THESIS

COMPARATIVE LEGAL ANALYSIS ON CLIMATE CHANGE LITIGATION BETWEEN AUSTRALIA AND INDONESIA (CASE STUDY OF BUSHFIRE SURVIVORS V. EPA AND ARIE ROMPAS ET AL V. GOVERNMENT OF INDONESIA ET AL)

Written and submitted by:

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INTERNATIONAL LAW DEPARTMENT
FACULTY OF LAW
HASANUDDIN UNIVERSITY
MAKASSAR
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TITLE PAGE

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As a Final Project in Completing the Undergraduate Studies in the Department of International Law, Legal Studies Program

Written and submitted by:

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PENGESAHAN SKRIPSI

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ABSTRACT

NURUL HABAIB AL MUKARRAMAH H IRFAN (B011191287), thesis titled **"Comparative Legal Analysis on Climate Change Litigation Between Australia and Indonesia (Case Study of *Bushfire Survivors v. EPA* and *Arie Rompas et al v. Government of Indonesia et al)*"** under the supervision of Laode M Syarif and Birkah Latif.

The absence of climate change regulatory framework in Indonesia and Australia have emerged as a novel challenge for judiciary body in each country to utilize various approach as a strategy to hear and adjudge climate change lawsuits to request for certain parties' responsibility. This research aims to analyze climate change litigation in Australia and Indonesia through case study selected from New South Wales Land and Environment Court, and District Court of Palangkaraya.

This research utilizes comparative legal method, as a part of normative legal research. Through a statutory and micro-level case comparison approach, this research compares and contrasts Indonesian and Australian legal and judicial system, different processes of climate litigation, and judiciary body approaches in hearing and adjudging climate change cases. The primary research material includes international, Indonesian, and Australian source of law. Secondary research material includes textbooks, journal article, and conference papers. Tertiary material includes dictionary, internet source, and reports. All collected research material is analyzed in a qualitative and descriptive manner.

The result of this research reveals that: 1) The contrasting legal system, and different use of approach in legal argument construction in climate change lawsuits, have influenced the strategy of judiciary body to utilize judicial activism, or restraint approach in hearing climate cases. 2) The comparison of the two cases have been able to contribute to the development of climate litigation by identifying and analyzing suitable strategies for judiciary body to hear and adjudge climate litigation cases.

Keywords: Australia, Climate Change, Climate Litigation, Comparative Law, Indonesia

FOREWORD

To Allah the all-knowing, the author shall express its highest gratitude. Only through his compassion and mercy, the author has the ability to interpret ideas into words written in this thesis titled “Comparative Legal Analysis on Climate Change Litigation Between Australia and Indonesia (Case Study of *Bushfire Survivors v. EPA* and *Arie Rompas et al v. Government of Indonesia et al*)” in completion of bachelor degree study to achieve a degree in law (S.H) at International Law Department, Legal Studies Program, Faculty of Law, Hasanuddin University Makassar.

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The author acknowledges that there is no perfectness in every of work including this thesis. Therefore, the author looks forward to any constructive comments and feedback for the improvement of this thesis. The author hope that this thesis will contribute to the society, to protect and conserve our earth.

Makassar, June 12th 2023

Nurul Habaib Al Mukarramah H Irfan

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INTRODUCTION

A. Problem Background

Since the emergence of pre-industrial till current era, the anthropogenic causes sourced from human activities in many aspects including industry, transportation, energy, land use, land-use change and forestry (LULUCF), and household emitting greenhouse gases (GHG)[1] have become one of the main factors in contributing to climate change as a part of environmental issues.[2] Therefore, the Intergovernmental Panel on Climate Change (IPCC) on its sixth report have declared that the human influence is very likely become the main driver of warming climate in the last 2000 years, and future emission would cause additional warming to over 2 degrees Celsius unless there are deep reductions in carbon dioxide and other GHG emission implemented in near term.[3]

The anthropogenic causes in climate change have resulted in negative impact on ecosystem in global scale shown by water scarcity due to limited freshwater, decreasing fisheries yield and aquaculture production resulted by degraded ocean, altered human health and wellbeing due to worsening air quality, and the changing pattern of weather.[4] The impact leads to more

[1] Joe C Gill, Bruce D Malamud, 2017, "Anthropogenic Processes, Natural Hazards, and Interactions in a Multi-hazard Framework" Earth-Science Reviews, Vol 166, p.246-269.
[2] Alessandro De Matteis, 2019, "Decomposing the Anthropogenic Causes of Climate Change", Environ Dev Sustain, vol. 21, p.165-179.
[3] IPCC, 2021, "Climate Change 2021: The Physical Science Basis (Working Group I)" (Online Report), point B.1, p.15.
[4] IPCC, 2022, "Climate Change 2022: Impacts, Adaptation and Vulnerability (Working Group II)" (Online Report) SPM.2, p.10.

adverse effect to human through environmental catastrophe, such as forest fire triggered by rising temperature which simultaneously amplify the changing climate.[5]

The current scientific evidence highlights a huge challenge in implementing the global commitment as stated in Glasgow Climate Pact which reaffirms the goal of Paris Agreement in holding the increase of temperature to well below 2 degrees Celsius above pre-industrial levels, and limiting the temperature increase to 1.5 degrees Celsius to mitigate serious impact of climate change.[6] Nevertheless, such challenge shall not hinder the effort of member states of the United Nations Framework Convention on Climate Change (UNFCCC) to adhere and to implement its obligations as a party to Paris Agreement.[7] This includes Indonesia and Australia (which then become the selected subject to compare in this thesis) commitment to contribute in mitigating and adapting to climate change by implementing its respective Nationally Determined Contributions (NDC) agreed upon the Paris Agreement phase,[8] where collective action between all entities including nations is needed in combating climate change and limiting the temperature as reaffirmed by the Glasgow Climate Pact. Therefore, as it has been established that climate change issue is urgent to

[5] *Ibid*.
[6] UNFCCC, 2021, Glasgow Climate Pact, FCCC/PA/CMA/2021/10/Add.1
[7] United Nations, 2015, Paris Agreement, article 4 Paragraph 2. UNTS vol. 3156 C.N.92. 2016 TREATIES-XXVII.7. d. Article 4(13)(14).
[8] *Ibid*. Under article 4(2) of Paris Agreement, member states are mandated to formulate NDC starting from 2020 and has the duty to fulfill its commitments which will be reviewed in each Conference of Parties (CoP) and Conference of parties serving as the meeting of the parties to Paris Agreement (CMA). Member states shall submit new or updated NDC every five years, and adhere to domestic commitment set forth under submitted NDC.

be resolved, it requires a collective action in international, regional, and national level.

In the context of international environmental law regime, the historical Stockholm Declaration in 1972 established the relation between human and environment, in which that environment is essential to human's well-being. Simultaneously, it demands the responsibility of various entities including (but not limited to) citizen, enterprises and institution to shape more prudent action to environment.[9] In national level, the principle 7 of Stockholm Declaration highlighted that national government shall manage its environmental policy and action within its own jurisdiction[10] in exercising the principle of states' sovereign right to exploit their own resources that is pursuant to national policies and responsibility to not cause damage to environment of other states or areas beyond the limits of its national jurisdiction.[11] Amidst the evolution of international agreements concerning climate change, the principle mandated under Stockholm Declaration on state sovereignty over its natural resources, and the responsibility to not cause transboundary environmental damage is later reaffirmed and acknowledged in further international agreements such as in the principle 2 of 1992 Rio Declaration.[12]

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[9] United Nations Environment Programme, 1972, Declaration on The Human Environment (Stockholm Declaration), Principle 1. UNGA Res. 2996/XXVII. La Ode Muhamad Syarif, 2001. *The Implementation of International Responsibilities for Atmospheric Pollution: A Comparison between Indonesia and Australia*. ICEL, Jakarta.

[10] *Ibid*, principle 7.

[11] *Ibid*, principle 21

[12] United Nations General Assembly, 1992, Rio Declaration on Environment and Development, Principle 2. UNGA A/CONF.151/26, Vol. I.

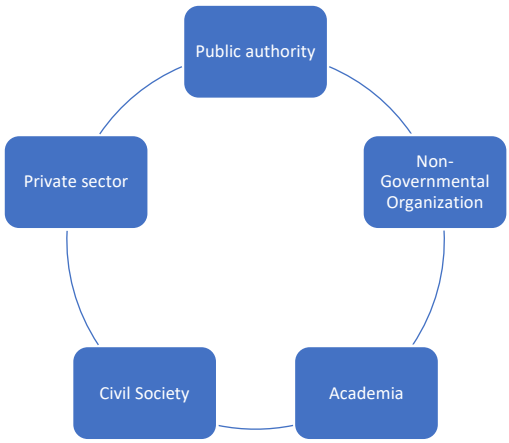

Figure 1. Penta helix element in environmental protection

(Igor Calzada: 2020)

The Stockholm Declaration impacts in three level: internationally through proliferating momentum for many environmental agreements including the Rio Declaration which established UNFCCC as its policy outcomes; in regional level by encouraging regional organization to pass environmental legislation; and domestically inspires state to generate ministerial structures devoted to environment. [13] Nevertheless, the focal point has to be highlighted from this paragraph is the check-and-balance mechanism between abovementioned stakeholders are indeed necessary in protecting the environment and combating climate change. Therefore, the judiciary body plays a pivotal role in promoting environmental governance in pursuit of the rule of law in the area of environment and sustainable development.[14]

[13] Pierre Marie Dupuy and Jorge E. Viñuales, 2018, *International Environmental Law 2nd ed*, Cambridge University Press, Cambridge, p.11. *Also see* Patricia W. Birnie and Alan E. Boyle, 1992. *International Law & The Environment*. Oxford University Press, Oxford.
[14] Lal Kurukulasuriya and Kristen A Powell, 2010, "History of Environmental Courts and UNEP's Role" Journal of Court Innovation, vol.3, no.1, p.269-276.

As the concern to environmental protection continues to grow internationally, the courts (even in domestic level) are now having to face climate change litigation as an avenue in pursuit of achieving climate justice and enforcing climate obligations under climate change legal regime. In many countries regardless of its legal system, the number of climate cases begins to rise. Several prominent example of climate litigation cases includes the *Juliana, et al. v. United States of America, et al*.,[15] in 2015 where 21 youth as the representative of the future generations institute proceedings against the United States of America under the jurisdiction of United States District Court of Oregon, contending that the federal government has violated the constitutional right of youth to life, liberty, property, and equal protection due to dangerous carbon dioxide concentration.[16]

Generally, when a climate lawsuit against government is filed, its main argument lies upon the state obligation to preserve and protect the environment.[17] In Indonesia, one of the fundamental standings to file climate litigation lies upon the right of citizen to be acknowledged and treated equally in front of the law is guaranteed by the constitution[18] which

[15] *Juliana, et al. v. United States of America* [2023] United States District Court for Oregon, Opinion and Judgment.
[16] César Rodríguez-Garavito, 2021, *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization can Bolster Climate Action*. Cambridge University Press, Cambridge, p.30.
[17] This originates from the international obligation reflected in Stockholm Declaration and Principle 2 of Rio Declaration, in which states have sovereignty over their natural resources and the responsibility to not cause transboundary environmental damage. However, each respective state has established its duty to protect and conserve on its written regulations.
[18] Republic of Indonesia, 1945, Constitution of the Republic of Indonesia, Article 28D Paragraph (1)

includes the right to access court and right to a clean and healthy environment.[19] Similar to Indonesia, the Australian Constitution granted its citizens the right to a trial[20] which enable citizen to file a case to its federal and state court. [21] In contrast to Indonesian court which enable environmental (including climate) cases to be brought in general court or in other specialized court (without any existing environmental court), climate litigation cases in specific state such as New South Wales may be filed through the Land and Environment Court (The Court) of New South Wales as the first superior court specialized in environmental cases in the world.[22] This emphasizes that although both countries grant the access to request government responsibility for climate change, each country has different processes in climate litigation that is mirrored upon respective domestic cases.

State Responsibility	State Liability
Arise when a state has done an internationally wrongful act through the conduct of an act or omission.[23]	Arise if an act of state has caused damage to others, therefore it shall

[19] *Ibid*, Article 28H (1)
[20] Parliament of Australia, 1901, Constitution of Australia, Section 80
[21] Brian J Preston, 2009, "Climate Change Litigation: A Conspectus", Environmental and Planning Law Journal, vol.9, p.169, mentioned that other legal argument often used in Australia's climate litigation cases are tort law and administrative law.
[22] Land and Environment Court of NSW, 2023. "About Us" [online] available at < https://www.lec.nsw.gov.au/aboutus.html#:~:text=The%20Land%20and%20Environment%20Court%20of%20New%20South%20Wales%20(the,launch%20(the%20Court%20Act).> (Accessed 9 June 2023)
[23] International Law Commission (ILC), 2001. *Articles of State Responsibility for Internationally Wrongful Act (ARSIWA).* Article 2.

	be held liable to pay compensation.[24]
Derived from a breach of international obligation attributable to the state.[25]	Does not necessarily derived from a breach of international obligation, as the term "liable" only reserved for injurious consequence of particular activities.[26]

Table 1. Difference of State Responsibility and State Liability

(ILC: 2001; United Nations: 2006; Horbach: 2006)

The international law through Articles of State Responsibility for Internationally Wrongful Act (ARSIWA) 2001 have established that any internationally wrongful act done by state through the conduct of an act or omission, entails the responsibility of the state.[27] In context to this research, both states in the case of *Bushfire Survivor v. Environmental Protection Agency* (*Bushfire Survivor* case)[28] and *Arie Rompas et al v. Government of Indonesia* (*Arie Rompas et al* case)[29] conducts an omission in regards to the occurrence of bush/forest fire occurring in each territory, that is caused

[24] United Nations, 2006. "International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law (International Liability in Case of Loss from Transboundary Harm Arising Out of Hazardous Activities" Yearbook of the International Law Commission, vol.2, part 1. p.71-101.
[25] N.L.J.T. Horbach, 2006. "The Confusion About State Responsibility and International Liability" Leiden Journal of International Law, vol.4. p.48-74.
[26] *Ibid*, p.53.
[27] ARSIWA, 2001. Article 1. Further elaboration on the thresholds of internationally wrongful act of a state is incorporated under article 2, and will be contextualized upon each case in the analysis section.
[28] *Bushfire Survivors for Climate Action Incorporated v. Environment Protection Authority* [2021] New South Wales Land and Environment Court 92 (Summon)
[29] *Arie Rompas et al v. Government of Indonesia* [2015] District Court of Palangkaraya

by, and in consequence, amplifies the climate change. Therefore, it is argued that both Australia in the *Bushfire Survivor* case and Indonesia in the *Arie Rompas* case shall be held responsible for each of its conduct, that is qualified as an internationally wrongful act in its character. Given that plaintiffs in both cases filed this lawsuit to domestic court, they have to utilize existing domestic environment protection legislation not specific to climate change as its legal basis, due to the inexistence of a clear framework on climate change and climate litigation in both countries. Therefore, parties including the judges shall undertake an extra step to interpret the law and linking it to climate change.

Based on the above explanation, it proliferates the interest of author to analyze the comparison of the climate litigation in Indonesian and Australian legal system. In particular, this research would focus on analyzing *Bushfire Survivor* case in the Court of New South Wales and *Arie Rompas et al* case in District Court of Palangkaraya as one of prominent climate cases in Indonesia. This research would examine the comparison of both cases through identifying the choice of court, legal rule, facts and reasoning, *ratio decidendi*, and the final judgment which result to an analysis of best practices to contribute for future climate litigation cases reflected in common and civil law countries' practices.

B. Research Question

Based on the introduction, this research will address two questions:

1. What does the *ratio decidendi* of judges in formulating the verdict compared in both cases in Australia and Indonesia?
2. What are the positive contributions of the two compared cases in the development of climate change litigation?

C. Research Purpose

The purpose of this research are as follows:

1. To compare the difference and similarities of the *ratio decidendi* of judges in formulating the verdict in both cases in Australia and Indonesia
2. To analyze the positive contributions of climate litigation case comparison in Australia and Indonesia towards the development of climate change litigation

D. Research Benefit

The benefit of this research are as follows:

1. Theoretically, the result of this research intends to enlighten the readers and author upon the areas of climate change litigation in international environmental law that may become a source of reference for future perusal.
2. Practically, the result of this research intends to contribute to the development of climate change litigation in environmental governance and policymaking in multifaceted level, by providing comprehensive literary benchmark between Australian common law and Indonesian civil law climate change litigation in practice.

E. Research Originality

The legal research titled “Comparative Legal Analysis on Climate Change Litigation Between Indonesia and Australia (Case Study of Bushfire Survivors v. EPA and Arie Rompas et al, v. Govt. of Indonesia)” is originally written by author’s self through observing and analyzing the growing concern of climate litigation cases. To compare, there are several significant differences between the current author’s scope of research and prior published research as follows:

1. Elida Rahajeng P and I Gusti Agung Made Wardana, Faculty of Law Gadjah Mada University, Yogyakarta, 2020. *Litigasi Perubahan Iklim Sebuah Studi Perbandingan Indonesia dan Australia* (in Indonesian). Even if this research is very similar to author’s proposal, the difference between the mentioned research and the author’s research lies upon the substance of the research. The mentioned research only focuses on regulatory framework of climate litigation process in Australia and Indonesia in general for adaptation measures, without focusing on any particular cases to be compared as author will research. Therefore, the result of this research would be more comprehensive.
2. Zefanya Albrena Sembiring and Audi Gusti Baihaqie, Faculty of Law University of Indonesia, 2020. *Litigasi Perubahan Iklim Privat di Indonesia: Prospek dan Permasalahannya* (in

Indonesian). Comparing to author's thesis proposal, this paper only looks at Indonesian Private Law as there is no comparison to other country's legal system or practice. The author's proposal will compare between two legal systems in dealing with climate litigation through selected cases.

3. Deniza Ariani, Faculty of Law University of Indonesia, 2019. The Effectiveness of Climate Change Litigation as a Venue to Uphold State Climate Change Obligations in Indonesia. The paper puts its scope in Indonesian law and highlighting the effectiveness, which is in contrast to author's thesis proposal that will analyze the comparison of two countries climate change case law.

F. Research Method

1. Research Type

This research utilizes comparative law, as a part of normative legal method that puts highlight in technical aspect of law.[30] This research focuses to analyze climate change law in examining the comparison and contrast of elaboration and application of certain legal rules in selected case law, in order to reach a reflective equilibrium.[31]

To contribute to the development of climate change litigation in environmental governance and policymaking, the analysis result

[30] Mathias Reimann in Mauro Bussani and Ugo Mattei (ed), 2012, *The Cambridge Companion to Comparative Law*. Cambridge University Press, Cambridge, p.29.
[31] John Rawls, 1973, *A theory of Justice*. Oxford University Press, Oxford.

on selected case comparison will reveal different processes of climate litigation practiced in Australian and Indonesian court. Both countries practices will be compared with climate litigations in various regions, through a comparative legal research method.

2. Research Approach

To understand the concept of comparative legal research (CLR) in a statutory and case approach, it is pivotal to define the method itself. Comparison is the construction of relations of similarity or dissimilarity between different matters of fact, [32] while legal research is defined as information identifying and retrieving process in supporting legal decision making that begins with analysis of facts of problem and concludes with application and results of investigation.[33] From the above definition, it can be defined that CLR is a method to identify and retrieve information by constructing relations of similarity or dissimilarity between different matters of object (in this research, the 'object' would refer to selected cases) through analyzing its facts of problem, and details of object in supporting legal decision making in its *ratio decidendi* and judgment as the result.

CLR operates as a systematic exposition of rules, institutions and procedures prevalent in one or more legal systems or sub-systems

[32] Nils Jansen, 2006, *Comparative Law and Comparative Knowledge*. Oxford University Press, Oxford, p.305.
[33] Steven M Barkan, Barbara Bintliff, Mary Whisner, 2015, *Fundamentals of Legal Research 10th ed*. West Academic Publishing, United States.

with comparative evaluation after analyzing similarities and dissimilarity and its implications.[34] CLR does not oblige object of comparison to be explicitly similar in order to be recognized as "comparable", and each object of comparison is possible to be compared by applying certain criteria of differentiation or similarity (*tertium comparationis*).[35] Comparative law approach is divided into macro and micro level comparison.[36] This research focus on micro-level case comparison approach [37] where it analyzes the juxtaposition of how climate lawsuits against government are treated in Australia as a common law state and Indonesia as a civil law state through specific selected cases.

3. Research Material

3.1. Primary Legal Material

Primary research material is an authoritative legal material which may be in a form of statutory regulations, case law, or official commentaries of certain statutory regulations.[38] This primary research material would utilize International legal sources consisting of treaties,

[34] Irwansyah, 2020. *Penelitian Hukum: Pilihan Metode & Praktik Penulisan Artikel.* Mirra Buana Media, Yogyakarta.
[35] P Ishwara Bhat. 2020. *Comparative Method of Legal Research: Nature, Process, and Potentiality*. Oxford University Press, Oxford, p.269.
[36] Jan M Smits, 2006. *Elgar Encyclopedia of Comparative Law*. Edward Elgar Publishing, Cheltenham, p.443.
[37] Peter Mahmud Marzuki, 2016. *Penelitian Hukum Edisi Revisi*. Kencana Prenada Media Group, Jakarta, p.119.
[38] Bambang Sunggono, 2003. *Metode Penelitian Hukum,* PT Raja Grafindo Persada, Jakarta, p.67.

customary international law, general principles of international law, and scholarly writings. Other primary research material includes Australian source of law,[39] and Indonesian source of law.[40]

3.2. Secondary Legal Material

Secondary legal material is a complementary source in analyzing primary legal materials, this includes monographs (including textbooks, case books), journal article, and conference papers.[41]

3.3. Tertiary Material

Tertiary source includes non-legal documents which gives direction and support in interpreting primary and secondary legal source. This includes dictionary, internet source, reports which related to the research topic.

4. Legal Material Collection Process

4.1. Primary Legal Material

Through utilizing case and statutory approach technique, primary legal materials are assembled through

[39] The Australian Constitution, 1901. Section 118 mandated that the source of law relies on case law, legislation (including Acts, Statutes, and subordinate legislation in federal law) which are based on a constitutional framework

[40] Peter Mahmud Marzuki, 2015. *Pengantar Ilmu Hukum Edisi Revisi*, Prenada media Group, Jakarta, p. 255., emphasized that the source includes statutory regulations, custom, agreement, jurisprudence, and doctrine.

[41] *Loc.cit.* Bambang Sunggono.

analyzing relevant regulations surrounding the selected cases.

4.2. Secondary Legal Material

In collecting secondary legal material, a library research approach will be utilized through obtaining monographs, journal articles, and reports which complements this research.

4.3. Tertiary Material

The tertiary material is collected through searching all research-related materials which are not part of legal material that supports the justification of the research as a result of synthesizing primary and secondary legal material.

5. Legal Material Analysis

After collecting all primary, secondary, and tertiary materials, a comparative legal analysis will be carried out through case and statutory approach. The literature analysis in each research question will prevail the analysis in a macro-scale legal comparison in order to obtain a systematic and comprehensive analysis from all the obtained legal materials.

The analysis will be conducted through a micro-scale legal comparison to enable a detailed *ratio decidendi* comparison which includes the facts of law and cited legal instruments as a deciding

material, which led to the decision of each selected case.[42] The result of this analysis will present the information as the answer of research problems.

[42] Arthur L Goodhart, 1959. “The Ratio Decidendi of a Case” The Modern Law Review, vol.22, no.2, p.117-121.

CHAPTER II

LITERATURE REVIEW AND ANALYSIS CONCERNING THE COMPARISON OF *RATIO DECIDENDI* OF JUDGES IN FORMULATING THE VERDICT IN BOTH CASES IN AUSTRALIA AND INDONESIA

A. Literature Review

To conduct a comprehensive analysis and comparison between *ratio decidendi* of both cases, it is pivotal to establish a prior understanding upon climate litigation in general, in Australian and Indonesian perspective through a literary review. This section will emphasize the historical background of climate litigation evolving from international law principles and its application reflected upon cases, leading into the attempt to define climate litigation, and comparison between Australian and Indonesian legal system in climate litigation.

1. Climate Litigation

Litigation is defined as the process of a party carrying on a lawsuit to hold certain entity to be responsible for its act,[43] which may relate to the concerns on climate change.[44] In various cases, the request of plaintiff in climate litigation may vary, such as: to take stronger measures in addressing climate change; implementing ambitious policies; compensation for damage

[43] Bryan A Garner, 2009. *Black's Law Dictionary*. Thomson Reuters, United States of America, p.1017.
[44] Maiko Meguro, 2020. "Litigating climate change through international law: Obligations strategy and rights strategy" Leiden Journal of International Law, vol.33, p.933-951.

suffered, and/or; to request for stopping certain activities which contributes to climate change.[45] It is necessary to scrutinize the historical background and establishing the definition of climate litigation, as a novel term in legal proceedings. Furthermore, a deeper analysis on Australian and Indonesian legal system shall be conducted in order to understand different processes of climate litigation based on each country's legal and adjudicatory system.

1.1. Historical Background and Definition

Before the term 'climate litigation' was prominent, the international environmental law principles established from *opinio juris* and state practices have developed and able to be traced back upon several notable cases and resolution:[46]

a. Principle of permanent sovereign rights over natural resources derived from the Stockholm Declaration,[47] which the UN General Assembly adopted resolution that people and nation has the right to permanent sovereignty over natural wealth and resources exercised in the interest of their national development of the well-being of

[45] Sandrine Maljean-Dubois, 2022. "Climate litigation: The impact of the Paris Agreement in national courts" The Taiwan Law Review, no.324, p.211-222.
[46] Joseph Gabriel Starke, 1963. *An Introduction to International Law 5th ed.* Butterworths, London, p.42. Mentioned that there are certain sources of international law including international customs, treaty, judicial decision or arbitral award, general principles of international law, and scholarly writings. Other source which supports this includes the United Nations, 1946. *Statute International Court of Justice*. 33 UNTS 993 under article 38 paragraph (1)
[47] *Loc.cit*. Stockholm Declaration, principle 21.

the people of the concerned state that reflected in *Bering Sealing 1893* [United States v. United Kingdom].[48]

b. The judgment made from the *Trail Smelter 1938* [United States v. Canada] decided that "no states have the right to use, or permit the use of its territory in a manner that cause injury by fumes in or to the territory of another, and that measures of control were necessary", [49] have become one of main international principle in environmental law known as the duty to prevent, [50] reduce, prohibit, [51] and control transboundary harm. [52] This case also links to the implementation of "Polluter Pays" principle [53] in which the court decided that

[48] UN General Assembly, 1962. UNGA Res. 1803 (XVII). Also see United Nations General Assembly, 1992. Rio Declaration on Environment and Development (Rio Declaration) A/CONF.151/26. An example of environmental precedent in the implementation of this principle may be observed in Bering Sea Fur Seals Arbitration 1893 [United States v. United Kingdom] UNRIAA concerning United States' fur seals exploitation in Bering Sea under the basis that defendant had the sovereign rights over Bering Sea, and they had the right and duty in protecting fur seals. The tribunal then rejected defendant argument and decided that even if a state has sovereign rights over a territory, it is the duty of state to protect its natural wealth and resources by not conducting over-exploitation.

[49] Trail Smelter, *United States v. Canada* [1938] Decision, 3 UNRIAA that evolve into a maxim "*sic utere tuo alienum non laedas*" which literally interpreted as "use your own property in such a way that do not cause injure to other".

[50] *Corfu Channel 1949* [United Kingdom v. Albania] Judgment, I.C.J. Reports p. 22, the court decided that principle of prevention is a customary rule in which it is every state's obligation to not allow its territory to be used for acts contrary to the rights of other states.

[51] *Legality of the Threat or Use of Nuclear Weapons* 1996, Advisory Opinion, I.C.J. Reports p.242, para. 29. The court in its advisory opinion recognized that the general obligation of states to ensure that activities within their jurisdiction and control to respect the environment of other states or of areas beyond national control is the part of corpus of international law relating to the environment.

[52] Ryan K Sullivan, 2018. "Environmental Law-How it Got There Matters: Trail Smelter Evades CERCLA Responsibility for the Aerial Deposition of Hazardous Waste" Western New England Law Review, vol.40, no.2. p.299.

[53] *Loc.cit*. Rio Declaration, principle 13.

Canadian Smelter as defendant shall paid indemnity and compensation for damage occurred due to its activity.[54]

c. In the judgment of *Pulp Mills 2010* [Uruguay v. Argentina], the International Court of Justice (ICJ) decides that each state should determine its Environmental Impact Assessment (EIA) prior to the implementation of certain activities that may have significant adverse impact in order to prevent harm, [55] which latter known as the principle of due diligence.[56]

d. The principle of sustainable development highlights that the development shall meet the need of present without compromising future generations to meet their own needs, [57] that reflected in the case of *Gabcikovo-Nagymaros Project 1997* [Hungary v. Slovakia].[58]

e. New Zealand on the case of *Nuclear Test 1973* [New Zealand v. France] in ICJ contends that the precautionary principle under international law must be adhered before undertaking a potentially dangerous activity which may or

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[54] *Loc.cit.* Trail Smelter *United States v. Canada*.
[55] *Pulp Mills on the River Uruguay v. Argentina* [2010] Judgment, I.C.J. Reports para.204-205
[56] Rumiana Yotova, 2016. "The Principles of Due Diligence and Prevention in International Environmental Law" The Cambridge Law Journal, vol.75, no.3, p.445-448.
[57] United Nations General Assembly, 1987, Report of the World Commission on Environment and Development, Annex UNGA A/42/427. *Loc.cit*, Rio Declaration, principle 1.
[58] *Gabcikovo-Nagymaros Project Hungary v. Slovakia* [1997] Judgment, I.C.J. Reports para.140, the court considered the need of reconciling economic development with protection of environment is aptly expressed in the concept of sustainable development.

may not possess risk to the environment,[59] which reflects the application of the foreseeability of harm and precautionary principle.[60]

f. The tribunal decision in *Lake Lanoux 1957* [France v. Spain] highlights that in the case of France intention diverting a shared watercourse with Spain, there shall be an agreement between the two government in utilizing the waters of Lake Lanoux in activities that might cause environmental risk, [61] which later internationally recognized as the principle of transboundary cooperation in causes of environmental risk.[62]

The aforementioned international environmental law principles, cases, and resolution have created a fundamental basis in environmental lawsuit, which then evolved into nowadays climate change-related lawsuits. In its literal interpretation, climate litigation refers to the process of a litigant as a party to a case carrying on a lawsuit[63] to the court concerning climate change. Although there is no exact legal

[59] Request for Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests Case *New Zealand v. France* [1995] I.C.J. Para.288
[60] Sona Boutillon, 2002. "The Precautionary Principle: Development of an International Standard". Michigan Journal of International Law, vol.23, no.429 p.452. *Loc.cit.* Rio Declaration, principle 15
[61] Lake Lanoux Arbitration *Spain v. France* [1957] Award, RIAA p.281.
[62] Philippe Sands. 2003. *Principles of International Environmental Law (2nd ed)*. Cambridge University Press, Cambridge, p.231. *Loc.cit*. Rio Declaration, principle 14
[63] *Loc.cit*. *Black's Law Dictionary*, p.1017.

definition concerning climate litigation, United Nations Environment Programme (UNEP) defined it as cases that relate specifically to climate change mitigation, adaptation, or the science of climate change.[64]

Several scholars attempted to define climate litigation as a legal term, that may lead to a meaning where all manner of litigation that may be characterized as related to climate change.[65] However, such definition tends to leave many grey areas.[66] Certain literatures also define that climate litigation is lawsuits which address the causes and consequences of climate change, which impacts the climate mitigation and adaptation, as well as climate related loss and damage.[67]

One of the legal definitions that may cover the aforementioned grey areas is that climate litigation defined as lawsuits which are: centrally put its basis on climate change, or where climate change is one of many issues raised in the lawsuit, or motivated by climate change but not raised as an issue and put as a legal argument, or a lawsuit

[64] UNEP, 2020. *Global Climate Litigation Report 2020 Status Review*, UNEP, Nairobi, p.7.
[65] Chris Hilson. 2019. "Climate Populism, Courts, and Science" Journal of Environmental Law, vol.31, no.3, p.395-398.
[66] The author emphasizes "grey areas" that may be in a form of: whether such cases have to be explicitly raising the issue of climate change, or shall it be only motivated by environmental concern which led to climate change; the definition of litigation which shall be or not limited to court judgment or other types of action which also creates decision.
[67] Joana Setzer and Lisa C Vanhala. 2019. "Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance" WIREs Climate Change, vol.10, no.3, p.1-19.

with no specific climate change framing but with implication for mitigation or adaptation.[68]

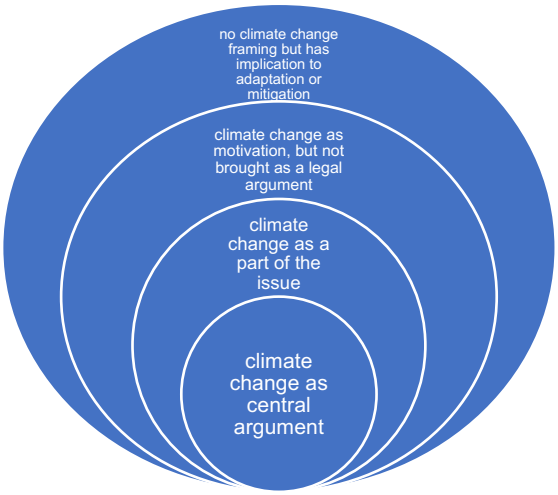

Figure 2. Layers of defining climate litigation

(Peel and Osofsky: 2020)

In relation to this research, the climate litigation case in Australia will cover lawsuit against government in court which may centrally put its basis on climate change. In Indonesian case, it does not have any specific climate change framing but has an implication to climate change mitigation and adaptation effort.

Content	Australia	Indonesia
Selected Case	Bushfire Survivors v. EPA	Arie Rompas et al v. Government of Indonesia

[68] Jacqueline Peel and Hari M Osofsky, 2020. "Climate Change Litigation" Annual Review of Law and Social Science, vol.16, no.8, p.1-8.

Type of Lawsuit	Civil enforcement against government	Civil enforcement against government
Lawsuit category	Administrative law matter	Civil law matter (tort)
Choice of Court	New South Wales Land and Environment Court	District Court of Palangkaraya
Type of Climate Litigation	Climate change as central argument	No climate change framing but has implication to mitigation and adaptation

Table 2. General comparison between selected cases

The trajectories of global climate litigation in common and civil law countries have reflected in various lawsuits including against governments and corporations. Suits against Governments have been implemented in the Netherlands through *Urgenda v. Netherlands 2015* in which Urgenda Foundation filed a lawsuit against the Netherlands in District Court of the Hague (but then appealed to the *Hoge Raad* /

Supreme Court of the Netherlands) due to insufficient existing pledge to reduce emission by 17% to prevent further impact on climate change that results to the court final decision ordering the state to increase the GHG emission limit to 25% below 1990 levels by 2020.[69] Suits against corporations implementation may be observed in *Milieudefensie et al. v. Royal Dutch Shell plc.*, which the Court decided that Royal Dutch Shell plc., shall be held responsible for its emissions produced.[70] Other suits against corporations can be observed in *ClientEarth v. Enea* case in Regional Court of Poznań, Poland. The plaintiff filed a lawsuit to seek for annulling the resolution of approval to a coal-fired power plant construction under climate-related financial risk, resulting into the court deciding that the authorization of the power plant is legally invalid due to the breach of due diligence given to climate-related financial risk.[71] The core objectives behind each climate litigation cases may vary, but mainly outlined upon:[72]

[69] *Urgenda Foundation v. Netherlands* [2015] Supreme Court of Netherlands, Judgment.
[70] Further details of *Milieudefensie et al v. Royal Dutch Shell plc.,* case will be further elaborated under the section 2 of the third chapter of this thesis concerning practice of European countries in environmental courts.
[71] *ClientEarth v. Enea* [2018] District Court of Poznań, Judgment, IX GC 1118/18
[72] Joana Setzer and Mook Bangalore, *Regulating Climate Change in the Courts* (Book Chapter) in Alina Averchenkova et al, 2017. *Trends in Climate Change Legislation*. Edward Elgar Publishing, Cheltenham, p.182-183.

a. Administration, with its main focus is to challenge whether particular project/activities proliferate adverse impact to climate change;
b. Legislation, focusing on calling for updating, creating new, or halting laws or policies in discourse surrounding climate change;
c. Disclosure of Information, where plaintiff filing lawsuit for further information such as climate risk disclosure, or environmental impact assessment;
d. Protection or loss and damage, in which plaintiff argue that climate change-related events have caused damage or injury to respective plaintiff.

1.2. Climate Litigation in Australia and Indonesia

Before stepping further in analyzing climate litigation in both countries, it must be acknowledged that Indonesia and Australia are practicing a contrasting legal system which is greatly influenced by the historical background and the current practice of each country. Therefore, this part will elaborate each countries' different backgrounds of legal system and comparing the contrast of Australian common law and Indonesian civil law system. The comparison of both country legal system will highlight different levels of judiciary body, and

processes of climate litigation mirrored upon cases in respective countries.

1.2.1. Australia

Australia is a federation of six states including New South Wales, Victoria, South Australia, Queensland, Tasmania, Western Australia, and two territories including Northern Territory and the Australian Capital Territory. Furthermore, Australia have been enacting commonwealth law originated from the British legal system. All states and territories shall comply to the Constitution of Australia, and laws enacted by the Parliament of Australia.[73]

i. Australian Commonwealth Legal System

Australia has two different laws, which are state and territory law and federal law where both laws utilized common and statutory law (act of parliament) as its source.[74] While federal law applies to everyone in Australia, states and territories may have its own law applied in its jurisdiction based under respective state and territory constitution.

In its judiciary system, federal law has its own court system which applies to all Australian law including The High Court of Australia as the highest court level; The Family

[73] The Constitution of Australia, 1901, Clause 5 "Operation of the Constitution and laws"
[74] *Ibid*, Section 118

Court of Australia, and; The Federal Court of Australia.[75] Meanwhile, state law has different level of court in its jurisdiction such as The Local Court; The District Court; and The Supreme Court that exists in every state.[76] There are no environmental courts established in federal level, and not all states and territories have its own environmental courts. Therefore, some climate litigation cases are being heard in general court such as *Sharma v. Minister of Environment* heard by the Federal Court of Australia. Nevertheless, certain states including New South Wales, and South Australia has its own unique feature on the specialized court for environment matters[77] such as State of South Australia's Environment, Resources and Development (ERD) Court,[78] and The Court of New South Wales.

Certain courts in both state and federal jurisdiction have faced climate litigation proceedings. According to previous precedents, there are several common categories in climate litigation such as but not limited to administrative law, tort,

[75] *Ibid*, section 71
[76] *Ibid*, section 77. Further specification of chamber or court may be regulated by each state and territory constitution, where each state may have different amount and level of court in its respective jurisdiction.
[77] Land and Environment Court of New South Wales, 2023. "About Us" [online] available at <https://www.lec.nsw.gov.au/lec/about-us.html> (Accessed 7 January 2023)
[78] Court Administration Authority of South Australia, 2023. "Environment, Resources and Development (ERD) Court Rules & Forms" [online] available < https://www.courts.sa.gov.au/rules-forms-fees/rules/environment-resources-and-development-court/> (Accessed 7 January 2023)

consumer protection, and human rights.[79] Certain climate cases reflect on one of the four categories such as:[80]

a) Administrative law: *Bushfire Survivors for Climate Action v. Environment Protection Authority [2021] NSWLEC 92*, on whether the defendant has the statutory duty to develop environmental guidelines and policies to ensure environment protection;

b) Tort: *Sharma and others v. Minister for the Environment [2022] FCA 560* in which the plaintiff argue that the defendant has committed tort [81] by duty of care negligence due to approving coal mine operation without considering foreseeability of harm principle and therefore resulting personal injury;[82]

c) Consumer protection: *O'Donnell v Commonwealth of Australia [2021] FCA 1233* where the plaintiff as an investor in Australian Government Bonds claimed that

[79] It needs to be highlighted that some cited cases may not come from The Court of New South Wales. Nevertheless, the doctrine of precedent in Australia enables the decision of other higher court to be bound to lower court (known as 'binding precedent' or '*stare decisis*'), and shall be persuasively considered if the decision established by superior court (non-binding/persuasive precedent), See Elizabeth A Martin and Jonathan Law, 2006. *Oxford Dictionary of Law 6th ed*. Oxford University Press, Oxford.

[80] Brian J Preston, Presentation. "Climate Change Litigation" in Judicial Conference of Australia Colloquium, 2008.

[81] Australian Government, 2015. "ALRC Interim Report 127" *[online] available at < https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-interim-report-127/17-immunity-from-civil-liability/what-is-a-tort/>* (Accessed 20 October 2022) established the threshold of a tort where: a. there must be a legal wrong committed by tortfeasor against a person/entity; b. the legal wrong cause an injury or loss; c. the remedy is an award of damages through compensation.

[82] Wendy Bonython, 2021, "Tort Law and Climate Change", University of Queensland Law Journal, vol. 20, p.436.

the Commonwealth failed to disclose information on financial risk arising from climate change, and therefore breaching the duty of due diligence and honesty to investors;[83]

d) Human rights: *Waratah Coal Pty Ltd v. Youth Verdict Ltd [2022] QLC 4* occurs when defendant objected the plaintiff's application for mining lease, where such mine would contribute to climate change and therefore violating the Queensland Human Rights Act 2019.[84]

After observing various categories of climate litigation, it highlights that the type of action may be in a form of individual,[85] or a class action litigation.[86] Whilst the class action is the most utilized type of action seen through numbers of Australian case laws, there are certain threshold of commencing a class action proceeding in climate litigation: There must be at least seven or more people as plaintiff; the plaintiff shall have claim against person; such claim are arisen out of the same circumstance; it give rise to one substantial common issue of law or fact.[87] While common law system

[83] O'Donnell v Commonwealth of Australia [2021] Federal Court of Australia 1233
[84] Waratah Coal Pty Ltd v. Youth Verdict Ltd [2022] Queensland Land Court 4
[85] Op. cit. (Even if the plaintiff also acted as a representative capacity for other investors, the *ratio decidendi* in point 8 of the judgment also highlight that the plaintiff also acting in as a personal capacity, which distinct from the representative capacity)
[86] Bernard Murphy and Camille Cameron, 2006. 'Access to Justice and the Evolution of Class Action Litigation' Melbourne University Law Review, vol. 30, p.400-439.
[87] See Federal Court of Australia Act 1976, Part IVA and Vince Morabito, 2002. "Class Actions Against Multiple Respondents" FedLawRw, vol. 30, no. 2, p.295.

usually held trial by jury system, many criminal and civil lawsuit in Australia is heard by judge alone without any jury.[88]

ii. New South Wales

The unprecedented heat and drought in Australia perpetrates more prevalent bushfire activity across densely populated region in certain states, in which climate change do play an important role as a trigger factor of bushfire, and the impact of released gases resulted from bushfire also simultaneously amplify more adverse impact of climate change.[89] During the timeframe of 1867-2021, there are approximately 110 bushfire cases occurring in states including Victoria, Queensland, New South Wales, South Australia, and Western Australia.[90] Nevertheless, New South Wales was the most severely burned state[91] with at least 12.8 million hectares consisting 53 percent of world heritage sites burnt and 1.5 billion animals killed.[92] Rising bushfire cases

[88] Allen and Overy, 2022. "Class Actions in Australia'. *[online] available at < https://www.allens.com.au/globalassets/pdfs/sectors-services/class-action/classactionsinaustralia.pdf>* (Accessed 20 October 2022). The non-jury trial has evolved and it the criminal offenses may be held trial by four to twelve members of jury if it is included as a serious criminal case, while jury trial also very rarely used in civil cases.

[89] Geert Jan van Oldenborgh et al, 2021. 'Attribution of the Australian Bushfire Risk to Anthropogenic Climate Change'. Nat. Hazards Earth Syst. Sci, vol. 21, p.941-960.

[90] Bushfire CRC, 2009. "Australian Bushfire Cases" *[online] available at <https://www.bushfirecrc.com/sites/default/files/managed/resource/australian-bushfire-litigation_annotations_jan2013.pdf>* (Accessed in 19 October 2022)

[91] Statista, 2022. "Total Area Burned by Bushfires in Australia as of January 2020, by state". *[online] available at <https://www.statista.com/statistics/1089996/australia-total-area-burned-by-bushfires-by-state/>* (Accessed 19 October 2022)

[92] Statista, 2021. "Bushfires in Australia – Statistics & Facts" *[online] available at < https://www.statista.com/topics/6125/bushfires-in-australia/#topicHeader__wrapper>* (Accessed 19 October 2022)

especially in New South Wales area, then became one of the reasons why The Court of New South Wales was established.

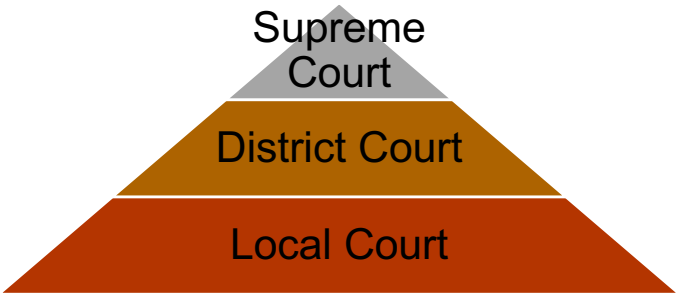

Figure 3. New South Wales State Court Legal system

(Law Handbook of New South Wales: 2019)

Formed in 1979, The Court of New South Wales is one of the superior courts in Australia,[93] along with The Supreme Court of New South Wales as a part of state court, under the New South Wales state court of appeal, and High Court of Australia as the highest court in Australia's judicial system.[94] Similar to the non-jury trial, The Court of New South Wales also held trial by judge alone.[95] The Court hears civil,[96]

[93] Judiciary Act 1903. Section 35 paragraph (2) regulated that there are two division of courts: inferior and superior courts. The local and district court are included as inferior court, while the supreme court of New South Wales and The Court of New South Wales included as superior courts. Any appeal from superior court shall be filed to New South Wales Court of Appeal, and final appeal upon judicial decision shall be filed to High Court of Australia through a special leave.

[94] Brian J Preston, 2008. 'Operating and Environment Court: The Experience of the Land and Environment Court of the New South Wales'. EPLJ, vol.25, p.385-409. It shall be noted that Australian Constitution (1901) Section 109 regulate that Australian court system are divided to federal law and state law, and federal law may override the state law if any conflict of law between state and federal parliament on the same subject exists.

[95] Land and Environment Court Act 1979 No. 204. Section 34C

[96] *Ibid*, Section 16

criminal,[97] and administrative environmental cases,[98] having eight classes of jurisdiction:

Classes	Types of proceeding
Class 1	Environmental planning and protection appeal
Class 2	Tree disputes and merit review appeals, Strata Scheme Development Act proceedings
Class 3	Valuation, compensation and Aboriginal land claim
Class 4	Judicial review of administrative decisions and civil enforcement of planning/environmental law to remedy or restrain breach
Class 5	Criminal proceeding[99]
Class 6 & 7	Criminal appeal from New South Wales Local Court
Class 8	Mining

Table 3. Classes of Jurisdiction in The Court of New South Wales (The Court of New South Wales: 2022)

[97] If the environmental offenses committed under The Crimes Act of New South Wales (2001), then such offense must be heard by local court. If after the verdict decided and defendant wishes to propose an appeal, then it may be heard by The Court of New South Wales as superior court under class 6 and 7 jurisdictions. Op. cit., Land and Environment Court Act, Section 41, 21.
[98] Op. cit. Land and Environment Court Act. Section 20
[99] Op. cit. The Crimes Act of New South Wales (2001)

Litigation in the Court of New South Wales have been utilized as a method by plaintiff to target governments through its agencies, or companies conducting activity that contribute to climate change based on private law instruments such as tort in request for remedy upon environmental damage, nuisance due to unwarranted activity by law, [100] and/or negligence.[101] Other cases utilize administrative law including judicial review and civil enforcement.[102] As a specialized court in environment and land matters, the judges of the court shall have knowledge and expertise within the jurisdiction of the court with qualification of previous experience as superior court judges or lawyers for at least seven years.[103] The Court provides dispute resolution including adjudication, conciliation,[104] mediation,[105] and neutral evaluation.[106]

The main arguments in many Australian bushfire cases, at that particular moment, instead of reflecting any climate change related basis either as a peripheral issue or as a central issue, it primarily seeks for compensation from

[100] David M Walker, 1980. *The Oxford Companion to Law*. Oxford University Press, Oxford. p.894.
[101] Brian J Preston, 2011. "Climate Change Litigation (Part 1)" Carbon & Climate Law Review vol.5, no.1, p.3-14.
[102] Brian J Preston, 2011. "Climate Change Litigation (Part 2)" Carbon & Climate Law Review vol.5, no.2, p.244-263.
[103] Op. cit. Land and Environment Court Act. Section 8 Paragraph (2).
[104] *Ibid*, section 34
[105] Civil Procedure Act 2005, Section 26
[106] Op. cit. Land and Environment Court Act. Part 6 section 6.2.

losses and injury[107] or liability for negligence.[108] Therefore, the analysis highlights that not all bushfire cases do necessarily fall under the central category of climate litigation.

The first among many cases which explicitly put climate change as its central argument in bushfire issue, is the *Bushfire Survivor* case in 2021, where plaintiff seeking mandamus[109] in order for EPA to develop environmental quality objectives, guidelines and policy as its statutory duty.[110] Such climate lawsuit then become a landmark precedent[111] which proliferate more climate litigation cases, particularly in the jurisdiction of New South Wales Land and Environment Court (The Court of New South Wales).[112] This highlights the importance of further analyzing the *Bushfire Survivors* case as one of the landmark case in The Court of New South Wales.[113]

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[107] *Matthews v. SPI Electricity* [2011] Victoria Supreme Court 167
[108] *Atkinson v. New South Wales* [2005] New South Wales Supreme Court 152
[109] Australian Government, 2016. Traditional Rights and freedoms-encroachments by Commonwealth Laws, (ALRC Report 129) section 15.11 defined the term 'mandamus' as writ issued by a court ordering governmental entity to perform mandatory duties.
[110] *Bushfire Survivors for Climate Action Incorporated v. Environment Protection Authority* [2021] New South Wales Land and Environment Court 92 (Summon).
[111] It shall be acknowledged that common law judges utilized inductive reasoning method through considering *in concreto* precedent similar or same to current matter of proceeding.
[112] See several cases including Nature Conservation Council v. New South Wales Nature Conservation Council v. Minister for Water, Property and Housing [2021] New South Wales Land and Environment Court.
[113] Judith A Preston, 2022, 'Youth Climate Courts, Amplifying an Intergenerational Voice and Participation for Climate Justice' The IUCN AEL Journal of Environmental Law, vol. 12 p.108-122., also mentioned that The Court of New South Wales is the first court holding the hearing of Youth Climate Court.

1.2.2. Indonesia

Indonesia is an archipelagic country consisting of approximately 17.508 islands abundant of biodiversity, and following the tradition of the European continental legal system (civil law). In contrast to Australia which divide its area to six states and two territories, Indonesia is divided into 37 provinces.[114] In Indonesian judicial system, district court exists in every district or city, and high court in every capital city in each province. Only one Supreme Court and Constitutional Court as the highest level of court in Indonesian judiciary body that exist in capital city of Indonesia,[115] comparing to Australia with the existence of Supreme Court in each state and territory, but with High Court of Australia as the highest level of court.

i. Indonesian Legal System

The Indonesian civil legal system is greatly influenced from the Dutch colonialism with written regulations as its primary legal source and an inquisitorial[116] character in its

[114] Thomas R Leinbach, et al. 2023. "Indonesia" < https://www.britannica.com/place/Indonesia/Ethnic-groups> (Accessed 22 February 2023)
[115] Law No. 48 Year 2009 concerning Judicial Power, article 25.
[116] Erick Christian Siagian, et al. 2021. "Sejarah Sistem Hukum Eropa Kontinental (Civil Law) dan Implementasinya di Indonesia" Jurnal Lex Specialis Vol.1, No.1, p.43-47. In contrast to common law system with its adversarial/accusatorial system that puts central role to parties in contesting each other before decision is made, inquisitorial system pursues judge involvement in conducting trial, determine questions to ask to any parties in the court, finding facts of law and assessing evidence before establishing verdict. Bryan A Garner, loc cit. p.62;864.

judiciary body.[117] However, Indonesia also practice a pluralistic legal system by enabling *adat* law (customary law) with unwritten legal sources and applied to ethnic communities[118] and Islamic law that is currently reflected through the Islamic religious court with utilizing the Holy Qur'an as its source of law in dealing various cases such as marriage and inheritance in Islamic law.[119] The source of law in Indonesia are statutory regulation, custom, treaty, jurisprudence, and doctrine.[120]

In Indonesian judicial system, there are two types of legal objections: 1) Ordinary objection which includes first level appeal to the High Court, and *cassatie* (second level appeal)[121] to the Supreme Court; 2) Extraordinary objection, which include judicial review (*peninjauan kembali*) as the final level appeal.[122] the Supreme Court holds the highest level of legal proceeding in *cassatie* and judicial review process in examining laws towards the law,[123] while the

[117] Peter Machmud Marzuki, loc cit.p.244.
[118] Achmad Ali, 2015, *Menguak Tabir Hukum 2nd ed.* Prenada Media Group, Jakarta, p.332.
[119] *Ibid*. Also see Ines Romadona Putri, et al. 2020. "Ihwal Penerapan Hukum Islam di Indonesia" Jurnal Kajian Hukum Islam vol.5, no.2, p. 151-159.
[120] *Loc.cit.,* Peter Machmud Marzuki.
[121] The term "*cassatie*" derived from European Continental phrases specifically in Dutch, interpreted as the legal appeal made by party to request to Supreme Court to review decision made by high court.
[122] Law No. 5 Year 1985 concerning the Supreme Court of Republic of Indonesia, article 67. Law 48/2009, article 24(1).
[123] Constitution of Indonesia, 1945. Article 24A "The Supreme Court". Also known as *Judex Jurist*, in which the Supreme Court has the authority to review legal interpretation and facts of law that has been decided under *judex factie* court.

Constitutional Court holds the jurisdiction for judicial review to examine laws towards the Constitution.[124] There are two main types of court divided into:[125]

1. General court: includes district court and high court for appeal has the *judex factie* to hear and give decision from assessing criminal and civil cases;
2. Specialized court: including military court, administrative court, religious court, human rights court (ad hoc), industrial court.

In contrast to common law countries including Australia, the Judges in Indonesian court are not bound by "the binding force of precedent" principle. Even if jurisprudence is one of legal source of Indonesian law,[126] there are thresholds that need to be fulfilled in enabling jurisprudence as source of law: 1) the verdict utilized in order to obtain clarity of legal regulation under the law that may still obscure; 2) the verdict must be a final, legally binding (*inkracht van gewijsde*) decision; 3) the verdict have been

[124] *Ibid*, Article 24C "The Constitutional Court"
[125] *Ibid*, Article 24 "The General Provisions". *Loc.cit.*, Achmad Ali.
[126] Peter Machmud Marzuki, loc cit., emphasized that the source of Indonesian law tends to follow civil law system through statutory regulation, custom, treaty, jurisprudence, and doctrine.

repeatedly used as rationale in deciding the exact same case; 4) The verdict have fulfilled the sense of justice.[127]

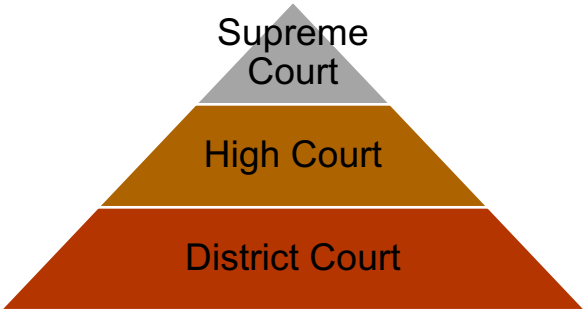

Figure 4. Indonesian court legal system

(Law Number 48 Year 2009, article 20)[128]

Certain recent cases prosecuted under Indonesian court have become evident that climate change is already a growing consideration involved in legal arguments under many lawsuits which may base into certain types including (but not limited to) climate lawsuit against parties (such as government) due to failure in complying to climate change obligations;[129] failure of environmental documents measuring impact of certain activities to climate change; [130] or concerning

[127] Supreme Court of Indonesia, 2005. *Naskah Akademis tentang Pembentukan Hukum Melalui Yurisprudensi*. Supreme Court of Indonesia, Jakarta, p.28.
[128] Under the Law Number 48 Year 2009 concerning Judicial Power, the district court has the jurisdiction in hearing and deciding first-level criminal and civil legal proceedings; an appeal upon district court decision must be directed to be heard in the high court; a *cassatie* and judicial review upon high court decision shall heard by the supreme court.
[129] See Komari et al v. Mayor of Samarinda [2015] High Court of Samarinda, verdict no. 138/PDT/2015/PT.SMR
[130] Ketut Mangku Wijana et al v. Governor of Bali [2020] Supreme Court of Indonesia, verdict no. 67_PK/TUN/LH/2020

the conduct of activities which may bring adverse impact to climate change.[131]

In Indonesian legal system, climate lawsuits may be brought into certain chamber of court depending on two competencies: whether the court has the competency to deal with the raised issue of law (absolute competency), and whether the court has legal jurisdiction in prosecuting such lawsuit (relative competency).[132] In the practical realm, several climate cases raised the issue of:

a) Administrative law: WALHI as an environmental Non-Government Organization filed a lawsuit against West Java Head of Investment Board One-Stop Service[133] to the Administrative Court of Bandung in 2022, where plaintiff request to annul the environmental permit of Tanjung Jati coal-fired power plant due to such project would endanger the environment and violate the precautionary principle, thus implicate to accelerating climate change. The court then decided to accept the

[131] *Minister of Environment v. PT. Kalista Alam* [2015] Supreme Court of Indonesia, verdict no. 1554_K/Pid.Sus/2015

[132] Randang S Ivan, 2016. "Tinjauan Yuridis tentang Peranan Identitas Domisili dalam Menentukan Kompetensi Relatif Pengadilan" Lex Privatum, vol.14, no.1, p.1-32. In civil cases, it may refer to article 118 and 134 of *Het Herziene Indonesisch Reglement* (HIR) 1926 or other specialized law governing each respective court.

[133] *WALHI v. West Java Head of Investment Board One-Stop Service* [2022] Administrative Court of Bandung, verdict No. 52/G/LH/2022/PTUN.Bdg

plaintiff argument by annulling the environmental permit, issued in 2016 by the defendant.

b) Criminal law: The District Court of Meulaboh in the criminal proceeding against PT. Kalista Alam[134] decided that PT Kalista Alam as a corporation have committed a crime under Law No. 32 Year 2009 Concerning Environmental Protection and Management and shall pay criminal sanction in amount of 3 billion rupiah due to use of fire in land clearing.[135]

c) Private/civil law: In 2019, 32 Indonesian citizens filed a lawsuit to Governor of Jakarta and four others under the basis of plaintiff's right to a clean and healthy environment violated due to air pollution occurring in Jakarta, yet the respondent have neglected its duty to fulfill the rights by controlling and reducing the air pollution. The court decided that the defendant have neglected its duty to fulfil the right of citizen to a clean and healthy environment, and after appeal trial

[134] *Prosecutor v. PT. Kalista Alam* [2013] District Court of Meulaboh, verdict no. 131/Pid.B/2013/PN.MBO

[135] PT Kalista Alam have been numerously prosecuted under environmental law violation, see Maskun et al, 2022. "Analisis Putusan Pemulihan Lahan Gambut Akibat Aktivitas Pembakaran PT Kalista Alam di Kawasan Ekosistem Leuser" Jurist-Diction, vol.5, no.3, p. 917-937

requested by respondent, the high court decided to reject the appeal and strengthen the district court decision.[136]

In observing the cases above, it may be highlighted that there are two types of lawsuits.[137] That may be in a form of citizen lawsuit,[138] or class-action lawsuit.[139] Despite the fact that many Indonesian forest fire cases have been brought to the court, most of the legal argument do not put climate change as a central or peripheral issue. This shall be an attention since climate change is one of the trigger factors to forest fire, and such forest fire may emit gases which amplify the acceleration of climate change.[140]

One of the cases which is suitable to analyze is *the Arie Rompas et al* case, as an example of citizen lawsuit against government due to forest fire occurred in 2015. The legal argument in the case focuses on tort committed by the

[136] *Melanie Subono et al v. Republic of Indonesia cq. President of Indonesia et al* [2019] verdict no. 374/PDT.G/LH/2019/PN.JKT.PST

[137] Supreme Court of Indonesia, 2009. *Class Action and Citizen Lawsuit*, Supreme Court of Indonesia, Jakarta, p.11. Although the Law Number 32 Year 2009 Concerning Protection and Management of Environment (Law 32/2009), article 90-92 identify three types of lawsuits which are government lawsuit; citizen lawsuit; class action, and; environmental organization lawsuit, this research would only focus on citizen lawsuit and class action.

[138] Supreme Court of Indonesia, 2013. Decision of the Chief Justice of the Supreme Court of Indonesia No. 36/KMA/SK/II/2013. *Ibid*, article 91 define citizen lawsuit as a mechanism for citizen to request state responsibility over the negligence in fulfilling the right of citizen.

[139] *Ibid*, article 92. Also see Supreme Court of Indonesia Regulation No. 1 Year 2002 concerning Class Action Proceeding Mechanism, which define class-action lawsuit as a method of litigation in which one or more person representing a group of people filing a lawsuit for themselves, and simultaneously representing numerous groups of people having the same fact or legal basis between the group representation and the represented group members.

[140] Birkah Latif, 2016. "Indonesian and Climate Change". Journal of Law, Policy and Globalization, vol.45. p.37-42.

defendant, but did not put any climate issue in this case.[141] It is intriguing to observe that a forest fire case which may be triggered and simultaneously impacting climate change, therefore creating the emphasis of strong link between forest fire and climate change, hereinafter did not become the primary argument of plaintiff in this proceeding. Therefore, analyzing this case will become a stepping stone for future climate cases on forest fire to be brought to the court which put its legal argument on climate change either as a central or peripheral issue.

B. Analysis

According to article 2 of ARSIWA, there are two elements to establish whether a state have the responsibility for internationally wrongful act: 1) Such conduct of an action or omission is attributable to a state under international law; and, 2) Such act constitute a breach of an international obligation of the state.[142] Both Australia and Indonesia have the obligation to comply with the international environmental standards set forth under various international legal instruments to address climate change such as Paris Agreement in limiting the temperature increase into well below 2 degrees Celsius and to pursue efforts to limit the temperature increase to 1.5 degrees

[141] *Arie Rompas et al v. Government of Indonesia* [2015] District Court of Palangkaraya.
[142] ARSIWA, 2001. Article 2.

Celsius above pre-industrial levels.[143] Therefore, each state through its organ,[144] shall carry out its duty to comply with the international obligation.

In the *Bushfire Survivor* case, the state through its organ (Environment Protection Agency) have alleged to conduct an omission by not carrying out its duty to develop environmental quality objectives, guidelines and policies specific to address climate change, therefore contributing to more intense effect of climate change in the New South Wales,[145] thus violating the international standards as mentioned above.

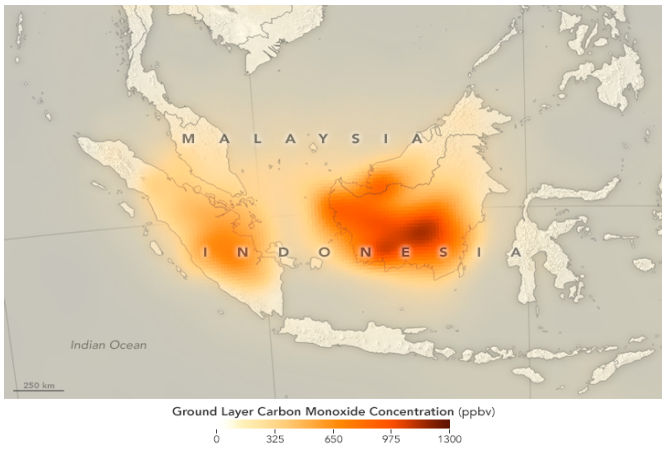

Figure 5. Carbon Dioxide Concentration Resulted from the Indonesia's 2015 Forest Fire (NASA Earth Observatory: 2015)

[143] Paris Agreement, 2015, Article 2(1). This article lies the foundation in satisfying the "primary rules" of ARSIWA, which there must be an international regulation giving obligation to states, acknowledging that both Australia and Indonesia are parties to Paris Agreement.
[144] Op. cit., ARSIWA, Article 4. State organs may include the legislative, executive, judicial, or any other functions in any position in organization of the state and its character as an organ of central government or of a territorial unit of the state.
[145] *Bushfire Survivors for Climate Action Incorporated v. Environment Protection Authority* [2021] New South Wales Land and Environment Court 92 (Summon)

In the *Arie Rompas et al* case, the state through seven of its organs have been alleged to conduct an omission by not carrying out its obligation to undertake prevention, mitigation, and curative action in the occurrence of land and forest fire in Central Kalimantan. In consequence, the haze resulted from the forest fire have polluted neighboring countries beyond the territory of Indonesia including Malaysia and Singapore, [146] thus causing respiratory disease, injuring and causing death to numerous Indonesian citizens. Therefore, the Plaintiff filed lawsuit under the grounds of tort law.[147]

To establish a comprehensive understanding upon both cases, this section will provide a detailed elaboration on the position of each case including: parties involved; seat of court; disputed problem; main argument of each party. Furthermore, an analysis upon the *ratio decidendi* in each case, followed by the comparison of *ratio decidendi* between both cases shall be conducted.

1. Case Position

   a. *Bushfire Survivor v. EPA*

      The parties involved in this case are the Bushfire Survivors for Climate Action Incorporated (BSCA), represented by Elaine Johnson from Environmental Defenders Office Ltd on behalf of

[146] Polluting territory of other state is a part of internationally wrongful act done by state, as mirrored upon the principle of international environmental law established by the *Trail Smelter* case "use your own property in such a way that do not cause injure to other", further affirmed in the Stockholm Declaration, Principle 21.
[147] *Arie Rompas et al v. Government of Indonesia* [2015] District Court of Palangkaraya

Plaintiff, and the Environment Protection Authority (EPA), represented by Damon Paul Anderson on behalf of Defendant.[148] With summon filed in 8 May 2020, this case falls under the class 4 jurisdiction (civil enforcement of planning/environmental law) of The Court of New South Wales.[149]

The Plaintiff requested to the court for an order of mandamus[150] that require EPA to perform its duty under section section 9(1)(a) of Protection of the Environment Administration Act 1991 (the Administration Act) to develop environmental quality objectives, guidelines and policies to ensure environment protection.[151] The summons of Plaintiff claimed that, although the New South Wales Climate Change Policy framework endorses the Paris Agreement and contains an objective to achieve net zero emissions by 2050, the Defendant has failed to develop guidelines or a policy to regulate GHG, consistent with limiting global temperature rise to 1.5 degrees Celsius. Meanwhile, it is the Defendant's duty to "develop guidelines and policies which are adapted to ensuring environment protection" as mandated under the Administration Act. The failure of Defendant to perform

[148] *Loc.cit. Bushfire Survivors for Climate Action Incorporated v. Environment Protection Authority* [2021] New South Wales Land and Environment Court 92 (*Bushfire Survivor* case) (Summon), p.1.
[149] *Ibid*.
[150] *Supra note* citation no.101, Australian Government, 2016. To seek for a mandamus, it must be proven before the Court that a public authority/official has failed to perform its duty.
[151] New South Wales Protection of the Environment Operations Act 1997, section 12(1); New South Wales Protection of the Environment Administration Act 1991 (the Administration Act), section 9(1)(a).

its duty has contributed to climate change and simultaneously perpetrating more intense bushfire which harmed the Plaintiff.

In supporting the argument, Plaintiff request to file expert evidence (affidavit) of Professor Penny D. Sackett concerning climate change, granted by the Court. Professor Sackett explained that the New South Wales emission trajectory, and the current policies, are not sufficient to fulfill the commitment to limit global temperature rise, and the target in reducing GHG emission by 35% by 2030. Therefore, such insufficiency will result to temperature increase by >2 degrees Celsius, and trigger various extreme events, such as the Australian 2019/2020 bushfire.[152]

The Plaintiff argued that in order to discharge the unperformed duties of Defendant as mandated by the Administration Act, Defendant has to develop guidelines, policies, and/or draft policies that address the topic of GHG and climate change; environmental impacts of GHG; regulate, reduce, and control sources of direct and indirect GHG; ensure, and adapted to ensure environment protection.[153]

Opposing the Plaintiff's claim, Defendant filed its response. Defendant asserts that there is no such phrase of "adapted to ensuring" incorporated in the section 9(1)(a) of Administration

[152] *Bushfire Survivors for Climate Action Incorporated v. Environment Protection Authority* (Affidavit of Professor Penny Diane Sackett), p.13.
[153] *Loc.cit*. *Bushfire Survivors for Climate Action Incorporated v. Environment Protection Authority* (Summon), p.12, paragraph 37.

Act, which the Plaintiff's claim under this basis has to be discharged by the Court.[154] Furthermore, the legal grounds of section 12(1) of New South Wales Protection of the Environment Operations Act 1997 (Operations Act) do not impose any mandatory requirements to Defendant, as it is clearly expressed that the phrases in section 12(1) did not stringently command the Defendant to perform its statutory duty.

"*The EPA <u>may</u> from time to time prepare draft policies in accordance with this Chapter*"

Upon all the aforementioned argument, Defendant declare that there is no basis for Plaintiff to request for mandamus, as there is no unperformed duty under the Administration Act and the Operations Act. Defendant provides seven documents to the Court as evidence on the performance of its duty: 1) New South Wales Climate Change Framework 2016; 2) Net Zero Plan Stage 1: 2020-2030; 3) New South Wales Changing Behaviour Together: Waste Less, Recycle More 2016-2021; 4) Environmental Guidelines: Solid Waste Landfills 2018; 5) New South Wales Energy from Waste Policy; 6) Methane fact sheet; 7) EPA Regulatory Strategy 2021-2024.

[154] *Bushfire Survivors for Climate Action Incorporated v. Environment Protection Authority* (Reply). Page 2, point 7.

The seven instruments supplements the legal argument that even if there is any specific requirement regulated under both legal basis, such as the phrase of “adapted to ensuring” (which the Defendant denied), Defendant have complied with such requirement by developed guidelines and policies from time to time to address GHG emissions that is further specified under the Annex A of the reply.[155] Therefore, Defendant argued that there shall be no order of mandamus by the Court to produce an objective, guidelines or policies as mandated under section 9(1)(a) of the Administration Act, and such claim made by Plaintiff shall be refused by the Court.

b. *Arie Rompas et al v. Government of Indonesia et al*

The parties involved in this case are seven Palangkarayan citizens (Arie Rompas, Kartika Sari, Fatkhurrohman, Afandi, Herlina, Nordin, Mariaty) represented by Haze Emergency Advocacy Team on behalf of Plaintiff, and seven government authorities (President of the Republic of Indonesia (Defendant I), Minister of Environment and Forestry (Defendant II), Minister of Agriculture (Defendant III), Ministry of Agrarian and Spatial Planning (Defendant IV), Minister of Health (Defendant V), Minister of Internal Affairs (Defendant VI), and Central Kalimantan House of Representatives (Defendant VII)) with each

[155] *Ibid*, Annex A.

appointed legal representatives representing on behalf of Defendants. Filed in 16 August 2016, this case was heard under the jurisdiction of the District Court of Palangkaraya, as a first-degree trial.

The Plaintiff, under citizen lawsuit as its legal *standi*, requested to the Court to adjudge that Defendants have committed tort[156] in the form of a nonfeasance[157] by the argument that Defendants have failed to perform its duty to fulfill the right of citizen to a good and healthy environment under article 28H of the Constitution, article 9(3) of Law 39/1999, and article 65(1) Law 32/2009 by its conduct of omission in the occurrence of the land and forest fire occurring in Palangkaraya. The 122.882,90 hectares of land and forest have burnt, proven by the NOAA-18 satellite hotspot record.[158] The Plaintiff argue that the conduct of omission and lack of coordination between central and regional government have resulted into immaterial and material injury to citizens including:

i) Reduced visibility range to <500m, which obstructs and halts citizens' daily social and economic activities;

[156] Article 1365 of Indonesian Civil Code (*Burgerlijk Wetboek*). There are 4 elements has to be satisfied in declaring whether a party have committed tort: 1) the conduct must violate the law; 2) element of wrongfulness from tortfeasor; 3) injury suffered by victim, and; 4) causality relation between the conduct and injury suffered

[157] *Loc.cit*., Bryan A Garner. The term "nonfeasance" is defined as the failure to perform an act/duty that is required by law.

[158] Verdict No.118/Pdt.G/LH/2016/PN Plk (*Arie Rompas et al* case), p.52.

ii) Haze resulted from the land and forest fire have roadblocked all means of transportation including airfare in three primary airports from 22 August till 29 October 2015;

iii) Air pollution standard index in Palangkaraya reached "very hazardous" level, triggering acute respiratory infection to 49.495 citizens (total number of cases in August-December) in 14 regency/city in Central Kalimantan, 4.453 cases of diarrhea, and causing death of 1 infant (Ratu Agnesia, aged 2 months old), 1 child (Intan Destiaty, aged 9 years old), and 2 adults (Salmiah, aged 49 years old; Karmansyah. aged 70 years old).[159]

The Plaintiff argued that the basis of facts represented before the Court have satisfied the elements of tort under the Indonesian Civil Code: 1) Defendants have conduct an omission which violates the law; 2) The conduct of omission satisfies the wrongfulness of Defendant as tortfeasor; 3) The Plaintiff suffered injury (which includes material and immaterial injury); 4) The conduct of omission by Defendant have caused injury to Plaintiff, which proves the causality of the conduct and the injury suffered.[160]

[159] *Ibid*, p.21.
[160] *Loc.cit.,* Article 1365 *Burgerlijk Wetboek*. *Arie Rompas et al* case, p.67.

The claim is strengthened by the witness of Adie, a farmer in Central Kalimantan. Adie opined that the land and forest fire have been occurred since 1997 and recurring in 2015, which Adie's family are infected with respiratory disease, impacted by the haze. During the occurrence of land and forest fire, Adie claimed that there is no respond from the government to mitigate the issue. The Plaintiff also provide an expert testimony concerning state responsibility in land and forest fire, Iman Prihandono, Ph.D., which is granted by the Court. Dr. Prihandono opined that the government has the duty to protect human rights, as incorporated under the pillars of United Nations guiding Principles on Business and Human Rights (UNGP-BHR). Dr. Prihandono argued that the duty to protect human rights are not simply performed if the extent of such action is only limited to performing certain action that is not optimally resolving the problem. In the current case, the government must conduct an action that ensure the land and forest fire to not reoccur in the future, in order to perform its duty to protect human rights. However, the fact that the 1997 land and forest fire reoccur in 2015, highlights that the government have failed to perform its duty to protect human rights.

Based upon all the claims and evidence proven through witness and expert testimony, The Plaintiff request to the Court to adjudicate and declare that:

i) Defendants have committed tort;

ii) To punish Defendant I and II in creating statutory regulations relevant to prevention and mitigation of land and forest fire which involve citizens' participation;

iii) To order Defendant I in forming taskforce consisting of Defendant II, III, IV, and VI to address the current land and forest fire matter, re-evaluation and revision of land license holders, and forming an early prevention and mitigation roadmap for land and forest fire victim;

iv) To order Defendant I, II, V, VI to establish health facilities in Palangkaraya including: hospital specialized for lung and respiratory, free of charges for those who are affected by the land and forest fire, evacuation site, and its technical guidance for evacuation site;

v) To order Defendant I, II, VI in establishing Central Kalimantan Forest and land fire vulnerability map, and control standard policy;

vi) To order Defendant II in revising the national forestry planning;

vii) To order Defendant II, VI to disclose the number of areas burned and license holder companies, and creating a forest-fire open access information system in Central Kalimantan;

viii) To order Defendant VI to form a special task force for forest fire early prevention;

ix) To order Defendant VI, VII to establish regional regulation on safeguarding protected areas;

x) To punish Defendants by publishing a public apology to all Central Kalimantan citizens through national and local media.[161]

The Defendants, contending upon the Plaintiff's claim, filed its *exceptie* (reply):

i) Defendant I argued that it has complied to its obligation by instructing Defendant II, III, IV, V to respond to the land and forest fire issue through Presidential Instruction no. 11 Year 2015 concerning Land and Forest Fire Control. It argues that it is not the obligation of President to conduct re-evaluation upon licensed companies, since the ministries have been mandated to carry out such obligation. Furthermore, Defendant I have passed legislations regulating legal enforcement

[161] Op. cit., *Arie Rompas et al* case

for environmental offences. Therefore, Defendant I declared that it has performed its duty to fulfill the constitutional right to a good and healthy environment, which concludes that there is no tort committed;[162]

ii) Defendant II argued that because there are other parties also having obligation to conduct control over land and forest fire which are not brought to the Court as Defendant. Therefore, the Plaintiff have conducted an error by filing a lawsuit which contains an incompleteness of parties (*plurium litis consortium*).[163] Furthermore, the claim of Plaintiff shall be rejected by the Court, as Defendant II have performed its duty to prevent land and forest fire through each government entity according to its region, and have enacted 2015-2019 strategic plan containing roadmap on controlling land and forest fire, and have announced the list of companies in Central Kalimantan which have been administratively and/or criminally penalized due to use of fire in land clearing in its area, and Defendant II have

[162] *Ibid*, p.77-82.
[163] Zainal Arifin Mochtar and Eddy O.S Hiariej. 2021. *Dasar-dasar Ilmu Hukum*, Red & White Publishing, Jakarta., p.130. "Plurium litis consortium" is a form of exception in Indonesian procedural legal system which defined that the Plaintiff conducted an error by not including other parties as the Defendant in the current case.

formed brigades to prevent and mitigate land and forest fire;[164]

iii) Defendant III argued that it has performed its statutory duty by formulating regulation and preventing land and forest fire by penalizing environmental offender which utilize fire in land clearing in its area, according to article 56(1) Law No. 39 Year 2014 concerning Plantations. Defendant III along with Corruption Eradication Comission (KPK) have conducted a coordination and supervision activity on palm oil licensing in several provinces including Central Kalimantan, proving no tort committed by Defendant III since there is no statutory duty remain unperformed;[165]

iv) Defendant IV argued that the Plaintiff have no legal *standi*, since citizen lawsuit is not recognized by the regulation and in Indonesian civil legal system. Defendant IV contended that it has performed its duty by enacting Ministry of Agrarian and Spatial Planning No. 15 Year 2016 concerning Relinquishment or Cancellation Procedures for Cultivation Rights on Burnt Land, and by conducting significant measures by

[164] Op. cit., p.83-87.
[165] *Ibid*, p.87-92.

providing services in the land sector for Indonesian citizens and have carried out their duties, functions and authorities as mandated by laws and regulations in this case Government Regulation No. 40 Year 1996 jo. Presidential Regulation No. 20 Year 2015 concerning National Land Agency. Therefore, the claim of Plaintiff shall be rejected by the Court;[166]

v) Defendant V, while supporting Defendant II's reply on *plurium litis consortium* error, contended that it has performed its statutory duty under Presidential Regulation no. 35 Year 2015 concerning Ministry of Health, and Ministry of Health Decision No. 289/MENKES/SK/III/2003 concerning Health Impact Control Procedure on Air Pollution due to Forest Fire, by sending 9 medicine packages for respiratory disease victims. Defendant V argued that, if the Plaintiff claimed that such package is not adequate for all victims, Defendant V is always ready to provide health-related support. Therefore, the tort allegation claimed by Plaintiff shall be rejected by the Court;[167]

[166] *Ibid*, p.92-103.
[167] *Ibid*, p.103-108.

vi) Defendant VI argued that the responsibility of the occurred land and forest fire shall not be only burdened to Defendant VI, as it must become the responsibility of other related sectors and every regent included in Central Kalimantan as incorporated under article 72 of Law 32/2009. Defendant VI contended that the Plaintiff conducted a premature presumption by objecting plantation license holders as the main perpetrator of the land and forest fire occurred, which is not only the contributing factor to the current issue. Furthermore, Defendant VI declared that there are no duties unperformed since all plantation licenses under its supervision are in "clean and clear" status, which detached the causality between license holders and the occurrence of land and forest fire. Therefore, the claim of Plaintiff shall be discharged by the Court;[168]

vii) Defendant VII argued that it should not be included as the part of Defendants, since Defendant VII is a regional government institution which are not included as a Defendant subject in citizen lawsuit.[169] Defendant

[168] *Ibid*, p.109-121.

[169] Supreme Court of Republic of Indonesia, 2015. Decision of the Chief Justice of the Supreme Court of Indonesia No. 36/KMA/SK/II/2013 concerning Guidelines for Handling Environmental Cases, p.22, the subject of "Citizen Lawsuit" must be government, and/or government institution starting from the President and Vice President, Ministers and continuing to state officials in the field who are considered to have committed omission in

VII contended that such land and forest fire may also be triggered by natural causes, which preclude the wrongfulness of Defendant VII. Furthermore, Defendant VII have conducted all necessary supervision measures in controlling, preventing, and mitigating land and forest fire through concrete actions. Upon that particular basis, Defendant VII requested to the Court to reject Plaintiff's claim.

Defendant II provided an expert testimony, Dr. Ir., Israr, M.Sc., concerning the issue. Dr. Israr opined that 99% of land and forest fire cases arise from anthropogenic activities, due to use of fire in land clearing. It is argued that the occurrence of land and forest fire in Indonesia is different to subtropical countries such as Australia which 70% resulted from natural causes, but simultaneously agreed that the peatland fire in Central Kalimantan contributes to global warming. Defendant III provide the witness of Abdul Sidik, a farmer in Central Kalimantan. Abdul Sidik as the head of *Kelompok Tani Peduli Api*/Fire Aware Farmer Group (KTPA) established by the Plantation Agency, claimed that there are no victims of haze in the burned area, and the witness claimed that they have coordinated with *Barisan*

its duty to fulfil the rights of their citizens. In the current case, Defendant VII argued that they are not classified as either government, or government institution.

Relawan Kebakaran/Fire Volunteer Front (BALAKAR). The exceptions, witness and expert testimony provided by the Defendant completed the contentions of Defendant to reject Plaintiff's claim.

2. *Ratio Decidendi* of Selected Cases

a. *Bushfire Survivor v. EPA*

In order to resolve the particular legal issue, the Court shall provide its *ratio* by answering the following aspects: 1) What is the duty of Defendant under the section 9(1)(a) of the Administration Act; and, 2) What breach of duty that Defendant have committed. To provide *ratio* on the first aspect, the Court must interpret the phrases of section 9(1)(a) of Administration Act which consists of "duty to develop", "instruments of objectives, guidelines and policies", "environment quality", "to ensure environment protection".

The Court, in its *ratio* find that the phrase "duty to develop" shall be construed as an exclusive duty to EPA as the subject of the action to develop the mandated objective, guideline or policy. The basis of such exclusive duty lies upon the section 5(1) of the Administration Act. Upon that interpretation, EPA may not delegate such mandate of "duty to develop" to any other person, or any governing body. Therefore, any objectives, guidelines, or policies developed by person or body other than EPA cannot be

constituted as a consideration to satisfy the "duty to develop" under section 9(1)(a) of the Administration Act. Additionally, this *ratio* signifies that the evidence provided by Defendant through citing seven documents must partially not to be considered by the Court, as two out of the seven submitted documents are not developed by the EPA as Defendant.

The Court interprets that "objectives, guidelines and policies" are three instruments that EPA is required to develop, with inviting and considering public submissions upon the development of such instruments. [170] Although the three instruments are disjunctive, EPA may develop certain instrument which consists as a combination of the three instruments.[171] The court, in its *ratio* utilize a grammatical interpretation on defining objective as "particular end which aimed at", guideline as "defining statement of certain policy or its operative area", and policy as "a course of action pursued by a government, or other relating entity". [172] Developing the three instruments may be complemented with an adoption of standards, to enable EPA in assessing whether such objectives, guidelines, policies, have been achieved. Therefore, the EPA must perform its duty to develop the three instruments, in relation to the aspect of environment protection.

[170] *Bushfire Survivor* case, judgment para.28.
[171] The Administration Act, section 8(f), section 9; *Bushfire Survivor* case, judgment para.32-33.
[172] *Bushfire Survivor* case, judgment para.30.

Given that the duty to develop the instruments shall be fulfilled based upon "environment quality", the Court in its *ratio*, interpreted such adjectival phrase where each of the objectives, guidelines, and policies need to be developed in relation to environmental quality, which includes all abiotic, and biotic components of earth such as land, air, water, any layer of atmosphere, and all interacting natural ecosystems.[173]

In construing the phrase "to ensure environment protection", the Court refers to the interpretation of "to ensure" as "to make certain" in the case of *Mount Isa Mines Ltd v Peachey* [1998] QCA.[174] The Court further affirm that the phrase of "environment protection" shall not be limited to the objectives of EPA set forth under the Administration Act,[175] as it is defined widely to include the protection of all components of earth including any layer of atmosphere.[176] Such protection of environment in New South Wales is not only limited to conservation and quality restoration, but also prevention and remedy to environmental harm, having regard to maintain ecologically sustainable development.[177] Therefore, it is clear that EPA has the duty to undertake a positive action in order to achieve the objectives of section 9(1)(a) of the

[173] The Administration Act, section 3(1).
[174] *Mount Isa Mines Ltd v Peachey* [1998] QCA 400, para.15.
[175] The Administration Act, section 6(1)(b).
[176] *Ibid.*
[177] The Administration Act, section 6(1)(a).

Administration by developing the three instruments to ensure environment protection.[178] It is the discretion of EPA, as the body whom such duty is imposed, to decide the number, content, and nature of such particular objectives, guidelines, and policies.[179]

To provide *ratio* on whether such duty in section 9(1)(a) of Administration Act includes the protection of environment from climate change, the Court interpret such article through a logical construction that establish the link to climate change as a part of objective of EPA set forth under section 6(1)(b) of Administration Act. This particular construction gives effect by extending the meaning of "environment protection" in section 9(1)(a) of Administration Act for this particular case which brought climate change as a part of threat to the environment in New South Wales, but it does not change the actual meaning or phrases that form the duty set forth under the aforementioned article.[180] To justify the *ratio*, the Court refer to the case of *R v G and another* [2004] which express:

"*Since a statute is always speaking, the context or application of a statutory expression may change over time, but the meaning of the expression itself cannot change*."[181]

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[178] *Loc.cit. Bushfire Survivor* case, judgment, p.13, para.47.
[179] *Ibid*, para.50.
[180] Julius Stone, 1985. *Precedent and Law.* Butterworths, Sydney. It shall be acknowledged that judges in countries following common law traditions have the power to make law.
[181] *R v G and another* [2004] 1 AC 1034; [2003] UKHL 50, para.29.

The particular precedent enabled the Court to construe that the section 9(1)(a) of Administration Act is “always speaking”. The Court also acknowledges and affirms the affidavit of Professor Sackett, that climate change is a threat to the environment of New South Wales which require EPA to respond to particular issue. Therefore, it allows the statutory duty to embrace any changes, given that the emerging threats to environment in New South Wales will evolve over time and place.

Upon the previously mentioned *ratio*, the Court considers that the duty under section 9(1)(a) of Administration Act require the instrument to address the topic of climate change. However, it does not require that the duty must be complied based on the level of specificity claimed by the Plaintiff.[182] Therefore, the Court considers to simply put the term “climate change” as a part of issue that the duty to develop the three instruments shall address, as such particular term is sufficiently wide to cover the phenomenon including its causes and consequences. This *ratio* answered the first aspect to resolve the legal issue.

The second aspect that the Court has to establish is whether there is any breach of duty to develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change, that Defendant has committed.

[182] *Loc.cit*. *Bushfire Survivor* case (summon) para. 37(d)

To answer this, the Court then continue to assess the five out of seven provided documents by Defendant.[183] The Court considers that the first document, New South Wales Changing Behaviour Together: Waste Less, Recycle More 2016-2021 do not fall within the description of "environmental quality objectives, guidelines, or policies to ensure environment protection", since the document is an education strategy, and not directed to ensure the protection of environment from climate change.[184]

The Court considers that neither the second document concerning Environmental Guidelines: Solid Waste Landfills 2018, nor the third document concerning New South Wales Energy from Waste Policy, and the fourth document concerning Methane fact sheet also sufficiently address environment protection from climate change. These considerations are based upon the fact that although the two guidelines may entail the regulation of methane emission from landfill, but it only account for small percentage of total GHG emission in New South Wales, which draws the conclusion that both documents do not meet the criteria of fulfilling the duty in section 9(1)(a) of Administration Act.

The EPA Regulatory Strategy 2021-2024 as the fifth provided document, may identify climate change as one of the

[183] See page 48 of this thesis, to view the title of the seven documents; two documents are not considered by the court, as it is not developed by EPA. See page 59.
[184] *Bushfire Survivor* case, Judgment para.112

environmental issues and the regulatory challenge to address the issue. Nevertheless, The Court considers that the document to not give any explanation on what the EPA does, or how does such identification of environmental issues may refer to the duty to develop environmental quality objectives, guidelines and policies to ensure environment protection, as mandated under section 9(1)(a) of Administration Act. Therefore, the Court decide to consider that none of the seven documents meet the statutory description of the three required instruments to be developed by EPA to ensure environment protection from climate change, followed by the establishment of the consideration that there has been a breach of duty under section 9(1)(a) of Administration Act done by Defendant through conduct of omission. By that conclusion, this *ratio* answered the second aspect to resolve the legal issue.

The Court concludes the *ratio* by adjudging and ordering that the Environment Protection Authority, in accordance with section 9(1)(a) of the Administration Act, is to develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change, and pay the cost of the proceedings. There is no appeal made by the Defendant, and accepts the judgment made by the Court.

b. *Arie Rompas et al v. Government of Indonesia et al*

The Court in its *ratio*, considered that the Plaintiff have an adequate *legal standi* before the Court through citizen lawsuit. Although the Defendants contended that such standi shall not be justified as it is originated from common legal system that contrasts with Indonesian civil legal system, the Court considered that the judiciary practice in Indonesian courts have been repeatedly utilizing citizen lawsuit as its legal standing, that have been further regulated under the Decision of the Chief Justice of the Supreme Court of Indonesia No. 36/KMA/SK/II/2013 which its elements[185] have been satisfied by the Plaintiff.

The Court has to provide its *ratio* in resolving the two aspects: 1) Whether the Defendants, in capacity as government authority, have not performed its duty to prevent and mitigate the land and forest fire that occurs in Central Kalimantan; and, 2) Whether the Defendants, during the land and forest fire issue, have committed tort by not optimally performing its statutory duty before, during, and after the land and forest fire in Central Kalimantan. To

[185] *Loc.cit*., Supreme Court of Indonesia. The elements of citizen lawsuit include: 1) The plaintiff must be one or more Indonesian citizen, and not a legal corporation; 2) The defendant must be a government and/or governmental agency; 3) The fundament of claim is for public interest; 4) The object of lawsuit is omission or unperformed legal duty; 5) The plaintiff have performed its duty to notify/filing *sommatie* to the defendant to perform its duty by 60 working days; 6) The plaintiff have forwarded the notification to local head of district court.

consider the first aspect, the Court shall identify and elaborate the statutory duty of the Defendants.

The Court considered that each Defendants are a government authority, and have the obligation to perform its statutory duty. However, such duty remains unperformed. Defendant I have the obligation to conduct forest destruction prevention and eradication action under Law 18 Year 2013 concerning Forest destruction Prevention and Eradication (Law 18/2013). In the current case, Defendant I have the central role to conduct action in addressing forest destruction. Even if Defendant I contended that such preventive measures have been carried out, the fact that land and forest fire keep occurring since 1997 till 2015 have eliminated such excuse. Therefore, the mandated duty of Defendant I is considered unperformed.

The interpretation of whether Defendant II, III, IV, and V are government institution, lies under article 14 of Indonesian Constitution, which regulated that each aforementioned Defendants may receive delegated instruction based on each Defendant's governing authority, from Defendant I to perform its duty. Each Defendants are obliged to perform its duty, based upon article 3 of Law 32/2009. Even if Defendant I delegated such mandate of duty to Defendant II, III, IV, and V, the Court considered that all the Defendants have not yet optimally

performed its mandated duty. Although several evidences provided by Defendants may demonstrate prevention and mitigation measure, but the inadequacy of such action, the slow response and performance of the Defendants have resulted to further injury. Such injury includes the haze polluting neighboring countries, victims experiencing respiratory infection disease which causing death of 4 citizens, obstruction of traffic, which halts economic and social development. Therefore, the Court in its *ratio*, considered that Defendant I, II, III, IV, and V have not yet performed its mandated duty.

The Court considered that article 27 and 34 of Government Regulation No. 4 Year 2001 concerning the Control of Environmental Destruction and/or Pollution relating to Land and Forest Fire, have given a statutory duty to Defendant VI as a governor to control land and forest fire in its governed area. However, the Court considered that Defendant VI have not optimally performed its duty to prevent and control, before, during, and after the land and forest fire. Thus, the slow performance in anticipating the forest fire to spread, and lack of coordination between central and regional government, contributes to the intensified haze pollution. This led the Court to consider that Defendant VI have not performed its duty.

The Court construe that article 18(3) of Indonesian Constitution, justified the position of Defendant VII as a government institution. Therefore, Defendant VII also bears the duty on treatment and control of land and forest fire that specifically occurring in Central Kalimantan. The Court consider that Defendant VII have not taken any initiative to form any regulations that is specific to prohibit land and forest firing before 2015, and have done so, only after the land and forest fire occurs in 2015. Therefore, the Court considered that Defendant VII as legislative authority in Central Kalimantan, have not performed its duty, particularly concerning the control and treatment of land and forest fire in Central Kalimantan.

After the Court have established that each Defendants are a government authority and have the obligation to perform its statutory duty, the Court shall move to resolve the second aspect. The fact that the *ratio* in the first aspect have also covered the question on whether there is an unperformed duty before, during, and after the land and forest fire in Central Kalimantan, then only require the Court to provide *ratio* on whether there is a tort committed by each Defendants.

The Court constructs that the claim of Plaintiff is based upon liability based on fault that utilize tort law, which the tort committed by government (*onrechmatige overheidsdaad*) is

incorporated under article 1365 of Indonesian Civil Code. There are four elements has to be satisfied in declaring whether a party have committed tort: 1) the conduct must violate the law; 2) element of wrongfulness from tortfeasor; 3) injury suffered by victim, and; 4) causality relation between the conduct and injury suffered. In the first element, the Court considered that the established considerations may construe that there is conduct of omission by all Defendants in the form an unperformed statutory duty mandated to each Defendants, that violates the law. Second, such omission fulfills the wrongfulness of an act done by tortfeasor, as it is categorized as the conduct of a nonfeasance. Third, the provided evidences have established that such nonfeasance have caused material and immaterial damage, as an injury suffered by the Plaintiff as victim in this case. Fourth, the Court considers that the three elements have concluded the issue of causality between the conduct and injury. The logical basis to justify this is that if the Defendants optimally perform its duty before, during, and after the land and forest fire, then the Plaintiff would not suffer material and immaterial injury.

The four *ratios* have led the Court to establish that Defendants have committed tort, by not performing its duty before, during, and after the occurrence of land and forest fire in Central Kalimantan. The Court adjudged and declared to partially

accepts the request of Plaintiff, by rejecting the request of Plaintiff to punish the Defendants by issuing a public apology to all Central Kalimantan citizens through national and local media.

Responding to the first trial judgment, the Defendants (except Defendant VII) filed for a first level appeal to the High Court of Palangkaraya. The main reasons of appeal are: 1) It is incorrect for *Judex factie* only give the burden of the issue to the government, as the participation of society is also pivotal; 2) *Judex factie* did not consider the *exceptie* of Defendant concerning *plurium litis consortium*; 3) *Judex factie* have exceed its authority to adjudge this matter, by allowing the citizen lawsuit method, and violating the *audi et alteram partem* principle.[186] The Court granted the appeal, but did not overturn the first trial judgment.[187]

Unsatisfied with the judgment, the Defendants filed a *cassatie* to the Supreme Court as the *judex jurist*. The defendants argued that the judgment of *judex factie,* both in first level trial and the first appeal level, have abandoned all of the exceptions made by the Defendants. Therefore, Defendants requested the Court to accept the *cassatie*, and declared that all *judex factie* decision

[186] *Loc.cit*, Zainal Arifin Mochtar and Eddy O S Hiariej. p.116. “Audi et alteram partem” is a principle which literally defined as “listen to both parties”, a general rule in assessing evidence which are as the same in equity as law.
[187] *Republic of Indonesia, et. al v. Arie Rompas, et. al* [2017] High Court of Palangkaraya, verdict no. 36/PDT/2017/PT PLK

shall be overturned. The Court adjudge to reject the *cassatie* of the Defendants.[188]

3. Comparison of *Ratio Decidendi* between Selected Cases

In considering the *ratio decidendi* of *Bushfire* case, it must be acknowledged that in Australian commonwealth legal system, a *ratio decidendi* is not about the 1) facts of the case; 2) applied law in the case; or, 3) the orders/judgment of the case.[189] Instead, *ratio decidendi* may be found in the judge's attempt to undertake necessary measures to resolve the case.[190] There are certain elements to identify whether a *ratio decidendi* is made to come into the judgment: 1) the *ratio* must be a necessary step to conclusion; 2) the *ratio* must directly relate to the current issue; 3) the *ratio* are resulted from the dispute of law, which may in the form of interpretation of certain rules including the common law/act; 4) such *ratio* must have been argued in the Court.[191]

In Indonesian case, the *ratio decidendi* of the Court shall be resulted from a valid and sound legal reasoning and basis to

[188] *Republic of Indonesia, et. al v. Arie Rompas, et. al* [2018] Supreme Court of Indonesia, verdict no. 3555/K/2018

[189] J L Montrose, 1957. "The Ratio Decidendi of a Case" The Modern Law Review, vol.20, no.6, p.587-595. Also see Rod Hollier, 2021. "The Ultimate Guide to the Ratio Decidendi and Obiter Dictum" (The Law Project) *[online] available at <https://www.thelawproject.com.au/ratio-decidendi-and-obiter-dictum>* (accessed 8 March 2022)

[190] H. K. Lücke, 1989. "Ratio Decidendi: Adjudicative Rational and Source of Law" Bond Law Review, vol.1., no.1. p. 36-51.

[191] *Ibid*, p.38. The *ratio decidendi* of a case which led to the order of the Court is binding between the parties, and may become a *stare decisis* to similar case in lower court, or persuasive to the higher court.

adjudicate the case.[192] Certain principles must be adhered by judges in interpreting the law, dissecting legal arguments, and evidences provided by both parties. For instance, in the *Arie Rompas et al* case, the Plaintiff's legal *standi* (citizen lawsuit) have not yet incorporated in the current statutory regulation, as it is a type of lawsuit originated from commonwealth legal system. However, the judges in adhering to *ius curia novit* principle, shall hear, adjudicate, and declare the judgment of any case appeared before the court.[193] In providing its *ratio*, the judges must delve in, follow, and understand the living legal and justice values in society.[194]

In the *Arie Rompas et al* case, there is no attempt of *rechtsvinding* (legal discovery). However, the judges respond to the legal vacuum of citizen lawsuit standing through utilizing a comparative interpretation. [195] This particular interpretation enables judges to delve into other sources of law by utilizing the Chief Justice of The Supreme Court of Indonesia's decision which justified such standing, even if such method of lawsuit have not yet been regulated in any laws.[196] Therefore, the judges must be

[192] Law 48/2009, article 53(2).
[193] Law 48/2009, article 10(1)
[194] *Ibid*, article 5(1)
[195] Sudikno Mertokusumo, 2002. *Mengenal Hukum Suatu Pengantar*. Liberty, Yogyakarta. There are eleven methods of legal interpretation, and four methods of legal construction. In the current case, the judges start interpreting by acknowledging the origin of citizen lawsuit, then continue to observe the practice of judiciary body decisions which allows citizen lawsuit to be a legitimate legal *standi* in the court.
[196] *Loc.cit*., *Arie Rompas et al* case.

very careful in interpreting and constructing the *ratio decidendi*, as certain judgment may been overturned by the reason of "insufficient judgment".[197]

Although both cases utilize normal articles in existing regulations as its legal basis, it has a contrasting approach of reconstructing legal argument in justifying the legal basis upon the question of law. One particular important finding highlighted in the *Bushfire Survivor* case, is the fact that: 1) The claims are based on identified intersections between climate change issues and the legal issue brought to the court; 2) The contentions of Plaintiff put its attention to the implication of climate change policy, which attempts to resolve the legal problem that address the climate change issues. Upon that observation, it is visible that the Plaintiff in this case satisfies the conditions of practicing a climate conscious approach in climate litigation.[198]

[197] Supreme Court Jurisprudence No. 384/K/SIP/1961. The term "insufficient judgment" may be recognized as "*onvoldoende gemotiveerd*". Also see Aditya Yuli Sulistyawan, Aldio Fahrezi Permana Atmaja, 2021. "Arti penting *legal reasoning* bagi hakim dalam pengambilan putusan di pengadilan untuk menghindari '*onvoldoende gemotiveerd*'" Jurnal Ius Constituendum, Vol.6, No.2., p.482-496.

[198] Brian J Preston, 2015. "Implementing a climate conscious approach in daily legal practice" (Paper Presentation) Australian & New Zealand Legal Ethics Colloquium. According to Kim Bouwer, 2018. "The Unsexy Future of Climate Change Litigation". Journal of Environmental Law, vol.30. p.483-486., the term "climate conscious approach" is defined as an approach in litigation that puts the context of climate change incorporated in the question of law, or legal issues brought to the court. It requires an active awareness of how climate change interacts with daily legal problems, and parties represented by legal practitioner may implement the climate conscious approach in identifying, interpreting, and applying the legal rules.

In contrast to the *Bushfire Survivor* case, the claim of *Arie Rompas et al* case tends to focus on a human rights-based approach by solely putting its basis to the constitutional right of a good and healthy environment, incorporated under the Indonesian Constitution, and the Law No. 39 Year 1999 concerning Human Rights (Law 39/1999). [199] Upon the observation of legal basis and contentions between parties, there are two points to highlight: 1) The claims are not based on identified intersections between climate change issues and the legal issue brought to the court; and, 2) The contentions of Plaintiff do not put attention to the implication of climate change policy, which attempts to resolve the legal problem that may not address the climate change issues.[200] The two points led into the finding that the Plaintiff in this case did not satisfy the conditions of practicing a climate conscious approach in climate litigation. Instead, it tends to implement a climate blind approach.[201]

As identified that a climate conscious approach is utilized in *Bushfire survivor* case, compared to the climate-blind approach in *Arie Rompas et al* case, this different use of approach creates

[199] Law 39 Year 1999 concerning Human Rights, article 2; 9(3); 100.
[200] *Loc.cit*., *Arie Rompas et al* case.
[201] Kim Bouwer, 2015, "Climate Consciousness in Daily Legal Practice" <https://blog.oup.com/2015/05/climate-consciousness-daily-legal-practice/> (Accessed 25 February 2023) define "climate blind approach" as an approach in climate litigation which pursues to solve a legal problem or dispute without putting specific attention and/or emphasis to climate change issues. Also see Leonie Kelleher, 2022. "A Climate Conscious Approach", Environmental Law Institute Journal Special Edition: Ethics, vol.96, p.44-47.

a significant impact towards the *ratio decidendi* upon the judgment. A Plaintiff with a climate-conscious argument, will lead to a climate-conscious *ratio decidendi*. Meanwhile, a Plaintiff with a climate-blind argument, would also restrain the *ratio decidendi* only to the extent of question of law, without giving any further emphasis to climate change.

Even if the *ratio decidendi* from both cases actually incorporate international environmental law principles, but the different approach of each Plaintiff has led the judges to either apply judicial activism, or judicial restraint approach in its decision.[202] In the *Bushfire Survivor* case, the judges explicitly put the issue of climate change as a consideration by acknowledging and utilizing the affidavit of expert as baseline of its *ratio*, which may benefit the judges to construct *ratio* that attempts to construe the particular question of law brough to the court. Meanwhile in *Arie Rompas et al* case, none of the *ratio decidendi* puts climate change issue to be acknowledged which may complements the legal reasoning of judges, although expert testimony has opined that the occurrence of land and forest fire have indeed contribute to the global warming, which accelerate climate change. Therefore, it is concluded that a good judicial decision is a reflection of a good quality of a lawsuit.

[202] *Loc.cit*., *Bushfire* case, judgment para.43; *Arie Rompas et al* case, p.187.