Green Court Towards Ecojustice

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Abstract. Everyone has the rights to have a good and healthy environment. Through judiciary bodies is one of the ways to fulfill the rights. Research questions are how is the role of green court to implement ecojustice and access to justice to get ecojustice. The method use is normative legal research, use primary and secondary data. Datas will be analyzed in qualitative method and describe with descriptive analysis. To build green court, has to prepare the system of law which based on principle of good environmental law. The competence of green court and its formal law should be clear, judges should have environmental certified, raise the society awareness to protect the environmental. Regulations to protect the environmental defender has to be made as well as to build green court. Acess to justice to get ecojustice can be made from judiciary system. Regulations about Anti Eco SLAPP has to be made, in order to protect to environmental defender. Filling lawsuit with citizen lawsuit mechanism also has to be made, this is to give opportunity to everyone to have healthy environment. Judiciary system has to make regulations that possible to build green court as judiciary body to protect the environment and Anti Eco SLAPP, citizen lawsuit which has to be developed in future.

1 Introduction

Constitution as basic law for every country to carry out the government. Jimly Assiddiqie introduced concept of environmental sovereignity [1]. This concept relates with ecocracy sovereign which is developed by constructed relationship between God, nature and human by changing the perspective from anthropocentris become Theocentrisme, which put human and nature in balance position and connected to God. In this concept, there should triangle relations between human, nature and put God as centre. Every development made must be fair to nature, while nature has its own basic rights not to be disturbed, actually it has to be kept in balance for next generation and it should be kept through the time, and this is sustainable development. Constitution emphasized their role to keep the balance position of human and nature, by making the green regulations.

Law Number 32 of 2009 concerning Protection and Management of Environmental (hereinafter is Environmental Law) is regulates matters related to environment, since the strategic position between two continents and two oceans, it has vulnerable positions of climate change. On the other side the massive development which can cause decrease in capacity, productivity of natural resources for human life, animals. Environment protection

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and management should be match with the usage plan without neglecting the human life needs.There should be regulations, policies which based on principle of good environmental principal, and supported with people's awareness. This awareness has to be protected also by law, which can be done by judiciary bodies. Judiciary bodies as implementation of the judiciary system, has role of law enforcement and justice. They also have to maintain the fullfillment of rights of citizen as well as environment. Research result of Maret Priyanta said that environment as subject to law newly developed in the judiciary, and it should be clearly defined as state responsibility for future generation [2]. Her research was based on comparison study of constitutional between Indonesia and Equador, while in Equador put environment as subject to law in the Constitutional.

This article focuses on Administrative Court as judiciary body under Supreme Court, and has authority to examine, settle the administrative disputes. Environment disputes in administrative law are under competence of Administrative Court, because the defendant is government and/or official body, and the object of dispute is government decree issue by government and/or official body. Environmental permit has an important role to control the development, management of environmental and to cancel the permit, it goes to Administrative Court.

The research questions are how is the role of green court to implement ecojustice, and access to justice to get eco justice. This research conducts as normative legal research, using primary data and secondary data. Datas will be analyzed in qualitative method and describe with descriptive analysis.

Novelty of this research is to develop the existing judiciary bodies to become green court in order to achieve SDG's goals. The role of judiciary bodies is strategic because for the law enforcement and human rights protection in the frame of Constitution. Access to justice to get eco justice also rights to get protection from SLAPP, which is obstruct the movement or action to speak their rights in environmental damage. Another way to access to justice is filling lawsuit using citizen lawsuit mechanism, which has not clear regulations right now in Indonesia.

2 Discussion

2.1 Green Court in Indonesia

Government has to prepare transformation about policy to protect and management of environment, also needs cooperation with private sector to develop and enhance utilization environment in such a wisdom and good way. These steps need green policy which covers major factor such as economic, education, social awareness, law enforcement, which lead to sustainable development and dynamic changes of information and technologies.

Green energy policy is a starting point to reach all the factors that may be relates and affect with the environment. Green enery policy consist of all policy aimed to synchronize the structure of country energy with the needs of sustainable development considering the absorption and the availability of natural resources [3]. According to the aim and meaning of green energy policy, government needs to coordinate with non-state actors, not only to get benefit and costs are distributed fairly, but also to keep the process of transformation goes well.

Policy which had been made by government may cause environmental dispute and it goes to court to settle the disputes, when the non-litigation process not achieved. Development of environmental disputes may vary, it needs clear arrangement to settle the disputes. This arrangement regulates from government, legalize, stipulates and implement in the public. There should be transformation in public and private sector with the prior to green policy,

without exception in the judicial body. Some government has started to have green court or green tribunal in order to protect the sustainable development and keep the natural resources for future generation.

For comparison in India, National Green Tribunal established in 2010 under National Green Tribunal Act 2010. This Tribunal settle environmental cases under the principle of natural justice and have its own procedures, since the application is different from civil suits and writ petitions. The Tribunal prioritize fast response after the receive the application [4].

In Sweden, Environmental Code stipulated in 1999, states that all human activities can harm environment, human health, and give environmental court for both administrative, criminal and civil procedure also for law enforcement [5]. Land and Environmental Court have legal jurisdiction for land use and environmental areas for civil and administrative but not criminal matters. Panel of judges are equals in decision making process.

Italy has commitment to protect environment, natural resources, also animal protoection for the future generation as stated in their Constitution. Private sector has duty to protect health, environment [6]. This shows that Government has strong commitment to protect environment in their Constitution, in order to make everyone has a healthy life also for future generation.

Research result of Yenehun Birlie, showed that since 2002 in Ethiopia, there are barriers during implementation of PIEL (Public Interest Environmental Litigation) are neglected and does not come forward [7]. According to his research, PIEL has 2 (two) important role, first as one way to communicate for community because is possible to representatives, NGO's to challenge the decision making process of government and polluters in the court. Second, PIEL is a useful instrument to give information about sustainable development, transparency, to action of private and governmental sector that might be harm to environment.

Article Number 4 of Environmental Law stated that environmental protection and management included planning, utilization, control, maintenance, supervision and law enforcement. To avoid bigger damage of environment, there should be preventive and represive way to be done, then it goes to judiciary body for law enforcement. Environmental disputes can be put into general court or administrative court, it is depending on the defendant, object of disputes.

Supreme Court has issued Supreme Court Decree Number 36 / KMA/SK/II/ 2013 of Guidelines for Handling Environmental Cases and implement for all judiciary bodies under Supreme Court. This decree also stated that judges should have certificate as environmental judge before examine the environmental disputes and certificate issued by Supreme Court. Judges has to implement the principle of good environmental in the process of litigation.

To develop green court in Indonesia, based on System of Law by Lawrence Friedman, there are structure, substance and culture of law. Legal structure is about legal bureaucracies, role of the judiciay bodies, law making institution. Legal substance is about process of making legal product by legislative and executive, besides that also contain of values, norms which are exist in the society, it also about political will of government. Legal culture has an important role as reflection of legal system [8]. The triangle between structure, substance and culture are connected and build the system of law.

Legal structure to build green court must be emphasized about the position of the court. Since there are 4 (four) courts under Supreme Court, more spesifically only general court and administrative court which are available to examine and settle environment disputes. It has to support with certified judge of environmental disputes. In China and Sweden, environmental court is under general court, but in India, National Green Tribunal as quasi-judicial body which has limited power to settle environmental disputes. Environmental court as above mention are depends on the system of law, culture and politics of state. It is proposed to make green court as special court under Adminisitrative Court with thought idea, that aim

is to cancel the environmental permit and permit is an administrative action by government body or officer.

Legal substance set about the competence of green court, environmental justice system, principle of good environmental government. Environmental justice system by prioritizing the implementation of principle of good environmental governance, access to justice, eco justice. Sonny Keraf stated that good implementation of governance will impact to good environmental management, moreover without good governance it is difficult to expect good environmental governance [9]. Massive development will damage environment, if the government did not pay attention for the principle of good environmental governance. Principle of good environmental governance is the implementation of principle of good governance for protection, management of environmental. The litigation procedure to file lawsuit, requirements, parties are included in legal substances.

Culture of law about the habit of society to aware with environment. This awareness will arise society concern to maintain, protect environment, also file lawsuit to court. If there are clear regulations about the public litigation or public participation in the substance of law, it will be helpful for environment. Legal obedience is a part of culture of law, it has important role also to build an environment awareness.

2.2 Access to Justice to Get Ecojustice

Aarhus Convention 1998 provides guarantees to individuals regarding access to information, public participation in making decisions, access to justice related to environmental issues. The 1945 Constitution in Article 28 H affirms the right of everyone to obtain a healthy living environment, then in Article 65 of the Environmental Law strengthens the right to a good and healthy environment, environmental education, access to information, access to justice, the right to submit proposals and/or or objection to the planned business and/or activity which is estimated to have an environmental impact, the right to play a role in the protection and management of the environment in accordance with the laws and regulations, the right to file a complaint due to the alleged environmental pollution and/or destruction. Article 66 of the Environmental Law stipulates that anyone who fights for the right to a healthy and good environment cannot be prosecuted criminally or be sued in a civil manner.

Access to justice in the environmental concept has a meaning regarding the rights of everyone in fighting for human rights and environmental justice. This right is also understood as the right to file a lawsuit in a civil and administrative manner, in a criminal case by considering the types of disputes that arise. Everyone who struggles to maintain a healthy living environment must be protected by law. The right of protection is granted by the state through legal channels. In some cases that arise, there can be a situation where environmental fighters are fighting for the rights to the environment, who later become defendants or suspects. This is contrary to Article 28 H of the 1945 Constitution, Articles 65 and 66 of the Environmental Law.

Environmental defender is committed to protecting, defending the right to a healthy environment, and obtaining environmental justice. Everyone has the right to obtain information and participate in making decisions related to the environment. Various efforts with actions that invite the community to take better care of the environment, conduct regular advocacy, can also be through hearings with the government as the regulator. The community is actively involved in protecting, preserving and saving the environment for current and future generations. In carrying out these activities, environmental fighters should receive legal protection from the State.

Settlement of environmental disputes can be settled out of court and through courts, both have the aim of giving the community the right to obtain environmental justice. The legal route is a mechanism that can be taken by citizens with the aim of obtaining justice and legal

certainty. Strategic Lawsuit Against Public Participation (SLAPP) as an effort to stop activities aimed at freedom of expression, expression of opinion [10]. Research on SLAPP was conducted by Pring and Canan in the United States, which emphasizes freedom of expression. SLAPP can be carried out by the Government or any party with the aim of impeding freedom of expression, which should receive protection from the state. Based on the research by Eko Riyadi and Sahid Hadi, there are 3 (three) patterns of SLAPP in Indonesia, also as act which are contradict or give bad effect on the freedom of expression [11]. They also emphasized that court must present to showed that States give protection in freedom of expression. There should be judge verdict that protect everyone who experiences SLAPP in civil and criminal matters.

Based on data obtained from the Indonesia Center for Environmental Law (ICEL), regarding cases of reporting against individuals who fight for the environment, but are reported parties both civilly and criminally. Furthermore, ICEL also emphasizes to be strictly regulated regarding effective Anti-SLAPP arrangements by prioritizing the termination of SLAPP cases as early as possible [12]. There must be a clear formulation of SLAPP, especially for those who commit and compensation, restoration of good name or other efforts that can be given to parties affected by SLAPP.

Eco SLAPP is SLAPP used in the environmental sector, as stated by Pring and Canan. The results of Nadya Zahra Aulia's research stated that the concept of Anti Eco SLAPP in Indonesia has not been well developed, because it has not been able to provide protection to environmental fighters and many cases have arisen. This situation is triggered by the lack of regulations governing Anti Eco SLAPP, the understanding of law enforcement officers is still lacking and this greatly affects the protection and legal certainty for environmental fighters, protection for environmental fighters is still limited by litigation, while in the non-legal sector, protection for environmentalists is still limited. litigation has not yet been arranged. There needs to be a firm regulation regarding Anti Eco SLAPP [13].

Raynaldo Sembiring stated that the Anti-Eco SLAPP regulation in Article 66 of the PPLH Law was counterproductive with his explanation, which stated that the requirement to provide protection was only to people who had carried out legal procedures [14]. According to Sembiring, in Article 66 of the PPLH Law, it is necessary to specify the subjects that must be protected, the limits for determining the occurrence of SLAPP, the types of SLAPP actions, the requirements for protection. The regulation in the Decree of the Supreme Court of the Republic of Indonesia Number 36 of 2013 states that Eco SLAPP can occur at any time, regardless of whether the community has taken legal procedures or not, so it is necessary to make clear regulations regarding Anti Eco SLAPP.

Anti-Eco SLAPP must be strictly regulated, because the provisions in Article 66 of the Environmental Law are still lacking in terms of substance and process [15]. The results of the study indicate that it is necessary to include an element of good faith in Article 66 of the Environmental Law, regulations regarding state responsibility to environmental fighters, joint regulations between relevant agencies, the authority of the competent institution to file a lawsuit against restoration due to environmental damage.

Article 66 of the Environmental Law stipulates that anyone who fights for the right to a healthy and good environment cannot be prosecuted criminally or be sued in a civil manner. Elucidation of Article 66 states that the provision aims to protect victims and/or reporters who take legal action due to environmental pollution and/or destruction. Based on the results of the research mentioned above, the phrase "… aims to protect victims and/or complainants who take legal action…", raises the question whether victims and/or whistleblowers who do not take legal action will not receive protection from the state. As quoted from Raynaldo Sembiring, the concept of Anti Eco SLAPP proposed by Pring and Canan, which does not limit protection only when the victim or the reported party who has carried out Eco SLAPP has gone through legal procedures.

Based on the concept of Anti Eco SLAPP by Pring and Canan, there needs to be a regulation that explicitly regulates Anti Eco SLAPP in Indonesia, that victims and/or reported parties have the right to receive legal protection, even though they have not or have not taken legal procedures. This is to emphasize the principle of equality before the law, justice. The lack of clarity in the application of Anti Eco SLAPP can cause harm to the community, the environment and future generations. The regulation regarding SLAPP, Anti Eco SLAPP is one form of access to justice for the community.

Access to justice can be done through filing a lawsuit with the Citizen Lawsuit, Class Action mechanism. The Class Action mechanism is regulated in the Regulation of the Supreme Court of the Republic of Indonesia Number 1 of 2002 concerning Class Action Lawsuit Procedures. Class Action lawsuits are one of the mechanisms that are often used in addition to civil lawsuits and administrative lawsuits. There is no specific regulation in Indonesian legislation regarding the Citizen Lawsuit mechanism. However, from practice in the judiciary so far, the CLS mechanism is often carried out in the District Court. CLS is part of Public Interest Litigation which is known in countries with a Common Law legal system, while in countries with a Civil Law legal system the term Actio Popularis is known, however, both have something in common, namely for filing lawsuits for the public interest. In Indonesia, CLS is more often used for filing civil lawsuits.

Supreme Court Regulation Number 1 of 2002 concerning Class Action (hereinafter is Supreme Court Regulation), since there is not yet regulations about formal procedural law. These regulations were made for civil matter as stated in Article 10 of Supreme Court Regulation, other provisions that have been regulated in Procedural Law for Private Case still applies. At that time some regulations as legal basis to file lawsuit as group representative, class action. These regulations have to follow with other regulations that have the same aim, to give access to justice for everyone.

In line with the Sustainable Development Goals (SDG's), especially point 16, the CLS mechanism in Indonesia needs clearer regulations, meaning that civil and administrative lawsuits can be filed. Access to justice in the environmental sector must be expanded, considering the increasing number of environmental damage and pollution. The examination of environmental disputes so far is more often entered into general courts, both civil and criminal cases. The thing that makes it possible to accept a lawsuit using the CLS mechanism is Article 10 of Law Number 48 of 2209 concerning Judicial Power which in essence states that the Court is prohibited from refusing to examine, hear and decide on a case that is submitted, on the grounds that the law does not exist or is lacking, but obliged to examine and judge.

The right to file a citizen lawsuit against the government or known as the Citizen Lawsuit (CLS) which is carried out to sue the responsibility of state administrators who neglect their obligations in an effort to improve the welfare of citizens [16]. From the results of research by Bagus Oktafian Abrianto and friends, it is stated that if the government makes negligence that causes damage and changes the function of the environment to the community, then CLS can be proposed. The community can ask the government to take certain actions that have become their obligations [17].

Citizen's lawsuit with case number 347/Pdt.G.LH/2019/PN. Jkt.Pst regarding the poor control of air quality in Jakarta Province, is an example of the CLS lawsuit regarding the environment. In his decision, the Judge stated that the Defendants had been proven to have violated the law. Because it uses the CLS mechanism, which does not demand compensation, so the Defendants are given the obligation to carry out the judge's decision. CLS is a lawsuit based on the public interest, so according to Elly Kristen there has been a shift in the point d'interest point d'action principle, this means that those who can file a lawsuit are interested or disadvantaged parties, so that the adoption of CLS does not require the basic principle of legal interest. enough for the plaintiff [18].

If it starts from the idea that the environment is in the public interest, it is necessary to develop the possibility of a CLS mechanism in the State Administrative Court system. Law Number 30 of 2014 concerning Government Administration, in Article 87 letter a, gives a broad meaning to the meaning of State Administrative Decisions. This means that the meaning of State Administrative Decisions is not only limited to being concrete, individual, final and causing legal consequences for a person and/or legal entity, but is broader, including written decisions that include factual actions. The examination mechanism for factual actions has been regulated in the Regulation of the Supreme Court of the Republic of Indonesia Number 2 of 2019 concerning Guidelines for the Settlement of Disputes on Government Actions and the Authority to Adjudicate Unlawful Acts by Government Agencies and/or Officials (OOD).

If the CLS mechanism is used in environmental disputes in the State Administrative Court, then following the contents of Article 5 paragraph 2 of Perma Number 2 of 2019, in the event that the lawsuit is granted, the Court may require the Defendant to take government action, not to take government action and stop government action. This can be considered to regulate the CLS mechanism in the State Administrative Court, based on the assumption that the environment is in the public interest. The Defendant is not given the obligation to compensate the Plaintiff, this is in accordance with the CLS mechanism which does not demand payment of compensation. The Plaintiff must be notified within a certain period of time, this is in accordance with the CLS mechanism.

According to Enrico Simanjuntak, regulations in the environmental sector require the participation of the community and the state in environmental management, thus giving the possibility that anyone can file a lawsuit to the Administrative Court [19]. It was further stated that disputes in lawsuits in the name of public interest, actually fall within the realm of public law, not being part of civil law, as has been the case in judicial practice. The implementation of CLS related to environmental issues has encountered several obstacles, there are no regulations that explicitly regulate CLS, the lack of understanding of law enforcement officers with the CLS mechanism, the lack of Judges who have Environmental Judge certification in the courts of first instance [20].

The settlement of administrative lawsuits at the State Administrative Court, so far, has been carried out, namely the cancellation of permits granted by the Government. The mechanism used is in accordance with the legislation regarding the procedural law of state administrative courts, this is confirmed in Article 93 paragraph (2) of the PPLH Law. Although Articles 90, 91, 92 have given litigation rights to the Government, Regional Government, Community and Environmental Organizations, the filing of a lawsuit with the CLS mechanism is not regulated. Considering current developments, the CLS mechanism in the procedural law system for state administrative justice needs to be regulated immediately, considering that it is the right of the community to obtain environmental justice.

3 Conclusion

It is necessary to prepare regulations of green court. These regulations have to covers about the structure, substance of green court. The existence and competence of green court in Indonesia judiciary system has to be clear. Implementation of principle of good environmental, the certified environmental judge is the important point to be implemented. Culture of law is important to build environmental awareness for public and government.

Access to justice also covers rights to have healthy and good environment, besides eco justice. To be able to realize eco justice, it is important to give wide opportunity in access to justice. Government has to make regulations concerning Anti Eco SLAPP and citizen lawsuit. Protection to environmental defender has to be guaranteed in law, because SLAPP may occur. Rights to get healthy environment can be obtain by file the case through citizen lawsuit

mechanism. The current development is an important reason to develop this mechanism by clear regulations, and it will give legal certainty.

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