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Lessons from a Decade of Indonesia Environmental Litigation: Accommodating Public Interests in Civil Liability Cases

By Rika Fajrini*

ABSTRACT

This paper analyses 321 civil environmental cases in Indonesia from 2009 to 2022, identifying patterns and trends over the past decade. The findings reveal a growing public interest dimension in these civil cases, marked by the rise of public interest litigation, the expansion of legally recognised harms as liability base and the shift toward restorative remedies. Despite the presence of a specialised environmental law, the cases are still trialled within a mix of private law framework, which has its limitation in accommodating public interest. The cases show the needs for a harmonious coexistence between public and private law in environmental liability.

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INTRODUCTION

In recent years, courts have become critical actor in enforcing environmental compliance and promoting sustainable development. Litigation has been used not only to punish polluters and demand compensation for economic loss but also to hold them accountable for restoring the environment and the loss of ecosystem services.[1] In jurisdictions that recognise public interest litigation, it has become a method of citizen enforcement when regulatory bodies fail to enforce environmental law.[2] High-profile cases have not only drawn attention to pressing environmental issues but also amplified advocacy efforts, providing momentum for policy change.[3]

Environmental litigation outcomes often extend beyond the courtroom. Reports such as the 2023 Global Climate Litigation Report highlights the role of litigation in compelling governments and businesses to adopt more ambitious climate change mitigation and adaptation goals.[4] Strategic environmental litigation shapes the law, furthering pro-environmental regulation.[5] Furthermore, litigation could also influence private sector governance by disincentivising polluting behaviour not only by legal penalties but also by tarnishing the corporate reputation which could affect investors' assessment of the value of polluting activities and policies.[6] Research also indicates that litigation could trigger the private sector to innovate in green technology.[7]

For a long time, the approach of public law has been deemed more appropriate in dealing with public goods and interest, however many landmark environmental cases that achieved the outcomes above have been using civil liability litigation to push environmental agendas beyond compensation. Legal scholars have debated the appropriateness of using private law tools to achieve public goals like environmental protection because it was originally designed to address private harm.[8] In practice, this liability framework operates through both traditional civil liability principles and specialised statutory regimes. Given its growing significance, it is critical to examine the development of this co-existence between private and public

1 Carol Adaire Jones and Lisa DiPinto, 'The Role of Ecosystem Services in USA Natural Resource Liability Litigation' (2018) 29 Ecosystem Services 333.

2 Jun Zhao and Jinye Han, 'From Advocators to Rule Makers: Exploring the Role of Chinese Lawyers in Environmental Law Making and Public Interest Litigation' in Xi Wang, Xiaobo Zhao and Noeleen McNamara (eds), *Environmental Public Interest Litigation in China* (Springer International Publishing 2023) <https://doi.org/10.1007/978-3-031-26526-6_11> 243.

3 Aisyah Llewellyn, 'Indonesians Hail "Unexpected Win" in Landmark Pollution Case' *Al Jazeera* (17 September 2021) <https://www.aljazeera.com/news/2021/9/17/indonesians-hail-unexpected-win-in-jakarta-pollution-case>.

4 UN Environment, 'Global Climate Litigation Report: 2023 Status Review' (UNEP - UN Environment Programme, 25 July 2023) <http://www.unep.org/resources/report/global-climate-litigation-report-2023-status-review>.

5 'Massachusetts v EPA, 549 U.S. 497 (2007)' *(Justia Law)* <https://supreme.justia.com/cases/federal/us/549/497/>.

6 Xiaoyi Lyu, Chenyu Shan and Dragon Yongjun Tang, 'The "Major Questions" of Carbon Emissions and Value Relevance of Climate Litigation' (1 April 2023) <https://papers.ssrn.com/abstract=4428369>.

7 Shuang Tao and others, 'The Role of Environmental Justice Reform in Corporate Green Transformation: Evidence from the Establishment of China's Environmental Courts' (2023) 11 Frontiers in Environmental Science <https://www.frontiersin.org/articles/10.3389/fenvs.2023.1090853>.

8 Peter Cane, 'Are Environmental Harms Special?' (2001) 13(1) Journal of Environmental Law 3.

interest in civil environmental cases and legal innovation to adapt to the challenges of environmental harms.

To enrich the scholarship, it is valuable to focus on cases in the Global South, where the tension between economic development and environmental protection is intensifying. Indonesia stands out in this regard. As a biodiversity-rich country, Indonesia has made ambitious commitments to reduce carbon emission by 31.89 percent unconditionally and 43.20 percent with international support by 2030.[9] However, this environmental commitment exist alongside an economic growth target of 8 percent by 2029, which involves large-scale development projects with significant environmental impact. Given these competing interests, litigation has emerged as a check-and-balance tool, shaping the interplay between environmental protection and economic development.

Moreover, Indonesia has become a fertile ground for environmental litigation.[10] The first attempt to provide an overview of Indonesia's environmental litigation is the study conducted by David Nicholson in which he collected 24 environmental cases from 1982-2002.[11] The number of environmental cases since then has grown significantly with a new environmental law and new environmental judges system being introduced.[12]

This research studied civil environmental litigation comprehensively to uncover legal strategies, trends, and challenges that might go unnoticed. It begins with a descriptive statistical analysis of cases filed between 2009 and 2022, followed by a qualitative discussion of key developments that highlight the public dimension of Indonesia's civil environmental litigation landscape. These developments show how the civil liability framework is continually tested by the rise of public interest cases which trigger the expansion of the scope of recognised harms and shifting toward restorative remedies. This transformation offers valuable lessons for future environmental litigation both in Indonesia and other jurisdictions facing similar problem.

A. Indonesia Statutory and Green Bench Framework

Indonesia Law No. 32 of 2009 on Environmental Protection and Management (EPM Law) as amended by Law No. 6 of 2023 on Job Creation is the main legal provision used in environmental litigation along with other sectoral laws such as Law No. 5 of 1990 as amended by Law No. 32 of 2024 on Biodiversity and Ecosystem Conservation, Law No. 39 of 2014 on Plantation and Law No. 18 of 2013 on Prevention of Forest Destruction. The EPM Law acknowledges a broad range of legal standing from individuals, Environmental NGOs, governments, and public-interest-based citizen lawsuits. The law also provides a strict liability provision which makes it easier to hold those engaging in abnormally dangerous activities liable. In addition, the law accommodates several important environmental principles such as the precautionary principle, polluter pays

[9] Indonesia Ministry of Environment, 'Enhanced Nationally Determined Contribution - Republic of Indonesia' <https://unfccc.int/sites/default/files/NDC/2022-09/ENDC%20Indonesia.pdf>.

[10] Environment (n 4).

[11] David Fergus Nicholson, *Environmental Dispute Resolution in Indonesia* (KITLV Press 2009).

[12] Nur Syarifah and others, *Assessment Report on Court Decisions on Environmental Cases* (Indonesian Institute for Independent Judiciary 2020).

principle, and three pillars of Principle 10 of the Rio Declaration (access to information, public participation, and justice). These provisions make it easier for potential plaintiffs to file environmental cases, because they have easy recognition in standing and various legal bases to demand liability.

Indonesia does not have a specialised environmental court or tribunal, but it has the Environmental Judges Certification System.[13] The system states that environmental cases should be adjudicated by judges who have passed the special training and are certified as environmental judges. In the case where there are not enough environmental judges to fill the panel, at least the head of the panel should be an environmental judge. The environmental judges are deployed in the General Court dealing with criminal and civil environmental cases and in the Administrative Court dealing with administrative cases. As of 2023, there were 1579 environmental judges including 1223 General Court judges, 344 Administrative Court Judges, and 12 judges assigned in Military Court for specific cases involving military personnel.[14]

The Supreme Court issued the Environmental Cases Guideline in 2013 which was recently revised.[15] The regulation complements the EPM Law and guides on various legal obstacles in the practice. The environmental case is given a special code so that the Supreme Court can monitor the case development easily. An Environmental Working Group is also established to advise and oversee the whole environmental judge certification system including capacity building for environmental judges.[16]

1. Overview and Typology of Indonesia's Civil Environmental Case

This research analyses first-instance civil environmental court decisions published in the Supreme Court Directory after the enactment of EPM Law until the data collection time (2010-2022).[17] An environmental case is defined as a case that uses environmental harm—such as pollution, loss of biodiversity, and harm to ecosystem services—either as the main or additional legal base to invoke liability. Agrarian conflict without mentioning any environmental harm is not classified as an environmental case (e.g., indigenous local community conflict with a national park regarding land tenure). The findings from these cases are as follows:

From 2010 until 2022, there were 321 civil environmental case decisions published in the Supreme Court Directory (Figure 1). The courts received more environmental cases since the environmental judge system was established in 2013. Since the enactment of the new EPM Law, the Ministry of Environment (MoE)[18] filed its

[13] Indonesia Supreme Court Decree No. 134 Year 2011 on The Establishment of Environmental Judges Certification System.

[14] Indonesia Supreme Court Training Center, 'Environmental Judges Database 2023 (Unpublished)' (Indonesia Supreme Court Training Center).

[15] Indonesia Supreme Court Regulation No. 1 Year 2023 on Environmental Case Handling Guideline <https://jdih.mahkamahagung.go.id/legal-product/perma-nomor-1-tahun-2023/detail>.

[16] Indonesia Supreme Court Decree No. 204 Year 2014 which has been revised by Decree No. 217 Year 2020 on Supreme Court Environmental Working Group.

[17] 'Indonesia Court Decisions Directory'.

[18] From 2015 to 2023 Is Known as Ministry of Environment and Forestry (MoEF).

first lawsuit in 2012 against a palm oil company,[19] but it was not until catastrophic forest and land fire that occurred in 2015 that the MoE enforced law aggressively on the perpetrators, resulting in an increasing number of MoE lawsuits to demand restoration and environmental compensation from big companies. Meanwhile, individual perpetrators are dealt with by using criminal law.

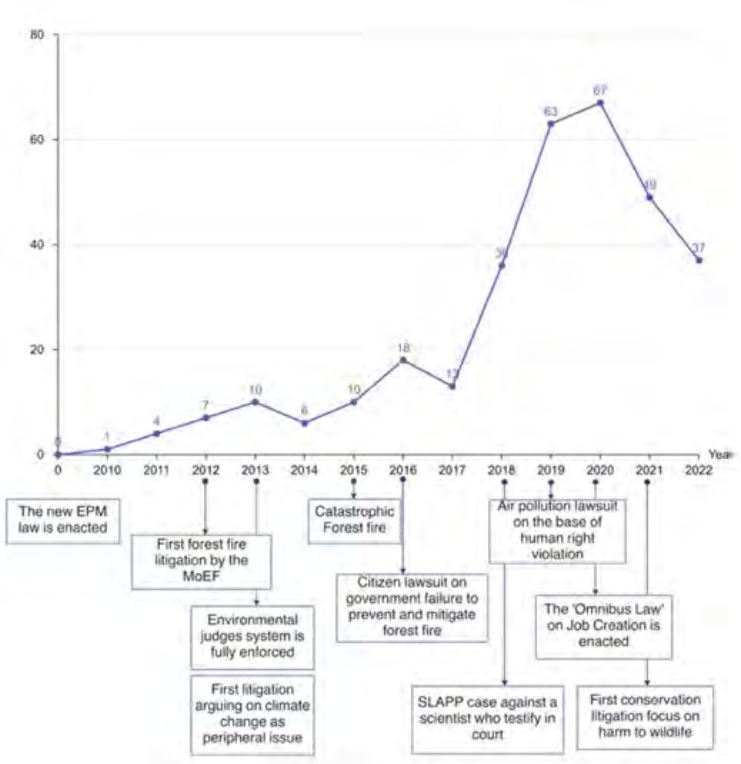

Figure 1. Environmental Civil Cases filed from 2010-2022[20]

Riau (135 cases) and West Java (28 cases) are the two provinces with the highest number of environmental cases (Figure 2). Riau Province has the highest number of cases filed from 2009-2022, but 76 percent (97 cases) of these cases were filed by five Environmental NGOs who frequently file many cases and revoke their lawsuit even before the proceeding could take place. For example, NGO X[21] filed 24 cases in 2022 but revoked all of them without clear reasons. These suspicious NGOs target not only companies but also individual farmers, who are usually not the preferred defendant in environmental

[19] *Ministry of Environment v PT Kalista Alam* [2014] Meulaboh First Instance Court No. 12/Pdt.G/2012/PN.MBO.

[20] Figure prepared by the Author based on the collected cases.

[21] The Name of NGO is made Anonymous.

damage claims due to their limited ability to pay. In contrast, reputable NGOs such as Friends of The Earth Indonesia (WALHI) filed only 1-2 cases per year, followed through with the cases until final decisions, and usually target strategic corporations as the defendants. The abnormally high number of cases that create unnecessary burdens for the court, the frequent revocations and unconventional choice of the defendant, raise question about the true intention of these NGOs, suggesting the possibility that these lawsuits may be frivolous.

Figure 2. Geographical Distribution of Cases[22]

Not all cases are adjudicated in the district court where the harm occurs because of legal procedures such as the preference to file a lawsuit in the plaintiff's legal domicile. Interestingly, even though there are fewer factual environmental harms occurring, courts in Jakarta rank second in the number of environmental cases adjudicated (32 cases). If the frivolous lawsuits in Riau Province are exempted, Jakarta's courts have adjudicated the most cases. It shows that many cases are adjudicated far away from the region where the actual environmental harm occurred. Most of the cases adjudicated by Jakarta courts are the MoEF lawsuits against companies that have caused environmental harm in Sumatra or Kalimantan, many of whom have headquarters and legal domicile in Jakarta.

There are no court cases found in provinces coloured in grey such as Maluku and Papua. However, this does not mean no environmental harm is occurring in that area. I conducted media clipping and found that some cases in this region are administrative lawsuits on permits that fall outside the scope of this research, and some cases have not yet reached the courts.

2. Parties and outcomes

Governments, individuals, Environmental NGOs, and corporations are the often parties in environmental litigation, both as plaintiff and defendant (Figure 3). The

[22] Figure prepared by the Author based on the collected cases.

national government only files a lawsuit against corporations, mainly palm oil companies (22 out of 32 cases). The local governments have never used their standing to sue but are frequently sued by NGOs and individuals in citizen lawsuit cases. Environmental NGOs mainly target corporations and governments in their lawsuits. Corporations and individual businesspersons mainly sue Environmental NGOs and individual citizens as counter-lawsuits when they are being sued. Some cases of corporate lawsuits are indicated as a Strategic Lawsuit Against Public Participation (SLAPP) cases.

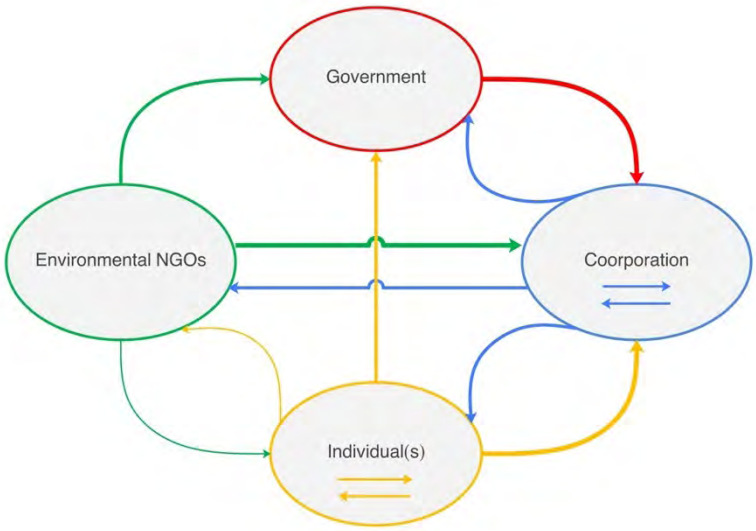

Figure 3. Actor Mapping[23]

The majority of cases are filed by Environmental NGOs (142 cases), followed by individuals (122 cases), corporations (25 cases), and the MoE (32 cases). Even though the MoE filed fewer cases, all of them are high profile and the MoEF has a high chance of winning (66 percent). Meanwhile, a third of cases filed by Environmental NGOs are revoked by the plaintiff, which raise the question of the lawsuit intention. Lawsuits filed by individuals are mainly based on personal interest through individual legal standing (79 cases), there are 26 class action cases, among which plaintiffs won in only one case. Individuals also sue in the name of public interest through the citizen lawsuit mechanism (11 cases), all these cases are won by the plaintiffs or settled in the first instance court. The outcome of these litigations is described in Figure 4.

[23] Figure prepared by the Author based on the collected cases.

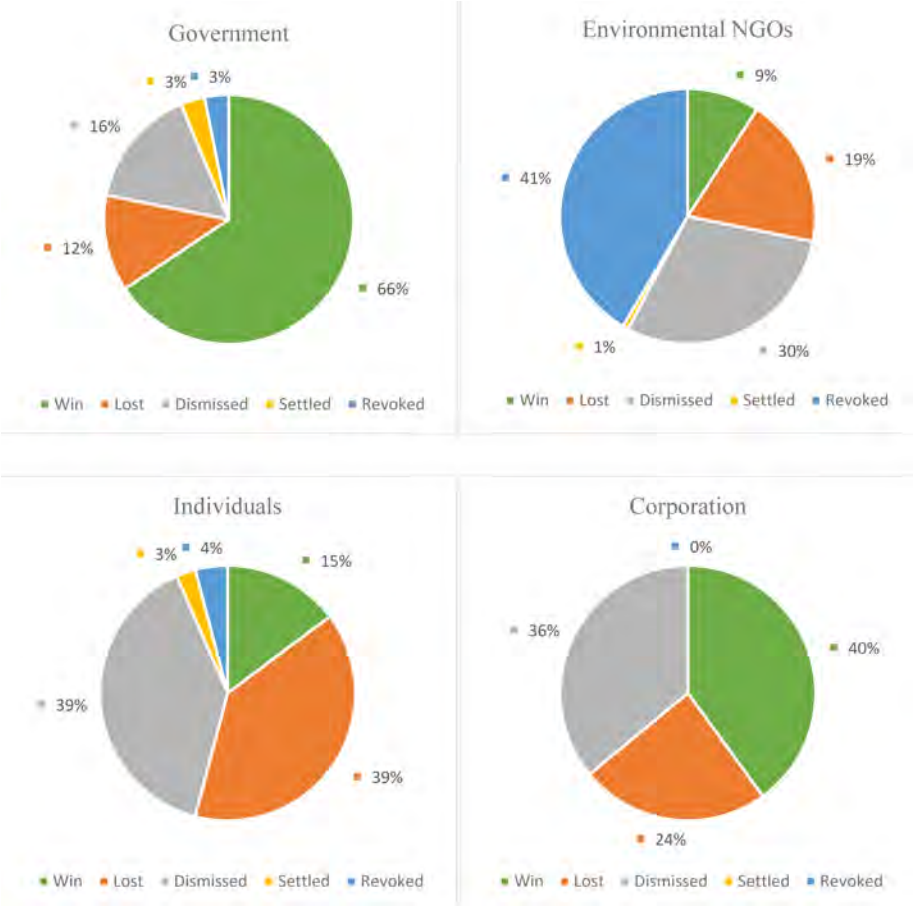

Figure 4. Litigation Outcome[24]

A significant number of cases filed by Environmental NGOs (30 percent) and individuals (39 percent) are dismissed on the grounds of procedural law, such as the lack of legal standing, the wrong procedure of lawsuit, incomplete parties, premature lawsuits, and the scope of claim that is outside the courts competence. This means that in many cases the court did not give any judgment on the core environmental problem that argued.

Other than plaintiff and defendant, it is interesting to see the role of scientists as a supposedly impartial party in the court dynamic. Among 321 cases analysed, only 116 cases featured significant scientific arguments (36 percent), and of those, only 68 cases presented experts to testify in the court. Notably, most cases that could afford to bring expert testimony are cases brought by the MoEF (45,5 percent).

3. Types of cases

From 321 decisions published, the details of 48 cases are unknown since the decision only stated that the cases were being revoked. Meanwhile, 13 cases are nuisance cases that involve minor environmental harm, so they were excluded from further scrutiny. The rest of the cases are categorised as climate change, biodiversity, pollution, and/or habitat destruction based on these criteria:

[24] Figure prepared by the Author based on the collected cases.

- Climate change: The litigation where climate change is a central or peripheral issue, as well as cases where it is one motivation but not explicitly raised as an issue.[25]
- Biodiversity: Any legal dispute that concerns the conservation of sustainable use, and access and benefit-sharing to genetic resources, species, ecosystems, and their relations.[26] Other scholars use the term 'conservation litigation' which is defined as litigation that focuses on restorative remedies for biodiversity.[27]
- Pollution: Pollution litigation is a dispute that arises due to contamination when a harmful substance is released into the air, water, soil, or other natural resources.
- Habitat destruction: Litigation that arises due to significant negative alteration to habitat or significant habitat loss due to human activities.

As Figure 5 shows, the largest number of environmental cases are related to biodiversity. Complaints against biodiversity loss have been used in early environmental cases in Indonesia, mainly due to deforestation concerns. The second largest number of cases are pollution cases, mainly due to industrial activities, followed by habitat destruction cases due to mining and illegal logging. Climate change litigation, as the new generation of environmental litigation, understandably places last in terms of case number. However, this number in Indonesia is still higher compared to other Southeast Asian countries. None of these cases solely focus on climate change; they are often paired with biodiversity loss.

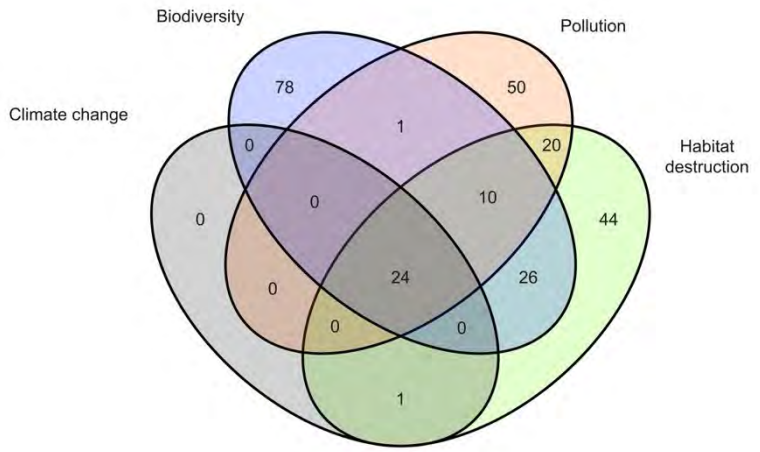

Figure 5. Type of Litigation[28]

Palm oil activities are the main trigger of environmental litigation, accounting for 38 percent of the cases (Figure 6). The number could be higher since the unaccounted unknown cases are most likely related to palm oil looking at the location of the case and the history of the plaintiff's dispute.

[25] Jacqueline Peel and Hari M Osofsky, 'Climate Change Litigation' (2020) 16 Annual Review of Law and Social Science 21.

[26] Guillaume Futhazar, Sandrine Maljean-Dubois and Jona Razzaque (eds), *Biodiversity Litigation* (Oxford University Press 2022).

[27] Jacob Phelps and others, 'Environmental Liability Litigation Could Remedy Biodiversity Loss' (2021) 14 Conservation Letters e12821.

[28] Figure prepared by the Author based on the collected cases.

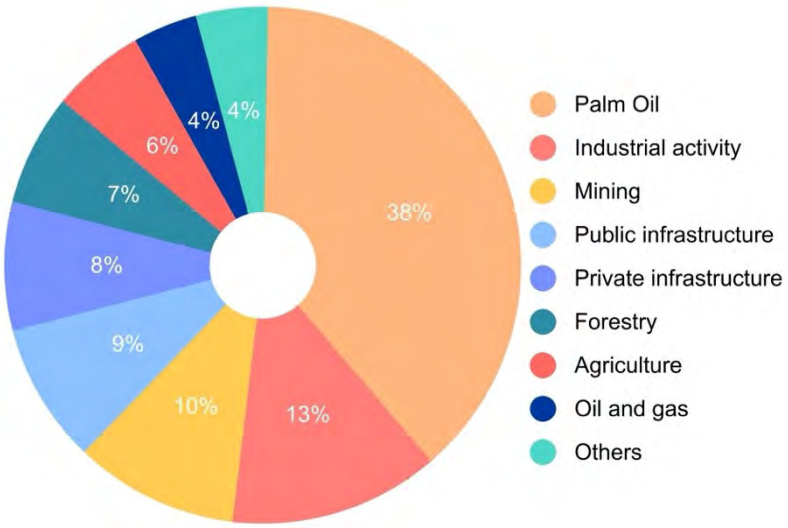

Figure 6. Type of Activities that Trigger the Lawsuits[29]

4. Harms and remedies

In environmental cases, both governments and Environmental NGOs are limited to seeking claims solely for environmental damages. However, if the harm inflicted results in specific monetary loss to their asset, then the usual civil code provision enables them to sue for monetary compensation. Conversely, corporations primarily litigation for their economic interest.

For individuals, there are four distinct mechanism they can pursue. The first involves individuals asserting their legal standing, based on their own private economic concerns. The second avenue pertains to individuals representing a specific group, such as indigenous communities, advocating for the collective interests of their groups. Thirdly, utilizing the citizen lawsuit standing, individuals can argue for matters of the public interest but can not seek financial compensation. Lastly, individuals may opt for class-action legal standing, where cases revolve around both economic interests and environmental harm. As class-action cases encompass a broad spectrum of public interests, they often reside in the intermediary realm between private and public concerns. For instance, a class action can demand remedies for environmental harm as an aspect of public interest that simultaneously heals private injury as well (Fig 7).

[29] Figure prepared by the Author based on the collected cases.

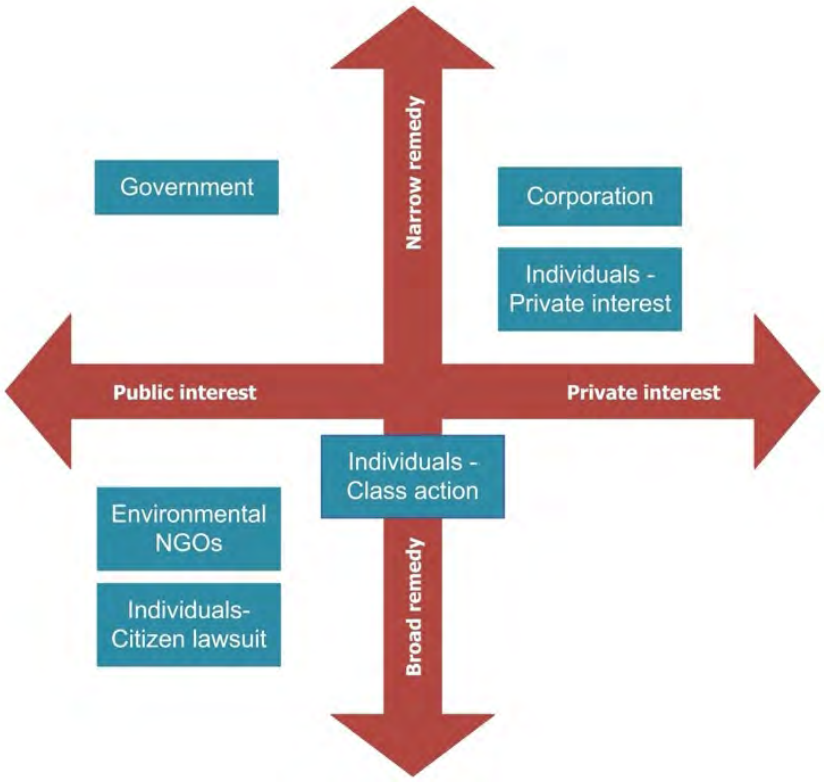

Figure 7. Actors and Remedy[30]

In terms of remedies, corporations and individuals suing on personal interest have requested traditional remedies in the form of monetary compensation. Meanwhile, the government when suing needs to follow The MoE Regulation No. 7 year 2014 on Environmental Damage. Therefore, we can expect the fixed variation of remedies requested by governments as plaintiffs. Meanwhile, Environmental NGO suits, citizen lawsuits, and class action suits have broad room for innovation in the remedies they requested (Table 1). They have requested not only environmental restoration action but also complementary action that ensures the restoration is conducted. They also requested tailor-made policy and administrative action that could remedy the harm. Some of the remedies are innovative to address immaterial harm, such as requests for conservation education and cultural activity to remedy the intangible harm from the loss of biodiversity. Although not all those remedies are granted by the court, the variety of remedies could inspire litigants in the future.

[30] Figure prepared by the Author based on the collected cases.

Table 1. Type of Remedies Requested in the Cases[31]

Remedies	Government	Corporation	Environmental NGOs	Individual			
				Personal interest	Citizen lawsuit	Class action	Group representation
Monetary compensation for economic loss	X	V	X	V	X	V	V
Environmental restoration in the form of action or payment of cost	V	X	V	X	V	V	X
Compensation for ecological loss in the form of money payment or action	V	X	V	X	X	X	X
Environmental dispute resolution cost (e.g. expert cost, cost to prepare lawsuit)	V	X	V	X	X	X	X
Clean-upandcountermeasure in the form of real action or payment of cost	X[32]	X	V	X	V	V	X

[31] Table prepared by the Author based on the collected cases.

[32] 'Normatively, the MoEF can request this type of remedy but they have not done so in all of their cases'.

Public apology	X	V	V	V	V	V	X
Issuance of certain regulations and/or policies	X	X	V	X	V	X	X
Declaratory relief	X	V	V	V	V	X	V
Administrative actions and law enforcement	X	X	V	X	V	V	X
Restriction of certain actions	V	X	V	X	V	V	V
Supplementary action to ensure environmental restoration (e.g. monitoring panel)	X	X	V	X	V	X	X
Restoration of public services	X	X	V	X	V	V	X
Action to address impact to human health and welfare	X	X	V	X	V	V	X
Publishing certain information	X	X	V	X	V	X	X

B. Analysing Key Development: Pursuing Public Goals in Civil Litigation

Over the past decade, environmental litigation in Indonesia has undergone significant transformation, marked by the development of new legal strategies and an increasing role for public interest cases. As the data has showed, Public Interest Litigation (PIL) drives the majority of environmental lawsuits, enabling broader public participation to test and strengthen legal frameworks. However, it also faces challenges, including retaliatory actions such as Strategic Lawsuits Against Public Participation (SLAPP). As PIL expands, so does the legal arguments used in environmental cases. Litigants have increasingly explored diverse legal bases for liability, seeking to establish responsibility for a wider range of environmental harms and values importance for the public, including biodiversity loss, human rights violations, and climate change impacts. This expansion of legal bases has, in turn, influenced the types of remedies sought in environmental cases. As courts begin to recognise environmental harm beyond direct monetary losses, there has been a growing shift toward restorative remedies that aim to repair public interest such as cultural and ecological losses.

1. Fostering Public Interest Litigation and the Challenge of SLAPP

Public Interest Litigation (PIL) has been a catalyst in flourishing jurisprudence on environmental justice. It is deemed as a 'weapon of creative judicial engineering' to revolutionise the interpretation and implementation of environmental law, to seek judicial relief for marginalised communities who could not afford to stand directly in the court, and to change detrimental policies.[33] The data shown in Indonesia has confirmed the important role of PIL in the environmental movement. Many of the environmental cases filed in the last twelve years are public interest litigation filed by NGOs, groups of citizens and even the government (211 cases in total).

The prerequisite to nurturing PIL is the relaxed rule of locus *standi* and protection of public participation. Indonesia's EPM Law provides a broad range of legal standing for public interest litigation. Environmental NGOs are only required to prove that they are a legal entity with organizational statutes that state their environmental mission and that they have been active in environmental works for at least two years.[34] The law also allows Indonesian citizens who are not directly harmed to sue the government when it fails to carry out its duty or obligation -through action or inaction- as stated in the laws. This kind of lawsuit is called Citizen Lawsuit (CLS),[35] the citizen can only demand the government to do or not to do something without requesting monetary compensation. Victims of collective harm can file a class action lawsuit where one or several class representatives sue on behalf of the entire class.[36]

[33] Hari Bansh Tripathi, 'Public Interest Litigation in Comparative Perspective' (2007) 1(1) NJA Law Journal 49.

[34] Law No. 32 Year 2009 on Environmental Protection and Management (EPM Law) Article 92.

[35] Before 2019, CLS Was Adjudicated as a Civil Case Trial by General Court. After the Enactment of Supreme Court Regulation No. 2 Year 2009, CLS Case Is Adjudicated as Administrative Case in Administrative Court.

[36] EPM Law, Article 91.

Despite the lenient requirement for legal standing, the probability of winning in public interest litigation appears to be low, except for cases brought by government. What is even more astounding is that, in contrast to the likelihood of facing defeat, there exists a higher probability of these lawsuits being dismissed on legal technicalities. This underscores the needs to improve the technical legal proficiencies of community and NGOs advocates to construct an effective legal claim.

The rise of PIL is followed by the backlash in the form of the Strategic Lawsuit Against Public Participation (SLAPP). The term SLAPP was first coined by George W Pring referring to malicious lawsuits against members of society who are exercising their political right to voice their concern in public issues.[37] This study found several SLAPP cases that have been filed related to environmental issues, involving individual members of the society,[38] Environmental NGOs,[39] the press,[40] and even scientists testifying in court.[41] The reasons for filing SLAPP case range from hindering business activities to defamation. This pattern is similar to Pring's finding in the U.S. where SLAPP cases occur in the form of civil claims or counterclaims camouflaged as ordinary torts such as defamation, business tort, and nuisance.[42]

However, an interesting development of SLAPPs in the global South is that the backlash to civil society occurs not only through civil lawsuits, as in the global North jurisdiction, but also through criminal charges.[43] In a country where injured parties can initiate criminal proceedings through a complaint to the police, this strategy is effective. Once the complaint is filed, the state institution (police and public prosecutor) is then ironically mobilised to obstruct its citizen participation. This occurs in India, Thailand, the Philippines, and, unsurprisingly, Indonesia.[44]

None of the civil SLAPP cases have won in an Indonesian court's final decision, but the strategy has achieved its main purpose: the target persons or groups seldom lose legally, yet they are frequently devastated and depoliticised by the long-term litigation. Meanwhile, SLAPP in the form of a criminal charge has a higher chance of winning[45] because of

37 George W Pring, 'SLAPPs: Strategic Lawsuits against Public Participation' (1989) 7(1) Pace Environmental Law Review 3.

38 *Pangon Sarkarys Sukses Mandiri Ltd v H Rudy* [2014] Malang First Instance Court No. 177/PDT.G/2013/PN.Mlg; *Bumi Konawe Abadi Ltd v Daeng Kadir et al* [2014] Unaaha First Instance Court No. 16/Pdt.G/2013/PN.Unh;

39 *Nuansa Indah Alam Ltd v WALHI (Friends of the Earth Indonesia)* [2021] Padang Sidempuan First Instance Court 9/Pdt.G/LH/2021/PN Psp; *Pertamina Ltd v PALI* [2017] Muara Enim First Instance Court No. 17/Pdt.G-LH/2016/PN.Mre.

40 *Terracota Ltd v Radar Cirebon Newspapr* [2015] Cirebon First Instance Court No. 4/Pdt.G/2015/PN Cn.

41 *Nur Alam v Basuki Wasis* et al [2018] Cibinong First Instance Court 47/Pdt.G/LH/2018/PN Cbi.

42 Pring (n 37) 9.

43 Nikhil Dutta, 'Protecting Activists from Abusive Litigation, SLAPPS in the Global South and How to Respond' (International Center for Not-for-Profit Law 2020) <https://www.icnl.org/wp-content/uploads/SLAPPs-in-the-Global-South-vf.pdf>.

44 *Public Prosecutor v Sawin et al* [2018] Banyuwangi First instance Court No. 559/Pid.B/2017/PN.Byw.

45 WALHI (Friends of the Earth Indonesia), 'Press Conference "Waiting for the President and the Minister of Environmental Decision on Protection for Environmental Activists"' <https://www.walhi.or.id/konprensi-pers-menanti-putusan-presiden-dan-menteri-lingkungan-hidup-atas-perlindungan-hukum-terhadap-pejuang-lingkungan-hidup>.

the resources available to prosecutors and the stricter and legalistic nature of criminal law proceedings.

Given the unique characteristics of SLAPP cases in Global South countries, it's crucial to develop innovative legal responses tailored to local contexts. In these regions, SLAPP cases might involve criminal charges, warranting laws empowering both judges and prosecutors to dismiss such cases early, akin to practices in Thailand and the Philippines. Additionally, assessing the criminal offences frequently employed in SLAPPs is essential. In Indonesia, various criminal offences, including those related to national security, public order, cybercrime, and forestry, are utilised in SLAPPs and require evaluation to prevent misuse. By learning from different jurisdictions, there is potential to enhance creativity in formulating effective responses to SLAPP.

Countries in the Global North have devised various legal strategies to tackle SLAPP, from swift dismissal procedures to penalising filers. Indonesia, drawing insights from these approaches, attempted to establish an anti-SLAPP legal framework. The simplest response to SLAPPs is to immunise participation in matters of public interest. Article 66 of the Indonesia EPM Law provides the same protection. Nonetheless, it has been largely criticised that this one general provision is not adequate to effectively operationalise protection in the courtroom. Therefore, the Supreme Court enacted Regulation No. 1 Year 2023 on Environmental Case Guideline which includes a technical provision on how to handle SLAPP cases both in civil and criminal proceedings.

However, since the Regulation can not contradict the existing laws, innovation is constrained, preventing the Supreme Court from introducing new procedures. Consequently, the regulation can only expand existing legal instruments to protect against SLAPP. This includes admitting SLAPP as a ground for exceptions,[46] rather than creating a new dismissal procedure and using a counterclaim mechanism to award compensation to the defendant as opposed to the mechanism where compensation can be awarded directly when the suit is proven as SLAPP.

The major consideration in designing the anti-SLAPP procedure is to choose whether the scheme should focus on suits filed with an improper purpose or suits targeting a protected class of communication and conduct. Focusing on the improper purpose will face the challenge of how to prove intention at the early stage of a trial. On the other hand, focusing on the protected class will raise the question of how to define this protected class.[47]

Indonesia combines both approaches by specifying the groups and activities protected from SLAPP suits and assessing the improper purpose of the suits.[48] Indonesia requires defendants to demonstrate that the suit has ill intent, aiming to obstruct their participation. As SLAPPs often masquerade as unrelated tort cases, linking the suit to their participation can be challenging. This method might inadvertently cause delays in early case dismissal, leading to unintended consequences.

[46] Exception in Indonesia Procedural Law is an objection filed by the defendant at early stage of the hearing on the defect in legal formality of the lawsuit. Such as objection on the Court competence. It does not address main dispute. The Supreme Court regulation broadens the scope of exception to not only include legal formality but also the improper purpose of the claim in SLAPP case.

[47] Dutta (n 43).

[48] Indonesia Supreme Court Regulation No. 1 Year 2023 on Environmental Case Handling Guideline, Article 48-50.

Safeguarding public participation raises the question of which forms of participation deserve protection. Should all environmental advocacy, irrespective of motivation, be shielded from SLAPP? Environmental NGOs significantly drive environmental litigation globally and support various civil society movements through their organising and resource mobilisation capabilities.[49] Yet, there have been instances where the public has questioned the motives behind certain NGOs litigating in the name of the environment.[50] This concern about the hidden intention of Environmental NGO is understandable. In fact, this research found a suspicious pattern in NGO litigation in Riau Province in which five NGOs filed an excessive number of lawsuits but revoked them all before the proceeding started.[51]

These frivolous lawsuits raise the question as to whether the 'intention' should be considered when giving anti-SLAPP protection. Pring in his research on SLAPP stated that the right of public participation does not depend on whether the citizen's views are right or wrong, wise or foolish, public-spirited or venally self-interested.[52] Indeed, the intention is a hidden thing that is difficult to judge, using it to filter public participation could bring unwanted consequences, especially where the environmental harm has in fact occurred. The question about the sincerity of intention is a moral question that differs from the positive legal question. In anti-SLAPP regulation, the question of the intention of a suspected SLAPP is translated into the law, which requires a judge to assess whether the plaintiff's suit is intended to hinder public participation. Meanwhile, in many countries, good intention is not a legal requirement in exercising the right to public participation, if the participation is conducted through the proper procedure then it should be protected.

2. Expanding the Scope of Harms for Liability Base: Biodiversity, Climate Change, and Human Rights

As discussed previously, PIL has been crucial in driving environmental cases in Indonesia. Since this type of litigation seeks to protect broader societal and ecological interests, plaintiffs have explored strategies to broadening the scope of legally recognised harm so that environmental damage is addressed in a way that reflects its full societal and ecological impacts. This has led to the expansion of legal base for liability beyond traditional claims of economic loss.

This development can be observed in biodiversity case where MoE expanded the harm in deforestation case to include ecosystem services such as hydrology regulation function and genetic resource storage. Recently, Environmental NGOs also tried to expand the liability in biodiversity case for species-based harm where a finite number of individual plants and animals are directly and intentionally harmed like in the case of illegal wildlife trade. Such species-based harm, in many jurisdictions, is primarily addressed through criminal and administrative processes, typically resulting in fines and imprisonment, while legal actions

[49] Mengxing Lu, 'The Role of NGOs in China's Environmental Public Interest Litigation' in Wang, Zhao and McNamara (eds) (n 2) 191.

[50] Darma, 'Dalam Tahun 2020! Ada Empat Gugatan Yayasan Riau Madani Dirohil Dicabut.Ada Apa?' <https://www.kabarriau.com/berita/4102/dalam-tahun-2020-ada-empat-gugatan-yayasan-riau-madani-di-rohil-dicabut-ada-apa> .

[51] See Sub-Section 2.1.

[52] Pring (n 37).

leading to restorative remedies are less common. Only a few cases were recorded worldwide where litigation was used to remedy species-based harm, those few cases occurred in countries such as China, Thailand, Cameroon, and France.[53]

The lawsuit by Walhi (Friends of the Earth Indonesia) against Nuansa Alam Nusantara Ltd (PT.NAN) – a company operating a zoo in North Sumatera- for illegal possession of protected species such as Sumatera Orangutan *(Pongo abelii)* and Komodo Dragon *(Varanus komodoensis)* is a pioneer litigation in Indonesia seeking to remedy species-based harm.[54] The main legal question in the case is whether removing a small number of animals from their wild habitat constitutes environmental harm. Indonesia's EPM Law recognises actions deemed to have caused environmental harm only when a certain threshold is breached. The use of thresholds to indicate a significant impact on the quality of the environment to trigger legal action is also used in other jurisdictions.[55] Unfortunately, the existing environmental thresholds are made for habitat-based harm which takes into account the carrying capacity of a specific ecosystem. There is no threshold of how many animals should be harmed or removed from the habitat so it triggers liability. Indeed, attempting to establish such a threshold will require a tremendous amount of scientific data over time which for many species in Indonesia is not available, not to mention the complex non-linear interaction in the ecosystem that needs to be taken into account. Yet, this effort might not be useful for biodiversity conservation as exceeding the threshold means we are already too late. The lawsuit argues that the 'protected status' of a species is an indicator that any kind of harm to this species constitutes environmental harm that should be restored.

The lawsuit also expands the scope of environmental harm to not only include harm to the individual species involved in the case but also harm to the species' survival and broader ecosystem services. It highlights that illegal wildlife trade affects more than just one or two orangutans—it threatens reproductive viability in an already shrinking population and disrupts ecosystem services like seed dispersal, scientific value, and cultural significance. Proving these broader impacts in court remains challenging, as judges may require case-specific causation, even where general ecological principles might be established. For example, research confirms that many tropical tree species rely on vertebrates, such as primates and hornbills, for seed dispersal, and their decline disrupts forest dynamics.[56] However, arguing on this research alone might not be sufficient in case specific litigation. Nevertheless, as scientific knowledge and public awareness of environmental links evolve, legal interpretations of causation also develop. Our ability to characterise and quantify direct and indirect harm continues to improve. With more cases testing these broader harms in court, judges may become increasingly receptive to recognising them.

[53] 'Cases Around the World' *(Conservation-Litigation.org)* <https://www.conservation-litigation.org/cases>.

[54] *WALHI (Friends of The Earth Indonesia) v PT Nuansa Alam Nusantara* [2021] Padang Sidempuan First Instance COurt 9/Pdt.G/LH/2021/PN Psp.

[55] Valerie M Fogleman, 'Threshold Determinations Under the National Environmental Policy Act' (1987) 15(1) Boston College Environmental Affairs Law Review 59.

[56] Richard T Corlett, 'Frugivory and Seed Dispersal by Vertebrates in Tropical and Subtropical Asia: An Update' (2017) 11 Global Ecology and Conservation 1.

Compared to biodiversity litigation, climate change litigation is relatively new in Indonesia with fewer cases, but it is expected that the climate change argument will be increasingly used as a legal basis in Indonesia cases, joining the global trend of climate change litigation.[57] A similar expansion of harm as ground for liability is emerging in climate change litigation, where Indonesian lawsuits are beginning to frame carbon emissions themselves as a form of direct environmental harm requiring compensation. Unlike other climate lawsuits seeking remedy for loss and damage from private entities that focus on attributing historical emissions to specific climate-related damages,[58] Indonesia has taken a more pragmatic approach: unlawful carbon release is treated as an immediate, actionable harm rather than requiring proof of long-term climate impacts. [59]

A key example is MoE vs. Kalista Alam Ltd, Indonesia's first major climate-related lawsuit, where the Ministry of Environment sued a palm oil company for illegally clearing peatland using fire.[60] The government argued that the defendant's actions resulted in excessive GHG emissions and the destruction of a critical carbon sink, thus violating environmental laws. While climate change was not explicitly framed as the lawsuit's central issue, the MoEF referenced Presidential Regulation No. 61/2011 on GHG Emission Reduction to establish standing and legal violations. Notably, the majority of climate change litigation from Indonesia recorded in the UNEP report follows a similar pattern, primarily involving MoE lawsuits.[61] These cases are often related to the Forestry and Other Land Use (FOLU) sector, which is a significant contributor to Indonesia's GHG emissions,[62] reflecting the priority placed on this sector for legal enforcement.

Indonesia takes a more pragmatic approach in this case by focusing on holding companies liable for their current emission. Rather than attempting to attribute a polluter's historical emissions to climate change and build the causal link between climate change and specific injuries, The MoE argues that the unlawful emission release by the perpetrators itself is damage that should be compensated and restored. Indonesia accepts the causal link between carbon release from the FOLU sector and climate change as an established fact, as many studies have proven it at the time of litigation. By arguing on a more direct environmental harm that includes carbon release and the loss of carbon sink, the case shifts the focus from past to future harm with a more causation friendly reasoning.

Furthermore, this case - just like majority of Indonesia climate change cases - does not only argue the harm caused by carbon emissions but also the damage

57 Joana Setzer and Catherine Higham, 'Global Trends in Climate Change Litigation : 2023 Snapshot' (Grantham Research Institute on Climate Change and the Environment, Sabin Center for Climate Change Law and Centre for Climate Change Economics and Policy 2023).

58 Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38(4) Oxford Journal of Legal Studies 841.

59 Andri G Wibisana and Conrado M Cornelius, 'Climate Change Litigation in Indonesia' in Douglas A Kysar and Jolene Lin (eds), *Climate Change Litigation in the Asia Pacific* (Cambridge University Press 2020) 234.

60 *Ministry of Environment v PT. Kalista Alam* (n 19).

61 Environment (n 4).

62 'Indonesia Second Biennal Update Under the UNFCCC' (Republic of Indonesia 2018) <https://unfccc.int/sites/default/files/resource/Indonesia-2nd_BUR.pdf>.

to biodiversity. The remedies sought typically include compensation for ecological losses from carbon emissions during the fire, as well as restoration costs for both carbon sinks and biodiversity. This underscores the interconnectedness between biodiversity loss and climate change in these disputes. This pattern also highlights a notable feature of climate change litigation in Indonesia which is its strong link to biodiversity issues.

The last key development in the legal basis used in environmental litigation is the integration of harm to human rights. Despite the fact that it has been long recognised Indonesia's 1945 Constitution and Law No. 39 Year 1999 on Human Rights, *Melanie Soebono vs Indonesia Government* is the first environmental litigation that tried to enforce this right.[63] The case was filed in 2019, in which 32 citizens accused the government of failing to enact the related regulations, conduct proper monitoring and evaluation, enforce the laws, and disseminate important information to the public, which resulted in the failure to provide clean air for Jakarta residents. The plaintiffs demanded the court to declare that the government has conducted unlawful act and has violated their human right to a healthy environment.

The court acknowledged that the government had conducted an unlawful act in failing to fulfil its legal duty stated in various regulations related to air pollution control. However, the court refused to declare that the government had violated human rights. The court's reason is that since the Citizen Lawsuit is based on the government's unlawful act, declaring the government has conducted this unlawful act is enough to trigger injunctive relief requested by the Plaintiffs. This raises the question of whether invoking harm to human rights is necessary at all.

Litigations invoking the right to a healthy environment are anticipated to be widely used in the Global South. However, critics argue this right lacks comprehensive theoretical underpinnings and faces contention regarding its nature, scope, and requisite threshold for establishing harm.[64] In contrast to first-generation human rights, wherein states are obligated to respect and protect, a healthy environment is a governmental policy objective that is continuously being pursued. In the defence presented in Melanie's case, the government asserts an ongoing commitment to realising this right, citing various policies and actions undertaken to date.

Recognising that environmental protection and improvement are ongoing efforts while also holding the state accountable for failing to fulfil the right to a healthy environment can be tricky. This could be one of the reasons the court refrains from solely condemning the government for not achieving its goal. Instead, the court evaluates specific measures and obligations outlined in regulations, then identifies actionable steps and milestones to facilitate the court's assessment of compliance. This approach shifts the focus from the end goal of a healthy environment to the procedural actions necessary to achieve it.

The effectiveness of invoking the right to a healthy environment as a human right in environmental cases is still vague. However, a study shows that bringing this argument somehow increases the chance of winning, even though the courts do

[63] *Melanie Soebono v Indonesia Government* [2021] Central Jakarta First Instance Court 374/Pdt.G/2019/PN Jkt Pst.

[64] Karen E MacDonald, 'A Right to A Healthful Environment- Humans and Habitats: Rethinking Rights in An Age of Climate Change' (2008) 17(4) European Energy and Environmental Law Review 213.

not rely on this argument specifically.[65] Indeed, bringing human rights issues will increase the plaintiff's standing and add a sense of urgency to the case. It will also draw more spotlight in public campaigns.

3. Shift to Restorative Remedies

As courts increasingly acknowledge diverse forms of environmental harm as the basis for liability, the nature of remedies sought is also evolving. Recognising harm to biodiversity and other ecosystem services demands more than just financial compensation, it requires restorative remedies that aim to repair ecological harms and harms to other values of nature. Restorative remedies reflect a shift towards a more inclusive and effective approaches to addressing environmental harm.

The shift toward restorative remedies marks an evolution in environmental litigation,[66] both conceptually and practically. Scholars have expanded restorative justice to environmental harm, recognising more-than-human victims (e.g., the environment, wildlife) and communities as collective victims..[67] If nature is a victim, then remedy must aim to heal it. In some cases, restorative remedies are better to address community harm (e.g., cultural loss) than monetary compensation alone. At practical level, legislations like the EU Environmental Liability Directive and the US Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) prioritise primary and compensatory restoration. This trend is also evident in the Global South, China amended its Environmental Protection Law and its judicial interpretation have improved guidance on environmental restoration.[68]

Indonesia's EPM Law lacks a clear definition of environmental damage, but this ambiguity allows parties to explore its scope through litigation. To guide government lawsuits, MoE Regulation No. 7/2014 defines four components of environmental damage: the cost of non-compliance, dispute resolution, mitigation and restoration, and ecological loss. MoE cases typically seek restoration costs and compensation for ecological loss, akin to primary restoration and compensation for interim loss under US CERCLA. While both components are calculated using a restoration-based approach, MoE relies on default values and templates in all of the cases, raising concerns about its methodological validity. Additionally, fiscal regulations require litigation proceeds to be transferred to the state treasury as non-tax revenue, delaying their use for case-specific restoration—a challenge also seen in China[69] and Cameroon.[70] The

[65] Pau De Vilchez and Annalisa Savaresi, 'The Right to a Healthy Environment and Climate Litigation: A Game Changer?' (2023) 32(1) Yearbook of International Environmental Law 3.

[66] Emanuela Orlando, 'Public and Private in the International Law of Environmental Liability' in Federico Lenzerini and Ana Filipa Vrdoljak (eds), *International Law for Common Goods: Normative Perspective on Human Rights, Culture and Nature* (1st edn, Bloomsbury 2014) 395.

[67] Miranda Forsyth and others, 'A Future Agenda for Environmental Restorative Justice?' (2021) 4((1) The International Journal of Restorative Justice 17.

[68] Fei Song, Kang Zhang and Baozhen Song, 'An Empirical Examination of Liability for Ecological Environment Restoration in the Context of the Civil Code of China' (2024) 10(11) Heliyon e31240.

[69] ibid.

[70] Maribel Rodriguez and others, 'Legal Remedies for Harm to Biodiversity: An Analysis of Cameroon's Environmental Liability Legislation' (Conservation-Litigation.org 2023).

reliance on default value and templates, fiscal constraints, and the EPM Law's lack of a clear mandate to allocate the money for actual restoration, raises concerns that restoration is used more as a basis for monetary claims rather than genuine environmental restoration.

In response to these concerns, the Supreme Court Environmental Case Guideline emphasise restoration as a required action for defendants. If they cannot restore the damage themselves, they must cover the costs for the government or a third party to do so. Monetary payment is thus a consequence of a restoration order, not the primary remedy. The Guideline also requires plaintiffs to submit a general restoration plan detailing the restoration object, activities, standards and targets, timeline, monitoring, and costs.[71] This ensures that claims for restoration costs are grounded in a reasonable plan, guaranteeing that any funds paid by the defendant to the government are used strictly for the intended restoration. Furthermore, having restoration standards in place at the time of judgment facilitates court order execution and compliance monitoring.

However, the Guideline is vague regarding compensation for ecological loss (i.e., interim loss). It states only that compensation should be considered for environmental protection, without explicitly requiring its use for compensatory restoration.[72] Although the MoEF applies a restoration-based approach when calculating ecological loss compensation, the lack of clear provisions allows funds to be allocated to general environmental protection activities rather than directly addressing the harm in the case—reinforcing past critiques that MoE uses restoration merely as a proxy for monetary valuation.

The MoE is currently revising Regulation No. 7/2014 to address public concerns and to align with the new Supreme Court Guidelines. Discussions have also begun between MoE and the Ministry of Finance on utilising the newly established Indonesia Environmental Fund (IEF/BPDLH) to manage restoration funds from litigation, rather than transferring them to the state treasury. Since the IEF operates outside the fiscal system, the funds can be used more swiftly for restoration, bypassing bureaucratic fiscal procedures. This demonstrates how court decisions can drive government reforms and improve environmental governance.

The Supreme Court crafted its Guideline to address the problem of environmental restoration as a remedy assuming the government as the plaintiff. However, it overlooks the growing role of Environmental NGOs and civil society in seeking restoration as part of their claim (Table 1). Initially, Environmental NGOs sought symbolic remedies like a public apology or general orders to halt pollution, but now they demand concrete actions such as the rehabilitation of particular wildlife within a specified timeframe[73] or the implementation of specific monitoring methods to prevent further harm.[74] Similarly, class actions, once focused on monetary compensation, are now increasingly incorporating environmental restoration that could remedy the group interest collectively.[75] Since the Guideline

[71] Environmental Case Guideline, Article 55.

[72] Environmental Case Guideline, Article 53.

[73] *WALHI (Friends of The Earth Indonesia) v PT. Nuansa Alam Nusantara* (n 54).

[74] *Ecoton v The MoEF* et al [2019] Surabaya First Instance Court 08/Pdt.G/2019/PN Sby.

[75] *Jalalimun et al v Ghandaerah Ltd* [2022] Pelelawan First Instance Court 17/Pdt.G/2022/PN Plw.

does not specify plaintiff types, it is unclear whether the restoration plan requirement applies equally to NGOs and civil society. Given their limited access to scientific resources (subsection 2.2), courts are unlikely to impose the same evidentiary burden on them as on government plaintiffs. However, incorporating restoration standards into court decisions would help ensure compliance and the effectiveness of restoration orders. Therefore, effort should be made to increase the capacity of NGOs and civil society to access scientific resources and expertise to help them develop a sound environmental case.

Ecological restoration alone may not be sufficient to remedy other types of harms such as harm to cultural or relational value of nature. Innovative remedies have emerged for such intangible harms, as seen in *Ramapough Tribe vs Ford Motor,* where a medicinal garden was funded to preserve traditional knowledge and educate local students.[76] However, Indonesian courts have been less receptive in recognising intangible harms, often dismissing them as too abstract or immaterial. While some cases have raised these claims, judges rarely grant remedies for them. However, as our knowledge evolves so does our ability to conceptualise harm. Ecological losses, once seen as too abstract, are now increasingly recognised as concrete damages warranting remedies. More cases are needed not just for the plaintiffs to exercise how to conceptualise and articulate these intangible harms better but also to push the judges to scrutinise and accept broader harms. Walhi vs PT.NAN case (see 3.2) is one such case, where the plaintiff argued on a more abstract value such as loss to scientific and cultural value and requested remedy in the form of conservation education funded by the defendant.

While plaintiffs and scientists may have the vision of an ideal remedy, the legal process imposes limitations. Judges, when deciding remedies, are bound by legal principles that may not always align with the best scientific solution. They must also consider practical non-scientific factors, such as whether the remedy can be realistically implemented, the time limits of a litigation, and the extent of the defendant's responsibility. Full ecological restoration, for instance, can take a long time or may even be impossible in some cases. Therefore, courts must establish a feasible standard of environmental recovery, determining what scope of restoration is reasonable and how long a defendant is responsible. In this case, a balance between scientific ideals and legal realities must be struck, requiring collaboration between scientists and legal practitioners to find a compromise that is both enforceable and effective.

Embracing innovative remedies is only part of the challenge, ensuring effective execution of court orders is equally critical. The execution of court orders poses a significant hurdle in Indonesia,[77] with defendants employing various strategies to impede the process by exhausting legal appeals or filing for bankruptcy. Even when the defendant complies by paying the restoration cost or opts to carry out the restoration themselves, monitoring these long-term obligations remain a challenge due to lack of court sustained oversight mechanism. Unlike jurisdiction with *writ of continuing* mandamus, Indonesia does not

[76] Kaelyn Forde, 'Ford Pays for Ramapough Tribe Medicine Garden on Former Toxic Site' *Aljazeera* (16 June 2014) <http://america.aljazeera.com/articles/2014/6/16/ramapough-ford-toxic.html>.

[77] Alfeus Jebabun and others, *Initial Assessment : Problems of Court Decision Enforcement System in Indonesia* (Indonesian Institute for Independent Judiciary 2018) 66-68.

have legal instrument to compel parties to perform an act continuously until full compliance is achieved, instead of just a one-time court order. The Environmental Case Guideline suggests incorporating enforcement measures into granted remedy such as clear a clear standard of when the restoration order is considered completed, timelines, monitoring, and reporting system.

C. Moving Forward: Expanding Legal Tools for Environmental Protection

Twelve years of environmental civil litigation in Indonesia reveal a growing public dimension in civil litigation, blurring the line between public and private law. Transplantation of public interest to liability is a dynamic triggered by civil society and NGOs in their effort to raise awareness, compensation and restorative remedies. While public-law enforcement is often favoured for addressing collective environmental harm, civil litigation remains crucial when public agencies fail to act or lack resources. Allowing civil society to impose liability not only complements government efforts but also expands environmental protection beyond a state-centred approach, ensuring broader accountability. However, using a civil law framework to pursue public goals has its own challenges.

While there are cases where private law tools have been invoked for the protection of public interest, civil liability law remain conceptually designed to address private harms;[78] environmental protection and restoration are not its original objective. Its focus on individual rights, direct causation and limited remedies might be inadequate to address the public aspect of environmental harms. Private law has historically accommodated environmental harms only when linked to private harms, often neglecting broader environmental concerns such as wildlife protection. Forcing a large-scale and complex environmental goal into private law framework raise a concern of destabilising legal doctrine.[79]

In response to this, some jurisdictions adjusted their classic civil liability rule to accommodate public dimension of environmental harms. For instance, France's 2016 Civil Code reforms introduced ecological damage as a distinct category, allowing restoration as the primary remedy, with monetary compensation used only when direct restoration is not feasible.[80] Another response is to develop a specialised environmental liability regime. This framework, distinct from traditional civil liability, explicitly addresses damage to natural resources and ecosystems. Notable examples include the US CERCLA which move beyond private compensation models to prioritise ecological restoration.

Indonesia adopted the later strategy by enacting an environmental liability regime through its 2009 EPM Law. However, since these cases are still classified under civil liability, the court defaults to the traditional civil law framework when the EPM Law is silent on certain matters, which might not be adequate, especially in term of procedural law. For instance, EPM Law expanded the legal standing, fuelling public interest litigation, and

78 Orlando (n 66) 1-2.

79 Sarah Downs, 'Civil Liability for Climate Change? The Proposed Tort in Smith v Fonterra with Reference to France and the Netherlands' (2024) 33(1) Review of European, Comparative & International Environmental Law 31.

80 ibid.

introduced an anti-SLAPP provision to protect such litigations. However, when operationalising this anti-SLAPP provision, the courts refer to the Civil Procedural Code which lacks a mechanism for early dismissal on anti-SLAPP ground and Civil Code does not recognise SLAPP as one of the reasons to reject a case. Furthermore, the EPM Law does not clearly define the scope of environmental damages which, on one hand, allows plaintiffs to push the boundaries of what courts may accept. However, courts in civil liability cases tend to classify damages as either material or immaterial and are often reluctant to award immaterial damages, deeming them too abstract. This creates obstacles when the plaintiffs argue on a more intangible value of nature. The issue of remedy is even more challenging, the EPM Law provides restorative action as one of the remedies, but relies on the Civil Procedural Code for enforcement, which lacks a mechanism for long-term restoration order. While the Civil Code recognises restoring the condition to original state as a remedy, the Civil Procedural Code allows it to be converted into monetary payment without plaintiff's obligation to use the money for restoration due to its orientation to private interest.

The Supreme Court Environmental Case Guideline aims to address this issue by providing instructions on how to handle SLAPP cases, crafting a court order on environmental restoration and how to execute them. However, its application faces challenges as courts, accustomed to the Civil Code and Civil Procedural Code, might unconsciously attempt to fit the guideline into traditional practices. To support this shift, the Supreme Court conducts environmental judicial training to reshape judges' understanding of civil liability in environmental cases,[81] such as encouraging the judges to consider causative link to projected harm based on scientific evidence instead of the traditional direct causation and to be innovative in crafting remedies beyond monetary compensation.[82]

Moving forward, both judge and parties in the court should be aware that addressing environmental harms through traditional civil liability way of thinking is like using old tools to solve new problem, making gaps inevitable. Instead of pushing the problem to fit the tools, parties and judges should innovate by combining the old tools with new tools such as environmental law, conservation law and human right law or by reinterpreting the general principle of civil liability in light of environmental law principles.

Ultimately, civil liability is an important instrument for pursuing environmental protection and restoration, but it has its limitations. Therefore, other types of liability should be explored alongside civil liability. In particular, recognising the environment as a public good justifies use of publicly-oriented legal actions, which may be found in administrative scheme or criminal law, both of which nowadays are also evolving to include restorative remedies and restorative justice.[83]

CONCLUSION

Based on the patterns observed in the 321 cases collected, it is anticipated that environmental litigation in Indonesia will continue to play a crucial role, with a

[81] Indonesia Supreme Court Environmental Working Group, 'Environmental Judges Certification Training Curriculum' (2022).

[82] Brian J Preston, 'What Judges Need to Understand in Adjudicating Climate Cases' (International Development Law Organisation (IDLO) 2024).

[83] Nicola Pain, 'Encouraging Restorative Justice in Environmental Crime' (2018) 13 The Newcastle Law Review 29.

decrease in volume and a shift towards fewer but more strategically selected cases. The key developments reflect an increasing recognition of the public dimension of environmental harm within the scope of civil litigation, requiring innovation in the structure and functional scope of liability regimes. The cases also uncover the limits of both Indonesia's environmental and civil liability law, particularly in operationalising restorative remedies, but it also highlights possible options for further developments.

The gradual integration of liability rules into broader environmental protection strategies signals a convergence between the goals of civil liability and public law norms on prevention and restoration, marking a significant shift in legal practices and strategies. Jurisdictions moving towards this coexistence must be mindful of the strengths and limitations of each legal tool based on its original intent so that they can identify appropriate solutions and modify the existing instrument to address emerging challenges.

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