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# Ecological Sustainability from a Legal Philosophy Perspective

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## ABSTRACT

Gustav Radbruch made a fundamental contribution to legal thought, by suggesting the framework of legal justice, legal benefit, and legal certainty as the main purposes of law. This framework is widely accepted and still serves as a basis for thinking about questions of legal interpretation and the problems of legal positivism. This article argues that Radbruch's framework falls short of addressing legal issues related to the threats of ecological crisis. Looking at legal theory and legal practice, we propose to add "sustainability" as a meta-value to Radbruch's ideals of the legal system

**Keywords:** Ecology, Deep Ecology, Ecofeminism, Sustainability



## INTRODUCTION

Rising temperatures have had far-reaching global impacts, including extreme weather conditions such as heat waves, prolonged droughts, severe floods and tropical storms. The melting of polar ice caps and glaciers has caused sea levels to rise, which threatens small islands and creates a potential for coastal flooding and abrasion. The impact extends to many species threatened with extinction.<sup>1</sup> The question is whether global warming is a threat that will eventually endanger human survival. This is quite reasonable, considering that humans are part of nature and that disturbances to the performance of nature affect human health – and ultimately survival.<sup>2</sup>

Climate change refers to long-term changes in temperature and weather patterns. Until recently, climate change was something that occurred naturally, as a result of changes in solar activity or large volcanic eruptions. But from the 1800s until the present, human activity has been the major driver of climate change, mainly through the burning of fossil fuels such as coal, oil and gas.<sup>3</sup> The average temperature on the Earth's surface is now about 1.1°C higher than in the late 1800s (before the industrial revolution) and has never been higher at any time in the past 100,000 years. The last decade (2011–present) was the hottest on record, and each of the last four decades has been warmer than the preceding decade.<sup>4</sup>

Because of the dominant role of humans in causing climate change the geological era we currently live in is now commonly referred to as the Anthropocene.<sup>5</sup> This idea of the Anthropocene has

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<sup>1</sup> Kunio Kaiho, "Relationship Between Extinction Magnitude and Climate Change During Major Marine/Terrestrial Animal Crises." *Biogeosciences Discussions* 19 (2022): 3369–3380.

<sup>2</sup> Oksana Evseeva, Svetlana Evseeva, and Tamara Dudarenko. "The Impact of Human Activity on the Global Warming." *E3S Web of Conferences* 284 (2021).

<sup>3</sup> Evseeva

<sup>4</sup> Xiaoyong Chen, "Climate Change: Causes, Impacts, and Adaptation." *GSU Intellectual Life Grant* (2015).

<sup>5</sup> Hiroshi Fukurai, "President's Farewell Message: The Anthropocene, Earth

also found its way into legal and socio-legal studies. For instance, at the annual conference organized by the Asian Law and Society Association (ALSA) the Presidential Session, “The Anthropocene and the Law in Asia”, aimed to explore the legal system and legal actions needed to reduce or, if possible, prevent disasters that could potentially hit the Asian region. In his presidential address Hiroshi Fukurai promoted the concepts of “Earth Jurisprudence” and “the Rights of Nature” as a response to the various crises of the Anthropocene.<sup>6</sup> Suggestions made during the discussion that followed included, (1) a paradigm shift to make “nature” a rights-holding entity, to protect the environment from states and corporate projects that are ecologically unsustainable; (2) integration of the study of anthropogenic threats into the legal education curriculum; (3) development of intersectional and interdisciplinary teaching frameworks to reshape legal education in Asia; (4) transformation of national energy laws to achieve energy sufficiency, to reduce dependence on fossil fuels and ecologically destructive human activities for energy production; (5) creation of ecological laws based on local (indigenous) knowledge and independent culture of native populations to prevent destructive anthropogenic impacts; (6) implementation of national security protocols in response to an anthropogenic crisis that could potentially lead to waves of climate refugees<sup>7</sup> and environmental migrants<sup>8</sup> and the possibility of militarization of borders and stricter enforcement of migration policies.<sup>9</sup>

Among these six points, the most important one is a paradigm shift from “*anthropocentric*” to “*anthropocosmic*”. An anthropocosmic

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Jurisprudence, and the Rights of Nature.” *Asian Journal of Law and Society* 7 (2020): 613–622.

<sup>6</sup> Fukurai, p. 613.

<sup>7</sup> A person forced to leave their country or area of origin because climate change has made it impossible for them to continue living or working in that country.

<sup>8</sup> A person forced to leave their area of origin due to sudden or long-term changes to their local or regional environment.

<sup>9</sup> Fukurai, “President’s Farewell Message: The Anthropocene, Earth Jurisprudence, and the Rights of Nature”, p. 614.

approach to environmental ethics allows humans to establish a harmonious relationship with the environment. This is what distinguishes it from anthropocentric, biocentric, and ecocentric paradigms. An anthropocosmic approach facilitates reciprocal relations between humans and nature.<sup>10</sup> Hardly any countries have such an *anthropocosmic* paradigm in place, and Indonesia is no exception. Ecological sustainability is not much on the mind of law and policy-makers in this country, even if ecological crises are becoming increasingly widespread due to the prevalent exploitative nature of development. Natural signs as disasters and extreme weather compel the human conscience to question the relevance of “laws for humans” again, when nature has no place in them.

This is remarkable, as the awareness of ecological transformations that are undesirable and harmful to the environment goes back decades and already found expression in the United Nations Stockholm Declaration on the Human Environment in 1972. Even though it reflects an anthropocentric, modern, and liberal framework to address the environmental crisis, the Declaration expressed a deep concern about the moral challenge to the international community to address the global environmental crisis resulting from anthropic ecosystem transformation.<sup>11</sup>

However, departing from the moral concern of the Stockholm Conference, the evolution of international environmental law has been based on a managerial point of view that frames the response of the international community to the environmental crisis in a traditional format of modern liberal constitutionalism and technical tools. Protection of the environment is understood as an instrument to ensure the fulfillment of human rights, designed to provide space for self-determination for each individual. It must be acknowledged that the Stockholm Declaration is an important document in the

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<sup>10</sup> Sam Mickey, “Contributions to Anthropocosmic Environmental Ethics.” *Worldviews* 11 (2) (2007): 226–47.

<sup>11</sup> Jordi Jaria-Manzano, “Beyond Sustainability: Challenges for Environmental Law in the Era of Uncertainty.” *Environmental Policy and Law* 52, No. 2 (2022): 93–104.

history of international environmental law, which promotes the recognition of the right to the environment. It has been the start of a process of emerging environmental rights which have been consolidated as conceptual patterns for framing environmental crises in the political and legal context of contemporary society. The Declaration has served as inspiration for constitutions to enshrine the right to a healthy environment, early examples being the Portuguese Constitution of 1976 and the Spanish Constitution of 1978, and as such has been of great significance.<sup>12</sup>

The idea of environmental protection based on the constitution has led some scholars to develop the idea of “*ecocracy*”, a term used to describe the relationship between forms of government which put environmental protection centrally.<sup>13</sup> In an embryonic form the idea of *ecocracy* first appeared in the Brundtland Report, and it has widely proliferated since. The idea of *ecocracy* is based on three foundations; first, the awareness of the importance of protection of water resources and other important elements of the atmosphere for human life. Second, a cosmopolitan feeling of belonging uniting human beings and communities bound by humanitarian ties, regardless of national borders and cultural differences. Third, the transfer of nation-state sovereignty to global non-state regimes for the maintenance and protection of the global environment in general.<sup>14</sup>

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<sup>12</sup> Jaria-Manzano,

<sup>13</sup> I Gusti Bagus Suryawan, “Strengthening Environmental Law Policy and Its Influence on Environmental Sustainability Performance: Empirical Studies of Green Constitution in Adopting Countries.” *International Journal of Energy Economics and Policy* 10, No. 2 (2020): 132–138.

<sup>14</sup> Suryawan. Furthermore, it is emphasized that *ecocracy* (or “ecological democracy”) is a concept that broadly refers to a system of governance that prioritizes ecological sustainability and environmental protection. It envisions a political and social framework where decisions are made with careful consideration of their impact on the environment. In an *ecocracy*, there is an emphasis on ecological values, conservation, and the well-being of ecosystems. Good environmental governance, on the other hand, is a recognized concept that focuses on the effective, accountable, and sustainable management of the environment. It involves the responsible use of natural resources, pollution prevention, biodiversity conservation, and addressing environmental

Henryk Skolimowski has first defined ecocracy, arguing that ecocracy is about recognizing the forces of nature and life in it, understanding the limitations of the environment, elements of cooperation with nature, and most importantly creating a sustainable ecological system that deals with the earth and its contents and does not promote plunder of natural resources or without calculation.<sup>15</sup>

Taking the latter idea about ecocracy as its point of departure, this article looks at the question whether the current paradigm for legal interpretation suffices to address the impending ecological catastrophe caused by climate change. Taking Gustav Radbruch's ideals of law – justice, benefit, and legal certainty – as our point of departure, we ask whether these ideals should not be reinterpreted or adapted to the Anthropocene. To this end we take into account insights from deep ecology, ecofeminism, transpersonal ecology, and similar approaches. We look at both theory and judicial practice to examine the need for and the use of such an adaptation. In the end we find that indeed such an addition of sustainability as an ideal of law makes sense in confronting the challenges of the contemporary world.

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challenges. Elements of good environmental governance may include transparency, public participation, rule of law, effective institutions, and the integration of environmental considerations into decision-making processes. See also Purniawati Purniawati, Nikmatul Kasana, and Rodiyah Rodiyah. "Good environmental governance in indonesia (perspective of environmental protection and management)." *The Indonesian Journal of International Clinical Legal Education* 2, No. 1 (2020): 43-56; Adiguna Bagas Waskito Aji, et al. "Social Justice on Environmental Law Enforcement in Indonesia: The Contemporary and Controversial Cases." *The Indonesian Journal of International Clinical Legal Education* 2, No. 1 (2020): 57-72; Dani Muhtada, "The Prospects for Public Management Reform in Indonesia." *Journal of Indonesian Legal Studies* 2, No. 2 (2017): 145-154.

<sup>15</sup> Henryk Skolimowski, *Philosophy for a new civilisation*. (New Delhi: Gyan Publishing House, 2005).

# THE VALUE OF SUSTAINABILITY IN LEGAL PHILOSOPHY

## I. Sustainability, the Forgotten Basic Objective of Law?

Sustainability is not something new in human legal thought. In fact, sustainability has been the face and the spirit of ecological “law” long before modern law came to dominate legal structures, legal substance, and legal culture across the globe. In Indonesia a good example is the traditional Javanese cosmological view of nature as a circle of life, as opposed to nature as a material object, what Heidegger alluded to as humans’ technological view of nature; no longer nature as something valuable in and by itself, but only in terms of the material benefits that mountains, sea, and forests can bring to humans.<sup>16</sup>

The figure of Dewi Sri, for example, is characteristic of East Javanese mythology in her role as the “Goddess of Rice” from whom rice originates as the main staple food in Indonesia. Not only that, Dewi Sri is also believed to be the guardian spirit of rice, the spirit of the mother goddess who provides fertility, prosperity, welfare, and as the earth goddess also spirit. Her services are remembered by East Javanese, who hold rituals to invoke Dewi Sri’s protection over agricultural and household matters in Java, as part of local ecological wisdom. The story of Dewi Sri also contains values of eco-criticism on ecological sustainability.<sup>17</sup>

The question is whether and if so how ideas of sustainability and ecocracy can be integrated into modern law. One the main legal philosophers who has addressed the practical integration of different values into legal thought is Gustav Radbruch (1878-1949). In his main

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<sup>16</sup> Martin Heidegger, *The Question Concerning Technology and Other Essays*. (New York & London: Garland Publishing Inc, 1977).

<sup>17</sup> A. Syarifuddin Rohman, Fitrahayunitisna, and I Kadek Yudi Astawan. “Nilai Ekologis Cerita Rakyat Dewi Sri dan Implikasinya dalam Kehidupan Pragmatis Masyarakat Petani Jawa Timur.” *WASKITA: Jurnal Pendidikan Nilai dan Pembangunan Karakter* 6 (1) (2022): 86-95.

work *“Rechtsphilosophie”* (1932), he italicized the following statement which can be translated into English as, “Law is the reality whose sense is to serve the value of law, the idea of law”.<sup>18</sup> Radbruch’s idea of law prioritizes the certainty and efficacy of a law,<sup>19</sup> however, later he seems to have rearranged the order of values law should serve. In his view, good law is when the law achieves justice, benefit, and certainty. Even though all three are legal ideals, each brings with it substantive demands that are different from the other, so that they can potentially lead to conflict.<sup>20</sup>

Radbruch has explained this in his short article “Five Minutes of Legal Philosophy”. The first minute – about legal certainty – speaks about legal positivism, but already implicitly questions the extent to which it should be carried through. The second minute is about benefit the law must serve, but it indicates that benefit is not free from potential dangers, especially when the public benefit is defined in the name of “justice” or “order”, which is then followed by equating justice with the idea that what the state does or decides must be good.<sup>21</sup>

The third minute is the most important one and speaks about justice. Here Radbruch coined what is known as the “Radbruch Formula”, which states that if a law is substantively unfair to a certain degree of intolerance it cannot be considered law anymore, even if it has been promulgated following a predetermined procedure.<sup>22</sup> When justice clashes with legal certainty, Radbruch does not want to give

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<sup>18</sup> Alexy, Robert. “Gustav Radbruch’s Concept of Law.” *Law’s Ideal Dimension* 26, No. 1946 (2021): 1-14

<sup>19</sup> Alexy, p. 3

<sup>20</sup> Gustav Radbruch, “Five Minutes of Legal Philosophy (1945).” *Oxford Journal of Legal Studies* 26 (1) (2006): 13–15.

<sup>21</sup> Tristam P. Moeliono, and Tanius Sebastian. “Tendensi Reduksionis dan Utilitarianis dalam Ilmu Hukum Indonesia: Membaca Ulang Filsafat Hukum Gustav Radbruch,” *Thesis*. (Bandung: Universitas Katolik Parahyangan, 2015).

<sup>22</sup> Seow Hon Tan. “Radbruch’s Formula Revisited: The ‘Lex Injusta Non Est Lex’ Maxim in Constitutional Democracy.” *Canadian Journal of Law & Jurisprudence* 34, No. 2 (2021): 461–491.

up legal certainty easily, and prioritizes it until it exceeds the limits of tolerance. In that case justice takes precedence.<sup>23</sup>

Radbruch also provided a critical note on legal positivism in another article he wrote shortly after the second World War, called "Statutory Lawlessness and Supra-Statutory Law" (1946). In this article he exposed the complexity of punishing crimes committed under the Nazi-regime. Radbruch argues that positivism can only prove that thanks to it, the law has the power to prevail. It does not question the legitimacy of the "ought" of the law. It is only "powerful" in terms of legitimizing law in its "must". This is what makes legal positivism vulnerable to being ridden by power, and its coercive tendencies to be exploited.<sup>24</sup>

Radbruch's argument that law should serve the ideals of justice, benefit, legal certainty is a fundamental contribution to legal thought and has become widely accepted. Simple as they look, the three ideals all relate to different stages in the development of law and society. The value of justice was already discussed long before modern law developed,<sup>25</sup> benefit became central through utilitarian thinkers as Mill, Bentham and Jhering,<sup>26</sup> while legal certainty only became central with the rise of modern law,<sup>27</sup> its rationalization, and its specific demand that laws must be predictable.<sup>28</sup>

The problem obviously is that justice, benefit, and legal certainty are not always compatible, and may be confronting or contradicting each other. This has led to a continuing debate between legal scholars on how to deal with such conflicts, not only in the abstract, but in real

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<sup>23</sup> Tan, pp. 462-463.

<sup>24</sup> Brian H Brix, "Radbruch's Formula, Conceptual Analysis, and the Rule of Law." *The American Journal of Jurisprudence* 56, No. 1 (2011): 45-57.

<sup>25</sup> Henrik Palmer Olsen, and Stuart Toddington. *Architectures of Justice Legal Theory and the Idea of Institutional Design*. (London: Routledge, 2007), pp. 84-87.

<sup>26</sup> Jeremy Bentham, *Principles of Morals and Legislation*. (Ontario: Batoche Books, 2000).

<sup>27</sup> R. A. Z. Joseph, "Legal Principles and the Limits of Law." *Yale Law Journal* 81, No. 5 (1972): 823-54.

<sup>28</sup> Ulrich Beck, *Risk Society: Towards A New Modernity*. (London, Newbury Park: Sage Publications, 1992).

life cases. Obviously, all of these ideals are open to interpretation and to different views, in particular where it concerns justice.

Furthermore, Radbruch's ideals of law do not offer us a solution for each and every problem of legal interpretation, but they constitute a dynamic framework for legal interpretation that can help jurists to better understand and clarify the choices they make. However, the question is whether Radbruch's ideals of law still suffice for addressing the problems the world is facing today. It is interesting to note that Radbruch himself was quite skeptical about technical progress. He starts off his memoirs with a description of the world he was born in in 1878 and how it changed with bicycles, cars, zeppelins, planes, radio etc. After two pages he asks the question whether all these things have made people any happier, and his answer is negative.<sup>29</sup>

In the same context, while the technological developments in Radbruch's time were already foreshadowing the problems we are facing today, ecological sustainability was clearly not his key concern. Only in the 1960s and early 1970s did an ecological awareness arise more broadly in the modern world, culminating in the present concerns with loss of biodiversity and climate change. This has put sustainability, of nature as we know it and including human life, center-stage. The question is whether sustainability is something separate or whether it can be integrated in the concept of justice. While Radbruch's concern was social justice, with a central position for equality, we will now explore whether justice can also cover ecological justice, as a way to achieve sustainability. This looks attractive, especially because social and ecological justice are intertwined. However, it may also be the case that adding the ideal of sustainability as a goal of the legal system may be more effective in causing a change in the interpretational legal frame.

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<sup>29</sup> See Gustav Radbruch, *Der innere Weg: Aufriss meines Lebens*. (Stuttgart K. F. Koehler Verlag, 1951).

## II. Ecological Philosophy

Ecological philosophy builds on ecological awareness, a philosophical perspective on the relationship between humans and nature that rejects the anthropocentric approach of placing humans at the center (subject) and nature at the periphery, as the object. However, even in the anthropocentric view sustainability is key as ecological change affects all humans, in particular those who are vulnerable, such as the poor, women and children. Moreover, the principle of intergenerational equity emphasizes our responsibility to protect and pass on sustainable life to future generations. This inevitably brings along obligations to nature, to animals and plants, in order to maintain the sustainability of this planet. It is impossible to talk about intergenerational justice outside the context of sustainable development, and vice versa.

Since these two concepts are intertwined, it is important to acknowledge that the latter provides the basis for the former.<sup>30</sup> Unlike humans, land does not produce offspring and still must remain proportional to the number of human offspring in order for it to sustain human life, including for our children and grandchildren.<sup>31</sup>

Such concerns, brought about by environmental damage, first gave rise to the idea of “deep ecology”, an environmental philosophy approach developed by thinkers, such as Arne Næss, George Sessions, and Bill Devall. Naess (1912-2009) pioneered ecosopy or deep ecology philosophy in 1972. According to Næss, grave environmental crises can only be resolved if humans change their perspective and behavior towards nature fundamentally and radically. Næss believed that the current global crisis stems from a fundamental-philosophical error in human understanding of nature

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<sup>30</sup> Anastasiia Myrvoll, “The Principle of Intergenerational Equity: To What Extent Does It Concern the Problem of Deforestation?” *Thesis* (Oslo: Faculty of Law, University of Oslo, 2022).

<sup>31</sup> Brian Barry, “Sustainability and Intergenerational Justice.” *Theoria: A Journal of Social and Political Theory* 89 (2008): 43–64.

and the ecosystems that surround it. It is this mistake that has resulted in the environmental damage we are currently witnessing.<sup>32</sup>

Naess and Sessions (1938-2016) presented the following eight principles that animate the deep ecology movement:

- 1) The well-being and flourishing of human and non-human life on Earth have value in themselves. These values are independent of the usefulness of the non-human world for human purposes.
- 2) Richness and diversity of life forms contribute to the realization of these values and are also values in themselves.
- 3) Humans have no right to reduce this richness and diversity except to satisfy vital needs.
- 4) The flourishing of human life and cultures is compatible with a substantial decrease of the human population. The flourishing of non-human life requires such a decrease.
- 5) Present human interference with the non-human world is excessive, and the situation is rapidly worsening.
- 6) The dominant socio-political living situation must therefore end. This will affect basic economic, technological, and ideological structures. The resulting state of affairs will be deeply different from the present.
- 7) The ideological change is mainly that of appreciating quality (dwelling in situations of inherent worth) rather than adhering to an increasingly higher standard of living. There will be a profound awareness of the difference between big and great.
- 8) Those who subscribe to the foregoing points have an obligation directly or indirectly to participate in the attempt to implement the necessary changes.<sup>33</sup>

Further developing deep ecological thinking, Devall (1938-2009), together with Sessions, emphasized the importance of deep

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<sup>32</sup> Edra Satmaidi, "Konsep Deep Ecology dalam Pengaturan Hukum Lingkungan." *Supremasi Hukum: Jurnal Penelitian Hukum* 24, No. 2 (2015): 192-105.

<sup>33</sup> Arne Naess, and George Sessions. "The Basic Principles of Deep Ecology." *The Trumpeter* 3, No. 4 (1986). See also Arne Naess, *The Deep Ecology Movement: Some philosophical Aspects*, 1986, in *Environmental Ethics an Anthology* (Oxford: Blackwell Publishing, Oxford, 2003).

ecological consciousness as a perspective to see the mistakes and dangers of dominance in itself, as dominance is the precursor to all forms of damage to nature. The idea of human domination over nature or other living beings implies that there is a separate relationship between humans and nature. Devall also argued that the idea of domination as something appropriate has been characteristic of Western civilization in particular, such as masculine over feminine, rich over poor, Western over non-Western.<sup>34</sup> To this, Fox has added that we should define our morals from a position of those who are classified as “non-human”. This will promote sensitivity to what actions are morally wrong given their consequences for other living beings in the “non-human” class.<sup>35</sup>

Deep ecology thus rejects the anthropocentric view which sees nature solely as a resource to satisfy human needs. It proposes radical thoughts about the relationship between humans and nature, seeing humans as an inseparable part of a wider network of life and considering all entities in nature to have the same intrinsic value, not just as a resource that can be utilized by humans. All living beings, human or non-human, are considered to have the right to exist and reproduce in their own natural environment.<sup>36</sup>

In addition, deep ecology emphasizes the development of an awareness in individuals and communities that every human action has ecological consequences and that all our decisions and behavior should be inspired by care and respect for nature. In other words, ecological awareness is a “psyche” that forms and develops in conformity with the environment, so humans feel and directly experience the oneness with nature and the world around them.<sup>37</sup>

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<sup>34</sup> Timothy W. Luke, “Deep Ecology: Living as if Nature Mattered: Devall and Sessions on Defending the Earth.” *Organization & Environment* 15, No. 2 (2002): 178–86.

<sup>35</sup> Warwick Fox, “Transpersonal Ecology: ‘Psychologizing Ecophilosophy.’” *Journal of Transpersonal Psychology* 22, No. 1 (1990): 59–96.

<sup>36</sup> Emille Boulot, et al. “Posthuman legalities: New Materialism and law beyond the human.” *Journal of Human Rights and the Environment* 12, No. 1 (2021): 1–12.

<sup>37</sup> V. I. Panov, “Ecological thinking, consciousness, responsibility.” *Procedia-Social and Behavioral Sciences* 86 (2013): 379–383.

A philosophy that refines or completes the ideas of deep ecology is “ecofeminism”. This philosophical current combines a feminist perspective with environmental issues. Ecofeminism challenges the logic of domination that underlies the oppression of women and the exploitation of nature. On this basis it develops a critique of the hierarchical, exploitative and dualistic views that separate humans from nature. Carolyn Merchant’s “The Death of Nature” argues that the traditional view of nature as a living organism, represented by female symbols as a nurturing mother earth, has been replaced by the image of nature as a machine, which must be dominated by science, technology, and capitalist production.<sup>38</sup> Yet, the nature of the machine is undoubtedly still female and Merchant argues that there is a close link between the justification for dominating nature and the domination of women.

This point has been taken further by scholars as Vandana Shiva, who reveal how patriarchal assumptions are at the root of of homogeneity, domination and centralization as the dominant rationale and development strategy.<sup>39</sup> They emphasize that this paradigm should be replaced with one that the finite planet should be treated with fulfillment remaining within the bounds of needs and limitations of nature, instead of conquest that exceeds needs.<sup>40</sup> In essence, this philosophy argues that there is a close relationship between domination over nature and domination over women, and that these two forms of domination are interrelated and reinforced by the same power structure. They coalesce in certain practices, such as the exploitation of female labor in the agricultural industry, where women work as low-wage laborers under unsafe working conditions, exposed to harmful pesticides and facing serious health risks. The oppression of women in this industry contributes to the unsustainable

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<sup>38</sup> Carolyn Merchant, “The scientific revolution and the death of nature.” *ISIS* 97, No. 3 (2006): 513-533.

<sup>39</sup> Patrick D. Murphy, “The Economist Subsistence Perspective Revisited in An Age of Land Grabs and Its Representations in Contemporary Literature.” *FEMINISMO/S* 22 (2013): 205–224. 1

<sup>40</sup> Murphy, p. 208

exploitation of land and natural resources.<sup>41</sup> Research by Nancy Chodorow and Carol Gilligan furthermore shows that feelings of alienation are more common in men, whereas feelings of connectedness are more common among women. Gilligan suggests that it is this detachment or alienation which animates patriarchal domination and is the cause of the current ecological crisis due to men's failure to recognize connections.<sup>42</sup>

Ecofeminism also explores women's unique relationship with nature; in their relationship with the body and reproduction as well as in their traditional role in managing natural resources. Plundering of natural resources, such as timber extraction or mining damages the environment and threatens women's traditional livelihoods such as collecting medicinal plants or other forest products. Women and nature are often treated similarly by patriarchal and capitalist systems of domination, as can be seen in the oppression of women, exploitation of natural resources, and environmental degradation. Ecofeminism argues that the domination of women and nature must be addressed simultaneously to achieve social and environmental justice.<sup>43</sup>

This can be done through policies that respect biodiversity, fight for social justice, and build a more sustainable and inclusive society.<sup>44</sup> In summary, by combining ecological thinking in deep ecology and feminist analysis in Ecofeminism, we can gain broader and more comprehensive insights into the importance of maintaining ecological balance and a just society.

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<sup>41</sup> Tasneem Anjum, "Ecofeminism: Exploitation of Women and Nature." *International Journal of English Literature and Social Sciences* 5, No. 4 (2020): 846–848.

<sup>42</sup> Greta Gaard, "Living Interconnections with Animals and Nature." In *Ecofeminism: Women, Animal, Nature*. (Philadelphia: Temple University Press, 1993).

<sup>43</sup> Ariel Salleh, *Ecofeminism as Politics: Nature, Marx, and the Postmodern*. (London: Zed Books, 2017). Compare with Birke, Lynda I.A. *Feminism, Animals, and Science: The Naming of the Shrew*. (Maidenhead: Open University Press, 1994).

<sup>44</sup> Huey-li Li, "Cross-Cultural Critique of Ecofeminism." In *Ecofeminism: Women, Animal, Nature*. (Philadelphia: Temple University Press, 1993).

### III. Environmental Loss

Against the onslaught of modernization, the first author of this article has witnessed local wisdoms that still survive, however, they are under increasing pressure. In the Wet Smokan forest, Bayan, North Lombok, an unwritten law forbids people from bathing with detergent in springs or rivers.<sup>45</sup> Similar examples can be found in many other rural places, but ongoing processes of modernization undermine such local institutions and their enforcement. On the other hand, the increasing scarcity of natural resources that were once abundant, such as water, compels people to deeper reflection on the meaning of ecological justice. In the last three decades symptoms have increasingly been felt universally, especially with global warming and climate change.

How dire the situation is has been demonstrated in a spatial analysis carried out between 2000-2014 by Hansen and colleagues from 15 universities together with Google. The analysis put the global area that lost its forest in this period at 2.3 million square kilometers (230 million hectares). That figure means deforestation at a rate of 68,000 football fields per day during 13 years or 50 football fields every minute. For Indonesia, Hansen calculated that the area of forest lost during that period was 15.8 million hectares with an average increase in deforestation of 1,021 square kilometers (102,100 hectares) per year. This figure is much higher than the 450,000 hectares deforested area according to the Ministry of Forestry.<sup>46</sup>

Exploitation supported by the industrial revolution, “*laissez-faire*” economics, and the freedom of contract doctrine as a legal instrument, has been utilized to maximize profit accumulation. This threatens the sustainability of collective life. If left unbridled by public

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<sup>45</sup> Observation: *Adat Law in Desa Bayan, North Lombok* (2022), conducted by Authors

<sup>46</sup> Ahmad Arif, “Dunia Masih Gagal Menghentikan Deforestasi”, *KOMPAS*, October 25 (2023). Retrieved from <https://www.kompas.id/baca/humaniora/2023/10/25/dunia-masih-gagal-menghentikan-deforestasi-dengan-tren-meningkat-pada-2022>

law, the freedom of contract gives enormous power to parties to do whatever they like, often causing irreparable damage to ecosystems. For this reason, “mutual assent” must be reviewed in terms of the extent of its validity, especially when it concerns agreements that are detrimental to others who are not a party to the contract.<sup>47</sup>

This harks back to the Coase theorem, which argues that where there are complete competitive markets with no transaction costs and an efficient set of inputs and outputs, an optimal decision will be selected. However, freedom of contract usually operates in incomplete competitive markets with high transaction costs and inefficient sets of inputs and outputs. In the case of environmental damage these problems are exacerbated by the fact that stakeholders include future generations and ecosystems, which cannot engage in the negotiations.

Indonesia has thousands of sites which show the deleterious effects of unbridled exploitation. Among them the Lapindo mining company’s mud volcano, which has submerged thousands of houses in Sidoarjo and contributed to rising temperatures; Newmont’s legacy of pollution in Buyat Bay; Freeport’s mining waste in West Papua covering an area of 8 square kilometers and in some places reaching a depth of 275 meters; and the same company disposing of the tailings from a gold-silver-copper mine into the Otomina and Ajkwa Rivers that discharge into the Arafura Sea. The mine produces and disposes of over 200,000 tons of tailings per day, over 80 million tons annually. As of 2006, the mine is estimated to have dumped more than three billion tons of tailings, most of which ended up in the ocean.<sup>48</sup>

What these examples indicate is that, at least to a degree, “sustainability” is a self-explanatory meta-value. In all of these examples the unsustainability of the practices concerned is self-evident and therefore the norms on which they rely are unlawful. We

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<sup>47</sup> Clarence D. Ashley, “Should There Be Freedom of Contract.” *Columbia Law Review* 4, No. 6 (1904): 423–427.

<sup>48</sup> Sapariah Saturi, “Laporan Greenpeace: Freeport Ancam Kelestarian Laut Indonesia”, *MONGABAY*, July 25 (2013). Retrieved from <https://www.mongabay.co.id/2013/07/25/laporan-greenpeace-freeport-ancam-kelestarian-laut-indonesia/>

argue that norms should not only be validated by testing them against a higher norm, as in Hans Kelsen's thinking about Stufenbau Theory,<sup>49</sup> but that they should also be judged in the light of the meta-value.

To facilitate the validation of norms, in many cases meta-values that are still abstract can be found in constitutional principles and norms. The constitutional principle or norm becomes a touchstone for norms that contradict meta-values. For example, both Law Number 7 of 2004 and amendments to Law Number 17 of 2019 concerning Water Resources provide ample space for the private sector to control water resources – groundwater, all forms of surface water, and parts of river bodies. This goes against the notion that water is a collective resource that all are entitled to, because no living thing can live without water. At this point the sustainability of collective life is a meta-value that directs the various legal regulations that derive from it and their interpretation. Privatization means that water is parceled and commercialized by companies which aim at accumulating profits, not distributing water for the continuation of collective life. Water in this case only “flows to those who are economically endowed”.<sup>50</sup>

This is just an example to show how privatization of water resources is not only inconsistent with the constitution, but also contradicts the meta-value of sustainability. The consequence of placing sustainability as a meta-value is that all legal products or public policies, whether in the form of laws, regulations, contracts, court decisions, or development programs, must normatively guarantee sustainability. Regulatory products that threaten sustainability are unlawful.

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<sup>49</sup> Hans Kelsen, *General Theory of Law and State*. (New York: Russel & Russel, 1973).

<sup>50</sup> Erina Pane, “Hak Guna Air dalam Hubungannya dengan Privatisasi Pengelolaan Sumber Daya Air.” *Pranata Hukum* 3, No. 1 (2008): 13–30.

## SUSTAINABILITY VALUES & PRINCIPLES IN THE MIDST OF INTERNATIONAL DISPUTES

In this section we will explore to what extent international law at present constitutes a realization of the meta-value of sustainability. Environmental movements have given rise to the third generation of Human Rights, which includes ecological and eco-social rights.<sup>51</sup> These rights are universal, because ecological problems are not only partial or regional, with climate change as the most outstanding example. Environmental problems are global issues that require collective action, most notably reducing greenhouse gas emissions.

The third-generation human rights discourse continues to evolve and also tries to accommodate communal rights, linking them with environmental rights and thus shaping the meaning of ecological and eco-social justice.<sup>52</sup> Ecological justice is no longer solely a discourse, but has become tangible in the emergence, ratification and enforcement of international agreements.

However, it is important to acknowledge that there is a North-South divide where it concerns ecological issues, as the Global South is much more badly afflicted by climate change than the Global North.<sup>53</sup> This is not only linked to vulnerability to climate disasters – such as tropical cyclones and rising sea-levels – but also to environmental problems such as food security issues, access to clean drinking water, trade in hazardous waste, and energy poverty. This conflict has become a hot topic of international discussion,

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<sup>51</sup> Al. Andang Binawan, and Tanius Sebastian. "Menim(b)ang keadilan ekososial." *Kertas Kerja Epistema*, No. 07 (2012). Online at <https://epistema.or.id/publikasi/working-paper/menimbang-keadilan-eko-sosial/>

<sup>52</sup> Binawan and Sebastian.

<sup>53</sup> The term "Global North" is a widely known nickname referring to first world or developed countries, as well as the richest countries in the world based on metrics, including GNP per capita and the Legatum Prosperity Index. The "Global North" is the opposite of the economic aspect of the "Global South", which was coined in 1969 to describe the developing and least developed countries of the world.

particularly where it concerns who has to pay for measures to mitigate climate change, to repair damage as a result of climate change, and to compensate for loss of biodiversity. Many scholars argue that the high level of poverty in the South is a result of the universalization of an economic development model that favors the North, and which has not only resulted in unequal economic growth, but also in destruction of the earth's ecosystems.<sup>54</sup>

This North-South divide has great impact on the debate concerning climate change and on the development of international environmental law. Data shows that emissions produced by the Global North) have disproportionately affected the world's poorest countries and most vulnerable communities—including indigenous peoples and small island states. The South has held the North accountable for their historical involvement in climate change based on the *Common But Differentiated Responsibility* (CBDR)<sup>55</sup> principle – a principle in international environmental law that holds all countries responsible for addressing global environmental degradation, but not equally liable.<sup>56</sup> Countries from the North have agreed to take a leadership role in providing technical and financial resources, but deny responsibility for their historical role in causing climate change and other environmental issues.<sup>57</sup>

The thesis of "International Environmental Law and the Global South" is that it is impossible to have an ecologically sustainable planet in a world of exponentially growing inequality. For

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<sup>54</sup> Carmen G. Gonzales, and Sunudu Atapatu. "International Environmental, Environmental Justice, and the Global Youth." *Transnational Law & Contemporary Problems* 26 (2017): 229–242.

<sup>55</sup> Gonzales and Atapatu, p. 232.

<sup>56</sup> Christopher D. Stone, "Common but Differentiated Responsibilities in International Law." *The American Journal of International Law* 98, No. 2 (2004): 276–301. Read also Miriama Williams, and Manuel F. Montes. "Common but Differentiated Responsibilities: Which Way Forward." *Development* 59, No. 1–2 (2016): 114–120.

<sup>57</sup> Gonzales and Atapatu, "International Environmental, Environmental Justice, and the Global Youth", p. 232.

international environmental law<sup>58</sup> to succeed, it must address the North-South divide by developing policies and legal frameworks that address the concerns and priorities of peoples and countries in the Global South (including “South in the North”, which refers to certain communities in the United States, Canada, and other affluent countries). This means, among other things, facing up to injustices in the international economic order and international law that result in the abuse of nature as well as the exploitation and marginalization of humanity.<sup>59</sup>

The United Nations Framework Convention on Climate Change (UNFCCC) together with its principles recognized in international law provides guidance to countries in fulfilling their obligations in realizing a sustainable world. In addition to the principle of *Common but Differentiated Responsibility*, the following principles recognized by the UNFCCC are of importance:<sup>60</sup>

*a. Inter and Intra Generational Equity Principle*

This principle is at the heart of sustainability. Climate change brings consequences that reach far beyond the current generation. If the generation of today continues to emit greenhouse gases at the current level, such adverse impact will extend to many future generations. To prevent this from happening, the principle of inter and intra generational equity posits the equality between generations as its

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<sup>58</sup> International environmental law, on the other hand, is a body of law related to environmental protection, mainly through bilateral and multilateral international treaties. International environmental law is tasked with regulating the behavior of States and international organizations towards the environment. See Joel Niyobuhungiro, “International Economic Law, International Environmental Law and Sustainable Development: The Need for Complementarity and Equal Implementation.” *Environmental Policy and Law* 49, No. 1 (2019): 36–39.

<sup>59</sup> Gonzales and Atapatu, “International Environmental, Environmental Justice, and the Global Youth”, p. 233.

<sup>60</sup> Sumudu Atapattu, “Climate Change, International Environmental Law Principles, and the North-South Divide.” *Transnational Law & Contemporary Problems* 26, No. 2 (2017): 247–261.

point of departure. The International Court of Justice has affirmed this principle in its advisory opinion on "The Legality of the Threat of Use of Nuclear Weapons". The Court notes that the environment is not an abstraction, but rather represents the living space, quality of life, and health of humanity, including of generations that are yet to be born.<sup>61</sup> The Inter and Intra Generational Equity Principle has also been included in many environmental agreements, such as the UNFCCC, the Convention on Biological Diversity, the Desertification Convention, and the Paris Agreement.<sup>62</sup>

### *b. Sustainable Development*

Sustainability as the guiding principle of development was first proposed by the World Commission on Environment and Development ("WCED") in 1987 to reconcile economic development with environmental protection. Since then, sustainable development has expanded to include three pillars—economic, social, and environmental—and now forms the basis of the UN Sustainable Development Goals that were adopted in September 2015.<sup>63</sup>

In the framework of debates on the UNFCCC, countries from the Global South have continued pressing their point that the UNFCCC should also include that "the right to development is an inalienable human right" and that "all people have equal rights in matters relating to a reasonable standard of living." Countries from the Global North prefer an alternative approach, arguing for incorporating the provision "that countries have an obligation to achieve the Sustainable Development Goals." These different takes on the sustainable development principle have caused a lot of debate. The United States, in particular, has consistently opposed the right to development despite its adoption by the UN General Assembly in

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<sup>61</sup> Atapattu, p. 225.

<sup>62</sup> Atapattu.

<sup>63</sup> Atapattu, p. 256.

1986, arguing that development is an end to be achieved, rather than a right.<sup>64</sup>

The United States' concern is that the right to development can be used as a basis for "ask[ing] for financial assistance from developed countries", while countries from the Global South fear that sustainability will become a condition for getting financial assistance. They believe that sustainable development is like other strategies used by Northern countries to hinder development in developing countries, which is not applicable to developed Northern countries.<sup>65</sup> In summary, there is no consensus here on how to reconcile the two concepts united in sustainable development.

### *c. Precautionary Principle*

Another principle that gives expression to the meta-value of sustainable development is the precautionary principle. Just as sustainable development, this principle continues to be a source of debate in international environmental law. The precautionary principle was first developed in the legal regime governing ozone depletion and was included in the Rio Declaration as an approach.<sup>66</sup> It can also be found in the UNFCCC, and has since been included in the *Biosafety Protocol*. In the Rio Declaration, the precautionary principle serves as an approach to protect the environment. When there is a threat of serious or irreparable damage, the lack of scientific certainty should not be used as an excuse to delay cost-effective measures to prevent environmental degradation.<sup>67</sup>

This very brief overview serves to indicate that international law provides ample support for considering sustainability as a meta-value. However, it also indicates that despite such support the translation of sustainability into principles and rights is not easy and creates a lot of controversy, even at this fairly abstract level. The

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<sup>64</sup> Atapattu.

<sup>65</sup> Atapattu.

<sup>66</sup> Atapattu, p. 258.

<sup>67</sup> Atapattu.

question is whether it is possible to use sustainability as a guiding principle at lower levels of law-making and legal interpretation. In the next section we will zoom in on Indonesia as a case study to show that despite the multiple legal interpretations' sustainability can support, it is sufficiently concrete to provide guidance in relevant cases.

## AN INSPIRING LABORATORY: CONSIDERING SUSTAINABILITY IN INDONESIAN JUDGE'S DECISIONS

In Indonesia, the right to a good and healthy environment is a human right that is recognized in the amended 1945 Constitution, specifically in Article 28H(1) "Everyone has the right to live a prosperous life physically and mentally, to reside, and to have a good and healthy living environment, and has the right to health services." and in the Human Rights Law (Law Number 39 of 1999), namely Article 9(3) which affirms that "everyone has the right to a good and healthy living environment". This is reinforced by Law Number 32 of 2009 concerning Environmental Protection and Management which is based on (at least) 6 considerations, including the following:<sup>68</sup>

- a. Affirmation and elaboration of human rights principles towards a good and healthy environment;
- b. Affirmation and elaboration of the principles of sustainable development in every economic activity;
- c. Strengthening decentralization and regional autonomy of environmental management;
- d. Affirmation of the foundation of environmental protection and management seriously and consistently by all stakeholders;
- e. Response to and anticipation of global environmental developments; and

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<sup>68</sup> Martono Anggusti, "Environmental Policy in the Wake of Indonesia's Fourth Industrial Revolution." *Environmental Policy and Law* 49, No. 2/3 (2019): 125–129.

- f. Guarantee of legal certainty and protection of everyone's right to obtain a good and healthy living environment as part of the protection of the ecosystem as a whole.

In addition, sustainability is recognized through Corporate Social Responsibility (CSR) in Indonesia. Companies engaged in the area of natural resources are required by law to practice social and environmental responsibility, both internally and externally. CSR is an initiative to fulfill the company's legal obligations in protecting society and the environment. This should ensure that companies dealing with natural resources that may potentially damage the environment implement programs that help safeguard wildlife, nature reserves and similar items. It builds on the principle that natural resources need to be protected so that the needs of future generations can be fulfilled.<sup>69</sup>

Indonesian law thus offers sufficient points of attachment for legal interpretations that seek to realize sustainability as a goal of the legal system. We will now consider two court cases in which judges seemed to actually follow this line of interpretation, which is not yet common, but which indicate how sustainability as a meta-value can be realized in actual judicial practice.

*a. Decision of the Supreme Court of the Republic of Indonesia No. 651 K / PDT / 2015<sup>70</sup>*

In this case the State Minister for the Environment sued oil palm plantation company PT Kallista Alam, claiming that it had deliberately and unlawfully cleared land by burning from 2009 to

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<sup>69</sup> R. Murjiyanto, D. Andani, E.S. Wibawanti, S.R. Ika, and S. Fransiska. "Corporate Social and Environmental Responsibility of Companies in the Natural Resources Business Industry: An Indonesian Juridical Perspective." *IOP. Conference Series: Earth and Environmental Science* 1165, No. 1 (2023): 1–11.

<sup>70</sup> Indonesian Supreme Court Decision. "Direktori Putusan Mahkamah Agung: Putusan No. 651 K/PDT/2015v," 2023. Online at <https://putusan3.mahkamahagung.go.id/direktori/putusan/bbf15c165693d4bd4a18ed636b2c40b1.html>.

2012.<sup>71</sup> The case was the first one seeing a plantation company in Indonesia being sued because of deliberately burning land. The oil palm plantation company was found to have been at fault by the Meulaboh District Court for burning down the Rawa Tripa peat forest, which caused a 1,000-hectare fire in Suak Bahong, Darul Makmur District, Nagan Raya, Aceh, in 2009-2012. The oil palm plantation company appealed the ruling, but the Banda Aceh High Court upheld the judgment. In cassation the Supreme Court did the same, awarding material damages of IDR 114,303,419,000 to the state and land restoration funds of about IDR251,765,250,000.

These rulings are interesting, because they provided a novel interpretation of principles in environmental law. While normally judges apply the principle *in dubio pro reo*,<sup>72</sup> here they applied the principle of *in dubio pro natura*.<sup>73</sup>

The Supreme Court explicitly stated that when judges are faced with a lack of evidence and dubious laboratory results, uncertainty of causation and questions about the amount of compensation – the judge should apply the the principle of *in dubio pro natura*:

“...deciding the causal relation between the Defendant’s activities and the occurrence of land fires, between land fires and environmental losses arising now and their consequences in the future, must indeed be based on the doctrine of *in dubio pro natura* which means that if faced with

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<sup>71</sup> Indonesian Supreme Court Decision. “Direktori Putusan Mahkamah Agung: Putusan PN MEULABOH Nomor 16/Pdt.G/2017/PN Mbo,” 2017. Online at <https://putusan3.mahkamahagung.go.id/direktori/putusan/89a08d0cb477ecacf d081b5aa614a1ad>.

<sup>72</sup> The principle *in dubio pro reo* is that if the judge is in doubt about something in a case, things must be decided in favor of the defendant. See Akbar Tri Nugroho, and Hendra Hendra. “Penerapan Asas In Dubio Pro Reo Pada Putusan Mahkamah Agung Republik Indonesia Dalam Perkara Pidana.” *Jurnal Ilmiah Hukum Kenotariatan Repertorium* 10, No. 1 (2021): 86–98.

<sup>73</sup> Wahyu Risaldi, Mujibussalim, and M. Gaussyah. “Penerapan Asas In Dubio Pro Natura dan In Dubio Pro Reo oleh Hakim Perkara Lingkungan Hidup.” *Kanun Jurnal Ilmu Hukum* 20, No. 3 (2018): 547–560.

uncertainty regarding such a causal relation and the amount of compensation, decision-makers, both in the field of executive power and judges in civil cases and environmental administration must give consideration or judgment that prioritizes the interests of environmental protection and restoration."

The precautionary principle has not been embedded clearly in Indonesian legislation. Nevertheless, the Banda Aceh High Court apparently adopted the precautionary principle as a basis for calculating the compensation and the costs of environmental restoration imposed on PT Kallista Alam. The judges argued that the precautionary principle originated from the Rio De Janeiro Declaration of 1992, which included Indonesia among its signatories, and therefore could be applied nonetheless. In cassation the petitioner objected to this argument, as well as to the use of the principle of *in dubio pro natura*. However, the Supreme Court rejected these arguments, holding that the principle of 'carefulness' (*kehati-hatian*) should be interpreted as the precautionary principle and thus underpin the *in dubio pro natura* principle. The Court expressed the following opinion:

"The use of the 'in *dubio pro natura*' doctrine in the settlement of environmental, civil and administrative cases is not a far-fetched consideration because in fact the Indonesian legal system recognizes this doctrine which is based on the principles stated in Article 2 of Law Number 32 of 2009, namely carefulness (*precautionary*), environmental equity, biodiversity and the polluter pays principle."<sup>74</sup>

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<sup>74</sup> The application of the 'in *dubio pro natura*' doctrine in resolving civil and administrative environmental cases is not a speculative consideration. It is evident that the Indonesian legal system recognizes this doctrine, which derives from the principles outlined in Article 2 of Law Number 32 of 2009. These principles include precautionary, environmental equity, biodiversity, and the polluter pays principle.

In this ruling the judges not only applied considerations of justice, expediency and certainty, but added sustainability. In fact, the *in dubio pro natura* principle is an expression of this ideal, as it puts sustainability central, instead of legal certainty, utility or justice.

*b. Central Jakarta District Court Decision No. 374/Pdt/G/Lh/2019.*<sup>75</sup>

The second case where we can see judicial interpretation in support of the sustainability ideal is the widely reported citizens' lawsuit against the government concerning Jakarta's air pollution. The plaintiffs in this case claimed that the government's negligence in taking action to address the air pollution in Jakarta constituted a tortuous act and violated the public's right to a good and healthy environment as well as a number of other human rights. They demanded that the defendants take a number of measures to finally address Jakarta's air pollution. As evidence they cited data from the DKI Jakarta Environmental Agency which indicated that during the past seven years levels of fine particulate matter and ozone far exceeded air quality standards. The plaintiffs also presented research data showing 5,387,694 cases of illnesses related to air pollution in 2010, a number which increased in 2016 to 6,153,634 cases. As a result, the costs residents of DKI Jakarta had to bear for the treatment of diseases related to air pollution amounted to IDR 38.5 trillion in 2010 and IDR 51.2 trillion in 2016.<sup>76</sup>

The defendants in this case were the President of the Republic of Indonesia (Defendant I), the Minister of Environment and Forestry of the Republic of Indonesia (Defendant II), the Minister of Health of the Republic of Indonesia (Defendant IV), the Governor of the Special Capital Region of Jakarta (Defendant V), the Governor of Banten Province (Co-Defendant I), the Governor of the Province West Java

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<sup>75</sup> Indonesian Supreme Court Decision. "Direktori Putusan Mahkamah Agung: Putusan 374/Pdt.G/Lh/2019/Pn Jkt.Pst," 2021. Online at <https://putusan3.mahkamahagung.go.id/direktori/putusan/zaec2b0d732a5e24a30f313033353330.html>.

<sup>76</sup> *Ibid.*

(Co-Defendant II). The plaintiffs held them accountable for committing unlawful acts as well as for violating human rights, in particular in failing to fulfill the right to a good and healthy environment.<sup>77</sup> They stated that the defendants and co-defendants as government officials had a legal obligation to protect and fulfill the human rights of every citizen, in this case the fulfillment of the right to a good and healthy environment.<sup>78</sup>

The judges found that the poor air quality in DKI Jakarta had harmed the plaintiffs and the inhabitants of DKI Jakarta generally. The defendants had indeed failed to fulfill the right to a good and healthy environment – as guaranteed in Article 28H (1) of the 1945 Constitution, Article 9 letter c of Law No. 39 of 1999 concerning Human Rights, and Article 65 (1) and (2) of Law No. 32 of 2009 concerning Environmental Protection and Management.

The judges also considered the opinion of an *amicus curiae* submitted by David R. Boyd, UN Special Rapporteur on Human Rights and the Environment, which argued that poor air quality has implications for various rights, including the right to life, health, food, housing, children's rights, and the right to a good and healthy environment. They moreover took into consideration the opinion of the National Commission for Human Rights (Komnas HAM), which stated that air pollution in DKI Jakarta is a form of violation of the enjoyment of human rights, namely the rights to life, to a healthy environment, to health, and the rights of children as guaranteed in the 1945 Constitution and the Laws on Human Rights, Child Protection, and the Environment. The judges accepted the plaintiffs' claim in part.

Yet, in the end they concentrated on the statutory obligations of the defendants and found that Defendants I to V had acted in violation of their legal obligations, detailing for each of the defendants

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<sup>77</sup> *Ibid.*

<sup>78</sup> The obligations of the defendants and co-defendants are regulated in the constitution Article 28 H paragraph (1) and paragraph (1945 Constitution), Article 9 paragraph (3) of Law No. 39 of 1999, Article 2 letter a Law No. 32 of 2009, as well as Article 2 paragraph (1) and Article 12 paragraph (2) letter b. The International Covenant on Economic, Social and Cultural Rights as ratified under Law No. 11 of 2005.

how they had been at fault. The judgment stated that the negligence of the defendants had been proven convincingly and that therefore there was no need to state that they had violated human rights, so this part of the claim they rejected.

What made the judgment exceptional was that the judges prescribed in great detail which actions each defendant had to take. Most of these measures could be deduced from the failure of the defendants to implement relevant laws and policies. However, the judges went one step beyond when they stated that the government of DKI Jakarta had to “produce stricter standards for air quality in the province of DKI Jakarta *which are sufficient to protect human health, the environment and the ecosystem, including the health of the population that is sensitive*” (to air pollution, emphasis added).<sup>79</sup> Here the sustainability ideal subtly and perhaps indirectly makes its way into the judgment, as the judges not only stick to the existing regulations – which they did for the large majority of the measures they prescribed – but they outlined a general obligation for the government to take care of the well-being of Jakarta’s citizens in a way that would enable them to live a life sustained by a healthy environment. And not only Jakarta’s citizens, but also its environment and ecosystem.

## CONCLUSION

With his ideals of justice, benefit and legal certainty Gustav Radbruch has made a major contribution to the development of modern legal interpretation, away from strict forms of positivism and allowing for nuance and fulfilment of a societal sense of justice. The question we have asked in this article is whether at present these ideals still suffice to offer a satisfying range for legal interpretation to solve the major problems of our time. We have explored whether it makes sense to

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<sup>79</sup> Tightening the Ambient Air Quality Standards for the DKI Jakarta Province is sufficient to protect human health, the environment, and ecosystems, including the health of sensitive populations [...].

add a fourth ideal to these three now that the world is facing climate and ecological crises that threaten whole ecosystems—including humans—with extinction. Our brief exploration of international law and theories of deep ecology, ecofeminism and related currents of thought suggests that there are clear legal and intellectual foundations to sustain such an addition. We therefore plead to add the ideal of “sustainability” as a meta-value in the implementation of law, both in theory and practice. This will help to shift the current modernist paradigm away from anthropocentrism to a more inclusive view of nature. We are happy to see that some judgments across the globe already contain indications that legal interpretation is indeed moving into the direction we suggest. Two examples we discussed show that in Indonesia, a country not especially known for the progressiveness of its judiciary, judges sometimes have decided environmental cases in ways that go beyond the simple positivism of relying on statutory norms alone. These judgments indicate that in these cases judges may show to be aware of the stakes and be willing to read sustainability into their interpretations. This offers at least some hope for the future.

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