ENVIRONMENTAL CONSTITUTIONAL REGRESSION IN RISK-BASED INVESTMENT GOVERNANCE: RECONFIGURING ENVIRONMENTAL PROTECTION STRUCTURE IN INDONESIA

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Abstract

The reform of the risk-based licensing system implemented through the Job Creation Law in Indonesia has had a significant impact on environmental protection. This shift, which replaces the precautionary-based preventive approach with risk management, has the potential to reduce ecological protection without explicitly changing constitutional norms. From a constitutional perspective, this change is considered environmental constitutional regression, referring to the decline in the legal system's ability to ensure the environmental protection that was previously achieved. This article analyzes the impact of this transformation on the legal structure and investment governance in Indonesia. Environmental protection, which previously functioned as a constitutional instrument limiting the rationality of economic development, is now repositioned as an administrative component within the risk-based licensing framework. This shift occurs amid efforts to deregulate and simplify licensing to accelerate investment, but at the expense of the state's obligation to ensure ecological sustainability. This reform affects various regulatory dimensions, including institutional structure, the role of law, public participation procedures, and environmental protection standards. The integration of environmental approval into the risk-based licensing system changes the paradigm from preventive control to administrative risk management. As a result, environmental protection mechanisms become dependent on risk assessments that do not always encompass the broader potential ecological damage. This study proposes the need for a progressive legal approach that reaffirms the state's obligation to uphold constitutional rights to a healthy and sustainable environment, while mitigating the negative impacts of regulatory reform on ecological justice and environmental sustainability. Thus, this research contributes to the understanding of the constitutional implications of risk-based regulatory restructuring, emphasizing the importance of ensuring that environmental protection remains a priority in development policy.

***Keywords**: Constitutional Environmental Regression; Ecological Justice; Environmental Constitutionalism; Investment Governance; Risk-Based Licensing.*

A. Introduction

The relationship between environmental protection and economic development is one of the most fundamental constitutional dilemmas in modern state governance.[1] Recently, more and more legal systems have recognized that environmental protection is no longer merely a public policy goal, but has evolved into a constitutional commitment that binds the state both normatively and structurally.[2] In the framework of environmental constitutionalism, environmental protection is positioned as a fundamental obligation of the state directly derived from the constitution.[3] In the context of Indonesia, this obligation is explicitly grounded in the 1945 Constitution of the Republic of Indonesia, particularly in Article 28H, paragraph (1), which guarantees the right of every individual to a good and healthy environment, and Article 33, paragraph (4), which affirms that the national economy must be conducted based on the principles of sustainability and environmental awareness.[4] These constitutional provisions emphasize that environmental protection is not only a public policy goal, but a constitutional obligation of the state that limits the use of state power in regulating and facilitating economic development. Thus, environmental protection functions as a constitutional boundary against the rationality of economic development, requiring the state to ensure that economic activities do not sacrifice ecological integrity and the constitutional rights of citizens.

Globally, the transformation toward risk-based regulatory governance has increasingly been adopted as part of regulatory reforms aimed at improving administrative efficiency, institutional

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[1] Habib Zafarullah and Monami Mehnaz, 'Balancing Economic Growth and Sustainability for Environmental Protection in Southeast Asia: A Regional Perspective', *Southeast Asia: A Multidisciplinary Journal* 25, no. 2 (2025): 95–107, https://doi.org/10.1108/SEAMJ-01-2025-0003; Rachel Pepper and Harry Hobbs, 'The Environment Is All Rights: Human Rights, Constitutional Rights and Environmental Rights', *Melbourne University Law Review* (Parkville, Victoria, Australia) 44, no. 2 (2021): 634–78, informit.20211021055462, https://search.informit.org/doi/10.3316/informit.20211021055462; Marina Requena-i-Mora et al., 'Eco-Paradox USA: The Relationships Between Economic Growth and Environmental Concern Generally, and by Different Income Groups', *Ecological Economics* 235 (September 2025): 108648, https://doi.org/10.1016/j.ecolecon.2025.108648.

[2] Douglas A. Kysar, 'Global Environmental Constitutionalism: Getting There from Here', *Transnational Environmental Law* 1, no. 1 (2012): 83–94, Cambridge Core, https://doi.org/10.1017/S2047102511000057; Louis J. Kotzé, 'Six Constitutional Elements for Implementing Environmental Constitutionalism in the Anthropocene', in *Implementing Environmental Constitutionalism: Current Global Challenges*, ed. Erin Daly and James R. May (Cambridge University Press, 2018), Cambridge Core, https://doi.org/10.1017/9781316691588.003.

[3] Kotzé, 'Six Constitutional Elements for Implementing Environmental Constitutionalism in the Anthropocene'.

[4] Hamzah et al., 'Sustainable Development of Mangrove Ecosystem Policy in South Sulawesi from the Perspectives of Siyāsah and Fiqh Al-Bi'ah', *Juris: Jurnal Ilmiah Syariah* 22, no. 2 (2023): 367–80, https://doi.org/10.31958/juris.v22i2.10559.

flexibility, and economic competitiveness.[5] This approach shifts the logic of regulation from a uniform preventive control model to a differential monitoring model based on the risk levels of regulated activities.[6] Administratively, this approach is seen as optimizing regulatory resource allocation and reducing bureaucratic burdens deemed disproportionate to actual risks.[7] However, the literature that has developed so far tends to focus on the administrative, economic, and institutional implications of this approach, particularly regarding licensing simplification and investment climate improvement. The constitutional dimension of this transformation, especially its implications for environmental protection as a constitutional obligation of the state and as a normative boundary against the rationality of economic development, has not been systematically analyzed, particularly in the context of developing countries undergoing intensive regulatory restructuring under the pressures of economic liberalization and global investment competition.

The restructuring of regulations in Indonesia, following the enactment of Law No. 11 of 2020 on Job Creation and its subsequent reformulation and re-establishment in Law No. 6 of 2023, introduced a risk-based business licensing system as the primary instrument for national investment governance reform.[8] This regime is further operationalized through Government Regulation No. 5 of 2021 on the Implementation of Risk-Based Business Licensing and Government Regulation No. 22 of 2021 on the Implementation of Environmental Protection and Management. This reform marks a significant paradigm shift from the previous environmental protection regime regulated under Law No. 32 of 2009 on Environmental Protection and Management, which placed environmental permits as a preventive prerequisite standing independently, toward a risk-based licensing regime that integrates environmental approval into the business licensing system.[9] In this new regulatory configuration, environmental approval no

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[5] Henry Rothstein et al., 'The Risks of Risk-Based Regulation: Insights from the Environmental Policy Domain', *Environmental Risk Management - the State of the Art* 32, no. 8 (2006): 1056–65, https://doi.org/10.1016/j.envint.2006.06.008.

[6] Evan Devara et al., 'Inovasi Pendekatan Berbasis Risiko Dalam Persetujuan Lingkungan Berdasarkan Undang-Undang Cipta Kerja', *LITRA: Jurnal Hukum Lingkungan, Tata Ruang, Dan Agraria* 1, no. 1 (2021): 101–16, https://doi.org/10.23920/litra.v1i1.641.

[7] Eleanor Stoney, 'Risk-Based Regulation: Examination of the Adoption of Risk-Based Regulation Reforms in Western Australia', *Environmental and Planning Law Journal* 34, no. 1 (2017): 59–68, agispt.20171284, https://search.informit.org/doi/10.3316/agispt.20171284.

[8] Joko T. Suroso et al., 'The Simplification of Licensing Procedure in Job Creation Law: The Effectiveness to Attract Foreign Investor', *Cogent Social Sciences* 10, no. 1 (2024): 2414509, https://doi.org/10.1080/23311886.2024.2414509; Richard C. Adam, 'Between Attraction and Evasion: Legal Factors Shaping FDI in Indonesia and Neighboring Countries', *Indonesia Law Review* 15, no. 1 (2025): 87–100, https://doi.org/10.15742/ilrev.v15n1.6.

[9] Rahmat Saputra and Rama Dhianty, 'Investment Licensing and Environmental Sustainability in the Perspective of Law Number 11 The Year 2020 Concerning Job Creation', *Administrative and Environmental Law Review* 3, no. 1 (2022): 25–38, https://doi.org/10.25041/aelr.v3i1.2472.

longer functions as an independent legal prerequisite, but is structurally attached to the business licensing mechanism based on the classification of activity risk levels. This integration not only represents a technical administrative change, but also reflects a structural transformation in the normative position of environmental protection, shifting from a constitutional instrument functioning as a boundary for economic activities to an administrative component in the architecture of investment governance.

Although this reform is often justified based on regulatory efficiency and acceleration of economic development, its constitutional implications for the integrity of the environmental protection system have not been adequately analyzed. Normatively, the repositioning of environmental protection instruments within the risk-based licensing regime could create tensions with the constitutional guarantee of environmental rights as stipulated in Article 28H paragraph (1) and the principle of sustainable development in Article 33 paragraph (4) of the 1945 Constitution. Furthermore, in Decision No. 91/PUU-XVIII/2020, the Constitutional Court emphasized that regulatory reform should not disregard the principle of meaningful public participation and the protection of citizens' constitutional rights, including the right to a good and healthy environment.[10] Thus, the restructuring of risk-based licensing not only has administrative implications but also raises constitutional issues related to the consistency between investment regulatory reforms and the constitutional obligation of the state to protect the environment

Traditionally, environmental law in Indonesia has been based on a preventive paradigm grounded in the precautionary principle, as outlined in Article 2, letter (f), of Law Number 32 of 2009.[11] This principle is operationalized through environmental impact assessments and environmental permits, as specified in the same law. These instruments serve as preventive mechanisms to ensure that economic activities do not lead to irreversible environmental harm. Within the constitutional framework, these preventive instruments are a tangible manifestation of the state's obligation to protect citizens' constitutional right to a good and healthy environment.

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[10] Helmi Chandra SY and Shevin Putri Irawan, 'Expansion Meaning of Public Participation in the Formation of Laws After Decision of Constitutional Court', *Jurnal Konstitusi* 19, no. 4 (2022): 766–93, https://doi.org/10.31078/jk1942.

[11] Andri G. Wibisana, 'The Development of the Precautionary Principle in International and Indonesian Environmental Law', *Asia Pacific Journal of Environmental Law* (United Kingdom) 14, no. 1/2 (2011): 169–202, informit.653224315603727, https://search.informit.org/doi/10.3316/informit.653224315603727; Ridwan Arifin and Siti Hafsyah Idris, 'In Dubio Pro Natura: In Doubt, Should the Environment Be a Priority? A Discourse of Environmental Justice in Indonesia', *Jambe Law Journal* 6, no. 2 (2023): 143–84, https://doi.org/10.22437/jlj.6.2.143-184; RM. Armaya Mangkunegara, 'Juridical Analysis of Forestry Criminal Law Enforcement by Corporations in Environmental Fiqh Framework', *Nurani: Jurnal Kajian Syari'ah Dan Masyarakat* 24, no. 1 (2024): 235–52, https://doi.org/10.19109/nurani.v24i1.23115.

The shift to a risk-based licensing regime represents a change in regulatory logic, transitioning from a preventive protection model to a risk management model. Structurally, this shift has the potential to undermine the preventive function of environmental protection, which traditionally serves as a constitutional boundary for economic activities.[12]

This transformation also has significant implications from the perspective of ecological justice. Ecological justice emphasizes the importance of a fair distribution of environmental risks and benefits across social groups, geographic areas, and generations.[13] The weakening of preventive instruments could lead to a redistribution of ecological risks to more vulnerable communities, including indigenous peoples, coastal communities, and areas with high ecological sensitivity.[14] From a constitutional perspective, this condition could weaken the state's capacity to fulfill its constitutional obligation to ensure equal and non-discriminatory environmental protection. Thus, the restructuring of risk-based investment governance not only has administrative implications but also has the potential to alter the state's structural capacity to ensure the constitutional protection of environmental rights.[15]

Although existing literature has made significant contributions to explaining the dynamics of environmental governance, environmental protection within the investment regime, and institutional challenges in the Indonesian legal system, most studies still focus on the dimensions of policy implementation and administrative regulatory effectiveness. Alicia[16] shows that legal instruments for pollution prevention have not been effective due to regulatory fragmentation, weak law enforcement, and institutional capacity limitations. Although existing literature has made

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12 Santi Hapsari Dewi Adikancana and Mas Achmad Santosa, 'The Licensing Transformation in Small and Medium Industries Affecting Environment Following the Establishment of the Law on Job Creation: A Case Study of the Washing Industry in Bandung Regency', *Padjadjaran Jurnal Ilmu Hukum (Journal of Law)* 11, no. 3 (2024): 339–64, https://doi.org/10.22304/pjih.v11n3.a2.

13 Sekander Zulker Nayeen and Akramul Islam, 'Environmental Justice: Emergence to Implementation and Its Relation with SDGs', in *Peace, Justice and Strong Institutions*, ed. Walter Leal Filho et al. (Springer International Publishing, 2021), https://doi.org/10.1007/978-3-319-95960-3_48; Traugott Jähnichen, '"Ecological Justice": Towards an Integrative Concept of the Protection of Creation', *HTS Teologiese Studies/Theological Studies* 78, no. 2 (2022): a7738, https://doi.org/10.4102/hts.v78i2.7738; Johannes Langemeyer et al., 'Ecosystem Services Justice: The Emergence of a Critical Research Field', *Ecosystem Services* 69 (October 2024): 101655, https://doi.org/10.1016/j.ecoser.2024.101655.

14 Corine Wood-Donnelly, 'Environmental Justice', in *Theorising Justice: A Primer for Social Scientists* (Bristol University Press, 2023), https://doi.org/10.51952/9781529232233.ch009.

15 Deepa Badrinarayana, 'The "Right" Right to Environmental Protection: What We Can Discern from the American and Indian Constitutional Experience', *Brooklyn Journal of International Law* 43, no. 1 (2017): 75–129, https://digitalcommons.chapman.edu/law_articles/227/.

16 Francisca Rachel Alicia, 'Implementation of Environmental Pollution and Damage Prevention Instruments in Indonesia: Issues and Challenges', *Indonesian Journal of Environmental Law and Sustainable Development* 3, no. 1 (2024): 125–56.

significant contributions to explaining the dynamics of environmental governance, environmental protection within the investment regime, and institutional challenges in the Indonesian legal system, most studies still focus on the dimensions of policy implementation and administrative regulatory effectiveness. Zahroh and Najicha[17] shows that legal instruments for pollution prevention have not been effective due to regulatory fragmentation, weak law enforcement, and institutional capacity limitations. In the context of licensing reform, Handayani et al.[18] found that the restructuring of environmental approval policies within the risk-based licensing framework has not fully achieved a balance between investment efficiency and environmental protection and still faces regulatory design and institutional coordination challenges. Meanwhile, Saputra and Dhianty[19] showed that licensing reform and the decentralization of environmental governance, although increasing flexibility and investment attractiveness, also pose risks of regulatory fragmentation, reduced public participation, and inconsistency in environmental protection.

However, these studies generally place environmental protection within the framework of policy effectiveness and administrative governance, rather than as a constitutional issue related to the change in the normative position of environmental protection within the structure of the state's legal system. The existing literature has not systematically analyzed how the integration of environmental protection into the risk-based licensing regime potentially reconfigures the status of environmental protection from a constitutional obligation of the state to an administrative instrument subject to the rationality of investment and risk management. As a result, this regulatory transformation has not been fully understood as a form of environmental constitutional regression, which refers to a condition where formally legitimate legal restructuring actually reduces the substantive capacity of the legal system to guarantee the constitutional protection of the right to a good and healthy environment. Thus, there remains a conceptual gap regarding the constitutional implications of the restructuring of risk-based investment governance on the integrity of environmental protection. This article fills that gap by analyzing the risk-based licensing reform as a form of environmental constitutional regression and evaluating its implications on

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[17] Ummi A'zizah Zahroh and Fatma Ulfatun Najicha, 'Problems and Challenges on Environmental Law Enforcement in Indonesia: AMDAL in the Context of Administrative Law', *Indonesian State Law Review* 5, no. 2 (2022): 53–66, https://doi.org/10.15294/islrev.v5i2.46511.

[18] I. Gusti Ayu Ketut Rachmi Handayani et al., 'Reform of Environmental Approval Policy for Renewable Energy in Indonesia', *Journal of Sustainable Development and Regulatory Issues (JSDERI)* 3, no. 2 (2025): 286–323, https://doi.org/10.53955/jsderi.v3i2.101.

[19] Saputra and Dhianty, 'Investment Licensing and Environmental Sustainability in the Perspective of Law Number 11 The Year 2020 Concerning Job Creation'.

environmental constitutionalism, the principle of non-regression, and the protection of ecological rights within Indonesia's legal system.

In addition to the constitutional dimension, the transformation of environmental governance within the risk-based investment regime also raises more fundamental questions regarding the orientation of law itself. In Indonesian legal discourse, this issue can be analyzed through the perspective of progressive law developed by Satjipto Rahardjo.[20] Progressive law rejects rigid legal formalism and emphasizes that law must function as an instrument to achieve substantive justice and social welfare.[21] From this perspective, law is not merely understood as a normative device to maintain regulatory efficiency but as a means to protect human dignity, life sustainability, and broader public interests.[22] Therefore, regulatory reforms prioritizing administrative simplification and investment acceleration without ensuring adequate ecological protection may indicate a shift in the orientation of law from an instrument of public interest protection to one of facilitating economic activity. Integrating the perspective of progressive law allows for a more critical analysis of whether the restructuring of environmental regulation in the risk-based licensing regime remains aligned with the constitutional obligation of the state to protect environmental rights or reflects the subordination of ecological protection to economic rationality and investment management.

This research makes a conceptual contribution to the literature on environmental constitutionalism by developing an analytical framework for environmental constitutional regression in the context of the reform of risk-based investment governance. Unlike previous studies that generally place environmental regulatory changes within the framework of policy effectiveness or administrative governance, this article treats these transformations as a constitutional issue related to changes in the normative position of environmental protection within the state's legal structure. By integrating environmental constitutionalism, the principle of non-regression, and the approach of Progressive Law, this article offers an analytical approach that explains how regulatory reform in investment governance can substantively weaken ecological protection without formal changes to constitutional norms. Through this approach, this research

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[20] Satjipto Rahardjo, 'Hukum Progresif: Hukum Yang Membebaskan', *Jurnal Hukum Progresif* 1, no. 1 (2011): 1–24, https://doi.org/10.14710/hp.1.1.1-24; Satjipto Rahardjo, *Penegakan Hukum Progresif* (Penerbit Buku Kompas, 2010).

[21] Muhammad Zulfa Aulia et al., 'The Use of Progressive Law Phrase in Constitutional Court Decisions : Context , Meaning , and Implication', *Jurnal Konstitusi* 20, no. 3 (2023), https://doi.org/10.31078/jk2034.

[22] Suteki and A. Natalis, 'Mainstreaming Progressive Law: Toward an Emancipatory Paradigm in Legal Higher Education', *Cadernos de Dereito Actual* 2025, no. 27 (2025): 160–83. https://cadernosdedereitoactual.es/index.php/cadernos/article/view/1339

seeks to expand the discourse on the relationship between economic deregulation, the transformation of the regulatory state, and the protection of environmental rights in developing countries.

Based on this framework, this research argues that the shift towards risk-based investment governance is not merely an administrative reform, but reflects a structural reconstruction of the constitutional architecture of environmental protection. By integrating environmental protection into the investment licensing regime, the regulatory reform repositions environmental protection from a constitutional boundary for economic activities to an administrative variable in investment governance. From the perspective of environmental constitutionalism and progressive law, this transformation creates a condition that can be understood as environmental constitutional regression, which is a substantive weakening of environmental protection guaranteed constitutionally without formal changes to constitutional norms. Through a normative-structural analysis of the constitution, laws, implementing regulations, and Constitutional Court decisions, this article seeks to develop a conceptual framework for environmental constitutional regression and explain how the restructuring of risk-based investment governance can change the relationship between the constitution, the state, and environmental protection in Indonesia's legal system. Thus, this article provides both theoretical and normative contributions to the literature on environmental constitutionalism, risk-based regulatory governance, and the transformation of the regulatory state, particularly in the context of developing countries facing simultaneous pressures between economic development imperatives and the constitutional obligation to protect the environment.

This research uses doctrinal legal research to analyze the constitutional implications of the transformation of environmental protection within the risk-based business licensing regime, as regulated by Law No. 11 of 2020 on Job Creation and its implementing regulations, particularly Government Regulation No. 5 of 2021 on the Implementation of Risk-Based Business Licensing and Government Regulation No. 22 of 2021 on the Implementation of Environmental Protection and Management. This study is based on the premise that law is a system of norms arranged hierarchically, as emphasized in Article 7 of Law No. 12 of 2011 on the Formation of Laws and Regulations, meaning that any restructuring of norms at the level of laws and their implementing regulations must be analyzed in relation to their consistency with constitutional norms, specifically Article 28H, paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which guarantees the right to a good and healthy environment, and Article 33, paragraph (4), which affirms the principle of sustainability and environmental awareness as the constitutional basis for national economic development. In this framework, the research not only identifies textual changes in

positive legal norms but also evaluates their structural implications on the position of environmental protection as a constitutional obligation of the state within a constitutional state legal system.

The approach used includes a statute approach, a conceptual approach, and a structural analytical approach. The statute approach is used to systematically analyze the normative relationship between Law No. 32 of 2009 on Environmental Protection and Management, Law No. 11 of 2020 on Job Creation, and its implementing regulations, in order to assess the shift in the status and function of environmental protection instruments in the risk-based licensing regime. The conceptual approach is used to build an analytical framework based on environmental constitutionalism theory, the precautionary principle, the principle of environmental non-regression, and ecological justice as normative parameters to assess the alignment of regulatory restructuring with the state's constitutional obligations. Meanwhile, the structural analytical approach is used to evaluate vertical consistency between the norms of laws and the constitution, horizontal coherence between environmental law and investment regimes, and teleological coherence between the goals of environmental protection and the rationality of risk-based regulation. The analysis is conducted qualitatively through systematic, grammatical, and teleological legal interpretation, with the aim of determining whether the integration of environmental protection into the risk-based licensing regime represents a constitutionally legitimate administrative adjustment or rather reflects environmental constitutional regression that weakens the legal system's capacity to guarantee the protection of the constitutional right to a good and healthy environment.

B. Transformation of Environmental Protection Structure in the Risk-Based Licensing Regime

In the framework of environmental constitutionalism, environmental protection is understood as an integral part of the normative structure of the constitution, functioning not only to limit but also to guide the exercise of state power in the economic development process.[23] The

[23] Tim Hayward, *Constitutional Environmental Rights* (Oxford University Press, 2004); William E. Rees, 'Economic Development And Environmental Protection: An Ecological Economics Perspective', *Environmental Monitoring and Assessment* 86, no. 1 (2003): 29–45, https://doi.org/10.1023/A:1024098417023; Luis A. Avilés, 'Sustainable Development and Environmental Legal Protection in the European Union: A Model for Mexican Courts to Follow?', *Mexican Law Review* 6, no. 2 (2014): 251–72, https://doi.org/10.1016/S1870-0578(16)30014-2; Hernando Díaz-Candia, 'Realization of the Right to Environment Protection as a Fundamental Right in the United States: Some Reflections', *Environmental Policy and Law* 55, nos 4–5 (2025): 138–51, https://doi.org/10.1177/18785395251364735.

constitution in this perspective does not merely serve as a political document regulating the distribution of state powers, but also as a normative instrument that establishes ecological limits on the use of natural resources and economic activities.[24] In the context of Indonesia, this constitutional mandate is explicitly rooted in the 1945 Constitution of the Republic of Indonesia, specifically in Article 28H, paragraph (1), which guarantees the right of every person to a good and healthy environment, and Article 33, paragraph (4), which affirms that the national economy must be based on the principles of sustainability and environmental awareness.[25] These constitutional provisions not only recognize the environment as an object of public policy but place it as a constitutional right of citizens and a legally binding obligation of the state. Thus, environmental protection has a normative status as a constitutional obligation of the state, serving as a legal boundary for the implementation of economic development and investment activities.[26]

This constitutional mandate is then systematically operationalized in Law No. 32 of 2009 on Environmental Protection and Management, which affirms the precautionary principle as one of the fundamental principles of environmental protection (Article 2, letter f). Doctrinally, the precautionary principle has developed strongly in international environmental law, especially since it was formulated in the Rio Declaration on Environment and Development, particularly in Article 15, which emphasizes that the lack of full scientific certainty should not be used as a reason to postpone effective measures to prevent environmental degradation.[27] In this sense, the precautionary principle requires the state to take preventive actions against serious or irreversible threats to the environment and human health, even when scientific evidence regarding the risks is not yet conclusive. Theoretically, this approach differs from the risk-based regulation model, which requires relatively certain scientific proof before state intervention is justified. The precautionary principle shifts the burden of justification from the state to the actors engaging in risky activities, thus placing prevention as the primary regulatory orientation.[28] This paradigm

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[24] James R. May and Erin Daly, eds, 'The Nature of Environmental Constitutionalism', in *Global Environmental Constitutionalism* (Cambridge University Press, 2014), Cambridge Core, https://doi.org/10.1017/CBO9781139135559.003.

[25] Ahmad Nugroho, 'Green Constitution in the Indonesian Perspective : Reconstruction of the 1945 Constitution for Sustainable Development', *Multidisciplinary Science Journal*, ahead of print, 2026, https://doi.org/10.31893/multiscience.2026024.

[26] Amalia Diamantina and Devi Yulida, 'Reinforcement of Green Constitution : Efforts for Manifesting Ecocracy in Indonesia', *IOP Conference Series: Earth and Environmental Science* 1270, no. 1 (2023), https://doi.org/10.1088/1755-1315/1270/1/012005.

[27] Kevin C. Elliott, 'Precautionary Principles', in *The Routledge Companion to Environmental Ethics* (Routledge, 2022).

[28] A. Wallace Hayes, 'The Precautionary Principle', *Arhiv Za Higijenu Rada I Toksikologiju* 56, no. 2 (2005): 161–66, https://hrcak.srce.hr/145.

affirms that environmental protection is not a post-damage response, but rather an early safeguard mechanism against potential impacts that have not yet been fully measured.

This normative construction is further reflected in Article 22 of the Environmental Protection and Management Law, which mandates that every business or activity potentially causing significant environmental impact must conduct an environmental impact assessment, and in Article 36, paragraph (1), which requires an environmental permit as a prerequisite for obtaining business and/or activity licenses. Therefore, the design of environmental regulation in the Environmental Protection and Management Law positions the permitting and impact assessment instruments as the legal threshold for economic activities. This structure demonstrates that environmental protection serves as a primary legal prerequisite that determines the legality of economic activities, not merely an additional administrative requirement. This configuration simultaneously reflects the internalization of the precautionary principle in the national legal system, where the prevention of ecological damage is placed as the primary priority in development decision-making.

In this normative design, environmental permits function as an ex ante control mechanism that is determinative of the legality of an economic activity from an environmental law perspective.[29] This position places environmental protection as a legal gatekeeping mechanism, serving as a constitutional prerequisite for the initiation of economic activities. Thus, the relationship between environmental protection and economic activities is not coordinative, but hierarchical: economic activities only gain legal legitimacy after meeting environmental protection standards set through normative evaluation, scientific studies, and public participation. This regulatory structure reflects the transformation of the rule of law towards an ecological constitutional state model, which is a form of governance where public power, including in regulating and facilitating economic development, is constrained by the constitutional obligation to maintain ecological sustainability.[30] In this framework, environmental law does not merely function as an administrative instrument but as a constitutional mechanism that limits exploitative development rationalities.[31] The subordination of economic activities to the ecological boundaries

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[29] D. K. Dewi et al., 'Environmental Permission and Environmental Crime in Law Enforcement Concerning Living Environmental Management and Protection', *IOP Conference Series: Earth and Environmental Science* 452, no. 1 (2020), https://doi.org/10.1088/1755-1315/452/1/012085.

[30] Akhilendra Pratap Singh, 'Towards "the Environmental State": Revelations from a Design-Oriented Enquiry of Environmental Constitutionalism', *Environmental Law Review* 25, no. 2 (2023): 120–34, https://doi.org/10.1177/14614529231166298.

[31] Susan J. Buck, *Understanding Environmental Administration and Law* (Island Press, 2013); Richard J. Lazarus, *The Making of Environmental Law* (University of Chicago Press, 2023).

institutionalized by law reflects the internalization of the sustainability principle as a constitutional norm binding all state actions.

However, this normative configuration has undergone a significant transformation through the regulatory reform introduced in the Job Creation Law. This regime eliminates the status of environmental permits as independent administrative permits and replaces them with the concept of environmental approval, which serves as a prerequisite in the business licensing system.[32] This change is further operationalized through Government Regulation No. 22 of 2021 on the Implementation of Environmental Protection and Management, specifically Articles 3 and 4, which emphasize that environmental approval serves as the basis for issuing business licenses, and its validity follows the business license.[33] In the risk-based business licensing architecture, as regulated in Government Regulation No. 5 of 2021 on Risk-Based Business Licensing, the issuance of permits is carried out through the electronic system Online Single Submission (OSS), so environmental approval is functionally integrated into the national electronic licensing mechanism.[34] Thus, the environmental protection instrument no longer stands as an independent permit but becomes an integral part of the risk-based business licensing scheme that is digitalized.

This restructuring introduces a risk-based approach, where environmental obligations are determined based on the classification of the risk levels of business activities within the framework of risk-based business licensing as outlined in Government Regulation No. 5 of 2021. In this system, business activities are categorized into four risk levels: low, medium-low, medium-high, and high, each determining the intensity of licensing requirements and environmental obligations.[35] Consequently, not all business activities are required to prepare an environmental impact assessment; this obligation is generally imposed only on activities with medium-high and high-risk classifications, while lower-risk activities are required to meet simpler standards, such as Environmental Management Efforts – Environmental Monitoring Efforts or environmental management commitment statements.

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[32] Fitri Nur Aini Prasetyo and Abdul Kadir Jaelani, 'The Changing of Environmental Approval Administrative Law Perspective', *Journal of Human Rights, Culture and Legal System* 2, no. 3 (2022): 191–208, https://doi.org/10.53955/jhcls.v2i3.55.

[33] Hariyanto, 'Risk-Based Business License and Problems Arising After The Job Creation ACT', *Jurnal IUS Kajian Hukum Dan Keadilan* 10, no. 2 (2022): 354–66, https://doi.org/10.29303/ius.v10i2.1082.

[34] Widhayani Dian Pawestri et al., 'Investment in Infrastructure: A Comparative Study of the Regulation of Online Single Submission in Indonesia, Canada, and New Zealand', *European Journal of Comparative Law and Governance* (Leiden, The Netherlands) 11, no. 1 (2024): 129–63, https://doi.org/10.1163/22134514-bja10068.

[35] Adikancana and Santosa, 'The Licensing Transformation in Small and Medium Industries Affecting Environment Following the Establishment of the Law on Job Creation: A Case Study of the Washing Industry in Bandung Regency'.

This approach marks a shift in regulatory rationality from a universal preventive protection paradigm to a differential risk management paradigm. If in the previous regime the precautionary principle functioned as the general basis for limiting economic activities, then in the risk-based design, the intensity of environmental protection is determined through administrative calculations based on the identified risk levels, considering licensing efficiency and investment acceleration.[36] Thus, the regulatory logic shifts from precaution-centered environmental governance to risk-calibrated regulatory governance, where environmental protection is aligned with risk categories set administratively.[37]

Furthermore, the risk-based regime also reflects a shift from a preventive paradigm to a risk management paradigm. In the previous preventive paradigm regulated by the Environmental Protection and Management Law, the main goal of regulation was to prevent environmental damage through strict and independent ex ante evaluation. In contrast, in the risk-based paradigm introduced through investment regulatory reform, the goal of regulation shifts to managing environmental risks to ensure they remain within administratively acceptable limits. This shift has significant constitutional implications, as it potentially changes the state's obligation from preventing environmental damage as part of the protection of constitutional rights, to managing environmental risks within the framework of facilitating economic activities.

Moreover, the integration of environmental approval into the risk-based business licensing system also impacts the institutional structure of environmental protection. The institutional autonomy of environmental protection instruments diminishes, as decisions regarding environmental feasibility become part of the investment licensing administration system, which primarily focuses on efficiency and accelerating business activities. This condition could create a structural imbalance in regulatory priorities, where economic considerations gain a more dominant position than environmental protection considerations. Normatively, this change reflects a shift in the state's role from being an environmental protector as a constitutional obligation to being an environmental risk manager within the framework of investment governance.

Thus, the restructuring of licensing through investment regulatory reform not only changes the administrative form of environmental protection instruments, but also reconfigures the hierarchical relationship between ecological protection and economic activities. The integration of

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[36] Joshua Wijaya Proyogo, 'Balancing Risk and Caution: The Precautionary Principle in Indonesian Environmental Law Context', *Indonesian Journal of Environmental Law and Sustainable Development* 3, no. 1 (2024): 1–30, https://doi.org/10.15294/ijel.v3i1.40206.

[37] Rothstein et al., 'The Risks of Risk-Based Regulation: Insights from the Environmental Policy Domain'.

environmental approval into the risk-based business licensing system shifts the initial design, which placed environmental protection as a relatively independent constitutional prerequisite, towards a model where it operates within the framework of digitized administrative risk calibration. This transformation indicates a shift from a determinative ex ante control structure to a more integrated evaluation mechanism within national investment governance.

From the perspective of progressive law, as developed by Satjipto Rahardjo[38], law is not merely understood as a collection of static formal norms, but as a social instrument that must work to protect humans and broader human values.[39] In this framework, changes in the environmental licensing structure should not be evaluated solely from the perspective of administrative efficiency or normative consistency, but also from its ability to maintain the law's function as a tool to protect public interests, including ecological sustainability. If regulatory restructuring reduces the capacity of the law to prevent environmental damage, then substantively, such changes could conflict with the progressive law orientation, which places social justice and sustainability as the primary goals of law enforcement.

However, this change in regulatory architecture does not by itself answer a more fundamental question: does this structural reconstruction still maintain the intensity of constitutional limits on state power in facilitating economic development, or does it recalibrate those limits to a degree that could weaken the protective capacity of the constitution? In other words, the institutional transformation described needs to be further examined not only as a policy phenomenon but as a constitutional issue regarding the sustainability of environmental protection functions as an effective boundary against the rationality of development. This question is the focus of the analysis in the following section.

C. Normative Conflict and Constitutional Implications on Ecological Justice

In the perspective of environmental constitutionalism, environmental protection is understood as a constitutional mandate that places the precautionary principle and preventive instruments as the main foundation for controlling development. In this framework, the post-restructuring licensing design following the Risk-Based Business Licensing Regulation creates normative conflicts that can be identified in the horizontal relationship between Law No. 32 of

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[38] Rahardjo, ‘Hukum Progresif: Hukum Yang Membebaskan’.
[39] Suteki and Natalis, ‘Mainstreaming Progressive Law: Toward an Emancipatory Paradigm in Legal Higher Education’.

2009 and Law No. 6 of 2023. The precautionary principle, the obligation for Strategic Environmental Assessments, and the position of environmental permits as independent prerequisites for business licenses have been restructured into a business risk classification scheme. This integration not only changes the regulatory techniques but also repositions environmental permits from autonomous preventive instruments to administrative components within an integrated licensing system. This shift is accompanied by the consolidation of authority at the central government level, particularly in the formation of feasibility test teams and the determination of business activity classifications, impacting the reduced role of provincial and district/city governments in environmental control.[40] From a decentralization perspective, this dynamic reflects the reorganization of power distribution, which weakens the role of local governments as the frontline of ecological protection. The resulting conflicts are thus paradigmatic, functional, teleological, and institutional: paradigmatically, a shift occurs from precautionary regulation to risk-based regulation; functionally, the obligation for environmental impact assessments is limited to high-risk activities; teleologically, regulatory priorities shift from ecological protection to investment acceleration; and institutionally, there is a tendency for centralization that changes the architecture of environmental control in the framework of regional autonomy. This transformation shows that regulatory changes are not merely technical administrative matters but reflect a political-legal reorientation in the relationship between environmental protection, power distribution in governance, and economic development.

The normative shift in the regulatory framework reflects a transformation of the environmental law paradigm, which is no longer positioned merely as an instrument to limit economic activities but as part of a risk management mechanism within investment-based development. In the preventive paradigm, which aligns with the precautionary principle and the framework of environmental constitutionalism, environmental law functions as a normative "threshold" that sets a legal boundary against activities that may cause damage, meaning that environmental protection is a prerequisite for the legitimacy of an activity. Conversely, in the risk-based paradigm, economic activities are assumed to proceed as long as the risks can be classified and managed through administrative instruments. As noted by Driesen[41], the function of environmental law is no longer a legal boundary binding economic activities, but rather a variable

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[40] Iskatrinah et al., 'Environmental Licensing After the Job Creation Act in the Perspective of a Decentralized Unitary State', *IOP Conference Series: Earth and Environmental Science* 1030, no. 1 (2022): 012023, https://doi.org/10.1088/1755-1315/1030/1/012023.

[41] David M. Driesen, *The Economic Dynamics of Environmental Law* (MIT press, 2003).

in the risk management mechanism supporting investment-based development. This transformation changes the hierarchical relationship between the environment and development: whereas previously economic activities were subject to binding ecological limits, environmental protection is now repositioned as one of the variables in balancing development policies, marking a shift in normative orientation from a precautionary-based limitation model to a risk-calculation model, which ultimately impacts the redefinition of the constitutional function of environmental law in the national legal system.

From the perspective of progressive law, the law should not be confined to formal legality but must be tested based on its ability to achieve substantive justice in social life.[42] This approach rejects the legalistic view that regulatory changes are valid merely because they were generated through a legitimate legislative process. On the contrary, progressive law demands that every legal change be assessed based on its impact on the protection of public interests and vulnerable groups. In the context of environmental governance, this approach emphasizes that regulatory designs that structurally weaken preventive instruments against ecological damage may reflect a failure of the law to fulfill its protective function toward society and the environment.[43]

From the constitutional perspective based on the 1945 Constitution of the Republic of Indonesia, these changes have implications for the redefinition of environmental law's function from an instrument limiting economic power to an instrument for managing economic risks, which systemically has the potential to reduce its capacity as a mechanism for protecting the constitutional right to a good and healthy environment.

The further consequence of this regulatory transformation is the repositioning of environmental law within the investment regulation framework, particularly after restructuring through the Job Creation Law. The integration of environmental approval into the Risk-Based Business Licensing system not only changes the administrative procedure but also the normative position of this instrument within the licensing legal structure. This change impacts the shift in the function of environmental authority: where previously environmental permits in Law No. 32 of 2009 functioned as a substantive prerequisite determining the ecological feasibility of an activity, now environmental approval becomes part of the integrated licensing mechanism focused on

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[42] Ikhsan et al., 'Bridging Law and Society: Reorienting Sociological Jurisprudence for Progressive Legal Reform in Indonesia', *Jurnal Hukum Progresif* 13, no. 2 (2025): 313–50, https://doi.org/10.14710/jhp.13.2.313-350.

[43] F. X. Adji Samekto, 'Neo-Liberalism , Greenwashing , and Deforestation : Rethinking Climate Action Through Progressive Law in Indonesia Neo-Liberalism , Greenwashing , and Deforestation : Rethinking Climate Action Through Progressive Law in Indonesia', *IOP Conference Series: Earth and Environmental Science* 1537, no. 1 (2025), https://doi.org/10.1088/1755-1315/1537/1/012038.

business risk classification. One tangible implication of this transformation is the reduced involvement of the public in the environmental impact assessment process, potentially decreasing the effectiveness of oversight and the legitimacy of sustainability assessments.[44] Functionally, this change marks a shift from a substantive control model to a procedural coordination model, meaning that the goal of environmental protection no longer holds autonomous priority in the decision-making structure but is considered alongside, and in certain conditions may be subordinated to, regulatory efficiency and the agenda for accelerating economic development.

This normative conflict is also reflected in the erosion of the precautionary principle as a fundamental principle of modern environmental law, which is explicitly recognized in the Environmental Protection and Management Law. In the preventive paradigm, scientific uncertainty becomes the basis for legitimizing stronger regulatory interventions to prevent potential serious or irreparable damage, so the precautionary principle functions as a protection mechanism against the limitations of scientific knowledge; the absence of scientific certainty cannot be used as an excuse to delay protective measures. In contrast, in the risk-based regime restructured through the Job Creation Law, uncertainty tends to be reduced to a technocratic variable managed through risk classification and administrative procedures. According to the research findings by Kasper et al.[45], administrative risk regulation and limited preventive mechanisms can result in systemic imperfections, regulatory gaps, and a potential reduction in the effectiveness of environmental protection. This transformation shifts the temporal orientation of legal intervention from an ex ante prevention approach to a risk management model after the potential impacts are categorized. From a constitutional perspective based on the 1945 Constitution of the Republic of Indonesia, the weakening of the preventive dimension has the potential to limit the state's capacity to fulfill its positive obligation to protect the right to a good and healthy environment in an anticipatory and sustainable manner.

This change in orientation directly affects the minimum protection standards, which in the preventive design function as a universal normative threshold for all activities that could potentially cause environmental impacts. In the structure built through the Environmental

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[44] Saputra and Dhianty, 'Investment Licensing and Environmental Sustainability in the Perspective of Law Number 11 The Year 2020 Concerning Job Creation'.

[45] Herman Kasper Gilissen et al., 'Towards More Effective Environmental Risk Regulation: An Analysis of Complementary Effects between Administrative Environmental Law and Tort Law in the Regulation of Environmental Risks, with a Specific Focus on Chemical Mining Activities in the Deep Subsoil', *Journal for European Environmental & Planning Law* (Leiden, The Netherlands) 18, nos 1–2 (2021): 77–102, https://doi.org/10.1163/18760104-18010006.

Protection and Management Law, environmental protection does not rely solely on administrative calculations but is set as a general prerequisite attached to every activity that could pose ecological risks. Conversely, in the risk-based regime restructured through the Job Creation Law, the level of protection is determined through risk classification and administrative assessment that is contextual. Dependence on this administrative discretion opens the door to the relativization of protection standards, especially when activities classified as low or medium risk are subject to limited evaluation, even though they may cumulatively lead to significant ecological impacts. Findings from previous research show that while risk-based regulation may offer efficiency, proportionality, and more effective governance, this approach faces epistemic, institutional, and normative challenges that could limit the achievement of the intended environmental protection goals.[46] The shift from a model based on general norms to one based on classification and administrative discretion results in a reduction in the certainty of protection for ecological interests as part of fundamental public interests. From the perspective of the rule of law, this situation raises questions about the consistency of the application of the principle of equal and non-discriminatory protection of the right to a good and healthy environment.

From a constitutional perspective, this regulatory conflict directly relates to the state's obligation to respect, protect, and fulfill the right to a good and healthy environment as guaranteed by the 1945 Constitution. This right is not merely a public policy aspiration but a constitutional norm that requires the state to build and maintain an effective legal framework to prevent ecological damage. In the doctrine of constitutional supremacy, every sectoral regulatory restructuring must be designed to strengthen, or at least not diminish, the level of protection that has been established. In line with international research findings on the non-regression principle, any reduction in the preventive capacity of environmental law or narrowing of previously existing substantive protection can be classified as normative regression, which could potentially conflict with the principle of progressive protection of constitutional rights.[47] Testing this consistency becomes part of the constitutional oversight mechanism to ensure that development policy transformation remains within the limits set by the constitution as the highest legal norm.

The implications of this normative conflict are increasingly evident in the dimension of ecological justice. The risk management approach in the Risk-Based Business Licensing regime

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[46] Rothstein et al., ‘The Risks of Risk-Based Regulation: Insights from the Environmental Policy Domain’.

[47] Andrew D. Mitchell and James Munro, ‘An International Law Principle of Non-Regression from Environmental Protections’, *International and Comparative Law Quarterly* 72, no. 1 (2023): 35–71, Cambridge Core, https://doi.org/10.1017/S0020589322000483.

tends to transform environmental protection from the state's preventive obligation into an administrative control mechanism, which in practice may shift some of the risk burdens to ecosystems and communities that are directly affected. When risk classification determines the level of monitoring and evaluation, local communities, especially those in coastal areas, mangrove regions, or areas with high dependence on natural resources, face increased vulnerability to environmental degradation, decreased quality of life, and disruption of traditional livelihoods.[48] At the same time, the economic benefits of business activities are often distributed disproportionately, creating imbalances between the beneficiaries and those bearing the ecological burdens.[49] From a constitutional perspective based on the 1945 Constitution of the Republic of Indonesia, this situation raises issues of distributive justice and equality of protection of rights, as the guarantee of a good and healthy environment should not depend on the social, economic, or geographical position of a community. Therefore, regulatory designs that weaken the preventive dimension have the potential to deepen ecological inequalities and challenge the state's commitment to the principle of equal protection of rights.[50]

In addition to the distributive dimension, this normative conflict also has significant intergenerational implications. The weakening of preventive instruments and the reduction of the precautionary principle, which in international environmental law literature relates to the prevention principle and the precautionary principle, may result in the gradual yet systemic accumulation of ecological damage, the effects of which will not only be felt by the current generation but also passed down to future generations.[51] The prevention principle emphasizes that the state has a constitutional obligation to act proactively in protecting the environment, ensuring that risks of damage that can be anticipated are not shifted or allowed to accumulate over time. Within the framework of ecological constitutionalism, rooted in the principle of sustainability as reflected in the 1945 Constitution, the state's obligation extends beyond protecting the rights of

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48 Irfan Amir et al., 'Climate Constitutionalism in Indonesia: Legal Pathways for Climate Action', *Al Bayyinah* 9, no. 2 (2025): 260–71, https://doi.org/10.30863/al-bayyinah.v9i2.10733.

49 Peggy James, 'The Supervision of Environmental Risk: The Case of HCB Waste or Botany/Randwick?', *Toxic Risk and Governance: The Case of Hexachlorobenzene* 90, no. 4 (2009): 1576–82, https://doi.org/10.1016/j.jenvman.2008.05.012.

50 Antono Adhi Susanto, 'Reconstruction of the 1945 Constitution for Strengthening the Legal Framework of Indonesia Environmental Law', *Jurnal Konstitusi* 21, no. 2 (2024): 183–202, https://doi.org/10.31078/jk2122; Achmad Irwan Hamzani et al., 'Balancing Utilitarianism with Access to Environmental Justice: An Indonesian Case Study', *Environmental Policy and Law* 55, nos 4–5 (2025): 152–65, https://doi.org/10.1177/18785395251374205.

51 A. I. Mahdi, 'The Principle of Preventing Environmental Harm', *Journal of Human Security* 20, no. 1 (2024): 94–98, https://doi.org/10.12924/johs2024.20113.

current citizens but also encompasses the responsibility to maintain environmental carrying capacity for future generations. Thus, the reduction in the effectiveness of preventive protection not only raises issues of intra-generational justice but also has the potential to erode the principle of intergenerational justice as part of a sustainable constitutional obligation. From this perspective, regulatory designs that prioritize short-term risk management must be tested against the state's constitutional commitment to ensuring ecological sustainability across generations.

Overall, the identified normative conflict shows a structural tension between the constitutional commitment to environmental protection and the policy orientation of accelerating investment. The transformation towards Risk-Based Business Licensing does not merely reform administrative procedures but affects the normative integrity of the environmental legal system and its capacity to guarantee the protection of constitutional rights to a good and healthy environment, as guaranteed by the 1945 Constitution of the Republic of Indonesia.

If such restructuring systematically reduces the level of preventive protection or narrows the scope of ecological guarantees that were previously available, then, in environmental constitutionalism literature, a situation where regulatory reform formally remains within the framework of valid law, but substantively reduces environmental protection, is often understood as environmental constitutional regression, which may conflict with the principle of constitutional supremacy and the character of a democratic rule of law. In this framework, the reconstruction of environmental regulatory governance is not merely a policy choice for development but also part of the constitutional responsibility of the state to ensure coherence between the investment agenda and the protection of rights.

Repositioning environmental protection as a normative foundation for development requires the integration of the precautionary principle, strengthening the independence of environmental protection instruments, and affirming ecological justice in the licensing design. Without such strengthening, the risk-based regime has the potential not only to weaken ecological protection factually but also to test the internal consistency of the constitutional rule of law system itself.

Thus, the normative conflict in the restructuring of risk-based licensing does not merely reflect a change in regulatory techniques but also raises constitutional issues regarding the consistency of the legal system in maintaining the level of environmental protection. When regulatory reform systematically reduces the capacity of environmental law to perform its preventive function, such changes can be classified as a form of environmental constitutional regression. This phenomenon shows that the weakening of environmental protection does not occur in a single form, but through various interconnected mechanisms. To capture this complexity

systematically, an analytical framework is needed that can identify the dimensions of environmental constitutional regression, which will be developed in the next section.

D. Environmental Constitutional Regression: Conceptual Framework and Comparative Perspective

Based on the analysis of the normative conflict outlined in the previous section, the weakening of environmental protection within the risk-based licensing regime does not occur in a singular form, but rather through a multidimensional mechanism configuration. This weakening is manifested in changes to institutional architecture, shifts in the function of legal instruments, reductions in the quality of public participation, and the potential lowering of environmental protection standards. In this context, this article proposes environmental constitutional regression as the main conceptual framework that allows for a systematic identification of the dynamics of weakening ecological protection in modern rule-of-law states. Thus, the primary contribution of this article is not only descriptive but also theoretical, providing an analytical tool to interpret the transformation of the relationship between the constitution, the state, and the environment in the context of regulatory reform.

Environmental constitutional regression is defined as a condition in which legal reform or public policy, while formally remaining within the constitutional framework, results in a reduction in the legal system's capacity to guarantee the level of environmental protection previously achieved. This concept highlights how changes in regulatory design or state policy can gradually weaken ecological protection without explicitly changing constitutional norms.[52] In the context of risk-based investment governance in Indonesia, this dynamic becomes relevant for understanding the transformation occurring in the environmental protection system. The integration of environmental approval into the risk-based business licensing system not only changes the institutional configuration of environmental instruments but also has the potential to shift the normative position of environmental protection from a preventive monitoring mechanism to an administrative component within the investment governance architecture. This change shows that regulatory restructuring, intended to simplify licensing procedures, can have broader implications on the constitutional integrity of environmental protection.

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[52] Mitchell and Munro, 'An International Law Principle of Non-Regression from Environmental Protections'.

Conceptually, this framework is rooted in the development of environmental constitutionalism, which places environmental protection as an integral part of the normative structure of the constitution. In this paradigm, the constitution not only functions as a political document that regulates the distribution of state power but also as a legal instrument that sets substantive boundaries on the state's actions in managing natural resources.[53] Environmental constitutionalism is built on several key elements, namely the rule of law, the protection of human rights, constitutional democracy, and the independence of the judiciary as a mechanism of oversight of state actions, which collectively provide normative legitimacy for ecological protection.

The urgency of this approach is further heightened in the context of the global ecological crisis, often described as the Anthropocene era, in which human activity has become the main force affecting the Earth's systems. In this situation, environmental degradation is no longer understood as a sectoral issue, but as a structural phenomenon closely linked to economic development patterns, natural resource exploitation, and governance.[54] However, the development of environmental constitutionalism also faces a fundamental paradox, namely the gap between normative recognition and implementation effectiveness. Economic pressures, institutional capacity limitations, and conflicts of interest between development and environmental protection often lead to the failure of constitutional norms to be optimally implemented.[55] In this situation, regulatory reforms aimed at economic deregulation have the potential to gradually trigger environmental constitutional regression.

In this article, environmental constitutional regression is analyzed through four main dimensions. First, the structural dimension, which refers to changes in institutional architecture that reduce the independent position of environmental protection mechanisms within the state governance system. Second, the functional dimension, which occurs when environmental legal instruments, previously functioning as mechanisms for preventing ecological damage, shift into

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[53] Kysar, 'Global Environmental Constitutionalism: Getting There from Here'.

[54] Czeslaw Mesjasz, 'The Anthropocene and Complexity: A Survey of Ideas', in *Towards Rethinking Politics, Policy and Polity in the Anthropocene: Multidisciplinary Perspectives*, ed. Hans Günter Brauch (Springer Nature Switzerland, 2025), https://doi.org/10.1007/978-3-031-71807-6_3; Frank Biermann et al., 'Down to Earth: Contextualizing the Anthropocene', *Global Environmental Change* 39 (July 2016): 341–50, https://doi.org/10.1016/j.gloenvcha.2015.11.004; Aga Natalis et al., 'Anthropocentrism Vs Ecofeminism: How Should Modern Environmental Law Be Reformed?', Articles, *Sortuz: Oñati Journal of Emergent Socio-Legal Studies* 13, no. 1 (2023): 38–68, https://opo.iisj.net/index.php/sortuz/article/view/1686.

[55] N. F. Stewart, 'Challenges and Opportunities in Implementing Environmental Constitutionalism in Nigeria', in *Implementing Environmental Constitutionalism: Current Global Challenges* (2018), https://doi.org/10.1017/9781316691588.011.

administrative risk management instruments. Third, the procedural dimension, which involves the weakening of public participation mechanisms, transparency, and access to the environmental decision-making process. Fourth, the substantive dimension, which refers to the direct reduction in environmental protection standards that could potentially increase ecological damage risks or lower the level of protection previously achieved.

This analytical framework is closely related to the development of the non-regression principle in environmental law, which asserts that the state should not adopt policies or regulations that substantively reduce the level of environmental protection that has been achieved. This principle places environmental protection as a progressive process that requires the continuous enhancement of standards. Thus, any regulatory reform that potentially lowers ecological protection standards should be critically assessed from a constitutional perspective, not merely from the viewpoint of economic efficiency or administrative simplification.

In this framework, a comparative approach becomes important to examine how these principles are operationalized in various legal systems and how regression potential emerges in different configurations. Comparative studies show that environmental protection within modern constitutional systems does not develop uniformly, but rather through models that reflect different emphases on substantive, procedural, and institutional dimensions.

In France, for example, the environmental non-regression principle has gained normative recognition as part of the constitutional framework to prevent the lowering of environmental protection standards through deregulation policies. This principle emphasizes that the level of environmental protection achieved cannot be reduced, reflecting a constitutional commitment to sustainable development and ecological preservation.[56] The French approach shows a form of dual constitutionalization: formal constitutionalization, where environmental norms are explicitly recognized within the constitutional framework, and substantive constitutionalization, where these principles meaningfully influence public policy design and environmental governance.[57]

[56] Valérie Bernaud and Felipe Calderon-Valencia, ‘Derecho Constitucional Ambiental Francés: Entre Promesas Y Decepciones’, *Estudios Constitucionales* 20, no. 2 (2022): 195–227, https://doi.org/10.4067/S0718-52002022000200195; Goce Kocevski, ‘Constitutionalizing the Environment in 21st Century Europe: Innovations for Greener Constitutions’, *Journal of Liberty and International Affairs* 11, no. 1 (2025): 62–81, https://doi.org/10.47305/jlianm.2025.1715.

[57] Sadam Mohammad Awaisheh et al., ‘Environmental Governance and Administrative Judiciary in Jordan and France: A Socio-Legal Comparative Study’, *International Journal of Sustainable Development and Planning* 20, no. 12 (2025): 5491–501, https://doi.org/10.18280/ijsdp.201238; Francesco Scattolin, ‘Il Principio Di Integrazione in Prospettiva Comparata: Riflessioni Sull’esperienza Francese’, *Federalismi. It*, no. 28 (2024): 145–91, https://www.federalismi.it/nv14/articolo-documento.cfm?artid=51404.

Furthermore, the implementation of this principle is not limited to the national level but is also reflected in local government practices, including in regions like Normandy and Brittany, which integrate sustainability principles into sectoral public policies.[58] Thus, the French legal system places the substantive dimension as the primary instrument in preventing environmental constitutional regression.

Meanwhile, in Germany, environmental protection is deeply integrated into the constitutional framework through the concept of the ecological rule of law, which positions sustainability as a fundamental principle in state governance. This approach not only emphasizes the importance of environmental protection as part of the state's obligations but also links it to dimensions of social justice and intergenerational responsibility.[59] In practice, the German legal system places strong emphasis on procedural environmental rights, including public participation, access to information, and transparency in decision-making, which are strengthened by adherence to international instruments such as the Aarhus Convention.[60] Emphasis on the procedural dimension ensures that environmental protection is determined not only by substantive standards but also by the quality of the democratic process in policy formation. Furthermore, the implementation of ecological principles is also reflected in governance practices at the regional level, such as in Bavaria and Baden-Württemberg, which integrate sustainability into sectoral policies. This approach demonstrates that the quality of the democratic process is a key element in maintaining the integrity of environmental protection.[61]

If the European approach tends to emphasize the normative and procedural dimensions, the dynamics in Global South countries show a more complex configuration. Brazil and South Africa explicitly recognize the right of citizens to a healthy environment in their constitutions. In Brazil, environmental protection has a strong constitutional basis through explicit recognition in the 1988 Constitution, specifically in Article 225, which asserts that everyone has the right to an

[58] Birgit Hoinle and Jocelyn Parot, 'Just Food for Kids? School Food Management Models and Sustainable Procurement in France and Germany', *Urban Planning* 10 (July 2025): 9569., https://doi.org/10.17645/up.9569.

[59] Milena Petters Melo, 'Constitucionalismo Ambiental Multilevel E Democracia Socioambiental', *Novos Estudos Jurídicos* 29, no. 3 (2024): 561–90, https://doi.org/10.14210/nej.v29n3.p561-590.

[60] Sofia de Abreu Ferreira, 'Fundamental Environmental Rights in EU Law: An Analysis of the Right of Access to Environmental Information', in *Managing Environmental Justice* (Brill, 2010), https://doi.org/10.1163/9789042029385_009.

[61] Felix Hörisch and Stefan Wurster, 'The Policies of the First Green-Red Government in the German Federal State of Baden-Württemberg, 2011–2016', *Politische Vierteljahresschrift* 60, no. 3 (2019): 513–38, https://doi.org/10.1007/s11615-019-00170-0.

ecologically balanced environment.[62] This provision not only recognizes the environmental right as a fundamental right but also imposes an obligation on the state and society to protect and preserve the environment for current and future generations. In practice, Brazil's legal system also provides relatively strong enforcement mechanisms, including expanded access to environmental justice, enabling the public to challenge policies or state actions that could harm the environment.[63]

However, Brazil's experience also shows that strong constitutional recognition does not automatically guarantee effective environmental protection in practice. Various development policies, especially large-scale infrastructure projects in areas like the Tapajós Basin, reveal a tendency to weaken environmental protection mechanisms, including the use of instruments like the *suspensão de segurança*, which allows the suspension of court rulings for the sake of development.[64] Policy practices show a tension between normative commitments and development interests, opening the door for regression through institutional mechanisms without explicit changes to constitutional norms. This shows a gap between the substantive dimension and policy practice.

In South Africa, environmental protection is given a strong constitutional basis through Article 24 of the 1996 Constitution, which guarantees the right of every person to an environment that does not harm health or well-being. This provision is not merely declarative but also imposes a positive obligation on the state to take legislative and policy measures to protect the environment for present and future generations. A key feature of the South African approach is the active role of the judiciary in enforcing environmental rights. The courts progressively use various mechanisms, including *structural interdicts*, to ensure government compliance with environmental

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[62] Ingo Wolfgang Sarlet and Wolfgang Kahl, 'Constitution and Climate Change: The Cases of Germany and Brazil', in *Encyclopedia of Contemporary Constitutionalism*, ed. Javier Cremades and Cristina Hermida (Springer International Publishing, 2020), https://doi.org/10.1007/978-3-319-31739-7_164-1; Ned Thimmayya, 'A Pioneering Statute in a Hostile Landscape: Brazil's Article 225 and Its Success in Protecting Biodiversity', *Brooklyn Journal of International Law* 37, no. 2 (2012): 713–49, https://brooklynworks.brooklaw.edu/bjil/vol37/iss2/10/; Antonio Herman Benjamin and Nicholas Bryner, 'Brazil', in *The Oxford Handbook of Comparative Environmental Law*, ed. Emma Lees and Jorge E. Viñuales (Oxford University Press, 2019), https://doi.org/10.1093/law/9780198790952.003.0004.

[63] Cristiano Capellani Quaresma et al., 'Environmental Injustice and Pedestrian Accessibility to Urban Parks: A Comparative Case Study in São Paulo, Brazil', *Urban Forestry & Urban Greening* 120 (June 2026): 129449, https://doi.org/10.1016/j.ufug.2026.129449; Andrea Ferraz Young, 'Urbanization, Environmental Justice, and Social-Environmental Vulnerability in Brazil', in *Urbanization and Sustainability: Linking Urban Ecology, Environmental Justice and Global Environmental Change*, ed. Christopher G. Boone and Michail Fragkias (Springer Netherlands, 2013), https://doi.org/10.1007/978-94-007-5666-3_7; Mariana Passos Freitas, 'Access to Environmental Justice in Brazil', *International Journal for Court Administration* 8, no. 3 (2017): 1–6, https://doi.org/10.18352/ijca.232.

[64] Philip M. Fearnside, 'Amazon Dams and Waterways: Brazil's Tapajós Basin Plans', *Ambio* 44, no. 5 (2015): 426–39, https://doi.org/10.1007/s13280-015-0642-z.

obligations.[65] This approach shows that constitutional environmental protection relies not only on substantive norms but also on the effectiveness of judicial enforcement mechanisms that can correct state policies.

Meanwhile, a more radical approach is seen in Ecuador, which through the 2008 Constitution recognizes the rights of nature as part of the constitutional framework. In this paradigm, nature is no longer merely positioned as an object of protection but as a legal subject with the right to exist, regenerate, and be restored. This ecocentric approach is rooted in the concept of *sumak kawsay* (living in harmony with nature), reflecting the integration of ecological and cultural values into the legal system.[66] In practice, Ecuadorian courts have developed jurisprudence based on the rights of nature, although its implementation faces various challenges.[67] However, this constitutional experiment has global significance as it promotes a paradigm shift from anthropocentric to ecocentric environmental governance.[68]

From a comparative perspective, these various approaches indicate a consistent global pattern, namely that environmental protection in modern constitutional systems depends on a multidimensional configuration that includes substantive, procedural, and institutional dimensions. Any weakening of one of these dimensions has the potential to result in systemic environmental constitutional regression. Thus, the global trend is not only towards the strengthening of the constitutionalization of environmental protection but also towards diversifying the mechanisms to safeguard it.

In this context, the case of Indonesia becomes relevant to examine how the dynamics of environmental constitutional regression manifest in the practice of regulatory reform. The

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[65] Sekwakwa Ledile, 'Structural Interdicts for Environmental Rights Violations? South African Human Rights Commission v Msunduzi Local Municipality (8407/2020P) [2021] ZAKZPHC 35 (17 June 2021)', *Potchefstroom Electronic Law Journal* 27, no. 1 (2024): 1–22, https://doi.org/10.17159/1727-3781/2024/v27i0a16044.

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implementation of the risk-based licensing system has changed the configuration of environmental protection instruments, which were previously based on a preventive paradigm. Instruments such as environmental impact assessments and environmental permits, which originally functioned as independent prerequisites, are now integrated into the investment licensing system focused on classifying the risks of economic activities.

This integration results in structural changes in the normative position of environmental protection in the national legal system. Environmental protection, which previously functioned as a boundary to economic activities, is now repositioned as an administrative variable in investment governance. From the perspective of environmental constitutional regression, this change reflects both structural and functional regression, gradually shifting the legal orientation from an ecological protection paradigm to an investment facilitation paradigm.

Using this framework, this article asserts that risk-based regulatory reform has the potential to weaken ecological protection without explicit changes to constitutional norms. Therefore, investment governance restructuring cannot be understood merely as an administrative reform but as a transformation that affects the normative relationship between the constitution, the state, and the environment. In this framework, environmental constitutional regression serves as a critical indicator for identifying systemic deviations from the global trajectory of strengthening environmental protection in modern constitutional systems.

E. Conclusion

This research shows that the risk-based business licensing restructuring introduced through the Job Creation Law and its implementing regulations has reconstructed the normative position of environmental protection from a constitutional prerequisite that serves as a constitutional boundary on economic activities to an administrative component within the architecture of investment governance. The shift from the precautionary paradigm to calibrated risk management is not merely technical-administrative, but directly impacts the configuration of the relationship between environmental protection and investment policy within the national legal system. From a constitutional perspective, this transformation has the potential to reduce the capacity of the legal system to guarantee the right to a good and healthy environment as guaranteed in Article 28H, paragraph (1), and the sustainability principle in Article 33, paragraph (4) of the 1945 Constitution of the Republic of Indonesia. This article asserts that this phenomenon represents environmental constitutional regression as an analytical framework that explains the weakening of ecological protection without explicit changes to constitutional norms. This regression manifests in a

multidimensional manner, encompassing structural, functional, procedural, and substantive dimensions, which collectively shift the legal orientation from an ecological protection paradigm to an investment facilitation paradigm.

From a normative perspective, these findings emphasize the importance of maintaining the constitutional integrity of environmental protection in any investment regulatory reform. Economic deregulation and licensing simplification cannot be justified if they reduce the capacity of the legal system to guarantee ecological protection as a constitutional right. Therefore, there is a need to strengthen the regulatory design to ensure that environmental protection standards do not decline (non-regression threshold), including through reaffirming the preventive function of environmental instruments, strengthening the independence and quality of environmental evaluation, and protecting public participation rights in decision-making processes. Furthermore, a more progressive constitutional testing approach by judicial institutions is needed to ensure that every investment policy remains aligned with the constitutional mandate of environmental protection. This approach is important to prevent the gradual yet systemic occurrence of environmental constitutional regression.

Moving forward, further research should integrate empirical approaches to examine the extent to which environmental constitutional regression manifests in practice, particularly in terms of environmental quality, effectiveness of supervision, and access to environmental justice. This empirical approach will complement the conceptual framework developed in this research and further strengthen its relevance in the context of public policy and environmental law theory development.

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