

Finding The Missing Piece: Integrating Liability without Fault on Waste Management Law Enforcement in Indonesia

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Overview



Introduction

Latest data and scientific research about Indonesia's Waste Management



Civil Liability Procedure in Indonesia Waste Management Act

Misconceptions and Disharmony with Indonesia's EPMA



Strict Liability for Marine Plastic Pollution and the Prospects in Indonesia

The prospects of strict liability in Marine Plastic Pollution based on the Ultrahazardous Test and Indonesia model of strict liability



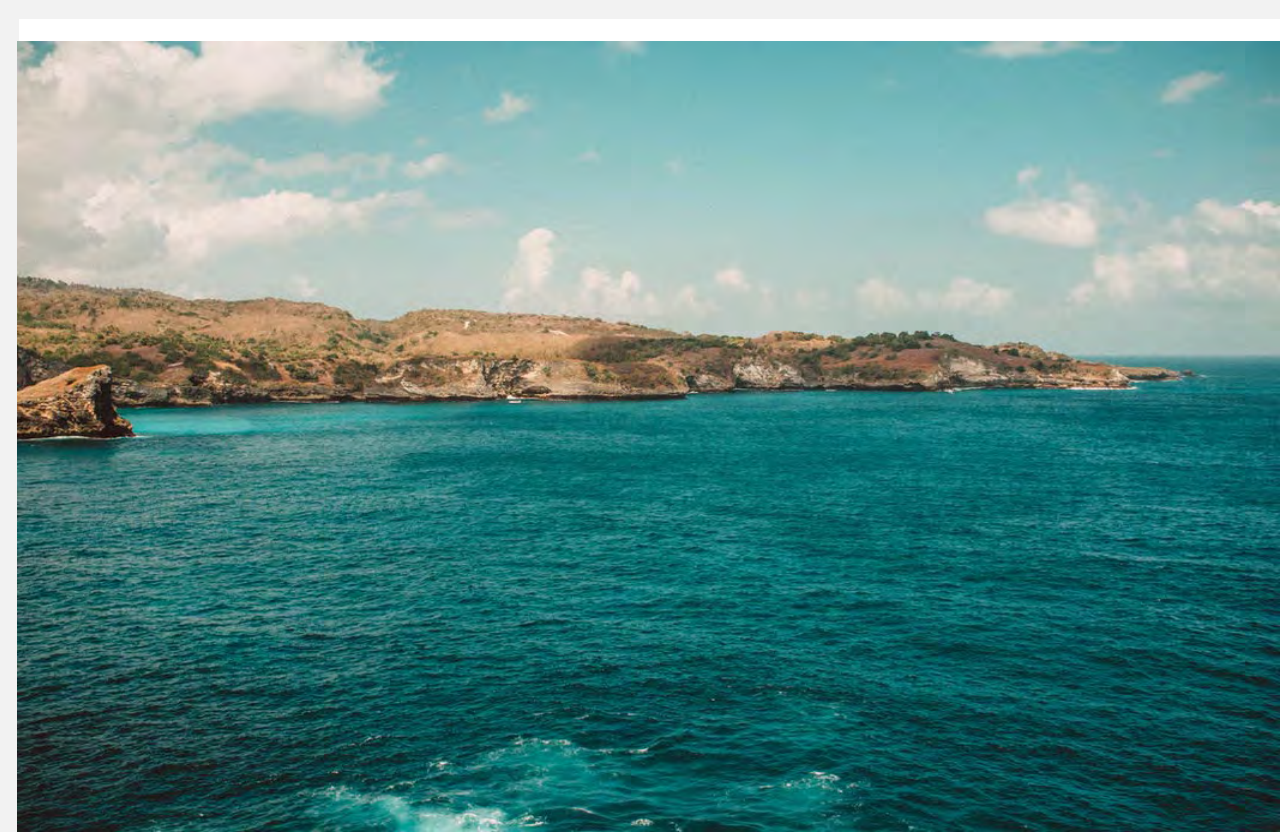
Civil Liability in Waste Management Sector: Singapore and Malaysia Experience

Lessons for Indonesia's Civil Liability Provisions



Conclusion

Ended with some concluding remarks



Introduction

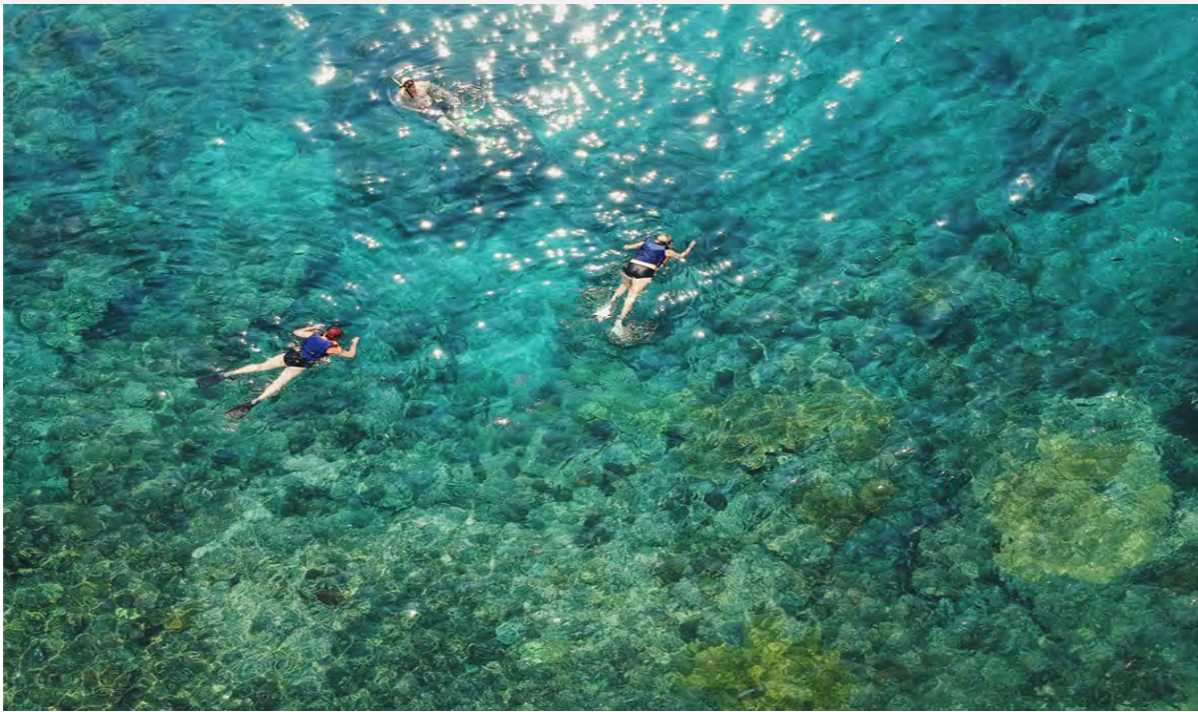
“Even an entire society, a nation, or all simultaneously existing societies taken together, are not the owners of the earth.”

- Karl Marx (Das Kapital, Volume III) -



Latest data and scientific research about Indonesia's Waste Management

- Indonesia is the second-largest country to release plastic debris in the ocean. (Jambeck, *et.al.*, 2015: 769)
- Current research has shown that land-based sources are the highest contributor for plastic waste in the ocean. (Jambeck, *et.al.*, 2015: 768; Lebreton, *et.al.*, 2017: 1)
- Provinces in Indonesia have a high number of municipal mismanaged waste. Indonesia reported the proportion of unmanaged municipal waste in Indonesian cities ranges from 7.2% to 51.2%. (World Bank, 2018: 1)



Civil Liability Procedure in Indonesia Waste Management Act

Misconceptions and Disharmony with Indonesia's EPMA

- Right to Sue for Organization
 - Article 37.1 of IWMA says: “Waste-related organization has the right to bring a legal action in the interest of safety waste management intended for community’s health and environment.”
 - Art. 37.3 of IWMA: “Waste-related organization which has the right to bring a legal action as mentioned at paragraph (1) has to fulfill the following requirement: a. legal entity **b. to own article of association in the waste management (sic!)** c. Should have done real action at least 1 (one) year that is in line with its articles of association.”
- Civil Liability in IWMA
 - Art. 35.1: “Dispute settlement in court could be applied for infringement (*Perbuatan Melawan Hukum*).”
 - Art. 35.2: “Suing the infringement as mentioned in paragraph (1), **it is necessary for the plaintiff to prove the legal violation’s elements**, liability, and the causality between an action and the liability.”



Right to Sue for Organization

In terms of history, the organizational lawsuit in environmental law aims to represent the environment as the holder of legal rights. (Stone, 2010: xii)

Organizational Lawsuit in Waste Management

- Law No. 23 of 1997 as the former environmental management act has stipulated a procedure for the organizational lawsuit.
- Somehow, **IWMA regulates a much narrower procedure and exclude the organizational lawsuit** procedure in Law No. 23 of 1997.
- Because of that, **environmental law organization** which regularly watch over the problems of waste management - as the problems of environmental too - **are ineligible to sue as either the representative of environment or public**
- In that sense, **IWMA assumes that waste management affair is not an environmental issue**. Thus, this is a misconception and fallacy leading to disharmony between Law No. 23 of 1997 and EMPA 2009.

Huge mistakes in IWMA's Liability Provision. Arguments as follow:

1. IWMA includes the type of toxic waste as one of the category in *Sampah Spesifik* (Specific Waste).
2. Comparatively, practices in the US use strict liability in the area of waste management. (*B.F. Goodrich v. Murtha* and *Transportation Leasing Co. v. California*)
3. Inconsistency of provisions between Governmental Regulation as the secondary legislation with the main act of IWMA.

Art. 31 Governmental Regulation No. 81 of 2012 stipulates concerning Strict Liability for the residents near land-fill (*Tempat Pembuangan Akhir*) (See: *Masri, et.al. v. Mayor of Payakumbuh, et.al.*)



Civil Liability Provisions in IWMA

Article 35.2 reaffirms the mandatory requirements in order for someone to be held liable. In that sense, IWMA adopt liability with fault regime as the only liability rules. This paper regards this as huge mistake with at least 3 arguments.

Marine Plastic Pollution in The Context of Strict Liability

Ultra-hazardous Test in the Restatement of Torts

Risk of Serious Harm to The Person, Land, or Chattels of Others	Likelihood that The Harm Resulting from It Will be Great	Innability to Eliminate The Risk By The Exercise of Reasonable Care	The Activity is not A Matter of Common Usage	Locality and Value Factors as Determiner to Held Someone Liable under Strict Liability
<p>There is increasing evidences of numerous mechanisms by which marine plastic pollution is causing effects especially to the marine environment and other levels of biological organization. The harm to marine life and environment can occur through entanglement and ingestion.</p>	<p>Plastic can alter the ecosystem composition and functioning and changing genetic diversity in the ocean. Entanglement and ingestion by large organisms can have fatal but also sub lethal consequences to marine organisms.</p>	<p>The ubiquity of plastic debris and the unfeasibility of its substantial removal from the marine environment, especially in the case of microsized particles mean that exposure is essentially irreversible. Plastic will break down into smaller parts and being ingested and exposed to marine organisms.</p>	<p>Marine plastic debris, with its presence in the ocean, has the risk of dangerous threats that may not occur when it is used or dumped on land. When plastic reaches the ocean, especially in large quantities, it creates potential losses and harmful impacts on marine life. It can also no longer be used or utilized.</p>	<p>Plastics that are dumped into the ocean from vessel-activities or land-based source, generate harms that outweigh their utility of beneficial values. This location factor is also reinforced by the fact that the ocean, logically and rationally, is not the designated place for waste disposal.</p>



Marine Plastic Debris in The Context of Strict Liability

Indonesia EPMA Model of Strict Liability

The Use of Hazardous Substance

Commonly used additives in plastic are categorized as hazardous and can actually cause harm to marine organisms.

Some are acknowledged by GR 101/2014 and PR 47/2005 as hazardous.

Potentially irreversible Impact

Currently, the distribution of plastic particles in the world's oceans is so widespread and undetectable that they are unlikely to recover. Small plastics (micro & nano) can enter digestive system and food chain.

Multidimensional Impacts

Apart from the impact on marine life and the sustainability of marine ecosystems, marine plastic debris also causes economic losses. Indonesia could loss up to US\$ 1 billion year from coastal tourism sector and cause disruption to human activities.



Injury and Proof of Causation of Marine Plastic Pollution

Coleman (1992) stated that even though the plaintiff's in strict liability doesn't need to prove whether the defendant is unlawful, the plaintiff still have to prove that the plaintiff suffered an injury and that there is a causality between the injury suffered by the plaintiff for the activities carried out by the defendant.

In the context of marine plastic debris, until now there is still a big uncertainty and a science gap related to the impact of marine plastic debris on humans, so it is difficult to prove the causality of the injury suffered by the plaintiff with the marine plastic debris pollution carried out by the defendant.

In Indonesia alone, the development of science related to marine plastic pollution and its impact especially the marine impact on human health and well being, is still limited and isn't able to prove the causality between marine plastic pollution.

Until there is an advancement of technology and science that is able to prove the causality between marine plastic pollution and individual injury, Strict liability lawsuit compensation for injury caused by marine plastic debris is not possible to do.

Indonesia's waste management law, as the main legislation to manage and combat Land-based source marine pollution, doesn't recognize strict liability as liability rules. Though with limited science development and huge scientific uncertainties that lay ahead of marine plastic pollution, it is at least proven that plastic debris in the ocean can cause harm and is dangerous.

However, due to the limitations of the development of science, it is, for the time being, not possible to scientifically prove the causality between the impact of marine plastic debris and individual injury or any kind of specific injury caused by the marine plastic pollution.

Based on the Indonesia EPMA strict liability model, there is still a possibility of using strict liability to enforce the pollution and harm caused by marine plastic pollution through a lawsuit done by the state. Indonesia EPMA acknowledges the existence of the government's right to sue which in which they can file claims for compensation and certain actions against activities that cause environmental pollution and / or damage and result in environmental injury related to marine plastic pollution.



Strict Liability for Marine Plastic Pollution: Reviewing the Prospects in Indonesia

Lessons Learned: Some Suggestions For Indonesia

- Malaysia → Environmental Quality Act of 1974. Further civil liability rule: Civil Law Act No. 67 of 1956, (1956).
- Singapore → Environmental Public Health Act; EPMA; Singapore Application of English Law Act No. 35 of 1993.
- The distinct act for waste management and environmental act is not always a thing to induce disharmony on the civil liability provisions. (Singapore experience: the EHP and EPMA apply complementary)
- Indonesia's main environmental protection and management act (EPMA) should become the main source for other environmental act in terms of civil liability rules.



Civil Liability in Waste Management Sector: Singapore and Malaysia Experience



Conclusion

- IWMA as the main legislation to manage and combat Land-based source marine pollution is problematic in civil liability provisions.
 - The right to sue for Organization in IWMA only for Waste-related Organization (No Environmental Organization allowed)
 - Civil liability rules in Indonesia waste management regulation are various and inconsistency between the Governmental Regulation and the Act.
- There is a possibility to adopt and use strict liability as the liability rules for the marine plastic pollution.
- From the observations conducted, this paper concludes that Indonesia's main environmental protection and management act (EPMA) should become the main source for other environmental act in terms of civil liability rules.



Thank You
Terima Kasih

Q & A?

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