Environmental Activists: A Legal Analysis Between Immunity Rights and Criminalization

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Abstract This article was written with the argument that environmental justice is a constitutional right of every citizen to fight for the right to a good and healthy environment that cannot be prosecuted criminally or sued civilly. The regulatory legal ratio is regulated in Article 66 of Law Number 32 of 2009 concerning Environmental Protection and Management which regulates immunity rights. This article also describes environmental fighters who are at risk of being criminalized or often called SLAPP (Strategic Litigation Against Public Participation). The research in this article uses a juridical-normative method through statutory and conceptual approaches. The core problem presented focuses on the meaning of the legal ratio of immunity rights in article 66 of Law Number 32 of 2009 concerning Environmental Protection and Management, as well as analyzing the theoretical and normative arguments for criminalization efforts carried out against environmental fighters. This article aims to look at the immunity rights of environmental fighters and describe the forms of criminalization aimed at environmental fighters.

Keywords: Immunity Rights, Criminalization, Environmental Activist

1 Introduction

Indonesia, as a vast unitary state with hundreds of islands, exhibits diverse environmental characteristics and varying environmental needs in different regions and communities. Being an archipelagic nation with 62% of its territory comprised of water, Indonesia possesses a significant marine economic potential that can contribute to the country's overall economy.[1] Development is crucial in Indonesia, given its status as a developing nation. However, development initiatives often clash with the acceptance of local communities, sometimes affecting environmental sustainability.[2] Similar debates regarding the conflict between local acceptance and environmental protection have arisen in other countries as well. For instance, the United Nations Human Rights Commission Resolution No. 48/13, adopted on October 8, 2021, recognized the right to a healthy environment as a fundamental human right. In fact, 60 countries and 1,350 civil society groups urged the UNHRC to have all countries acknowledge and uphold their citizens' right to live in a healthy environment.[3]

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Indonesia, too, recognizes its citizens' right to a healthy environment through its constitution, specifically Article 28H, paragraph 1 of the 1945 Constitution, which states, "Everyone has the right to live in physical and spiritual prosperity, reside, and have a good and healthy environment, and is entitled to obtain health services." Additionally, Article 33, paragraph 3 of the constitution declares, "The land and waters and the natural wealth contained therein are controlled by the state and are used for the greatest prosperity of the people." These constitutional articles establish the concept in Indonesia that state control originates from popular sovereignty and the collective rights of the people, granting the state a mandate to create, regulate, manage, and oversee measures aimed at the welfare of the people.[4]

Indonesia has also established legal frameworks for environmental protection and management through Law Number 32 of 2009 concerning Environmental Protection and Management. Under Article 65 of this law, Indonesian citizens have the right to a good and healthy environment as part of their human rights. They are entitled to environmental education, access to information, the ability to participate, and access to justice in fulfilling their right to a good and healthy environment.[5] Citizens have the right to propose or object to business plans or activities that are anticipated to have an impact on the environment and are encouraged to play a role in the protection and management of the environment in accordance with legal regulations. Every citizen has the right to file complaints regarding alleged environmental pollution or damage.

In the pursuit of their rights, citizens are also regulated by Article 66 of Law No. 32 of 2009 concerning Environmental Protection and Management, which states that "Everyone who advocates for the right to a good and healthy environment cannot be prosecuted criminally or sued in civil court." Paradoxically, there is often a lack of harmony in the protection of citizens' rights when it comes to environmental activism. Often, environmental activism encounters a form of counteraction known as "SLAPP" (Strategic Litigation Against Public Participation).

SLAPP stands for "Strategic Litigation Against Public Participation," which can be defined as legal action in civil court or criminal complaints against individuals or groups who engage in community participation in governmental decision-making or environmental management.[6] The objective of SLAPP is to instill fear through civil lawsuits, criminal charges, and financial burdens on those who engage in community participation, ultimately suppressing or nullifying such civic engagement. Another form of SLAPP is "Anti-SLAAP," which constitutes legal remedies, self-defense, or legal protection for citizens or individuals exercising their participatory rights in government decision-making or environmental management.

This phenomenon unfolded among the residents of Kenanga Subdistrict in Sungailiat District, Bangka Regency, Bangka Belitung Islands Province in 2020. In case number 475/Pid.B/2020/PN Sgl, a trial took place in the Sungailiat District Court concerning the criminalization of environmental activists, specifically six Neighborhood Association (RT) Chairpersons. Initially, they were charged with offenses as stipulated in Article 228 and Article 263 of the Criminal Code (KUHP) by the Public Prosecutor of the Sungailiat District Attorney's Office. However, during the trial, the prosecutor only pursued charges under Article 228 of the KUHP. This decision was made after a postponement of the trial due to the unreadiness of the public prosecutor to present the charges. Environmental activists are individuals who selflessly dedicate their time and effort to the preservation of the environment, thus warranting legal protection under environmental laws. Law Number 32 of 2009 on Environmental Protection and Management, specifically in Articles 65 and 66, explicitly addresses the rights of every citizen

to participate in the pursuit of a clean and healthy environment, as well as the legal protection of individuals actively engaged in environmental issues. Both of these conditions are present in this case, rendering the defendants unfit and undeserving of being in the defendant's seat.

The suspicion of a conspiracy between law enforcement figures and PT. BAA in the criminalization of environmental activists in this case is notable because the defendants have vigorously opposed and even demanded the closure of PT. BAA due to the pervasive foul odor they have experienced almost daily since the company was established. This conspiracy theory gains credibility due to the observed irregularities in the investigation process to the prosecution process, particularly in the addition of Article 263 of the Criminal Code (KUHP) during the transfer from the police to the public prosecutor. The inclusion of Article 263 in the indictment is perceived as a tool for the prosecution to legitimize silencing the critical voices of the defendants and the fervent environmental campaigners who have consistently protested the noxious odors in Kenanga Village. Nevertheless, neither the investigators nor the public prosecutor has ever examined any witnesses to fulfill the elements of Article 263 KUHP. The defendants have evidently become victims of an unfair trial process, and it is our earnest plea to the honorable judges, who are the arbiters in this case, to evaluate the situation with the utmost integrity and fairness, ultimately exonerating the defendants from all charges.

In the investigative process, the defendants were never provided with a Notification of the Commencement of the Investigation (SPDP), even though, according to Constitutional Court Decision No. 130/PUU-XIII/2015, an SPDP must be issued to the suspect no later than seven days after the issuance of the investigation order. This legal defect renders the investigative and prosecutorial actions null and void, including the actions related to the allegations and charges. The motives of the law enforcement agencies in this case have cast a dark shadow that must be dispelled by the honorable judges.

Furthermore, in the Dening Village, Riau Silip Subdistrict, Bangka Regency in 2021, a situation arose when fishermen who earned their livelihood from the sea protested against a Production Purse Seine Vessel (KIP) entering the local waters. The protest culminated in the occupation of one of the KIPs on the seashore, leading to the criminalization of seven fishermen by the Water Police of the Bangka Belitung Regional Police, charging them under Article 170, paragraphs 1 and 2, Article 2, and Article 410, in conjunction with Article 55 of the Criminal Code. The cases were subsequently brought to the Sungailiat District Court and split into three cases, numbered 414/Pid.B/2021/PN.Sgl, 415/Pid.B/2021/PN.Sgl, and 416/Pid.B/2021/PN.Sgl. The environmental activists were handed prison sentences, each for six years, including the appellate decision. Despite the rejection of their cassation requests, these environmental activists continue their fight.

Based on the aforementioned background and phenomena, the problem statement is as follows: What is the legal interpretation of the ratio legis regarding immunity rights according to Article 66 of Law No. 32 of 2009 on Environmental Protection and Management? How has the criminalization been carried out by law enforcement against environmental activists?

2 Method

The methodology employed in this academic work is normative writing through relevant literature, focusing on discussions and investigations based on the issues raised by the author.

The study in this writing aims to analyze legal studies that are both theoretical and material in nature, such as legal supremacy, normative legal facts through court decisions, journals, and various other references.[7] The technique utilized in this writing is qualitative analysis, involving the continuous implementation of relevant regulations in line with real-world occurrences. Data sources are gathered, verified, and subsequently incorporated into the text.

3 Result and Discussion

3.1 Ratio Legis of Immunity Rights in the Environmental Protection and Management Law

Indonesian citizens need to be protected when exercising their rights, one of which is their right to a clean and healthy environment.[8] In their pursuit, citizens often find themselves in legal conflicts due to their advocacy. Many phenomena commonly arise from the public's participation or advocacy process, such as organizing and participating in demonstrations against planned activities or projects, sending letters to various government agencies highlighting non-compliance with prevailing regulations, for example, a significant project that requires an Environmental Impact Assessment (AMDAL), but in reality, authorities providing permits do not mandate AMDAL. Other actions include expressing dissent or objections to proposed activities either verbally or in writing, reporting to the competent authorities regarding environmental quality changes in areas near the reporter's residence since the establishment or operation of a specific project, acting as witnesses or experts in court proceedings, bringing lawsuits against business activities, serving as members of an Environmental Impact Assessment Commission, facing criminal charges for vandalism or incitement, and even being accused of creating counterfeit documents, among other allegations.[9]

Community participation in environmental advocacy often faces intimidation from business owners, who aim to generate fear through civil litigation and criminal charges as well as financial burdens on those engaged in environmental advocacy.[7] This is commonly referred to as a Strategic Lawsuit Against Public Participation (SLAPP). SLAPP is a phenomenon that occurs even in advanced democracies such as the United States. Hence, the term SLAPP, which bears the same meaning and spelling as the English term, slapping (i.e., hitting someone's cheek), has emerged. In the context of environmental law, SLAPP means injuring, and it can even stifle the courage of individuals, communities, or environmental activists participating in environmental management.

1. To protect public participation and environmental advocacy, the state is responsible for providing legal protection. Several legal sources support the right to a clean and healthy environment, including:

2. Article 28H, paragraph 1 of the 1945 Constitution, which states, "Every person has the right to live in prosperity, both physically and spiritually, to reside, and to obtain a good and healthy environment, as well as the right to receive health services."

3. Article 66 of Law No. 32 of 2009 on Environmental Protection and Management, which states, "Every person who advocates for the right to a good and healthy environment cannot be subject to criminal prosecution or civil lawsuits."

4. Article 70 of Law No. 32 of 2009 on Environmental Protection and Management, which states, "(1) The community has an equal opportunity and the broadest possible role to actively participate in the protection and management of the environment. (2) The role of the community may include: a. Social monitoring; b. Providing suggestions, opinions, proposals, objections, complaints, and/or, c. Providing information and/or reports."

5. Article 76, paragraph 1 of Law No. 18 of 2013 on the Prevention and Eradication of Forest Destruction, which states, "Every person who becomes a witness, reporter, and informant in efforts to prevent and eradicate illegal logging shall be provided with special protection by the government."

6. Article 78, paragraph 1 of Law No. 18 of 2013 on the Prevention and Eradication of Forest Destruction, which states, "Reporters and informants cannot be legally prosecuted, either criminally or civilly, for their reports and testimonies that have been, are being, or will be provided."

Reviewing these legal sources, our focus is on Article 66 of Law No. 32 of 2009 on Environmental Protection and Management, which also regulates Anti-SLAPP measures. This was first proposed during a General Hearing with several environmental organizations when discussing the draft Environmental Management Law as part of the revision of Law No. 23 of 1997 on Environmental Management. The inclusion of Anti-SLAPP provisions was approved by the drafters of Law No. 32 of 2009 on Environmental Protection and Management.

Article 66 of Law No. 32 of 2009 on Environmental Protection and Management is influenced by the spirit of promoting genuine and active community participation and encouraging reports and complaints from the community as a source of information for environmental law enforcement. This provision aims to protect victims and/or whistleblowers who seek legal action due to environmental pollution and/or damage. This protection also intends to prevent retaliatory actions against whistleblowers and defendants through criminal prosecution or civil lawsuits while ensuring judicial independence.

The application of Anti-SLAPP practices in other countries is often associated with the protection of citizens who advocate for human rights, including:

1) The Right to Freedom of Expression and Freedom of Speech.
2) The Right to Petition on Matters Related to Public Interest.
3) Immunity Rights, which protect individuals involved in such advocacy.

Environmental activists, based on the aforementioned legal sources, receive immunity rights for their endeavors in promoting a healthy and safe environment. This immunity protects them from both criminal charges and civil lawsuits. The inclusion of Article 66 in environmental law aims to safeguard environmental advocates against any illegitimate attempts to criminalize or litigate their actions. Civil lawsuits or criminal reports that exhibit SLAPP characteristics lack a valid legal basis. The primary motive of SLAPP actions is to suppress and halt the civic engagement of those who strive for a healthier environment. Actions taken by business operators, suspected or proven to cause environmental pollution or damage through their activities, and their subsequent legal actions against environmental advocates or victims, or even counterclaims when sued by environmental advocates or victims, are all legitimate legal processes. However,

they are often motivated by the intention to stifle public engagement, making it challenging for law enforcers, particularly judges, to detect the ulterior motive.

In examining civil lawsuits, judges focus on the plaintiff's claims of unlawful actions, usually based on Article 1365 of the Civil Code. In criminal cases, judges concentrate on the charges brought forward by the Public Prosecutor, often related to criminal offenses like defamation (Article 310, paragraph 1 of the Criminal Code) or other relevant legal provisions, without considering the underlying environmental issues. After four years since the enactment of the Environmental Law, the Supreme Court of Indonesia issued guidelines regarding Anti-SLAPP in the form of a Decree by the Chief Justice of the Supreme Court Number 36/KMA/SK/II/2013, which detailed the implementation of these environmental case-handling guidelines.

However, the guidelines provided in SK KMA No. 36/2013, though serving as guidance for judges in environmental cases, especially concerning Anti-SLAPP, do not offer sufficient clarity on how judges should handle cases with SLAPP indications. Additionally, these Guidelines for Handling Environmental Cases, while setting procedural rules, do not supersede the specific civil and criminal procedural rules detailed in the Code of Civil Procedure (HIR/Rbg) and the Code of Criminal Procedure (KUHAP). Neither Article 66 of the Environmental Law nor SK KMA No. 36/2013 provides a clear definition of SLAPP, its principles, criteria, and characteristics, nor does it specify who qualifies as an environmental advocate protected by Article 66 of the Environmental Law. These documents also lack an explanation of the legal procedures (both civil and criminal) involved in the SLAPP examination process to ensure a swift, effective, and cost-efficient means of dismissing such claims. These ambiguities make it challenging for legal authorities, particularly judges, to address cases exhibiting SLAPP tendencies effectively.

It is crucial for law enforcement authorities to examine the underlying reasons for the citizens' struggle in obtaining their rights that may involve criminal acts. For instance, during their pursuit of these rights, citizens may engage in acts of property damage directed towards industrial entities responsible for environmental management.[10] Therefore, investigators must also scrutinize the intent behind such acts of property damage, whether it is aimed at obstructing the management processes or causing harm with mens rea that is not geared towards safeguarding the right to a clean and healthy environment. Law enforcement officers, public prosecutors, and judges have several justifications for either discontinuing or dismissing cases related to citizens' advocacy for the right to a clean and healthy environment.

3.2 Criminalization of Environmental Activists

The act of criminalization itself is grounded in several theories, including:

a. Moral Theory

Moral theory is closely intertwined with criminal law because morality serves as a foundational source of values in shaping criminal law.[11] Some principles of criminal law governing offenses stem from moral norms that exist within society. Immoral actions are transformed into criminal offenses according to legislative decisions. When immoral actions are legalized as

criminal acts, it signifies a harmonious relationship between morality and criminal law. However, this relationship is not always seamless, and conflicts between morality and criminal law can arise. Tensions emerge when highly immoral actions are not criminalized.[12] Pada intinya kebijakan hukum pidana adalah bagaimana hukum pidana dapat dirumuskan dengan baik dan dapat memberikan pedoman bagi pembentuk undang undang (kebijakan legislatif), kebijakan aplikasi (kebijakan yudisial), dan pelaksanaan hukum pidana (kebijakan eksekutif).[13] Tensions emerge when highly immoral actions are not criminalized. These moral and criminal law conflicts manifest in various cases, such as those involving birth control, suicide, and LGBT activities. Given the close connection between morality and criminal law, the moral basis of criminal law is a significant concern.

Jerome Hall posits that "the moral quality of the criminal law is the major issue of our times and permeates all the social disciplines." In essence, the policy of criminal law focuses on how criminal law can be well-formulated and provide guidance for lawmakers (legislative policy), the application of the law (judicial policy), and the enforcement of criminal law (executive policy).

According to van Bemmelen in "Criminologie, Leerboek der Misdaadkunde," the concept of criminalization stems from the belief that acts to be considered as criminal are those that are inherently destructive or morally reprehensible. A similar viewpoint is expressed by Herbert L. Packer in defining the boundaries of criminal sanctions. Packer asserts that "only conduct generally considered immoral should be treated as criminal." This means that only actions that are generally recognized as immoral are declared as crimes. However, not all immoral actions can be subject to criminal sanctions; the threat of such sanctions should be limited to behavior that is generally regarded in society as morally reprehensible. Referring to both opinions, it can be concluded that the justification for criminalizing an act from a moral perspective is rooted in the immorality of the act, meaning it contradicts the values or moral norms and disrupts the prevailing moral sentiments within society.

One of the proponents of the moral theory as a justification for criminalization, Lord Devlin, argues that common morality plays an essential role in maintaining society. If the moral bonds that bind society together are lost, society will experience disintegration.[14] Therefore, society has the right to legislate morality that can ensure its integrity. If society has this authority, there are practical limits on the maximum amount of individual freedom that is consistent with social integration. However, if individual freedom exceeds the allowed limits, then immoral actions that cause disruption, anger, annoyance, and disgust within society must be made criminal acts. According to Lord Devlin in "The Enforcement of Morals," the primary function of criminal law is to preserve public morality. In his view, intolerance, anger, annoyance, and disgust should be subject to regulation through various criminal legal instruments. The fundamental argument in supporting laws that regulate moral conduct, as stated by Devlin, is that the state has an interest in preserving the morality of its society. Moral principles are emphasized in the law and do not permit individuals to abuse moral principles with a new behavior that can undermine human conduct.

Criminalizing solely based on immorality poses problems due to the relativity of morality influenced by culture, place, and time. Therefore, it is important to determine which immoral actions should be criminalized as specific criminal offenses in a given country. Cultural backgrounds, geographical conditions, the religiosity of the population, economic, social, and

political circumstances, certainly play a role in determining which immoral actions are subject to criminalization.

b. Paternalism Theory

Paternalism refers to a government policy or action in which the government assumes responsibility for the affairs of its citizens, particularly by providing for their needs or regulating their behavior through coercion, typically enacted through criminal law, particularly through the enactment of laws. Paternalism can be divided into two groups: volitional paternalism and critical paternalism.[15] Volitional paternalism believes that coercion sometimes helps individuals achieve what they desire, and the reason for coercion is in their best interests. Critical paternalism argues that coercion can sometimes provide a better life than individuals' current lives, which they may consider good, and that coercion is sometimes in their critical interests.

Therefore, groups of society that seek protection through the paternalism theory using criminal law include minors. Several laws in most countries are designed to provide specific protections for children. However, it is not only through legislation that such protection is sought; parents also actively share the responsibility for ensuring that their children do not engage in deviant behavior. Besides being aimed at protecting children, paternalism is also directed at safeguarding individuals with mental illnesses from potential harm that may arise if they engage in certain acts. The primary role of paternalism theory is to protect individuals from harming themselves. Criminal law legitimizes the prohibition of an individual's actions that may harm themselves.

c. Feinberg’s Theory

The theory of criminalization proposed by Joel Feinberg, a philosopher who extensively critiqued criminal law doctrines, is known as Feinberg's theory. This theory not only adds to the fundamental principles of criminalization but also clarifies the concept of harm as the basis for criminalizing an act as a crime. Feinberg presents two reasons as the basis for criminalization: to prevent or reduce harm to others and to prevent serious harm to others. According to Feinberg, the criminal law system is an essential instrument to prevent individuals from intentionally or negligently harming or injuring others.[16] "Harmful" actions are the direct subjects of criminal law, not merely harmed conditions. However, from a legislative perspective, the harmed condition is fundamental because it determines which actions are considered harmful and, therefore, should be prohibited by the law.

Examining the criminalization process for environmental activists advocating for their rights, one can see its application in the Criminal Procedure Code Act No. 8 of 1981. In the initial stages of the investigation conducted by the police, when receiving reports or complaints regarding alleged criminal acts committed by environmental activists, a thorough inquiry should be made to gather in-depth information from the reporter or complainant. The police, in seeking statements and evidence, should do so fairly and comprehensively, including statements from citizens involved in environmental advocacy and those affected by the damage.

Furthermore, secondly, in the investigative process, which includes receiving a report or

complaint from an individual regarding a criminal offense and taking initial actions at the scene, such as arrest, detention, search, and seizure, as well as summoning necessary experts for case examination, it is essential to act in a fair manner that prioritizes the fundamental legal interests. Police investigators should not hesitate to consider suspending the investigation when dealing with environmental activists.

Thirdly, public prosecutors, when receiving and reviewing case files from investigators or their assistants, should also evaluate any deficiencies in the investigation. They should provide guidance for improving the investigation by the investigators while also taking into account the intentions of environmental activists. The prosecutors should consider whether the case files are deserving of continuation. Additionally, in decisions related to extending detention, ordering detention, or altering the detainee's status after the case has been transferred by investigators, prosecutors must be mindful of public trust and avoid immediate detention based solely on the nature of the activists' advocacy. Furthermore, when drafting the indictment and referring the case to the court for prosecution, prosecutors should transparently convey to the suspects or defendants the existence of the environmental activism for a clean and healthy environment.

In summary, it is crucial that the investigative and prosecutorial processes related to environmental activists who are advocating for a clean and healthy environment are conducted fairly, taking into account the broader societal interests and the nature of their activism. This approach ensures that the legal system respects their rights and the importance of environmental conservation.

4 Conclusion

The rationale for the immunity rights according to Article 66 of Law No. 32 of 2009 on Environmental Protection and Management is a right acquired by citizens who advocate for the right to a clean and healthy environment as part of their human rights and community participation rights. They cannot be subject to criminal prosecution or civil litigation. Law enforcement officers, public prosecutors, and honorable judges should consider the nature of environmental activists' struggles and understand the various forms of SLAPP.

The criminalization of environmental activists by law enforcement authorities is an unjust act. Policy-makers with the authority to create regulations should provide detailed guidelines for the implementation of Anti-SLAPP measures. The application of the criminal process to citizens advocating for the right to a clean and healthy environment as part of community participation and human rights should involve intervention during the investigation and inquiry stages to prevent cases from waiting for a court decision.

In conclusion, the protection of the rights of environmental activists is vital, as it is closely linked to human rights and the well-being of the environment. Law enforcement and legal authorities should exercise discretion and sensitivity when dealing with cases related to environmental activism to ensure that the law serves justice and the protection of the environment.

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