Strengthening Anti-Eco-SLAPP Regulations in Indonesia

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Abstract. This paper identifies Eco-SLAPP practices in Indonesia and analyzes the weaknesses of the regulation in Indonesian law; hence it is necessary to regulate Anti-Eco-SLAPP strengthening. As stipulated in the Indonesian constitution, public participation is a right that gets protection. However, guarantees from the regulation seem to have yet to materialize correctly. Many people still need to be involved in state administration or policymaking by the government, especially in the environmental field. In Law Number 32 of 2009, Article 66 has given the community rights to access participation and information, submit proposals, and play an active role in protecting and managing the environment (Anti Eco-SLAPP); however, in practice, Article 66 cannot run effectively because there are still many cases of people fighting for the environment being criminalized. This writing uses a normative juridical approach by qualitatively analyzing legal materials in the form of regulations, journals, and previous studies.

Keywords: Public Participation, Environment, Anti-Eco-SLAPP

1 Introduction

Indonesia has been actively and massively building infrastructure as a developing country since the New Order era. The development is executed by utilizing natural resources to support development. Development is not only a positive influence (benefit) for the continuation of human life and the environment. However, at the same time, it will also pose a threat (negative impact in the form of risk) to the survival of human life and the environment. Building the economy cannot be separated from externality problems, such as destroying natural resources and the environment, resulting in social problems such as public disputes. When natural resources and the environment have been depleted, the existence of these natural resources and the environment can be a boomerang for economic growth. It can create a prolonged social conflict involving various levels of society[1]. In addition, the people living near the construction site often need access to sufficient information, resulting in damage to natural resources and the environment that impact the community itself.

The 1972 Stockholm Convention was the first international legal instrument that laid down the principles of environmental law, including the fundamental rights to freedom, equality and sufficiency in a healthy environment. Every citizen must have access to information about the environment, including information on hazardous materials around them and the opportunity to participate in decision-making. The state must provide facilities and encourage public awareness and information that is easily disseminated, as well as provide adequate access to legal and administrative processes, including if there are improvements.

IWLEG 2022, July 27, Semarang, Indonesia

DOI 10.4108/eai.27-7-2022.2326270

Article 28H of the 1945 Constitution after the amendment regulates the right to obtain a good and healthy environment. This arrangement shows that protecting the environment is a guarantee of human rights granted by the state in the constitution. One of these human rights is public participation. This public participation has been regulated in Article 28C paragraph (2) of the 1945 Constitution after the amendment, which mandated that everyone has the right to fight for their rights to build the public interest collectively. Then, Article 28E paragraph (3) states that everyone has the right to express their opinions and thoughts, both in oral and written form. In addition, the Indonesian constitution also gives freedom to the public to seek, obtain, possess, store, process and convey information through all types of media, as mandated by Article 28F of the 1945 Constitution after the amendment [2].

Public participation as stated above should be a right that gets protection in accordance with Article 28G paragraph (1) of the 1945 Constitution after the amendment, but the guarantee from this arrangement has not appropriately materialized. Many people still need to be involved in state administration or policymaking by the government. Providing space for the public to participate in all policymaking processes will provide a good foundation for the birth of a policy. Further, it will also ensure more effective policy implementation because the public knows and gets involved, and their opinions are considered from the beginning of forming a policy. Ultimately, it will lead to trust, respect and recognition from the community towards the policymakers. With the fulfilment of public participation, the formation of policies is not only the will of top-down policymakers but also based on the people's aspirations.

Participation means there is participation or involvement (*KBBI Online*, n.d.). Participation or involvement (supervising, controlling, and influencing) of the community in policy activity, starting from planning to evaluating the implementation of policies/regulations. Public participation in the policymaking process that binds all citizens is an effective way to achieve a pattern of equal relations between the government and the people. Community participation is a prerequisite and a representation of the realization of a democratic government. Without participation and only relying on mobilization. Indeed, democracy in the state government system will not be realized. For this reason, a good government must improve the flow of information, and accountability, protect the public and provide a voice for the parties most affected by the public policies implemented [3].

Public participation can be performed in all areas of community life, one of which is in the environmental realm. Public participation has long been regulated from Law Number 4 of 1982 on Basic Provisions for Environmental Management to Law Number 32 of 2009 on Environmental Protection and Management Articles 70 and 66. Participation is one of the principles in the protection and management environment as regulated in Article 2 letter k of Law Number 32 of 2009. Then further regulated in Article 65, paragraph (2) and paragraph (3), which explains that the community has the right to access participation, access information, submit proposals, and play an active role in protecting and managing the environment.

In addition, Article 70 also stipulates that the community has the same and most comprehensive possible rights and opportunities to play an active role in environmental protection and management in the form of social supervision, giving advice, opinions, proposals, objections, complaints and submission of information and/or reports. Article 66 guarantees that any person (whether individual, group or legal entity) who fights for the right to a good and healthy environment cannot be prosecuted criminally or civilly sued. This explanation of Article 66 confirms that this provision is intended to protect victims and/or complainants who take legal action due to environmental pollution and/or destruction. This

protection is intended to prevent retaliation from the reported party through criminal prosecution and/or civil lawsuits while considering the judiciary's independence [4]. Article 66 is referred to as the legal basis for the Anti Strategic Lawsuit Against Public Participation (Anti SLAPP) by the Decree of the Supreme Court of the Republic of Indonesia Number 36/KMA/SK/II/2013 on the Implementation of Guidelines for Handling Environmental Cases.

In practice, Article 66 cannot run effectively because there are still many cases of people fighting for the environment being criminalized (the Eco-SLAPP action); for example, earlier this year, there was a summons from the police against the Director of WALHI regarding the action of rejecting iron sand mining by WALHI Bengkulu with Seluma residents at the mining site of PT Faming Levto Bakti Abadi (FT FLBA) (*Putus Daftar Panjang Upaya Kriminalisasi Terhadap Pejuang Lingkungan Hidup*, n.d.). In addition, there were also six residents of the Kenanga sub-district, Sungaillat sub-district, Bangka Belitung Islands Province who served one month in prison for protesting against the stench of tapioca factory waste operating in the vicinity of the settlement. However, they were later released by a High Court Judge (*Putusan Bebas Pejuang Lingkungan, Momentum Perkuat Kebijakan Anti-SLAPP*, n.d.).

The following is data on violence and threats for human rights defenders in each quarter during 2020-2021:

Table 1. Data on Violence and Threats for Human Rights Defenders in 2021-2021

Data on violence and threats	Quarter I/ 2020	Quarter II/2020	Quarter III/2020	Quarter I/ 2021	Quarter II/2021
Cases	22	28	10	10	6
Action	24	31	10	18	10
Individual victim	68	59	51	70	21
Group victim	5	6	10	2	2
State actor	36	26	8	10	4
Non-state actor	15	27	4	7	4

(Report from the Institute for Community Studies and Advocacy (Elsam))

Based on the table 1, there is a decrease in cases of each type of threat and violence against environmental defenders. However, the risks and forms of threats or attacks received by environmental defenders have remained the same. The level of vulnerability in advocacy work during the last four months also tends to be high.

Weak regulations that protect environmental defenders are one of the causes of criminal prosecution and/or civil lawsuits. This is the difficult part of implementing the Anti-SLAPP concept in Indonesia. The rules regarding Anti-SLAPP in Indonesia still need to be regulated, both from the definition of SLAPP and the criteria for SLAPP. Moreover, the technical implementation of anti-SLAPP needs to be regulated; hence it is necessary to strengthen the regulation. Based on the problems above, the authors are interested in assessing the urgency of the need for strengthening Anti-SLAPP regulations in environmental protection and management.

2 Method

This is doctrinal research using a normative juridical approach. This study uses legal materials from regulations, journals, and previous studies. These legal materials were obtained

through a literature study in accordance with the topics discussed. Then, the data were analyzed qualitatively by identifying the Eco-SLAPP practices that had occurred in Indonesia, to analyze the weaknesses of the regulation that had so far regulated Anti-Eco-SLAPP, and draw conclusions.

3 Discussion

3.1 Basic Concept of Anti SLAPP

SLAPP is silencing those who exercise freedom of expression or the right to speak in public. SLAPP related to environmental issues is known as Ecological SLAPP or Eco SLAPP [5]. The concept of SLAPP and Anti-SLAPP first emerged after Pring and Canan researched lawyers fighting for clients' rights regarding environmental issues, which were filed in a lawsuit against them by the polluting companies and Government for fighting to the right for a healthy environment. Anti-SLAPP is a protection given to people who exercise freedom of expression in public, protected by law. Anti-Eco SLAPP originated from the SLAPP concept, so it is still based on the initial criteria of SLAPP. Because it started from the SLAPP concept, to be able to find out an action as SLAPP, there are 4 (four) criteria put forward by Pring and Canan, namely lawsuits or the existence of resistance or demands from the community, communication made by the public to the Government on objections, resistance, concerning the public interest, there is resistance from the government or interested parties against groups or individuals [6].

Article 66 of the PPLH Law aims to protect people who fight for the right to a healthy environment and cannot be prosecuted criminally or civilly sued. This provision shows that the Government has included SLAPP in positive law. Elucidation of Article 66 of the PPLH Law states that the provision aims to protect victims and/or reporters who take legal action due to environmental pollution and/or destruction. The content of Article 66 and the explanation of the article are not appropriate because the content of Article 66 states that "…cannot be prosecuted criminally nor be sued civilly." Meanwhile, the explanation states that this provision can be applied to the reporter who takes legal action due to environmental pollution and/or destruction. Thus, it can be said that protection can only be given to those who have taken legal means. This is contrary to the contents of Article 66 of the PPLH Law. The question will arise, what if the community does not take legal action? Will they get the protection as referred to in Article 66 of the PPLH Law? Because it can and often happens that people carry out movements, which are carried out together in public to voice concern for a healthy environment.

The Anti Eco SLAPP proposed by Pring and Canan does not limit protection only when the target or victim of Eco SLAPP has gone through legal procedures. This is per Supreme Court Decision Letter 36/2013 on the Implementation of Guidelines for Handling Environmental Cases, which states that Eco SLAPP can occur at any time, whether or not the community has taken legal procedures [7]. To determine the requirements for Anti SLAPP in Indonesia, it is necessary to pay attention to the following matters, first, the construction of Anti-SLAPP in Article 66 of the UUPPLH, which contains 2 (two) main elements, namely participation or expression and public interest. Second, protection, that the construction of Article 66 of the PPLH Law and its explanation is counterproductive, which should limit protection to people who have taken legal action—third, related to the subject that must be

protected. Fourth, the criteria for determining SLAPP and fifth, the types of actions that are included in SLAPP [8].

The lack of clarity regarding the Anti-SLAPP philosophy can create uncertainty in legal protection for the community. The Anti-SLAPP philosophy must be the basis for preparing the Anti-SLAPP Law, which includes Anti Eco SLAPP, as well as legal protection apart from criminal charges and civil lawsuits. The key to dealing with SLAPP is to take a balanced approach by guaranteeing the right of citizens to play an active role and protecting Plaintiffs from filing lawsuits according to applicable law [9].

3.2 Eco-SLAPP Practices in Indonesia

Anti-Eco-SLAPP is a legal protection mechanism for public participation in expressing opinions, objections, and expressions on environmental issues or policies. The formulators approved the Anti-SLAPP provisions of the PPLH Law as an essential provision to protect community participation in realizing a healthy and good living environment. However, the Anti-Eco-SLAPP norm in Indonesia still has substantive and procedural weaknesses that have led to rampant legal attacks against human rights defenders on the environment [10].

In Indonesia, Eco-SLAPP occurred before the Anti-Eco-SLAPP provisions in Law Number 32 of 2009, where there have been many problems in the field of natural resources that are being fought for by environmentalists. Here, the author conveys some of the Eco-SLAPP practices that have occurred in Indonesia, both before and after Law Number 32 of 2009:

3.2.1 The case of Dr. Rignolda Djamaludin against PT Newmont Minahasa Raya (PT NMR) (Indrawati, 2022)

The Eco-SLAPP case experienced by Dr Rignolda Djamaludin occurred before 2004 when there was no regulation regarding Anti Eco-SLAPP (Law Number 32 of 2009 on Environmental Protection and Management has yet to be issued). Dr Rignolda Djamaludin was an environmentalist. This case began with his opinion in the Kompas daily on July 20, 2004, and the daily Sinar Harapan on July 21, 2004, regarding the mining operations, carried out by PT. Newmont Minahasa Raya (PT. NMR). They were suspected of having polluted Buyat Bay, North Sulawesi, and causing Minamata disease in the community around Buyat Bay. Based on this opinion, PT NMR took legal action by suing Rignolda Djamaludin with the argument of a lawsuit against the law (Article 1365 BW). The Unlawful Acts lawsuit was granted by the Manado District Court and upheld by the Manado High Court. However, the decision was overturned by the Supreme Court at the cassation level with legal considerations that the basis of the rights (base of the lawsuit) of the Respondent for Cassation was originally the Plaintiff to sue the original Cassation Petitioner for the Defendant was news from 2 (two) newspapers Kompas and Sinar Harapan.

In reporting on the two newspapers, it was emphasized that the source of the news (the legal subject) was the Director of the North Sulawesi Management Foundation and members of his staff (Kompas) and the Sinar Harapan newspaper without involving his staff. The dissemination of news/news sources was the Press. Based on the news, the Director of the North Sulawesi Management Foundation (Legal Entity) should have been sued, so the Supreme Court ruled that the Plaintiff's lawsuit (the Respondent for Cassation) contained an error in the subject being sued so that the verdict stated that the Plaintiff's claim could not be accepted.

3.2.2 The case of Willy Suhartanto against H. Rudy (Indrawati, 2022)

Willy Suhartanto's lawsuit against H. Rudy occurred after Law Number 32 of 2009 on Environmental Protection and Management was issued. This case began with Willy Suhartanto (Director of PT. Panggon Sarkarya Sukses Mandiri), who built The Rayja Batu Resort, filed a lawsuit over the law (Article 1365 BW) against H. Rudy, the coordinator of the Fountain Concern for Springs (FMPMA). They fought for the construction of the resort. The program was stopped because it could have a negative impact on Gemulo springs in the city of Malang. The Malang District Court decided the case on July 21, 2014; in its decision, the Panel of Judges rejected Willy Suhartanto's claim, granted the Defendant's counterclaim (H. Rudy), and ordered the counterclaim Defendant to pay Rp. 2,000,000, - (two million rupiah). The Panel of Judges examining the case considered that The Rayja Batu Resort Building Permit (IMB) violated the law because the distance between the springs and the hotel building was only 150 meters. In comparison, the minimum distance should be 200 meters. Resort discontinued.

However, the Surabaya High Court upheld the decision of the Malang District Court at the cassation level; the decision was annulled with legal considerations that the Judex Facti decision of the Surabaya High Court, which upheld the Malang District Court's decision, had misapplied the law, with the consideration that Judex Facti had been wrong in considering the Defendant's exception. / The Respondent of Cassation regarding the claim is vague, where in the lawsuit posita, it turns out that the actions of the Defendant / Respondent for Cassation, which according to the Plaintiff / Petitioner for Cassation are unlawful acts by threatening residents, sending letters of public objection to relevant agencies, provoking people residents to conduct demonstrations, as well as destroying the fence belonging to the Plaintiff/Applicant for Cassation. However, the petitum section contains applications for ratification of permits for the construction of villas/hotels and recommendations from relevant agencies that have been approved. Received by the Plaintiff/Applicant for Cassation, so that the relationship between the petition and the claim is unclear, and in the counterclaim filed by the Respondent for Cassation/Defendant, it is proven that the position of the Respondent for Cassation/Defendant of the Convention/Plaintiff for Counterclaim is unclear, namely whether he filed a counterclaim in his position as individually or on behalf of a group. The Panel of Judges at the Cassation Level then decided and adjudicated itself with a verdict in the exception granting the Defendant's exception, in the leading case stating the Plaintiff's claim was unacceptable (*niet ontvankelijk verklaard*), and in the reconvention declaring the Plaintiff's claim against the Convention unacceptable (*niet ontvankelijk verklaard*).

From several Eco-SLAPP practices that occur, it shows that community participation carried out in accordance with laws and regulations still provides open space for criminalization, even though Indonesia now has provisions governing Anti Eco-SLAPP in Law Number 32 of 2009 on Environmental Protection and Management. After four years of enactment of this Law, the Supreme Court of the Republic of Indonesia also issued guidelines regarding Anti-SLAPP, namely in the Decree of the Chief Justice of the Supreme Court Number 36/KMA/SK/II/2013 concerning the Enforcement of Guidelines for Handling Environmental Cases (hereinafter referred to as SK KMA Number 36 of 2013), in letter B number 4 describes ..." to decide as Article 66 of the Law of the Republic of Indonesia Number 32 of 2009 concerning Environmental Protection and Management that the Plaintiff's lawsuit and/or reporting of criminal acts from the Petitioner is SLAPP which can be filed either in exceptions, provisions and counterclaims and/or defence and must be decided first in an interim decision.

However, Supreme Court Decision Letter Number 36 of 2013, which is a guideline for Judges in handling environmental cases, mainly regarding Anti-SLAPP, is not clear enough in providing guidelines for Judges in handling cases indicated by SLAPP, in addition to the Guidelines for Handling Environmental Cases. in the form of a decision letter which is a guideline in dealing with environmental cases that applies internally to the Supreme Court and the Judicial Bodies under it. Thus, it is necessary to have more explicit regulations regarding Anti Eco-SLAPP in the future.

3.3 Weak Anti-Eco-SLAPP Regulations in Indonesia

Anti-Eco-SLAPP Indonesia has been regulated in Article 66 of Law Number 32 of 2009. Article 66 is a form of participation and supervision that the community can carry out in environmental protection and management. Participation and supervision can be carried out by the community, both individuals/independent, business entities and environmental activists. Article 66 stipulates that anyone who fights for the right to a good and healthy environment cannot be prosecuted criminally or be sued civilly. Therefore, this article provides exceptional protection for environmental defenders. The concept contained in Article 66 is known as Anti Eco SLAPP.

Simply put, SLAPP can be interpreted as strategic action through courts to eliminate public participation. Following its understanding, the purpose of SLAPP is to silence/eliminate community participation. Unfortunately, until now, there has yet to be a standard definition of SLAPP in Indonesia. However, it can refer to the notion in other countries, such as in Canada, which was later adopted in the Protection of Public Participation as stated, that SLAPP is:

"...an action/lawsuit carried out against a person or several persons or groups who express an opinion or attitude towards a related issue with the public interest. SLAPPs use the court system to limit the effectiveness of opposing parties' opinions or actions. SLAPPs can intimidate opponents, drain their resources, reduce opportunities to participate in public affairs and prevent them from participating in matters of public interest"[7].

Although the provisions of Article 66 have protected the environmentalist community so that they cannot be prosecuted or sued, there are still some weaknesses in the explanation section. The explanation of Article 66 is different from the basic concept of Anti Eco SLAPP. The basic concept of Anti Eco SLAPP is the same as Anti SLAPP relating to general public interest issues. The provisions in the Rules of Procedure for Environmental Cases stipulate that protection for targets or victims of Eco SLAPP can be carried out in any situation, not only through litigation; non-litigation channels can also, as long as a person or community is or has exercised their right to participate, either in law enforcement as well as in responding to a policy in environmental protection and management. However, the regulation of Article 66 has a different meaning from the basic concept of Anti SLAPP. Article 66 excludes environmental defenders who take non-litigation to be able to carry out Anti-SLAPP. However, Article 66 has covered the criminal and civil realms in protecting Anti-Eco SLAPP [11].

The Anti-SLAPP arrangement, as mandated by Article 66, is different from that stipulated in the Supreme Court Decision Letter Number 36/KMA/SK/II/2013 on Guidelines for Handling Environmental Cases, which states:

"Anti SLAPP is legal protection for environmental defenders. SLAPP lawsuits can be in the form of counterclaims (reconvention lawsuits), ordinary lawsuits or in the form of reporting that they have committed criminal acts against environmental defenders (for example, they are considered to have committed acts of "insult" as regulated in the Criminal Code)."

From the explanation of the Supreme Court Decision Letter Number 36/KMA/SK/II/2013 above, it is illustrated that protection for environmental defenders can be carried out at any time, both when the community takes the non-litigation or the litigation route. This is the same as the Rules of Procedure for Environmental Cases provisions. However, in the criminal realm, the protection of environmental fighters can only be carried out after the case is examined in court.

However, from the Anti-Eco-SLAPP arrangements above, there is no precise regulation of the elements of SLAPP, making it difficult for applicants and plaintiffs to make applications or lawsuits to court, as well as making it difficult for judges to identify the actions of Eco-SLAPP that have appropriately occurred. Penelope Canan revealed that the community could make a petition or a lawsuit if they find errors that fall into four categories:

1. Environmental problems, for example, threats to wilderness, unspoiled areas or endangered species;
2. The neighbourhood (neighbourhood), such as the controversy over the disposal of toxic waste, mining, quarrying;
3. Dissatisfied customers or tenants; or
4. As an opponent of urban development [12]

The basis for SLAPP's lawsuit itself is also related to interference or intervention in business activities/contracts; defamation, slander, abuse of property and reputation, humiliation and interference with economic gain (Siege, 1992). Based on that, the Anti Eco SLAPP regulations should determine what elements of action that fall into the Eco SLAPP category should look like. In addition, there is also no regulation regarding the provision of disincentives for prosecutors or plaintiffs who have submitted SLAPP to provide a deterrent effect. Thus, the submission of the SLAPP case in Indonesia seems to have no consequences, even though the impact is tremendous on the democratic process and public participation in Indonesia, especially in environmental management and protection, which directly impacts the community [11].

Therefore, it is necessary to encourage the amendment of provisions of Article 66 of Law Number 32 of 2009 on Environmental Protection and Management by incorporating clear elements from SLAPP and issuing a Regulation of the Minister of Environment and Forestry on the Legal Protection of Environmental Fighters. which will further regulate the provisions of Article 66 of Law Number 32 of 2009 on Environmental Protection and Management.

This regulation is expected to be the answer to protecting human rights defenders in the environmental sector. The regulation needs to regulate the criteria for actions included in the Eco-SLAPP, prevention mechanisms, handling of protection, protection in emergencies, inter-agency coordination mechanisms, and funding for protection from the state. In addition, law enforcement agencies that function well, are credible, competent, have integrity, and are eco-oriented are needed in dealing with environmental cases, as well as public awareness of the law as an indicator that the law serves its purpose.

4 Closing

. There have been many cases of Eco-SLAPP against environmentalists in Indonesia, both before and after Law Number 32 of 2009 on Environmental Protection and Management stipulates the Anti-Eco-SLAPP provisions. This is a common question about how effectively the Anti Eco-SLAPP arrangement regulated in Indonesian law can guarantee the freedom of

the community to participate, access information, submit proposals, and play an active role in protecting and managing the environment. It is because of the provisions in the Law. Number 32 of 2009, particularly Article 66, needs to regulate the elements of Eco-SLAPP and its enforcement mechanism so that there is still an open criminalization against the environmentalist community. Thus, it is necessary to strengthen the regulation through amendments to Article 66 by clearly incorporating SLAPP elements, which is then issued by the Minister of Environment and Forestry Regulation as a further regulation governing the enforcement of Eco-SLAPP in Indonesia. In addition, it is also necessary to raise awareness of law enforcement officers to be more progressive in dealing with environmental cases.

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