**INPUT TO THE UNITED NATIONS’ SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS IN THE CONTEXT OF CLIMATE CHANGE: ENHANCING CLIMATE CHANGE LEGISLATION, SUPPORT FOR CLIMATE CHANGE LITIGATION, AND ADVANCEMENT OF THE PRINCIPLE OF INTERGENERATION JUSTICE**

INPUT RELATED TO INDONESIAN CONTEXT

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**The Enactment of Climate Change Law is Essential to Enhance Regulatory Framework**

Despite being one of the most vulnerable countries potentially hit by climate change impacts, Indonesia has not yet enacted any legislation that specifically regulates or adresses climate change. Numerous provisions on climate change or potentially affect climate efforts have been regulated in sectoral legislations (e.g., mining act, environmental management act, forestry act)[[1]](#footnote-2) or lower-level regulation as presidential regulation. However, during the past years, climate change narratives and its embodiment under Indonesia’s regulation has been stronger than ever, resulting in the government enacting a presidential regulation followed by a ministerial regulation made as the legal basis for NDC implementation and achievement.[[2]](#footnote-3)

However, even with strong means to regulate climate change, no link between human rights elements and climate change has been discussed and articulated in a substantive manner. Although in general, there are clauses that represent guarantees for the fulfillment of several environmental human rights, especially procedural rights. For instance, the EPMA 2009 clearly recognized a good and healthy environment as human rights and noted the worsening climate change has exacerbated environmental degradation. Thus, there needs to be a stronger environmental protection and management efforts taking place to ensure the fulfillment of environmental human rights. The same narrative is also encapsulated in Presidential Regulation 98/2021 where it is stated that climate change impacts affect the quality of life of the people and protection measures need to be taken to tackle climate change impact as part of realizing the rights to a good and healthy environment.[[3]](#footnote-4) EPMA 2009 also guarantees the right to environmental information, participation in environmental decision making, and access to justice, which in turn influences the environmental regulations made under it. Presidential Regulation 98/2021 and its technical regulation have their share of articles regulating enhancing parties’ participation in mitigation and adaptation measures, including carbon pricing as well as guaranteed access to information related to climate change mitigation and adaptation efforts. Still, in places where human rights elements are essential to safeguard community’s rights (i.e., stronger climate change consideration in project assessment, benefit sharing and access to resources in carbon pricing mechanism), the human rights nuance remains missing.

For loss and damage, Disaster Management Act 2007 has regulated almost all the points listed in Article 8. Even so, the regulation is framed within disaster risk and emergency preparedness and hence put the duty heavily on government including funding. There is still no provision on institution or wider access to remedy for loss and damage nor capacity building for the impacted community. We are in the opinion that expanding access to remedy particularly funding from developed countries and not limiting the burden on the government while increasing resiliency in the face of loss and damage are important factors that need to be engaged in climate legislation. In conclusion, the legal framework for climate is in place. But, the legal gap remains wide. There is an urgent need for the drafting and passing of climate change legislation in Indonesia, to increase climate ambition, improve involvement and coordination across parties and sectors, and establishing good climate governance from the national to sub-national level. This is also important tool to incorporate human rights elements in climate actions.

**Urgent Need for Human Rights Understanding to Support Climate Change Litigation**

Regardless of global success in utilizing and incorporating human rights arguments in climate cases, not a single court in Indonesia has discussed or mentioned human rights arguments in climate litigation.[[4]](#footnote-5) While some plaintiffs specifically environmental organizations or public in citizen lawsuit cases, have incorporated human rights arguments in their complaints, the narrative would always get lost in translation and was never brought to the surface in court’s decision. Although there have been various legal instruments that recognize and guarantee rights to a healthy environment and other human rights (e.g., Indonesian constitution, EPMA 2009, Human Rights Act), the absent of human rights discourse in climate litigation is due to Indonesian judges’ limitations in developing legal arguments based on human rights build on the misconception of human rights violation.

Reflecting on Jakarta’s air pollution case-whose plaintiffs leaned heavily on human rights arguments, it was shown that the judges in the case clearly misunderstood the concept of human rights violation by associating human rights violations limited to only gross human rights violence including genocide and crimes against humanity as stipulated under Human Rights Court Act 2000. In its opinion, the court stated: “Even though it has been proven that the defendants **have been negligent in fulfilling the right to a good and healthy environment**, however, since a citizen lawsuit case is based on unlawful act/negligence, according to the judges, it is sufficient if the defendants are proven and declared to have committed unlawful act by neglecting its duty to fulfill the rights to a good and healthy environment, **without being declared to have violated human rights**.”[[5]](#footnote-6) There seems to be reluctancy from the judiciary to engage with human rights arguments and declare a party has violated human rights when it is being understood as gross human rights violence, as it would portray human rights as political, rather than a legal issue.[[6]](#footnote-7)

The failure to understand the scope of human rights violation is only one of Indonesia’s judiciary barriers in incorporating human rights arguments into climate litigation. It particularly stems from limited knowledge on human rights in environmental context. Since Indonesia is using the dualism system in international law, ratification laws rarely have power in term of political and legal influence to the judiciary. International law must be adopted and translated into national legal system to be commonly followed. This system consequently has also resulted in Indonesian courts rarely referring to international human rights instruments[[7]](#footnote-8). It is also unaccustomed for Indonesian court to look at practices or refer to cases from other jurisdictions. Additionally, the insubstantial number of jurisprudences from both the Constitutional Court and the Supreme Court on what the rights to a healthy and good environment, or any other human rights encompass when it comes to environmental matters also render deliberating human rights arguments difficult. Up to today, there are only two contextual interpretations directly linked to the rights to a good and healthy environment (Article 28H par. 1 of Indonesian constitution) from the Constitutional Courts, on rights to participate in environmental decision/policy making and rights to manage hazardous waste while waiting for permit’s approval.[[8]](#footnote-9) While not many differences going on the Supreme Court’s side-banning single use plastic to protect the environment, on duty to guarantee clean air, and timely review of mining permits to ensure compliance and environmental quality.[[9]](#footnote-10)

To overcome these barriers in Indonesia’s judiciary, it is necessary to improve the judges’ understanding of human rights in environmental context, followed by enhancing the capability to analyze and argue on human rights grounds in judges’ deliberations. This capability would include the knowledge to understand which instruments can be utilized or referred to, how human rights obligations of the state and private actors should be carried out, as well as building the culture to start creating jurisprudence related to human rights. All of this can be incorporated into Indonesia’s signature environmental judge certification program conducted by the Supreme Court. There is an urgent need for the Constitutional Court to engage human rights arguments as well. Lastly, all of this can be push forward by judicial activism, in times where legal interpretation and regulation on human rights are still far and between. Currently, there is a complaint from youths addressed to Indonesia’s National Human Rights Commission (NHRC) requesting NHRC interpretation of the state’s obligations related to climate change.[[10]](#footnote-11) This is a good opportunity that can later become the judiciary’s reference when considering human rights arguments in climate change litigation.

**The Intergenerational Justice within the Indonesian Environmental and Climate Legal Framework: A Brief Appraisal**

Intergenerational equity has been one of the prominent principles while discussing the imminent catastrophe caused by the changing climate. Impacts from climate change have been widely predicted to severely damage many lives aspect in the long term. Therefore, climate issues are certainly related to the notion of intergenerational equity.[[11]](#footnote-12) Weiss, in a piece discussing climate change and intergenerational equity, elucidates a groundbreaking idea to justify the moral imperatives of considering the future generation. For Weiss, the consideration of future generation is of importance since the current generation are obliged to shift natural resources to the same quality as it is first received. Moreover, the present generation should ensure the accessibility of natural resources to the future generation. These facts are well-summarised as Planetary Obligations.[[12]](#footnote-13)

From the Indonesian experience, there are no explicit provisions about intergenerational rights within the constitution or climate legislation. Still, this input discusses some noteworthy provisions within the constitution or environmental statutes that can be implicitly interpreted as provisions to protect the right of future generations. The first provision is the right to a healthy environment as provided under Article 28H of the Indonesian Basic Law of 1945.[[13]](#footnote-14) Concerning the rights of future generations, Bridget Lewis is one of the scholars that discusses the needs of consideration of future generations through a human rights-based approach.[[14]](#footnote-15) For Lewis, it is theoretically possible to conceive future generations as the subject of rights.[[15]](#footnote-16) Human rights approach covers the future generations in the sense that the impacts of climate change will reduce the enjoyment of rights such as the right of life, the right to health, and the right of property.[[16]](#footnote-17) Hence, it is theoretically possible to extend the subject of environmental right not merely the present generations but also the future generations.

Secondly, the public trust doctrine in the 1945 Constitution of the Republic of Indonesia can also be interpreted as part of protecting the rights of future generations. Indonesia recognizes the public trust doctrine in Article 33 of the 1945 Constitution of the Republic of Indonesia which means placing the government as the trustee.[[17]](#footnote-18) This has led the EPMA 2009 to adopt the public trust doctrine as one of the main principles of managing the environment.[[18]](#footnote-19) When it was first introduced, references to public trust doctrine explain that this doctrine was initially only covered water and marine resources.[[19]](#footnote-20) Nonetheless, Sax refuted this old understanding of the doctrine and argues this doctrine must continue to develop and not be limited to water and marine resources. In the context of climate change problems, the public trust doctrine is pushed to cover other natural resources such as the atmosphere.[[20]](#footnote-21) This, for example, was conveyed in the case of *Juliana v. the United States* whereas future generations are the ones affected by government neglect of the atmospheric ecosystem.[[21]](#footnote-22) Eventually, the development of public trust doctrine should therefore shed a new interpretaion that the state is also under the obligation to protect the rights of future generations in Indonesia.

Thirdly, EPMA 2009 regulates several provisions related to the rights of future generations. EPMA 2009 itself adopts that one of the objectives of protecting and managing the environment in Indonesia is to ensure that future generations justice is fulfilled.[[22]](#footnote-23) This provision somehow opens the door for the environmental organisation to file a lawsuit on behalf of future generations. This can be possible since EPMA 2009 allows an environmental organization to file a lawsuit for the sake of environmental protection and management as elaborated in Article 3 of EPMA 2009. Unfortunately, this regulation only touches upon the principal level and does not elaborate further on how to implement it at the policy and decision-making level.

Though the provisions about future generation within the constitution and legislation are still indefinite, the intention to incorporate intergenerational justice has been apparent lately in a climate case. In the case of Tanjung Jati Coal-Power Plant, the plaintiff has incorporated the right of future generation in the face of a massive amount of GHGs emitted by a Coal-Power Plant on the north coast of West Java province.[[23]](#footnote-24) The plaintiff further explores that the public trust doctrine in EPMA 2009 does not only require the government to be accountable to the present generation but also future generations.[[24]](#footnote-25) With the number of GHGs released by the power plant, this certainly has the potential to violate the state's obligations as a trustee.[[25]](#footnote-26) In addition to the public trust doctrine argument, the judge saw that the interests of future generations need to be considered because of environmental destruction due to the release of large CO2 emissions. The interests of generations are of importance in the light of the principle of expediency that is interpreted by judges within the framework of the principle of sustainable development.[[26]](#footnote-27)

This effort to interpret intergenerational equity from the public trust doctrine and sustainable development is worthy of appreciation. This is because several environmental cases in Indonesia adopt the narrative of protecting future generations limited to ‘name-dropping.’ There is no effort to further elucidate the theory of intergenerational equity and how it may be interpreted from the given provision within our current legal framework. In this case, the Tanjung Jati decision stands alone and shows an improvement from the plaintiffs and judges in arguing on behalf of future generations.

In conclusion, this input shares some commentaries regarding the right of future generations within Indonesia’s climate legislation. Despite having numerous provisions which can be further interpreted to consider the right of the future, this input is of the opinion that Indonesia is extremely in need of thorough interpretation regarding intergenerational justice from judicial institutions. The court has to take more initiative in construing the doctrine and legal concepts within the Indonesian legal framework since we are facing the impeccable danger of climate change. The history of environmental law has revealed that the court holds a vital role in regulating many environmental problems. Therefore, the court is urged to take part to foster a more ambitious climate policy. In addition, this input opines that Indonesian has the potential to exercise the right of future generations through lawsuits. As previously explained, the IEL has permitted the environmental organization to represent the future generations as it is mandated as the objectives of Indonesia’s environmental protection and management. Hence, this provision gives standing for future generations in which their rights can be represented by environmental organisations.

1. For instance, the Environmental Protection and Management Act (EPMA) 2009 stipulated that the government has a duty to assess the climate impacts and vulnerability, incorporating the assessments together with mitigation and adaptation actions to address the risk and minimize vulnerability on national and regional planning as well as development policies. The legislation also ordered the government to develop environmental standard for climate change impacts to assess whether a nature or built environment has been severely damaged by climate change. [↑](#footnote-ref-2)
2. Presidential Regulation No. 98/2021 solely becomes the only higher-level climate specific regulation in Indonesia. It concerns mainly about mitigation and adaptation efforts including carbon pricing mechanism. It replaced the old Presidential Regulation No. 61/2011 which was enacted long before the Paris Agreement’s entry to force. [↑](#footnote-ref-3)
3. The presidential regulation 98/2021 which becomes the basis for NDC implementation cited Article 28H par. 1 of Indonesian constitution and Art. 65 par. 1 of the EPMA 2009 that guarantee the fulfillment of the rights to a good and healthy enironment. [↑](#footnote-ref-4)
4. Indonesia currently has more than 16 climate cases, a lot of which have been decided. However, there are only two cases that use climate change as their main arguments while the rest are used as secondary argument and/or one of the arguments used by the plaintiffs. Some of the cases can be accessed through: <http://climatecasechart.com/non-us-jurisdiction/indonesia/>. Regrettably, there is no case where the judiciary deliberate on human rights arguments brought forth by the plaintiffs. [↑](#footnote-ref-5)
5. The plaintiffs in their complaint asked for the court to declare the defendants violate Jakarta’s residents’ rights to a good and healthy environment by neglegting their duty to ensure and provide clean air. However, despite agreeing with the plaintiffs’ arguments on human rights violation done by the defendants, the court denied the request to declare the defendants violated human rights as it is not ‘serious’ enough to be considered one. [↑](#footnote-ref-6)
6. Article 1365 of Indonesian Civil Law, which becomes the legal basis for unlawful act/negligence even stipulated violation of someone’s rights as a form and one of the preconditions of unlawful act. [↑](#footnote-ref-7)
7. Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social, and Cultural Rights, The Convention on the Rights of the Child, or any general comments of international human rights covenants. The courts rarely refer to human rights report and interpretation such as the framework principles on human rights and the environment developed by the Special Rapporteur on Human Rights and the Environment or similar documents. [↑](#footnote-ref-8)
8. Case No. 18/PUU-XII/2014 and Case No. 32/PUU-VIII/2010 [In Bahasa Indonesia]. There was a possibility for the Constitutional Court to provide substantive interpretation on the rights to a healthy and good environment during the recent constitutional review case on the revision of mineral and mining act. However, apart from providing a general interpretation of the right to participation, the constitutional court did not specifically provide interpretation on substantive aspects of the rights. See: Case No. 37/PUU-XIX/2022. [↑](#footnote-ref-9)
9. Case No. 29 P/HUM/2019 on judicial review to plastic ban regulation by Bali Governor, Case No. 27 P/HUM/2016 on judicial review to Presidential Regulation No. 18/2016 on waste to energy plants development, Case No. 374/Pdt.G/LH/2019/PN.Jkt.Pst on Jakarta’s air pollution, Case No. 55/Pdt.G/2013/PN.Smda on citizen lawsuit to mining permit duty by the Samarinda government. [↑](#footnote-ref-10)
10. The case can be found here: http://climatecasechart.com/non-us-case/indonesian-youths-and-others-v-indonesia/ [↑](#footnote-ref-11)
11. *See*: Stephen M. Gardiner, *A Perfect Moral Storm: the Ethical Tragedy of Climate Change*, (Oxford University Press, 2011), pp. 7; Edith Brown Weiss, “Intergenerational Equty, Climate Change, and International Law”, *Vermont Journal of Environmental Law*, Vol. 9, 2008, pp. 616. [↑](#footnote-ref-12)
12. Edith Brown Weiss, “Our Rights and Obligations to Future Generations for the Environment”, *American Journal of International Law*, Vol. 84(1), 1990, pp. 201-203. [↑](#footnote-ref-13)
13. Art. 28(H) of the Republic of Indonesia Basic Law of 1945. [↑](#footnote-ref-14)
14. Lewis in her contribution begins his discussion of this topic with these questions: “However, while human rights law is experienced in dealing with the rights of existing individuals and communities, its application to future generations presents several issues. First, can future generations be said to possess human rights, such that present generations owe them corresponding obligations? Second, if such obligations exist, how should they be balanced against potentially competing duties already owed to present generations? Further, how well-equipped is human rights law to enforce obligations owed to persons not yet born, who are not able to bring claims for enforcement of their rights?” *See:* Bridget Lewis, “Human Rights Duties Towards Future Generations and the Potential for Achieving Climate Justice”, *Netherlands Quaterly of Human Rights,* Vol. 34(3), 2016, pp. 208. [↑](#footnote-ref-15)
15. *Id*. [↑](#footnote-ref-16)
16. *Id.,* pp. 212. [↑](#footnote-ref-17)
17. Article 33 of the Indonesian Basic Law of 1945 is consisted of four paragraphs. In this case, the public trust doctrine lies on the third paragraph of the Article 33 which stated that: “*Bumi dan air dan kekayaan alam yang terkandung di dalamnya dikuasai oleh negara dan dipergunakan untuk sebesarbesar kemakmuran rakyat*.” See: Art. 33(2) of the Republic of Indonesia Basic Law of 1945. See also: Simon Butt and Prayekti Murhajanti, “Country Studies: Indonesia”, In: Emma Lees and Jorge E. Viñuales, *The Oxford Handbook of Comparative Environmental Law* (Oxford University Press, 2019), pp. 234. [↑](#footnote-ref-18)
18. Art. 2(a) of Indonesian Environmental Law. [↑](#footnote-ref-19)
19. James Huffman, “Speaking of Incovenient Truths - A History of the Public Trust Doctrine”, *Duke Environmental Law & Policy Forum*, Vol. 18(1), 2007, pp. 5-9. [↑](#footnote-ref-20)
20. Joseph L. Sax, “The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention”, *Michigan Law Review*, Vol. 68(3), 1970, pp. 556. [↑](#footnote-ref-21)
21. Michael C. Blumm and Mary Christina Wood, “No Ordinary Lawsuit: Climate Change, Due Process, and the Public Trust Doctrine”, *American University Law Review*, Vol. 67(1), 2017, pp. 7. [↑](#footnote-ref-22)
22. Art. 3(f) of Indonesian Environmental Law. [↑](#footnote-ref-23)
23. Case No. 52/G/LH/2022/PTUN.Bdg, pp. 41. [↑](#footnote-ref-24)
24. Case No. 52/G/LH/2022/PTUN.Bdg, pp. 34. [↑](#footnote-ref-25)
25. Case No. 52/G/LH/2022/PTUN.Bdg, pp. 35. [↑](#footnote-ref-26)
26. Case No. 52/G/LH/2022/PTUN.Bdg, pp. 194. [↑](#footnote-ref-27)