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THE EFFECTIVENESS OF CLIMATE CHANGE LITIGATION AS A VENUE TO UPHOLD STATE CLIMATE CHANGE OBLIGATIONS IN INDONESIA

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Abstract

Climate change has increasingly raised concerns regarding the continuity of human life. As a consequence, there are certain obligations upon governments to conduct climate change mitigation and adaptation measures. However, there remains the issue of ensuring States comply with their obligations. Under the Paris Agreement, a recent international legal instrument concerning climate change, compliance is one of the matters addressed. The Agreement introduces a "Compliance Committee". The Agreement, however, underlines that the Compliance Committee's actions will be limited to non-adversarial and non-punitive measures. Therefore, it remains unclear whether non-compliant States would indeed adhere to the Compliance Committee. Recently, climate change litigation has begun to develop around the world. This form of litigation also encompasses lawsuits from citizens against States, concerning such State's obligations in mitigating and adapting to climate change. With such development, a question arises, which is "How effective can climate change litigation be in upholding Indonesia's climate change obligations?" In answering such question, this research will use the normative juridical method, consisting primarily of bibliographical research. The composition of this research will firstly consist of an explanation of the research background, including an explanation on current State climate change obligations, which leads to the main research problem, and a comparison with prior research. Next, an analysis upon recent developments in Indonesia, along with a brief comparison with global developments will be conducted, which will then be used in answering the research problem. The paper will then conclude with conclusions and suggestions.

Keywords: *climate change litigation, international obligations, State compliance, international law*

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I. INTRODUCTION

Climate change has grown in importance upon national policy-making around the world over the years. Whether it is in the formulation of national plans for climate change mitigation and adaptation, or referencing the issue of climate change when regulating the energy, forestry, agriculture, transportation, or other relevant sectors. Nevertheless, there remains the matter of compliance upon existing policies and regulations, as non-compliance may bring the earth closer

to changes such as extreme weather events, water scarcity, declining crop yields, and rising sea-levels, which would be detrimental to human life.¹ Non-compliance upon climate policies and regulations currently not only involves private parties such as farmers or companies, but there is also a possibility that a State's government fails, or is not willing to comply with their national or international obligations concerning climate change. A method in holding State accountability in their failure to comply with climate-related obligations has thus become needed, and current signs turn towards climate change litigation as such a method.²

Litigation is defined as “*a contest in a court of justice, for the purpose of enforcing a right*”.³ Climate change itself is defined by the United Nations Framework Convention on Climate Change as “*a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.*”⁴ Climate change litigation, therefore, includes contests in a court of justice which have the purpose of enforcing rights related to the occurrence of anthropogenic climate change. The UN Environment released a report in 2017 discussing climate change litigation and its recent developments globally. The report concluded that there are five tendencies in climate change litigation cases that are occurring, which include:

1. Holding governments to their legislative and policy commitments;
2. Linking the impacts of resource extraction to climate change and resilience;
3. Establishing those particular emissions are the proximate cause of particular adverse climate change impacts;
4. Establishing liability for failure to adapt and the impacts of adaptation;

¹ Carl-Friedrich Schleussner, *et al.*, “Differential Climate Impacts for Policy-Relevant Limits to Global Warming: The Case of 1.5°C And 2°C”, *Earth System Dynamics* 7 (2016), p. 329.

² Maria L. Banda, and Scott Fulton, “Litigating Climate Change in National Courts: Recent Trends and Developments in Global Climate Law”, *Environmental Law Reporter* 47 (2017), p. 10121.

³ “Litigation”, Black’s Law Dictionary 2nd ed.

⁴ United Nations Framework Convention on Climate Change (UNFCCC), Article 1.

5. Applying the public trust doctrine to climate change.⁵

The climate change litigation cases that will be analysed in this paper will be the first type, which are cases which hold governments to their legislative and policy commitments.

Ensuring compliance upon climate change mitigation and adaptation obligations is an important matter for citizens of all States. In Indonesia in particular, there are numerous interests of the general public that are at stake. Not only does this include the long term health and livelihood issues that come with climate change, but also the more immediate impacts that are to be felt by citizens, and are already being felt now.⁶ Indonesia's status as an archipelagic State with thousands of islands has made the country particularly vulnerable to rising sea levels, which then brings issues upon sectors such as the agriculture sector.⁷

As mitigating and adapting towards climate change is a matter that will affect all Indonesian citizens, there is a need to analyse methods and venues that would allow for citizens to uphold its government's obligations in that aspect. Research regarding climate change litigation is continuously growing, and there are several articles that are notable, namely Michael Nachmany, Sam Fankhauser, Joana Setzer and Alina Averchenkova's "Global Trends in Climate Change Legislation and Litigation" published in 2017, which provides a comprehensive and general understanding upon global developments in climate change litigation.

However, articles on climate change litigation are still quite scarce in Indonesia. Rizkita Alamanda's "*Gugatan Warga Negara: Studi Kasus Gerakan Samarinda Menggugat*", which translates into "Citizen Lawsuit: Case Study of the *Samarinda Menggugat* Movement", analyzes the *Samarinda Menggugat* case, a climate change litigation case occurring in Indonesia. The article provided explanations on the Citizen Lawsuit which can be used for climate change litigation. It, however, lacks in analysis upon the relation between climate change

⁵ Michael Burger, and Justin Gundlach, *The Status of Climate Change Litigation: a Global Review*, (Nairobi: UN Environment Programme, 2017), p.14.

⁶ Michael Case, et. al. "Climate Change in Indonesia: Implications for Humans and Nature" (Godalming: World Wide Fund for Nature, 2007), p. 1-2.

⁷ Hannah Forster, et.al. "Sea-level rise in Indonesia: on adaptation priorities in the agricultural sector", *Regional Environmental Change* 2011, p.893.

litigation, and Indonesia international obligations, which has also not been analysed in existing articles or papers. This article will, therefore, provide such an analysis.

This paper argues that climate change litigation is a legal venue that would allow citizens to effectively uphold State climate-related obligations, in a court of law. This is possible because of the available litigation venues in Indonesia, namely the Citizen Lawsuit, and because of the legally binding aspect of several international legal instruments concerning climate change that the Indonesian government has ratified, and national legal instruments. This paper will, therefore, start with an analysis upon the existing obligations upon Indonesia in regards to climate change, then analyse the relationship between climate change litigation and the upholding of such obligations, and its effectiveness. The paper will then conclude with an answer upon the main question “How effective can climate change litigation be in upholding Indonesia’s climate change obligations?” and provide suggestions.

II. ANALYSIS

A. INDONESIA’S CLIMATE CHANGE REGIME

1. International Regime

Scientific research regarding climate change started early on, after World War II. After significant scientific findings in the late 20th century, states started to pay more attention to climate change. This rise in attention was particularly due to Rowland and Molina’s findings regarding the depletion of the ozone layer in 1974.⁸ With the increase in the discussion upon climate change, came a need for States to convene and regulate climate action internationally. This led to the formulation of the United Nations Framework Convention on Climate Change in 1994. According to article 1 of the convention, its main goal is to stabilize greenhouse concentrations in the atmosphere, so as to prevent any adverse anthropogenic interference upon the atmosphere.⁹

⁸ Yutian Wu, *et al.*, “The Importance of the Montreal Protocol in Protecting Earth’s Hydroclimate”, *Journal of Climate* 26:12 (2013), pp.4050-4051.

⁹ United Nations Framework Convention on Climate Change - Article 1

Indonesia has ratified the convention in 1994, through Law No. 6 Year 1994 regarding the Ratification of the United Nations Framework Convention on Climate Change. Under the UNFCCC, a number of additional legal instruments were produced, namely the Kyoto Protocol and Paris Agreement. Both have also been ratified by Indonesia. Indonesia has ratified the Kyoto Protocol through Law No.17 the Year 2004 regarding the Ratification of the Kyoto Protocol to the United Nations Framework Convention on Climate Change. Then in 2016, after signing the Paris Agreement to the UNFCCC on the 22nd April 2016, Indonesia has ratified the agreement through Law No.16 the Year 2016.¹⁰

The purpose of the UNFCCC is to act as the framework upon which governments will conduct their efforts in tackling climate change.¹¹ Under article 2 of the Convention, it is stipulated that the objective is to “*achieve...stabilization of greenhouse concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.*”, There is special emphasis upon “anthropogenic interference”, or in other words human-made interference, to which the government may indeed conduct measures to prevent and mitigate. In achieving the stabilization of greenhouse gasses, article 2 provides additional objectives, which consist of (a) achieving such objective within a sufficient time frame so as “to allow to allow ecosystems to adapt naturally to climate change”, (b) “to ensure that food production is not threatened”, (c) “to enable economic development to proceed in a sustainable manner”. As mentioned in article 2, the previous objectives also act as the objectives of any future legal instruments to be concluded during the Conference of Parties.

Article 3 provides a set of principles upon which party-States will base their actions when conducting measures in order to achieve the objectives under article 2 part (1) of article 3 mentions the principle

¹⁰ PPID Kementerian Lingkungan Hidup dan Kehutanan, “UU No. 16 Tahun 2016 tentang Pengesahan Paris Agreement to the UN Framework Convention on Climate Change”, http://ppid.menlhk.go.id/berita_klhk/browse/250, accessed on September 5th 2018.

¹¹ Elizabeth Ferris, “Making Sense of Climate Change, Natural Disasters, and Displacement: A Work in Progress”, (Presented as part of the Brookings-Bern Project on Internal Displacement – Calcutta Research Group Winter Course, 2007), p.3.

of “Common but Differentiated Responsibilities” (CBDR). The UNFCCC is also the first ever formal convention which mentions the CBDR principle, as opposed to it previously being mentioned in declarations. The term “respective capabilities” is equally mentioned, further referencing the different capabilities between States. This is then strengthened again by how part 1 of article 3 states that there is a responsibility for developed States to “take the lead” in combatting climate change.¹²

The principles that were stipulated under the UNFCCC then became the basis for additional legal instruments, such as the Kyoto Protocol, which was agreed upon at the third session of the UNFCCC Conference of Parties (COP-3), and held in Kyoto in 1997. The Protocol was seen as an ambitious step in the protection of the climate. It contained details regarding emission reduction targets, specified a time-table, and had certain binding effects upon ratifying States.¹³ Indonesia has also ratified the Kyoto Protocol through Law No.17 the Year 2004 regarding the Ratification of the Kyoto Protocol to the United Nations Framework Convention on Climate Change.

The main point of the Protocol, which is for the reduction of emissions, is contained in article 3. The article concretizes the commitments for State parties to ensure that emissions under Annex A¹⁴ do not exceed each State’s assigned amount in accordance with Annex B. The commitment under Annex B implies a reduction of at least 5% to 1990 emission levels for the 38 mentioned states and the European Community.¹⁵ This commitment applies to the period of 2008-2012.¹⁶

After the Kyoto Protocol’s period of applicability and currently still applicable, there is the Paris Agreement on Climate Change.

¹² UNFCCC, Article 3 part (1).

¹³ Andreja Cirman, et.al., “The Kyoto Protocol in a Global Perspective”, *Economic and Business Review* 11:1 (2009), p.31.

¹⁴ Annex A of the Kyoto Protocol lists the greenhouse gasses that are under the scope of the Protocol as the follows: carbon dioxide (CO²), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), sulphur hexafluoride (SF₆).

¹⁵ Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997), Article 3.

¹⁶ Kyoto Protocol , Article 3.

was adopted by the 197 parties to the UNFCCC in December 2015 during the UN Climate Change Conference held in Paris, then signed by 175 States on April 22nd, 2016.¹⁷ Despite past efforts in reducing greenhouse gasses emissions through instruments such as the Kyoto Protocol, emissions still increased steadily throughout the years. The Paris Agreement was intended to change the status quo, as the past UN General Secretary Ban Ki-moon described it, the agreement was seen as “a monumental triumph for people and our planet”.¹⁸ Article 2 part (1a) of the Agreement contains its main goal, which is to limit global temperature increase. The article states that one of the methods to respond to the threat of climate change is:

“Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;”

The wording in the article implies that there is an obligation to hold the increase in temperature to 2°C, but there is also the commitment to limit such increase to 1.5°C.¹⁹

The second new element in the Paris Agreement is the introduction of “Nationally Determined Contributions” (NDC) which is elaborated under articles 4, 7, 9, 10, 11, and 13.²⁰ Leading up to the Paris Conference, party States have already submitted intended NDCs, which will take effect following the Paris Agreement’s entry into force. Pursuant to article 4 part (2), NDCs will include a State’s objective that it has committed to fulfilling through domestic mitigation measures.²¹ These NDCs must be communicated by the Parties and will be made publicly available on a registry which is maintained by the UNFCCC secretariat.²² NDCs must also be renewed every five years, but may be

¹⁷ Lixin Wu, “Paris Agreement: a roadmap to tackle climate and environment challenges”, *National Science Review* 3 (2016), p.153.

¹⁸ Robert Falkner, “The Paris Agreement and the New Logic of International Climate Politics”, *International Affairs* 92:5 (2016), p.1107.

¹⁹ Paris Agreement, Article 2 (1a).

²⁰ Paris Agreement, Article 3.

²¹ Paris Agreement – Article 4 part (2).

²² UNFCCC, “NDC Registry”, <https://unfccc.int/process/the-paris-agreement/na->

amended at any time if needed.

The Paris Agreement does not provide any specific obligations upon the contents of an NDC, but there are several strong suggestions on what should be considered. Article 4 part (4) states that developed countries should undertake “economy-wide absolute emission reduction targets”, whereas developing states are encouraged to improve their mitigation measures, but also to undertake emission reduction targets and emission limitations while considering their respective circumstance.²³ Like the previously mentioned legal instruments, the Paris Agreement also mentions a need to support developing States. Article 4(19) also specifically mentions the Common but Differentiated Responsibilities principle in regards to a suggestion for States to formulate low greenhouse gasses development strategies.²⁴

There are indeed obligations to formulate NDCs and communicate regularly to the Secretariat, however, the UNFCCC does not contain specific emission reduction obligations, but creates an obligation of efforts to maintain an average temperature increase of below 2 degrees Celsius. This is the result of several States, namely the United States, believing that legally binding emission reductions and limitations which were present in the Kyoto Protocol were not actually effective. U.S. Foreign Secretary John Kerry stated that pushing for legally binding limitations would only result in the failure of the Conference.²⁵

Nevertheless, the obligation to formulate and submit NDCs is important and effective in overcoming the lack of specific emission reduction obligations. Prior international agreements containing emission reduction obligations, namely the Kyoto Protocol, was seen as creating an unequal burden for developed countries, as only such countries had any specific obligations. Developing countries were only obliged to conduct efforts in climate change mitigation, without specific targets. Additionally, the lack of targets for developing countries was seen as potentially being insufficient to decrease global emissions

tionally-determined-contributions/ndc-registry, accessed on September 6th 2018

²³ Paris Agreement on Climate Change (2016), Article 4.

²⁴ Paris Agreement, Article 4 (19).

²⁵ Raymond Clemencon, “The Two Sides of Paris Climate Agreement: Dismal Failure or Historic Breakthrough?”, *Journal of Environment and Development* 25:1 (2016), p.6.

enough to prevent the average temperature rising. An NDC, in which each State is to present its own commitments in accordance with their situation would be a more equal and effective method in creating emission reduction obligations. Under article 4 (2), a State is obliged to pursue domestic measures in order to achieve the objectives of nationally determined contributions. As Indonesia has ratified the Paris Agreement, terms within the agreement that are of an obligatory nature are also legally binding upon Indonesia.

b. National Regime

Under the national legal regime, there are several legislations and policies which raise the issue of climate change. There is the main law on the environment, which is Law No.32 the Year 2009 on the Protection and Management of the Environment. Under the considerations in this legislation, climate change is mentioned. Additionally, certain principles that relate to climate change are mentioned in article 2. Fourteen different principles are mentioned. Amongst them are the principles of state responsibility, sustainability, precautionary principle, and equity responsibility.²⁶

Secondly, there is Law No. 31 the Year 2009 regarding Meteorology, Climatology, and Geophysics. Chapter X of Law No. 31 the Year 2009 is dedicated to climate change. Article 65 (1) mentions that the Indonesian government is obliged to mitigate and adapt to climate change. The second paragraph then specifies the exact steps that the government must undertake in climate change mitigation and adaptation. In conducting the steps, paragraph 3 specifies that the government must identify greenhouse gasses, observe the symptoms of climate change and greenhouse gasses, and also collect and analyse related data.²⁷ In conducting the previous measures, the related institutions in the sector of climate change mitigation and adaptation will be responsible.

There are also several national programmes and policies that are or have been implemented in the past. Through Presidential Decree No.61 the Year 2011, the RAN-GRK or National Action Plan to

²⁶ Law No.32 the year 2009 on the Protection and Management of the Environment, Republic of Indonesia, Article 2.

²⁷ Law No.31 year 2009 on Meteorology, Climatology and Geophysics, Republic of Indonesia, Article 65.

reduce Greenhouse Gasses Emissions, was implemented. This Plan is applicable from 2010 until 2020. The considerations of the decree also mentions the Bali Action Plan and COP 13, 15 and 16, as well as Indonesia's unilateral commitment that was stated during G-20 in Pittsburgh, which is that Indonesia commits to reducing greenhouse gasses emissions by 26% on its own, or by 41% with international aid by 2020.²⁸ RAN-GRK is a document specifying the national plan which will be the basis for the implementation of activities related to emission reduction, reflecting the government's commitments. Under the presidential decree, a "RAD-GRK" is also mentioned, which is the regional plan in reducing greenhouse gas emissions.

Presidential Decree No.2 the Year 2015 regarding the National Mid-Term Development Plan of 2015-2019 (*Rencana Pembangunan Jangka Menengah Nasional Tahun 2015-2019*) mentions that for the general improvement of environmental quality, there will be an increase in efforts in reducing greenhouse gas emissions. Presidential Decree No.1 the Year 2016 regarding the Peatland Restoration Agency (*Badan Restorasi Gambut or BRG*) initiated the formation of the Peatland Restoration Agency (BRG). The function of the agency is to facilitate the restoration of peatland in several Indonesian provinces, including Riau, Jambi, South Sumatera, West Kalimantan, Central Kalimantan, South Kalimantan, and Papua. The restoration of peatlands is vital in climate change mitigation and adaptation, as it acts as a self-sustaining ecosystem which accumulates carbon, and also aids water flow, contributing to the surrounding ecosystem.²⁹

There have also been several institutions in the past that were formed to handle the issue of climate change and also concerning the Reduction of Emissions Deriving from Forest Degradation (REDD+). Through Presidential Decree No.46 the Year 2008 the *Dewan Nasional Perubahan Iklim* (National Board on Climate Change) or commonly abbreviated as DNPI, was formed. Its task was to formulate national policies and strategies concerning climate change mitigation, coordinating the activities conducted as a consequence of the previous

²⁸ Indonesian Presidential Decree no.61 year 2011 on the National Plan for Reducing Greenhouse Gas Emissions, Consideration (b).

²⁹ Zicheng Yu, "Peatlands and Their Role in the Global Carbon Cycle", EOS 92:12 (2011), 97.

task, and also supervising and evaluating the implementation of such activities.³⁰ In 2013, a board concerning REDD+ was formed. The *Badan Pengelola REDD+* (Managing Body for REDD+, abbreviated as BP REDD+) was formed following the REDD+ partnership with Norwegia. The Body was formed through Presidential Decree No.62 the Year 2013 concerning BP REDD+ and had the task of aiding the President in coordinating, planning, facilitating and supervising the implementation of controlling REDD+ in Indonesia.³¹ However, these two bodies have now been replaced. Through the Presidential Decree no.16 year 2015, the tasks and functions of DPNI and BP REDD+ now are under the responsibility of the Ministry of Environment and Forestry.³² This resulted in the formation of the *Direktorat Jenderal Pengendalian Perubahan Iklim* (Directorate General on Controlling Climate Change) under the Ministry of the Environment and Forestry.

B. CLIMATE CHANGE LITIGATION IN INDONESIA

In Indonesia, in which the legal system is civil law, the main venue to hold a party accountable in case of a wrongful act, such as environmental damage or pollution, is through a tort suit or *Perbuatan Melawan Hukum* (PMH). A tort suit is a lawsuit in which there is a form of loss experienced by the plaintiff, which is caused by the subject of the lawsuit. The subject must, therefore, pay or conduct an action in order to compensate for the loss. However, a new form of lawsuit, which is the Citizen Lawsuit, is developing in Indonesia. The subject of the lawsuit may be government officials or government institutions, and the result of the lawsuit would be an obligation for the government party to regulate or implement policy to compensate for a certain loss experienced by citizens.³³ In general lawsuits based on PMH, the party

³⁰ Kementerian Lingkungan Hidup, “*Dewan Nasional Perubahan Iklim Terbentuk – Respon Publik Beragam*”, <http://www.menlh.go.id/dewan-nasional-perubahan-iklim-terbentuk-respon-publik-beragam/>, accessed on September 2nd 2018

³¹ Indonesian Presidential Decree No.62 the Year 2013 on the Managing Body for the Reduction of Greenhouse Gas Emissions, Article 4.

³² Ichwan Susanto, “*Presiden Jokowi Bubarkan BP-REDD dan DNPI*”, <https://sains.kompas.com/read/2015/01/28/18352191/Presiden.Jokowi.Bubarkan.BP-REDD.dan.DNPI.>, accessed on September 4th 2018.

³³ Yustina Niken Sharaningtas, “*Gugatan Warga Negara (Citizen Lawsuit) dan Justiciability Pemenuhan Hak Atas Lingkungan Hidup yang Baik dan Sehat*”, *Jurnal*

incurring the injury must prove the exact injury or damage that is experienced, however, this does not become a requirement in Citizen Lawsuits.

Citizen Lawsuits are lawsuits which concern a general interest of the public, with results either requiring the government to formulate legislation or implement legislation and policy. This form of lawsuit was first seen as a common law concept. Then in 2003, a case in the form of a Citizen Lawsuit was brought to an Indonesian national court, in which the plaintiffs were Sandyawan Sumardi and others, concerning the State's inaction in regards to Indonesian migrant workers that were deported by Malaysia. The case was brought to the Central Jakarta District Court and had the case number of No.28/Pdt.G/2003/PN.JKT. PST. Concerning the form of the lawsuit which is a Citizen Lawsuit, the judges deliberated the following:

“Every citizen without exception has the right to defend the public interest to bring charges against the state or government or anyone who commits a wrongful act (PMH) that is detrimental to public interest and public welfare (pro bono public), in line with human rights, is access to justice if the state is silent or does not take any action for the benefit of its citizens “.³⁴

The judges then ruled in favour of the plaintiffs and resulted in an obligation for Indonesia to take measures to resolve this issue of inaction. The resulting legal document from this Citizen Lawsuit was the Law No.39 Year 2004 concerning the Placement and Protection of Indonesian Workers.³⁵

a. Komari, et.al v. Mayor of Samarinda et. al.

This case involves plaintiffs Komari along with seventeen other plaintiffs who form jointly the *Samarinda Menggugat* movement which

Ilmiah Fakultas Hukum Universitas Udayana 38:1 (2016), p.34

³⁴ Sandywaman Sumardi et. al. v. Head of the Republic of Indonesia cq.Megawati Soekarno Putri et. al, No.28/Pdt.G/2003/PN.JKT PST.

³⁵ Yose Octavia Henry, Disriani Latifa Soroinda, “Perbandingan Dan Penerapan Gugatan Citizen Lawsuit Di Indonesia Dengan Di Amerika Serikat Dan Di India”, short summary of a research paper for the Faculty of Law, Universitas Indonesia (2016), p.3-4.

translates literally into “Samarinda Suing”. The plaintiffs are citizens of the city of Samarinda, filing a lawsuit against the Mayor of Samarinda, the Minister of Energy and Mineral Resources, the Governor of East Kalimantan, the Minister of the Environment and Forestry, and the Regional House of Representatives (DPRD), at the Samarinda District Court. The type of lawsuit is a “Citizen Lawsuit” which is a venue of lawsuit in Indonesia in which citizens may bring a lawsuit against the government, government officials, or government institutions, on the basis of a *Perbuatan Melawan Hukum* (PMH) or a wrongful act, which results in a form of injury or damages to the citizen side.³⁶

In this Komari case, the main basis of the lawsuit is how the Mayor of Samarinda has conducted a wrongful act, in continuing to issue mining licenses, despite its detrimental effect to surrounding citizens approximating the area, and how this mining contributes to the effects of global climate change that are continuously being experienced by Samarinda citizens. An important element, in this case, is whether the government officials and institutions, in this case, could be held responsible for contributing to the damages felt by the plaintiffs.

However, the judges rule that this responsibility and direct causation element does not have to be concretely proven. The government already has the obligation, under the Indonesian constitution, to ensure a healthy and safe environment for its citizens. The judges in this case deliberated that the increasing activities of mining in Samarinda cause stress upon the health of Samarinda citizens, and has increased the fragility of Samarinda citizens in the face of climate change, in which these mining activities have increased the frequency of flooding, extreme temperatures, droughts, and water pollution, resulting in a risk of upper respiratory infections.

The defendants, in this case, particularly the Mayor of Samarinda, acted negligently by not adequately controlling the licensing of these mining activities, which results in additional strain upon the environment and an increase of risks towards Samarinda citizens. An important part of the judge’s deliberation is their recognition towards the global climate change issue, and that despite the lack of clear causation and

³⁶ Rizkita Alamanda, “Gugatan Warga Negara - Studi Kasus Gerakan Samarinda Menggugat”, *Jurnal Hukum Lingkungan Indonesia* 1:2 (2014), p.105.

contribution from mining in Samarinda to global climate change, a causal connection with mining and the environmental abnormalities in Samarinda can be seen.³⁷

The judges then ruled in favour of the plaintiffs, and called for the defendants to implement and fulfill its obligations in relation to the mining licensing, that has yet to be fulfilled and to further regulate mining activities in Samarinda. This case is seen as proof on an increased concern of citizens towards a government's inaction. Although the nature of this Komari case is not seen as ambitious as those occurring in other countries, which infer the State's obligation to comply with its international obligations or the State's direct responsibility due to its inaction or insufficient action in the face of climate change, this case is still an innovation in Indonesia.³⁸

C. INDONESIA COMPARED TO GLOBAL LANDMARK CASES

Although climate change litigation is still relatively new and not present in all countries, there are several landmark cases, in which two cases raise the issue of a violation of international as well as national obligations in regards to climate action, similar to what was raised in the Komari case. These two cases are the Leghari v. Pakistan and Urgenda v. Kingdom of Netherlands cases.

1. Urgenda v. Kingdom of Netherlands

The Netherlands has only one case of climate change litigation to date, and yet, the case has been very significant in the development of global climate litigation, which is the Urgenda Foundation v. the Kingdom of the Netherlands. The Urgenda case was also the first ever case in the world which held the Government accountable for "*contributing to dangerous climate change*".³⁹ As this case is also the very first successful climate change litigation case in which the plaintiffs were normal Dutch citizens, it has also inspired citizens in other countries to do the same. An example is a case in Belgium, in

³⁷ Rizkita Alamanda, p.107.

³⁸ Rizkita Alamanda, p.108.

³⁹ Urgenda, "The Urgenda Climate Case against the Dutch Government", <http://www.urgenda.nl/en/themas/climate-case/>, accessed on September 15th 2018.

which a group of Belgian artists and celebrities have sued the Belgian government for its lack of action in climate change mitigation.⁴⁰

The plaintiff, in this case, is the Urgenda Foundation (Urgenda). Urgenda is a Dutch environmental group, which, along with 900 Dutch citizens, sued the Dutch state on the basis of a lack of action in response to climate change.⁴¹ The Netherlands was, in the past, a pioneer in environmental regulation and policy. One of its policies that was seen as remarkable was the participatory nature of its policies, which allowed reserves space for NGOs and other stakeholders. However, the Netherlands started to be overtaken by other countries policy-wise and has also stated that it will not regulate beyond required measures under EU directives, unless such measure is needed to fulfill significant interests from the Dutch citizens.⁴²

In addition to a lack of intent to go beyond the bare minimum, the Dutch government also revised its greenhouse gas reduction goals, which was deemed as lack-luster in combatting climate change. Not only was the new goals seen as insufficient, but it also became scientifically proven that if the Dutch government would only implement measures in accordance with its revised goals. In that case, the measures would also become insufficient in maintaining Dutch land above water within the following decades.⁴³ Based on the previous reasoning, Urgenda and the 900 co-plaintiffs brought a claim against the Dutch government to the Hague District Court.

The claim against the Dutch government was based on the Dutch “*onrechtermatige daad*”, which translates literally into a “wrongful act”, and is comparable with the concept of a tort lawsuit. It is also comparable to the Indonesian civil lawsuit of a *Perbuatan Melawan Hukum*. The concept of *onrechtermatige daad* can be used in a suit in which there

⁴⁰ Anne Sophie Brandlin, “Four Climate Change Lawsuits to Watch in 2018”, <http://www.dw.com/en/four-climate-change-lawsuits-to-watch-in-2018/a-42066735>, accessed on September 15th 2018.

⁴¹ Jacqueline Peele, Hari. M. Osofsky, “A Rights Turn in Climate Change Litigation?”, *Transnational Environmental Law* 7:1 (2018), p.38.

⁴² Josephine van Zeven, “Establishing a Governmental Duty of Care”, *Transnational Environmental Law* 4:2 (2015), p.340.

⁴³ Roger Cox, “A Climate Litigation Precedent: Urgenda Foundation v. The State of the Netherlands”, *Journal of Energy and Natural Resources Law* 34:2 (2016), p.153.

is a claim against another party, in which such party has conducted an action which incurs damages towards the plaintiff. Besides the Urgenda case involving the matter of an occurrence of damages towards the plaintiff, the suit is also heavily based on the Duty of Care of the Dutch government towards its citizens, and the violation of such duty.

Under Dutch national law, the Duty of Care is based upon Section 162 from Book 6 (6:162) of the Dutch Civil Code.⁴⁴ Section 6:162 stipulates that:

“Except where there is a ground for justification, the following acts are deemed as to be unlawful: the violation of a right, an act or omission, violating a statutory duty or a rule of unwritten law pertaining to proper social conduct”.

The above article, particularly the element which mentions a *“statutory duty... pertaining to proper social conduct”*, is interpreted as including the duty of care. The Dutch Hoge Raad, or Supreme Court, that there is a duty of care in a court decision in 1965. The Supreme Court mentioned several elements in determining the duty of care, which is that there is:

“the probability that the required attentiveness and care will not be taken by the potential victim, the probability that harm will result, the possible extent of the harm, and the extent of the defendant’s objection to taking appropriate safety measures.”⁴⁵

Based on the 1965 Hoge Raad decision and the panel of judge’s own considerations for the Urgenda case, the scope of the duty of care was determined as the following:

- a) the nature and scope of the damage caused by climate change;
- b) the foreseeability of the damage;
- c) the likelihood of dangerous anthropogenic climate change;
- d) the nature of the government’s actions (and omissions); and
- e) the discretion that the government may exercise based on public

⁴⁴ Berndard A. Koch, *Medical Liability in Europe: A Comparison of Selected Jurisdictions*, (Berlin: Walter de Gruyter, 2011), p.370.

⁴⁵ Elizabeth van Schilfhaarde, “Negligence Under the Netherlands Civil Code: an Economic Analysis”, *California Western International Law Journal* 21, p.276

law.⁴⁶

In the foreseeability and the likelihood of damage, the judges determined that the Dutch government indeed had a duty of care in that aspect, as it was beyond a doubt that there are dangerous risks pertaining to climate change.

As the only entity that would have the power to manage as a whole, emissions occurring in the Netherlands' territory is only the Dutch government, then the government indeed has the obligation to provide an adequate framework for climate change mitigation. This obligation is to ensure that measures are taken and sufficient enough to prevent dangerous climate change due to anthropogenic emissions.⁴⁷

Another element that is to be considered in *onrechtermatige daad* suits is the element of harm or damages. Since the Urgenda case concerns climate change, the harms and damages resulted may not be easily materialized and calculated, or have yet to occur. However, the court determined that the risk of harm, despite in the future, was sufficiently clear based on scientific findings up until that point. The last element is the element of causation from the perpetrator of *onrechtermatige daad*.

The causation in climate change cases is often difficult to be determined. The acts of a single individual may be difficult to be directly linked with the resulting damages. Nevertheless, despite the lack of direct causation by the Dutch government towards climate change, the presiding judges determined that it did not negate the fact that there is a duty of care by the Dutch government. Based on this extensive duty of care, the judges have determined that the Dutch government must implement greenhouse gas mitigating policies, so as to avoid neglect in implementing such duty.⁴⁸

The judges also directly addressed the matter of whether the Netherlands' international obligations under international legal instruments, including the UNFCCC and the Kyoto Protocol of which the Netherlands has ratified and is legally bound to. The judges deliberated that obligations under such instruments may not be directly attributed to private citizens. The nature of such agreements is to have

⁴⁶ Van Zeben, "Establishing a Governmental Duty of Care", p.347.

⁴⁷ Van Zeben, p.348.

⁴⁸ Van Zeben, p.349

obligations towards the other parties of the agreements, and not directly to the country's own citizens. However, when a country is legally bound to an international agreement, it is expected to comply with such agreement's contents. Enacted national laws and policies must, therefore, be in compliance with relevant international agreements. In the implementation of the international agreement in the national context, a national court may therefore take into account the international legal instruments.⁴⁹

Additionally, the revision by the Dutch government of its emission reduction goals is seen as violating the state's NDC under the Paris Agreement. Based on the previous facts, Urgenda made the case of the Dutch government violating the constitutional obligation of "the duty of care". The court then decided in favour of Urgenda, stating that based on the severe consequences that may result from the government's action in altering the reduction goals, the Dutch government has violated Article 21 of the Dutch Constitution; EU emissions reduction targets; principles under the European Convention on Human Rights; the "no harm" principle of international law; the doctrine of hazardous negligence; the principle of fairness, the precautionary principle, the sustainability principle embodied in the UNFCCC; the principle of a high protection level, the precautionary principle, and the prevention principle embodied in the European climate policy.⁵⁰

The Urgenda case thus highlights how a state's international obligations can indeed be used as a basis in climate change litigation, and successfully so.

b. Leghari v. Pakistan

The major case of climate change litigation in Pakistan is the Leghari v. Pakistan, which despite not making the news as much as the Urgenda case, is actually equally as important, if not more so. The main difference between the Leghari case and the Urgenda case is that the plaintiff was successfully determined as having certain rights that are to be fulfilled by the government, and thus was a rights-based lawsuit against the Pakistani government, for its lack of action.

⁴⁹ Cox, "A Climate Change Litigation Precedence", p.155-156.

⁵⁰ UN Environment Program: Law Division, *The Status of Climate Change Litigation – A Global Review* (Nairobi: UNEP, 2017), p.11-13.

The focus of the proceedings in this case was also more upon the issue of the lack of government action in response to climate change, rather than the technical and emissions based discussion in the Urgenda case.⁵¹ This case was brought against the Federation of Pakistan, by Asghar Leghari, who is a farmer.⁵² The issue of climate change is more on the need of adaptation, as consequences of climate change are already present and may badly affect the livelihood of Pakistani citizens, and include greater risks of droughts and flooding.⁵³ Leghari filed the case against the Pakistani government on the base of “public interest” litigation, which is a form of litigation that has developed in Pakistan. The basis of public interest litigation is article 184 (3) of the Pakistani constitution, in which the concept of the protection of fundamental rights is embodied.⁵⁴

The basis of Leghari’s claim against the Pakistani government was based on the fundamental human rights as stipulated under the Pakistani Constitution, and include the rights to life under article 9 of the constitution, the right to dignity and privacy of home under article 14, and the right to property under article 23. Leghari claimed that climate change has increasingly brought risks to the fulfillment of the aforementioned basic human rights. The lack of adaptation measures in order to ensure risks from climate change do not negatively affect citizens must, therefore, be implemented.

Leghari claims that the adaptation measures implemented by the government at that time were insufficient in the face of climate change, and did not comply with the National Climate Change Policy of 2012.⁵⁵ The court then gave a deliberation in favour with the Plaintiff, Leghari. The court deliberated that the Pakistani government’s lack of action in apply measures in climate change adaptation is against the fundamental

⁵¹ Jacqueline Peele, and Hari M. Osofsky, “A Rights Turn in Climate Change Litigation?”, *Transnational Environmental Law*, 7:1 (2018), p.52.

⁵² Giulio Corsi, “A Bottom-Up Approach To Climate Governance: The New Wave Of Climate Change Litigation”, *ICCG Reflection 57* (2017), p.3.

⁵³ Anjum Bari Farooqi, Azmat Hayat Khan, Hazrat Mir, “Climate Change Perspective In Pakistan”, *Pakistan Journal of Meteorology* 2:3 (2005), p.20.

⁵⁴ Muhammad Amir Munir, “Public Interest Litigation in Supreme Court of Pakistan”, paper for the Federal judicial Academy of Islamabad (2007), p.1-2.

⁵⁵ Gabriela Wedy, “Climate Change Legislation and Litigation in Brazil”, (New York: Sabin Centre for Climate Change Law, 2017), p.53.

rights of citizens that are to be secured. The court even goes on as to specify the list of fundamental rights that are to be taken into account when determining whether something has breached legal provisions or not in regards to climate change. The judges deliberated that:

“[the]right to life, right to human dignity, right to property and right to information under articles 9, 14, 23 and 19A of the Constitution, read with the constitutional values of political, economic and social justice, provide the necessary judicial toolkit to address and monitor the Government’s response to climate change”.

As a consequence of this deliberation, the court ordered relevant ministries to appoint representatives who will exchange information between the different ministries, in order to ensure that the National Climate Change Policy 2012 is indeed applicable.⁵⁶

D. CLIMATE CHANGE LITIGATION’S EFFECTIVENESS IN UPHOLDING STATE OBLIGATIONS

The three previous cases portray that a violation of international climate action obligations, in addition to national obligations, can indeed be used as a basis in climate change litigation cases against governments, and successfully so. And although Indonesia, the Netherlands, and Pakistan may be subject to different international obligations due to their different status as a developing and developed country, which is subject to different obligations under international law, it does not mean that climate change litigation cases would be impossible and ineffective in developing countries. Although there is no direct binding emission limitation for Indonesia now, the international agreements that Indonesia has ratified have required for national regulation and policy in mitigating and adapting towards climate change. Then these national laws and policies may become a basis for a citizen lawsuit, if not adequately implemented by the government, as the government indeed has an obligation to implement such laws and policies to its citizens.

The commitment of a country that binds itself to an international treaty does not only bring the responsibility of the country to implement it to the international community, but also to its own citizens. As national

⁵⁶ Wedy, “Climate Change Legislation and Litigation in Brazil”, p.54.

climate policies and legislation are connected to the international legal instruments that a state has ratified, citizens may ensure that the government complies with its international obligations by ensuring it has effectively implemented its national laws and policies resulting from the State's international obligations. Climate change litigation at the local level can also become an effective way to assess local compliance with climate change mitigation and adaptation obligations. This is because even though climate change occurs globally, its impacts will occur within the local scope. Citizens can, therefore, bring cases against local governments too rather than only nationally, as local governments are also subject to climate obligations, such as in the Indonesian Komari case.

Furthermore, in regards to the effectiveness of climate change litigation, there is also the unique Paris Agreement framework, and its bottom-up approach by proposing the National Determined Contribution (NDC) and its transparency framework, which contributes in climate change litigation. Due to the nature of NDCs being obliged to be implemented through national measures based on article 4 paragraph 2 of the Paris Agreement, if there is indeed a lack of action by governments violating such article, such violation may be therefore questioned by citizens. Remembering that a State's commitments in reducing emissions would now be contained in NDCs, such as the case of Indonesia, such States would consequentially become obliged to implement national measures in order to achieve such commitment. The introduction of the NDC in the Paris Agreement and its obligatory implementation, therefore, sets a strong basis for future climate change litigation cases.

Specifically in Indonesia, however, there are challenges against the effectiveness of climate change litigation cases. The result of a Citizen Lawsuit lies on whether the actions that are ordered to be conducted by the court- which under Citizen Lawsuit cases may only include the government formulating regulation or policy- will actually be conducted promptly and effectively. The mere matter of further regulation is indeed already a positive step, however, there is no certain time frame for legislation or policy to be implemented a policy.

III.CONCLUSION AND SUGGESTIONS

Climate change litigation can indeed effectively uphold the Indonesian government's international and national obligations concerning climate change. As the Citizen Lawsuit results in an obligation for the government to regulate or implement policies, a successful Citizen Lawsuit concerning climate change may effectively shape how Indonesia combats climate change through increased regulation and policies, which may be based on initial international commitments and obligations. Such climate change litigation cases may thus force the Indonesian government to regulate and implement the policy if indeed deemed lacking by a panel of judges. This effectiveness is further emphasized by terms under the currently applicable Paris Agreement, which obliges States to implement their NDCs through national legislation, policy, and measures.

As mentioned in the second part of this paper, there are however certain factors that may hinder the effectiveness of climate change litigation. And thus, the writers provide the following suggestions :

Firstly, towards stakeholder in climate action, particularly NGOs and citizens, it is important for such parties to be aware that the venue of climate change litigation can indeed be used as an effective instrument to ensure that a State complies with its obligations, either on the basis of international legal instruments or national instruments. Through increased knowledge and understanding upon climate change litigation, a climate change litigation case may be started by such parties, if there is indeed non-compliance of the government upon international and national obligations.

Secondly, towards regulators and policymakers, the issue of timeliness and effectiveness of regulations and policies resulting from climate change litigation cases, particularly in Indonesia, should be further looked upon as there has always been an issue of long periods of time needed to draft and implement legislation. This is particularly urgent in the issue of climate change, as the longer a regulation or policy is drafted and implemented, damage towards the climate will continue to occur.

Thirdly, towards legal scholars and jurists, the author also

encourages for further research in the field of climate change litigation. The potential of climate change litigation in furthering a State's efforts in their climate change mitigation and adaptation are quite high, due to the potential outcome of further regulation and policy-making. However in Indonesia, the initiative in researching climate change litigation is still quite low, and only a few literary products discuss the issue in the context of Indonesia. Through further research, climate change litigation cases may become more effective in the future, and even result in deliberations such as the Urgenda or Leghari case, stating that there is a duty of action on behalf of the government.

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