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## Strict Liability in Environmental Dispute Responsibility Before and After the Enabling of Omnibus Law

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Article's Information	Abstract
<p><b>Keywords:</b> <i>Strict; Liability; Dispute; Omnibus; Law.</i></p> <p><b>DOI:</b> <a href="https://doi.org/10.25041/aelr.v2i1.2318">https://doi.org/10.25041/aelr.v2i1.2318</a></p>	<p><i>With the limitation of the principle of fault-based liability, which is not effective in the implementation of the responsibility for activities with high risk, Law No. 23 of 1997 concerning Environmental Management and Law no. 32 of 2009 concerning Environmental Protection and Management which adheres to the principle of absolute responsibility or strict liability. The regulation regarding the principle of strict liability is clarified in Article 88 of Law no. 32 of 2009 (UU PLH). However, with the passing of the Omnibus Law, which changed Article 88 of Law no. 32 of 2009 becomes article 88 of the Omnibus Law, which eliminates the principle of strict liability. This writing uses a normative approach, a statutory approach. The data analysis used is a qualitative analysis. The elimination of strict liability in resolving environmental disputes is considered a shift, which in the provisions of Article 88 of the Job Creation Law seems to provide an opportunity for corporations to pollute the environment without firm accountability. The government seems to protect the sustainability of a corporation more than the interests of the community. The type of research used in this study is using normative legal research methods using a statutory approach and literature study.</i></p>



## A. Introduction

The population density in Indonesia, especially in urban areas, affects the quality of cities, namely as a producer of waste and environmental pollution caused by people's lifestyles which often cause damage to the environment.<sup>1</sup> Rober Heirboner in Antonius, says “An Inquiry Into the Human Prospect”, projects a gloomy future in which all human beings will be overwritten or attacked by the environment, which consequently makes the position of society unable to win against natural conditions.<sup>2</sup> According to data obtained from National Geographic Indonesia, as of May 2016, data released by the Directorate General of Pollution and Environmental Damage Control at the Ministry of the Environment in 2015, nearly 68% of river water quality in Indonesia is heavily polluted.<sup>3</sup> In Article 28 H paragraph (1) of the 1945 Constitution of the Republic of Indonesia, obtaining a good and healthy living environment is one of the rights possessed by every citizen.<sup>4</sup> Therefore, it is only natural for the government to seek various ways to protect the environment, one of which is through the field of law. Law enforcement that is suitable for the conditions in Indonesia includes preventive and repressive methods.<sup>5</sup> Mainly in the form of government involvement to participate in increasing legal awareness at the community level. In addition, environmental law itself is a highly complex issue because there are meetings from various fields of civil law, criminal law, state administrative law, laws such as tax law, land law, constitutional law, and international law.<sup>6</sup> In Indonesia itself, environmental regulation is regulated in Law number 32 of 2009 concerning Environmental Protection and Management.

Preventive enforcement of environmental laws is carried out by punishing environmental destroyers or polluters.<sup>7</sup> While repressive efforts are carried out by imposing criminal and fine sanctions, civil sanctions (compensation), and/or administrative sanctions (government coercion, forced money, and license revocation).<sup>8</sup> However, there are still various problems in the implementation of this environmental law. One of them is about complicated evidence in environmental disputes.<sup>9</sup>

So far, environmental law enforcement often finds difficulties regarding the evidentiary problems raised by victims of environmental pollution.<sup>10</sup> The victim must prove the concrete element of the perpetrator's mistake and explain the loss scientifically or, in other words, use

<sup>1</sup> Anita Lailia Nur, “Gerakan Masyarakat Dalam Pelestarian Lingkungan Hidup (Studi Tentang Upaya Menciptakan Kampung Hijau Di Kelurahan Gundih Surabaya),” *Politik Muda* 3, no. 3 (2014), [http://journal.unair.ac.id/JPM@gerakan-masyarakat-dalam-pelestarian-lingkungan-hidup-\(studi-tentang-upaya-menciptakan-kampung-hijau-di-kelurahan-gundih-surabaya\)-article-8091-media-80-category-8.html](http://journal.unair.ac.id/JPM@gerakan-masyarakat-dalam-pelestarian-lingkungan-hidup-(studi-tentang-upaya-menciptakan-kampung-hijau-di-kelurahan-gundih-surabaya)-article-8091-media-80-category-8.html).

<sup>2</sup> Antonius Atosökhi Gea, “PEOPLE, ENVIRONMENT, AND FUTURE SEBUAH TINJAUAN ATAS KESIMPULAN PESIMIS MENGENAI LINGKUNGAN HIDUP DAN MASA DEPAN MANUSIA,” *Humaniora* 3, no. 1 (2012): 332–44, [http://research-dashboard.binus.ac.id/uploads/paper/document/publication/Proceeding/Humaniora/Vol. 3 No. 1 April 2012/36\\_CB\\_Antonius.pdf](http://research-dashboard.binus.ac.id/uploads/paper/document/publication/Proceeding/Humaniora/Vol. 3 No. 1 April 2012/36_CB_Antonius.pdf).

<sup>3</sup> Zairin. *Kerusakan Lingkungan Dan Jasa Ekosistem*. Bengkulu: Jurnal Georattlesia, 2016: 5.

<sup>4</sup> Article 28 H paragraph (1) the 1945 Constitution of the Republic of Indonesia.

<sup>5</sup> Ridho; Siti Nurul Intan Sari Kurniawan, “PERTANGGUNGJAWABAN PIDANA KORPORASI BERDASARKAN ASAS STRICT LIABILITY,” *Jurnal Yuridis* 1, no. 2 (August 25, 2014): 153–68, <https://doi.org/10.35586/V1I2.148>.

<sup>6</sup> Andi Hamzah. *Penegakan Hukum Lingkungan*. Jakarta: Sinar Grafika, 2005: 49-50.

<sup>7</sup> Siti Sundari Rangkuti. *Hukum Lingkungan dan Kebijakan Lingkungan Nasional*. Surabaya: Airlangga University Press, 2000: 209.

<sup>8</sup> Zairin Harahap, “Penegakan Hukum Lingkungan Menurut UUPH,” *Jurnal Hukum IUS QUIA IUSTUM* 11, no. 27 (September 16, 2004): 7–22, <https://doi.org/10.20885/iustum.vol11.iss27.art2>.

<sup>9</sup> Anak Agung Sri Utari, “PENGARUH PENGHAPUSAN ASAS STRICT LIABILITY DALAM UNDANG-UNDANG CIPTA KERJA TERHADAP MASIF DEFORESTASI DI INDONESIA,” *Jurnal Kertha Negara* 8, no. 12 (January 12, 2020): 1, <https://www.carbonbrief.org/profil-carbon-brief-indonesia>.

<sup>10</sup> Franz Werro and Erdem Büyüksagis, “The Bounds between Negligence and Strict Liability,” in *Comparative Tort Law* (Edward Elgar Publishing, 2021), 186–213, <https://doi.org/10.4337/9781789905984.00017>.

the principle of responsibility, which requires an element of fault or fault-based liability.<sup>11</sup> Evidence related to environmental disputes is not accessible and requires expensive costs.<sup>12</sup> In addition, there are also many victims of environmental pollution who are still legal and are included in the economically vulnerable group.<sup>13</sup> Moreover, the application of fault-based liability can also allow environmental polluters to be free from civil liability if they can prove that they are not wrong. They have made maximum efforts to prevent pollution through an environmental impact analysis approach by consistently implementing Environmental Management Plan or *Rencana Pengelolaan Lingkungan Hidup* (RKL) and environmental Monitoring Plan or *Rencana Pemantauan Lingkungan Hidup* (RPL) and a management approach. Such as environmental audits (regulatory compliance audit or environmental management system audit). Several factors make it challenging to prove environmental disputes; namely, there are causes from several sources (multisource) which make it difficult to identify a single source of environmental disputes, and often the losses caused by environmental disputes arise sometime later (lengthy period of latency) so that no can be proven directly.<sup>14</sup>

With the limitation of the principle of fault-based liability, which is not effective in the implementation of the responsibility for activities with high risk, Law No. 23 of 1997 concerning Environmental Management and Law no. 32 of 2009 concerning Environmental Protection and Management or *Undang-Undang Perlindungan dan Pengelolaan Lingkungan Hidup* (UU PPLH) which adheres to the principle of absolute responsibility or strict liability. The regulation regarding the principle of strict liability is clarified in Article 88 of Law no. 32 of 2009 (UU PLH). The principle of strict liability is considered a shield in protecting the rights and protection of the community as victims of environmental pollution in terms of suing the perpetrators.<sup>15</sup> With the application of strict liability, the plaintiff does not need to prove a concrete element of the perpetrator's error in asking for accountability for compensation. In addition, with the implementation of strict liability, corporations or business actors will be more careful in taking actions related to environmental problems. The purpose of applying the principle of strict liability is to fulfill a sense of justice; keep up with the complexities of technological developments, natural resources, and the environment; and encourage high-risk enterprises to internalize costs. Social activities can arise as a result of their activities.<sup>16</sup>

However, since the entry into force of the Job Creation Law, the provisions of Article 88 of Law no. 32 of 2009 (UU PLH) was amended into article 88 of Law no. 11 of 2020 concerning Job Creation which removes the phrase "without the need to prove the element of error" in the previous law, namely the PLH Law. This has resulted in eliminating the application of the

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<sup>11</sup> Sabaa Ahmad Khan, "E-Products, E-Waste and the Basel Convention: Regulatory Challenges and Impossibilities of International Environmental Law," *Review of European, Comparative and International Environmental Law* 25, no. 2 (July 1, 2016): 248–60, <https://doi.org/10.1111/reel.12163>.

<sup>12</sup> Lara B. Fowler and Xiaoxin Shi, "Human Conflicts and the Food, Energy, and Water Nexus: Building Collaboration Using Facilitation and Mediation to Manage Environmental Disputes," *Journal of Environmental Studies and Sciences* 6, no. 1 (March 1, 2016): 104–22, <https://doi.org/10.1007/s13412-016-0373-x>.

<sup>13</sup> M.Fahmi Al Amruzi, "UPAYA PENEGAKAN HUKUM LINGKUNGAN MELALUI PENERAPAN ASAS STRICT LIABILITY," *Masalah-Masalah Hukum* 40, no. 4 (October 18, 2011): 454–60, <https://doi.org/10.14710/mmh.40.4.2011.454-460>.

<sup>14</sup> Prim Haryadi, "Pengembangan Hukum Lingkungan Hidup Melalui Penegakan Hukum Perdata Di Indonesia," *Jurnal Konstitusi* 14, no. 1 (July 24, 2017): 124, <https://doi.org/10.31078/jk1416>.

<sup>15</sup> Rob White, "Reparative Justice, Environmental Crime and Penalties for the Powerful," *Crime, Law and Social Change* 67, no. 2 (March 1, 2017): 117–32, <https://doi.org/10.1007/s10611-016-9635-5>.

<sup>16</sup> Malvin Edi Darma and Ahmad Redi, "PENERAPAN ASAS POLLUTER PAY PRINCIPLE DAN STRICT LIABILITY TERHADAP PELAKU PEMBAKARAN HUTAN," *Jurnal Hukum Adigama* 1, no. 1 (August 1, 2018): 1657, <https://doi.org/10.24912/adigama.v1i1.2236>.

principle of strict liability in resolving environmental disputes and is considered beneficial for corporations or business actors who pollute the environment.

## B. Discussion

### 1. Responsibility for Environmental Disputes Based on the Principle of Strict Liability.

Environmental disputes are disputes that are caused or suspected of causing environmental impacts. Article 1 point 25 of the 2009 Environmental Protection Management Law defines environmental disputes as disputes between two or more parties arising from activities that have the potential and/or impact the environment.<sup>17</sup> Therefore, the subject of environmental disputes is the perpetrators and victims of environmental impacts. In contrast, the disputes' objects are activities that have the potential and/or impact on the environment. In civil environmental dispute resolution, there are several aspects of the settlement. One of them is the accountability system.

The civil liability system in environmental law is an instrument to obtain compensation and costs for environmental restoration caused by pollution and/or environmental damage. In general, two types of civil liability can be enforced or used in resolving environmental disputes, namely:<sup>18</sup>

1. Liability based on illegal acts or *Perbuatan Melawan Hukum* (PMH), and;
2. Liability based on strict liability.

Liability based on illegal acts (PMH) is regulated in Article 34 paragraph (1) of Law Number 23 Year 1997, which states:

*"Every act violates the law in the form of pollution and/or environmental destruction which causes harm to other people or the environment, obliging the person in charge of a business and / or activity to pay compensation and/or take certain actions."*<sup>19</sup>

Then, it is reaffirmed in Article 87 paragraph (1) of Law Number 32 of 2009, which states: *"Every person in charge of a business and/or activity that commits an act that violates the law in the form of pollution and/or environmental destruction which causes harm to other people or the environment is obliged to pay compensation and/or take certain actions."*<sup>20</sup>

Furthermore, acts against the law (PMH) are also regulated in Article 1365 of the Civil Code or *Kitab Undang-Undang Hukum Perdata* (KUHPer), which states that every action against the law and brings harm to others obliges the person who made a mistake to compensate the victim from his actions.

Meanwhile, strict liability is regulated in Article 88 paragraph (1) of Law Number 32 of 2009, which states:<sup>21</sup>

*"Every person whose actions, business, and/or activities use B3, produce and / or manage B3 waste, and/or that pose a serious threat to the environment are absolutely responsible for the losses incurred **without the need to prove the element of error.**"*

Based on the explanation of this article, it can be interpreted that the principle of strict liability is the principle of being responsible for disputes committed by victims without proving the element of the perpetrator's fault as a basis for asking for compensation loss. The provisions of the article above are *lex specialis* or special rules in lawsuits regarding acts of breaking the law in general.

<sup>17</sup> Muhammad Akib. *Hukum Lingkungan Perspektif Global dan Nasional*. Jakarta: PT. Raja Grafindo Persada, 2014: 228.

<sup>18</sup> Laode M. Syarif dan Andri G. Wibisana. *Hukum Lingkungan: Teori, Legislasi, dan Studi Kasus*. Jakarta: Partnership Partnership, 2015, p. 575.

<sup>19</sup> Article 34 paragraph (1) Law Number 23 Year 1997

<sup>20</sup> Article 87 paragraph (1) Law Number 32 of 2009

<sup>21</sup> Article 88 paragraph (1) Law Number 32 of 2009

Previously, the principle of strict liability had been known and developed a long time ago, to be precise, in the 19th century in 1868, which began with the *Rylands Vs. Fletcher* in England. From this case, the Supreme Court in England gave birth to a provision that stipulated that if an activity using resources was carried out in an inappropriate or non-natural manner, it would be subject to strict liability.<sup>22</sup> Finally, the principle of strict liability is adopted by various countries into their national laws and regulations along with various international conventions. The application of strict liability in Indonesia has a long history, starting with the ratification of the Civil Liability Convention for Oil Pollution Damage (CLC) in 1969 by Presidential Decree No. 18 of 1978, but the ratification was revoked in 1998. Then in 1982, it was incorporated into Law no. 4 of 1982 concerning Basic Provisions for Environmental Management, Law no. 10 of 1997 concerning Nuclear Energy, Law no. 23 of 1997 concerning Environmental Management, which later ended in Law no. 32 of 2009.

Furthermore, the principle of strict liability arises to overcome the limitations of the liability principle based on fault, namely accountability which requires an element of error that the victim or the plaintiff must prove.<sup>23</sup> In practice, the plaintiff often experiences difficulties in proving it. Many environmental polluters are free from responsibility because the victim or plaintiff cannot prove the existence of a genuine environmental dispute. In proving environmental disputes, debates often arise between the relationship between chemicals and the losses suffered by the plaintiff, which is caused by the possibility of multiple causes, which makes (multi-sources) it difficult to identify a single source of environmental disputes. In addition, debates also often occur because the losses caused by environmental disputes only arise sometime later (long period of latency), so that they cannot be directly proven.

Therefore, applying the principle of strict liability will further assist victims in protecting their rights and protection, namely by suing the perpetrators of environmental pollution. Because with the application of strict liability, the plaintiff or victim does not need to prove a concrete element of the perpetrator's mistake in suing the perpetrator to ask for compensation for damages. In addition, with the implementation of strict liability, corporations or business actors will be more careful in taking actions related to environmental problems.<sup>24</sup> Legal experts believe strict liability protects victims in obtaining compensation because victims do not have to prove that the perpetrators of environmental pollution have carried out environmental management by violating the law. So, if the principle of strict liability is removed as a basis for responsibility, it will potentially reduce the victim's ability to get compensation.

However, it should be underlined that with the implementation of strict liability, the plaintiff is still unable to file a lawsuit against the perpetrator immediately without explaining the impact or clear causality between the perpetrator's actions experienced by the victim plaintiff.<sup>25</sup> There is still something to be proven, namely what losses have occurred and the causality between the losses and the defendant's actions.<sup>26</sup> Furthermore, Article 1 point 34 of the Environmental Law also provides a provision that actions that cause losses in strict

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<sup>22</sup> Koesnadi Harjasoemantri. "Strict Liability (Tanggung Jawab Mutlak)", Paper Presented Lokakarya Legal Standing and Class Action, Hotel Kartika Chandra (1998): 1.

<sup>23</sup> Carole M. Billiet and Sandra Rousseau, "How Real Is the Threat of Imprisonment for Environmental Crime?," *European Journal of Law and Economics* 37, no. 2 (April 2014): 183–98, <https://doi.org/10.1007/s10657-011-9267-2>.

<sup>24</sup> Laode M. Syarif dan Andri G. Wibisana, Op.cit., p. 388.

<sup>25</sup> icel.or.id, "Strict Liability , Jurus Ampuh Hukum Lingkungan Menjerat Korporasi Tanpa Buktikan Unsur Kesalahan" available on <https://icel.or.id/berita/strict-liability-jurus-ampuh-hukum-lingkungan-menjerat-korporasi-tanpa-buktikan-unsur-kesalahan/>.

<sup>26</sup> Nila Amania, "Problematisasi Undang-Undang Cipta Kerja Sektor Lingkungan Hidup," *Syariat: Jurnal Studi Al-Qur'an Dan Hukum* 6, no. 02 (December 17, 2020): 209–20, <https://doi.org/10.32699/syariat.v6i02.1545>.

liability are in the form of severe threats to the environment or threats that have a broad impact on the environment and cause public unrest.

## 2. Impacts Arising From the Enactment of the Provisions of Article 88 of Law No. 11 of 2020 Concerning Job Creation.

The passing of Law No. 11 of 2020 concerning Job Creation or Omnibus Law gave birth to a lot of debate and controversy for the community. One of them is in the environmental sector. This can be seen from Article 88 of the Omnibus Law, which amends the provisions of Article 88 of the UPLH, which initially contained:<sup>27</sup>

*Any person whose actions, business and/or activities use B3, produce and / or manage B3, and / or who pose a serious threat to the environment. life is absolutely responsible for the losses that occur without the need to prove the element of error ".*

In article 88 of the omnibus law, it is changed to:

*<sup>28</sup>Every person whose actions, business, and/or activities use B3, produce and/or manage B3 waste, and/or who pose a serious threat to the environment are absolutely responsible for the losses incurred from the business and/or activity".*

The elimination of the phrase "without the need to prove the element of error" in the omnibus law has led to a new interpretation, namely eliminating the principle of strict liability in terms of holding accountable actors of environmental pollution. This is because Article 88 of the UUPPLH applies the principle of strict liability, which does not require proof of wrongdoing. This article is very beneficial for victims in terms of accountability for damages to perpetrators of environmental pollution. Therefore, the elimination of the phrase "without the need to prove the elements of error" in the new omnibus law provisions makes it possible that the compensation liability system no longer uses the strict liability system.<sup>29</sup> With the elimination of the principle of strict liability, resulting in the absence of environmental protection, there is no longer a legal basis for punishing the perpetrators of environmental pollution or the defendants without needing to prove the perpetrators' mistakes. Many corporations, incredibly irresponsible corporations, have feared the implementation of strict liability. This shift in the omnibus law regulations provides more opportunities for polluting corporations to escape their responsibilities.<sup>30</sup> In apprehending the perpetrators of crimes against the environment, the government has used Article 88 of the UUPPLH as a legal instrument. Although the application of strict liability is only an exception because it is only applied to certain activities, it has provided fresh air in enforcing environmental pollution and destruction. Therefore, if the provisions of Article 88 of the UUPPLH are amended as in Article 88 of the Omnibus Law, this can cause the absolute responsibility of the corporation for environmental pollution to be reduced, and over time it will disappear. In the formation and application of the Omnibus Law, the government seems to be more protective of a corporation's sustainability, meaning that the interest in protecting and preventing environmental damage done by government corporations seems to protect the corporation rather than the interests of the wider community.

The elimination of strict liability in resolving environmental disputes is considered a shift, which in the provisions of Article 88 of the Job Creation Law seems to provide an opportunity for corporations to pollute the environment without a clear responsibility. The loss of the strict

<sup>27</sup> Article 88 Law No. 32 of 2009 of Job Creation.

<sup>28</sup> Article 88 Law No. 11 of 2020 of Job Creation.

<sup>29</sup> Klikhukum.id, "RUU Cilaka, Memudarkan Strict Liability", April, 12, 2021. Available online <https://klikhukum.id/ruu-cilaka-memudarkan-strict-liability/>.

<sup>30</sup> Anak Agung Gede Duwira Hadi Santosa, "Pertanggungjawaban Pidana Korporasi Terhadap Pencemaran Lingkungan (Suatu Perbandingan UU PPLH Dengan Omnibus Law Kluster Lingkungan Hidup)," *Jurnal Komunikasi Hukum (JKH)* 7, no. 1 (February 2, 2021): 336, <https://doi.org/10.23887/jkh.v7i1.31738>.

liability principle can also be said to be the loss of government control to manage the environment towards a corporation. It can be used as an excuse for corporations to escape from their responsibility for the actions they have done. The existence of the principle of strict liability as a control to corporations in the environmental sector is also an effort to preserve the environment.

### C. Conclusion

In ensnaring environmental pollution actors so far using Article 88 of the UUPH, which implements strict liability. Strict liability is the principle of being responsible for disputes committed by perpetrators of environmental pollution without proving the elements of the perpetrators' mistakes as a basis for asking for compensation. Article 88 of the UUPH, which applies the principle of strict liability, is considered a magic article in asking for compensation for the perpetrators and also makes it easier for victims to sue perpetrators of environmental pollution because victims or plaintiffs do not need to prove that there is an element of the perpetrator's guilt, which is difficult to prove. However, the passage of the Job Creation Law, which changes Article 88 of the UUPH to Article 88 of the omnibus law, which eliminates strict liability, can result in the release of environmental polluters in restoring compensation. Thus, the application of Article 88 of the Omnibus Law appears to be more protective of a corporation's sustainability compared to the interests of the community.

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