



THE RIGHT TO A GOOD AND HEALTHY ENVIRONMENT: Problems Of Implementation In Indonesia.

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ABSTRACT

The integration of environmental rights into human rights in Indonesian Environmental Management Acts (EMAs) has taken 37 years after the 1972 Stockholm Declaration on Human Environment and 27 years after the Indonesian Government enacted the first EMA 1982. Although a lot of community environmental disputes have been brought before the District Courts during the period of the EMA1982 up to the EMA1997, the Courts' decisions have dissatisfied the people. The nexus of constitutional rights, environmental rights and human rights in the realm of environmental human rights has remained uncertain since violation to environmental human rights cannot be brought before the Indonesian Human Rights Court as its jurisdictions only includes genocide and crimes against humanity. A crime against environmental rights is still excluded from the Human Rights Law No. 39 of 1999 as well as the Human Right Law No. 26 of 2000 on the Indonesia Human Rights Court. Hence, environmental human rights violation comes within the jurisdiction of the District Court. With all its strengths and weaknesses the District Court is the only recourse for community environmental disputes adjudication. In the interest of protecting people's good and healthy environment, this paper suggests the establishment of a special environmental court under the General Court in Indonesia as a solution. Additionally, it also suggests the inclusion of a supplementary element to the crime against humanity in the Law No. 39 of 1999 on Human Rights and Law No. 26 of 2000 on Human Rights Court which is environmental rights violation.

Key words: environmental rights, environmental human rights, Indonesian EMA, Indonesian Human Rights Court, the right to a good and healthy environment, the 1972 Stockholm Declaration.

I. INTRODUCTION

The notion of people's right to a good and healthy environment has been stipulated in the Indonesian Environmental Management Acts (EMAs). The first EMA 1982 (the 1982 Law No. 4 on Basic Provisions on Environmental Management) has provided for the notion above under Article 5. When the second EMA was enforced in 1997 through the 1997 Law No. 32 on

Environmental Management,¹ the two EMAs above in reality do not accommodate the people's need to have their right to a good and healthy environment. This situation is getting blurred when in 2009 the Government of Indonesia applies the EMA 2009 (The 2009 Law No; 23 on the Protection of and the Management of the Environment), the notion of the right of the people to a good and healthy environment is

¹ See: Art 5 (1), EMA 1997.



vanished. There is no such provision which clearly mentions the notion above. Something new in the EMA 2009 is the integration of environmental rights into human rights as stated in Article 3 paragraph (g) of the EMA 2009 where the objectives of the protection and the environmental management are, *inter alia* for the assurance of and the fulfilment of the protection of environmental rights as part of human rights.” It is argue whether the right to a good and healthy environment is included in the concept of environmental rights and automatically is regarded as part of the elements of human rights.

As a matter of fact that the acknowledgement of the right to a good and healthy environment has long been stipulated in The 1999 Law No. 39 on Human Rights precisely under Article 9 paragraph (3) which states that everybody has the right to a god and healthy environment. Furthermore in 2000, the recognition of people’s right to a good and healthy environment is guaranteed under Article 28 (H) of the Second Amendment of the 1945 Constitution. Thus in Indonesia the right to a good and healthy environment has completely become constitutional rights and also legal rights. Theoretically these provisions can be the people used whenever their environmental rights got violated.

From these three regulations therefore the notion is also named as the notion of environmental human rights. A corporation of two different areas of law, environmental law and human rights law but they are synergy to one another for the protection of human survival.

The questions raised in this paper are: the extent of the people’s right to a good and healthy environment is guaranteed and

protected under the EMAs; is violation to environmental rights seen as violation to human rights. How that notion implemented it; what is or are the parameters supporting the notion of a good and healthy environment. The questions rose due to many environmental disputes between the communities and the industries, palm plantations, and so forth occurred during the application of the EMAs which impair the people’s right to a good and healthy environment.

II. ENVIRONMENTAL CONSTITUTIONAL RIGHTS IN OTHER COUNTRIES.

The right to a good and healthy environment has been adopted into national constitutions of at least 55 countries, *inter alia*, the constitution of The Republic of Belarus,² Brazil,³ the French,⁴ Republic of Georgia,⁵ Norway,⁶ Slovenia,⁷ Argentina,⁸ Chile,⁹

² Art 46 (Environment) (Belarusian Constitution, Adopted 1994) ” (Retrieved: <http://www.belarusguide.com>).

³ Ch VI: Environment. Art. 225, the 1988 Constitution of the Federative Republic of Brazil.

⁴ Art 1 – Everyone has the right to live in a balanced environment which respects health (D. Marrani, “The Second Anniversary of the Constitutionalisation of the French Charter for the Environment: Constitutional and Environmental Implications”, (2008) 10 *Envtl.L. Rev.* 9).

⁵ The Georgia Constitution, Adopted on 24 August 1995, and last amendment 27.12.06 (<http://www.parliament.ge>).

⁶ Art. 110 (b) of The Norwegian Constitution (<http://www.stortinget.no>).

⁷ Art 72 (Healthy Living Environment) of The Slovenian Constitution adopted on 23 Dec. 1991 and amended on 14 July 1997, 25 July 2000, 7 March 2003, 15 June 2004, 20 June 2006 (<http://www.servat.unibe.ch>).

⁸ Sec 41 (The 1994 Argentina Constitution) (<http://www.hrcr.org/chart/annotations&references/Argentina.html>)



Costa Rica,¹⁰ Cuba,¹¹ Ecuador,¹² El Salvador,¹³ Honduras,¹⁴ Nicaragua¹⁵ and Paraguay¹⁶ Indonesia, Burma, Philippines, Thailand and Vietnam.

Similarly to what happen to Indonesian EMAs, and other human rights law, the countries above also have lack of information describing what is meant by the right to a good a healthy environment. Some writers proposed such term refer to environmental rights¹⁷ likewise “decent

environment”, “healthy environment,” “safe environment,” “balanced environment,” “secure environment,” “satisfactory environment,” “adequate environment,” “clean environment,” “pure environment,” “natural environment,” “viable environment,” “ecological sound,” “ecologically-balanced.” Regrettably to say the terms offered by the writers above are vague, diverse, controversial, and ever-changing¹⁸ and assumed to be quoted from the national constitutions. It is still argue whether it includes the rights of land, water, air being free from pollution, including the right to enjoy the un-spoilt nature¹⁹ or does it just pure human rights, pure economy or purely environment (ecology).²⁰

III. ENVIRONMENTAL CASES RELATED VIOLATION TO HUMAN RIGHTS.

When one traces back during the application of the Indonesian EMAs, starting from the first one up to the promulgation of the second EMA 1997, there were a number of community environmental disputes brought to district courts. In general the case dealt with pollution and environmental

⁹ Art 19 Para. 8 (1980 Constitution of Chile).

¹⁰ Art 50. Para. 2 (Constitution of The Republic of Costa Rica, as amended by Article 1°, Law No. 7412, June 3, 1994.) (http://www.costaricalaw.com/constitutional_law/constitution_en.php)

¹¹ Art 27 (Constitution of the Republic of Cuba, 1992) (http://www.cubanet.org/ref/dis/_const_92_e.htm).

¹² Art. 14 (Constitution of the Republic of Ecuador) (<http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>).

¹³ Art 69 (Constitution of the Republic of El Salvador, 1983 (As Amended to 2003) (<http://pdba.georgetown.edu/constitutions/elsal/elsalvador.html>).

¹⁴ Art 145 (Constitution of the Republic of Honduras 1982 (Updated through the Decree 36 of May 4 2005) (<http://www.honduras.com/honduras-constitution-english.html>).

¹⁵ Art 60 (Nicaraguan Constitution of January 9 1987. (Retrieved: <http://janda.org/politxts/Major%20Democratic%20Documents/nicaragua.htm>).

¹⁶ Art 7 (1) (Paraguay Constitution, adopted 20 June 1992) (Retrieved: <http://www.servat.unibe.ch/icl/pa00000.html>).

¹⁷ Melissa Thorne, “Establishing Environment As a Human Rights”, 1990-1991 19 *Denv. J. Int’l L. & Pol’y* 301- 342; James W. Nickel, “The Human Rights to a Safe Environment: Philosophical Perspectives on Its Scope and Justification”, 18 *Yale. J. Inter’l L.* 281-993; Ole W. Pedersen, “European Environmental Human Rights and Environmental Rights: A Long Time Coming”, 2008 21 *Geo. Int’l Env’tl. L. Rev.* 73 and Luis E. Rodriguez- Rivera, ‘Is the Human Rights to Environment Recognised Under International Law? It Depends in the Source’, (Winter 2001) 12 *Colo. J. Int’l Env’tl. L. & Pol’y I.*

¹⁸ Luis E. Rodriguez- Rivera, ‘Is the Human Rights to Environment Recognised Under International Law? It Depends in the Source’, (Winter 2001) 12 *COLO. J. INT’L ENVTL. L. & POL’Y I.*

¹⁹ R.R. Churchill, “Environmental rights in existing human rights treaties”, in Alan Boyle, 1996 *Human Rights Approaches to Environmental Protection*, Claredon Press-Oxford, pp 91- 108.

²⁰ M. Thorne, ‘Establishing Environment As a Human Right’, (1990-1991) 19 *Denv. J. Int’l L. & Pol’y* 301., J. W. Nickel, 18 *Yale J. Int’l L.* 283)., R. F. Dasmann, (1975) *The Conservation Alternative* (4th ed.), New York: Wiley, Daniel D. Chiras, *Environmental Science: A Framework for Decision Making*, The Benjamin Cummings Publishing Company, Inc. 2727 Sand Hill Road, Menlo Park, Ca 94025, p. 42.



degradation which affected the economic activities of the local people. It was recorded within the period of 1989-2004 there were at least 39 community environmental disputes had been solved either through litigation and non-litigation. Meanwhile, during the enactment of the first EMA1982 there were 20 cases and the number is declined to 19

cases when the second EMA1997. From 2004 up to the promulgation of the third EMA2009, there was no record of cases. The following table illustrates the community environmental disputes within 1989-2004.

**Table 1 The Community environmental disputes within the period of
The promulgation of the EMAs**

No	Disputes	Year	Litigation (L) /Non-Litigation(NL) (Mediation)
1	PT. Inti Indorayon Utama Case	1989	L
2	PT. Pupuk Iskandar Muda	1989	L
3	Samidun Sitorus cs v. PT. Inti Indorayon	1989	L
4	PT. Sarana Surya Sakti Case	1991	L
5	PT. Muara Jaya	1991	L
6	Tapak River Case	1991	NL
7	Tembok Dukuh vs. PT. SSS Case	1991	NL
8	Sulae Case	1992	L
9	Tyfountext (Solo)	1992	NL
10	Siak River	1992	NL
11	Sambong River (Batang)	1993	NL
12	Singosari SUTET Case	1994	L
13	Reafforestation Fund (IPTN) Case	1994	L
14	Sibalec (Yogyakarta)	1994	NL
15	Naga Mas (Central Java)	1994	NL
16	Ciujung River (West Java)	1995	NL
17	Samitex (Yogyakarta)	1995	NL
18	Surabaya River Case	1995	L
19	Freeport Case	1995	L
20	Sari Morawa Case	1996	L
21	Reafforestation Fund (PT. Kiani Kertas)	1997	L
22	Indo Acidatama (Central java)	1997	NL
23	Exponent 66 vs. APHI	1998	L
24	Laguna Mandiri	1998	L
25	WALHI vs. PT. Pakerin	1998	L
26	PT. Palur Raya Dispute	1998	L
27	Kalimantan Peat Land Case	1999	L
28	Banger Case	1999	L
29	PT. Sumber Sehat (Kudus)	1999	NL
30	Kanasritex (Semarang)	1999	NL
31	PT. Kayu Lapis Indonesia (KLI)	1999	NL
32	PT. Pura (Kudus)	1999	NL
33	Way Seputih River	2000	L
34	Tawang Mas (Semarang)	2000	NL
35	Pekanbaru Smog Case	2000	L
36	Kelian Equatorial Mining	2001	NL
37	WALHI vs. PT. Freeport	2001	L
38	Transgenic Cotton Case	2001	L
39	PT. Lapindo Case	2004	L

Source: D.F. Nicholson, *Environmental Dispute Resolution in Indonesia*, PhD thesis, Leiden University, 2005.



If one looks at the cases above and confront them to the Second Amendment of 1945 Constitution and the EMA 2009 and also The 1999 Law No. 39 on Human Rights conclusion one will get that pollution and environmental degradation, the impairment of people's economy activities are in contraction to principle of human rights. Thus one can say that violation to environmental rights is also seen as violation to human rights. This argument is parallel to the opinions delivered by many scholars, likewise: Thorne²¹ says that even though the Universal Declaration on Human Rights 1948 has an implicit reference to the environment but Article 25 paragraph (1) may be used as reference to environmental rights that everyone has "the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing [and] housing." Meanwhile, Shelton²² cited that the right to life, personal security and the right to health and food as rights to the environment or as rights of the environment and even the right to information may be regarded as environmental rights. Thus, the right to life, the right to health, to food, to safe and healthy working conditions, the right to housing, the right to information, freedom of association are rights that have interconnection with environment and ultimately have an impact on the enjoyment of environment.²³ Thus, the nexus of environmental rights to human rights²⁴ implies everyone's obligation to safeguard the environment²⁵ for the violation of environmental rights will be the impairment to human rights. Shelton,²⁶ Cassel,²⁷ Giorgetta,²⁸

Soveroski,²⁹ Mowery³⁰ and Nickel³¹ support the connection of environmental rights to human rights.

IV. ENVIRONMENTAL RIGHTS VIOLATION UNDER INDONESIAN LAWS.

As mentioned early on that the right to a good and healthy environment has been constitutional rights and legal rights for it is guaranteed under the 2000 Second Amendment of The 1945 Constitution and also protected under the EMA2009 and The 1999 Law No. 39 on Human Rights. These provisions can be used by the people for their environmental rights impaired by pollution and environmental degradation. These provisions are also seen as legal foundation for people to claim their environmental rights. In other word, community environmental disputes with industries, palm plantations, mining, agricultures, and so forth have human rights nuances. Furthermore they are welcome to submit their cases to human rights court. Is environmental crime covers under The 2000 Law No. 26 on Human Rights Court? Unfortunately the Human Rights Court has no jurisdiction over environmental rights violation. Although in Human Rights Law of 1999 No. 39 has admitted that environmental rights is human rights. Human Rights Court has only jurisdiction over the

²¹ M. Thorne., 'Establishing Environment As a Human Rights,' (1999-2000) 19 *Denv. J. Int'l L. & Pol'y*, p. 301-342.

²² D. Shelton, Human Rights, Environmental Rights, and the Right to Environment, (1991-1992) 28 *Stan. J. Int'l L.*, p. 103- 138.

²³ UN Economic and Social Council (GENERAL E/CN. 4/Sub. 2/1994/9 6 July 1994).

²⁴ Paolo Galizzi, "From Stockholm to New York, via Rio and Johannesburg: Has the Environment Lost its Way on the Global Agenda?" (2005) *Fordham International Law Journal* (29) 5.3, pp. 952-1008.

²⁵ Principle 2 (UN Doc A/CONF/48/14/REV.1 (1972))

²⁶ For examples: D. Shelton, "Human Rights and Environment Issues in Multilateral Treaties Adopted between 1991 and 2001." *Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment* 14-16 January 2002, Geneva: Background Paper No. 1. (<http://www.ohchr.org>).

²⁷ J. Cassel, 'Enforcing Environmental Human Rights: Selected Strategies of US NGOs.' (2007) 6 *Nw.U.J. Int'l Hum. Rts.* 104; M. Thorne, 'Establishing Environment As Human Rights.' (1990-1991) 19 *Denv. J. Int'l L. & Pol'y* 3001-342.

²⁸ S. Giorgetta, 'The Right to a Healthy Environment, Human Rights and Sustainable Development.' *International Environmental Agreements: Politics, Law and Economics*, Kluwer Academic Publishers, Printed in Netherlands, 2002, pp. 173-194; O. W. Pedersen, 'European Environmental Human Rights and Environmental Rights: A Long Time Going?' (2008) 21 *Geo. Int'l Env'tl. L. Rev.* 73.

²⁹ M. Soveroski, 'Environmental Rights versus Environmental Wrongs: Forum over Substance?' (2007) *RECIEL* 16 (3), pp. 261-273.

³⁰ L. A. Mowery, 'Earth Rights, Human Rights: Can International Environmental Human Rights Affect Corporate Accountability?' (2002) 13 *Fordharn Ent'l. Law J.* 343.

³¹ J. W. Nickel, 'The Human Rights to a Safe Environment: Philosophical Perspective on Its Scope and Justification', 18 *Yale. J. Int'l L.* 28. 281-295.



Genocide crime and a crime against humanity. The inconsistency between Human Rights law and Human Rights Court above will have an impact on the future community environmental disputes where District Court is the only legal remedy to solve environmental disputes. Since community environmental disputes is distinctive from other legal disputes therefore submitting environmental disputes before the District Court will have an impact on the victims of pollution and environmental degradation who economically have weaken bargaining position and can be predicted they will not be the winners.

Possibility of submitting environmental cases to Human Rights Court is not impossible if the Indonesian Commission of Human Rights (KOMNAS HAM) intends to make a breakthrough and follow to the practice of the European Commission of Human Rights. In European Convention on Human Rights there are no provision deals with environment. After the 1972 Stockholm Declaration on Human Environment where Principle I is the political foundation for environmental human rights. The European Commission realised that there is a link between between the impairment of environmental rights to the enjoyment of human rights, especially the right to life. The Commission finally declared the admissible of environmental cases submitted to European Human Rights Court. Herein, the Indonesian Commission of Human Rights (KOMNAS HAM) can interpret the provisions in the Human Rights Law of 1999 No. 39 have some linkages to environmental rights violation.

V. CLOSING REMARKS

The notion of the right to a good and healthy environment under Indonesian laws and regulations is just a myth. Although it has been guaranteed in The 1945 Constitution and legally protected in the EMA 2009, the Human Rights Law of 1999 No. 39. The environmental disputes-related human rights cannot be submitted to Human Rights Court for it is inconsistent to The 2000 Law No. 26 on Human Rights Court. Only crimes of genocide and of against humanity are under the jurisdiction of Human Rights Court. As a result, District Court is the only recourse for the people seeking for environmental legal justice.

Since environmental disputes are different with those of legal disputes in areas of civil and criminal laws, the verdicts made by the Court will not be able to satisfy the victims of pollution and environmental degradation.

It is suggested that reformation in area of Indonesian legal system is quite urgent in future. Establishing special environmental court will be of the solution.

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