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Public Participation in Environmental Matters: Indonesia's Brief Reflection[a]

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ABSTRACT

The Aarhus Convention has played a pivotal role in advancing public participation in environmental matters in the world. This article introduces the principles and pillars of the Aarhus Convention as well as explores the Convention's impact on environmental governance and the promotion of transparent and inclusive decision-making processes. By examining the legal and institutional frameworks, case studies, and challenges faced in the implementation of the Aarhus Convention principles, it sheds light on Indonesia's journey towards achieving environmental sustainability through enhanced public involvement. The analysis reveals that, while significant progress has been made, there still need to be obstacles to fully realizing the Convention's objectives in Indonesia. This article underscores the need for continued efforts to strengthen the legal infrastructure, capacity building, and public awareness to ensure robust public participation and environmental protection in the Indonesian context.

Keywords: environment; justice; participation.

INTRODUCTION

Over the past few decades, there has been a proliferation of the concept of 'environmental democracy' in international environmental law and of the vision for public participation in environmental matters. Specifically, the Aarhus Convention in 1998 became the most significant international innovation in this area. The procedural and institutional norms derived from the convention blossomed into a wealth of law in both regional and national jurisdictions. This article focuses on the norms embedded in the 1998 Aarhus Convention and attempts to investigate how these norms have been adopted under Indonesian law.

Since the 1960s, public awareness of the environment and criticism of the function of the state has grown and led to the hypothesis that parliamentary democracy may not be adequate to address environmental issues[1], triggering the debate that democracy might not be the best type of government to protect environmental condition in all circumstances.[2] Rather than democracy, it is suggested that something radically new is needed in the world to overcome the increasing levels of resource scarcity and environmental degradation, because the old moral precepts will not solve the

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[1] Jeroen van Bekhoven, 'Public Participation as a General Principle in International Environmental Law: Its Current Status and Real Impact' (2016) 11 *NTU Law Review,* 219-271.

[2] Margrethe Winslow, 'Is Democracy Good for the Environment?' (2005) 48 *JEPM*, 771.

problems of modern society.[3] As an alternative, an authoritarian regime should emerge to prevent ecological ruin,[4] thus, William Ophuls describes:[5]

> "In brief, liberal democracy as we know it… is doomed by ecological scarcity; we need a completely new political philosophy and set of political institutions… what is ultimately required by the ecological scarcity is the invention of new mode of civilization, for nothing less seems likely to meet the challenge."

Many scholars responded to these challenges and argued that democracy and environmental quality are compatible, and in fact, the promotion of totalitarianism on environmental grounds conflicts with the environmental movement.[6] As environmental quality is made up of public goods; the idea of public participation in environmental decisions through the democratic process is consequential.[7]

According to Winslow, the important reason why democracy is more desirable than authoritarianism is because many forms of environmental degradation benefit the few and harm the many.[8] From another perspective, democracy may increase legitimacy and enhance the rationality of decisions as the public has a good chance to be heard and considered.[9] As stated by Mason, the definition of 'environmental democracy' concerns how the public can involve itself in environmental decision-making in a rational manner in order to prioritize judgements based on long-term generalizable interests, facilitated by communicative political procedures and a radicalization of existing liberal rights.[10] This definition has relatively little legal content, and might be considered a set of political or financial conditions[11] requiring further legislative groundwork to ensure proper implementation.

Participation in a more deliberative style of environmental decision-making has been put forward as a way to revitalize democracy at a time when citizens' trust in established government institutions is decreasing.[12] International effort to answer how democracy and environmentally sustainable development can be made compatible and mutually supportive led nearly 150 environmental governance scholars and practitioners from more than 65 developed, developing and

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[3] Lester Milbrath, *Environmentalist: Vanguard for a New Society* (Albany, NY; SUNNY Press 1984) p. 12. See also Jonathan Schell, *The Fate of the Earth* (New York: Knopf, 1982) p. 226, J. Donald Moon, 'Can Liberal Democracy Cope with Scarcity?' (1983) 4 IPSR 385-400.
[4] Winslow, *Op. Cit.,* p. 772.
[5] William Ophuls, *Ecology and the Politics of Scarcity* (W.H. Freeman 1977) p. 3 and 9. See also Garret Hardin, *Exploring New Ethics for Survival: The Voyage of the Spaceship Beagle* (Viking Press, 1972).
[6] Quan Li and Rafael Reuveny, 'Democracy and Environmental Degradation' (2006) 50 *International Studies Quarterly* 935-956. Bob P. Taylor, 'Environmental Ethics & Political Theory' (1991) 23 *Polity* 567-583.
[7] Frans Coenen, Dave Huitema, and Johan Woltjer, 'Participatory Decision-Making for Sustainable Consumption' in Frans Coenen (eds), *Public Participation and Better Environmental Decisions* (Springer 2008).
[8] Winslow. *Op. Cit,* p. 772.
[9] Hans Wiklund, 'In search of arenas for democratic deliberation: a Habermasian review of environmental assessment' (2005) *23 J Impact Assessment and Project Appraisal,* 281-292.
[10] Michael Mason, *Environmental Democracy: A Contextual Approach* (Earthscan 1999).
[11] As Sands explains, the development of international environmental law accepts great influence from non-legal factors such as economics and science. Other important factors among others are: increasing of public concern, short political interest, and justice conception on prevention of environmental problems between States. Philippe Sands, *Principles of Environmental Law*, *2nd Edition* (CUP 2003) pp. 6-7.
[12] Wiklund. *Op. Cit,* p. 281.

transition countries to meet to discuss the issues in a 2008 UNITAR-Yale Conference on Environmental Governance and Democracy.[13] The conference highlighted that public participation in environmental decision-making and implementation has become a cornerstone of environmental governance, since the benefits from public participation has contributed greatly to improving the quality of decision-making, facilitating policy implementation, and enhancing the accountability of institutions.[14] The conference also mentioned the development of several legal instruments at the international level, and called on states to seek the best approach to implement the concept in practice, in national, regional and local environmental governance, whilst taking into account their political, social and cultural circumstances.[15]

Public participation in environmental decision-making has echoed all over the world and become a permanent feature of many environmental regulatory systems over the past few decades.[16] Today, a body of regulations which seek to define the relationship between democracy and environment has been developed at the international, regional, and national level. States are witnessing the emergence of environmental democracy from new environmental legislation. There is no other regulatory field in current legal systems, which has developed the legal conditions of public participation in such a broad way, as in that of environmental protection.[17] These exceptional circumstances can be seen as a practical democracy or environmental democracy as it is widely understood.[18]

This research aims to present doctrinal research regarding the foundational principles and pillars of the Aarhus Convention and examine its effects on environmental governance, particularly in encouraging transparent and inclusive decision-making. Additionally, it seeks to assess Indonesia's alignment with achieving environmental sustainability through enhanced community participation.

DISCUSSION

The Aarhus Convention

The Aarhus Convention, officially known as the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998,[19] represented a significant step in the development of procedural environmental rights. Negotiations began in 1996

[13] UNITAR, 'Institutions, Public Participation and Environmental Sustainability: Bridging research and capacity development' (2008 UNITAR-Yale Conference on Environmental Governance and Democracy) <https://www.unitar.org/ksi/2008-unitar-yale-conference-environmental-governance-and-democracy> accessed 17 October 2018.
[14] *Ibid,* see also Achim Halpaap, 'Understanding the Democracy-Environment Interface' (2008) 8 *ENVIRONMENTAL POLICY AND LAW,* 323.
[15] *Ibid.*
[16] Benjamin J. Richardson and Jona Razzaque, 'Public Participation in Environmental Decision-Making' in Benjamin J. Richardson and Stepan Wood (eds), *Environmental Law for Sustainability* (Oxford: Hart 2006).
[17] Gyula Bándi, *Environmental Democracy and Law: Public Participation in Europe* (Europa Law Publishing 2014) Ch. I.
[18] *Ibid.*
[19] Hereinafter Aarhus Convention. The Aarhus Convention was drawn up on 25 June 1998 by the United Nations Economic Commission for Europe (UNECE), which is one of the five United Nations regional commissions. Aarhus is a city in Denmark where the treaty was signed.

and culminated in the adoption of the treaty just two years later,[20] an impressively short amount of time for the notoriously difficult task of drafting a convention in a version acceptable to a significant number of nation-states.[21]

The origin of the principles on the Aarhus Convention can be traced back to the 1960s. Public participation has enjoyed a long tradition in the environmental movement and more generally in the political activism of that era which sought stronger democratic governance and environmental protection.[22] Literature reviews on public participation cover a range of specialist areas including, transportation, health care, tourism, education and environment.[23]

A book by Rachel Carson, 'Silent Spring', published in 1962, had a significant impact on the awareness of dangers threatening the environment.[24] This book only describes how the pesticide DDT, intended to control insects, ended up being ingested by birds that ate those insects, and as a result was health problems for the birds and in the end the people who ate the birds, and influenced political leaders in it the portrayal of environmental degradation affecting quality of life.[25] Silent Spring and other works opened the world eyes so that a healthy environment became a matter of both public and individual concern and, eventually, a fundamental part of human rights.[26] Carson's ground-breaking work contributed to the development of environmental rights, including the right to participate in environmental decision-making, now widely recognized by scholars around the world, as well as by leading human rights and environmental institutions.[27]

Another significant contribution in this area was made by Christopher Stone in his seminal work, 'Should Tress Have Legal Standing?'[28] Carlson's work related to the manifestation of public participation in a democracy based on the eco-centric approach, or as scholars recognized it, the theory of natural objects.[29] In a persuasive argumentation, Stone argues for the expansion of rights and, for example, the possibility to represent the interests of other biotic communities before the courts. [30] The essence of Stone's conception is the possibility of setting up guardians to represent the rights of other biotic communities before the courts.[31] *Sierra Club v Morton* case seems to support

[20] U.N. ECON. COMM'N OF EUR., *The Aarhus Convention: An Implementation Guide 2nd edition*, pp. 15-16.
[21] Marianne Dellinger, 'Ten Years of the Aarhus Convention: How Procedural Democracy Is Paving the Way for Substantive Change in National and International Environmental Law' (2012) 23 Colo. *J. Int'l Envtl. L. & Pol'y*, 309, 319.
[22] Dinah Shelton and Donald K. Anton, *Environmental Protection and Human Rights* (CUP 2011), Ch. 1.
[23] Azizan Marzuki, 'Challenges in the Public Participation and the Decision Making' (2015) 53 *Sociologija i proctor,* 21.
[24] Alexandre Kiss and Dinah Shelton, *Guide to International Environmental Law* (Martinus Nijhoff Publisher 2007), 34.
[25] Benjamin W. Cramer, 'the Human Right to Information, the Environment and Information about the Environment: From the Universal Declaration to the Aarhus Convention' (2009) 14 *COMM.L. & POL'Y,* 73–103.
[26] In later testimony before Congress, Carson emphasized that one of the most basic human rights should be the "right of the citizen to be secure in his own home against the intrusion of poisons applied by other persons." Linda Lear, Introduction, Rachel Carson, Silent Spring xv (40th Anniversary ed. 2002) in *Ibid.*
[27] Even though Rachel Carson idea of environmental protection as a preventive or proactive human right has not yet caught on in America, though it has gained currency in other nations, particularly in Europe. In *Ibid.*
[28] Christopher Stone, *Should Tress Have Standing? Law, Morality and the Environment, 3rd ed.* (London: Oxford University Press 2010).
[29] *Ibid.*
[30] *Ibid.*
[31] Holly Doremus, 'Environmental Ethics and Environmental Law: Harmony, Dissonance, Cacophony, or Irrelevance?' (2003) 37 U.C. *Davis Law Review,* 1-11.

this.[32] Dissenting opinion delivered by Justice William O. Douglas was memorable arguing that the environment may become parties in litigation and they may possess legal personality.[33] The judgment has provoked widespread debate and opened a new perspective of the environment being treated as a legal person.[34]

Influenced by human rights perspectives, scholars identified at least three theoretical approaches to explain and capture the various nuances, viewpoints and controversies surrounding the legal and philosophical conceptualization of environmental issues in term of human rights.[35] The first theory sees the environment as a 'precondition to the enjoyment of human rights'. The second theory views human rights as 'tools to address environmental issues, both procedurally and substantively', and the third theory attempts to integrate human rights and the environment under the concept of sustainable development.[36]

Environmental rights have not yet received international recognition even long after the adoption of the Universal Declaration on Human Rights 1948 and the two UN Covenants on human rights in 1966.[37] It is also noteworthy, that most individual and group rights entered the international environmental discourse in the early 1970s, especially after the Declaration of the United Nations Conference on the Human Environment 1972 (Stockholm Declaration) acknowledged that human beings have the fundamental right to a safe or wholesome environment, and adding that the implementation of these rights depends upon ecological conditions. The statement was reflecting the perception that environmental degradation can impair the full enjoyment of human rights.[38] Broadly interpreted, Principle 1 of the Stockholm Declaration not only contains the right to the environment but also includes procedural environmental rights.[39] 'Substantive' and 'procedural' obligations became common under international environmental law.[40]

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[32] Sierra Club v. Morton, 405 U.S. 727 (1972) case has become a landmark in environmental protection. This was the first case that postulated the environmental lawsuit since Sierra Club sued US Forest Service for environmental damaged caused by the development of Mineral King around Sequoia National Park, United States.

[33] *Ibid.*

[34] *Ibid.*

[35] Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 Eur J Int Law 613. See also Linda Hajjar Leib, *Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives* (Brill 2010) Ch. III. Leib mentions three theories, to describe the relationship between human rights and the environment: the expansion theory, the 'environmental democracy' theory and the genesis theory.

[36] *Ibid.* See also Richard Desgane, 'Integrating Environmental Values into European Convention on Human Rights' (1995) 89 Am, *J. Int'l L,* 263. From a human rights perspective, environmental conservation and environmental quality improvement enhance the quality of human life. While from the ecological perspective, the protection of human rights will automatically protect the environment.

[37] The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). See Andriy Andrusevych, 'the Right to Public Participation in Environmental Decision-Making in Ukraine: Challenges of Compliance' (2018) 2 *Hum. Rts. & Int'l Legal Discourse*, 211, 212.

[38] "*Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations*" Principle 1 UN Declaration of the United Nations Conference on the Human Environment, United Nations, available at <http://www.un-documents.net/unchedec.htm> last visited 24 August, 2018.

[39] Dinah Shelton, 'Stockholm Declaration (1972) and Rio Declaration (1992)' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2008).

[40] Sands *Op. Cit.* p. 142, Pierre Marie Dupuy and Jorge E. Viñuales, *International Environmental Law* (CUP 2015) 54.

According to Shelton, the definition of 'environmental rights' is the human right to environmental conditions of a specified quality.[41] In practice, substantive environmental rights relate to the realization of specific environmental rights and obligations, such as the right to health, clean drinking water, sanitation.[42] The purpose of substantive environmental rights is to guarantee human health and quality of life by creating rights which conserve the integrity of the environment. In point of fact, a substantive right is designed to terminate decisions of government and other polluters that will cause environmental degradation.[43]

As well as the development of substantive environmental rights, a focus on procedural environmental rights appears to have gained momentum. Procedural environmental rights are attractive because these rights enable the public to be heard and to affect decisions.[44] To guarantee public involvement, international environmental conventions confer on individuals or groups three generic types of right: the right to information, the right to participation and the right to a judicial remedy in the environmental context.[45] These three elements are characterized as the 'pillars of environmental democracy.'[46]

The assertion of the important relationship between human activities and the environment in international legal instruments began in the Stockholm Declaration.[47] The Stockholm Declaration evidenced that human beings, flora and fauna have indispensable rights.[48] Furthermore, this Declaration highlighted the protection of a person whereas pollution (especially air and water pollutions) and other environmental damage may affect the whole people and affect the sustainability of the development.[49] Ten years later, the UN World Charter for Nature reasserted and gave emphasizes to the notion of public participation.[50] Paragraph 23 of the document states that

> "All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation."[51]

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[41] Dinah Shelton, 'Developing Substantive Environmental Rights' (2010) 1 J of Human Rights and the Env 89.
[42] Birgit Peters, 'Unpacking the Diversity of Procedural Environmental Rights: The European Convention on Human Rights and the Aarhus Convention' (2018) 30 *Journal of Environmental Law*, 1-27.
[43] Jason Unger, *Environmental rights in Alberta. Module 1: substantive environmental* (The Environmental Law Centre 2016) <http://elc.ab.ca/wp-content/uploads/2016/12/EBR_MOD-1_Substantive-Environmental-Rights-in-Alberta.pdf> accessed 15 September 2018.
[44] van Bekhoven *Op. Cit,* p. 228.
[45] The notion of environmental procedural rights is mushrooming in international environmental law agreements. For example, Articles 14(1)(a), (c) of the Convention on Biological Diversity (CBD) call—to the extent possible—for the participation of the public in impact assessments and for taking into account the resulting arrangements. Likewise, the United Nations Framework Convention on Climate Change (UNFCCC) calls for the widest participation possible in the process of climate change and in education and training on climate change. Also more newly adopted international environmental agreements, like the Paris Agreement or the Minamata Convention on Mercury, contain procedural environmental rights.
[46] David Hunter, James Salzman, and Durwood Zaelke, *International Environmental Law and Policy 4th ed.* (Foundation Press 2007) p. 535.
[47] Declaration of the United Nations Conference on the Human Environment 1972, Principle 1.
[48] *Ibid.* Principle 2.
[49] *Ibid.* Principle 11.
[50] A/RES/37/7 World Charter for Nature 1982.
[51] *Ibid.* para. 23.

Adopted ten years after the World Charter for Nature, Principle 10 of the Rio Declaration constituted a firm legal basis for citizens to exercise their environmental rights, and at the same time, included direct obligation of states to develop their regulation in accordance with this principle. Principle 10 assured public participation as follows:

> "Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."[52]

With more than 150 states agreeing the Rio Declaration, the attention of the international communities to the participatory elements in the context of international environmental law and policy has expanded.[53] Principle 10 expounded the distinction between the three cornerstones of public participation: access to (environmental) information; participation in decision-making; and access to judicial and administrative proceedings (access to justice).

However, the first multilateral treaty specifically addressing the link between human rights and environmental rights, while connecting both of those to government accountability and transparency was the Aarhus Convention.[54] Aarhus, considered by many as a landmark environmental treaty, became the globally significant example of the legal consolidation of measures to enhance public participation concerning administrative decision-making, freedom of information and access to justice.[55] This convention indicated the enormous achievement of public participation reforms[56] and considered as the first multilateral environmental agreement that mainly aims to apply certain obligations to member states regarding their citizens.[57] State enthusiasm to ratify the treaty reflects the fact that many governments already provide for similar kinds of public involvement in environmental decision-making.[58]

As its full title implies, the Aarhus Convention details three generic types of procedural environmental rights (or three 'pillars').[59] The first pillar deals with securing effective access to environmental information; the second pillar aims to improve public participation in decisions

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[52] The Rio Declaration on Environment and Development 1992, principle 10.
[53] Jonas Ebbesson, 'The Notion of Public Participation in International Environmental Law' (1997) 8 Yearbook of International Environmental Law 51-97.
[54] United Nations Economic Commission for Europe, Introducing the Aarhus Convention, available at <https://www.unece.org/env/pp/introduction.html> accessed 4 October 2018.
[55] Richardson and Razzaque *Op. Cit* p. 174.
[56] *Ibid,* p. 168.
[57] Mark Palmer, 'Regulation of environmental rights, review on Aarhus Convention' in Seiyed A. Sajjadi and M Hossein Ramazani Ghavamabadi, 'The Element of Access to Information in Aarhus Convention and Act Regarding Dissemination and Free Access to Information' (2016) 9 *Journal of Politics and Law,* 105.
[58] *Ibid.*
[59] This is why these three types of rights are often called as the three 'pillars' of the Aarhus Convention.

relating to the environment; and the third pillar ensures the existence of a review procedure for any decision, act or omission under the previous two pillars of the Convention and in relation to other domestic environmental law.[60] The three pillars are interconnected, which means the effective fulfilment of each pillar depends on the other. For example, without access to information, participation in decision-making has little substance. Analogously, obtaining a form of reparation for environmental damage through administrative or judicial proceedings is problematic without valid evidence or public participation.[61]

The Preamble of the Convention acknowledges several prior legal documents, among them: the Stockholm Declaration on Human Environment (Article 1); the Rio Declaration on Environment and Development and Element of Access to Information (Article 10); Resolution No 37/7, October 1982 concerning World Charter for Nature; and General Assembly Resolution No. 54/94, December 1990 on Healthy Environment for the Welfare of Members of the General Assembly.

As regards the first pillar, the drafting of the Convention drew mostly on the Directive of the Council of the European Community, in particular, Council Directive 90/313 on the freedom of access to information on the environment.[62] However, since the first pillar went beyond that Directive, the European Union (EU) superseded it with Directive 2003/4 of the European Parliament and the Council on public access to environmental information, proceeding to ratify the Convention.[63] Likewise, the Directive on Environmental Impact Assessment (the EIA Directive)[64] and the Directive on Integrated Pollution Prevention and Control (the IPPC Directive)[65] were the models for the second pillar.

Theoretically, the Convention embraced a rights-based approach rather than an American-style reactive statutory protection,[66] which requires member states to ensure the right to information, participation in decision-making, and access to environmental justice within their jurisdiction. It also aims to protect the right of every person of present and future generations to live in an environment adequate for health and wellbeing,[67] representing a significant step forward in international law. Moreover, the nature of the convention is to set the 'floor' not the 'ceiling', only establishing minimum standards[68] offering the possibility for member states to go further in providing access to information, participation in decision-making, and access to environmental justice.

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[60] Parola interpreted enforcement of environmental law (Art. 9(3) Aarhus Convention) and the Review of Compliance Mechanism (Art. 15 Aarhus Convention) as two additional pillars (pillar four and five). Parola argued that both are original because never before were they granted to individuals. See Giulia Parola, *Environmental Democracy at the Global Level* (Walter de Gruyter GmbH 2013) pp. 158-165.

[61] Dinah Shelton, Sylvia Bankobeza & Barbara Ruis, Information, 'Public Participation, and Access to Justice in Environmental Matters', in *UN Environment Program Training Manual on International Environmental Law*, in van Bekhoven *Op.Cit* p. 229.

[62] Council Directive 90/313/EEC on Freedom of Access to Information on the Environment, 1990 O. J. L 158/56.

[63] Council Directive 2003/4/EC on Public Access to Environmental Information and Repealing Council Directive 90/313/EEC, 2003 O.J. L 41/26.

[64] Council Directive 85/337/EEC on the Assessment of the Effects of Certain Public and Private Projects on the Environment, 1985 O.J. L 175/40. That Directive has now been replaced by Directive 2011/92 of the European Parliament and the Council (2012 O.J. L 26/1).

[65] Council Directive 96/61/EC on Integrated Pollution Prevention and Control, 1996 O. J. L 257.

[66] Cramer *Op. Cit.* p. 93.

[67] Aarhus Convention *Op. Cit* p. Art. 1.

[68] Abdul Haseeb Ansari, 'Principle 10, the Aarhus Convention and Status of Public Participation in Environmental Matters in the Malaysian Laws with Special Reference to EIAs' (2009) 17 *IIUMLJ* 57.

Furthermore, it does not require any derogation of existing rights in this area.[69] The Convention also restricted any forms of discrimination based on citizenship, nationality or domicile against persons who seek their rights under the Convention.[70]

The role of public authority as an authoritative body to ensure the fulfilment of several rights of the Convention is considered important. The Convention provides 'public authority' as an important foundation. The functional definition of public authorities covers governmental bodies from all sectors and at all levels (except bodies acting in a judicial or legislative capacity), as well as bodies performing public administrative functions. Although the Convention is not primarily focused on the private sector, privatized bodies with public responsibilities concerning the environment and which are under the control of public authorities are also covered by the definition.[71] The definition of public authority also encompasses the institutions of regional economic integration organizations that become party to the Convention. Consequently, once the European Community ratifies the Convention, the provisions of the Convention will apply to EU institutions.[72]

Another essential feature from the Convention is the role of international organizations to promote the application of its principles within the global framework process and bodies in matters relating to the environment.[73] For compliance review, meeting of the member states is required to establish, based on consensus and voluntary arrangement of a non-confrontational, non-judicial and consultative nature. Such arrangements are designed to make 'appropriate public involvement' possible.[74] Although implicit, reference to the practice of setting up non-compliance procedures under Multilateral Environmental Agreements (MEAs), along the lines established under the Montreal Protocol and subsequently followed in several other MEAs. The link to this model is indeed reflected in the institutional and procedural features of the mechanism, as well as in the language used in the Decision, in that it avoids any wording possibly suggesting judicial or confrontational attitudes.[75] Therefore, expressions such as 'non-compliance', 'submission' or 'communication', and 'Party concerned' are used instead of the words 'breach', 'application' or 'defendant'.[76] Although the Convention is regional and European, the Convention is open to any non-ECE countries to join after the approval of assembly members.[77]

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[69] Aarhus Convention *Op. Cit.* Art. 1. Art. 3 paras. 5 and 6.
[70] *Ibid.* Art. 3 para 9.
[71] *Ibid.* Art. 2.
[72] *Ibid.* Art. 2 par. 2(d).
[73] *Ibid.* Art. 3.
[74] See Cesare Pitea, ''the Non-Compliance Procedure of the Aarhus Convention: Between Environmental and Human Rights Control Mechanisms' (2006) 16 *Italian Y.B. Int'l L.* 85.
[75] *Ibid.*
[76] *Ibid.*
[77] Aarhus *Op. Cit* p. Art. 19.

1. First Pillar: Access to Environmental Information

The first pillar of the convention, access to information, is the fundamental starting point for any public involvement in decisions-making.[78] This pillar aspires to ensure that members of the public are conscious of what is occurring in their adjacent environment and moreover aims for the public to be competent to participate in an informed manner.[79] Therefore, the Aarhus Convention member states shall ensure that the public has access to environmental information held by public authorities.[80] This includes not only information on the state of human health and safety and on the state of the environment, but also information regarding factors that affect human health and elements of the environment, such as relevant substances, activities, administrative measures, policies, legislation, plans and programs.[81]

Free access to environmental information is essential due to the advantages it offers. As Robinson states access to environmental information assists more rational, informed decision-making and promotes transparent and accountable decision-making.[82] Accordingly, the notion of transparency - expressed as access to information - was deemed to be a necessary expression and condition for democratic governance.[83]

The notion that environmental information may empower members of the public is effectively articulated in the ninth and tenth paragraphs of the Convention preamble. Articles 4 and 5 cover the methods by which environmental information can be requested from public authorities and the obligations on member states to ensure that such authorities actively disseminate environmental information from various sources. The Aarhus Convention encompasses both active and passive expressions of the right to access environmental information.[84] Active information requires public authorities to collect and disseminate environmental information in publicly accessible lists, registers, and files, while passive information grants the right to the public to receive environmental information in response to a request.[85]

Under article 4, any information held by a public authority must be provided when requested by a member of the public, unless it can be shown to fall within a finite list of exempt categories.[86] The information must be provided promptly, within one month after submission of the request, although, this interval may be extended by a further month where the volume and complexity of the information justify the condition. The requester must be notified of any

[78] Maria Lee and Carolyn Abbot, 'The Usual Suspect? Public Participation under the Aarhus Convention' (2003) 66 *Mod. L. Rev.* 80, 88.
[79] Parola *Op. Cit,* p. 146. See also Sébastien Duyck, 'Promoting the Principles of the Aarhus Convention in International Forums: The Case of the UN Climate Change Regime' (2015) 22 RECIEL 123, 126.
[80] Jonas Ebbesson, 'Public Participation and Privatization in Environmental Matters: An Assessment of the Aarhus Convention' (2011) 4 *Erasmus L. Rev.* 71.
[81] Aarhus Convention *Op. Cit,* Art. 2, para. 3.
[82] JR Robinson, et al., 'Public Access to Environmental Information: A Means to What End?' (1996) 8 *Journal of Environmental Law*, 19, 20.
[83] Michael Mason, 'Information Disclosure and Environmental Rights: The Aarhus Convention' (2010) 10 *Global Environmental Politics,* 11.
[84] Ansari. *Op. Cit* p. 67.
[85] See. UNECE, *The Aarhus Convention an Implementation Guide* (United Nations Publication, 2nd edition, 2014) p. 75
[86] Aarhus Convention. *Op. Cit* Art. 4. Paras 1, 3 and 4.

such extension and provided with the reason.[87] Charges for supplying environmental information may be imposed by public authorities providing the charge does not exceed a 'reasonable amount'.[88]

The Convention includes provision to allow public authorities to disclose environmental information, including any reasons for refusing an information request (such as national defence, international relations, public security, the course of justice, commercial confidentiality, intellectual property rights, personal privacy) or where the environmental information requested has been supplied free or contains internal communications or material in the course of completion.[89] However, there are some restrictions on these the use of these exceptions withhold information on emissions which is significant for the protection of the environment.[90] Generally, these grounds must be interpreted in a restrictive way and always taking into account the public interest served by disclosure.[91]

If a public authority does not retain the information requested, it should either guide the requester to another more appropriate public authority which might have the information or transfer the request to that public authority and inform the requester of this.[92] The Convention also enacts a refusal mechanism, which requires the public authority to provide the reason for refusal in written form within one month from the date of the request, with a possibility to extending by a further month where the complexity of the information justifies the condition.[93]

In contrast to the request-based disclosure obligations on public authorities contained in Article 4, Article 5 covers the forms and categories of environmental information which public authorities are actively required to collect and disseminate.[94] These include general obligation on public authorities to be in possession of up to date environmental information that is relevant to their functions and to make information 'effectively accessible' to the public by providing information on the type and scope of information held and the mechanism to access the information.[95]

Member states are required to 'progressively' make environmental information publicly available in electronic databases which can be readily accessed through public telecommunications networks.[96] Furthermore, the convention outlines certain types of information as examples of what should be included provided that the information is already

[87] *Ibid.* Art. 4, para. 2.
[88] *Ibid.* Art. 4, para. 8.
[89] *Ibid.* Art. 4, paras. 1, 3 and 4.
[90] *Ibid.* Art. 4, paras. 3(c) and 4.
[91] Ebbesson. *Op. Cit* p. 75.
[92] Aarhus Convention (n 20) Art. 4, para. 5.
[93] *Ibid.* Art. 4, para. 7.
[94] Mason. *Op. Cit* p. 15.
[95] *Ibid.* Art. 5, paras 1 and 2.
[96] *Ibid.* Art. 5, para. 3

available in electronic form.[97] This includes facts on the state of the environment, the literature of legislation relevant to the environment, environmental agreements, and "other information to the extent that the availability of such information in this form would facilitate the application of national law implementing this Convention".[98] Member states are required to produce national reports on the state of the environment at regular intervals not exceeding four years.[99]

The Convention requires member states to progressively establish such register.[100] It also requires the issue to be on the agenda of the first meeting of member states where further steps are to be considered, including the elaboration of relevant instruments that could be annexed to the Convention.[101] These provisions provided the legal basis for the negotiation and adoption of the Protocol on Pollutant Release and Transfer Registers (PRTRs) and, at least for States that are a member of both instruments, will effectively be superseded by the protocol.[102] Public authorities are required to promptly provide the public with all information in their possession that could enable the public to take action to prevent or reduce harm arising from an impending threat to human health or the environment.[103]

2. Second Pillar: Environmental Participation

The second pillar of the Convention follows the conventional approach on the threefold distinction of public participation in specific decision-making, in planning, policy-making, and legislative drafting and rule-making.[104] This structure is similar to the Arnstein theory, "A ladder of citizen participation", in which members of the public are possessed with more power when they have a particular interest in matters directly affecting their lives and well-being and gradually less power and influence as issues become more abstract and general.[105] In an academic approach, Arnstein proposed a framework for eight rungs on the ladder in the three main categories: "citizen power", "tokenism" and "non-participation".[106]

The Convention provides minimum standards for public participation in various categories of environmental decision-making in Articles 6 to 8. Article 6 is by far the most important and is concerned with public participation in decision-making on specific activities. Article 7 covers public participation concerning plans, programs and policies relating to the environment, whilst Article 8 covers public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments.

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[97] See Anaïs Berthier and Ludwig Krämer, *The Aarhus Convention: Implementation and compliance in EU law* (The European Union Aarhus Centre, 2014), p. 35.
[98] *Ibid.*
[99] Aarhus Convention. *Op. Cit,* Art. 5, para. 4.
[100] *Ibid.* Art. 5, para. 9.
[101] *Ibid.* Art. 10, para. 2(i).
[102] The Kiev Protocol 2003 was adopted at an Extraordinary Meeting of the Parties in Kiev. It is presented by UNECE as the first legally binding international instrument on pollution inventories, with the goal of enhancing public access to information through the establishment of coherent, integrated, nationwide pollutant release and transfer registers. See Mason (85) p. 15.
[103] Aarhus Convention *Op. Cit* Art. 5, para. 1(c).
[104] Jerzy Jendroska, 'Aarhus Convention and Community Law: The Interplay' (2005) 2 *J. Eur. Envtl. & Plan,* 12.
[105] Sherry R. Arnstein, 'A Ladder of Citizen Participation' (1969) 35 *JAPA,* 216-224.
[106] Ibid. See also UNEP, *Putting Rio Principle 10 into Action: An Implementation Guide* (UNEP 2015) Esp. Chapter 3.

As far as specific decision-making is concerned, in Article 6 the Convention establishes a relatively sophisticated set of procedural guidelines to be followed by authorities when making decisions to approve certain activities.[107] Most of the activities covered by Article 6 fall under the categories listed in an Annex to the Convention.[108] This Annex is based on a list of activities subject to the EIA Directives and IPPC Directives. The difference is thus not so much in the scope of the activities covered but in the procedural details concerning public participation which Article 6 of the Convention elaborates in much more detail.[109] This provision applies, in particular, to the requirements concerning the notification of the public and the extent of information to be provided free of charge for public inspection in order to allow the public to participate actively.[110]

Article 7 of the Convention is drafted in a somewhat complicated manner. That part of the Article relating to plans and programs refers closely to the provisions of Article 6, nevertheless, the obligations are clear. The parties to the Convention are obliged to make appropriate provisions for the public to participate during the preparation of plans and programs concerning the environment, within a transparent and fair framework, having provided the important information to the public. Such a framework has to comply with the following criteria:[111]

a) identify the public who may participate;
b) provide reasonable time-frames for different phases;
c) provide for early public participation
    i. when all options are open
    ii. when effective public participation can take place
d) Take due account of the outcome of public participation

Compared to the provisions concerning plans and programs, the provisions of Article 7 which concern policy-making and those of Article 8 regarding public participation in rule-making and legislative drafting are vague, leaving room for interpretation by the parties to determine the actual scope of public participation. Article 8 applies to public participation during the preparation by public authorities of executive regulations and other commonly applicable legally binding rules that may have an important effect on the environment.[112] Because the legislative bodies are the competent institutions for the final adoption of legal acts, with subsequent binding effect, the preparation of legislation by public authorities cannot be considered as acting in a legislative capacity within the meaning of the Convention.[113] Public

[107] Aarhus Convention. *Op. Cit.* Art. 6, paras. 2, 3, 4, 5 and 7.
[108] *Ibid.* Annex I List of Activities Referred to in Article 6, Paragraph 1 (a)
[109] Jendroska. *Op. Cit,* 15.
[110] Aarhus Convention. *Op. Cit.* Art. 6, paras 4, 5 and 6.
[111] Jendroska. *Op. Cit,* p. 17, within this framework Art. 6, paras. 3, 4 and 8, of Aarhus Convention shall be applied.
[112] Aarhus Convention. *Op. Cit*. Art. 8.
[113] UNECE. *Op. Cit.* p. 182.

authorities drafting legislation will subsequently pass it on to a parliament or other legislative body, however, public participation while the drafts are under the auspices of public authorities does, in fact, constitute participation at an early stage.[114]

As a guideline, it suggests three factors for effective participation: the fixing of time frames sufficient for public participation; ensuring the public availability of draft rules through publication or other means; and giving the public the opportunity to comment on draft rules either directly or through representative bodies.[115] As with Article 4, the provisions of Article 6, and possibly of Articles 7 and 8, can give rise to a right of appeal.[116]

3. Third Pillar: Access to Justice

The third pillar of the Convention is closely tied to the other two pillars of the treaty. The third pillar of the Convention aims to provide access to justice in three contexts:[117]

a) Review procedures concerning information requests;
b) Review procedures concerning specific (project-type) decisions which are subject to public participation requirements;
c) Challenges to breaches of environmental law in general.

Thus, the inclusion of an 'access to justice' pillar not only underpins the first two pillars; it also points the way to empowering citizens and NGOs to assist in the enforcement of the law.[118]

Article 9(1) and 9(2) concern the availability of administrative and judicial remedies designed to enforce the rights granted to the public under the passive access to information provisions (Article 4) and the provisions relating to public participation in decisions on specific activities (Article 6). According to Kravchenko, Skrylnikov and Bonine, an examination of Article 6 shows several procedural requirements that could become the subject of a lawsuit or other appeal which can be grouped into three classifications of procedural errors:[119]

a) Failure to disclose all information to the public relevant to its participation;
b) Improper procedures for public participation, such as timely or adequate notice, opportunity to comment, timeframes, restrictions on "administrative standing," or other conditions; and
c) Inadequate response to comments received (failure to take due account), or failure to reveal the reasons or considerations for the decision.

The Convention provides that the access to justice provisions apply to such other parts of the Convention as states may designate.[120] Significantly, the Convention makes provisions for different legal systems and distinguishes between those that require the impairment of a

[114] *Ibid.*
[115] Aarhus Convention. *Op. Cit* Art. 8 (a) – (c).
[116] *Ibid.* Art. 9, par. 2.
[117] Jeremy Wates, 'the Aarhus Convention: A Driving Force for Environmental Democracy' (2005) 2 *J. Eur. Envtl. & Plan. L*. 2 (2005) p. 6.
[118] *Ibid.*
[119] Svitlana Kravchenko, Dmitry Skrylnikov and John E. Bonine, 'Access to Justice in Cases Involving Public Participation in Decision-making' in Stephen Stec (ed), *Handbook on Access to Justice under the Aarhus Convention* (ProTertia, 2003) p 27.
[120] Aarhus Convention. *Op. Cit* Art. 9, par. 2.

right and those that do not.[121] In doing so, the Convention is trying to reach a single standard and directs those states requiring an impairment of a right to consider the circumstances of a violation of the Convention's provisions.[122] The Convention also goes some way towards establishing general legal standing for environmental NGOs since it necessarily requires states to recognize that the purposes of an organization as stated in its charter or statute may establish a sufficient and recognizable legal interest.[123] Thus, the Convention states that environmental NGOs meeting the requirements of national law shall be deemed to have rights capable of being impaired or sufficient legal interest to challenge the procedural and substantive legality of decisions on specific activities.[124]

The issue of an "*actio popularis*" was hotly debated during the negotiation[125] of the Convention and the outcome can be found in Article 9(3). Whether this amounts to an *actio popularis* is a matter of some debate.[126] It has been noted that the possibility to make a complaint to a prosecutor or a responsible agency may technically satisfy the obligation under this paragraph, although the paragraph would seem to indicate that, as a minimum, a member of the public should be allowed to appear as a party in the proceedings.[127] But the provision also raises the possibility that a state may introduce specific criteria into its national law as a prerequisite for recourse to this remedy.[128] Thus, this mechanism can, at most, be said to come close to the notion of an *actio popularis*. It is worth mentioning that the Convention also requires that Parties to the Convention ensure that information is provided to the public about review procedures and that the establishment of appropriate assistance mechanisms to remove financial and other barriers to access to justice are considered.[129]

Indonesia's Achievement in Public Participation

As mentioned above, although the Aarhus Convention is regional, in practice it has the potential to be global as membership of the Convention is accessible not only to member states of the UNECE but also to any member of the United Nations upon approval of the Meeting of the Parties (MOP).[130] Moreover, parallel principles are being advocated and applied in various legal regimes. There has been plethora of academic writing on the nature of public participation in environmental matters and its position in international environmental law. For instance, as a result of jurisprudence examination research, Anne and Paoli found that public participation is being consolidated in

[121] *Ibid.*
[122] *Ibid.*
[123] *Ibid.*
[124] *Ibid.*
[125] See John E. Bonine, 'The Public's Right to Enforce Environmental Law' in Stec. *Op. Cit,* p. 31.
[126] Jendroska. *Op. Cit* p. 19.
[127] Aarhus Convention *Op. Cit* Art. 9, par. 3.
[128] *Ibid.* Art. 9, par. 4.
[129] *Ibid.* Art. 9, par. 5.
[130] *Ibid.* Art. 19, par. 3.

international environmental law and there are hints of its potential customary nature.[131] Van Bekhoven identified the strong connection between public participation with other established principles such as sustainable development, the duty to execute environmental impact assessments, and good governance.[132] Since public participation has influenced the formation, content, interpretation, and development of international environmental law, van Bekhoven firmly categorised public participation as a general principle of international environmental law.[133]

At the regional level, states seek a more effective approach to implementation of this legal instrument on the ground. Recently, 24 representatives of Latin America and Caribbean (LAC) countries committed to adopting the first legally binding instrument to protect the rights of access to information, public participation and access to justice in environmental matters.[134] Prior to this, and in the context of enormous environmental constraints and the vast number of people in East Asia,[135] the Guidelines for the Development of National Legislation on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters' (Bali Guidelines) were unanimously accepted in 2010.[136]

While environmental law in Indonesia has proliferated over the last five decades, Indonesia's experience of environmental law is recent.[137] It began after the Government of Indonesia (GOI) officially enacted the first law to regulate environmental management on the 1982 Law No. 4 on Basic Provisions of Environmental Management Act (BPEMA 1982), ten years after the Stockholm Declaration on Human Environment in 1972 resounded across the world.[138]

The first amendment to the BPEMA 1982 was in 1997, with the 1997 Law No. 23, the Environment Management Act (EMA 1997). The new law was equipped with more instruments such as an enforcement squad to drive implementation, including the introduction of class action in the Indonesian environmental legislative regime.[139] Although vague, EMA 1997 also embraced the concept of public participation, whether explicitly using the term 'participation' or implicitly with non-

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[131] Leslie-Anne and Duvic-Paoli, 'the Status of the Right to Public Participation in International Environmental Law: An Analysis of the Jurisprudence' (2012) 23 Yearbook of International Environmental Law 80-105.
[132] van Bekhoven. *Op. Cit*.
[133] *Ibid.*
[134] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, concluded on 4 March 2018 in San Jose, Costa Rica, after 4 years negotiating process that began in 2014.
[135] Volker Mauerhofer, 'Public participation in environmental matters: Compendium, challenges and chances globally' (2016) 52 Land Use Policy 481-491.
[136] Ibid. The see the implementation of Principle 10 read Benson Owuor Ochieng, 'Implementing Principle 10 and the Bali Guidelines in Africa' (Issue Paper to Support UNEP and Other Stakeholders, 2015). Even though such laws exist but are inadequate, all African countries should make measurable and time bound commitments to improve them. The laws should comprehensively cover freedom of access to information, public participation and access to justice, and should include non-discrimination clauses. In addition, the establishment of any regulations, institutions and practices required to enforce such laws should be fast-tracked.
[137] Koesnadi Hardjasoemantri, *Hukum Tata Lingkungan 7th edition* (Gajah Mada University Press 2002) 6-7.
[138] Even though there were several official legal frameworks before independent, as inherited from colonial government (i.e. *Staatsblad* 1931 No. 134 on Ord. on Wildlife, *Staatsblad* 1939 No.733 Ord. on Hunting, in Java and Madura, *Staatsblad* 1941 No.167 Ord. on Nature Reserve, etc.) but these laws are partially in scope and nature. This study pointed to Stockholm Conference in 1972 as starting point to draw the development of Indonesia's environmental law, as well as at the same year the pioneer institution Ministry of Environment of Republic Indonesia was established for the first time. See *Ibid.*
[139] Art. 37 (1) EMA 1997, the guidance for the implementation of class action mechanism is in detail furthermore regulated by the 2002 Supreme Court Rules No. 1.

direct terms like 'provide information' and 'express opinions'. Public participation in EMA 1997 was regarded as a way to respect the community; therefore this law mentioned that the scope of 'participation' included public participation in the decision-making process, as well as public hearings based on the principle of openness.[140] Besides the obligation to provide true and accurate information regarding environmental management,[141] EMA 1997 also regulates extensive possibilities to participate in environmental management by increasing public independence; community empowerment, and partnership; giving growth to community capability and initiative; increasing community responsiveness in carrying out social supervision; providing suggestions; and conveying information and/or conveying reports.[142]

Over twelve years, it gradually became clear that EMA 1997 suffered various shortcomings. Notably its lack of specificity and dependence on the development of implementing regulations which were slow to appear.[143] With many shortcomings, there was an impetus to make amendments. According to Asaad, the fundamental reason for the amendment is the inability of EMA 1997 to overcome the actual environmental problems in Indonesia, in particular, with major environmental damage still occurring and environmental cases never being appropriately resolved.[144] Sundari argued that the regulations in EMA 1997 still require further elaboration through several legal mechanisms.[145] Sundari also highlights that EMA 1997 only recognized the right of information and participation without regulating the mechanisms for the public to access these rights, including legal consequences if public rights are not fulfilled or are violated.[146]

With reformation in 1998, regional governments desired much greater autonomy.[147] After the first autonomy law was enacted (the 1999 Law No. 22 concerning Regional Government), several competences in central government regarding the environment were transferred to the authority of the local government. This situation has demanded adjustments to some provisions in EMA 1997. Hence, in October 2009, EMA 1997 was revoked and declared invalid, being replaced by the 2009 Law No. 32 concerning Environmental Protection and Management (EPMA 2009). The new law not only contains several norms related to regional autonomy but also inserted refinements in environmental protection and management.[148] Regarding public participation, EPMA 2009 states that the principles of environmental protection and management based on good governance shall appear in every environmental development process (formulation, application, prevention, countermeasures and

[140] EMA 1997 Art. 5, par. 3.
[141] *Ibid.* Art. 6, par. 2.
[142] *Ibid*. Art. 7, paras 1 and 2.
[143] Warren, C. and Elston, K., Environmental Regulations in Indonesia, Asia Paper no. 3 (Nedlands, University of Western Australia, 1994), 19.
[144] Ilyas Asaad, '*UUPLH No. 32 tahun 2009: Tonggak Baru Keberlanjutan LH*' (2010) 9 *Jurnal Kementerian Lingkungan Hidup*.
[145] Siti Sundari Rangkuti, *Hukum Lingkungan dan Kebijaksanaan Lingkungan Nasional* (Airlangga University Press, 2000) 278-279.
[146] *Ibid.*
[147] Asaad. *Op. Cit*.
[148] *Ibid.*

enforcement)[149] and emphasizes the integration aspects of transparency, participation, accountability and justice.[150] EPMA 2009 added not only procedural but also substantial rights as stated in Article 65:[151]

(1) Everybody shall be entitled to a proper and healthy environment as part of human rights.
(2) Everybody shall be entitled to environmental education, information access, participation access and justice access in fulfilling the right to proper and healthy environment.
(3) Everybody shall reserve a right to submit a recommendation and/or objection against businesses and/or activities predicted to affect the environment.
(4) Everybody shall reserve a right to participate in the environmental protection and management in accordance with legislation.
(5) Everybody shall reserve a right to report the alleged consequences of environmental pollution and/or damage.

More importantly, the 2009 Environmental Protection and Management Act (EPMA) safeguards communities advocating for their right to a clean and healthy environment, ensuring they cannot be subject to criminal prosecution or civil lawsuits.[152]

The recent enactment of Indonesia's Job Creation Law also reflects developments in public participation within environmental decision-making processes.[153] According to Law No. 6 of 2003, there are seven key aspects of the environmental impact assessment regulations under the Job Creation Law. First, the nomenclature for permits has shifted from environmental permits to business permits. Second, environmental permits are now integrated into business permits. Third, the Environmental Impact Assessment (EIA) assessment commission has been replaced by an independent team to review EIA documents. Fourth, the feasibility of environmental impact assessments will be tested. Fifth, community involvement in preparing EIA documents is required, but only for communities directly affected. Sixth, criteria are established for businesses and/or activities with significant environmental impacts. Seventh, environmental protection and management permits, along with environmental impact assessments, are integrated into environmental documents.

1. Access to Environmental Information

To assess Indonesia's achievement on access to environmental information, quality and accessibility of information may be used as indicators. Generally, quality refers to the efforts of the government to produce information, and accessibility refers to the extent to which people can obtain information.[154] These indicators can be analysed from the legal

[149] EPMA 2009, Art. 4.
[150] *Ibid.* Art. 2.
[151] *Ibid.* Art. 65.
[152] *Ibid*. Art. 66
[153] In 2023, Indonesia's House of Representatives enacted Government Regulation in Lieu of Law No. 2 of 2022 on Job Creation ("Job Creation Regulation") into law, following the approval of Law No. 6 of 2023, which formalizes Government Regulation No. 2 of 2022 as a replacement for Law No. 11 of 2020 on Job Creation.
[154] Elena Petkova, et. al. *Closing The Gap: Information, Participation, And Justice In Decision-Making For The Environment* (World Resources Institute 2002) 36.

development, law implementation, and cases related to empirical practices in the fulfilment of access to environmental information in the community.

Theoretically, to guarantee the fulfilment of access to environmental information, a country should have three types of legal instruments, namely:[155] (1) constitutional guarantees to information; (2) freedom of information held by government agencies; and (3) laws or legal provisions specifically governing access to environmental information. In Indonesia, access to information has been mandated in the 1945 Constitution of the Republic of Indonesia (the Constitution) under the Chapter XA (Human Rights), as specifically declared in Article 28F

> "Every person shall **have the right to communicate and to obtain information for the development of his/herself and social environment**, and shall have the right to seek, obtain, possess, store, process and convey information by employing all available types of channels".

Accordingly, the GOI enacted the 2008 Law No. 14 on Public Information Disclosure Act (PIDA 2008) in order to realize the Constitutional mandate to provide a mechanism for information disclosure and to improve transparency and accountability. However, even though PIDA 2008 governed the procedural mechanism to access information, specific information concerning the environment is governed by EPMA 2009. Moreover, EPMA 2009 has provided a specific article on access to environmental information.

Despite the fact that Indonesia is not party to the Aarhus Convention, EPMA 2009 has adopted its principles.[156] EPMA 2009 also emphasized that the right to environmental information is a logical consequence of the right to participate in environmental management, based on the principle of transparency.[157] The right to environmental information would enhance the value and effectiveness of participation in environmental management, besides opening an opportunity for communities to actualize their right to achieve a proper and healthy environment.[158]

In a further advance, EPMA 2009 has obliged not only government but also business actors to provide environmental information.[159] EPMA 2009 provided specific mandates to every stakeholder who conducts business and/or activity to provide information connected to the protection and management of the environment correctly, accurately, openly and at a

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[155] *Ibid.*

[156] EPMA 2009, Art. 65 (2). Subjects of EPMA 2009 is different compared to PIDA 2008. According to PIDA 2008, legal subjects that should open the information is a public agency that part or all of its fund originates from the central government budget, local government budget, the contribution from the public, and overseas sources. PIDA using "origin of funding" as an approach to defining the public agency. In this context, EPMA 2009 is more advanced rather than PIDA 2008, because, in practice, environmental information not only in the hands of public agencies.

[157] *Ibid.*

[158] *Ibid*.

[159] This approach is different with PIDA 2008 because according to PIDA 2008, legal subjects that should open the information is a public agency that part or all of its fund originates from the central government budget, local government budget, the contribution from the public, and overseas sources. PIDA using "origin of funding" as an approach to defining the public agency.

proper time.[160] In addition, EPMA 2009 also mandates the stakeholder to develop an environmental information system as follows:[161]

a. The Government and regional government shall develop an environmental information system to support the implementation and development of policies on environmental protection and management;
b. The environmental information system shall be formulated in an integrated and coordinative manner and published publicly; and
c. The environmental information system shall at least contain information about the status of the environment, a map of environmental vulnerabilities and other environmental information.

Because EPMA 2009 is an umbrella act, further provision to regulate environmental information is needed. Hence, the Ministry of Environment enacted Regulation No. 6 of 2011 on Public Information Service which was subsequently amended with Ministry of Forestry and Environment Regulation No. 18 of 2018 on Public Information Services in the Ministry of Forestry and Environment (MFR Regulation No. 18 of 2018) as a *lex specialis* to govern environmental information.[162] MFR Regulation No. 18 of 2018 divided environmental information into five categories, namely:[163]

(1) Public Information which shall be provided and published regularly;
(2) Information which shall be published immediately;
(3) Information which shall be provided at all times; and
(4) Classified information.

However, although the legal basis of the MFR Regulation No. 18 of 2018 is EPMA 2009, the classification above adopts the PIDA 2008 approach.[164] As a consequence, Indonesia's current environmental law is yet to settle the provision on environmental information in detail and has thus triggered difficulties in standardizing environmental information in Indonesia. Apart from causing diverse forms of environmental information, the actual usefulness of information becomes questionable due to a lack of integrity and insufficient detail. This condition produces a chain reaction because without being able to understand information, the public will not be able to effectively participate in decision making. As Timothy found, for example in Yogyakarta, public participation in environmental decision-making is non-existent for several reasons: the local community's lack of knowledge and understanding of public

[160] EPMA 2009 (n 134) Art. 68(a)
[161] *Ibid.* Art. 62.
[162] The primary motivation for this amendment was due to the merger of two ministries, namely the ministry of forestry and the ministry of environment. Previously the two ministries had their own rules of public information, Ministry of Environment Regulation No. 6 of 2011 for the Ministry of Environment and Ministry of Forestry Regulation No. P.07 / MENHUT-II / 2011 for the Ministry of Forestry. Regulation of Ministry of Forestry and Environment No. 18 of 2018 on Public Information Services in the Ministry of Forestry and Environment combine and revoke both of the previous rules.
[163] MFR Regulation No. 18 of 2018, Art. 4-7
[164] See also Dyah Paramita, Dessy Eko Prayitno, and Margaretha Quina, *Strengthening the Right to Information for People and Environment*, (ICEL Final Report, 2013) to know the development of access to environmental information before MFR Regulation No. 18 of 2018 enacted.

participation generally and specifically in the decision making processes; insufficient resources regarding managing staff and information, and limited budget allocations.[165] This encourages call for the standardization of environmental information so that environmental information is not only accessible and readable but also easily understood by the public.

Another important issue is the willingness of stakeholders to share information with the public before a meeting, in particular, when carried out by a private party as a project proponent. This condition has caused many environmental cases in Indonesia, where the community explicitly opposes a project because of the reluctance of the project proponent to provide environmental information publicly, with concerns regarding the lack of information on environmental hazards that could potentially affect the community if the project was implemented.

A relevant case is the construction of a geothermal power plant in Solok, West Sumatra. Even though the project was initiated in 2017, it is not active because of resistance from the local community.[166] As of December 2018, the proponent company (PT Hitay Daya Energi) assisted by the government is still trying to convince the public that this project is safe and environmentally friendly.[167] From the beginning of the project, Hitay was not open in providing environmental information to the public. The form of dissemination was limited to meetings attended by restricted members of a community. Furthermore, these meetings had a single agenda item, inform the land requirement, and did not offer a mechanism for the community to deliver its opinions. As a result, residents from 12 villages around the project held a mass protest.[168]

Evidently, the reluctance of a stakeholder to offer open access to environmental information has been made possible by the ineffectiveness of sanction provisions in EPMA 2009. According to EPMA 2009, sanctions are divided into two categories: administrative sanction and criminal sanction for any violations that occur. Administrative sanctions only relate to violations of environmental permits and do not regulate information violations,[169] while criminal sanctions only regulate misleading information without emphasizing mandatory

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[165] See Dallen J. Timothy, 'Participatory planning: a view of tourism in Indonesia' (1999) 26 Annals of Tourism Research 371-391.

[166] Vinolia 'Ketika Warga di Solok Protes Pembangunan Pembangkit Panas Bumi, Mengapa?' (Mongabay Situs Berita Lingkungan, 20 September 2017) < https://www.mongabay.co.id/2017/09/30/ketika-warga-di-solok-protes-pembagunan-pembangkit-panas-bumi-mengapa/> accessed 2 June 2018.

[167] Hitay Daya Energi is energy company from Turkey that according to Decree of West Sumatera Governor No. 2/1/IPB/PMA/2017 have right to build and manage geothermal power plant which covering an area of 27,000 hectares for 37 years in Solok mountain.

[168] Agusmanto 'Proyek Geothermal di Solok, Kadis ESDM Sumbar: Masyarakat akan Sejahtera' (Klikpositif, 3 December 2018) <http://news.klikpositif.com/baca/42569/proyek-geothermal-di-solok--kadis-esdm-sumbar--masyarakat-akan-sejahtera?page=2> accessed 3 January 2019.

[169] Article 76 (1) EPMA 2009: "The Minister, governors or regents/mayor shall impose administrative sanctions on personnel in charge of businesses and/or activities in the case of the environmental permit being violated"

disclosure of environmental information.[170] Overall, sanctions in EPMA 2009 are weak and potentially cannot be applied to violations of the right to environmental information possessed by community.

Research by Suhardjanto and Choiriyah, from an economic perspective, may affirm the above. Their research found that there was a large gap between the demand from the public for environmental information and the party that provided information caused by reluctance and insufficient existing environmental information.[171] Data shows that public demand for environmental information from companies that conduct business activities near their local environment is very high. However, the research found that only 44% of companies in Indonesia have disclosed environmental information.[172] The poor quality of the information also exacerbated the results of this study, because as a whole environmental information has a very limited level of disclosure of 4.84%, meaning that, on the whole, companies only provide unimportant and/or irrelevant information for the public to access.[173]

In order to resolve such problems, the government needs to initiate, develop and impose standard operating procedures (SOP) for environmental information. SOP should be considered compulsory for project proponents as part of the requirements to obtain an environmental permit from the government. As part of the project proponent compliance for an environmental permit implementation of SOP should be monitored and evaluated.

This is also true for the provision of administrative sanctions which, in the EPMA 2009, are only considered in relation to violations of the environmental permit. The provision for SOP on environmental information as a procedural requirement for environmental permits may lay the foundation for the imposition of administrative sanctions if violations occur.

Additionally, recent developments in the Job Creation Law introduce significant changes in regulating access to environmental information in Indonesia. The law amends the 2009 Environmental Protection and Management Act (EPMA), revising several key articles crucial for ensuring the right to environmental information. One major change affects Article 26, paragraph (2) of the 2009 EPMA, which previously required community involvement in the preparation of Environmental Impact Assessment (EIA) documents while adhering to principles of transparency and completeness of information, to be provided before an activity takes place. Article 26 of the EPMA was amended by Article 22, number 5 of the Job Creation Law, and now reads: Paragraph (1): EIA documents, as referred to in Article 22, are prepared by the project initiator with community involvement; Paragraph (2): Community involvement is required from those directly impacted by the proposed business or activity; Paragraph (3):

[170] Article 113 EPMA 2009: "Anybody providing fake information, misleading information, disappearing information, damaging information or providing untrue information which is needed for the need of supervision and law enforcement with respects to environmental protection and management as referred to in Article 69 paragraph (1) letter j shall be subject to imprisonment for one year at the minimum and a fine amounting to IDR 1,000,000,000 (one billion rupiah)."
[171] Djoko Suhardjanto and Umi Choiriyah, 'Information Gap: Demand Supply Environmental Disclosure di Indonesia' (2010) *Jurnal Keuangan dan Perbankan*, 36-51.
[172] *Ibid,* 44.
[173] *Ibid,* 47.

Further provisions regarding the process of community involvement are to be regulated by Government Regulation.

The changes introduced by the Job Creation Law suggest that regulations on environmental information have been significantly reduced. Article 26 of the EPMA, which governs Environmental Impact Assessments (EIA), has been altered, effectively limiting access to environmental information related to the EIA documents. This includes details about the potential impacts—both positive and negative—of a proposed business or activity. Now, only the community directly affected by the project has access to this information, as public involvement in providing feedback or objections to the EIA document is restricted to those directly impacted. This represents a setback in terms of access to information, a crucial aspect for a democratic country, especially since the right to environmental information is recognised as a human right in the 1945 Constitution.[174]

Limiting community involvement to only those directly affected, while excluding environmental observers and other communities impacted by decisions in the EIA process, will undoubtedly have significant consequences. Without adequate access to environmental information, community participation will be limited, and individuals may be unable to fully exercise their right to be involved. Therefore, the right to access environmental information is inherently linked to the right to participate in environmental protection and management.[175]

2. Access to Participation

The dynamic character of public participation in decision-making in the most common environmental practice of environmental impact assessments. EIA has the potential to improve environmental decision-making through stakeholder and public input and to manage potential social conflict.[176] To assess Indonesia's achievement in the second pillar this study will focus on EIA in Indonesia, where EPMA 2009 is the chief legal instrument to describe the current legal position and assess accomplishment in this area.

As stated previously, Indonesia's environmental law developed following the enactment of BPEMA 1982. It is important to note that this act was initiated in 1976, in line with requirements from the US government on US Aid for International Development (USAID) to provide EIA documents for every single grant and aid project under USAID auspices in Indonesia.[177] As a result, BPEMA 1982 states that "Every proposed plan which is considered likely to have a significant impact on the living environment has to be accompanied with

[174] Fajar Winarni, 'Problematika Undang-Undang Nomor 11 Tahun 2020 tentang Cipta Kerja Terhadap Pemenuhan Hak Atas Informasi Lingkungan Hidup', *Jurnal Bina Lingkungan Hidup*, Vol 6 No. 3, 2022, pp, 394-395.
[175] *Ibid.*
[176] Wiklund (n 10) 282.
[177] Asian Development Bank, *Environmental Planning and Management, Proceeding,* 1982. On Mas Achmad Santosa and Margaretha Quina, '*Gerakan Pembaruan Hukum Lingkungan Indonesia dan Perwujudan Tata Kelola Lingkungan Yang Baik Dalam Negara Demokrasi*' (2014) 1 *Jurnal Hukum Lingkungan Indonesia*, 36.

environmental impact assessment that carried out according to government regulations"[178] To implement the procedures, GOI has Government Regulation No. 29 of 1986 on EIA (GR No. 29/1986). This regulation governs the mechanism to establish an EIA review commission and the Environmental Impact Management Agency (known as BAPEDAL) founded in 1990. The concept of public participation is still weak as both BPEMA 1982 and GR No. 29/1986 paid little attention to direct public participation. Both regulations did not consider direct public participation in the EIA process as mandatory. Therefore, only NGOs can sit as members of an EIA review commission and have the right to participate in the EIA process.[179]

The second attempt of GOI to improve EIA regulation was with an amended GR No. 29/1986 and with Government Regulation No. 51 of 1993 on EIA (GR No. 51/1993). The new regulation provided clearer procedures, shortened periods for EIA review,[180] and introduced a standard Environmental Management Plan (known as RKL).[181] GR No. 51/1993 had an additional explanation of activities which consider may cause "significant impact" as introduced in EMA 1982.[182] The new regulation also specifies the documents that should be reviewed by an EIA commission.[183] A breakthrough achievement in public participation is presented in this regulation in Article 22, and states that "All proposed business or activities for which an EIA must carry out shall be disclosed to the public by the authorized government agency". However, because of lack of regulation on how the public participates in the process, including a period for the public to give feedback or make comments, GR No. 51/1993 requires further improvement.

Under the new environmental act, EMA 1997, GOI amended the regulations on EIA as a response to the demand for more genuine public participation and to overcome several legal problems in the EIA process. GOI made Government Regulation No. 27 of 1999 on EIA (GR No. 27/1999) and the Decree of the BAPEDAL chairman No. 20 of 2000 on Public Participation and Information Disclosure on EIA Process (KepDal No. 08/2000). Both regulations are a significant achievement, allowing the public (local community) to sit as representatives in the EIA review commission.[184] Furthermore, KepDal No. 08/2000 makes a clear distinction between the interested community, the affected community and the concerned community.[185] The public has the right to express their comment within 30 days of the announcement of the project.[186] Also, the project proponent should conduct public consultation in the EIA documents

[178] BPEMA 1982, Art. 16.
[179] See Dadang Purnama, 'Reform of the EIA Process in Indonesia: Improving the Role of Public Involvement' (2003) 23 *Environmental Impact Assessment Review,* 425-439.
[180] GR No. 51/1993 Art. 7.
[181] *Ibid.* Art. 7 and 8.
[182] *Ibid.* Art. 2 and 3.
[183] *Ibid.* Art. 18 par. 3.
[184] GR No. 27/1999, Art. 9.
[185] KepDal No. 08/2000, point 1.
[186] GR No. 27/1999 (n 165), Art. 33, par. 3.

preparation stage, it is mandatory to consider and attach the results of this consultation to the EIA document.[187]

The latest environmental act, EPMA 2009, adjusted and improved the regulation on public participation in EIA. Regulation of the Minister Environment No. 16 of 2012 (RME No. 16/2012) on Guidelines for Compiling Environmental Documents, Regulation of the Minister Environment No. 17 of 2012 (RME No. 17/2012) on Guidelines for Public Participation in EIA (RME No. 17/2012), and Government Regulation No. 27 of 2012 on Environmental Permit (GR No. 27/2012) were enacted to make public participation in EIA more effective and less superficial. Some of the important contributions of these regulation are: financial issues during the EIA process,[188] official language for the environmental information (may use local languages),[189] various forms of public participation as an alternative (workshop, public hearing, seminar, interactive dialogue, focus group discussion, and any other methods that make two-way communication possible).[190]

With these latest alterations, the provisions for public participation in EIA in Indonesia were considered comprehensive and transparent.[191] However, several finding through research on the implementation of EIA in Indonesia confirmed that problems remain, mostly because the improvements in practice lag behind advances in the law.

Research on EIA implementation conducted by Hindriyani and Purwanto in crude palm oil (East Kalimantan), hotel and apartment building (Yogyakarta) and the cement industry (Central Java) found that the representation of the community in EIA commissions has impeded the optimum implementation of EIA.[192] Even though regulation provides a mechanism for the selection of public representation to sit on an EIA commission, the actual selection of these representatives mostly does not reflect public interest.[193] Issues of representation, which is also a socio-cultural issue in Indonesia, especially for local people, are still not adequate grounds to reject a proposal or even for local people to deliver their objection in a formal process.[194]

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[187] KepDal No. 08/2000 (n 166), point 2.
[188] Based on GR No. 16/2012, proponent should take responsibility for cost of produce public notice, public consultation, and inviting the representative of affected community in IEA review stage. Government agencies responsible for cost of publishing the application and issuance of environmental license.
[189] *Ibid.*
[190] GR No. 17/2012. Chapter 2(C) point 2.
[191] Sudharto P. Hadi, 'Public Participation in Indonesia EIA' (UNEP EIA Training Resource Manual 2003).
[192] Aniek Hindrayani and Purwanto, 'Public Participation Planning of Environmental Impact Assessment (EIA) and Regulations: Analysis of Inconsistency for Some Cases in Indonesia' Proceeding of the 2nd International Conference on Energy, Environmental and Information System (ICENIS 2017).
[193] *Ibid.*
[194] *Ibid.* See also Punama *Op. Cit.* p. 428.

Findings from cases such as the development of the steam power plant Teluk Sepang (Bengkulu),[195] reclamation of Teluk Jakarta,[196] reclamation of Tanjung Benoa (Bali),[197] or the development of the Hambalang sport and training center[198] confirmed that the project proponent usually only carried out the minimum requirement. There is an impression that the project proponent does not have any genuine intention to involve the community since the notification of EIA is only conducted through government office pamphlets, announcements in newspapers or on the radio, without directly reaching the affected community or relevance stakeholders. Community approval is performed by visiting stakeholders directly, such as the head of the village, or chairperson of the village consultative body, and presenting a draft of an EIA document previously made by the project proponent. Finally, public consultations are arranged in the form of a face-to-face meeting with minimal participants. After the face-to-face meeting has been conducted, public participation is considered complete.

The Job Creation Law has introduced significant changes to community participation, particularly affecting Article 25 of the EPMA. Under this new law, community participation has been restricted to only those directly affected by a project, granting them the right to submit suggestions, input, and responses to EIA documents, provided their contributions are relevant. This is a departure from the EPMA, which allowed broader participation, enabling environmental observers, organizations, and communities with expertise in EIA and environmental matters to be involved in the process, regardless of whether they were directly impacted.[199]

It has not been straightforward to implement EIA in Indonesia. Several problems such as clear representational structure and the lack of a formal participation culture remain critical constraints. From the regulations and cases above, we may conclude that the role of the public in the EIA process is minimal due to the low level of knowledge of the community of the EIA documents submitted. In addition, people who are directly affected by an environmental project generally do not understand the contents of EIA or do not understand the importance of EIA. To summarize, the practical problems that still hinder the implementation of EIA in Indonesia are as follows: the low level of human resources of the people affected; lack of knowledge and understanding of the residents of affected communities regarding the importance of their involvement in the EIA preparation process; restricting community

[195] Tempo, 'Tolak PLTU, Warga Satu Kelurahan di Bengkulu Minta Direlokasi' (Tempo, 2 September 2016) <https://nasional.tempo.co/read/801157/tolak-pltu-warga-satu-kelurahan-di-bengkulu-minta-direlokasi> accessed 19 November 2018.

[196] M Ambari, 'Tanpa Perda Zonasi, Ahok Ternyata Sudah Terbitkan Pergub Reklamasi' (Mongabay Situs Berita Lingkungan, 17 January 2017) <https://www.mongabay.co.id/2017/01/17/tanpa-perda-zonasi-ahok-ternyata-sudah-terbitkan-pergub-reklamasi/> accessed 19 November 2018.

[197] Forbali, 'Tolak Reklamasi Berkedok Revitalisasi Teluk Benoa Segera Batalkan Perpres 51 Tahun 2014 (forbali.org, 8 April 2015) <http://www.forbali.org/id/pernyataan-sikap-tolak-reklamasi-berkedok-revitalisasi-teluk-benoa/> accessed 19 November 2018.

[198] BPK RI, 'BPK Beberkan Empat Tahap Penyimpangan' (BPK RI, 4 Juni 2014) <http://www.bpk.go.id/news/bpk-beberkan-empat-tahap-penyimpangan> accessed 19 November 2018.

[199] See Asrizal, 'Reduksionisme AMDAL Dan Ancaman Deteriorasi Lingkungan: Perspektif Pembangunan Dalam Undang-Undang Cipta Kerja', *Lex Renaissance,* No 2, Vol 7, 2022, p. 325.

participation solely to those directly impacted by the law; and the lack of socialization carried out by the government or the project proponent to residents of the community affected by the activity.

It is important to encourage the role of government and project proponent to be more proactive in initiating greater public involvement in the EIA process in Indonesia's current socio-political condition. In practice, there is a significant loophole which means that most EIA public participations in Indonesia are formally enforced only for the reason of evaluation and approval of the EIA documents.

3. Access to justice

As Bedner investigated, environmental disputes in Indonesia can be categorized into three groups.[200] The first are those about nature conservation, most commonly disputes between citizens and state agencies, or among citizens themselves. For example, disputes between citizens undertaking economic activities that are potentially harmful to nature conservation on the one hand and state agencies administering a nature conservation park or project on the other,[201] or disputes between citizens conducting activities that are not harmful to the goals of nature conservation versus others carrying out similar activities but which cause irreparable damage (for instance traditional fishing versus blast fishing). The dispute may either concern the economic activity itself or negligence, collusion, or corruption on the part of the conservation administrator in performing his tasks.[202]

The second type of disputes concerns the use of natural resources, and are generally between citizens and companies. At the center of such conflict is the denial of access to natural resources and their depletion (for instance mining and logging disputes), or disputes concern state licensing policies.[203]

The last type of dispute is those concerning pollution or environmental damage outside the first two categories mentioned above.[204] A typical pollution dispute is one between a polluter and a local community affected by the pollution, or between the agency controlling environmental standards and the polluting or damaging party. Similar to the case of natural resources, the role of the government in upholding environmental standards often becomes a particular focus of such disputes.[205]

Although the issues of access to justice in this sub-chapter are related to type two or three in Bedner classification, the scope of the analysis in this sub-chapter is narrow. It only focuses on the development of procedural aspects of law in Indonesia, in particular, connected

[200] Adriaan Bedneer, 'Access to Environmental Justice in Indonesia' in Harding (ed.), *Access to Environmental Justice: A Comparative Study* (BRILL 2007). See also David Nicholson, *Environmental Dispute Resolution in Indonesia* (BRILL 2010).
[201] *Ibid.*
[202] *Ibid.*
[203] *Ibid.*
[204] *Ibid.*
[205] *Ibid.*

to whether citizens can seek redress and remedy when they unable to obtain environmental information they are entitled to or when they participate in environmental decisions that affect them.

The provision on access to justice in EPMA 2009 is stipulated in Chapter XIII on the Settlement of Environmental Dispute form Article 84 to 93 with provisions mostly adopted from EMA 1997. According to EPMA 2009 the procedure for environmental dispute settlement may be resolved through the court or outside the court.[206] If the parties have agreed to resolve their disputes outside the court, then the court mechanism is only granted if the outside the court mechanism is declared to have failed by one or all parties.[207] Importantly, outside the court settlement mechanisms should not apply to environmental crimes as governed by EPMA 2009.[208]

Settlement of an environmental dispute through a court begins with a claim from the party who perceives damage or loss due to another party. EPMA 2009 provides two forms of indictments, a claim for compensation or a request to the offender to take certain measures.[209] To acquire compensation, a claimant should prove before the court that the offender committed a mistake or violated the law, 'liability based on fault'.[210] Environmental damage often requires scientific evidence which is costly and takes time, so for environmental pollution or damage attributed to business or activities using toxic hazardous materials and causing a severe threat to the environment, the responsibility is absolute for incurred losses without necessity to prove substance. This concept is called 'strict liability'.[211] In general, EPMA 2009 provisions on dispute settlement through court mechanisms govern compensation and recovery of environment, strict liability, the litigating right of central and regional government, the litigating right of communities, the litigating right of environmental organization, and administrative lawsuit.[212]

Compensation and recovery of the environment should be imposed on every person in charge of a business or activity that has caused losses to other people or the environment. Furthermore, after the court has declared the decision, it may stipulate coercive money for delays in the implementation of the court decisions.[213] Furthermore, for any subjects who produce or manage toxic and hazardous materials causing a severe threat to the environment should be strictly responsible without necessity to prove the substance of a mistake before the court.[214]

In the case of the business or activities causing environmental damage or pollution which inflicts environmental loss, central or regional government institutions may lay claim and

[206] EPMA 2009 *Op. Cit.* Art. 84, par. 1.
[207] *Ibid.* Art. 84, par. 3.
[208] *Ibid.* Art. 85, par. 2
[209] *Ibid.* Art. 85.
[210] *Ibid.* Art. 87.
[211] *Ibid.* Art. 88.
[212] *Ibid.* Art. 87-93.
[213] *Ibid.* Art. 87.
[214] *Ibid*. Art. 88.

should have the authorization to file litigation for compensation and certain measures against the violators.[215] As well as the community, they reserve a right to file a class action for their interest or the public interest in the event that they suffer from losses attributable to environmental pollution or damage.[216] In the framework of implementing the responsibilities to protect the environment, NGOs also have the right to file claims in the interest of environmental conservation. The right to file a claim is limited to the demand for certain actions without claims for compensation, except for real costs or expenses.[217]

The enforcement of EPMA 2009 through an administrative lawsuit is a legal option to achieve compliance from stakeholders or subjects under this regulation. EPMA 2009 states that anybody may file a law suit against a state administration decision in the event that:

a) state administration agencies or officials issue an environmental permit to businesses and or activities obliged to undergo EIA but not accompanied by documents;
b) state administration agencies or officials issue an environmental permit to activities obliged to undergo Environmental Management and Monitoring Programs but not accompanied by that document; and/or
c) state administrative agencies or officials issue business and/or activity permits not accompanied by an environmental permit.

The court procedure for environmental violations is similar to another case and should follow the procedure from the General Court in Indonesia. Judges from General Court examine cases and parties may appeal to the Supreme Court if the court decision did not fulfil a sense of justice. For administrative litigation, the lawsuit is submitted to the Administrative Court by bringing *beschiking* as the object of the claim.

What is important to note in the enforcement of environmental law in Indonesia is the competence of judges adjudicating cases. It is a fact that environmental cases are closely related to scientific evidence and verification which require specific expertise. The court decision becomes questionable when the judgements do not reflect a sense of justice because of a judges' lack of proficiency to interpret environmental evidence or scientific documents. The idea of an Environmental Court has been conceived, but is yet be realized. In the near future, the practical approach to increase court decisions is by expanding judges' knowledge through capacity building programs or technical briefings relating to environmental cases.

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[215] *Ibid.* Art. 90.

[216] *Ibid.* Art. 91, Class action may be submitted in the case of representatives of groups and members of their groups sharing the same fact or incident, legal basis as well as kind of demand.

[217] *Ibid.* Art. 92, Environmental organisations may file a lawsuit if the following requirements are fulfilled:
a) in the form of a legal entity;
b) affirming in their memorandum of association that the organisations are established in the interest of environmental function conservation; and
c) already executing real activities in accordance with their memorandum of association for 2 (two) years at the minimum.

The mechanism of dispute settlement outside the court reflects criticism of the court in Indonesia.[218] However, for a citizen who requires justice when they are harmed or when the environment is damaged, the mechanism outside the court is sometimes very exclusive and expensive. Therefore, as Bedner said, many environmental disputes remain hidden in the villages and most disputes do not develop beyond the stages of 'naming' and 'blaming'.[219]

CLOSING

Public participation is generally accepted globally as an expression of democracy and has been embedded in many jurisdictions. This reflects the desire of the international community to achieves better environmental conditions and avoid severe environmental degradation. The greatest effort by the international community to encourage public participation is evidenced by the Aarhus Convention of 1998. Although Indonesia is not a participant in the Aarhus Convention 1998, the EPMA 2009 adopted the principles of the Aarhus Convention. In practice, there are still shortcomings, especially the details on environmental information, and both the passive aspects and active aspects of environmental information as public rights are now regulated. Public participation in decision-making through EIA process has been completely regulated, and access to justice for public in the event of violations or environmental damage are guaranteed by law, however, the EIA process is still dependent on stakeholders to properly implement these provisions and other significant problems remain, such as the quality of judges in court.

Recent changes introduced by the Job Creation Law significantly alter the regulation of environmental information in Indonesia. The law amends the 2009 Environmental Protection and Management Act (EPMA), notably revising Article 26, which governs Environmental Impact Assessments (EIA). Previously, this article required community involvement and transparency in preparing EIA documents, but the new law limits this involvement to only those directly affected by the proposed activity. This reduction in access to information excludes broader public participation, including environmental observers and other communities, marking a setback in terms of democratic transparency. As a result, limited access to environmental information hinders community participation, which is crucial for effective involvement in environmental protection and management, a right recognized as fundamental in Indonesia's 1945 Constitution.

The Job Creation Law also has significantly altered community participation rules, particularly Article 25 of the EPMA. It now restricts participation to those directly affected by a project, allowing them to submit suggestions, input, and responses to EIA documents, as long as their contributions are relevant. This is a departure from the EPMA, which previously allowed broader involvement, including environmental observers, organizations, and experts, regardless of direct impact.

With regard to increasing community participation in decision-making, there needs to be an effort from the government to provide more detailed rules in order to strengthen the capacity of the community and to improve their knowledge, and also to simplify the language of the legal framework

[218] Elvie Wahyuni, 'Penyelesaian Sengketa Lingkungan Hidup di Luar Pengadilan' (2009) 4 *Al Ahkam,* 275-290.
[219] Bedner *Op. Cit.* p. 89.

related to public participation in environmental matters. In such ways the quality of environmental decisions can improve the quality of the environment and reflect the interests of all parties.

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