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Research Article

A Concept of Liability for the Government's Negligence in the Prevention of Wildfires in Indonesia

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Abstract.
Wildfire is considered an annual problem in Indonesia. Based on the polluter-pays principle, the environmental damage that occurred from the fires must hence be borne by the injurers through the provided liability mechanisms. The Indonesian liability system, however, still focuses merely on how private entities as the bearers of the permits are being held liable, with no attempts to reach other potentially liable parties. The liability system has not considered the governments negligence in the issuance of the permit, fulfilling the statutory duties, or failures to supervise the permitted activities. This research attempts to investigate the concept of government liability for wildfires in Indonesia by analyzing some doctrines and legal principles as the bases for imposing liability in different jurisdictions (the liability trends in developing countries, the US, and the Netherlands). The results are: first, each country adopts its own doctrine and legal principle in imposing liability on their governments. However, in general, most countries acknowledge that they cannot impose liability to the government when they act in terms of discretions, policies, and choices in which they have multiple interests to consider. Second, government liability in Indonesia has been laid down under the Article 1365 of the Civil Code and the Law Number 30 of 2014 on Government Administration. As for the prevention of wildfires, the authors recommend applying the concept of a multi-task/single-task agent to consider to what extent the liability can be held against each government agency based on their statutory duties.

Keywords: liability, government, negligence, wildfires

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1. Introduction

Indonesia has crucial issues of wildfires[1] and problems in imposing liability on all the potentially liable parties.[2] In the domestic domain, liability has played a role within civil litigation against private entities as the permit holders of the burned areas.[3] The transboundary haze pollution resulting from wildfires also highlights Indonesia's liability in the regional context.[4] However, the liability of its public authorities (i.e. the regional governments and the Ministry of Environment and Forestry) that also hold statutory duties of the prevention of wildfires, have never been discussed. This article attempts to identify the theoretical basis for the government liability that applies in different

jurisdictions and to justify which concepts are considered as the most suitable for the Indonesian wildfire cases.

Liability of the government for wildfires is crucial since in Indonesia, the wildfires liability merely relies on civil litigation to compel the main injurers to compensate the victims. Similar to other developing countries, polluters in Indonesia possibly have insolvency issues, which hinder the full payment of compensation because no other mechanisms of liability can be imposed on them.[5] Therefore, indicating other potential liable parties becomes crucial. Furthermore, the liability of public bodies also compels the government to take the adequate prevention and build strong supervision over permitted activities since in the tort law, the *ex-ante* (prevention) approach is more advisable rather than the *ex-post* (compensation) perspective.[6]

In reality, however, imposing liability to public authorities is challenging. In most jurisdictions, public authorities receive a huge exemption from tort liability, especially on discretionary decisions.[7] Kit Barker indicates that this liability is difficult to be implemented due to a number of factors:[8] *First*, it is often the authorities' liability for negligence to prevent harm caused by third parties. *Second*, the liability of public authorities will lead to defensive practices that will decrease the standards of public service in the longer term. *Third*, the duty may put the public authorities in a conflict of interest between competing responsibilities owed to different individuals or groups. However, several doctrines convince the authors on the possibilities for public authorities to be held liable for their wrong doing.

The discussion of government liability for the Indonesian wildfires in this article is started from the study on the applied theories, principles, or concepts in the developing countries, in the US, and in the Netherlands. The authors highlight some doctrines or legal principles that justify of imposing liability to government, and some doctrines or legal principles those provide legal immunity for public bodies. After elaborating such doctrines and principles, we discuss some applied regulations of government liability for the Indonesian wildfires and analyze which doctrines or legal principles from abovementioned countries is considered suitable reference for improving government liability for wildfire cases in Indonesia.

From the abovementioned background, the two research questions addressed by this article are:

1. What are the theoretical basis and legal principles for imposing liability to the governments across jurisdictions?

2. What is the concept which is considered to be the most suitable for imposing liability to the government in the case of wildfires in Indonesia?

2. Methods

This article is a result of a doctrinal legal research. The data used in the research are secondary data collected through library research. To answer the first research question, we collected a secondary data that consist of legal principles of government's liability applied in some jurisdictions (US, the Netherlands, and the trend occurred in some developing countries). For the second one, we evaluated briefly about the enacted laws of government's negligence, then we analysed the collected data to justify which principle is considered suitable for the government's liability in the cases of wildfires in Indonesia. We analysed the data and wrote the results descriptively and qualitatively.

3. Result and Discussion

3.1. Theories and Legal Principles Applied Across Different Jurisdictions

Since the concept of liability has a theoretical basis in the polluter-pays principle, which essentially states that all pollution costs should be borne by the polluters, it is necessary to look at the shift of the principle to the government-pays principle in a practical basis. Luppi *et al* shows that the recent trend of the polluter-pays principle in some developing countries[9] has shifted from the main actor liability to governmental liability through judicial, legislation[10], and constitutional reforms by focusing on the mitigation of the harm. These regimes specifically ensure that the government provides direct and prompt compensation to victims when polluters cannot be identified or are insolvent.[9] Joseph Belza also mentions that in the US, a government can possibly be held liable for issuing a permit for an activity which causes damage to individual's use and enjoyment of property under a constitutional theory of inverse condemnation.[11] Additionally, the US system also applies the ministerial function concept in which the government is subjected to liability for conducting omissions when they have precise rules in operating policies.[7] The concept of ministerial functions is similar to de Geest's concept of single-task agent in which government exercise in the matter of operation and the minimum standard of care is clear, then they could be held liable for their wrongs.[12]

The opposite perspectives provide immunity for public authorities based on some legal principles. In the US, discretionary function exception hides the government from liability for their actions which contain policies, plans, and choices.[7] This doctrine is in line with what de Geest calls as multi-task government agent theory. The multi-task agent is an agent that has to produce *multiple outputs* for someone else at the same time, and single-task agent, an agent that has only to produce one output.[12] According to de Geest, immunity should be granted to public authorities if two conditions are met: the injurers are the multi-task agent (then it should have at least two different externalized outputs) and the minimum norms cannot be defined.[12] In other words, if the public authorities exercise in the matter of plans, policies, and choices, in which they have multi-dimensional aspects or interests to consider while there is no minimum standard of care, then they should be granted immunity.

The Netherlands has different system when it comes to government liability. The liability of government is laid down under the doctrine of relativity. The doctrine defines that public authorities can be held liable and ordered to compensate the victims for their wrong doing only when they breach legal norms which dedicated to protect rights of the plaintiffs.[13] There are three elements in this condition: a). relativity is required with regard to injured parties; b). the type of harm suffered and the way the harm was caused is to be examined; c) for which harmful consequences of its wrongful and culpable conduct of the state should be held liable and the question to whom the State should be held liable. It is required that the harm (as is suffered by the claimant and caused by the government) falls within the protective scope of the violated norm. In other words, the claimant should show that a legal norm that is meant to protect his or her interest and to prevent such harm has been breached.[14]

3.2. The Suitable Concept for Imposing Government Liability for Wildfires in Indonesia

In Indonesia, the government liability in Indonesia has similar basis of liability in civil law as found in the Article 1365 of the Indonesian Civil Law Code,[15] which states: *every person who conduct unlawful which cause injuries on others, should be liable to remedy the injuries*. The Law Number 30 of 2014 on Government Administration have similar definition about government liability states that: *The people may file a suit against the government for their unlawful actions before the administrative court with a reason that this Act is a material law of administrative procedural law*. From

these provisions it is conclusive that the Indonesian legal system acknowledges that the government can be held liable for wrongdoings that cause injuries.

In the case of wildfire prevention in which the governments have statutory duties stipulated in some regulations. To hold the government liable, firstly the judge should examine whether the fires occurred due to negligence of the government in carrying out their duties for wildfire prevention. If it is proven that the governments have conducted omissions, then it should be classified in what capacity the governments conducting such omissions, whether in their capacity of doing discretionary powers or in their capacity of executing the regulations.

According to the de Geest theory of governmental agency, the public agents tasked with preventing wildfires have different characteristics of agency from one to others. In this case, the multi-task agent theory should be looked at since the due care of public authorities is divided into different characteristics of agencies. The Minister of Environment and Forestry and the Head of Regional Governments are definitely multi-task agents. They hold a statutory duty on planning and determining policies on wildfires control. While the operational tasks are hold by the specific teams both at the central and the regional levels. The due care of those teams might be as single-task agents as their tasks are merely controlling the fires. However, the teams are sub-ordinates of the Minister and the Head of Regional Governments. They implement their tasks of controlling fires on behalf of the government. In that case, the vicarious liability that imposes liability on the Minister and Heads of Region for wrongdoing committed by operational teams — as an individual or in a group — within the scope of employment can possibly be imposed.[16]

4. Conclusion

The liability of government across jurisdictions is based on various theoretical and legal bases. In some developing countries, the concept of liability for environmental cases has been shifted from the polluter-pays principles to the government-pays principles that indicates the liability of government is in the spotlight of scholars. However, in some developed countries which previously have experienced filing suits against governments show that imposing liability to public bodies is not as easy as imposing liability on private entities due to some public interests attached to governments. Therefore, holding liability to the government for their negligence in preventing wildfires

in Indonesia would also pose big challenges. The theory from de Geest assists in highlighting that there is a potential design to impose liability to public bodies in the cases of wildfires. However, since public agencies have a characteristic of vicarious relationship, hence the de Geest theory leaves a critical question on the implementation of the theory within the vicarious liability in government agencies.

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