



## Green Justice: The Efforts of the Supreme Court of the Republic of Indonesia in Preserving the Environment Through the Judge Decision

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<http://dx.doi.org/10.18415/ijmmu.v8i5.2575>

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### **Abstract**

The concept of justice is not only understood as a concept aimed at humans as the subject, but also the environment as a unified system, which ultimately justice is also for humans and the environment itself, both for present and future generations. The principles that develop in relation to environmental protection and management, are formed from global awareness which then become principles that must be adopted in the legal systems of countries that recognize the importance of environmental protection and preservation. The Supreme Court is fully aware of its role in protecting and preserving the environment. Through its regulations and decisions, the Supreme Court seeks to form a unified view of green justice and 'green judges'.

**Keywords:** *Green Justice; Green Judge; Environmental Justice; Ecological Justice; The Supreme Court of Indonesia; Judge Decision; Cassation*

### **Introduction**

The Supreme Court of the Republic of Indonesia is a cassation court that has the duty to cultivate uniformity in the implementation of law by means of decisions on cassation and review to preserve that all laws and legislation through the territory of the Republic of Indonesia of Indonesia are administered justly, appropriately, and correctly. As the Highest State Court, the Supreme Court also handles environmental cases. The enforcement of environmental cases in Indonesia proceeds by way of civil, criminal, or administrative judicial processes. The administrative court adjudicates the disputes between Indonesian citizens versus the government over alleged violations of environmental law or misuse of power by official or a state organ. Meanwhile, the general court hears civil litigation and criminal proceedings. From 2003 to 2019, the Supreme Court of the Republic of Indonesia has tried 300 cases related to environmental cases, either through cassation or review.<sup>1</sup> In the same period, the court of first

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<sup>1</sup> Nur Syarifah et al, *Assessment Report on Court Decisions on Environmental Cases: Enhancement of Human Rights and Environmental Protection in Training and Policy in The Judicial Process in Indonesia* (Indonesian Institute for Independent Judiciary, 2020) 4<[https://leip.or.id/wp-content/uploads/2021/01/Buku-ASSESSMENT-REPORTON-COURT-DECISIONSON-ENVIRONMENTAL-CASES\\_ISBN.pdf](https://leip.or.id/wp-content/uploads/2021/01/Buku-ASSESSMENT-REPORTON-COURT-DECISIONSON-ENVIRONMENTAL-CASES_ISBN.pdf)>.

Instance and appeals, both civil, criminal, and environmental administration cases, have tried 373 cases.<sup>2</sup> Based on these data, most of the parties in environmental cases submitted legal remedies to the Supreme Court.

The Supreme Court's decision related to the environment cannot be separated from the criticism of the writers, by stating that industry litigants gain significant advantage over the public interest litigants or victims of environmental damage in litigation, who tend to come from economically and socially disadvantaged sections of society.<sup>3</sup> Chairman of Chamber the State Administrative Court of the Republic of Indonesia Supreme Court, Dr. Supandi, S.H., M.Hum, also states that a common obstacle faced in hearing environmental cases is the difficulty of proof while it occur between parties who have greater access and parties who have limited access.<sup>4</sup> He also confirmed that: "Armed with a large intake of funds and pursuing short-term profits alone, of course environmental polluters will be easy to conduct research funding conducted by certain institutions that do not work objectively and put forward the facts in the field significantly".<sup>5</sup> This statement has also been supported by reports which have stated that victims of environment-related violations who seek civil redress or remedies were rarely successful in court.<sup>6</sup> Even successful plaintiffs generally have difficulty enforcing favourable decisions.<sup>7</sup> Several reasons that caused difficulty in executing these decisions include: the government as defendant ignoring judicial decisions; decisions so unclear that execution is not possible; or, in cassation or review cases, a certified copy of the decision is not immediately sent to the general court of first instance which has the authority to carry out the execution.<sup>8</sup> Furthermore, the lack of judges with environmental law expertise is one of the biggest obstacles to law enforcement in cases of environmental damages.<sup>9</sup>

Amid criticism of environmental law enforcement, the Supreme Court of Indonesia introduced certified environmental judges which issued the Chief Justice Decree No. 134/KMA/SK/IX/2011 Concerning Environmental Judge Certification.<sup>10</sup> The Decree stipulates that environmental cases must be tried by a certified environmental judge and have been appointed by the Chief Justice of the Supreme Court.<sup>11</sup> Furthermore, environmental judge certification aims to improve the effectiveness of handling environmental cases in court as part of efforts to protect the environment and fulfil a sense of justice. The Supreme Court has enacted several decrees to support the certified judge's system, namely: The Chief Justice Decree No.178/KMA/SK/XI/2011 concerning the Selection Team for the Certified Environmental Judges System, The Chief Justice Decree No.26/KMA/SK/II/2013 concerning the Selection and Appointment of Certified Environmental Judges, The Chief Justice Decree No. 36/KMA/SK/II/2013 on the Guidelines for Handling Environmental Cases. Decree No. 36/KMA/SK/II/2013 provides guidelines on using environmental principles, such as prevention of harm, precautionary principles, polluter-pays principles, sustainable development, intragenerational equity, intergenerational equity, common but differentiated responsibility, equitable utilization of shared resources, and so on.<sup>12</sup> Moreover, several

<sup>2</sup> Ibid.

<sup>3</sup> David Nicholson, *Environmental Dispute Resolution in Indonesia* (Brill, 2010) 261 <<https://library.oapen.org/handle/20.500.12657/34653>>.

<sup>4</sup> '[Joint Press Release] Reflections on the Ten-Year Law on Environmental Protection and Management: Enforcement of Environmental Law in Indonesia, Still Weak – ICEL' <<https://icel.or.id/en/news/press-release/joint-press-release-reflections-on-the-ten-year-law-on-environmental-protection-and-management-enforcement-of-environmental-law-in-indonesia-still-weak/>> ('[Joint Press Release] Reflections on the Ten-Year Law on Environmental Protection and Management').

<sup>5</sup> Ibid.

<sup>6</sup> Nicholson (n 3) 186.

<sup>7</sup> Simon Butt and Prayekti Murharjanti, 'Indonesia' in Emma Lees and Jorge E Viñuales (eds), *The Oxford Handbook of Comparative Environmental Law* (Oxford University Press, 2019) 245.

<sup>8</sup> Ibid.

<sup>9</sup> The Jakarta Post, 'Govt Bemoans Judges' Lack of Environmental Expertise', *The Jakarta Post* <<https://www.thejakartapost.com/news/2020/03/19/govt-bemoans-judges-lack-environmental-expertise.html>>.

<sup>10</sup> Chief Justice Decree No. 134/KMA/SK/IX/2011 Concerning Environmental Judge Certification 2011.

<sup>11</sup> Ibid 2.

<sup>12</sup> *The Chief Justice Decree No. 36/KMA/SK/II/2013 on the Guidelines for Handling Environmental Cases 2013*.

Supreme Court decisions which have become landmark decisions have also applied the principle of environmental law, namely: the polluter-pays principle and the precautionary principle.

This article analyses the efforts of the Supreme Court of the Republic of Indonesia in preserving the environment through the judge decision particularly cassation and review decisions. Using cassation and review landmark decisions of the Supreme Court of the Republic of Indonesia in environmental cases as a case study, it then assesses whether these decisions would need some adjustment to bring it into line with green justice. More specifically, the article first analyses the conceptual background of green justice and the reasons why green justice is necessary. Second, the article analyses environmental principles and Indonesia legal frameworks that are relevant to green justice theory. Third, the article analyses the initiatives the Supreme Court of the Republic of Indonesia has implemented green justice in cassation decisions. It is argued herein that activities related to green justice can feasibly be included in the Supreme Court of the Republic of Indonesia decisions.

### ***Legal Materials and Methods***

This paper uses the qualitative content analysis doctrinal method to analyses the Supreme Court of the Republic of Indonesia decisions regarding the environmental cases in Indonesia. It also analyses legal approach of Indonesia legal instruments and principles of environmental law implied in the Supreme Court. It also used several cases regarding the environmental rights enforcement in Indonesia to explain and analyses the situation in Indonesia.

### ***Result and Discussion***

#### **Concept of Green Justice**

J. Rawls, with the principle of justice, sought to regulate the distribution of certain primary goods, which are divided into two types, namely the social primary goods and the natural goods.<sup>13</sup> The social primary goods consist of rights, liberties, and opportunities, and income and wealth, while the natural goods consist of health and vigour, intelligence, and imagination.<sup>14</sup> Based on that division, green justice is included in social good which is concerned with ecological security.<sup>15</sup> Two key policies are involved in the arrangements needed to ensure such security: first, the provision of public environmental goods, such as favourable environmental conditions and the efficient use of environmental resources, and second, the equal distribution of social benefits and burdens resulting from these environmental conditions, including rights and freedoms, obligations and responsibilities.<sup>16</sup> Furthermore, green justice can be or has been explored through an approach that discusses ecological harms affecting humans; through an approach to ecological justice that explores environmental harms; and as an extension of an approach to species justice aimed at exploring ecological harms to non-human animals from three perspectives: through the use of environmental justice.<sup>17</sup>

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<sup>13</sup> John Rawls, *A Theory of Justice, Rev. Ed* (Cambridge, MA: harvard university Press, 1999) 52.

<sup>14</sup> John Rawls, *A Theory of Justice, Rev. Ed* (Cambridge, MA: harvard university Press, 1999) 54.

<sup>15</sup> Jiangli Wang et al, 'Green Justice Approach to the Environmental Governance Dilemma: A Case Study of Jiufeng Environmental Energy Project in Yuhang District, Hangzhou' [2019] *Greening China's Urban Governance* 217, 220 ('Green Justice Approach to the Environmental Governance Dilemma').

<sup>16</sup> *Ibid.*

<sup>17</sup> Michael J Lynch, Michael A Long and Paul B Stretesky, *Green Criminology and Green Theories of Justice: An Introduction to a Political Economic View of Eco-Justice* (Springer, 2019) 1–2.

Green justice emerges because of criticism of the unilateral pursuit of the material growth that has characterized industrial civilization and the serious ecological crisis it causes.<sup>18</sup> The advent of the current environmental crisis and the resulting need for global ecological protection guarantees have raised justice issues to multi-dimensional levels.<sup>19</sup> The dualism of human beings as ecological (inter-species justice) and social beings (intra-generational justice and inter-generational justice) represents green justice which combines environmental justice (international, domestic, and global justice) and ecological justice.<sup>20</sup> Environmental justice is characterized as the equal treatment and substantive participation of all individuals in terms of development, implementation of environmental laws and policies, regardless of race, colour, national origin or income.<sup>21</sup> Equal treatment means that no group, including socio-economic groups, ethnic, or racial, should bear a disproportionate share of the adverse environmental impacts of agricultural, municipal and commercial activities or the implementation of federal, state, local and tribal programs.<sup>22</sup>

Ecological justice refers to human beings' relationship with the rest of the natural world in general, which entails issues about the health of the biosphere and, more specifically, plants and animals that also occupy the biosphere.<sup>23</sup> The nature of the planetary environment (which is often seen to have its own intrinsic value) and the rights of other species (especially animals) to live free from torture, exploitation and habitat destruction are the key concerns of ecological justice.<sup>24</sup> In simple terms, environmental justice focuses on relationships between members of our own (human) species, while ecological justice focuses on relationships between human beings and the rest of nature.<sup>25</sup> Green justice is a more holistic term than either 'ecological' or 'environmental' justice, since it has a much wider scope: it involves regulation and coordination in relation to the three general dimensions of species, time, and space.<sup>26</sup>

Maintaining a holistic approach to green justice and demonstrating foresight in the law enforcement is important; otherwise, the environmental problems that emerge in the course of green crimes cannot be solved. Green crimes are commonly described simply as environmental crimes.<sup>27</sup> Primary crimes are those crimes that arise directly from the destruction and deterioration, by human acts, of the earth's resources and secondary or symbiotic green crime is the crime resulting from the violation of laws that aim to control environmental disasters.<sup>28</sup> Primary green crimes consist of crimes of air pollution (e.g. burning of corporate waste), crimes of deforestation (e.g. destruction of rainforests), crimes of species decline and against animal rights (e.g. traffic in animals and animal parts), crimes of water pollution (e.g. lack of drinking water), meanwhile secondary green crimes consist of state violence against oppositional groups (e.g. French bombing of the Rainbow Warrior), hazardous waste and organised crime (e.g. toxic and general waste dumping both legal and illegal).<sup>29</sup> Individual or micro-level offender, group or mezzo-level offender, organized crime groups, corporate or state or

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<sup>18</sup> Wang et al (n 15) 220.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid 220–221.

<sup>21</sup> Nicole C Kibert, 'Green Justice: A Holistic Approach to Environmental Injustice' (2001) 17(1) *Journal of Land Use & Environmental Law* 169, 170 ('GREEN JUSTICE').

<sup>22</sup> Ibid.

<sup>23</sup> Robert Douglas White, *Crimes against Nature: Environmental Criminology and Ecological Justice* (Routledge, 2013) 18.

<sup>24</sup> Ibid.

<sup>25</sup> David Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature* (Oxford University Press, 2007).

<sup>26</sup> Jiangli Wang et al, 'Green Justice Approach to the Environmental Governance Dilemma: A Case Study of Jiufeng Environmental Energy Project in Yuhang District, Hangzhou' [2019] *Greening China's Urban Governance* 217, 222 ('Green Justice Approach to the Environmental Governance Dilemma').

<sup>27</sup> White (n 23) 92.

<sup>28</sup> Ibid 92–93.

<sup>29</sup> Ibid 93.

corporate-state/state-corporate offender are able to commit these green crimes.<sup>30</sup> These green crimes may also be invisible due to seven interrelated factors - namely the absence of knowledge, statistics, research, theory, control, politics and panic.<sup>31</sup> It breaches existing environmental laws (criminal, civil, and regulatory violations) which aimed for protecting the health, protection and vitality of humans, habitats and natural resources.<sup>32</sup>

Green justice also includes procedural justice, spatial justice and social justice both in the domestic, international and global scope.<sup>33</sup> Originally, the idea of procedural environmental justice was created as a direct response to previous approaches that were narrowly defined in terms of burden or profit distribution and race, and criticism of them.<sup>34</sup> Procedural justice initiatives have moved the lens from distributive results to decision-making and from racial bias to planning and institutional processes, procedural justice also raising the issue of environmental equity on questions of participation, access, choice and control.<sup>35</sup> Procedural justice is connected with the idea that a process that guarantees rights of substantial participation is an important prerequisite for the legitimate authority of action-guiding legal norms.<sup>36</sup> The procedure is operated equally when the formalities defining the procedure have been properly adhered to.<sup>37</sup> In simple term, procedural justice refers to equity in the processes employed for the dispute resolution and the resource allocation.<sup>38</sup>

Spatial Justice is an “intentional and focused emphasis on the spatial or geographical aspects of justice and injustice”.<sup>39</sup> It is also defined as a socially just distribution that is achieved fairly.<sup>40</sup> Achieving justice was seen as an intrinsically geographical problem, a challenge to “design a form of spatial organization that maximizes the least fortunate region's prospects”.<sup>41</sup> A territorial or regional distribution of resources can be made more fairly, when if there is an equal distribution of private and public investment spatial patterns and where special attention is paid to redress environmental or social issues.<sup>42</sup> Specific characteristics contained in spatial justice are: (1) the consciousness of inequalities or privileges in various geographies, (2) The power to alter geography, (3) spatial inequalities need to be addressed because they do not change on their own, and (4) The long-term method associated with it and the holistic perspective that must be taken to achieve the objective.<sup>43</sup> The NIMBY (not in my back yard) phenomenon is a very common example in spatial justice. Residents will oppose and protest the construction of public facilities such as public toilets, electric cables, garbage collection systems or transfer stations, because they fear damage to their health, property or the environment. Residents often express their reluctance to consider the existence of such facilities near their homes.<sup>44</sup>

<sup>30</sup> Avi Brisman and Nigel South, ‘Green Criminology and Environmental Crimes and Harms’ (2019) 13(1) *Sociology Compass* e12650, 2.

<sup>31</sup> Ines Arroyo-Quiroz and Tanya Wyatt, *Green Crime in Mexico: A Collection of Case Studies* (Springer, 2018) 12.

<sup>32</sup> Brisman and South (n 30) 2.

<sup>33</sup> Wang et al (n 26) 222.

<sup>34</sup> Richard Schroeder et al, ‘Third World Environmental Justice’ (2008) 21(7) *Society & Natural Resources* 547, 552.

<sup>35</sup> Ibid 552–553.

<sup>36</sup> Lawrence B Solum, ‘Procedural Justice’ 78 *SOUTHERN CALIFORNIA LAW REVIEW* 143, 183.

<sup>37</sup> Brian Barry, *Political Argument: A Reissue with New Introduction* (University of California Press, 1990) 97 (‘Political Argument’).

<sup>38</sup> Wang et al (n 26) 223.

<sup>39</sup> Edward Soja, ‘The City and Spatial Justice’ (2009) 1(1) *Justice spatiale/Spatial justice* 1, 2.

<sup>40</sup> David Harvey, *Social Justice and the City*, vol 1 (University of Georgia Press, 2009) 101.

<sup>41</sup> Ibid 110.

<sup>42</sup> Edward W Soja, *Seeking Spatial Justice*, vol 16 (U of Minnesota Press, 2013) 85.

<sup>43</sup> JS Onésimo Sandoval, ‘Review of Seeking Spatial Justice by Edward W. Soja’ (2011) 40(4) *Contemporary Sociology* 491, 491–492.

<sup>44</sup> Peter Hall, *Cities of Tomorrow An Intellectual History of Urban Planning and Design since 1880*(John Wiley&Sons,2014) 430.

The nature and environment are understood to establish the social justice conditions.<sup>45</sup> Social justice “requires that any inequalities must benefit all citizens, and particularly must benefit those who will have the least”.<sup>46</sup> As a principle, social justice aim is to provide a way to establish the rights and duties in society and to identify the sufficient allocation of benefits and burdens of social cooperation.<sup>47</sup> It implies that the needs of all are met according to a common standard of need.<sup>48</sup> Social justice is also described as the availability of the concrete and real opportunities to each person to achieve freely the things that are important to him or her freely. Social justice is not concerned with the limited emphasis on what is only for the individual alone, but with what is for the whole of society.<sup>49</sup> In the current global situation, social justice must include an understanding of the relations within and between a multitude of cultures and peoples.<sup>50</sup> Furthermore, the study of social justice requires gaining an understanding of distributive principles (fair distribution of rewards and burdens) and retributive principles (proper responses to harm).<sup>51</sup> Distributive justice is defined as “justice owed by a community to its members, including the fair allocation of common advantages and sharing of common burdens”,<sup>52</sup> meanwhile retributive justice is depicted as “recompense...the dispensing or receiving of reward or punishment according to the deserts of the individual...that given or exacted in recompense.”<sup>53</sup> “Recompense” is defined as “repayment, compensation, or retribution for something, esp. an injury or loss”.<sup>54</sup> Related to environment, many objectives involving social justice, such as improving the bargaining power of workers, reducing income disparities and providing good public services, are aligned with improved environmental standards: fewer polluting industries, better energy efficiency and more public transportation.<sup>55</sup>

In addition to the concepts mentioned above, the following problems and approaches are involved in the spectrum of views on green justice, namely: the impacts of environmental decisions on future generations; the property rights problems that arise with regard to damages caused by ecological destruction and with regard to laws limiting the use of property by property owners; analysis of illegal use of resources and how the illegal acquisition of resources has an impact on ecological justice; attention to the participation of disadvantaged groups in the debate of ecological justice and how the interests of marginalized groups can be respected in relation to environmental justice issues; concerns about procedural justice and whether the mechanisms that aim to ensure justice are followed; the implications of the conceptualization of distributive justice and the equitable distribution of goods within society and fairness in the distribution of goods are clear; the role of dispute management in relation to justice for the environment; and green justice principles that originate from ethical and moral orientations.<sup>56</sup> Related to these issues, the international law has also “greening”.<sup>57</sup> Several international regulation of environmental problems has taken place in international fora, such as United Nations Environmental Programme, the conferences of the parties to environmental treaties, the World Trade Organization, the European Union,

<sup>45</sup> David Schlosberg, ‘Theorising Environmental Justice: The Expanding Sphere of a Discourse’ (2013) 22(1) *Environmental politics* 37, 38.

<sup>46</sup> Leif Wenar, ‘John Rawls’, *The Stanford Encyclopedia of Philosophy (Fall 2008 Edition)*, Edward N. Zalta (ed.) <<https://plato.stanford.edu/archives/fall2008/entries/rawls/>>.

<sup>47</sup> Dominic Roux and Marie-Claude Desjardins, ‘Sustainable Development and Social Justice: A Need for Coherence with International Law’ (2012) 20 *Waikato Law Review* 30, 32 (‘Sustainable Development and Social Justice’).

<sup>48</sup> Loretta Capeheart and Dragan Milovanovic, *Social Justice: Theories, Issues, and Movements* (Rutgers University Press, 2007) 80 (‘*Social Justice*’).

<sup>49</sup> *Ibid.* 2.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> Bryan A Garner and Henry Campbell Black, *Black’s Law Dictionary* (West, 9th ed, 2009) 942.

<sup>53</sup> Capeheart and Milovanovic (n 48) 3.

<sup>54</sup> Garner and Black (n 52) 1386.

<sup>55</sup> William M Bowen et al, ‘Toward Environmental Justice: Spatial Equity in Ohio and Cleveland’ (1995) 85(4) *Annals of the Association of American Geographers* 641, 2.

<sup>56</sup> Michael J Lynch, Michael A Long and Paul B Stretesky, *Green Criminology and Green Theories of Justice: An Introduction to a Political Economic View of Eco-Justice* (Springer, 2019) 42.

<sup>57</sup> Philippe Sands, ‘The “Greening” of International Law: Emerging Principles and Rules’ 33.

the European Convention on Human Rights, the World Bank and the General Agreement on Tariffs and Trade. These forums have produced treaty law, soft law, case law, and doctrinal works which contain the principles of environmental law. Furthermore, these principles of environmental law implicate green justice. The environmental principles are principle of common but differentiated responsibilities; principle of ecological integrity; common heritage of mankind; ecological solidarity; principle of equitable and reasonable utilization; principle of sustainable use; principle of inter-generational equity; high level of environmental protection; principle of integration; non-regression or stand- still principle, and its corollary principle of progression; in dubio pro natura; the ecological function of the property; co-operation principle; remediation for environmental damage or recovery principle; principle of proximity and self- sufficiency; principle of waste minimization; principle of protection and preservation of the marine environment; principle of ‘As Low As Reasonable Achievable’, principle of notification, principle of co-operation; principle of Environment Impact Assessment; and principle of information, participation, and access to justice.<sup>58</sup>

Using the concept related to the green justice theory, this paper will discuss and analyse the landmark decisions of the Supreme Court of Indonesia. It will also elaborate on the application of principles of environmental law, namely: the polluter-pays, prevention, and precautionary principles. It because these environmental law principles have greatest relevance for international and national legal regimes.<sup>59</sup>

### **Environmental Principles**

This part attempts to discuss the principles in environmental law, namely the polluter-pays, the preventive, and the precautionary principle. The discussion is intended to answer the question whether the existing of Law No. 32/2009 regarding the Environmental Protection and Management has recognized these principles.

### **The Preventive Principle**

The decision of the Trail Smelter Arbitration case is the first implementation of the principle of prevention.<sup>60</sup> This decision has created an obligation that each country must protect other countries against the damage caused by activities within its jurisdiction.<sup>61</sup> In 1972, that principle was incorporated into principle 21 of the Stockholm Declaration, which states:<sup>62</sup>

“States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”.

The Trail Smelter Arbitration and principle 21 of the Stockholm Declaration mandate the preventive measures to be enforced. However, Principle 21 in the 1972 Stockholm Declaration distinguishes between the preventive principle for several reasons. First, Principle 21 comes from the recognition of the sovereignty of the State to utilize resources available within its jurisdiction, while the

<sup>58</sup> Nicolas De Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press, 2020) 5–6.

<sup>59</sup> Ibid 11.

<sup>60</sup> Andri G Wibisana, ‘Three Principles of Environmental Law: The Polluter-Pays Principle, the Principle of Prevention, and the Precautionary Principle’ in Michael Faure and Nicole Niessen (eds), *Environmental Law in Development: Lessons from the Indonesian Experience* (Edward Elgar Publishing, 2006) 37 <[https://ideas.repec.org/h/elg/eechap/3946\\_3.html](https://ideas.repec.org/h/elg/eechap/3946_3.html)> (‘Three Principles of Environmental Law’).

<sup>61</sup> Nicolas De Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press, 2020) 86.

<sup>62</sup> Stockholm Declaration, ‘Report on the United Nations Conference on the Human Environment Declaration 1’ in *A/CONF* (1972) 14, 21.

principle of prevention comes from the need for environment protection as a goal itself.<sup>63</sup> Secondly, the prevention principle is not confined to the problem of transboundary effects of certain activities, but aims to minimize the risk of pollution.<sup>64</sup> Therefore, the preventive principle relates to preventive measures to avoid pollution before it happens. According to Hunter and others, the principle of preventive action may reflect a belief that environmental protection is best achieved by preventing environmental harm in the first place rather than attempting to remedy or compensate for it after it has occurred.<sup>65</sup> The focus of Principle 21 is not on assessing of responsibility for the damage caused to another State, but, rather, on the duty to avoid harm to the environment in general.<sup>66</sup>

The underlying view is that prevention is particularly important in the context of environmental protection, as environmental damage is often irreversible.<sup>67</sup> The Principle 2 of the Rio Declaration on Environment and Development laid down more stringent terms for this obligation on the preventive principle, which states:<sup>68</sup>

“that states have “sovereign right in exploiting their own resources” in accordance with their national policies. Nevertheless, they also have the responsibility to ensure that activities within their jurisdiction or control do not damage the environment outside their jurisdiction”

Several conventions also adopted the prevention principle, such us: the 1979 Convention on Long- Range Transboundary Air Pollution (CLRTAP), the United Nations Convention on the Law of the Sea (UNCLOS), the 1985 Vienna Convention for the Protection of the Ozone Layer, the United Nations Framework Convention on Climate Change (UNFCCC) and the Convention on Biological Diversity (CBD).<sup>69</sup> The principle has been implemented in the decision of the International Court of Justice in the case of *Gabcikovo-Nagymaros*, which states that: “in the field of environmental protection, vigilance and prevention are required on account of the often-irreversible character of damage to the environment”.<sup>70</sup>

Based on Principle 2 of the Rio Declaration on Environment and Development, States are bound by a duty of due diligence to avoid the occurrence of significant damage.<sup>71</sup> If a state has taken measures to prevent to avoid the damages, it cannot be held responsible for the transboundary damage. The measures can be considered as due care by several conventions, such us: the requirement to perform an environmental impact assessment (EIA), monitoring, and consultations.<sup>72</sup> Furthermore, the prevention principle can be justified only if, all possibilities considered, it is better than the alternatives, which means that the advantages of prevention are greater than the costs incurred.<sup>73</sup>

The preventive principle is probably the most likely principle to address environmental injustices.<sup>74</sup> In the framework of environmental justice, authorities must take prevention actions before harm occurs, which does not have to wait until causation or conclusive "proof" is established.<sup>75</sup>

<sup>63</sup> Arie Trouwborst, *Evolution and Status of the Precautionary Principle in International Law* (Springer, 2002) 35.

<sup>64</sup> Wibisana, ‘Three Principles of Environmental Law’ (n 80) 38.

<sup>65</sup> Ibid.

<sup>66</sup> Pierre-Marie Dupuy and Jorge E Viñuales, *International Environmental Law* (Cambridge University Press, 2018) 66.

<sup>67</sup> Pierre-Marie Dupuy and Jorge E Viñuales, *International Environmental Law* (Cambridge University Press, 2018) 66.

<sup>68</sup> *Agenda 21: Programme of Action for Sustainable Development; Rio Declaration on Environment and Development; Statement of Forest Principles: The Final Text of Agreements Negotiated by Governments at the United Nations Conference on Environment and Development (UNCED), 3-14 June 1992, Rio De Janeiro, Brazil* (n 75) 2.

<sup>69</sup> De Sadeleer (n 58) 67–68; Dupuy and Viñuales (n 87) 68.

<sup>70</sup> De Sadeleer (n 58) 88.

<sup>71</sup> Ibid 90.

<sup>72</sup> Mohamed-Katerere (n 73) 38.

<sup>73</sup> Cass R Sunstein, *Risk and Reason: Safety, Law, and the Environment* (Cambridge University Press, 2002) 101.

<sup>74</sup> Ole W Pedersen, ‘Environmental Principles and Environmental Justice’ (2010) 12(1) *Environmental Law Review* 26, 36.

<sup>75</sup> Robert D Bullard, *Dumping in Dixie: Race, Class, and Environmental Quality* (Avalon Publishing-(Westview Press), 2008) 121–125.



Preventive focus tends to be reasonable for a regulatory standpoint, but for a judicial point of view, a distant approach from causality and proof may cause problems, as the 'environmental justice framework' that neglects causality issues may have trouble in persuading the judiciary that injustice occurred.<sup>76</sup> Another issues arise between the principle of prevention and environmental justice when it is implemented through domestic environmental laws. For instance, How the authorities qualify the rules of a particular harm being either 'serious' or 'significant' before action is taken. Moreover, the probability of harm against potential environmental, health, and socioeconomic profit and costs should be weighed by authorities.

In Indonesia, the preventive principle has been recognized in Article 13 (2) Law No. 32/2009, which states the control over the environmental pollution and/or damage shall cover: prevention; mitigation; and restoration.<sup>77</sup> Moreover, Article 13 (3) stipulates that the control over environmental pollution or damage shall be done by the government, regional governments and personnel in charge of businesses and/or activities on the basis of their respective scopes of authority, role, and responsibility.<sup>78</sup> The instruments for preventing environmental pollution or damage are also stipulated by Law No. 32/2009, which shall consist of: strategic environmental assessment; layout; quality standard of the environment; standard criteria for environmental damage; environmental impact analysis; environmental management and monitoring programs; licensing; economic instrument of the environment; environment-based legislation,<sup>79</sup> environmental risk analysis, and other instruments in accordance with advancement of science and technology.<sup>80</sup> In addition, Article 90 (1) Law No. 32/2009 gives authorization to institutions of the government and regional governments which in charge in environmental affair to perform certain measures against businesses or activities causing environmental pollution or damage inflicting environmental loss.<sup>81</sup> The certain measures constitute actions to prevent and mitigate pollution or damage as well as restore environmental functions in a bid to ensure that negative impacts on the environment won't occur or repeat.<sup>82</sup>

### The Relation of the Preventive and Other Principle

There are connections and sharp differences between the polluter-pays principle and the preventive principle. The principle of the polluter pays is principally aimed at internalizing externality so as to avoid the cost of repairing social and non-polluter-causing harm.<sup>83</sup> Theoretically, however, the effective tool would cost the potential polluter highly.<sup>84</sup> The impact of the polluter-pays principle is a deterrent effect, which could eventually prevent the repetition of similar damage.<sup>85</sup> On the other hand, the main objective of the preventive principle is to prevent damage reparation: better than cure, to prevent.<sup>86</sup> Prevention thus applies, contrary the polluter-pays principle, when damage has not yet occurred, but reasonable grounds exist to suspect that if prevention had not been carried out, the damage would arise.<sup>87</sup> Another striking difference between prevention and precautionary principle, as mentioned by Andri G. Wibisana, is that although the principles of prevention and early prevention are closely related, the Principle of Prevention is intended to address risk under certainty, and it is the precautionary principle

<sup>76</sup> Pedersen (n 94) 36.

<sup>77</sup> *Law No. 32/2009 Regarding the Environmental Protection and Management* (n 78) 13 (2).

<sup>78</sup> *Ibid* 13 (3).

<sup>79</sup> *Ibid* 14.

<sup>80</sup> *Ibid* Elucidation, General, I (8) d.

<sup>81</sup> *Ibid* 91 (1).

<sup>82</sup> *Ibid* Elucidation 90 (1).

<sup>83</sup> Wibisana, 'Three Principles of Environmental Law' (n 80) 39.

<sup>84</sup> *Ibid*.

<sup>85</sup> *Ibid*.

<sup>86</sup> *Ibid*.

<sup>87</sup> *Ibid*.

that requires preventive action even if the risk was still not fully scientifically defined.<sup>88</sup> In addition, the precautionary principle applies only to irreversible or significant risks or threats.<sup>89</sup>

### The Precautionary Principle

This principle was first included in the 1992 Rio Declaration signed by more than 170 countries, which was the most significant international recognition of this principle.<sup>90</sup> Principle 15 states: "...Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation".<sup>91</sup> The precautionary principle requires that if there is a threat of serious or irreversible damage, scientific uncertainty should not be used as an excuse to delay taking effective measures to prevent environmental damage. This principle originated from the German concept, *vorsorgeprinzip* which means the precautionary principle / foresight principle which received support in the 1960s as a response to concerns about pollution levels.<sup>92</sup> In the early 1970s, this principle could be found in West German legislation which was used as an effort to reinforce environmental protection policies in particular to combat toxic fumes, global warming and pollution in the oceans.<sup>93</sup>

Since the 1980s this principle has been at the forefront of international environmental law and is often found in academic literature and references environmental management strategies in international and domestic policy documents.<sup>94</sup> At the international level, the 1972 Stockholm Conference has become a testament to the recognition of the need for the preservation of natural resources through careful planning and management for the survival of future generations.<sup>95</sup> In international law, the current preventive principle requires states to refrain from acts that pose a "significant risk" of "reasonably foreseeable" damage.<sup>96</sup> Furthermore, international jurisprudential innovations of the Trail Smelter doctrine have extended the due diligence criteria to include the duty to examine the possibility of environmental damage and determine whether the risk of harm is severe.<sup>97</sup> The innovation of the principle of precautionary principle lies in the precautionary requirement not only when there is a significant risk of damage, but also when there is uncertainty about whether the damage will occur or not.

There are several references used to apply the principle of precautionary principle, namely:<sup>98</sup>

1. The threat of environmental damage is serious and irreversible. For example, it has consequences that are dangerous in nature that are intergenerational, or there is no substitute for the resources used.
2. In the nature of scientific uncertainty, there are circumstances in which the consequences that will arise from an activity cannot be predicted with certainty due to the character of the problem itself, the causes or potential impacts of the activity.
3. Prevention measures include preventive measures to cost effectiveness.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> Warwick Gullett, 'Environmental Protection and the Precautionary Principle: A Response to Scientific Uncertainty in Environmental Management' 55.

<sup>91</sup> *Agenda 21: Programme of Action for Sustainable Development; Rio Declaration on Environment and Development; Statement of Forest Principles: The Final Text of Agreements Negotiated by Governments at the United Nations Conference on Environment and Development (UNCED), 3-14 June 1992, Rio De Janeiro, Brazil* (n 75) 15.

<sup>92</sup> Gullett (n 110) 55.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid 57.

<sup>97</sup> Ibid.

<sup>98</sup> NHT Siahaan, *Hukum Lingkungan* (Pancuran Alam, Cet. 1, 2006) 61.

The precautionary principle, in Indonesia, has been adopted in Article 2 Law No. 32/2009, which stipulates environmental protection and management shall be executed on the basis of: "...b. conservation and sustainability; c. harmony and equilibrium; d. integration; e. benefit; f. prudence/precautionary; g. justice;..."<sup>99</sup> The prudence/precautionary is a form of precautionary principle which must be considered in efforts to manage and protect the environment. The elucidation of Article 2 (f) Law No. 32/2009 gives explanation which states uncertainty about impact of a business and/or activity due to limited mastery of science and technology is not a reason for delaying measures to minimize or avoid threat against environmental pollution and/or damage.<sup>100</sup> Because it has become the norm in Law No. 32/2009, this principle has also become a touchstone for actions related to environmental management and protection in Indonesia.

### Intergenerational Equity

There are several indications that there have been changes in the environment and ecosystem on earth due to the exploitation of natural resources for economic purposes.<sup>101</sup> The impact of these indications in the long term will eventually become a burden for future generations. Ecosystems and environment damage, erratic climate change, the ozone layer damage which causes the melting of ice in the North and South Poles and rising temperatures of the earth will be a barrier and the cause future generations will not be able to meet their needs the same as meeting the needs of the current generation. In the end it will become a burden to future generations. In the context of intergenerational relations, Edith Brown Weiss introduced four models of intergenerational equity approach, namely:<sup>102</sup>

1. The preservationist model:  
This approach stems from the present generation's willingness not to destroy or consume natural resources but to preserve them for the benefit of future generations.
2. The opulence model:  
as much as they want and achieve the highest welfare. The present generation can consume all-natural resources as much as they want and achieve as much wealth. The basic assumption of this model is that there is uncertainty about future generations, whether there will exist or not. Maximizing today's consumption is considered to be the best way to raise wealth for future generations.
3. The technology model:  
This approach states that we do not need to pay too much attention to the environment for the continuity of future generations because technological innovation will allow us to introduce an unlimited number of substitute sources.
4. Environmental economic model:  
Our obligations to future generations can be fulfilled if we take into account and use natural resources appropriately. The economic infrastructure that we develop will then be guided by an environmentally view economic development (green economics). This fourth model is more appropriate in the framework of sustainable development. The fulfilment of the goal of intergenerational justice is only possible if we look the earth with all its sources of wealth not only as an opportunity to invest but as a trust given to us by our ancestors to enjoy and to give to our descendants for their benefit. Therefore, the present generation carries the trust of future generations

<sup>99</sup> Law No. 32/2009 Regarding the Environmental Protection and Management (n 78) 2 (f); Andri G Wibisana, 'The Development of the Precautionary Principle in International and Indonesian Environmental Law' (2011) 14 *Asia Pacific Journal of Environmental Law* 169, 19.

<sup>100</sup> Law No. 32/2009 Regarding the Environmental Protection and Management (n 78) the elucidation of Article 2 (f) Law No. 32/2009.

<sup>101</sup> Robert Goodland et al, *Environmentally Sustainable Economic Development: Building on Brundtland* (Unesco, 1991) 15–27.

<sup>102</sup> Edith Brown Weiss, 'Intergenerational Equity: A Legal Framework for Global Environmental Change' in Edith Brown Weiss (ed), *Environmental Change and International Law: New Challenges and Dimensions, Modul Training on Environmental Law and Enforcement, Australia*. (Tokyo: United Nations University Press, 1992) 15.

to control the earth and its natural resources and at the same time we have the right to use it and benefit from it.

There are three forms of principles that are the basis of intergenerational equity, namely:<sup>103</sup>

1. Each generation should conserve the natural diversity and cultural, so that it does not limit the ability of future generations to solve their problems and should also be entitled to a degree of diversity equivalent to previous generations.
2. Each generation should be required to conserve the quality of the environment, so that it will not end up in a damaged condition.
3. Each generation should provide equal rights of access to the legacy of past generations and should conserve this access for future generations.

Intergenerational equity theory determines that all generations have an equal place in relation to the environment. There is no reason to prioritize / prioritize the present generation over future generations in taking advantage of this earth. This statement is implied in international law. The opening of the universal declaration of human rights begins with the sentence: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom justice and peace in the world...".<sup>104</sup> The phrase "... all members of the human family ..." indicates a time dimension, so that the scope for recognition of equal rights to freedom, justice and peace includes all generations.<sup>105</sup>

Laura Westra concluded that the main characteristics of Brown Weiss's statement, consisted of rights and obligations, and included aspects 'intragenerational' and 'intergenerational'.<sup>106</sup> The duties of intergenerational include:

1. To pass on Earth as well as it was when that first generation received it to the next generation;
2. The obligation to fix any harm inflicted by any failure of past generations.

Thus, each generation has the right to inherit the earth in conditions comparable to those enjoyed by the previous generations. The theory of intergenerational justice, in Law No. 32/2009 has also become a principle as stated in Article 2 letter b, namely the principle of harmony and sustainability<sup>107</sup> and Article 2 letter g, namely the principle of justice.<sup>108</sup> The elucidation of Article 2 (f) Law No. 32/2009 states the principle of harmony and sustainability means everybody bears obligation and responsibility for the future generation and their fellow generation by taking efforts to preserve the support capability of the ecosystem and improving the quality of the environment.<sup>109</sup> Meanwhile, the elucidation of Article 2 (g) Law No. 32/2009 describes the principle of justice means environmental management must reflect justice proportionally for every citizen, either inter-region, inter-generation or inter-gender.<sup>110</sup> From the perspective of intergenerational justice, all actions related to environmental management and protection efforts must be linked to the principle of sustainability and sustainability as well as the principle of justice.

<sup>103</sup> Ibid 19.

<sup>104</sup> UN General Assembly, 'Universal Declaration of Human Rights' (1948) 302(2) *UN General Assembly* 14, Preamble.

<sup>105</sup> Brown Weiss (n 122) 17.

<sup>106</sup> Laura Westra, *Environmental Justice and the Rights of Unborn and Future Generations: Law, Environmental Harm and the Right to Health* (Routledge, 2008) 138.

<sup>107</sup> Law No. 32/2009 Regarding the Environmental Protection and Management 2009 2 (b).

<sup>108</sup> Ibid 2 (g).

<sup>109</sup> Ibid Elucidation 2 (b).

<sup>110</sup> Ibid Elucidation 2 (g).

## The Implementation of Green Justice on Cassation and Review Decisions of the Supreme Court of the Republic of Indonesia.

Takdir Rahmadi, a justice of the Indonesian Supreme Court, argues Indonesian needs to institutionalize green judges and green rules of procedure since environmental problems know no boundaries and Indonesia has ratified an international convention which requires considering international environmental principles in deciding national environmental cases.<sup>111</sup> Indonesia needs to greening the courts, as courts are responsible for protecting the environment by their decisions and environmental regulations are relatively recent and complex.<sup>112</sup> The Indonesian judiciary plays an important role in assisting enforcement and compliance of the environmental laws of Indonesia, especially the Supreme Court of Indonesia roles in deciding environmental cases. In the landmark decisions, the Supreme Court affirmed the application of the environmental principles.<sup>113</sup>

### The Supreme Court Decision on Cassation Case No. 291/K/TUN/2013<sup>114</sup>

The consideration of the supreme court in this case states:<sup>115</sup>

1. Business permit granted by the Regent of the North Minahasa District (*objection litis*) as Defendant is unlawful, both procedurally and substantially with the applicable laws and regulations as stipulated in Article 52 Paragraph (1) of Law No. 4 of 2009 on Mineral and Coal Mining which stipulates the Mining Business Permit Holder (IUP) Metal Mineral Exploration is granted a WIUP (Mining Business Permit Area) with an area of at least 5,000 (five thousand) hectares and a maximum of 100,000 (one hundred thousand) hectares, whereas in fact Defendant had granted 2,000 (two thousand) hectares of mining location permits to Defendant II Intervention, thus clearly contradicting Article 52 paragraph (1) of Law Number 4 of 2009 concerning Mineral and Coal Mining and Article 35 letter k. Law Number 27 of 2007 concerning the Management of Coastal Zones and Small Islands.
2. The Supreme Court needs to add legal considerations made by Judge of the State Administrative High Court from sociological and futuristic aspects as follows:
  - a. The area of Bangka Island is  $\pm 3.3 \text{ Km}^2$  (3,319 hectares), therefore it is classified as a small island, so that the regulation of the Bangka Island area is subject to Law Number 27 of 2007 concerning the Management of Coastal Zones and Small Islands (UUPWP3K).
  - b. Because the area of Bangka Island is qualified as a small island (Article 1 point 3 Law Number 27 of 2007), the issuance of a State Administration Decree on the Object of the Dispute must consider all aspects as determined for zoning planning for coastal areas and small islands as stipulated in Article 9 Law No. 27/2007, which must pay attention to aspects of suitability, harmony and balance with the carrying capacity of the ecosystem, utilization and protection functions, space and time dimensions, technological and socio-cultural dimensions, as well as defense and security functions.
  - c. The Decree of the State Administration of the Object of the Dispute in which it determines that the exploration mining authority is expanded to 2000 hectares. Mathematically, with an area of Bangka Island which is only 3,319 hectares, then the remaining area of the island which is not for mining is only 1,319 hectares.

<sup>111</sup> Asian Development Bank, *Asian Judges Symposium on Environmental Decision Making, the Rule of Law, and Environmental Justice: The Proceedings of the Symposium* (2011) 12 <<http://site.ebrary.com/id/10905524>> ('Asian Judges Symposium on Environmental Decision Making, the Rule of Law, and Environmental Justice').

<sup>112</sup> Takdir Rahmadi, 'Institutionalizing Green Judges and Green Rules of Procedure: Indonesian Efforts' (2010) <<https://www.ajne.org/sites/default/files/event/2052/session-materials/takdir-rahmadi-institutionalizing-green-judges-and-green-rules-of-procedure-indonesian-effort.pdf>>.

<sup>113</sup> Asian Development Bank (n 114) 68.

<sup>114</sup> *Sersia Balaati, et al Vs Minahasa Utara Regent* [2013] The Supreme Court of the Republic of Indonesia 291 K/TUN/2013.

<sup>115</sup> *Ibid* 58–59.

- d. The minimum remaining land on the island that is not for mining will result in a decrease in the quality of the ecosystem and the carrying capacity of the environment on the island.
- e. Mining activities are closely related to the environment; therefore, they must also pay attention to and consider the preservation of environmental functions on the island and ensure the utilization of natural resources and the environment by the present generation (Defendant and Defendant II Intervention) without sacrificing the interests or needs of future generations on natural resources and the environment (intergenerational equity).
- f. Although the mining activities have not been implemented, and there has been no in-depth study of the possibility of a serious threat to environmental damage from the iron ore mining activities, precautionary principles must be taken to prevent environmental damage.
- g. This is in accordance with the principles of environmental protection and management as stipulated in Article 2 letters b, c and f of Law Number 32 of 2009 concerning Environmental Protection and Management.

The considerations of the Supreme Court decision, if examined closely, are divided into two important legal issues, namely 1. Regarding the State Administrative Decree of the object of dispute, and 2. Regarding the integration of the principles of sustainable development.

1. Regarding the State Administrative Decree of the object of dispute.

The Mining Business Permit Holder (IUP) for iron or mining exploration granted by the Regent of North Minahasa to PT. X is 2,000 hectares. Substantially, according to Law No. 4 of 2009 on Mineral and Coal Mining, the minimum mining area that can be granted is 5,000 hectares (Article 52 Paragraph 1 of Law No. 4 of 2009). Provision regarding the minimum limit of mining area as stipulated in Law No. 4 of 2009 indicates that the granting of a Mining Business Permit Area cannot be less than that stipulated in this Law. The minimum requirement is imperative and cannot be deviated by giving less than what has been determined. Bangka Island is a small island in the category of only + 3.3 Km<sup>2</sup> (3,319 Hectares). This means that the area of the island of Bangka is less than the area of a small island as stipulated in Article 1 number 3 of Law Number 27 of 2007 concerning the Management of Coastal Zones and Small Islands which determines that Small Island is an island with an area smaller or equal to 2,000 Km<sup>2</sup> (two thousand square kilometers) along with the unity of the ecosystem.

With the facts about the area of the island of Bangka, The Supreme Court argued that the regulations for the management of the island of Bangka should also be subject to Law Number 27 of 2007 and therefore must also pay attention to the prohibition provision as referred to Article 35 letter k of Law Number 27 of 2007. Article 35 Letter k of Law Number 27 of 2007 stipulates that in the utilization of coastal areas and small islands, each Person directly or not directly forbids: execute the mining of mineral at area which is if as technically, ecology, social, and/or culture which shall cause the environment destruction and/or environment pollution and/or damage Its local Society. The utilization of Law Number 27 of 2007 in the consideration of the Supreme Court indicated that the issuance of the Mining Business Permit Holder (IUP) on a mining area of 2,000 hectares by the Regent of North Minahasa to PT. X should also pay attention to other sectoral laws in the environment. Based on these, the Supreme Court argued that the integration of other sectoral environmental laws should be taken into consideration when the government issues IUP or other permits. From the side of the General Principles of Good Government (AAUPB), the local government is less careful in considering relevant facts in its consideration.

2. Regarding the integration of the principles of sustainable development.

The Mining Business Permit Holder (IUP) for iron or mining exploration granted by the Regent of North Minahasa to PT. X is 2,000 hectares. Mathematically, with an area of Bangka Island which is only 3,319 hectares, then the remaining area of the island which is not for mining is only 1,319 hectares. The Supreme Court shall provide considerations by mathematically comparing the remaining physical area of Bangka Island land (which is not for a mining area), will result in a

decrease in the quality of the ecosystem and the carrying capacity of the environment on the island. The decline in the quality of the ecosystem and environmental resources on the island due to mining activities will result in insecure use of natural resources by future generations on the island. The opinion of the Supreme Court has clearly put forward the theory of intergenerational justice which determines that all generations have the same place in relation to the natural environment. There is no reason to prioritize / prioritize the present generation over future generations in taking advantage of this earth.

The theory of intergenerational justice which has become the principle content in Article 2 Letter c of Law No. 32 of 2009 concerning Environmental Protection and Management has apparently been integrated by the Supreme Court as its consideration, and thus, although the Supreme Court did not specify the reasons for the Law No. 32 of 2009 being used as a basis for rejecting the petition for cassation from the Regent of North Minahasa and Defendant II Intervention, however indirectly the Supreme Court states that the existence of Law No. 32 of 2009 is an umbrella for all other sectoral laws in the environmental sector, therefore all permits related to the environment that exist in other sectoral laws in the environmental sector must comply and pay attention to the principles contained in Law No. 32 of 2009. The consideration of the Supreme Court also implies that the earth with all its sources of wealth is not only an opportunity to invest but as a belief given to us by our ancestors to be enjoyed and to give to our descendants for their benefit. In its consideration, the Supreme Court has also put forward the principle of precautionary which has become the content of the principle in Article 2 letter f of the Law No. 32 of 2009, namely the principle of prudence. The opinion of the Supreme Court regarding the principle of precautionary principle is "Even though the mining activity has not been implemented, and there has been no in-depth study of the possibility of a serious threat to environmental damage due to the iron ore mining activity, it must be taken. precautionary principle to prevent environmental damage." The precautionary principle which was originally contained in Principle 15 in the 1992 Rio Declaration states: "... Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation". The principle of precautionary requires that if there is a threat of serious or irreversible damage, scientific uncertainty should not be used as an excuse to delay taking effective measures to prevent environmental damage. The use of the precautionary principle by the Supreme Court as a basis for its consideration is based on the fact that with an area of Bangka Island which is only about 3.3 Km<sup>2</sup> (3,319 Hectares) compared to the mining business permit area of 2,000 hectares granted by the Regent of North Minahasa to PT. X, then the remaining land area of the island is only 1,319 hectares. By referring to this fact, it is better to take effective measures to prevent environmental damage even though there has been no in-depth study of the possibility of a serious threat to environmental damage due to the mining of iron. The considerations of the Supreme Court which also prioritize the principle of prudence as referred to in Article 2 letter f of Law No. 32 of 2009, have also shown that Law No. 32 of 2009 must be integrated in any decision making related to mining permit issuance activities and therefore, IUP issuance must pay attention to the principles of principles of environmental management and protection as stipulated in the Law No. 32 of 2009.

### **The Supreme Court Decision on Cassation Case No. 651 K/PDT/2015**

The implementation of the polluter-pays principle can be seen in the decision of the Supreme Court in Cassation Case No. 651 K/PDT/2015 which is described by the Supreme Court as landmark decision.<sup>116</sup> On 27 November 2012, Kallista Alam Ltd. was sued by the Indonesian Ministry of

<sup>116</sup> the Supreme Court of the Republic of Indonesia, 'Landmark Decisions', *Directory of Decisions of the Supreme Court of the Republic of Indonesia* of [https://putusan3.mahkamahagung.go.id/search.html?q=polluter%20pay%20principle&jenis\\_doc=&cat=&jd=&tp=2&court=&t\\_put=&t\\_reg=&t\\_upl=&t\\_pr=&t\\_pilihan=1](https://putusan3.mahkamahagung.go.id/search.html?q=polluter%20pay%20principle&jenis_doc=&cat=&jd=&tp=2&court=&t_put=&t_reg=&t_upl=&t_pr=&t_pilihan=1); *PT Kallista Alam vs Menteri Negara Lingkungan Hidup Republik Indonesia* [2015] the Supreme Court of the Republik of Indonesia Nomor 651 K/Pdt/2015.

Environment for unlawful burning of the Tripa Peat Swamps before the District Court of Meulaboh. Kallista Alam Ltd. was decided guilty in January 2014 of a breach of the law No. 32/2009 by the Meulaboh District Court when Kallista Alam Ltd. used fire for clearing forest. Furthermore, the court ordered it to pay Rp114.3 billion (about \$8.6 million) to compensate the government, Rp251.7 billion (about \$18.9 million) to fully restore the affected forests to their original condition, and an additional fine of Rp5 million (about \$376) for each day that the company failed to pay on time. In addition, the court confiscated 57 square kilometers of Kallista Alam's concession land in Tripa. Furthermore, the Meulaboh District Court ordered Kallista Alam Ltd. to provide compensation to the state for Rp11,3 billion (approximated \$8,6 million) and to provide complete restoration of original condition for the forests affected by Rp251,7 billion (approximated \$18.9 million). The High Court denied Kallista Alam's appeal on 15 August 2014. In this case, the Supreme Court have agreed with the decisions of the Meulaboh District Court<sup>117</sup> and the Banda Aceh High Court.<sup>118</sup>

The amount of compensation for the government is calculated by the Regulation of the State Minister of Environment of the Republic of Indonesia No. 13 of 2011 concerning Compensation for Damages Due to Pollution and / or Environmental Damage and expert from Plaintiff (the State Minister of Environment), with the details:<sup>119</sup>

1. Ecological loss consists of water storage (IDR 65.000.000.000,00); water management (IDR 30.000.000,00), erosion control (IDR 1.225.000.000,00); Soil formers (IDR 50.000.000,00); nutrient recycler (IDR 4.610.000.000,00); waste decomposers (IDR 435.000.000,00); biodiversity loss (IDR 2.700.000.000,00); genetic resources loss (IDR 410.000.000,00); carbon release (IDR 1.215.000.000,00); carbon reduction (IDR 425.250.000,00). The total cost that must be spent in the context of restoring ecological damage by considering the above 10 parameters is IDR 76.100.250.000,00.
2. Economical loss consists of: loss of service life due to burning activities (IDR 45.843.802.800,00).

Meanwhile, land restoration costs consist of: the cost of purchasing compost (IDR 200.000.000.000,00); compost transportation costs (IDR 40.000.000.000,00); compost spread costs (IDR 2.000.000.000,00); recovery costs to activate lost ecological functions (IDR 9.765.250.000). The total costs incurred to restore the land is IDR 251.765.250.000,00. In addition, the Supreme Court gave consideration in this case which stated the environment and natural resources contained in it as the creation of God Almighty have a very complex ecological function that has many benefits for humans and not all of these benefits are known to humans.<sup>120</sup> The cassation decision No. 651 K/PDT/2015 also rejected the objection of Kallista Alam Ltd. regarding the cause and effect between the activities of Kallista Alam Ltd. and the environmental losses that arise as well as the objection of Kallista Alam Ltd. regarding the matter of environmental compensation that must be borne by Kallista Alam Ltd. The rejection is based on precautionary principle, environmental equity, bio diversity, and polluter pays principle which is stipulated on Article 2 Law No. 32/2009.<sup>121</sup>

<sup>117</sup> *PT Kallista Alam vs Menteri Negara Lingkungan Hidup Republik Indonesia* [2015] the Meulaboh District Court 12/PDT.G/2012/PN.MBO.

<sup>118</sup> *PT Kallista Alam vs Menteri Negara Lingkungan Hidup Republik Indonesia* [2014] the Banda Aceh High Court Nomor 50/PDT/2014/PT.BNA.

<sup>119</sup> *PT. Kallista Alam vs State Minister of Environment* (n 118) 200.

<sup>120</sup> *PT. Kallista Alam vs State Mnister of Environment* (n 117) 72.

<sup>121</sup> *Ibid* 73.



## The Adjustment of the Supreme Court of the Republic of Indonesia with the Green Justice Framework

Most environmental decision-making (including adjudication) is equally a matter of balancing such values and interests<sup>122</sup> - freedom to use property, a safe environment, human rights economic and social development,<sup>123</sup> etc. For achieving the balance, the Supreme Court of Indonesia has made efforts to adopt green justice frameworks by promoting greening judges and rules of procedure.

### Green Judges

In some countries, judicial institutions have responded innovatively to environmental challenges. The judicial models as a response to these challenges included specialized environmental courts, formal and informal chambers or panels of judges allocated environmental cases within a regular (non-specialized) court (green chambers), and selected judge or judges on a general court handled environmental cases (green judges).<sup>124</sup> The legal system of Indonesia has chosen not to create specialized environmental courts or green chambers, but the Supreme Court of Indonesia starts with environmental training and certification for selected judges. In 2011, the Supreme Court of the Republic of Indonesia issued Decree No. 134/KMA/SK/IX/2011 concerning Environmental Judge Certification.<sup>125</sup> This decree stipulates “environmental cases must be tried by a certified environmental judge and have been appointed by the Chief Justice of the Supreme Court”.<sup>126</sup> The judges who have environmental judge certification can handle environmental cases include:

1. Administrative court: violation of administrative regulations in the field of environmental protection and management, including but not limited to regulations in the fields of forestry, plantation, mining, coastal and marine, spatial planning, water resources, energy, industry, and / or natural resource conservation;
2. General court: violation of civil and criminal provisions in the field of environmental protection and management, including but not limited to regulations in the fields of forestry, plantation, mining, coastal and marine, spatial planning, water resources, energy, industry, and / or natural resource conservation.

Based on this decree, the aim environmental judge certification is to improve the effectiveness of handling environmental cases in court as part of efforts to protect the environment and fulfill a sense of justice.<sup>127</sup> Judges who have environmental judge certification are expected to create a pro-environment decision. An example of an environmental case tried by environmental certified judges was case between Kallista Alam Ltd. Vs the Indonesian Ministry of Environment,<sup>128</sup> which decision was determined as a landmark decision by the Supreme Court. By 2020, approximately 1,000 Indonesian judges have environmental judge certification<sup>129</sup> which not every court has environmental certified judges. The

<sup>122</sup> Todd S Aagaard, ‘Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy’ (2009) 95 *Cornell L. Rev.* 221, 256.

<sup>123</sup> George Pring and Catherine Pring, ‘Specialized Environmental Courts and Tribunals at the Confluence of Human Rights and the Environment’ (2009) 11 *Oregon Review of International Law* 301, 307.

<sup>124</sup> George W Pring and Catherine Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (The Access Initiative, 2009) 21 (‘Greening Justice’).

<sup>125</sup> *Chief Justice Decree No. 134/KMA/SK/IX/2011 Concerning Environmental Judge Certification 2011.*

<sup>126</sup> *Ibid* 2.

<sup>127</sup> *Ibid* 3.

<sup>128</sup> Muhammad Ramli Haba, Ahsan Yunus and M Chaerul Risal, ‘Environmental Law Enforcement through Environmental Judge Certification in Indonesia’ (2020) 7(19) *Journal of Critical Reviews* 874, 875.

<sup>129</sup> Asian Development Bank, *Sixth ASEAN Chief Justices Roundtable on Environment: Forging the Sustainable Future of the ASEAN Region the Proceedings* (Asian Development Bank, 0 ed, January 2018) 18 <<https://www.adb.org/publications/6th-asean-chief-justices-roundtable-environment-proceedings>> (‘Sixth ASEAN Chief Justices Roundtable on Environment’); the Supreme Court of the Republic of Indonesia (n 124); the Supreme Court of the Republic of Indonesia, *Indonesia Supreme Court Annual Report 2017* (2018) <<https://mahkamahagung.go.id/media/7130>>; the Supreme Court of the Republic of Indonesia, *Indonesia*

supreme court issued Decree 36/KMA/SK/III/2015 to solve this problem which states: in the event that there is no certified environmental judge, the chief judge of the court at the first level and at the appellate level at the general court and administrative court has the authority to try environmental cases.<sup>130</sup> Furthermore, the chief judge of court at the first level and the level of appeal at the general court and administrative court can appoint a senior judge to hear environmental cases.<sup>131</sup>

### Green Rules of Procedure

In 2013, the Supreme Court of Indonesia issued Decree No. 36/KMA/SK/XI/2013 concerning the Guidelines for Handling Environmental Cases. In the Decree Introduction, the Supreme Court states: in handling environmental cases, judges are expected to be progressive because environmental cases are complex and scientific evidences are abundant, therefore environmental judges must have the courage to apply environmental protection and management principles (prevention of harm, precautionary principle, polluter pays principle, sustainable development, people's empowerment, principles of recognition of the carrying capacity and sustainability of ecosystems, recognition of the rights of indigenous peoples and local communities, enforceability, intragenerational equity, intergenerational equity, common but differentiated responsibility, equitable utilization of shared resources)<sup>132</sup>, and conduct judicial activism.<sup>133</sup>

This decree stipulates, inter alia:

1. Guidelines for handling environmental civil cases:
  - a. Legal standing includes individual, business entities (legal entities and non-legal entities), and the government's and / or local government's right to claim
  - b. Representative action consists of class action, environmental organization lawsuit, citizen lawsuit, and strategic lawsuit against public participation.
  - c. Mediation in environmental case.
  - d. Evidentiary issues: civil liability (unlawful act, strict liability), evidence (witness statements; expert statements; letters/documents: laboratory analysis results; other evidence: photos and data stored electronically, hotspot maps and their interpretations, e-mails, satellite photos and their interpretations; scientific evidence: laboratory analysis results, calculation of compensation due to pollution and / or damage from experts.
  - e. Calculation of compensation due to pollution and / or environmental damage.
2. Guidelines for handling environmental crime cases:
  - a. Environmental criminal actor: individual dan business entities.
  - b. Types of environmental crime.
  - c. Evidence: witness statement; expert statement; documents (laboratory results, sampling official report, satellite photo interpretation results, official letters or notes, memoranda, meeting minutes or anything related); an indication; statement of the defendant; other evidence.
  - d. Relation between administrative sanctions and criminal sanctions.
  - e. Additional sanctions.
  - f. Investigation authority by environmental civil servant investigators.
3. Guidelines for handling environmental administrative cases:
  - a. Legal standing: Individual or Civil Legal Entity.

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*Supreme Court Annual Report 2018* (2019) <[https://kepaniteraan.mahkamahagung.go.id/images/laporan\\_tahunan/FA%20MA%2020119-%20interactive.pdf](https://kepaniteraan.mahkamahagung.go.id/images/laporan_tahunan/FA%20MA%2020119-%20interactive.pdf)>; the Supreme Court of the Republic of Indonesia, *Indonesia Supreme Court Annual Report 2019* (2020) <[https://kepaniteraan.mahkamahagung.go.id/images/laporan\\_tahunan/LAPTAH%20030220.pdf](https://kepaniteraan.mahkamahagung.go.id/images/laporan_tahunan/LAPTAH%20030220.pdf)>.

<sup>130</sup> Chief Justice Decree No. 36/KMA/SK/III/2015 Concerning Amendments to the Decree of the Chief Justice of the Supreme Court of the Republic of Indonesia Number 134/KMA/SK/X/2011 2015 1 (1).

<sup>131</sup> Ibid 1 (2).

<sup>132</sup> Chief Justice Decree No. 36/KMA/SK/II/2013 on the Guidelines for Handling Environmental Cases 2013 II.

<sup>133</sup> Ibid Introduction.

- b. Environmental disputes: object of dispute; definition of environmental permits and types of business permits; the legal reasons and basis for filing a lawsuit to the state administrative court as well as the basis for examining the state administrative decision of the object of the dispute by the state administrative court (PTUN) judge;
  - c. Evidence.
4. Expert:
- a. The criteria for experts who can be proposed as experts in civil, criminal and state environmental cases are as follows: have a scientific discipline in accordance with the case proven by a diploma, at least a post graduate degree (academic) or get public recognition as an expert; have compiled or made scientific work or relevant research (experts); active in seminars or workshops.
  - b. Appointment of experts by judge: In the event that there is a difference in the expert's statement and the judge is not sure or in the case that the defendant and the plaintiff do not propose an expert, the judge can appoint other experts who are considered neutral or can apply the Precautionary Principles.
  - c. Cost: In the event that the judge appoints another expert, the judge may determine who should bear the expert's fees.

Decree No. 36/KMA/SK/XI/2013 emphasizes on implementation of precautionary principle which states: in the absence of sufficient reason or evidence, it cannot prevent the judge from taking action to prevent environmental damage. In proving environmental cases and the absence of scientific evidence in determining the causal relationship between human activities and environmental impacts, the court must apply the precautionary principle as a constitutional right to a healthy ecology. For example, the judge ordered the defendant to take environmental protection measures in the main decision of a case, even though it required a higher cost than the initial plan of activity. Furthermore, the standards for implementing the precautionary principle are: threats to humans or health; utilization of natural resources that does not consider the preservation of environmental functions for future generations; or carry out activities without considering (prejudice) the environmental rights of those who receive the impact. This decree also describes implementation of scientific evidence. If there are two different expert statements, the judge can: select the information based on the judge's conviction by providing the reasons for the choice of information on evidence presented by expert testimony; or present other experts with fees based on the agreement of the parties; apply the precautionary principle.

### ***Conclusion and Suggestion***

Based on landmark decision: Cassation Case No. 291/K/TUN/2013 and No. 651 K/PDT/2015, the Supreme Court of the Republic of Indonesia has adopted the green justice framework. The Supreme Court of the Republic of Indonesia through these decisions has considered ecological justice and environmental justice. Ecological justice has been considered by the Supreme Court by applying the polluter pay principle and the precautionary principle to the cassation decision. Meanwhile, the Supreme Court has also considered environmental justice by taking side with the environment to save the quality of human life. Furthermore, for realizing green justice, the Supreme Court has made efforts by greening judges and rules of procedure. However, the insufficient number of environmentally certified judges has caused the Supreme Court's efforts to adopt green justice to be not optimal. This problem can be resolved by the Supreme Court by accelerating the environmental judge certification program so that each court has at least one panel of judges who can hear environmental cases.

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