

## STRICT LIABILITY PRINCIPLES IN ENVIRONMENTAL PROTECTION AND MANAGEMENT BASED ON ACT NUMBER 11 YEAR 2020 CONCERNING JOB CREATION

Suyanto<sup>1</sup>, Rizki Kurniawan<sup>2</sup>, Dara Puspitasari<sup>3</sup>, Zakiah Noer<sup>4</sup>, Moh. Nasichin<sup>5</sup>,  
Aprila Siti Cholifah<sup>6</sup>

<sup>1</sup> Universitas Gresik, Jl. Arif Rahman Hakim Gresik No. 2B, Gresik, Indonesia

<sup>1</sup> Universitas Gresik, Jl. Arif Rahman Hakim Gresik No. 2B, Gresik, Indonesia

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<sup>1</sup> Universitas Gresik, Jl. Arif Rahman Hakim Gresik No. 2B, Gresik, Indonesia

<sup>1</sup> Universitas Gresik, Jl. Arif Rahman Hakim Gresik No. 2B, Gresik, Indonesia

[soe.unigres@gmail.com](mailto:soe.unigres@gmail.com) (081252944449), [rizkikurniawanshmh@gmail.com](mailto:rizkikurniawanshmh@gmail.com) (0817375649),  
[darapuspitasari.dp@gmail.com](mailto:darapuspitasari.dp@gmail.com) (082232178995), [zakiahnoer12@gmail.com](mailto:zakiahnoer12@gmail.com) (082257014105), ,  
[muhammadnasichinsh@gmail.com](mailto:muhammadnasichinsh@gmail.com) (082244939845), [aprilasiticholifah@gmail.com](mailto:aprilasiticholifah@gmail.com),  
(081225689370)

### ABSTRACT

*In Article 88 of Act Number 32-year 2009 concerning the Environmental Protection and Management, Strict Liability Principles known as a responsibility without having to prove a fault. However, since the enactment of Act Number 11-year 2020 concerning Job Creation which amends the provisions of Article 88 of Act Number 32-year 2009 by eliminating the phrase "without the need to prove a fault" creates an ambiguity. Where the removal of the phrase confuses the meaning of strict liability in this article. This research raises two issues: 1) Strict liability principles in Article 88 of Act Number 32-year 2009 as amended in Article 22 Number 33 of Act Number 22-year 2020; (2) the implementation of strict liability principles in the enforcement of environmental law in Indonesia. This research is a type of normative legal research with a statutory approach, a conceptual approach, and a historical approach. The results showed that the removal of phrase "without the need to prove a fault" in Article 22 Number 33 of Job Creation Act is only a form of simplifying the provisions or clauses without reducing the nature or dignity of strict liability principles itself, namely responsibility without the need to prove a fault. The implementation of strict liability principles in the enforcement of environmental law in Indonesia is guided by Supreme Court Decision Number 36/KMA/SK/II/2013 concerning the Enforcement of Guidelines for Handling Environmental Cases. Where the defendant can file a defense by proving that he is innocent. If he is unable to prove that the fault was committed by a third party or due to a natural disaster, then the defendant is obliged to pay the compensation incurred.*

**KEYWORD:** Strict Liability Principles, Protection and Management, Environment

## 1. INTRODUCTION

Act Number 11-year 2020 concerning Job Creation (hereinafter referred to as Job Creation Act) which was validated on October 5, 2020 is a legal product based on the Omnibus Law. Job Creations Act reaps many contradictions in terms of principles, forms, permits and so on. Likewise, in its design and ratification, it is also labeled as not transparent and less democratic. The regulations in the Job Creation Act amend and/or revoke at once the provisions of several articles in approximately 80 Acts. One of them is the regulation of the environmental protection and management fields.

The Indonesian Center for Environmental Law (ICEL) in its series of analyzes expressed their opinion that none of Legislator really understood and was able to explain the Job Creation Act. his belief is based on several basic findings such as the complexity of reading several articles, the existence of material that should have been deleted but was not completely deleted, or other changes that cause ambiguity in its interpretation and application.

One of them is stated in Article 22 Number 33 of the Job Creation Act which changes the provisions of Article 88 of Ac Number 32 of 2009 concerning Environmental Protection and Management (hereinafter referred to as PPLH Act) regarding the provisions of the principle of strict liability in environmental protection and management.

It should be noted that there are 2 (two) civil liability systems adopted by the PPLH Act, namely liability based on fault and strict liability principles. Liability based on fault is regulated in Article 87 of PPLH Act. This article is based on Article 1365 of Civil Code which requires a proof of fault as the basis for requesting compensation. While strict liability is the concept of immediate responsibility without requiring proof of fault.

The PPLH Act essentially a regulatory breakthrough in the Indonesian legal system because it adopts strict liability principles which has never been implemented in Indonesia before (Immamulhadi, 2014). This principle comes from the concept of a common law state as in the case of *Ryland v Fletcher*. In this case, a person is considered immediately responsible for environmental pollution if he/she in carrying out his/her activities uses hazardous substances (super-hazardous substances) (Immamulhadi, 2014). In Indonesia, strict liability principles cannot be applied to all pollution cases, it is only applied selectively to certain environmental cases.

Strict liability principle is stated in Article 88 of the PPLH Act, namely: "Everyone whose actions, business, and/or activities use B3, generates and/or manages B3 waste, and/or poses a serious threat to the environment, is absolutely responsible for the losses that occur without the need to prove the element of fault".

In the explanation of Article 88 the meaning of strict liability is interpreted, where the element of fault does not need to be proven by the plaintiff as the basis for payment of compensation. This means that as long as there is an action that causes damage, the perpetrator must be responsible for restitution or compensation for damage to the victim without the need for supporting evidence. From a legal point of view, the absence of this evidence is a special rule (*lex specialist*) in a lawsuit for violating the law as referred to in Article 1365 of Civil Code, which the responsibility is based on the defendant's fault.

However, the Government through the Job Creation Act changed the provisions of strict liability principle in the settlement of environmental disputes as regulated in Article 88 of PPLH Act by eliminating the phrase "without the need to prove the element of fault".

Article 22 Number 33 of Job Creation Act stipulates that: "Every person whose actions, business, and/or activities use B3, generates and/or manages B3 waste, and/or poses a serious threat to the environment, is absolutely responsible for the losses that occur from his business and/or activities"

The removal of the phrase "without the need to prove an element of fault" certainly creates ambiguity and concern for business circles and society in general regarding environmental law enforcement in Indonesia. Based on this background, this article attempts to answer a number of problems as follows: Strict liability principles based on Article 88 of Act Number 32-year 2009 as amended in Article 22 Number 33 of Act Number 22-year 2020; and The implementation of strict liability principles in the enforcement of environmental law in Indonesia.

This research is a type of normative legal research which uses statutory approach, conceptual approach, and historical approach.

## **2. RESULTS**

### **Strict Liability Principles Based on Article 88 Act Number 32-year 2009 as amended in Article 22 Number 33 of Act Number 22-year 2020**

Strict liability is one of the principles of legal liability that has been known for a long time. Strict liability emphasizes the accountability system without focusing on the defendant's fault. James Krier argues that: "The doctrine of strict liability for abnormally dangerous activities can be of assistance in many cases of environmental damage, strict liability is, of course, more than a burdenshifting doctrine, since it not only relieves the plaintiff of the obligation to prove fault but forcloses the defendant proving the absence of fault". The statement means that the problem of environmental damage is part of a dangerous activity. So that the doctrine of strict liability is very important to be applied, not because the injured party must explain but, in this case, it is the defendant who must be able to explain the fault resulting from environmental damage caused by his actions.

Strict liability principle is the principle of legal responsibility that has developed since the past. This principle was born from a case in England (Rylands v. Fletcher) in 1868. Since then, various countries in the world have begun to accommodate this principle in their legal systems. In this case, Indonesia is a country that is bound by this principle.

The principle of strict liability was adopted by the Indonesian government through PPLH Act in terms of environmental law enforcement. Article 88 of PPLH Act, stated that: "Everyone whose actions, business, and/or activities use B3, generates and/or manages B3 waste, and/or poses a serious threat to the environment, is absolutely responsible for the losses that occur without the need to prove the element of fault".

Further explanation of Article 88 of PPLH Act explains that "The element of fault does not need to be proven by the plaintiff as the basis for payment of compensation".

The absence of this evidence from a legal point of view is a special rule (*lex specialis*) of the violating the law provisions in Article 1365 of the Civil Code which requires proof of fault as the basis of compensation requirements.

The element in Article 88 actually strongly emphasizes the main characteristics of strict liability, where in its regulation there is a phrase or clause stating that the provisions regarding strict liability are "without the need for proof of the element of guilt". In this case, the government emphasizes that environmental damage or pollution is part of a dangerous activity so that the strict liability principle must be applied in environmental law enforcement. Although in practice the strict liability principle can only be applied selectively to certain environmental cases.

However, with the issuance of the Job Creation Act, the provisions of the strict liability principle in the PPLH Act are currently being debated among various groups, including academics, practitioners, and even business actors. This was triggered by removal a phrase "without the need to prove the element of fault" in Article 88 of PPLH Act.

Article 22 Number 33 of Job Creation Act changes the provisions of Article 88 of PPLH Act as follows: "Every person whose actions, business, and/or activities use B3, generates and/or manages B3 waste, and/or poses a serious threat to the environment, is absolutely responsible for the losses that occur from his business and/or activities"

The elimination of the phrase "without the need to proof of an element of fault" basically does not reduce the essence of strict liability principle itself, namely immediate responsibility without having to prove an element of fault. The government in this case is only trying to simplify the clause in Article 88 of PPLH Act without annulling the implementation of strict liability principle in environmental law enforcement. In other words, it can be concluded that the removal phrase "without the need to prove an element of fault" in Article 22 Number 33 of the Job Creation Law is only a form of simplifying the provisions or clauses without reducing the nature or dignity of the strict liability principle itself.

### **The implementation of strict liability principles in the enforcement of environmental law in Indonesia**

In law enforcement, the PPLH Act adopts 2 civil liability systems (Ade Risha Riswanti, 2013). Namely:

- 1) Liability that requires proof an element of fault that causes harm (fault-based liability);
- 2) Strict liability is a responsibility without having to prove an element of fault, where accountability and compensation appear immediately after the act is committed.

Civil liability in the context of environmental law enforcement is a civil law instrument in order to obtain compensation and environmental restitution costs due to pollution and/or environmental damage caused (Salim HS, 2008).

PPLH Act is essentially a breakthrough in the Indonesian legal system because it adheres to the strict liability principle which has never been implemented in Indonesia before. The birth of the PPLH Law is motivated by the many cases in the field of

environmental law, both damage and pollution which currently require serious environmental law enforcement. In practice, environmental law enforcement, whether administratively, criminally, or civilly, has not yet had a significant impact on legal protection in the environmental field.

Although the strict liability principle has been regulated in the PPLH Act since 2009, in reality this principle is rarely used by law enforcement officials in resolving environmental disputes. This is due to the lack of understanding of law enforcement officers on the concept and implementation of the strict liability principle which is essentially contrary to the principles of civil and criminal law.

Therefore, in 2013 the Supreme Court issued Supreme Court Decision Number 36/KMA/SK/II/2013 concerning the Enforcement of Guidelines for Handling Environmental Cases, one of which regulates the strict liability principle. According to the decision, there are several things to be noted in the implementation of the strict liability principle, namely:

- 1) The plaintiff does not need to prove element of fault. The defendant can be free from responsibility if the loss or damage occurs due to the actions of another party;
- 2) Proof with the strict liability principle must be requested by the plaintiff and contained in the plaintiff's lawsuit.
- 3) Strict liability is not reverse proof. Even though you have made all efforts in accordance with the laws and regulations to prevent pollution and/or environmental damage, you must still be responsible.
- 4) The Defendant may file a defense by proving that:
  - a. not use, produce B3 and pose a serious unproven threat;
  - b. The damage or pollution is not caused by its activities but it is caused by a third party or force majeure (based on literature and judicial practice in Common Law countries).

The request for provision in the form of a temporary suspension of activities can be immediately granted in the event that the defendant's activities are managing B3 and/or B3 waste or there is a serious threat and imposed if it is immediately apparent that there is irreparable environmental damage.

- 5) The Panel of Judges may add to the decision even though it is not explicitly requested by the plaintiff, with considerations for environmental protection and the interests of the community. This can be done on the basis of a subsidiary petition asking for a fair decision;
- 6) Precautionary Principle: in the event that there is no reason or sufficient evidence, it cannot prevent the judge from preventing environmental damage.

Seen in the guidelines issued by the Supreme Court above, the principle of absolute liability has a much more effective legal force compared to ordinary civil procedural law in which the plaintiff must first prove the defendant's fault (*actor incumbit probatio*) (Hariman Satria, 2017). Where the defendant is given the opportunity to prove that he did not do anything wrong. If he is unable to prove that the error was committed by a

third party or due to a natural disaster, then the defendant is obliged to pay the compensation incurred.

Unfortunately, although it has been enacted since 2009 and guidelines have been made since 2013, strict liability principle still rarely applied on environmental dispute in Indonesia. This is because the legal basis for the application of guidelines for handling environmental cases is only regulated in a Supreme Court Decision which is not very strong as a legal standing. Therefore, the provisions of strict liability principle should be regulated more firmly and detail in the Environmental Protection and Management Act (UU PPLH).

### **3. CONCLUSION**

The elimination phrase "without the need to prove an element of fault" in Article 22 Number 33 of Job Creation Act which changes the provisions in Article 88 of PPLH Act basically does not reduce the essence of strict liability principle, namely immediate responsibility without having to prove a fault. In this case, the government is only trying to simplify the clause in Article 88 of PPLH Act without annulling the implementation of strict liability principle in environmental law enforcement.

The implementation of strict liability principle in environmental law enforcement is guided by the Supreme Court Decision Number 36/KMA/SK/II/2013 concerning the Enforcement of Guidelines for Handling Environmental Cases. Where the defendant can file a defense by proving that he is innocent. If he is unable to prove that the error was committed by a third party or due to a natural disaster, then the defendant is obliged to pay the compensation incurred.

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