal System is almost identical and closely related to the application of the legal aspects of compensation provided for in the provisions of civil law legislation specified in Articles 1243, 1365 and 1865 *Burgerlijk Wetboek* (BW).

The demand for liability in the legal aspects of indemnity set forth in the civil law is based on the aspect of fault as the core of accountability demands (liability based on fault), so that if the defendant is able to show the various proofs of caution made through the reverse verification process (*omkering van bewijslast*) then they can be free from the liability of the responsibility to take care of an ordinary prudent and careful man to indemnify him.²

¹ Asikin Kusumaatmadja, Peluang dan Manfaat Penerapan Asas Tanggungjawab Seketika dalam Sistem Hukum Indonesia, Workshop Proceeding on the Main Problems in Strict Liability Implementation in the Environmental Sector, Jakarta, 29 April 1996.

² Richard A. Posner, A Theory of Negligence, in Robert L. Rabin, Perspectives on Tort Law, Boston: Brown and Company, 1990, p.14.

Proof of the fault (negligence, *schuld*, or fault), let alone the deliberate aspects of the impact and or risk of environmental damage is very difficult to be realized in the practice of Environmental Law, because to prove the existence of an element of fault in various cases and or environmental events takes a long time, substantial funds, and high technical ability, so that if the concept is applied in the legal arrangement and environmental management then in addition will complicate the improvement of environmental conditions can also increase the burden of affected communities and or the environmental risk.

The application of the legal aspects of strict liability in the environmental law system is not solely based on the element of fault, because that is expected from the application of the legal aspects is that the immediate response of the condition of the affected communities and to the immediate improvement of the environment in order to be re-functioned as before, so the concept of applying aspects of responsibility in environmental management is not based on the aspect of fault (liability without fault) but rather directed to the fulfillment of the rights and obligations to establish a good and healthy environment (right to a decent environment).

The concept of applying the legal aspects of strict liability principle in the regulation of law and environmental management is manifested by the form of compensation to assist the fulfillment of the interests of society individually and publicly related to the continuity of environmental functions (private and public compensation).¹

The concept of applying strict liability principle in environmental law system in most countries in the world is done strictly (strict liability) against activities that pose risks that could endanger human health or survival (significant risk), especially to the environmental risks posed by various activities classified as extrahazardous, ultra-hazardous, atau abnormally dangerous.²

The legal aspects of strict liability in the provisions of Article 21 of Law of the Republic of Indonesia Number 4 Year 1982 and Article 35 of Law of the Republic of Indonesia Number 23 Year 1997 and Law of the Republic of Indonesia Number 32 Year 2009 are defined as strict liability and not as absolute liability, since it is enforced as follows:³

- 1) The concept of strict liability is only aimed at various development activities of the project and/or business activities that potentially have a major and/or important impact on the environmental conditions and or activities concerned with hazardous and toxic materials;
- 2) The concept of responsibility for environmental risks is determined within the maximum limits specified by a certain calculation and enforced under a legitimate Legislative Directive; and
- 3) For the purposes of risk management, a proof process is required, among others, as follows:
 - a) The presence or absence of environmental risks expressed as acts that interfere with the interests of others;
 - b) To the extent to which prevention efforts have been taken by the parties in anticipation of such risks; and or
 - c) Determining how much the burden of legal obligations that must be accounted for. In this case the aspect of proof that is done is not an attempt in the process of legal defense but solely focused on the interests of insurance coverage.

The application of strict liability principle to a case and or environmental problem is carried out in accordance with the environmental rights and procedures specified in the environmental law, so that for the sake of administration in order to fulfill the procedural of the environment is needed a process of proof of condition of pollution and or environmental damage caused by human activity.⁴

¹ Robert L. Rabin, *Persepectives on Tort Law*, Third Edition, Brown and Company, Little, 1990, p.1.

² Mas Achmad Santosa, et.al., *op.cit.*, p.13-15

³ A. Hamzah, *Penegakan Hukum Lingkungan*, Jakarta: Arikha Media Cipta, 1995, p.118.

⁴ Arnold H. Loewt, *Criminal Law Relating to Environmental Offences*, Proceeding of Eight United Nations Congress in Havana, Prevention of Crime and Treatment of Offenders, August 27 – September 7, 1990.

Various reasons are not needed to prove the fault aspect for legal defense in the concept of applying strict liability principle to environmental law system, among others, as follows:¹

- 1) Evidence of the fault element (*mens rea*) in various cases and / or environmental problems is very difficult and expensive to do;
- 2) The magnitude of the level of danger and suffering caused by an environmental risk concerning social life that requires immediate action and remedies;
- 3) The application of these legal aspects is actually intended to establish a guarantee of financial readiness for the prevention of environmental crises;
- 4) Implementation of the principle of law aims to create conditions of legal certainty, social justice, and or upholding of human rights, in addition to assisting and or supporting efforts to improve people's lives.

The evidentiary processes imposed in the application of strict liability in the environmental legal system as applied in the compensation system, so that proof is done is simpler and basing on the main purpose to facilitate the settlement of the problem.

According to Komar Kantaatmada that the application of strict liability principle in the regulation of law and environmental management is manifested in the form of compensation as done in the system of compensation in various cases of oil pollution at sea which set with various concepts, among others, as follows:²

- 1) CRISTAL (Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution);
- 2) TOVALOP (Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution); and
- 3) Funds Convention atau CLS (Convention on The Civil Liability for Oil PollutionDamage, Brussels 1969).

The concept of application of strict liability principle as legal aspect in the environmental law system is basically the application of special provisions (*lex specialis*) which is applied in general provisions (*lex general*) which regulates unlawful acts (*onrechtmatige daad*) prescribed in the provisions of Article 1365 of civil law. This kind of legal practice can actually be regarded as a legal aberration, but on the other hand is considered to be a form of legal reform in realizing modern law that suits the needs of community life.

According to the provisions of civil law, it requires compliance with *schuld, schade, causaal verband*, and relativity in the case of legal problems (*relativiteit*),³ and it is no longer appropriate to the social conditions of society today that require aspects of speed, effectiveness, and or efficiency in all things.

Mechanism and or procedure of settlement of lawsuit case and or demands of coverage in environmental problem is not yet regulated and determined in a lawful regulation, so that with this situation many environmental lawsuits filed based on procedures and mechanisms of the General Court, while for lawsuits against environmental problems that are often carried out by the Government on behalf of the public interest is based on Provisions of Administrative Law through Procedures and mechanisms of State Administrative Court, this creates a legal aspect that is inconsistent with the intent and purpose of the concept of applying the strict liability principle in the Environmental Legal System.

¹ L.B. Curzon, Proceeding International Environmental Law Workshop, Utrecht, October 1990.

² Komar Kantaatmadja, Ganti Rugi International Pencemaran Minyak di Laut, Bandung: Alumni, 1981, p.127.

³ N.S.J. Koeman, Privaatrechtelijk Milieurecht, p. 446, in A. Hamzah, Penegakan Hukum Lingkungan, Jakarta: Arikha Media Cipta, 1995, p.128-132.

III. Conclusion

The application of strict liability principle as a legal aspect in the Environmental Law System contains the interest to utilize various mixed tools of compliance, to realize the guarantee of environmental risk coverage (channeling for transfer of environmental risks liability) as well as fund management for the prevention of environmental risk encountered (trust funds for environmental vulnerability risks management).

The application of strict liability principle as a legal aspect in the Environmental Legal System has the meaning of giving obligations to each party to manage the environmental risk (risk assessment), while the implementation of the Mechanism of Insurance Services as an instrument of legal compliance and environmental management has the role of realizing the application of strict liability principle through the process of transferring guarantee and fund management to anticipate various environmental risks.

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