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Environmental Litigation in Indonesia

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Abstract

This article examines environmental litigation and law enforcement through the judicial system in Indonesia in the respective contexts of civil, administrative and criminal law. Standing, class actions, compensation and restoration of environmental damage are considered in relation to civil environmental litigation. The relevance of the Administrative Judicature Act to environmental public interest suits is considered in relation to administrative environmental litigation. In relation to criminal environmental litigation, an overview of criminal sanctions for environmental offences is given and potential obstacles to successful prosecution considered. Finally, some of the broader institutional and political obstacles to effective enforcement of environmental laws through the judicature are discussed, including independence and impartiality within judicial institutions.

Key Words

Indonesia, Environmental Litigation, Judiciary, Public Interest, Class Actions, Standing.

This article reflects the law up until July 2000.

Introduction

In Indonesia the promulgation of the Environmental Management Act No. 4 of 1982 (EMA 1982) constituted the first legislative enactment of modern principles of environmental management and sustainable development.[1] The Act, more an expression of principled intent than a detailed legislative blueprint, was intended to provide a framework for the consolidation and coordination of past and future legislation relating to environmental management. Past legislation relating to environmental management included several laws enacted by the Dutch colonial government prior to Indonesian independence, such as the Nuisance Ordinance 1926, the Wild Animal Protection Ordinance 1931 and the Nature Protection Ordinance 1941. Whilst such laws continued in force following independence,[2] they were largely unsuited to managing modern problems of environmental pollution.[3] Post-independence legislation relevant to environmental management, and enacted prior to the EMA 1982, included a number of sectoral laws which were aimed more at facilitating exploitation of natural resources rather than environmental protection.[4] In addition to consolidating past legislation, the EMA 1982 also pre-empted a number of more detailed implementing laws and regulations, including a system of environmental impact assessment introduced in 1986 and revised in 1993.[5] In 1997 the EMA 1982 was replaced with a new Environmental Management Act No. 23 of 1997 (EMA 1997) intended to facilitate improved integration of Indonesian environmental law.

Today, nearly two decades after the enactment of the EMA 1982, a substantive and relatively comprehensive body of environmental law exists in Indonesia. Furthermore, government policy in the past two decades has not been solely confined to legislative development. In early 1990, a policy shift was evident in the Environment Ministry, with mounting concern being displayed over the pressing need for enforcement of existing environmental regulations. Statements of the then Environment Minister Emil Salim and even President Soeharto emphasised,

1 The Act was, in part, a reaction to growing international concern over environmental issues as expressed in the 1972 Stockholm Declaration on the Human Environment (1972) 11 ILM 1416 and gave legislative expression to a number of the principles enunciated therein.

2 To the extent they did not conflict with the Indonesian Constitution of 1945 or legislation subsequently enacted: Transitional Provisions, Indonesian Constitution 1945, Art. II (Indonesia).

3 Jean Bush Aden "The Relevance of Environmental Protection in Indonesia" (1975) 4 *Ecology Law Quarterly* 987 at 987.

4 Such laws included basic laws on Agriculture (No. 5 of 1950); Forests (No. 5 of 1967); Mining (No. 11 of 1967) and Water Management (No. 11 of 1967): James Fox *The Legal Framework for Managing the Environment in Indonesia* (unpublished) (1994) (on file) 4.

5 Government Regulation No. 29 of 1986 (Indonesia) and Government Regulation No. 51 of 1993 (Indonesia).

at least in principle, the importance of environmental law enforcement and the implementation of sanctions against those responsible for environmental damage and pollution.[6]

In most jurisdictions, administrative monitoring and sanction generally constitutes the predominant approach to environmental law enforcement. Indonesia has been no exception in this respect, with administrative initiatives such as the *Prokasih* clean rivers program featuring prominently in approaches to environmental law enforcement. Nonetheless, enforcement of environmental laws via the judiciary provides an important adjunct and backstop to administrative sanction. Enforcement of environmental laws through the courts may refer to several legally distinct processes of civil, administrative or criminal litigation. These respective processes are discussed in more detail below.

Firstly, environmental litigation may occur in the civil context and thus be citizen or 'community'-initiated. The frequent failure of the Indonesian state to achieve consistent implementation of environmental legislation through its administrative agencies has prompted such initiatives. Community-initiated litigation, in this respect, may be undertaken in the general public interest of environmental preservation or to obtain recompense where the "private" interests of health, well-being and property are damaged. A common legal obstacle to purely public interest litigation is that of standing, which refers to the right to be heard by a court or tribunal. The issue of standing together with the substantive legal grounds for citizen-initiated environmental litigation and the interpretation of such provisions in a number of recent cases is considered in the second part of this article.

Issues of environmental law enforcement may also be raised in an administrative context, where a decision of the state is made subject to legal challenge. In Indonesia, legal review of state administrative decisions is regulated by the Administrative Judicature Act No. 5 of 1986, which created a system of administrative courts to address such disputes. The third part of this article examines the framework of judicial review established by this Act, and the scope it has provided for environmentally-related litigation.

Enforcement of environmental laws through the courts may also occur through the process of criminal prosecution. Criminal prosecution, or the threat of criminal prosecution, is a most significant deterrent of pollution and transgression of environmental standards.[7] The fourth part of this article begins by examining the

6 "Mendesak, Upaya Mengefektifkan Penerapan UU Tentang Lingkungan" *Kompas* 13 April 1988, quoted in Munadjat Danusaputro *Peranan Pengadilan Dalam Menangkal Pencemaran Lingkungan* (SKREEP and WALHI, Jakarta: 1989) 7. President Soeharto emphasised the need for sanctions to be enforced against polluters in a welcome speech given on World Environment Day 1991; see Mas Achmad Santosa "Penegakan Hukum Lingkungan: Kajian Praktek dan Gagasan Pembaharuan" (1994) 1 *Jurnal Hukum Lingkingan* 60.

7 Santosa, ibid at 63.

range of environmentally-related criminal provisions in pre and post-independence legislation and considering their application in several cases to date. Finally, whilst many issues raised in the course of environmental litigation relate to the immediate legal framework, whether civil, administrative or criminal, a number of overriding contextual factors may also influence the course of environmental litigation and this article discusses some of these contextual issues, including judicial independence and impartiality.

Civil Environmental Litigation

The ability of citizens or civil groups to utilise existing laws and the legal process to prevent, ameliorate and compensate environmentally-related damage has become increasingly relevant over the last several decades in Indonesia, which have been characterised by rapid industrialisation and exploitation of natural resources. This process of civil environmental litigation may generally be divided into two interrelated spheres: private interest and public interest. Private interest cases refer to those disputes where persons adversely affected by environmental damage seek recompense through litigation from the party at fault. Public interest cases refer to those legal actions brought by concerned parties, such as environmental organisations, on behalf of environmental interests. Such actions are increasingly common in Indonesia where environmental organisations in conjunction with legal aid agencies are becoming more experienced in utilising the legal process in defence of environmental interests. In practice, private and public interest are often intertwined, with most cases involving a mix of both.[8] Water and air pollution, the clearfelling of rainforest and other environmentally destructive activities invariably have a human as well as an environmental impact, combining private and public interest in the vast majority of environmental disputes.

This section of the article examines a number of issues relevant to the process of civil environmental litigation. First, the issue of standing is considered, which in the past has presented a procedural obstacle to purely public interest claims. Secondly, a further procedural issue of relevance in the environmental context, that of class or representative actions, where a large number of plaintiffs seek to bring a single claim arising from similar factual and legal circumstances, is also discussed. Thirdly, the legal grounds available for both compensation and restoration of environmentally-related damage will be reviewed.

8 David Robinson "Public Interest Environmental Law – Commentary and Analysis" in David Robinson and John Dunkley (eds) *Public Interest Perspectives in Environmental Law* (Wiley Chancery, London: 1995) 294 at 321.

Standing

Standing or *locus standi*, which refers to a right of audience before a court or tribunal, is a necessary prerequisite to most forms of litigation.[9] The conventional approach to the issue of standing in both civil and common law jurisdictions requires a potential litigant to possess a proprietary interest in the subject matter of the dispute. This principle was confirmed by the Indonesian Supreme Court (*Mahkamah Agung*) in 1971.[10]

In Indonesia, as in other modern jurisdictions, the requirement of standing has been a significant procedural obstacle to the public interest litigant seeking to enforce a public, often non-pecuniary, interest.[11] Consequently, the common interest in environmental sustainability has remained, until recently, unrepresented in judicial fora due to its non-private nature. However, in many modern jurisdictions, courts have taken the lead in revising the traditionally restrictive doctrine of standing.[12] They have done so within a social context of growing environmental concern and within a developing legal context of environmental laws and regulations. As will be described below, Indonesia has proved to be no exception to this global trend.

PT Into Indorayon Utama Case

A more liberalised approach to standing in relation to environmental matters was first adopted by an Indonesian court in the now well-known *PT Into Indorayon Utama* case. In that case the Central Jakarta District Court, in a decision dated 17 July 1989, granted WALHI, an environmental organisation representing local residents in the area of the PT IIU pulp and rayon factory,[13] standing to bring its

9 Diana L. Torrens "Locus Standi For Environmental Associations Under EC Law - Greenpeace" (1999) 8 *Review of European Community and International Environmental Law* 336-346.

10 See the discussion in Mas Achmad Santosa "Standing atau Locus Standi: Persoalan Pokok dalam Gugatan Lingkungan" (1988) 6 *Forum Keadilan* 100.

11 For example the legal action of R.O. Tambunan against P.T. Bentoel advertisement; see Santosa, ibid. Note, however, in the case of persons directly and materially affected by environmentally-damaging activities, the requirement of standing would be fulfilled.

12 In the Netherlands a liberalised approach to standing was judicially adopted in the *Nieuwe Meer* (HR 27 June 1986, NJ 1987, No. 743) and *Kuunders* (HR 18 December 1992, NJ 1993, No. 139) cases. In Australia the traditional doctrine of standing was modified in *Onus* v. *Alcoa* (1981) 36 ALR (Australian Law Reports) 425 (Australia), and further modified by a range of legislation in the area of the environment, such as the Environmental Planning and Assessment Act 1979 (New South Wales - Australia).

13 The factory is located on the Asahan river near Lake Toba in North Sumatra and started operation within a 150,000 ha concession area at the beginning of 1984. Environmental damage attributed to the factory's operations has included a significant drop in water levels, due to large scale deforestation in watershed areas, and toxic pollution of the Asahan river which local people had previously relied on for their day-to-day living needs: (December 1988) Vol 2 No. 3 *Environesia* 1.

suit against five government agencies as well as the Indorayon Company. The court justified its decision, notwithstanding the lack of a material interest on WALHI's part, on a number of grounds. First, the Court described the environment as "common property" and emphasised the public interest in environmental preservation.[14] Secondly, it emphasised that the environment was a legal subject itself with an intrinsic right to be sustained. The "environmental interest" in question could be legitimately represented by WALHI, a national environmental interest group, in court. Such a representative capacity was legally justified given the right and obligation of every person to participate in environmental management[15] and the specific endorsement given to the participatory function of NGOs by article 19 of the EMA 1982 which recognises self-reliant community institutions as performing "...a supporting role in the management of the living environment."

Legislative Provision for Environmental Standing

The *PT Into Indorayon Utama* case was significant in that it helped surmount the procedural obstacle of environmental standing, thus paving the way for future legal actions protecting "environmental interests". The judicial precedent on this issue furthermore acted as an impetus for subsequent legislative reform through the recently enacted EMA 1997. Article 38(1) of that Act grants environmental organisations the right to bring a legal action "in the interest of preserving environmental functions". This provision thus marks the legislative adoption of the liberalised approach to standing taken by Indonesian courts in the cases discussed in the previous section. The Elucidation confirms that standing according to the stipulated criteria is available in respect of actions in both the general courts and the administrative courts.[16]

Environmental organisations, as defined in article 38(3), must be a legal body or foundation, the articles of association of which clearly state environmental preservation to be one of the founding goals of the organisation. The organisation must also have undertaken activities in pursuit of this aim. The requirements stipulated in article 38(3) fairly closely conform to those criteria enunciated in the *IPTN* (Reafforestation Funds) case, where the Jakarta State Administrative Court granted standing to four of six environmental organisations who challenged

14 The Court justified its view in this respect by reference to the 1973 Broad Outline of the Nation's Direction (GBHN) and statements made to the national parliament (*Dewan Perwakilan Rakyat*) on 23 January 1982 prior to the enactment of the EMA 1982.

15 EMA 1982, Art. 6 (1) (Indonesia).

16 An "Elucidation" in Indonesian law is an explanatory appendix commonly included in Indonesian legislation. Whilst not formally a part of the Law, it is nonetheless a primary reference point for its interpretation.

Presidential Decree No. 42 of 1994, concerning a transfer of funds from a reafforestation fund to *PT Industri Pesawat Terbang Nusantara* (IPTN). The Court justified its decision stating "... the contended decision afflicted the interest that could be induced from the well-defined goals they pursued according to their statutes. Moreover, they had a clear organisational structure, and could prove that they had actively sought to realise their goals."[17] Whilst the requirements stipulated in this decision and in article 38(3) do not appear to be inherently restrictive, their inclusion in the Act has attracted some criticism from the NGO community in Indonesia, on the grounds that it might exclude a number of potential public interest litigants whose articles do not state their founding goal to be the preservation of the environment.

Class Actions

Whilst legal claims of a purely public interest nature have been excluded in the past due to a lack of standing, another procedural obstacle is raised where a number of litigants seek to bring a joint claim grounded in similar legal and factual circumstances. In situations where pollution from a single source can affect hundreds or even thousands of people it is easy to see the necessity of a "class" or representative action to resolve the common issues at hand. However, the incidence of "mass torts" can raise a number of problematic legal issues including the relationship between individual claims, proof of causation in individual instances and the calculation of overall damages.[18]

Whilst these issues were not specifically regulated in EMA 1982, a number of more general principles enunciated within that Act held considerable relevance to the issue of class or representative actions. For instance, article 5(1) confirmed the right of every person to "a good and healthy living environment." The Elucidation defines "person" to mean "an individual person, a group of persons, or a legal body". Thus the Act explicitly recognised the possibility that the right referred to in article 5 be vested in, and hence exercisable by, a group of persons. Similarly, the Act envisaged both an individual and collective vesting of the obligation contained within clause 2 of article 5, which recognises the obligation on every person "... to maintain the living environment and to prevent and abate environmental damage and pollution." The Elucidation to the Act stipulates that this obligation "is not separated from ... [a person's] position as a member of the community, which

17 (5 January 1995) *Forum Keadilan*, quoted in Adrian Bender "From the Old to the New EMA: Integration or Disintegration of the Legal Potential for Enforcement?" paper presented at Seminar of the Indonesian Netherlands Study on Environmental Law (INSELA), Leiden University, Leiden, 20 May 1999.

18 John G. Fleming "Mass Torts" [1988] *Denning Law Journal* 37–50.

reflects the value of man as an individual and as a social being." Thus the EMA 1982, whilst failing to make explicit provision in relation to class actions, did nonetheless provide statutory grounds for at least the consideration of group compensation claims due to pollution or environmental damage.

PT Pupuk Iskandar Muda

The issue was raised for judicial consideration in the *PT Pupuk Iskandar Muda* (PT PIM) case where a "class action" for compensation was advanced within the framework of the EMA 1982. PT PIM owned a factory in Northern Aceh, from which, in 1988 and subsequently on several occasions, poisonous gas leaked out and spread through several villages in the near vicinity. A large number of residents who inhaled the fumes experienced symptoms ranging from unconsciousness to nausea.[19]

In the case that followed the local residents, represented by the Medan Legal Aid Institute, sued PT PIM claiming compensation for damages. The claim for compensation failed, both at the first instance and in a subsequent appeal to the High Court of Aceh. In rejecting the legal suit, both courts stated that the individual claims of respective victims could not be contained in one, single claim. According to the court, no legal connection existed between the respective claims, and as a consequence, each claim should be advanced individually on its own grounds.

Thus the court both at first instance and at the appellate level largely failed to give recognition to the specific subject matter of the application, which clearly brought it within the scope of the EMA 1982. Instead the courts, in denying the claim, chose a traditional, restrictive approach based on principles of civil procedure law more appropriate to the resolution of individual disputes.

Legislative Provision for Class Actions

The absence of provision for representative or class action in the EMA 1982 was one deficiency remedied by the revised EMA 1997. Article 37 of that Act states:

> The community has the right to bring a representative action to court and/or report to legal authorities various environmental problems, which adversely affect the life of the community.

Inclusion of such a provision, which provides a legal basis for the conduct of class actions in environmental disputes, represents a significant improvement on the previous EMA, which did not contain such a clause. More generally, the

19 A. Hutapea (ed) *Beberapa Penanganan Kasus Lingkungan Hidup* (WALHI, Jakarta: 1993) 15.

introduction of the Anglo-American concept of class actions represents a novel development in Indonesian law. Given this is the case, it is unfortunate that article 37 does not spell out in more detail the nature and particularly the procedure according to which a class action may be undertaken. The clarity of the provision is also not enhanced by the inclusion of the entirely distinct right to "report to legal authorities various environmental problems embodied in the same article".

The Elucidation provides at least a basic definition of a "representative action" as "the right of a small group of the community to act in representing a community of a large number which has incurred losses based upon a similarity in problems, legal facts, and demands arising from the environmental pollution and/or damage." Yet what is lacking is a more detailed specification of the procedure pursuant to which such an action may be undertaken. The matter of procedure is separately raised in article 39, which provides:

> The procedure for the submission of a claim in an environmental dispute by a person, community and/or environmental organisation shall refer to existing Civil Procedure Law.

Such a provision is, however, of little assistance in the matter of class actions, which represent an entirely novel development in Indonesian law generally. The deficiency of the Act in this respect may have contributed to an apparent reluctance amongst sections of the Indonesian judiciary to utilise the new procedure. A similar reticence has been evident amongst some environmental public interest litigants as well, who have avoided relying on the new provision where possible, due to the likelihood of an application being defeated on procedural grounds.[20] Despite its flaws, however, the mechanism for representative actions introduced by article 37 has already been utilised, to some extent, in the recent case of *Eksponen 66* v. *APHI*.

Eksponen 66 v. APHI

In this case the Plaintiffs, a group of various community organisations with a self-professed "interest in the state of the environment" sued the Defendants for the damage caused by forest fires and the resultant thick haze which blanketed much of Indonesia in the latter half of 1997. The Plaintiffs, who claimed an amount of Rp2.5 trillion as compensation, brought the representative action on behalf of the people of Northern Sumatra. The amount of compensation claimed was said to be in respect of damage incurred by the "community" of Northern Sumatra to health, economy, society, communications, education and work activities.

20 Personal communication - Nur Amalia (24 November 1999).

For their part, the Defendants argued that the Plaintiffs were not legally entitled to represent the people of Northern Sumatra and did not possess any legal interest which would permit them, according to civil law, to bring the action in question. On this point, however, the District Court of Medan decided on the side of the Plaintiff. The Court recognised the 13 applicants as community organisations who, in accordance with article 37, could legitimately represent the people of Northern Sumatra in defence of their collective right to a "good and healthy environment". The Plaintiffs were successful in their substantive application as well, being awarded damages to the amount of Rp 50 million. The decision at first instance was subsequently appealed, however, and recently the High Court of Northern Sumatra overturned the decision at first instance, thus denying the Plaintiffs' claim for compensation.[21]

The devastating forest fires, which gave rise to the above case, are a dramatic example of the often diffuse and widespread nature of environmental damage. The necessity of a provision facilitating collective actions arising from common circumstances is clear in this and other cases of wide-ranging environmental damage. The decision in *Eksponen 66* v. *APHI* represents the first attempted application of the class action approach in Indonesia. Whilst one can empathise with the result at first instance, from a legal perspective the case demonstrates some of the inherent difficulties associated with transplanting a novel legal procedure into a foreign environment. It is doubtful that the requisite commonality in factual circumstances and legal claims could have been established in this case, in which a diverse range of community organisations purported to represent the people of North Sumatra. The decision in the *Eksponen 66* case also illustrates the considerable confusion existing in the Indonesian judicial and legal community concerning class actions, particularly the procedural steps which may be utilised. Further procedural clarification may, however, be forthcoming from the Supreme Court, which is reportedly considering a Circular Letter on this subject.

Compensation

Overcoming the procedural hurdles discussed, whilst crucial to the success of public interest or representative actions, does not guarantee success in any substantive sense. Whilst environmental litigation may be initiated in pursuit of political objectives, legally speaking the primary objective is to obtain an appropriate remedy for the loss in question. The cause of action and remedy sought in environmental suits may vary from case to case. A typical remedy, especially

21 At the time of writing the reasons for the appellate decision in this case were not available to the author.

where the litigant has suffered direct loss as a result of environmentally damaging activities, is that of compensation. The different statutory grounds for claiming compensation in civil environmental cases and their application in recent cases are considered below.

Article 1365 of the Civil Code

Article 1365 of the Civil Code states that where an action contrary to law (*perbuatan melawan hukum*) causes loss to another person, then the person responsible for that action is obliged to pay compensation to the person sustaining such loss. To establish that an action contrary to law has been committed several elements must be fulfilled:

- The action in question must be contrary to law;
- The person committing the action must be at fault;
- There must be damage or loss;
- There must be a sufficient causal connection between the action and the damage in question.[22]

Establishing the elements of fault and causation are the most significant obstacles to obtaining compensation under article 1365. Fault may constitute deliberate intention or negligence regarding an action or omission contrary to law.[23] Establishing fault may involve an examination of steps taken by the defendant to prevent pollution and a determination as to whether such steps were sufficient to constitute "due care", thus excluding the element of fault.[24]

Proof of a causal connection between the defendant's activities and loss sustained by the Plaintiff is also a frequent source of difficulty in environmental disputes. Incriminating evidence may be withheld or deliberately concealed by polluting companies.[25] Furthermore, proof that it was the defendant's actions in particular that caused pollution may be problematic, especially in situations where the pollution originates from many sources. In the context of environmental disputes, the somewhat heavy burden of proof limits the practical utility of article 1365 of the Civil Code. The difficulties of establishing fault and causation make for long and protracted legal proceedings and ensures that litigation only has a relatively small chance of success.[26] Finally, victims of pollution or environmental

22 A. Nusatara *Sengketa Lingungan dan Masalah Beban Pembuktian* (SKREPP and WALHI, Jakarta: 1989) 57.
23 Ibid.
24 *Zorgvuldigheid* is a Dutch concept meaning "carefulness"; see Siti Sundari Rangkuti "Beberapa Problematika Hukum Lingkungan" (1995) 1 *Jurnal Hukum Lingkungan* 52.
25 WALHI *Gugatan dan Jawaban: Proses Peradilan Masalah-Masalah Lingkungan* (WALHI, Jakarta: 1991) 6.
26 Nusatara, note 22 at 58.

damage, who in the majority of cases originate from the socially and economically weak sectors of society, are seldom in a position to afford the expenses associated with such proceedings.

Article 20 of the EMA 1982

In addition to containing a number of important legislative principles that provided the basis for a judicial reconsideration of standing, the EMA 1982 also explicitly provided for a right of compensation for victims of environmental damage. Article 20(1) of the EMA 1982 read:

> Whosoever damages and/or pollutes the living environment is liable for payment of compensation to victims whose right to a good and healthy living environment has been violated.

The process through which compensation is determined is referred to in article 20 (2) which provides for investigation of complaints and determination of damages by a tripartite team including representatives of the respective parties, government and expert opinion as required. Where conciliation via the tripartite team fails to produce agreement then the matter may be taken to court.[27]

There has been considerable confusion as to whether article 20 required all or only some claims for compensation in respect of environmental damage to be preceded by mediation pursuant to article 20(2). Whilst at least one commentator has argued a claim for compensation without mediation is not precluded by the terms of article 20, judicial consideration of the article has tended to support the view that mediation pursuant to article 20(2) must precede any claim for compensation.[28] Such a view, combined with the absence of implementing legislation referred to in clause 2, has contributed to a definite judicial reluctance to interpret or apply the provision, as was evident in the decision of the Surabaya District Court in the *PT Sarana Surya Sakti* (PT SSS) case. In that case a claim for compensation was made by the residents of Tembok Dukuh village who claimed zinc and chromium waste from the PT SSS factory had resulted in pollution of groundwater and village wells. The claim was rejected by the Surabaya District Court on the grounds that article 20(2) required a claim for compensation to the court to be preceded by mediation via a tripartite team.[29] On factual grounds, the decision of the court in this case seems questionable, as extensive government-facilitated mediation had in fact taken place and the allegations of pollution even

27 Elucidation, Art. 20 (2) (Indonesia).
28 Siti Sundari Rangkuti Tanggunggugat Pencemar dan Beban Pembuktian Dalam Kasus Pencemaran Lingkungan (SKREPP and WALHI, Jakarta: 1989).
29 For discussion of the case see Hutapea, note 19 at 6.

confirmed by the investigation of an official government technical team.[30] The decision of the court, however, gave no consideration to either the mediation or investigation processes undertaken. The court's reluctance to interpret or apply the provision was justified by the presiding judge in a subsequent statement by reference to the absence of implementing regulations in respect of article 20(2).[31] The *Sari Morawa* case is another example of the stubborn reticence of courts to award compensation for loss resulting from environmental damage or pollution. In that case a group of some 260 plaintiffs who resided next to the Belumai River sued PT Sari Morawa, the owner of a pulp and paper mill adjoining the same river upstream from the villages of the Plaintiffs. The villagers alleged that since July 1992 the Belumai River had been severely polluted as a result of untreated waste discharged from the PT Sari Morawa factory into the river. Convincing evidence of the pollution was presented by the Plaintiffs to the Lubuk Pakam District Court, including research carried out in 1994 by PT Sucofindo, which indicated that hazardous waste was being discharged from the factory greatly in excess of stipulated limits. Further data compiled by the Environmental Management Enforcement Agency, Bapedal, confirmed that waste discharged from the Sari Morawa factory failed to comply with applicable regulations. The continuing discharge of untreated waste from the factory, and the company's failure to install appropriate waste management facilities, prompted Bapedal to give the factory a "black" rating; the worst pollution rating available.

The District Court of Lubuk Pakam consented to hear the Plaintiffs' claim based on article 20 (1) EMA 1982 and article 1365 of the Civil Code, notwithstanding the lack of regulations governing procedure in respect of the former provision. Yet in a surprising decision on the substantive issue of compensation, the Court rejected the Plaintiffs' claim for compensation. In its decision, the Court concluded that the evidence presented to it did not establish that the action of the Defendant in discharging waste into the River Belumai had resulted in pollution and thus caused the Plaintiffs' loss.[32] Such proof, the presiding judges stated, would require samples to be taken from the river and examined in laboratories especially designed for testing environmental pollution. Strangely, in coming to this conclusion the Court did not discuss the main evidence upon which the Plaintiffs' case was based; laboratory research carried out by PT Sucofindo demonstrating that waste discharged from the Sari Morawa factory was greatly in excess of regulatory

30 Letter from Walikotamadya Kepala Daerah Tingkat II to Director PT SSS (25 October 1990).

31 "Sulitnya Menjerat Sang Pencemar" (2 September 1993) No. 10 Tahun II *Forum Keadilan* 83. Whether this was actually the reason for the court's decision in this case is difficult to say. In any case, the absence of implementing regulations certainly provided a reason for the court to avoid applying the provision.

32 As discussed above, Civil Code, Art. 1365 (Indonesia) requires proof of causation, that is that the Defendant's action caused the loss of the Plaintiff.

standards, and in fact constituted hazardous waste.[33] According to the Plaintiffs, PT Sucofindo was also authorised to carry out and publish laboratory examinations in relation to pollution,[34] a fact not commented upon by the Court. The position taken by the Court may perhaps be partly explained by the fact that the samples analysed by PT Sufocindo were seemingly taken only from the waste discharge itself, not the Belumai River.[35] Whilst not clearly spelt out in the decision itself, the Court's position seems to have been that the fact the factory's waste exceeded stipulated levels did not constitute proof in itself that the Belumai River (into which the waste was discharged) was polluted as a result. Interestingly, the Court's reasoning in this respect ran counter to testimony by an expert witness called by the Plaintiffs, who confirmed that waste of a nature such as that discharged from PT Sari Morawa, would most definitely cause pollution in the water into which it was discharged.[36] In addition, the Court discounted witness evidence from a member of the Pollution Control section of Bapedal in Jakarta, which corroborated the polluting nature of the waste discharge from PT Sari Morawa. Witness testimony as to the strange colour, smell and quality of the river water (observations consistent with pollution), were also considered insufficient proof by the Court.

The Court's line of reasoning also contradicts the position taken by the Indonesian Supreme Court in the 1989 criminal case of *Sidarjo*.[37] In that case the Court considered that the excessive BOD and COD levels of the factory's effluent to be a sufficient indicator of environmental impact in themselves. Rather than requiring proof of a further causal connection between the discharged effluent and pollution of the Surabaya River, the court instead proceeded on the assumption that effluent exceeding the legal standard could be presumed to have an important impact causing a decline in environmental quality.

One of the few cases in which compensation for environmental damage has been awarded on the basis of article 20 is the *Muara* case. In that case the installation of an oil pipe in West Kalimantan by PT Santan Mas DRC caused

33 The PT Sufocindo data presented a laboratory analysis of waste discharged from the PT Sari Morawa factory. The data was as follows (regulatory limits are in parantheses for comparison): pH 10.77 (6–9); BOD 1,045.46mg/L (150mg/L); COD 1,712.18mg/L (350mg/L); suspended matter 1,568ppm (200ppm).

34 In accordance with Governor's Decision No. 660.3/1776/K/1993 (Indonesia).

35 The Plaintiffs' submission as recorded in the Court decision actually states that "research carried out by PT Sucofindo in July 1994 *proves that the water of the Belumai River was polluted and damaged as a result of the waste discharged by the First Defendant* into the river without treatment and whilst exceeding regulated levels of pollutants" (emphasis added). However, it is not clear from the decision itself whether this conclusion (that the waste resulted in pollution of the Belumai River) was contained in the research itself or was simply alleged by the Plaintiffs. In any case the data presented from the research question seems to relate only to samples taken from the waste discharge, as distinct from the water of the Belumai River into which the waste was discharged.

36 Decision No. 24/PDT/G/1996/PN-LP, p.62 (Indonesia).

37 Decision of the Supreme Court RI No. 1479/K/PID/1989 (Indonesia); see discussion below.

significant damage to the environment of local inhabitants. A claim advanced by the affected community to the Balikpapan District Court was refused but subsequently allowed on appeal to the High Court of Samarinda, with compensation of Rp977,433,500 being awarded. A final appeal by PT Santan Mas DRC to the Supreme Court failed. In its decision dated 17 March 1993, the Supreme Court stated that nothing in the High Court's decision conflicted with existing law, and that as a result the decision was valid.[38]

Article 34 of the EMA 1997

The right of compensation in relation to environmentally damaging activities has been preserved in the EMA 1997 by article 34, which reads:

> Each action contrary to law in the form of pollution and/or environmental damage causing loss to another person or the environment, obligates the party responsible for the enterprise and/or activity to pay compensation and/or carry out certain actions.

Unlike the situation under the EMA 1982 discussed above, a claim pursuant to article 34 need not be preceded by any process of mediation. The drafters of the new law made a clear distinction between resolution of environmental disputes within and outside of courts, in order to avoid the confusion that had arisen in relation to article 20 EMA 1982.[39] Whilst parties may choose to opt for mediation in environmental disputes, the choice is voluntary and if declared to have failed by one or both parties, then the matter may proceed to court. Note also the wider scope of application of article 34 when read in conjunction with article 37, which enables a community to bring a representative action in respect of environmentally-related damage, as discussed above.

Strict Liability

In certain cases of environmental damage the principle of strict liability may apply, with the result that it will not be necessary for the claimant to establish fault, as would otherwise be the case. The first EMA 1982 introduced the principle of strict liability in the environmental sphere, yet its application required the enactment of further implementing regulations which never occurred. Article 35 of the new EMA 1997 makes more specific provision in this respect, stating:

> The party responsible for a business and/or activity which gives rise to a large impact on the environment, which uses hazardous and toxic materials, and/or produces hazardous and toxic

38 *Buletin Informasi Hukum dan Advokasi Kingkungan* (1993) 2 at 2.
39 Personal communication, Mas Achmad Santosa (May 1999).

waste, is strictly liable for any resulting losses, with the obligation to pay compensation directly and immediately upon occurrence of environmental pollution and/or damage.[40]

From the somewhat ambiguous language of the article, it is not clear whether a "large impact on the environment" is sufficient in itself to give rise to strict liability, or whether such an impact will only incur strict liability where it results from the use of hazardous or toxic materials or the production of hazardous or toxic waste. This issue was raised in the *Laguna Mandiri* case, which arose out of the devastating fires that swept much of the Indonesian archipelago in 1997. In this particular case a number of members of the Dayak Samihim community in the regency of Kotabaru, Kalimantan, brought a legal action for compensation against several companies including PT Laguna Mandiri, which owned coconut plantation estates adjoining the Plaintiffs' villages. The Plaintiffs claimed that fires intentionally lit by the Defendants for the purpose of land-clearing between July and November 1997 had spread out of control, destroying large areas of the Plaintiff community's crops and housing. The Plaintiffs argued, *inter alia*, that the burning off carried out by the Defendants had resulted in a large and significant impact on the environment, including the loss of crops that represented the livelihood of the Plaintiffs and, moreover, and far-reaching ecological damage. Accordingly, and on the basis of article 35(1) EMA 1997, it was argued that the Defendants were strictly liable for loss caused by their actions and obliged to pay compensation.

The claim for compensation was accepted, in part, by the District Court of Kotabaru on separate grounds, without reference to the issue of strict liability. However, on appeal the Plaintiffs' claim was rejected by the High Court of Banjarmasin, which did consider the issue of strict liability. The court adopted a more restrictive interpretation of article 35, stating that it applied only to industries, producing a large and significant impact on the environment, which used hazardous and toxic materials. As the Defendants in the *Laguna Mandiri* case did not use such materials in the course of their activities, given that they were a plantation company rather than an industrial company, strict liability could not apply.

It is likely that the High Court's decision on the issue of strict liability in this case accords with the drafter's intention.[41] It seems unlikely that strict liability would

40 EMA 1997, Art. 35(2) (Indonesia) also stipulates several exceptions to the application of strict liability. Strict liability will not apply where it can be proved that the pollution or environmental damage resulted from a natural disaster, war, an extraordinary situation beyond human control or the actions of a third party. In the latter case strict liability will apply to the third party responsible for the environmental damage.

41 This interpretation is also favoured by Professor Koesnadi Hardjasoemantri; see Koesnadi Hardjasoemantri "The Development of Environmental Policies and Laws in Indonesia" in Koesnadi Hardjasoemantri and Naoyuki Sakumoto (eds) *Current Development of Laws in Indonesia* (Institute of Developing Economics, Japan External Trade Organisation, Tokyo: 1999) 203.

have been intended to apply to a category as broad as any "business and/or activity which gives rise to a large impact on the environment." Yet for the sake of clarity the article should be re-worded in order to more explicitly demarcate its application to cases where the use of hazardous materials or production of hazardous waste results in a large impact on the environment.[42]

Restoration Costs

In the previous section the grounds upon which persons directly affected by environmental damage might claim compensation were discussed. A related issue is the legal grounds upon which a polluting party may be obliged to pay the costs of restoring damage to the environment. An obligation to pay environmental restoration costs was first introduced by the EMA 1982, article 20(3) of which provided that: "Whosoever damages and/or pollutes the living environment is liable for payment to the State of the restoration costs of the living environment." According to the Elucidation to the EMA 1982, evaluation of environmental restoration costs were to be undertaken by the same government investigation team established under article 20(2) for the determination of compensation levels. From the article itself it was unclear whether environmental organisations could themselves bring an action to compel payment of restoration costs to the State.

The situation in this respect has been clarified by the more specific provision made in article 38(2) in the subsequent EMA 1997. Article 38(2) restricts the right of an environmental organisation to bring a legal action to "a claim for the right to carry out certain measures, excluding any claim for compensation, with the exception of expenses or real outlays." The Elucidation to the EMA 1997 describes three sub-categories of "certain measures" which may be legitimately claimed by an environmental organisation pursuant to article 38:

(i) application to the court for an order that a person undertake certain legal actions connected with the preservation of environmental functions;
(ii) a declaration that a person has carried out an action contrary to law due to pollution or damage to the environment;
(iii) an order that a person carrying out a business and/or activity install or repair a waste treatment unit.

The Elucidation further states that "expenses or real outlays" are "expenses which can in fact be proven to have been outlaid by an environmental organisation."

42 For example, the revised article might read, in part: "The party responsible for a business or activity which uses hazardous or toxic materials and/or produces hazardous or toxic waste, and which gives rise to a large impact on the environment, is strictly liable for any resulting losses...".

Whilst the Elucidation does not explicitly present the list of remedies as exhaustive, the language used suggests that this is indeed the case.

Notably absent from the list of potential remedies provided in the Elucidation is an order of an injunctive nature, that a person refrain from carrying out actions which cause pollution to or damage of the environment. This could, however, conceivably be included within the scope of the first paragraph of the Elucidation if "an order that a person undertake certain legal actions" is interpreted to include, cessation of an ongoing activity, which might be the case if compliance with a regulatory standard were required and a legal consequence thus intended. The absence of an expedited procedure to cease polluting activities is a further deficiency of the remedies presented above. A possible alternative in this respect would be a tort action encompassing a provisional claim for the cessation of unlawful polluting activities, brought on the basis of custom based on the *Wetboek van Burgerlijke Rechtsvordering*,[43] a Dutch law which remains in force in Indonesia.

The exclusion of any potential claim for compensation by environmental organisations on behalf of environmental interests significantly diminishes the potential deterrent effect of public interest suits towards potential polluters. Such exclusion also seems somewhat inconsistent with the right of compensation created by article 34(1). That article states:

> Every illegal action of pollution and/or damage to the environment, which has an adverse impact on other people, *or the environment*, obliges the party responsible for the business and/or activity to pay compensation and/or to carry out certain actions. [emphasis added]

This article thus explicitly creates an obligation on the part of a polluting party to pay compensation, *inter alia*, where the environment is damaged or polluted as a result of their activities. From a practical perspective it is difficult to see how such an obligation is to be enforced if environmental organisations are prevented from claiming such compensation through legal action on behalf of environmental interests. On logical grounds the exclusion of compensation as a remedy available to environmental organisations thus seems inconsistent with both the legal obligation in article 34 and the recognition of environmental organisations as representatives of environmental interests in article 38(1). It is notable that compensation is also excluded as a potential remedy in articles 3:305a and 3:305b of the Dutch Civil Code, which possibly provided a model in the drafting of the above provision.[44]

43 Civil Law Statute Book: personal communication - Adriaan Bedner (7 December 1999).

44 Mas Achmad Santosa and Sulaiman N. Sembring *Hak Gugat Organisasi Lingkungan* (ICEL, Jakarta: 1997) 36.

Whilst article 38(2) does allow an environmental organisation to claim restitution of expenses outlaid in cleaning up the environment, obviously this will only occur where such an organisation has the required funds in the first place. Clearly, this will not always be the case. As argued above, one possible solution would be allowing claims of compensation to be brought by environmental organisations on behalf of environmental interests. However, such a solution might be criticised as a deterrent to economic growth, as it would expose firms to an indeterminate liability. A possible compromise in this respect might be a remedy of a restorative rather than a compensatory nature, requiring a firm to take action to rectify any harm caused to the environment itself – a course of action already contemplated under article 36(1).

WALHI v. Pt Pakerin and Others

The issue of what "measures" an environmental organisation might apply for pursuant to article 38(2) was raised in the recent case of *WALHI* v. *Pt Pakerin*.[45] In that case WALHI claimed an amount of some Rp2 trillion from the Defendants whom they alleged were responsible for the catastrophic environmental damage caused by the 1997 forest fires. WALHI described the amount claimed as costs of environmental restoration (*pemulihan*) rather than compensation. The Palembang State Court, however, in its decision of 17 October 1998, ruled that the amount claimed by WALHI, whilst described as restoration costs, in fact constituted compensation (*penggantian rugi*) and was thus disallowed by the terms of article 38(1).[46] So whilst the procedural obstacles to environmental public interest suits are to a large extent overcome by the recognition of standing in article 38(1), much of the potential "sting" of such suits is removed by the exclusion of compensation as a possible remedy.

Administrative Environmental Litigation

Community-initiated enforcement of environmental laws via the courts in Indonesia may also occur in the context of public administrative law, where the subject of litigation is typically a decision or action of the state which permits or condones environmentally damaging activities. Decisions of the state in the environmental context usually take the form of state-issued licences, a number of

45 Decision No. 8/Pdt.G/1998/PN.Plg (Indonesia).

46 Nonetheless, two of the Defendants were found to have committed actions contrary to law in polluting and damaging the environment, and were accordingly ordered to establish a forest fire management system in each of their industries: ibid.

which are required for almost all forms of development in Indonesia.[47] Where it is believed that an administrative decision to grant or withhold an operating licence is erroneous, that decision may be challenged in the State Administrative Court (*Pengadilan Tata Usaha Negara*).[48] The process of challenging State administrative decisions is governed by the Administrative Judicature Act No. 5 of 1986 which stipulates a number of conditions for contesting a State decision.

Standing

First, the applicant must have suffered a loss as a result of the contested decision.[49] Material damage to a person or property caused by polluting activities would certainly constitute a "loss" under article 53(1), justifying a challenge to the operating licences facilitating such activities. Moreover, recent precedent indicates that a material loss may not be necessary where an organisation is representing environmental interests affected by an administrative decision. This "liberalised" approach to standing was applied in relation to the Administrative Judicature Act by the Jakarta State Administrative Court in the widely publicised Reafforestation Fund Case. In that case a group of environmental NGOs lodged a legal suit with the State Administrative Court in Jakarta requesting that Presidential Decree No. 42 of 1994, concerning a transfer of funds from a reafforestation fund to PT Industri Pesawat Terbang Nusantara (IPTN), be declared invalid. In its decision the Court recognised the phenomena of "environmental standing", whereby an environmental organisation may bring a legal action in defence of the public interest of environmental preservation. The Court emphasised, however, that only environmental organisations fulfilling certain criteria would be qualified to bring such an action. The Court set out four such criteria:

1 That the aim of an organisation must be environmental protection or preservation and stipulated as such in its Constitution;
2 That the organisation must be a Legal Body or Foundation;
3 That the organisation must demonstrate a concern for the environment in its actual activities;
4 That the organisation must be sufficiently representative.

47 Typical licences include the Industry Enterprise Permit (*Izin Usaha Industri*), the Location Permit (*Izin Lokasi*), the Building Permit (*Izin Mendirikan Bargeman*) and the Mining Authority (*Kuala Pertambangan*). The Nuisance Ordinance (*Ordonansi Gangguan*) also requires permits to be obtained for a wide range of development activities, including most forms of industrial development.

48 Pursuant to the Administrative Judicature Act No. 5 of 1986 (Indonesia). A State administrative action, as distinct from a written decision, may not be challenged in the State Administrative Court. In certain circumstances, however, it may be challenged as an "action contrary to law" (*perbuatan melawan hukum*) in the general or civil courts.

49 Administrative Judicature Act 1986, Art. 53(1) (Indonesia).

The Court found that four out of the six plaintiffs fulfilled these criteria and they were thus allowed legal standing. It can be noted that these grounds are reflected in the requirements of article 38(2) of the EMA 1997.

Substantive Grounds

Beyond the procedural requirement of standing, an application contesting an administrative decision must also be made on one or more of three grounds stipulated in article 53(2) of the Administrative Judicature Act. The first ground is inconsistency with regulations or legislation, of either a procedural or substantive nature. A regulatory restriction on the issuance of an operating licence of great environmental significance is the requirement to undertake an environmental impact analysis. Where a business and/or activity may give rise to a large and significant impact on the environment, then the business concerned must prepare an environmental impact analysis as a prerequisite to obtaining the necessary operating licence.[50] Once granted, the operating licence also includes conditions and obligations to carry out environmental control efforts.[51] Thus where an administrative authority grants an operating licence for an activity which may have a significant impact on the environment in the absence of an environmental impact assessment, that decision may be contested as inconsistent with existing legislation.

A second ground which may invalidate a State administrative decision is the use of an administrative decision maker's authority for a purpose other than that authorised by statute. This ground, also termed "abuse of power" (*penyalahgunaan wewenang*), is usually difficult to prove and as a result holds little practical significance in administrative court practice.[52] The third and final ground stipulated in the Administrative Judicature Act is that, on a consideration of interests relevant to the decision, the government agency concerned should not have issued a particular decision or should not have issued a decision at all. This ground further restricts the scope of the administrative discretion by necessitating a consideration of relevant interests in the decision-making process. Relevant interests are usually defined by the immediate legislative framework under which the decision is made. The potential environmental impact of a project may constitute such a "relevant interest", especially where that impact may be of a

50 EMA 1997, Art. 18 (Indonesia); Regulation No. 27 of 1999 regarding Environmental Impact Assessment (Indonesia) now sets out the requirements for environmental impact analysis.

51 EMA 1997, Art. 18(3) (Indonesia).

52 Adrian Bedner *Administrative Courts in Indonesia: A Social-Juridical Study* (PhD Thesis, University of Leiden, The Netherlands: 2000) 96.

significant nature. Finally, a fourth substantive ground, not stipulated in article 53(2) of the Administrative Judicature Act, principles of proper administration, is in practice becoming increasingly accepted in administrative court procedure.

Remedies

Challenges to State administrative decisions are heard by the State Administrative Court, although in certain circumstances disputes must undergo administrative review prior to the process of judicial review. Upon evaluating the legality of an administrative decision the court decides whether an invalidation of the decision is appropriate in the circumstances. The Court does not itself possess authority to re-decide the issue on its merits, but may invalidate a decision and submit it to the administrative decision-maker for re-decision. The administrator must take into account the decision of the court but is not obliged to arrive at a decision substantively different from that originally made. Of some significance in the environmental context is the Court's authority to award compensation where the applicant has suffered loss as a result of the administrative decision.[53]

One limitation on the efficacy of this process is the court's lack of authority to directly implement its own decision. Rather, an obligation rests with the government agency responsible for issuing a decision subsequently invalidated by the court, to cancel and/or issue a new decision after considering the judgement of the court.[54] Nonetheless, where a defendant refuses or otherwise fails to rescind a decision pursuant to court order, it will become void in four months. A further limitation on the relevance of this process in the environmental context is the stipulation that any challenge to a State administrative decision must be brought within 90 days of the decision being issued.[55] The position in respect of interested third parties adversely affected by the decision is not clearly defined under the Administrative Judicature Act.[56] This distinction is of particular importance in

53 Administrative Judicature Act 1986, Art. 97(10) (Indonesia).

54 Hadjon *Pengantar Hukum Administrasi Indonesia* (Gadjah Mada University Press, Yogyakarta: 1993) 309. Pursuant to Administrative Judicature Act 1986, Art. 116 (4) and (6) (Indonesia), the Chairman of the Court may notify the government office superior to the defendant (and failing that, the President) where an order of the court is not implemented.

55 Administrative Judicature Act 1986, Art. 55 (Indonesia); in respect of a third party the limitation period runs from the date at which he/she knew of the decision.

56 However, the Supreme Court has issued a guideline on this subject in its Circular Letter no.2/1991 at V-3, advising judges to determine the date upon which the third party first became aware of her loss and commence the period from that day.

environmental matters, as the effects of pollution or other environmental damage caused by a particular industry or enterprise upon third parties may only be felt a number of months, or years, after the industry begins operation.[57]

Environmental Cases in the Administrative Courts

To date environmental cases entering the administrative courts have been a fairly rare phenomenon, the majority of cases being civil servant and land cases. The IPTN case discussed above appears to be the first environmental public interest suit brought in the Administrative Courts. Whilst the Plaintiffs in that case won the procedural victory of environmental standing (discussed above), the substantive application was, unsurprisingly, defeated.[58] In their application the Plaintiffs had argued that the Presidential Decree in question was a reviewable administrative decision, according to the provisions of the Administrative Judicature Act. The decision in question, it was further submitted, was inconsistent with, *inter alia*, the provisions of the EMA 1982 concerning the government's role in sustainable development and Presidential Decision No. 29 of 1990 and Presidential Instruction No. 6 of 1986 stipulating the use of Reafforestation Fund money to be solely for reafforestation and rehabilitation.

By way of reply, legal counsel for the President argued that any Presidential Decree possesses the same legal force and standing as laws (*undang-undang*) enacted by the Indonesian Legislative Assembly (*Dewan Perwakilan Rakyat*) and thus is not subject to judicial review. It may be noted here that the term "judicial review", in contrast to common law jurisdictions, has a restricted meaning in Indonesian law, being limited to reviewing the validity of regulations and similar instruments made pursuant to legislation. Legal counsel for the President also asserted that Presidential Decree No. 42 of 1994 fell outside the jurisdiction of the State Administrative Court as it was not yet a decision of a "final" nature.[59] In support of this assertion counsel for the Defence cited article 5 of the Decree, which stated that the loan which was the subject of the Decree, and the manner of its repayment, would be further implemented by both the Minister of Forestry and the Director of IPTN. As the terms of the decree had yet to be fully implemented, and

57 N. Suparni *Pelestarian Pengelolaan dan Penegakan Hukum Lingkungan* (Sinar Grafika, Jakarta: 1992) 170.

58 In the political context at that time, it was considered a victory that the Administrative Court would even entertain a legal action against the President in the first place: David Nicholson "Environmental Litigation in Indonesia" (Honours Thesis, Murdoch University: 1994) (on file) 54.

59 Administrative Judicature Act of 1986, Art. 1(3) (Indonesia) states that a State administrative decision which may become the subject of a State Administrative Court's jurisdiction, may be defined as a: written determination issued by a State Administrative body or official containing administrative action based on valid regulations or legislation, of a concrete, individual and *final* nature (emphasis added).

as further regulation on a Ministerial level was required in this respect, the decree could not be said to be a decision of a "final" nature.[60]

In its decision the Jakarta State Administrative Court concluded that the Presidential Decision in question did not constitute an administrative decision as defined in the Administrative Judicature Act, as it was not final in nature. As a result, it was not within the authority of the Court to review the Presidential Decision in question. Several legal commentators have considered the Court's decision to be sound from a legal perspective, a perception reinforced by the fact that the transfer of money to IPTN was indeed in the form of a loan supported by an official contract.[61] Yet whilst failing in the legal sense, the Reafforestation Case was successful in capturing considerable media attention. Ultimately the matter received a political resolution of sorts, with the subsequent Habibie administration belatedly retracting the Presidential Decision in question.[62]

Criminal Environmental Litigation

Criminal prosecution, or the threat of criminal prosecution, may function as a significant deterrent of pollution and transgression of environmental standards and thus constitutes an important part of environmental law enforcement through the courts. In Indonesia, criminal penalties in respect of acts harmful to the environment are found in a wide range of both pre and post-independence legislation. Whilst some colonial laws with environmentally-related criminal provisions remain in force, their comparatively weak criminal sanctions render them of little practical value.

In post-independence legislation, criminal penalties for environmentally related offences have been enacted in both the 1982 and 1997 Environmental Management Acts, a range of sectoral legislation and regulations and a number of specific laws. Sectoral laws, including:

- the Law on Industries; [63]
- the Law on Fisheries; [64]

60 Harian Umum Republika, 1 November 1994.
61 *Perjanjian* no.928/*Menhut*/II/RHS/1994.
62 Personal Communication (16 November 1999).
63 No. 5 of 1984 (Indonesia).
64 No. 46 of 1985 (Indonesia).

- the Forestry Law; [65] and
- the law concerning water management; [66]

also contain a range of more specific criminal sanctions.[67] Further criminal sanctions are found in Government Regulations enacted pursuant to these laws. Besides sectoral laws, there are also a number of specific laws, such as the Law for the Conservation of Living Natural Resources and Ecosystems[68] and the Law on the Exclusive Economic Zone,[69] relevant to the criminal prosecution of environmental offences. For the purposes of this study, however, the main focus is on the general criminal provisions for environmental offences introduced first in the EMA 1982 and subsequently in the EMA 1997. It is these provisions that arguably hold the widest scope and significance in the prosecution of environmental offences.[70] It can be noted in passing that investigation of offences is carried out by civil investigators employed by BAPEDAL, under article 40 of the EMA 1997. However, these officers cannot directly prosecute, but merely report their findings to the public prosecutor through the National Police Investigators.

EMA 1982

Article 22 of the EMA 1982 introduced a general criminal liability where an "...action ...causes damage or pollution of the living environment...", either intentionally or through negligence. In practice establishing causation has proven to be the most difficult obstacle to criminal prosecution under article 22. According to the definitions of environmental pollution and damage in that Act, the action in question must cause the environment to "function insufficiently or lose its proper functions...".[71]

65 No. 5 of 1967 (Indonesia), now superseded by the Forestry Law 1999, No. 41 of 1999 (Indonesia).

66 No. 11 of 1974 (Indonesia).

67 For example, Law No. 5 of 1984 concerning Industry, places an obligation upon Industrial Enterprises (*Perusahaan Industri*) to take measures towards the harmonious balance and conservation of natural resources together with the prevention of damage or pollution of the living environment as a result of the activities of industry; Art. 27 applies criminal penalties to industries acting in a manner contrary to the obligation stipulated in Art. 21(1).

68 Law No. 5 of 1990 (Indonesia).

69 Law No. 5 of 1983 (Indonesia).

70 Nonetheless, in some circumstances, criminal sanctions stipulated in specific or sectoral legislation may be more relevant and/or applicable. For a detailed discussion of the interrelation and integration of EMA legislation with specific and sectoral legislation in Indonesia, see Bedner, note 52.

71 EMA 1982, Art. (1) and 1(2) (Indonesia). The penalties provided by Art. 22 are a maximum of 10 years and/or a fine to a maximum of Rp. 100,000,000 ($US 11,500) in respect of clause 1 and a maximum of one year imprisonment and/or a fine to a maximum of Rp. 1,000,000 ($US 115) in respect of clause 2.

Two obstacles are raised by this causative element. First, it must be established that the environment is damaged or polluted to the extent indicated by the article. Obviously, proof of environmental damage or pollution in itself will not suffice under article 22. Rather, the environment must "function insufficiently" or "lose its proper functions". The ambiguity of these terms leaves much to the discretion of the courts in determining whether environmental damage or pollution has occurred.

Secondly, it must be established, under the terms of article 20, that the environmental damage or pollution was actually caused by the action of the accused. Where pollution originates from a number of sources, establishing a causative link between the waste of one factory, for instance, and environmental damage in general, is a difficult task. The recent decision of the Indonesian Supreme Court in the *Sidarjo* case has gone some way towards overcoming this difficulty.

The Sidarjo Case

The accused in the *Sidarjo* case[72] was the director of two companies, PT Sidomakmur and PT Sidomulyo, involved in tofu production and pig farming respectively. Waste from the two factories was held in storage containers prior to treatment and disposal. However, the insufficient capacity of the storage containers resulted in untreated waste being dumped into the Surabaya River.[73]

At first instance the accused was held by the District Court of Sidarjo to be not guilty of contravening article 22 of the EMA 1982. The District Court cited the conflict of sample results as one ground for its decision.[74] In its decision the court also stated that there was a lack of evidence indicating it was the waste of the accused in particular which caused pollution of the Surabaya river. The existence of a number of waste-discharging industries on the Surabaya river made proof of such a direct "causal connection" particularly difficult.[75] However, in a landmark decision on 20 March 1993, the Supreme Court (*Mahkamah Agung*) overturned the decision of the District Court of Sidarjo, finding the accused guilty of the lesser

72 Decision of the Supreme Court RI No. 1479/K/PID/1989 (Indonesia).

73 A. Patzer "Putusan Kasus Sidoarjo: Suatu Harapan Baru Bagi Pengembangan Penegakan Hukum Lingkungan di Indonesia" (1994) 1 *Jurnal Hukum Lingkungan* 94.

74 The BOD (mg/l) standard was 30 whereas the samples from the two factories (PT Sidomakmur (tofu factory) and PT Sidomulyo (pig farming)) indicated levels of 3095.4 and 462.3 respectively. The COD (mg/l) standard was 80 whilst samples from the two factories showed readings of 12293 and 1802.9 respectively. The cited figures were the results of an official examination carried out by the Technical Bureau of Environmental Health on 20 July 1988. In significant contrast were the results of an examination carried out without the Plaintiffs' attendance by the Bureau of Industry Research and Development which found BOD and COD levels to be under the stipulated legal standards. The legal standards of BOD and COD levels in question were set by Surat Keputusan Gubernor Jawa Timur No.414/1987, see Patzer, note 73.

75 Patzer, note 73.

charge of causing environmental damage or pollution through negligence. A fine of Rp 1 million was imposed with three months imprisonment in default.

The decision of the court not only established a valuable precedent of conviction under article 22 of the EMA 1982, but also gave some consideration to the element of causation within article 22. Previously, situations of multi-source pollution have made it difficult to establish a direct causal connection between the actions of an accused and actual damage or pollution caused to the living environment. However, in this case, the court stated that in situations where the environment is threatened by multiple sources of pollution, companies are under an obligation to take extra care (*bertindak ekstra hati-hati*) in disposing of waste. Such extra care is warranted by the cumulative effects that may result from the disposal of waste exceeding set limits from multiple sources. On this basis the court considered that the excessive BOD and COD levels of the factory's effluent were a sufficient indicator of environmental impact in themselves. Rather than requiring proof of a further causal connection between the discharged effluent and pollution of the Surabaya River, the court instead proceeded on the assumption that effluent exceeding the legal standard could be presumed to have an important impact causing a decline in environmental quality.[76]

EMA 1997

The criminal provisions discussed above have been recently replaced by similar provisions in Chapter IX of the EMA 1997.[77] The new provisions retain the basic structure of their predecessors, stipulating criminal penalties for actions resulting in environmental pollution and/or damage. Most notably, the applicable fines have been substantially increased,[78] and more onerous penalties introduced where an environmentally damaging action causes the death or serious injury of a person. Unfortunately, the problematic element of causation remains in the new provisions, with articles 41 and 42 respectively referring to an action which results in or causes environmental pollution and/or damage. Yet, as discussed above, the approach adopted in the *Sidarjo* case may go some way towards overcoming this particular legal obstacle.

For such offences, neither causation or proof of actual environmental damage is required to establish liability. A further matter dealt with in the criminal provisions

76 Ibid.

77 EMA 1997, Arts. 41 and 42 (Indonesia).

78 An intentional action resulting in environmental pollution or damage is subject to a maximum imprisonment under EMA 1997, Art. 41 (Indonesia) of 10 years and a maximum fine of Rp500,000,000 (US$55,000). A negligent action resulting in the same under EMA, Art. 42 (Indonesia) is subject to a maximum imprisonment of 3 years and a maximum fine of Rp100,000,000 (US$11,000).

of the new EMA is that of corporate liability. There had been some ambiguity under the old law as to whether the criminal provisions applied to legal bodies, such as companies, or their directors. This ambiguity has been eliminated with the introduction of article 45 which confirms the application of the provisions to legal bodies, and provides for increased fines in this case.[79] According to article 46(1) the directors of companies or other legal bodies may also be subject to criminal liability.

The Institutional Context

Whilst this article has emphasised a "micro" perspective, focusing on the legal and procedural framework of environmental litigation, reference should also be made to the "macro" institutional context which significantly influences the process and outcome of environmental litigation. Institutional context in this respect refers primarily to the judiciary, but also to the wider political-economic milieu which informs the behaviour of societal institutions.

Effective judicial enforcement of environmental law presumes a judiciary that is both impartial and independent from executive influence. In Indonesia the principles of judicial independence and the rule of law are given at least formal recognition in the Indonesian 1945 Constitutional Law (*Undang-Undang Dasar 1945*) which proclaims "Indonesia is a state based on law (*rechtstaat*), not merely based on power (*machtstaat*)." The Elucidation to the Constitution further defines judicial authority as "an independent authority, in the sense that it is beyond the influence of the government".[80]

Yet during the New Order period[81] in Indonesia, statist legal rhetoric depicting Indonesia as a *negara hukum* (state based on law) was criticised by many as little more than a transparent attempt to legitimise a political system built along authoritarian and corporatist lines. Throughout this period, the judicial system as a whole was directly responsive to the influence of a highly powerful executive. A frequently cited example of executive influence over judicial decision-making in an environmentally-related matter is the *Kedung Ombo* case. In that case a landmark Supreme Court decision in 1993 to award record levels of compensation to villagers displaced by a dam and irrigation project was reversed, following high-level political pressure and a reputed request by President Suharto that the ruling be reviewed.[82]

79 Criminal liability in respect of fines is increased by a third.

80 See Todung Mulya Lubis *In Search of Human Rights: Legal-Political Dilemmas of Indonesia's New Order, 1966–1990* (PT Gramedia Pustaka Utama, Jakarta: 1993).

81 The New Order (*Orde Baru*) refers to the period of President Suharto's rule, from 1966 until 1998.

82 See Nicholson, note 58 at 84.

Executive influence over judicial decision-making was supported by the structural integration of the legal and executive apparatus, which granted the Minister of Justice financial, administrative, and organisational supervision of the court.[83] Such authority was not infrequently used to influence the course of justice, through selective manipulation of judicial transfers and promotions.[84] Over time the political co-optation of the judiciary became more complete, until such overt mechanisms of control were no longer necessary. In a repressive political environment, the judiciary internalised the rules of political compliance for itself.[85] For example, whilst not possessing powers of legislative review, the Supreme Court was nonetheless empowered to review regulations and executive directions, which in fact constituted the majority of substantive executive policy. Yet in practice the Supreme Court consistently refused to hear cases where it was asked to quash executive regulation, contributing to its image as a "toothless court" (*Mahkamah Ompong*).[86]

Judicial impartiality has also been significantly impaired by the incidence of corruption at all levels of the judiciary.[87] Widespread corruption has produced an unsurprising correlation between the financial resources of a litigant, and their capacity to influence the judicial decision-making process in their favour. In environmental litigation, this places industry litigants at a significant advantage over public interest litigants or victims of environmental damage, who tend to be from socially and economically disadvantaged sections of society. It is not surprising, given the prevalence of judicial corruption and impartiality, that many environmental disputes are never brought to court due to a deeply held community skepticism toward the integrity and capacity of judicial institutions.[88]

Whilst it is perhaps the lack of judicial independence and impartiality that produce the greatest distortions in the legal process, other factors also play a part. Commentators have criticised the failure of judges and other legal actors handling environmental disputes to understand and correctly apply environmental law.[89] Judicial decision-making in environmental disputes has tended to interpret environmental legislation in a legalistic, narrow and conservative manner to the frustration of environmental public interest litigants. Whilst this may be the result

83 Law on the General Court No.2 of 1986, Art. 5 (Indonesia). The term "General Court" includes the District Court and the Court of Appeal of the District Court.

84 S. van Hoeij Schilthouwer Pompe "The Indonesian Supreme Court: Fifty Years of Judicial Development" (PhD Thesis, University of Leiden: 1996) 222.

85 Ibid at 101.

86 Ibid at 118–119.

87 Ibid at 343.

88 Hyronimus Rhiti "Penyelesaian Sengketa Lingkungan Menurut UUPLH" (22 January 1998) *Suara Pembaruan*.

89 See for example Hardjasoemantri, note 41 at 200.

to some extent of the institutional pressures discussed above, inadequate judicial education concerning environmental law may also be a contributing factor. In this respect it will be interesting to see if recent intergovernmental initiatives to enhance Indonesian judicial awareness of environmental law result in noticeable differences in judicial decision making in environmental disputes.[90]

More substantive judicial reform, including efforts to promote the rule of law, judicial independence and the eradication of corruption, have assumed a high priority in the post-Suharto era of *reformasi*, prompted by both domestic and international pressure. Recent legislation amending the Basic Law on Judicial Authority No. 14 of 1970 has entirely transferred responsibility for judicial management (in matters such as promotions and transfers) from the Ministry of Justice to the Supreme Court.[91] Such administrative reform will hopefully assist in demarcating the boundaries of executive and judicial power.[92] The amending legislation also has pre-empted further regulation establishing mechanisms of judicial supervision, including a Council of Judicial Honour (*Dewan Kehormatan Hakim*) which will establish a code of judicial conduct and review issues such as recruitment, promotions and judicial corruption. Calls for external supervision of the judiciary has also prompted the creation of several non-government judicial supervisory bodies including the Indonesian Institute for an Independent Judiciary (*Lembaga Kajian dan Advokasi untuk Independensi Peradilan*) and Judicial Watch. Whilst comprehensive reform of the judiciary will no doubt be a protracted and challenging process, the prospects for its success have been greatly increased by the dramatic political changes in Indonesia, which include democratic elections in 1999 and the ongoing transition from a highly centralised authoritarian regime to a politically diversified and pluralist polity.

Conclusion

This article has sought to provide an overview of environmental litigation in Indonesia, in civil, administrative and criminal matters. It has focused on the legal framework for environmental litigation in these areas, from both the perspective of the public interest or civil litigant and the criminal prosecutor. In addition, it has

90 Inter-governmental initiatives to date include courses on environmental law for Indonesian judges and jurists sponsored by the Dutch and Australian governments. For example, 22 courses have been conducted under the auspices of the AusAID (the Australian Government's Agency for International Development) Indonesia Australia Specialised Training Project Phase II in 1999 and 2000.

91 See Law No. 35 of 1999 (Indonesia).

92 cf. Pompe, note 84 at 109 who questions whether a transfer of court administration to the Supreme Court of Indonesia would in fact contribute to judicial independence.

considered the interpretation and application of these legal provisions in a number of cases.[93]

As noted in the Introduction, Indonesia now has a reasonably comprehensive body of environmental law. From a legal perspective, the scope for the enforcement of environmental law and the resolution of environmental disputes through the courts is widening. The liberalised approach to standing taken in the *PT IIU* case and subsequently confirmed by legislation has done much to facilitate environmental public interest litigation. Compensation for environmentally-related damage has also been successfully obtained through community-initiated litigation in several cases, although the number of such cases still remains small. Legal provision for compensation in environmental disputes has been facilitated by provision for representative actions in the EMA 1997, which represents a significant improvement to the legal framework governing compensation for environmental damage.[94] Nonetheless, further procedural elaboration will be necessary to ensure that representative actions can be undertaken in practice.

The Administrative Judicature Act 1986 has further widened the legal scope for challenge to environmentally-damaging activities and has also (at least potentially) increased the accountability of administrative decision-makers in the environmental context. The recent challenge to the transfer of reforestation funds on the basis of Presidential Decision No. 42 of 1994 was one of the first examples of the administrative justice framework being utilised by environmental public interest litigants.

Prosecution of criminal offences relating to environmental pollution or damage has also occurred under both the EMA 1982 and the EMA 1997. The interpretation of article 22 by the Supreme Court in the *Sidarjo* case has helped to resolve some of the legal ambiguity that had undermined the enforceability of those provisions and has increased the scope for successful criminal prosecution. The elaboration of the criminal offences in the EMA 1997, and the increases in penalties and fines, has also contributed to a more comprehensive legal framework for prosecution of environmental offences. The criminal sanctions available in the EMA 1997, when read in conjunction with comparable provisions in sectoral and specific laws now provide an extremely wide scope for criminal prosecution of environmental offences. Whether or not this scope will be realised in the future will depend much upon the institutional framework supporting the prosecutorial process in environmental cases.

93 For reasons of space, the cases discussed in this article were chosen for illustrative purposes only and do not represent a comprehensive overview of environmental cases in Indonesia. This latter task will be the subject of a forthcoming publication.

94 See the discussion in Mas Achmad Santosa and Karl Fjellstrom "The Indonesian Environmental Management Act of 1997" (1997) 2 *APJEL* 366-372.

Nonetheless, a recurring limitation of the environmental legal framework is a dearth of implementing regulations. This particularly was a feature of the EMA 1982 which, due to its wide ambit and broad provisions, required at least 15 implementing regulations, most of which were never enacted. For instance, the general right of compensation created by article 20(2) of that Act was in practice unenforceable due to the absence of implementing regulations pre-empted by the article itself. The lack of implementing legislation limits the enforceability of a number of key environmental laws and provisions, as traditionally the appellate courts in Indonesia have been reluctant to "create" law through the judicial interpretation of wide and ambiguous provisions.[95] Unfortunately, the situation has not significantly improved with the advent of the EMA 1997, the provisions of which remain generally broad in nature and lacking in specific detail. Eight provisions of the EMA 1997 require further government regulation (*peraturan pemerintah*) for implementation, whilst at least five further articles imply further (unspecified) legislation.[96]

Whilst the legal framework is of primary importance to the process and outcome of environmental litigation, of equal importance is the surrounding institutional context. Effective judicial enforcement of environmental law requires an impartial and independent judiciary. In Indonesia, executive influence and widespread corruption have frequently derailed the legal process, not least of all in environmental disputes which frequently involve industries of immense political and economic clout. No doubt environmental public interest suits will continue to be advanced for political and publicity purposes regardless of such judicial shortcomings.[97] Yet if judicial enforcement of environmental law is to achieve tangible and concrete results, then fundamental restructuring of judicial institutions in Indonesia must first occur. The recent changes in the broader political-economic milieu and resultant legal reform initiatives to promote judicial independence give some cause for hope in this respect.

95 Cf. policy statement in the REPELITA II (1974-1979) ch 27 (Indonesia) which confirms judicial decisions as an important source of law in Indonesia.

96 Nicole Niessen "Indonesia's Environmental Management Act of 1997: Comprehensive and Integrated?", in note 17.

97 Several environmental public interest litigants interviewed with were all too familiar with the flaws of the legal process and the small chances of any environmental suit actually succeeding. Nonetheless, they regarded the courts as a stage (*tanggung*) which could be utilised for political and publicity purposes in environmental disputes. In most cases any legal victory would be regarded as an unexpected bonus: personal communications (November 1999).