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ENVIRONMENTAL JUSTICE IN JUDGE'S DECISION

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ABSTRACT: Environmental disputes have their own characteristics. Not many judges' decisions are based on the principle of sustainable environmental management. Some judges' decisions are based on considerations of how to apply the precautionary principle. These decisions serve as a bridge between responsibilities to prevent damage to ecosystems with uncertain scientific information. This paper is attempted to analyze judge's decisions which can create social justice for the environment.The results of the study concluded that (1) based on several examples of judges' decisions, the realization of environmental justice is undertaken through reasoning to produce decisions about what is good for the environment based on general ethical principles, principles of environmental ethics and the principles of environmental preservation, and (2) in environmental disputes, judges must be progressive in giving decisions, judges must find and explore legal values related to the written and unwritten environment that live in the community.

KEYWORDS: environment, judge's decision, justice

I. INTRODUCTION

Several cases of law enforcement carried out by the Ministry of Environment and Forestry experienced a deadlock. Efforts to restore the environment due to forest fires are often constrained, but there are some decisions that use strong arguments to punish business actors. Some decisions of the Supreme Court Jugde regarding environmental cases are appreciated, because they have upheld environmental justice and the constitutional right of the community to obtain a good and healthy environment. The Supreme Court commits to apply the principle in dubio pro natura (justice for the environment). [1]

One of the decisions as an example: in the Supreme Court Decision No. 460K/Pdt /2016, how judges at the cassation level use a number of arguments to correct the judges' decisions and appeal (judex facti). If faced with scientific uncertainty (scientific uncertainty), where the arguments of the plaintiff and the defendant are equally strong, they should not give up looking for propositions. Especially if it does not try to refer, understand and apply the essence of legislation in the environmental field. Where the law has contained the precautionary principle. The 1992 Rio Declaration states "in order to protect the environment, the precautionary approach shall be widely applied by states according to capabilities. Where there are threats of serious or irreversible damage, lack of full scientific uncertainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[2]

In some environmental disputes, the panel of judges gave consideration based on the view that God created forests for humans by having various functions, if they are destroyed by humans, then the situation would not be the same as before. Management of forest areas must be done carefully. Moreover, this principle of prudence has become part of national law. The judiciary as part of the state's power in the field of justice, must ensure that in deciding the case for trial, consideration must be given to how the principle of prudence has been implemented. [3]

Judges are generally tasked with examining, adjudicating and completing proposed cases. Judges' decisions must meet the formal juridical element, can be implemented and resolve the problem. Decisions handed down cannot be withdrawn or changed, so as a human being in giving decisions, judges only dialogue with themselves and their Lord. Ideally the verdict handed down by a judge, should really exude the spirit of justice and God. The spirit of justice and God leads to environmental ethics. In the Middle Ages, historian Lynn White said that "modern science and technology as sources of contemporary environmental problems are interrelated to one another." The eco-justice movement emerged in the environmental crisis. This movement seeks to integrate ecology, justice for society and religious matters. [4]

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The judge's decision consists of at least three principles that must be fulfilled, namely the principle of justice, the principle of legal certainty, and the principle of benefits. In practice, judges find it difficult to make decisions proportionately, especially if there is a conflict with one another. The judge must think which should take precedence over the value of certainty, fairness or benefit. This description shows that the judge is faced with a dilemmatic situation facing an antinomy between values certainty, fairness, and benefits, which should take precedence, especially if there is a conflict between the value of certainty and justice[5]

In the settlement of environmental cases through the judicial process, the function and role of the judge is not only the leader in the trial, but also has the obligation to seek and find objective or material law that will be applied in deciding the case. In the implementation of sustainable development, the most important thing is: "how to prevent dispute, not how to settle dispute"in accordance with the adage: “prevention is better than cure”, and the adage that is not denied its truth: “an ounce of prevention is worth a pound of cure.” Where the settlement of environmental disputes aims to stop environmental pollution and damage, compensation can be given, the person in charge of the business /activity complies with the laws and regulations in the environmental field and environmental recovery can be carried out. The problem in an environmental lawsuit is that compensation can be carried out for unlawful acts, if there is evidence. [6]

Proving that there is a loss in environmental cases is usually not easy. This is due to the effects of new pollution felt in the long run or the lack of knowledge of the plaintiff. Some examples of cases pollution of the Ajkwa river and river ecosystems due to acid and toxic waste disposal from PT Freeport Indonesia (1996), pollution of the marine ecosystem due to the disposal of PT Newmont Minahasa Raya's tailings (PT NMR) to the seabed (1999), or the case of Kanann vs Ford (2005), Wayne Mann leads a group of Ramapough in a lawsuit against Ford Motor Company.[7]

The inability to prove something that has caused harm as mentioned in the cases above, requires law enforcement in which the material truth to realize material justice. Jimly Asshiddiqie said that “law enforcement should contain justice itself, so that the terms law enforcement and justice enforcement are two sides of the same coin.” For the sake of legal certainty, judges are faced with normative settlement of environmental cases and must consider environmental justice. The purpose of this paper is to (1) analyze how judges' decisions can realize environmental justice and (2) analyze how the judge's decision progresses in deciding environmental disputes.

II. RESULT AND DISCUSSION

1. Environmental Justice as Judge's Consideration

The first time that was considered by the judge as the basis for the decision was written law. If the written law was not sufficient as the basis for the decision or considered not the right basis for the case, the judge sought and found his own law. The intended law is obtained from other legal sources, such as jurisprudence, doctrine, treaties, customs or unwritten laws and is obliged to explore the values that live in society. The role of the judge is very large to determine how environmental protection and rehabilitation is put forward in cases of forest fires or environmental destruction.[8]

Some decisions on environmental disputes that are examined, in an effort to further develop a text of the law, the judge uses his logical reasoning. The judge is no longer bound and adheres to the sound of the text of the law, but the judge must not ignore the law as a system and the judge uses his logical reasoning (construction method). In this globalization era, many statutory texts are static and slow to adapt to changing conditions, while problems continue to develop and require interpretation. Legal language in the form of statutory texts often cannot describe human thoughts that are very nuanced, so judges often make legal discoveries, so that justice can be achieved.[9]

Judges explore the law by promoting the principle of justice. If the dispute faced is not yet regulated by law as written law, the judge applies an unwritten law by promoting justice with the main characteristics of being humane, civilized, and appropriate. This is in accordance with the notion of justice that puts forward the postulate, that philosophically essential justice is values that are in accordance with humanity (humanist), civilization (civilization), and propriety (reasonable). The table below attempts to illustrate several examples of judges' decisions on environmental disputes from different levels of the judicial process. Of the several decisions there are important notes to the ruling of the ruling. The verdict shows how the judge uses his interpretation and reasoning to decide on environmental disputes. Judges not only pay attention to the legal text,

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but also use their interpretation that environmental management needs to pay attention to environmental principles, rules and ethics, as follows: [10]

Table 1.
Precautionary Principle in the Decision of the Environmental Dispute Judge

No	Level	Number of Decision	Conclusions from the Amar Decision
1.	First Level Verdict: 21-02-2018	Decision: 21-02-2018 Banjarmasin District Court Decision No.125/ Pdt.G/ LH/2016/PN Bjm	Precautionary principle functions to change the responsibility from acts against the law to strict liability.
3.	Appeal Rate Verdict : 21-07-2016	Decision of PT Banda Aceh No.128/PID/2016/ PT.BNA	Judges are expected to be progressive because environmental matters are complex, therefore judges must have the courage to apply the principles of environmental protection and management including the precautionary principle
4.	Decision Cassation Rate Verdict : 28-08-2015	Supreme Court Decision Number 651 K/Pdt/2015	There is no strong scientific evidence in environmental cases to determine the causal relationship between human activities and its influence on the environment, the high court / judge /community as holders of constitutional rights to a healthy ecology must apply the precautionary principle
5.	Decision Cassation Rate Verdict: 29-02-2016	Supreme Court Decision Number 2905 K/Pdt/2015	The judges should be progressive, because environmental cases are complex and many scientific evidences are found, therefore they must have the courage to apply the principle of protection and environmental management, including the precautionary principle.
6.	Decision Cassation Rate Verdict : 28-06-2018	Supreme Court Decision Number 1095 K /Pdt/2018	Decision-making officials including judges should apply the precautionary principle.
7.	Review Level Verdict : 17-10-2018	Supreme Court Decision Number 690 PK/Pdt/2018	Precautionary principle is applied if a dispute is faced with scientific uncertainty. Because scientific evidence is not easy to obtain, it does not necessarily mean that they conclude that no environmental consequences or damage have occurred but instead they have to make decisions in the interests of the environment (in dubio pro natura)

Source: Directory of Decisions of the Supreme Court of the Republic of Indonesia, 2019

Based on the conclusions of the decision delivered in the table above, it can be analyzed that the principle of caution (precautionary principle) is the basis for judges to decide environmental disputes. Complicated scientific evidence does not serve as a reason for judges to ignore the causal relationship between human activities affecting confusion (being damaged or polluted). Even the judges conveyed the precautionary principle can function to change the responsibility from acts against the law to strict liability. Strict liability is

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known as liability without error, absolute responsibility which means that liability arises immediately at the time of the action, without questioning the wrongdoing. “Several studies have shown that there are obstacles in court practice when applying strict liability. There is a difference in understanding among law enforcers about the implementation of strict liability operationally.” In Indonesia, strict liability is seen as liability where the guilty element of the defendant has been proven, and then based on the presumption/assumption regarding the existence of this error, the defendant is declared responsible. Defendants can only escape responsibility if they are able to prove their innocence. When the element of error cannot be proven, the principle of prudence can be considered by the judge to decide the environmental dispute. [11]

In one of the environmental disputes, it is stated in the Supreme Court judge's ruling that the judicial panel used its logical reasoning in resolving the dispute. The panel of judges argued that forest and land fires were related to the loss of various ecological elements. Damage to the ecological functions of natural resources, such as peatlands and the extinction of various flora and fauna, basically cannot be fully restored as they were before (irreversible effects). Ecological, flora and fauna elements were created by God Almighty, and humans are not able to create them. The impact of land fires is not only felt in one district or province, but also reaches several provinces and even reaches neighboring countries.[12]

Widespread social losses with air pollution across regencies/provinces and countries. Peatlands have important ecological functions for the Indonesian people in the form of maintaining water systems. The presence of burning peatlands causes many losses. Environmental matters always contain questions of uncertainty about the extent of the occurrence of environmental disasters, environmental losses and their consequences in the present and future. The environment created by God Almighty has a very complex connection. The relationship between one region or one type of natural resource with another is not fully known and is certain by humans, the applicable law orders that decision-making officials including judges apply the precautionary principle.[13]

Environmental protection and management is based on prudence which implies when faced with uncertainty, then decision-making officials including judges must make decisions or decisions that prioritize environmental protection and restoration (in dubious pro natura). As a result of forest and land fires in the form of loss of ecological elements, loss of fauna and flora, air pollution, disruption of water systems and decline in other ecological functions cannot be fully restored, then decisions in environmental cases related to forest and land fires must deterrent effect, so that other business actors also pay attention and comply with environmental legal norms in conducting their business. Ecological losses or environmental losses are losses that cannot be measured by market prices.[14]

The verdict of the judges considered that there had been environmental damage due to the exceeding of the criteria for environmental damage. Environmental damage certainly causes environmental losses that can be measured or estimated in monetary terms. In addition, forest fires, vegetation and land must release what is mentioned with greenhouse gases into the air or atmosphere that can cause climate change. In the previous decision, the principle of prudence should be applied. The precautionary principle implies that decision-making officials including judges as state decision-makers in law enforcement or dispute resolution if faced with scientific uncertainty. This does not necessarily conclude that there is a result or environmental damage that occurs. On the other hand, the judge must have made a decision in the interests of environmental protection or recovery (in dubio pro natura), because environmental damage is latent (not immediately apparent) and often irreversible.[15]

There should be a prohibition on plantation business operators opening or cultivating land by burning land. The occurrence of land fires in this case is due to the element of omission, so that there is a serious threat to the environment. The perpetrators are absolutely responsible for the loss of the burned area and cause environmental damage, without the need to prove the element of error. This consideration was decided because the area of land and peat forests has important ecological functions for human life in the present and the future, among others, as the guardians of the water system, the lungs of the earth and the habitat for flora and fauna as the creations of God Almighty who are also entitled to alive and protected. [16]

2. Progressivity of Judge's Decisions

In one appeals decision in the table above, the judge expects the courage of the first-degree judge to use the principle of prudence and be progressive. Progressive attitude is one alternative so that judges find law and not be bound by legal positivism, because law enforcement is a series of processes to describe values, ideas, and ideals that are sufficiently abstract as the objectives of law. Legal goals or legal ideals start moral values, such as justice and truth. These values must be able to be realized in real reality. The existence of law is recognized if

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the moral values contained in the law are able to be implemented or not. Law enforcement as a means to achieve legal objectives, then all energy should be mobilized so that the law is able to work to realize moral values in law.[17]

A progressive attitude is taken because the law always changes. There are values in society that experience a shift that is no longer in accordance with the text of the legislation. Changing the legal text to suit the needs requires a long and complicated mechanism, therefore another legal source is needed that can be used as a basis for responding to legal events for which there is no legal text. One of them is the judge's decision. For this reason, judges have to have progression in order to provide justice for justice seekers. [18]

Judges' progressive decisions, for example in environmental cases. Environmental cases always contain of an element of scientific uncertainty, in addition to examine scientific evidence, judges must look for written legal norms or unwritten legal norms or values related to the environment that lives in society. Another important issue of this decision is the consideration of the panel of judges regarding the calculation of compensation for environmental damage. The calculation of losses due to environmental damage cannot be compared to objects or property rights that have become objects of trade, but more than that. In calculating losses due to environmental damage, ecological loss (function) and environmental recovery costs must be considered. In fact, the environment has a multifunctionality for humanity. It is still rare for decisions to make environmental justice the basis for deciding environmental cases, because in this decision judges not only decide according to their conscience, but also see environmental justice. [19]

Judges occupy a central position in giving birth to decisions that meet the values and sense of justice of the community's law. In essence, what the judge does when confronted with a concrete event, case or conflict of interest, he must resolve it completely. Judges are given freedom in finding the law, whether the judge is sufficient with the law as the only source, or needed another source, to achieve good legal judgment. For that the judge must know, search for and find a law to apply to the case presented to him. Through good legal reasoning which is then outlined in legal considerations, the rationale of the judge can be known to arrive at a conclusion.[20]

In the realm of jurisprudence, the characteristics of the existence of progressive law, when questioned the essence of a truth that does not stop as long as humans still continue to think. Society always moves continuously throughout time, in line with the empirical reality that law works in society, as well as achieving the truth always see the reality of society and law. Satjipto Rahardjo initiated a progressive law based on the assumption that “law is for humans, not vice versa, and law is not an absolute and final interaction.” The law exists not for the law itself, but exists for a broader. If there is a problem in the law, then what must be corrected is the law itself. Interaction in law occurs continuously, because law is in the process of continuing to become (law as a process, law in the making).[21]

The existence of progressive law is among several theories, not independent, but related to other legal theories. There is a relationship between law and society. Progressive legal studies are essentially described as the use of legal optics towards behavior. Law is not seen from the view of law itself but rather from the social goals to be achieved and the consequences arising from the operation of the law. In environmental disputes, as with progressive legal studies that have core behaviors, dispute resolution is not only based on legal texts, but more than that. The paradigm of thinking and the ability to reason that a good decision is based on ethics and environmental justice. To achieve environmental justice, his perspective is based on ethical biosentrism.[22]

Keraf argues that “the ethics of biosentrism seeks to make a revolution and a moral leap which demands that the biotic and ecological community be treated as a moral community.” The ethical view of biosentrism, describes humans as being at par with nature. Humans are not separate from nature and are not the center of nature, but rather a part of the universe. As Keraf said, “humans can only live and develop as whole people not only in the social community but also in the ecological community, that is, creatures whose lives depend on and are closely related to all other life in the universe.” Thus, it is not only humans who have value, but nature also has value for itself, so nature deserves and needs to get moral consideration and care.[23]

In essence, every life on this earth has the same moral value, so it needs to be protected and saved. As a moral community, the universe and humans together have moral values. Therefore, the scope of ethical conduct and morality is broader, not only applicable to the human community, but includes all life in the universe. The scope of ethical conduct is no longer limited to humans, but it can be applied to all living things. All life on earth has the same moral status. Based on the description, it is understood that the moral basis is the nobleness of life

itself, so moral demands and responsibilities are not applied to social communities only, but also to ecological communities.[24]

III. CONCLUSION

Based on several judges' decisions regarding environmental disputes, it can be shown that judges have tried to realize environmental justice in their decisions. Proof of environmental disputes and the absence of strong scientific evidence in determining the causality relationship between human activities and the influence of environment, both the judges on behalf of the community as the owner of the constitutional right to a healthy ecology apply the precautionary principle. Judges have considered prudential principles to bring about environmental justice. The use of the doctrine of "in dubio pro natura" in settling civil and administrative environmental disputes is not an absurd consideration because it turns out that the Indonesian legal system has known this doctrine based on principles that are based on listed legislation.

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