Environmental Dispute Resolution Through Class Action Lawsuit

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Abstract. The procedural law of Class Action is a legal concept known in the Anglo-Saxon legal system (Common Law). Whilst this concept is not recognised in the Continental European legal system (Civil Law), likewise in Indonesian civil procedure that based on Herzien Inlandsch Reglement (H.I.R) and Rechtsreglement voor de Buitengewesten (RBg). Initially, the procedural law of class action in Indonesian legal system was arranged consecutively under Law No. 23 of 1997 (Environmental Protection Law), Law No. 8 of 1999 on Consumer Protection and Law No. 41 of 1999 on Forestry. The arrangement of class action lawsuit in the substantive law was inspired by the recognition of class action lawsuit in the United States through Article 23 of the US Federal Rule of Civil Procedure prescribing that the requirements for filing class action lawsuit are as follows: numerosity, commonality, typicality, and adequacy of representation. In Indonesia there is no procedural law setting out the class action lawsuit, thus Supreme Court Regulation No. 1 of 2002 was enacted. The replacement of Law No. 23 of 1997 (Environmental Protection Law) by Law No. 32 of 2009 (Environmental Protection and Management Law) allows the application of the class action with reference to this Supreme Court Regulation. The arrangement of class action lawsuit in the Supreme Court Regulation No. 1 of 2002 still encounters many challenges in its application. The initial process i.e. certification is very decisive whether the lawsuit can be accepted or is qualified as a class action lawsuit. In conjunction with this, the judges' active role is very important whilst waiting for a specific and adequate legislation to establish the class action procedure. Meanwhilst, the judges are supposed to patch up the Supreme Court Regulation No. 1 of 2002.

Keywords: **Environmental Disputes, Procedural Law, Class Action Lawsuit**

I. INTRODUCTION

Environmental dispute resolution in the field of civil law can be undertaken in the court (litigation) and outside the court (non-litigation). In Law No. 32 of 2009 on Environmental Protection and Management (hereinafter referred to as Environmental Protection and Management Law), the environmental dispute resolution in the field of civil law through class action lawsuit is regulated under Article 91 of Environmental Protection and Management Law.

The provision of class action in Environmental Protection And Management Law has not been completed with class action procedure, thus the implementation of class action in the civil justice practices shall be based on the Supreme Court Regulation No. 1 of 2002 (Class Action Lawsuit). Besides, it shall also be based on the Civil Procedure regulated in HIR and RBg as well as other legislations including judge's verdicts over class action lawsuit.

Initially, in the civil justice practice, all class action lawsuits filed to the district court have always been refused (declared N.O or Niet on van verklaard) since the legal form of class action is not set forth in HIR and RBg which are the source of Indonesian Civil procedure, in other words class action is not recognised in Continental European legal system (Civil Law). At the time of its execution in Indonesia, the term of class action was not recognised, lawyer RO Tambunan through ”Bentoel Remaja” case and Muktar Pakpaham through ”Demam Berdarah” case had put forward this procedural concept. This class action lawsuit is not always accepted since this kind of lawsuit is more known to the Anglo-Saxon law system (Common Law) and not recognised in Continental European law system (Civil Law), likewise in Indonesian law.

Therefore, the legal cases related to the progress and demand of the people shall require a legislation update and reform in Indonesia. The law supremacy and enforcement in Indonesia have long been highlighted by the public. According to Mas Achmad Santosa, in the context of a lawsuit involving a group of plaintiffs or class, then the class action concept is very relevant to be implemented in Indonesia.

In order to address the legal vacuum, the Supreme Court issued the Supreme Court Regulation No. 1 of 2002 on Class Action Lawsuit. It is mentioned in letter (c) of the consideration that there are various laws in place having been regulating the class action basis. The laws using the class action basis are among others Law No. 23 of 1997 on Environmental Management, Law No. 8 of 1999 on Consumer Protection, and Law No. 41 of 1999 on Forestry, but there is no provision yet providing the procedure for examining, adjudicating, and passing judgement on the lawsuit filed. Moreover, in letter (f) whilst waiting for the legislation and by considering the Supreme Court's authority in regulating legal proceedings that have not adequately been regulated by the existing regulations, thus for the sake of certainty, order and smoothness in examining, adjudicating passing judgement on class action lawsuit, the enactment of Supreme Court Regulation is considered necessary. This can be reaffirmed to address the legal vacuum in the civil justice practice and Supreme Court Regulation No. 1 of 2002 on Class Action Lawsuit shall apply as the procedure. Based on the historical development of class action in Indonesian law system and its application in the civil justice practice, the authors formulated 2 main problems to be discussed in this paper as follows:

(1) How is the arrangement of class action lawsuit in the enforcement of the environmental-related civil law?
(2) How is the certification process in class action lawsuit?

II. RESEARCH METHOD

The type of research in this paper writing is a research of normative law, which is conducted by examining the primary and secondary law materials.

This research employs legislation approach, conceptual approach, and case approach. The primary and secondary law materials were analysed to answer the problems that have been formulated. The primary and secondary law materials were analysed qualitatively within a framework directed to get the answer to the problems being studied in this research and the result is embodied in this paper.

III. RESULTS AND ANALYSIS

The Arrangement of Class Action Lawsuit in Indonesian Law System

The concept of class action lawsuit in Anglo-Saxon law system (Common Law) in this instance in the United States in 1966 upon the amendment to Federal Law by inserting Article 23 of 1966 under the following C.A. requirements.

Numerosity: the number of the plaintiff in class action lawsuit should be many thus ordinary lawsuit (joinder) would not be practical.

Commonality: there must be something in common question of law, the question of fact between the representative and members of the class".

Typicality: demands and defences of the representative must be (typical) with the class members.

Class protection/adequacy of representation: the representative of the class should sincerely and truly protect the interest of the class members. Article 23 of the Federal Rules of Civil Procedure generally regulate/provide the legal basis for 3 things:

1) Class action can be either class action as plaintiff (plaintiff class actions) or class action as defendant (defendant class actions).
2) Class action authorises the filing of lawsuit which is not related to money indemnification (injunctive or declaratory relief), and
3) Class action provides the basis for a remedy in the form of money ("damage" class actions). Article 23 also regulate the determining mechanism on whether a lawsuit is categorised as class action or ordinary lawsuit under "judicial certification mechanism or preliminary certification test".

This regulated class action became an inspiration for the formulation of class action in Indonesia e.g. Law No. 23 of 1997 on Environmental Protection juncto Article 91 Law No. 32 of 2009 on Environmental Protection and Management. The content of Article 37 of the Environmental Protection Law reads as follows:

1) The community is entitled to file a class action lawsuit to the court and/or report to law enforcers on environmental issues that are detrimental to the livelihood of the community.
2) If legally proved that the community suffers from pollution and/or environment degradation in such a way that it affects their livelihood, then the responsible government agency may act for the public interest.
3) Further provisions as referred to in paragraph (2) shall be regulated by a Government Regulation.

The explanation of Article 37 Paragraph (1) stipulates that the right to file a class action lawsuit hereunder this paragraph is the right of a small number of people to act on behalf of a larger number of people being harmed, on the basis of commonality of legal facts, demands, and problem caused by pollution and/or environmental destruction.

If the explanation of Article 37 paragraph (1) is further elaborated, the requirements of class action lawsuit, among others:

1) Small number of class representative
2) A large number of class members
3) Commonality of problem
4) Legal facts

5) Typical demands
6) Pollution and environmental destruction as the main causes.

Associating Article 37 and Article 39 of the Environmental Protection Law, the procedure for filing a lawsuit on an environmental issue by a person, community and/or Environmental Organisation shall refer to the applicable Civil Procedure. This concludes that class action cannot be implemented yet since HIR and RBg do not recognise it.

Whereas, with the revocation of Law No. 23 of 1997 and replaced by Law No. 32 of 2009 on Environmental Protection and Management, the procedural law to authorise class action refers to the Supreme Court Regulation No. 1 of 2002 on Class Action Lawsuit. Juridically speaking, tt can be concluded that the procedural law for class action lawsuit is the Supreme Court Regulation No. 1 of 2002. In relation to the Supreme Court Regulation, a question arises whether class action has comprehensively been arranged.

In accordance with the 1st problem, the discussion has more emphasis on the civil procedure regulated in the Supreme Court Regulation No. 1 of 2002 on Class Action Lawsuit. The Supreme Court Regulation No. 1 of 2002 consists of VI chapters and 11 articles. The provisions of article 1 letter b, the representative of the class shall be one person or more who suffer losses, file a lawsuit, and at the same time represent a group of more people. The formulation of Article 1 letter b does not reflect the legal certainty, especially on more group representative, it requires confirmation depending on the groups being represented.

According to Susanti Adi Nugroho in its development, the Supreme Court Regulation has some gaps among others, the existence of several group representatives filing a lawsuit against the same defendant in different courts. The question would be whether it is possible to merge those lawsuits into a single case so that the defendant does not respond to the same case filed by different class representatives in different courts. Another question occurs relating to the executions described by Susanti Adi Nugroho on page 32 i.e. which District Court to distributing the granted compensation because the class members are spread across different court areas.

Based on such criticising legal facts, Siti Sundari Rangkuti and Suparto Wijoyo consider that the Supreme Court Regulation No. 1 of 2002 should make a juridical adjustment against civil procedure contained in HIR and RBg. According to the authors, thus, harmonisation between the two procedural laws is necessary to prevent overlapping on their implementation.

Class Action Certification Process

According to Indro Sugianto, the certification process in United States federal court is a preliminary process to be undertaken in order to determine whether a lawsuit can be executed through class action procedure. This certification process is done through preliminary certification test at the beginning of the legal proceeding. Indro Sugianto further concluded that the aim of implementing this certification are (1) ensuring the requirements of class action (Numerosity, Commonality, Typicality and Adequacy of Representation are met, (2) ensuring the interests of potential class members are adequately protected.

In HIR and RBg civil procedure, there are 3 (three) stages namely preliminary process, determining process, and execution process. Pursuant to the Supreme Court Regulation No. 1 of 2002, the procedural aspects derived from HIR and RBg are altered and the process of certification, notification, and opt out statement are introduced. Pursuant to Article 5 paragraph (1) of the Supreme Court Regulation No. 1 of 2002.

1) At the initial process of court examination, the judges are obliged to examine and consider the requirements of class action lawsuit as referred to in Article 2 (lawsuit formal requirements).
2) The panel of judges may advise the parties on the requirements of class action lawsuit as referred to in Article 3.
3) The validity of a class action lawsuit as referred to in paragraph (1) shall be set forth in a court decision.
4) If the judges decide and declare the class action lawsuit valid, then immediately the judges shall order the plaintiff to propose a notification model for approval of the judges.
5) If the judges decide and declare the class action lawsuit invalid, then the examination against the lawsuit shall be ceased by a verdict.

Article 6 of the Supreme Court Regulation No. 1 of 2002, the judges are obliged to encourage the parties to resolve the case amicably both at the beginning of the trial and during the examination of the case. In criticising Article 5 and 6 of the Supreme Court Regulation, other than passive principle, the active principle shall be put forward in this certification process. This point, according to the authors, is understandable since the victim community or the class members are a large number of people whose social status, educationally and financially speaking, is weak (poor).

It is in line with Article 119 of the HIR that the Head of the District Court has the authority to provide advice or assistance to the plaintiff or the defendant or their respective proxy concerning matters concerning the formal requirements for filing a lawsuit. Such matters are affirmed by Koesnadi Hardjasoemantri stating that the class action is a mean for granting an access to the community to pursue justice because it is in line with the principles of quick, practical and inexpensive judicial proceedings. According to the authors, the losses suffered by the wider community due to environmental pollution and destruction harm the future generations as the heirs of the current generation, it is an obligation of the judges as law enforcers to administer justice, and here the active principle shall appear.

According to N.H.T Siahaan, for the court itself the workload can be reduced because if the lawsuit is filed individually, there will be a cumulation of cases.

The Supreme Court Regulation No. 1 of 2002 does not regulate the allowed size or number of the class members. If such a large number of the group members can be identified, then for the sake of legal certainty and efficiency in the administration of class action lawsuit, a regulation is required to specifically set out the size of the group members including their identity. Thus, such regulation will enable data collection on the identifiable group members at the initial process of examination or certification which can be done more transparently and orderly. An example the authors gave e.g. if the members of a fishers association can be calculated, it will be easier to distribute the indemnification or compensation should it is granted, and the rule of law is necessary to ensure legal certainty.

Back to the certification, The initial stage of a legal proceeding in Article 5 paragraph (1) of the Supreme Court Regulation No. 1 of 2002 is known as certification process or preliminary certification test or preliminary hearing or preliminary examination. According to Syahrul Machmud, it consists of examination and verification to validate the requirements of the class action filed. In this preliminary stage the following matters are examined and take into account:

1) Representatives of eligible class
2) Eligible members of the class
3) Commonality of facts and legal basis
4) Typicality of demands.

According to Hari Purwadi, the provision of Article 5 and Article 2 of the Supreme Court Regulation No. 1 of 2002 indicate that the certification should meet 3 conditions: numerosity, commonality and adequacy of representation. Numerosity is set forth in Article 2 letter a, commonality in Article 2 letter b, and adequacy of representation in Article 2 letter c. Hari Purwadi considered the three requirements are highly determining for a lawsuit to be categorised as a class action lawsuit.

As a comparison of certification or permission granting, according to E. Sundari, based on a request for permission to become a representative of the group and an application to file a class action lawsuit, the court will examine whether the representative i allowed to become a representative of the class. Moreover, whether the requirements to file a class action lawsuit are met and whether class action is the appropriate procedure to handle a lawsuit with the same interest.

The provision of Rule 23 of the Federal Rules of Civil Procedure in the United States mentions that a class action lawsuit should meet the following requirements.

1) The requirements of class action lawsuit are (1) a large number of the class members who file the lawsuit joinder, making individual lawsuit will not be practical, (2) commonality of legal matters and facts amongst the class members, (3) typicality of demands of the class members, (4) the representative is considered honest and truly represent the class' interest.
2) The lawsuit filed individually will lead to (1) risk of having an inconsistent and different verdict; (2) each member of the class might demand their respective interest separately.
3) The defendant has refused to do or not to do something that should be done for the members of the class as a whole, and
4) In the event of a claim for compensation, the commonality of legal matters and facts of all class members should be more prominent than individual members.

Looking at the description of Article 23 of the US Federal Rules of Civil Procedure, it stipulates in details as to whether or not a lawsuit should be filed as class action. Each description from No. 1 to No. 6 above has its own consequences, whether it is appropriate in terms of law system to file class action.

The judges examine the requirements or consequences which may or may not allow the filing of class action lawsuit. As described earlier by the authors, in civil case the passive principle is used, but in class action the active principle/judge's active principle is very instrumental notably in the certification as a preliminary process, perhaps after a lawsuit can enter the court proceeding through class action mechanism, the substance of the lawsuit in posita or pundamentum petendi shall be concern of the parties.

British Columbia has a similar provision to Ontario concerning the requirements of class action, and class action is considered as the most appropriate procedure. Pursuant to the provision of C. 50. 2.4 (2) BCCPA, the criteria are as follow:

1) Is the commonality of legal matters and facts amongst the class members more prominent when compared with other individual issues?
2) Is the size of class members with an interest in carrying out individual lawsuit significant?
3) Will the class action lawsuit contain claims or demands that have been filed under other procedure of lawsuit?
4) Is the other way to solve the problem less practical and less efficient?
5) Whether or not the court administration for the class action lawsuit is more complicated than other types of lawsuit.

As a comparison, the provision set forth in the Supreme Court Regulation No. 1 of 2002 on Class Action Lawsuit on the arrangement of short certification, according to the authors the certification in the United States and the British Columbia can be used as a comparison or source of input for the implementation of class action certification and certainly as source of inspiration for the establishment of class action mechanism at the national level. The authors observe and acknowledge that the certification

arrangements in America, Columbia are very comprehensive and everything is likely to be incorporated in the Law.

The use of class action procedures after certification is declared valid, the judges shall order the plaintiff to propose a notification model. Article 7 paragraph (4), the notification shall include:

a. The lawsuit number, the identity of the plaintiff, and the plaintiffs as class representatives, as well as the defendant(s).
b. Case brief
c. Description of class definitions
d. Description of the implication of class participation
e. Description of the possibility of class members who are included in the class definition to opt out of the class membership
f. Description of the time i.e. month, date, time of the opt-out notification that may be brought to the court.
g. Description of the destinated address to submit the opt-out notification.
h. Where needed by the class members, a description of the available source of additional information (person or place or organisation).
i. The opt-out form is set forth in the annexe of this Supreme Court Regulation
j. Explanation on the amount of indemnification to be proposed

Whilst opt-out is set forth in Article 8 paragraph (1) and paragraph (2).

Paragraph (1) After the notification is made by the class representative under the consent of the judge, the class members shall, within the period determined by the judges, be given the opportunity to declare an opt out by filling out the form as set forth in the attachment of this Supreme Court Regulation.

Paragraph (2) The party that has declared to opt-out of the class action lawsuit shall not legally be related to the verdict of the class-action lawsuit concerned.

Report of the opt-out notification in the class action must be followed up and implemented effectively. The great role of the judge to ensure whether the representative of the class and his/her attorney/lawyer has been fully aware of and put into effect the opt-out notification. Rule 23 (c) (2) of the US Federal Rules of Civil Procedure, 1966 stipulates that after the court decides to certify and accept the plaintiff's lawsuit as class action as referred to in rule 23 (b) (3), the court shall order the class representative to notify the class members through the best notification method in accordance with the circumstances of the case, including separate notification to the entire members of the class action that contains a claim for damages (class "damage" actions). In this instance, the court also determines the form and content of the notification.

IV. CONCLUSION

From the discussion of the 2 (two) problems as the central issues of this paper, it can be concluded that the history of class action development in the environmental law system has not been completed with the procedure on class action lawsuit. The Supreme Court Regulation No. 1 of 2002 which serves as the procedure of class action has a legal vacuum in its implementation. At the certification process, all involving parties should play their active role, especially the judges who have a great role in controlling the parties, thus class action lawsuit may enter the court proceeding. For a good and effective notification process, the opt-out notification form is made available and this can provide legal certainty.

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