Out-of-Court Settlement of Environmental Crime based on Law and Morality

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Abstract. Criminal case settlement through non-litigation can provide a more flexible and beneficial judgment for victims, perpetrators, and the community. It is closely related to legal and moral issues. This article ontologically examines the relationship between law and morality in settling environmental crimes outside the court. It hermeneutically and dialectically applied particular methodologic principles in legal research with a doctrinal approach, especially through literature review. Separating law and morality implies that law can always be criticized. According to H.L.A. Hart on law and morality, both aspects are correlated, typically in environmental crimes settlement. Moral issues manifested in environmental crimes settlement through non-litigation channels offer more flexibility than litigation ones. The separation of law and morals in resolving environmental crimes outside the court can be an opportunity to execute their responsibilities in realizing and maintaining environmental balance.

Keywords: Law, Morality, Non-litigation, Environmental Crimes

1 Introduction

Management of environment and natural resources tends to be aimed at investment-things interests and is always understood in an economic sense instead of an ecological and sustainable sense. Therefore, environmental preservation is a crucial issue, stating that conservation and natural resource availability is one of the human rights [1]. Awareness of human rights and the environment is triggered by the massive global environmental damage caused by rapidly-growing industries in the forestry, marine, energy, and mining industries. These destructions, in turn, make it impossible for proper human rights fulfillment, which is ideally not only limited to economic, social, and cultural rights but also includes civil and political ones [2].

Regarding environmental problems, parties experiencing loss due to pollution can file a claim against restoring their rights. The settlement can be done through litigation (inside the court) and non-litigation (outside the court) [3]. This issue has been regulated in Law No. 23 of 1997 on Environmental Management as repealed by Law No. 32 of 2009 on Environmental Protection and Management. Cases from environmental crimes are conflicts of interest between parties committing acts of environmental destruction and/or pollution (perpetrators) and parties harmed by environmental pollution and/or destruction (victims). Compliant with the applicable laws, the environmental crimes settlement has so far been dominated by the court mechanism [4].

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Constraints in resolving environmental criminal cases through the court process are generally related to the difficulty of proof, including the need for plentiful money. A number of environmental crimes cannot be settled in court. Efforts were made to reconstruct the case settlement method, one of which is the out-of-court (non-litigation) method. This settlement is informal and flexible in that it is oriented towards resolving cases with a priority on recovering losses due to environmental crimes [5].

One suitable aspect to becoming a prior consideration in settling environmental crimes is the position of victims—relatively similar to others in general cases, is weak. Victims are commonly not involved directly in every judgment process to get their rights. In this case, the victims are the environment itself. Numerous parties forget it; they frequently only focus on individuals (humans) or corporations [6].

In this context, settlement through non-litigation channels can be a significant compromise to restore the rights of victims that have been violated; they can also be aimed as the main focus of recovery. It might provide a more flexible and beneficial punishment for victims, perpetrators, and the community because the non-litigation process allows for meetings and dialogue between perpetrators and victims [5].

Problems in settling environmental crimes revolve around how the crime is resolved, the legal instruments used in its enforcement, and the moral and legal relationship providing its own bias in law enforcement. Compliant with the discussion of morality and law, H.L.A Hart rejects that moral views contribute to the absolute interpretation of the law based on the following issues. *First*, the standards that reference how the law should be or ideal (in fact, not all are followed) [8]. *Second*, the law that should not be absolute refers to morality. Hart elaborates that the word "must" reflects the existence of several standards, one of which is moral[8]. The example can be seen in numerous cases when a judge decides based on social goals. *Third*, the opinion on the absolute relationship between law and morality also contains a proposal to expand the meaning of the law to include standards, principles, and social policies—which judges in deciding a case also consider [8].

Belief in the absolute relationship between law and morality in interpreting the law will have implications for its identification with morals, which means all law forms become moral standards. This then implies that non-legal behavior is non-moral behaviour and leads to spread in law enforcement, especially against environmental crimes. Such thinking can position the law to damage morals and even itself [7]. Based on the preceding elaboration, this study proposes to analyze the relationship between law and morality in the out-of-court settlement of environmental crimes.

2 Method

This article ontologically examines the relationship between law and morality in settling environmental crimes outside the court. It hermeneutically and dialectically applied particular methodologic principles in legal research with a doctrinal approach, especially through literature review. Common recognition puts law as an instrument to enforce justice in the form of behavioral guidelines with the main function of regulating human behaviour [8]. Law is an autonomous normative phenomenon, which is separated from social phenomena, [9] and then acts as a methodologic center of doctrinal research. This methodology will reveal schemes and motives for the relationship between law and morality in the out-of-court settlement of

environmental crimes. These efforts are expected to contribute to a broad understanding of that relationship, typically in environmental crimes.

3 Result and Discussion

Equating the meaning between law and morality can open up a potential that law will turn into a conservative form that views any legal order as a moral commandment [10]. This situation will trigger a conflict when the morals believed by humans are found contrary to the ones stated in the law itself. At worst, it will create massive non-compliance.

In the context of environmental crime settlement, specifically through litigation, material and formal law (stated in the Law on Protection and Management of the Environment, UUPPLH) can never be separated. It then constructs a tendency to override stability, sustainability, and environmental sustainability. This greed is based on the view of humans who prioritize their interests, particularly the economy—over a balanced relationship with the environment.

Environmental crime settlement through non-litigation channels offers flexibility. The "victim" acts as a subject with an active and autonomous role. As moral beings, humans, in this case, can become representatives of other creatures who do not have the awareness that humans do [11]. The settlement process spotlights negotiations to get positive results [12]. In addition, this kind of settlement is part of an effort to improve the criminal justice system to be more effective and efficient since it accommodates all parties who have suffered losses to get recovered.

Settlement of disputes through non-litigation channels (which are categorized as extrajudicial settlement of dispute or alternative dispute resolution) can be based on the following law: Article 31 of the Environmental Management Law states that the settlement of environmental disputes through non-litigation channels is held to reach an agreement on the form and amount of compensation, and/or certain actions, in order to ensure that there will be no occurrence or recurrence of negative impacts on the environment [13].

Response on dissatisfaction of environmental dispute settlement through "confrontational and *zwaarwichtig* litigation process" is extrajudicial settlement of dispute or more popularly known as alternative dispute resolution (ADR). This settlement is carried outside the court comprehensively. ADR is a conceptual meaning which accentuates environmental dispute settlement through negotiation, conciliation, mediation, fact-finding, and arbitration.

In literature, some combinations called "hybrid" also exist. One of which is mediation with arbitration—abbreviated as "med-arb". In business, people prefer arbitration because it has multiple advantages over litigation methods, such as guaranteeing confidentiality/closed examinations, avoiding administrative procedural delays, having the freedom to choose an arbitrator, being free to make choices of law, and accommodating the place where the decision will be administered and implemented. The award is also final and has permanent legal force [14].

According to the UUPLH, this alternative environmental dispute settlement is defined as an "out-of-court settlement of environmental disputes through non-litigation channels". Based on Article 31 of the Environmental Management Law, the settlement of that dispute is held to reach an agreement on the form and amount of compensation and/or certain actions in order to ensure that there will be no occurrence or recurrence of negative impacts on the environment. Its pattern, as stated in the provisions of the Law on Environmental Management, appears to

be a correction of the error in the Tripihak (three parties) Team system according to Law no. 4 of 1982 on the Basic Provisions for Environmental Management (UULH), which are deemed not to be compliant with the provisions of Environmental Law known in developed countries such as Japan, the United States, and Canada, namely ADR. However, unfortunately, the completion of the UULH "model" seems to be still embedded in the Elucidation of Article 31 of the Environmental Management Law. Stakeholders such as victims, perpetrators, and related government agencies are known as the "Tripihakala Team" [6].

Based on UUPPLH, out-of-court settlement of environmental disputes does not require "compensation", the services of a neutral third party—both through those "with no authority to make decisions (conciliation and mediation)" or through "with authority to make decisions (arbitration)". Instead, it might be carried out by the parties involved in the dispute (negotiation). The use of neutral third-party services in environmental dispute settlement is to the extent wanted by the parties and depends on the needs on a case-by-case basis. In developed countries, it turns out to prioritize legal mediation as an effective solution to environmental disputes. This is reasonable, considering that mediation has comparative advantages compared to dispute resolution by arbitration and litigation. In Indonesia, mediation will be an effective and efficient medium for settling environmental disputes compared to arbitration or litigation. This kind of settlement is the choice of the involved parties and is voluntary. The parties are also free to determine the service provider institution that assists them. The institutions will provide resolution services by delegating arbitrators, mediators, or third parties [15].

However, the non-litigation settlement does not guarantee the ideal harmonization between humans and the environment. In Article 85 in Law No. 32 of 2009, environmental dispute settlement can be carried out through the services of mediators and/or arbitrators. Meanwhile, Article 86 states that the service provider can be established by the community—facilitated by the government, aiming to be independent and neutral. One of the developing media in environmental dispute settlement through non-litigation channels is alternative dispute resolution (ADR). This medium incorporates litigation, negotiation, mediation, consolidation, fact-finding, and arbitration processes.

In terms of environmental law development, the principles of "Strict Liability" and "Reversal Burden of Proof" are applied where the perpetrators of environmental pollution/destruction are responsible for their actions immediately at the time of loss without having first to prove the existence of an element of "error". Moreover, the burden of proof is placed on the perpetrator (the defendant). The perpetrator must prove that he cannot be blamed for the losses. Errors are considered to exist unless the defendant can prove otherwise. Although the government has issued numerous regulations in environmental management, many obstacles are still appearing in terms of achieving the principles of dispute resolution, mainly related to the amount and form of compensation [5]. Of those regulations, the criteria and procedures for calculating compensation in a comprehensive and aspirational manner are not clear in order to avoid disagreements/differences in the parties' views. Therefore, scientific and technological studies and expert opinions are required to convince the parties about the actual situation. This way, they are able to understand and not hold on to their position. By that channel, no suspicion might arise, eventually leading to rational demands for deliberation to reach an agreement.

At times positioned against administrative decisions—namely revocation of business licenses which will have sociological and economic impacts, enforcement of administrative law in the context of environmental management can trigger pressure from the community/Non-Governmental Organizations (NGOs)—which have the potential to bring

pollution and destruction cases to the court. Evidence and testimony are the most burdensome aspect of bringing environmental cases to court. Evidence is intended to legally prove that an environmental crime has occurred, as regulated in Articles 183 to 189 in the Criminal Procedure Code. A comprehensive approach to environmental problems is used to prove environmental crimes. Therefore, it is demanded to be able to translate scientific evidence into legal ones. This way, the evidence for environmental crimes is dominated by expert testimony and laboratory analysis results—which should also be supported by others.

Problems will come about if the judge doubts the results of the laboratory analysis of samples from polluted environmental elements. In this situation, the judge will order a re-examination of which the results may be different. These differences can occur, among others, due to natural factors. Polluted rivers, which are then added with rainwater, can cause an increase in water discharge to neutralize pollutant substances—at least reduce the level of intensity. As a result, the rivers are not polluted anymore, yet they are still contaminated within tolerable limits. Different facilities, such as laboratories, can also lead to different results. A policy regarding standardization with juridical value is urgently needed to determine procedures or sampling techniques, laboratory appointments, and others [12].

Unfortunately, the Department of Environment, an institution controlling environmental impacts, has not yet performed optimal work. Many roles are still legally attached to sectoral agencies. It has not been given full authority to supervise and order an environmental audit if an activity or attempt to commit irregularities in environmental management is suspected. In such cases, deliberations on dispute resolution can usually hinder environmental crime settlements through non-litigation channels. This is because there are different views between polluters and claimants; polluters adhere to rules and procedures, while the claimant (community) overrides them—instead, they are based on the wills and customs. As a result, the value of demand and ability has been very far adrift.

Separating law and morals in the environmental crimes settlement opens up a great opportunity to criticize laws deemed not under the morals believed by the community. In this case, it is to maintain balance, stability, and sustainability of human interaction with the environment. Criticism referred to, besides being realized through legal reform as discussed, can also be done as environmental crime settlement through non-litigation channels. The settlement is a crucial chance to carry out moral responsibility for the environment or other creatures outside of humans—that possess no awareness. Ultimately, a huge change is needed to see the reality; humans and the environment cannot be separated. Therefore, it is not morally justified if humans see themselves as the only party with the right to fight for their interests. Instead, as civilized beings, humans have responsibilities and moral values to maintain the balance, stability, and sustainability of the environment and themselves.

4 Conclusion

Separating law and morality implies that law can always be criticized. According to H.L.A. Hart on law and morality, both aspects are separated yet correlated, typically in environmental crimes settlement. Settlement of these cases through non-litigation channels emphasizes the balance between the interests of the parties involved so that all is fulfilled, especially “victims”. Even though many obstacles will still be faced in the future, we can understand that humans with morals must realize and maintain the environment’s balance and sustainability.

References

[1] Ginting, Longgena. “Hak-Hak Lingkungan Hidup Sebagai Hak Asasi Manusia.” *Jurnal Hukum Internasional* 2, no. 2 (2005): 311–18.

[2] Syaputri, Martika Dini. “Partisipasi Masyarakat Dalam Penyusunan Analisis Mengenai Dampak Lingkungan Berdasarkan Uu No 32 Tahun 2009.” *Varia Justicia* 13, no. 2 (2017): 123–31. https://doi.org/10.31603/variajusticia.v13i2.1886.

[3] Januari Siregar and Muaz Zul, “Penegakan Hukum dalam Tindak Pidana Lingkungan Hidup di Indonesia,” *Mercatoria* 8, no. 2 (2015): 107–31.

[4] Indah Dwi Prihatiningtyas, “Fungsionalisasi Hukum Pidana dalam Menjaga Pelestarian Lingkungan Hidup,” *Jurnal Dialektika Hukum* 1, no. 2 (2019): 211

[5] Lamusu, Andrianus. “Pengadilan Melalui Mediasi Penal dalam Tindak Pidana Lingkungan Hidup.” *Lex Administratum* 3, no. 1 (2015): 5–13. https://doi.org/10.1145/3132847.3132886.

[6] Ifrani, I. “Mediasi Penal Sebagai Alternatif Penyelesaian Perkara Tindak Pidana Lingkungan Hidup Pada Lahan Basah Di Kalimantan Selatan.” *AL’Adl* 8, no. 1 (2016): 1–19.

[7] H. L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1994), 205.

[8] Muhdlor, Ahmad Zuhdi. “Perkembangan Metodologi Penelitian Hukum.” *Jurnal Hukum dan Peradilan* 1, no. 2 (July 31, 2012): 189–206. https://doi.org/10.25216/JHP.1.2.2012.189-206.

[9] Peter Mahmud Marzuki, *Pengantar Ilmu Hukum* (Jakarta: Prenada Media, 2021).

[10] William C. Starr, “Law and Morality in H.L.A. Hart’s Legal Philosophy,” *Marquette Law Review* 67, no. 4 (1984): 673–89.

[11] Yudhi Priyo Ambodo, “Lokal Dalam Menciptakan Perlindungan dan Pengelolaan Bagi Lingkungan Hidup (Sebuah Kajian Teologi Hukum),” *Journal of Judicial Review* 18, no. 2 (2016): 135–44.

[12] Salmudin. “Penyelesaian Sengketa Lingkungan Hidup di Luar Pengadilan.” *Legalita* 1, no. 1 (2019): 80–97.

[13] Saragih, R F. “Fungsionalisasi ADR Dan Penyelesaian Sengketa Lingkungan Hidup.” *Jurnal Hukum IUS QUIA IUSTUM* 7, no. 13 (2000): 138–47. https://doi.org/10.20885/iustum.vol7.iss13.art11.

[14] Muryati, Dewi Tuti, and B. Rini Heryanti. “Pengaturan Dan Mekanisme Penyelesaian Sengketa Nonlitigasi Di Bidang Perdagangan.” *Jurnal Dinamika Sosial Budaya* 13, no. 1 (2011): 49–65.

[15] Ambodo, Yudhi Priyo. “Lokal dalam Menciptakan Perlindungan dan Pengelolaan bagi Lingkungan Hidup (Sebuah Kajian Teologi Hukum).” *Journal of Judicial Review* 18, no. 2 (2016): 135–44.