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Can the Right to A Good and Healthy Environment be Claimed as a Human Right?

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Article	Abstract
<p>Keywords:</p> <p>Climate change; Community Health; Environmental Law; El Nino; Human Rights Law; Land fire; The 1945 Constitution.</p> <p>Article History Received: Nov 12, 2021; Reviewed: Jan 05, 2024; Accepted: Jan 30, 2024; Published: Jan 31, 2024.</p> <p>DOI: 10.28946/slrev.Vol8.Iss1.1537.pp197-212</p>	<p>Land fires in South Sumatra are an annual problem during the long dry season. It was recorded that in 2015, 2016, 2017, and 2018, the land fires spread massively in the four districts of South Sumatra. The peatlands located within oil palm plantations in the Districts of Ogan Komering Ilir, Banyuasin, Musi Banyuasin, and the district of Ogan Ilir were the source of the fire. The haze not only attracts national but also international attention. Besides human contribution to land fire, climate change should also be considered. The role of El Nino makes the season uncertain. Land fires affect human health and other human activities in the affected areas. Three legal instruments guarantee and protect the people's right to the environment, i.e., The 1945 Indonesian Constitution, the 2009 Law No. 32 on the Environment, and the 1999 Law No. 39 on Human Rights. The problem raised herein is to what extent people can claim the right to a clean environment as human rights guaranteed and protected in those legal instruments. The results of the discussion show that those three legal instruments do not protect people whose human rights have been violated. This is because 2000 Law No. 26 on Human Rights has no jurisdiction over environmental matters. It is suggested that establishing a special Environmental Court is the solution to protect community environmental human rights cases.</p>

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INTRODUCTION

In 2015, 2016, 2017, 2018 and 2019 there were a massive land fire in the Province of South Sumatra,¹ Indonesia. However, land fires have been an annual problem in South Sumatra, particularly during the long and dry seasons. It was claimed that the traditional peasants who still practice slash-and-burn agriculture, especially in the low land of South Sumatra, such as the District of Ogan Komering Ilir and the District of Banyuasin, as well as the District of Musi Banyuasin, the long and dry seasons is a good time to start to plant paddy “*sonor*.”² The practice of slash-and-burn tradition above, from the economic perspective, is the cheapest and the easiest way for the farmers to open the farmland. They do not need to wait longer to make the woods and the bushes dry out. The fire will finish the work using a box of matches and a bottle of kerosene. Herein, they thought using fire could make the land fertile and easy to work with regardless of the season. It makes the soil fertile by recycling the nutrients from cutting and planting trees again; plant ash also increases soil fertility; it prevents the growth of weeds and makes the soil fertile without using chemical fertilisers, pesticides, and weedicides. J.S. Otto and N.E. Anderson³ argue that slash-and-burn cultivation has advantages. This is because the cultivation process can release nutrients accumulated over years of forest growth to fertilize plants for several years. When crop yields begin to decline, farmers leave the land to grow naturally in the long term so that the land can return to its original state. Furthermore, Otto and Anderson added that the success of slash-and-burn cultivation also depends on maintaining a high ratio of vacant land to cultivated land to allow the gradual recovery of forests and nutrients over a while. On the other hand, Kleinman argues⁴ that slash-and-burn practices do not depend on external inputs, such as fossil fuels, for fertilizer, pesticides, and even irrigation.

Theoretically, the practice of slash-and-burn cultivation is no longer in existence after the promulgation of 1979 Law No. 5 on the Village Government⁵ which abolished the *Marga* government. Consequently, all *Marga*'s forests are converted into the State's forest. It attracts many palm plantation companies that own huge forest areas and operate in the ex-*Marga*'s forests. Furthermore, the practice of slash-and-burn has now been adopted by the locals to open the lands. Many people are involved in this work, such as the locals, the family of the head of the village, and the village apparatuses. This kind of work opens new business opportunities since it involves much money.⁶

Nevertheless, land fires in the years 2015, 2016, 2017, 2018 and 2019 occurred in the districts above, mostly located in the peatland's areas within the palm plantations. For example, in 2019, forest and land fires scorched at least 1.6 million hectares of land, around 500,000 hectares of which occurred on peatlands. The smog and haze problems result from land fires nationally and in Singapore and Malaysia. Besides the contaminated air, the negative impact of

¹ the District of Ogan Komering Ilir, “The District of Banyuasin and the District of Musi Banyuasin,” n.d.

² The term of *Sonor* “Is the Local Term That Refers to the Agricultural Practice of Planting Paddy during the Long and Dry Season,” n.d.

³ S. Otto and N.E. Anderson, “Slash-and-Burn Cultivation in the Highlands South: A Problem in Comparative Agricultural History,” *Society for Comparative Study of Society and History*, 1982, 131–47.

⁴ P.J.A. Kleinman, “The Ecological Sustainability of Slash and Burn Agriculture,” *Agriculture, Ecosystems and Environment* 52 (1995): 235–49.

⁵ State Gazette of the Republic of Indonesia, “State Gazette of the Republic of Indonesia,” 1982.

⁶ H Purnomo et al., “Fire Economy and Actor Network of Forest and Land Fires in Indonesia,” *Forest Policy and Economics* 78 (2017): 21–31.

smog and haze also disrupts the social and economic lives of the people in South Sumatra. It was recorded that thousands of children (1-4 years old) and the elderly (above 50) suffered from URTI/ISPA⁷ in the affected areas. As a part of that, land fire also has degraded the physical quality of the peatlands and the water available, decreasing soil quality to withstand flooding.⁸ Regarding land fire, there are quite a lot of studies conducted by researchers, for example, [H Purnomo](#), [B Shantiko](#), [S Sitorus](#), [H Gunawan](#),⁹ H. Purnomo, B. Okarda, B. Shantiko, R. Achdiawan, A. Dermawan, H. Kartohardjo, and A. A. Dewayani,¹⁰ M Ardiansyah^{1,2}, R Boer and A P Situmorang,¹¹ and many more. Unfortunately, there is very little information regarding land fires, smog and haze in the affected areas, rather than studies discussed the correlation between land fires, hotspots, and rainfall in Indonesia; likewise, Rieska Yuniva and Lailan Syaufina,¹² Hanifa Mirzha and Lailan Syaufina,¹³ Sukmawati Aprillia,¹⁴ Husni, Rahmadika Fairus, Putra Erlianto Indra,¹⁵ Rina M. Harahap,¹⁶ and many more and so forth. Somehow, only one article discusses the relationship between peatland and hotspots in Musi Banyuasin, South Sumatra. It was written by Denni Prasetya and Lailan Syaufina,¹⁷ Unfortunately, there is very little information found discussing the issues of land fires, smog, and haze associated with people's rights to a clean environment as human rights. The strength of paper judges from the angle of human rights. The cases that happened in the Province of Sumara Selatan are a reflection of similar problems of land fires in other areas in Indonesia, likewise, Riau, Kalimantan¹⁸ which had burnt at least 34.000 Ha of forest land. That is the reason the problem raised herein is the extent to which the environmental human rights instruments protect the people.¹⁹ This paper aims to provide a clear legal problem that people face when they want to claim their right to a clean environment as a human right. The

⁷ URTI stands for Upper Respiratory Tract Infection), "ISPA (Infeksi Saluran Pernafasan Bagian Atas)," n.d.

⁸ H. Achmad Romsan et al., *Tanggung Jawab Negara Terhadap Kebakaran Lahan Di Propinsi Sumatra Selatan: Dampak Kebakaran Lahan Terhadap Kesehatan Masyarakat* (Yogyakarta: Bildung, n.d.).

⁹ Purnomo et al., "Fire Economy and Actor Network of Forest and Land Fires in Indonesia."

¹⁰ H. Purnomo et al., "Forest and Land Fires, Toxic Haze and Local Politics in Indonesia," *International Forestry Review* 21, no. 4 (2019).

¹¹ M Ardiansyah, R Boer, and A P Situmorang, "Typology of Land and Forest Fire in South Sumatra, Indonesia, Based on Assessment of Modis Data," *IOP Conference Series: Earth and Environmental Science* 54 (2016).

¹² Rieska Yuniva and Lailan Syaufina, "The Correlation of Rainfall and Hotspots as Indicators of Forest and Land Fire in the Province of Jambi," n.d., <http://repository.ipb.ac.id/handle/123456789/94322>.

¹³ Hanifa Mirzha and Lailan Syaufina, "The Correlation Analysis of Rainfall and the Distribution of Hotspots as Early Detection in the Province of Kalimantan Timur," n.d., <http://repository.ipb.ac.id/handle/123456789/94322>.

¹⁴ Sukmawati Aprillia, "The Correlation of Rainfall and the Hotspots as Indicators of Forest and Land Fire in the District of Pontianak Province of Kalimantan Barat," n.d., <http://repository.ipb.ac.id/handle/123456789/94322>.

¹⁵ Husni, Rahmadika Fairus, and Putra Erlianto Indra, "The Pattern of Rainfall and the Forest Fire at the Protected Peatlands Londerang, Province of Jambi," accessed August 8, 2021, <http://repository.ipb.ac.id/handle/123456789/94322>.

¹⁶ Rina M. Harahap, "The High Intensity of Hotspots Distribution in the Riau Province," *Jurnal Geografi Lingkungan Hidup* 2, no. 1 (2018).

¹⁷ Denni Prasetya and Lailan Syaufina, "The Correlation between Water Surface of Peatland and the Land Fire and Peatland in the District of Banyuasin," accessed August 8, 2021, <http://repository.ipb.ac.id/handle/123456789/94322>.

¹⁸ Jumarto Julianus, "This Time, Forest and Land Fires in South Kalimantan Are the Worst in the Last Three Years," n.d., <https://www.kompas.id/baca/english/2023/10/03/en-karhutla-di-kalsel-tahun-ini-terburuk-dalam-tiga-tahun-terakhir>.

¹⁹ environmental human Rights, "Instruments Are The 1945 Indonesian Constitution, The 2009 Law No. 32 on the Protection of and The Management of the Environment, and the 1999 Law No.39 on Human Rights," n.d.

advantage is that this paper provides information for those wanting to deepen their knowledge of human rights and the environment. Since land fire correlates with climate change (CC), the discussion below will be about CC relating to the definition of climate change, which, up to now, has no agreement among scholars. Furthermore, discussion going down toward the land fire in South Sumatra. The discussion below shows some correlations within the years where land fires occurred. The smog and haze resulting from land fires in the mentioned years also become problems for the children and the elderly in the four regions in South Sumatra above. Hundreds of thousands of them suffer from what is called Upper Respiratory Infection (URTI/Upper Respiratory²⁰The smog and haze are against the people's human rights. They cannot enjoy their right to a clean and healthy environment, guaranteed in the 1945 Indonesian Constitution and legally protected in the Human Rights Law of 1989 and the Environmental Law of 2009. The paper's organisation discusses climate change, which correlates to land fires in South Sumatra, and the impact of land fires on community health. The smog and haze from landfills disrupt the community's right to a clean and healthy environment. There are many cases of environmental disputes between communities and oil palm plantations filed at the District Court, where communities are always in a losing position. It perceives the need to create a special Environmental Court under the General Court and the conclusion. The discussion ended with a conclusion.

RESEARCH METHODS

This article derives from research the author and team conducted in 2021. Where most of the collected data are secondary data obtained from the law library, such as laws and regulations, and data obtained from Health Centers at the district levels, especially data on the number of people suffering from the URTI/ISPA in the years 2015, 2016, 2017, and 2018. The research sites, such as District Ogan Ilir, Ogan Komering Ilir, Banyuasin, and Musi Banyuasin, are chosen purposely. These four districts are also locations where peatlands are located in palm plantations and experiencing land fires. All the data gathered are descriptively and qualitatively analysed. At the same time, quantitative data is used to support the qualitative data.

ANALYSIS AND DISCUSSION

The problems of defining the Climate Change

Regarding Climate Change (CC) as it is provided for in the 2009 EMA²¹ the definition of CC is caused directly or indirectly by human activities. CC may cause changes in the composition of the global atmosphere and a change in natural climate variability observed over comparable periods. Unfortunately, the elucidation of Article 1 of the EMA 2009 declares "sufficiently clear." No further information will be obtained to understand what the CC means. Similarly, the scholars' definitions are different from one to another, depending on the backgrounds. The debate centres on the issue of when and how many years the dry season will occur and the

²⁰ Infection), "ISPA (Infeksi Saluran Pernafasan Bagian Atas)."

²¹ Article 1 Paragraph 19 of Law no. 32 of 2009, "Concerning Environmental Management and Protection. (Hereinafter Cited as EMA)," n.d.

fluctuations that exist. This can be seen by Richard Lord QC,²² who quotes the definition from the WMO that CC is “the 'expected’ weather and its variability, given the boundary conditions (parameters that govern the climate system, including the composition of the atmosphere and levels of solar and volcanic activity) that apply to the system atmosphere-ocean at any given time.” However, this definition is difficult to understand because climate change is a complex and debatable matter in the entire science of meteorology.²³ In addition, climate experts have yet to have a unanimous agreement regarding the definition of climate, let alone climate change or climate fluctuation trends. Jutta Brunnee²⁴ said that climate change has many aspects in many ways. This can have implications for physical, scientific, economic, social, political and cultural issues, as well as legal issues. Therefore, there are no strict criteria regarding how many years of dry time must occur to justify using climate change (CC) terms. However, CC generally refers to major changes in global climate conditions, including weather, temperature and sea level phenomena caused by the influx of greenhouse gases, which account for the largest share of fossil fuel emissions worldwide. In this context, forest and land fires are one of the impacts of CC.²⁵ This was also seen in four districts in South Sumatra in 2015, 2017, 2018 and 2019. Only in 2015 and 2019 were land fires the impact of CC.²⁶ In contrast, the other three years (2016, 2017, 2018) have resulted from human activity, as discussed below.

Landfires in the Province of South Sumatra

It is noted that land fires occur not only in the province of South Sumatra but also in other areas of Indonesia, such as Riau and Kalimantan²⁷ Nevertheless, compared to 2015, 2017, 2018, and 2019, they were recorded as the largest peatland fires in Indonesia. For example, in 2019, forest and land fires at least 1.6 million hectares of land, around 500,000 hectares of which occurred on peatlands in South Sumatra. The districts of OKI and Musi Banyuasin are the two largest regencies that have extensive peatlands and provide permits for many plantations. For example, in September 2020, there were 113 permits for spatial use on peatland, covering 70 Permits for Plantations (IUPs), and 49 of them were on deep peatland (>3 meters). For the FPWP (Forest Plantation Wood Production Permit (FPWP/IUPHHK (*Izin Usaha Pemanfaatan Hasil Hutan Kayu*)) and PHBM (*Pengelolaan Hutan Bersama Masyarakat*) are located on deep peatland. Thus, judging from the area, the distribution of peatland in South Sumatra is 1,256,502.34 ha which has been converted into the plantation, forest plantation and mining businesses covering an area of 851,169.23 ha (67, 74%) with an area of deep peat (>3 meters) converted into plantations, forest plantations and mining, which is 178,650.25 ha or 40.29% of the total area of deep peat in South Sumatra. Meanwhile, peatland < 3 meters is converted into an oil palm plantation area of 670,519.01 ha (82.46% of peatland area < 3 meters).²⁸

²² Richard Lord QC et al., *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press, 2012).

²³ Todorov. A V, "Reply," *Journal of Applied Climate and Meteorology* 25 (1986): 258–59.

²⁴ QC et al., *Climate Change Liability: Transnational Law and Practice*.

²⁵ Mark A. Cochrane and William F. Laurance, "Synergisms among Fire, Land Use, and Climate Change in the Amazon," *Ambio* 37, no. 7–8 (2008).

²⁶ Achmad Romsan et al., "The Phenomenon of Land Fires in Indonesia, Is It a Natural Disaster or a Man-Made Disaster?" *Jurnal Undang-Undang Dan Kemasyarakatan*, n.d.

²⁷ Harahap, "The High Intensity of Hotspots Distribution in the Riau Province,."

²⁸ KaKI 2015, "Kompilasi Data Sebaran Lahan Gambut Sumsel," n.d.

The conversion of peatland into agricultural land, plantations, and palm plantations will, however, impact the preservation of the peatland itself. It is noticed that about 98% of forest and peatland fires in Indonesia occur due to human activities²⁹ and are also supported by natural factors.³⁰ The dry temperature factor during the dry season, coupled with the extreme temperature phenomenon of El Nino, further triggers the occurrence of forest and land fires. Very dry soil conditions and chemical reaction factors from peatlands ignite the emergence of fire sources in peatland locations, which are then supported by the sun's heat in the dry season. The very high El Nino phenomenon occurred in 1982, 1997, and 1998 in the last 30 years. In that year, there was also a big fire in Indonesia. For more details, see the graph below.

Figure 1, El nino and La nina in the period 1982-2016
Historical NINO3.4 Sea Surface Temperature Anomaly

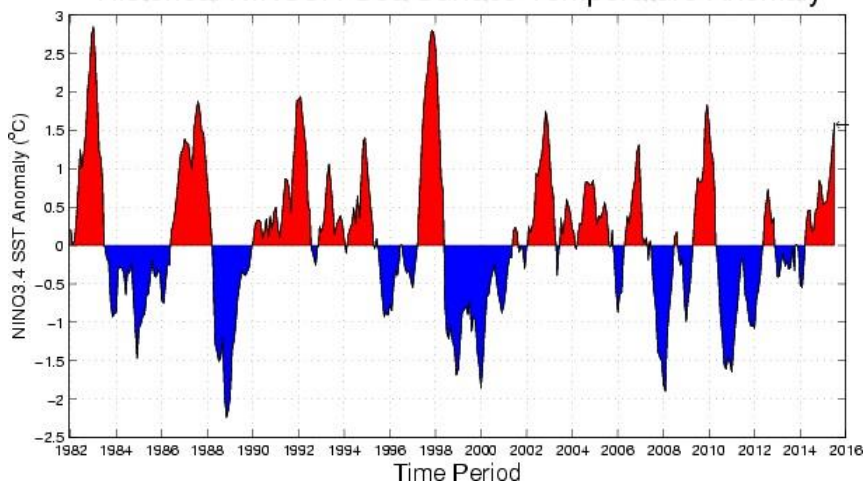


Figure 1 depicts that the red colour shows the El Nino phenomenon, and the blue represents the La Nina phenomenon. When El Nino occurs, the dry season becomes very dry, and the onset of the rainy season is late. Meanwhile, during La Nina, the rainy season will arrive earlier than usual. The impact of globalisation causes many problems on earth, both social problems and problems of the balance of nature. It is noted that the smog and haze resulting from land fires in the mentioned years above impacted the health of the people in four districts of South Sumatra. A detailed discussion of the impact will be explained below.

The impact of land fire on community health

There are several studies regarding air pollution resulting from land fires and its impact on human health. Some of them are Ana G. Rappold, *at all*,³¹ and also, E. Cascio,³² Notwithstanding, the land fires in 2015, 2016, 2017, and 2018 in the provinces of South Sumatra and other regions of Riau and Central Kalimantan, besides causing health problems for people in the affected areas, also attracted national and international attention, especially Singapore and Malaysia. There are hundreds of thousands of people in South Sumatra, especially those fragile people (children of 4 years old and adult people of above 40 years old)

²⁹ Romsan et al., “The Phenomenon of Land Fires in Indonesia, Is It a Natural Disaster or a Man-Made Disaster?”

³⁰ Romsan et al.

³¹ Ana g. Rappold et al., “Community Vulnerability to Health Impacts of Wildland Fire Smoke Exposure.,” *Environ. Sci. Technol* 51, no. 12 (2017): 6674–82.

³² Wayne, “Wildland Fire Smoke and Human Health,” n.d., <https://doi.org/https://doi.org/10.1016/j.scitotenv.2017.12.086>.

in the four districts of Ogan Ilir, Ogan Komering Ilir, Banyuasin, and Musi Banyuasin have suffered from Upper Respiratory Infection (URTI/Upper Respiratory Tract Infection).³³ One of the examples taken here is the URTI patients in the District of Ogan Ilir. The following table 1 shows the Outpatient Disease Patterns in Public Health Centers of All Age Groups in Ogan Ilir District, 2011-2016.³⁴

Table 1: *Outpatient Disease Patterns in Public Health Centers of All Age Groups in Ogan Ilir District, 2011-2016*

	2011	2012	2013	2014	2015	2016
Other acute Infections of the Upper Respiratory Tract	29448	33 524	26 935	25 265	19 177	22211
Other Diseases of the Upper Respiratory Tract	7 889	11 224	6 790	5 498	7 467	6462
Diarrhoea (Including Cholera Suspects)	11 002	16 128	12 673	12 018	10 053	11044

Source: Ogan Ilir District Health Office

The problems of people who suffer from URTI are also found in the District of Ogan Komering Ilir from the years 2015, 2016, 2017, and 2018. It is similar to those of people who suffer from URTI in the District of Banyuasin and Musi Banyuasin. URTI is the most common disease people suffer from. Notwithstanding, URTI is number one of the top ten diseases in the four districts above.³⁵

It is noted that during 2015, 2017, 2018, and 2019, the haze disrupted the economic activities, the teaching and learning processes, and water, land, sea, and air transportation. The haze also hit neighbouring countries like Singapore, Malaysia, Brunei, and Thailand. In a civil lawsuit between the Minister of Environment and Forestry v. PT. Bumi Mekar Hijau (BMH) (2015), The Minister of Environment and Forestry claims compensation of Rp 6.7 trillion for forest land destruction due to burning. Unfortunately, the Minister of the Environment was defeated in the above civil suit. The Court reasoned that the civil suit filed by the Minister was unclear (*obscure libel*). Conversely, in the second case between the Minister of Environment and Forestry v. PT. Waringin Agro Jaya (WAJ) (2015), the decision of the South Jakarta Court granted the plaintiff's (Minister of Environment and Forestry) request that the insured PT. WAJ is responsible for land fires of approximately 1,626.53 hectares and must pay compensation to the Minister of around Rp. 4.66 billion. However, in the High Court at the Appeal level, only 10% of the claims were granted. The environmental problems and the abovementioned environmental cases would not have been brought to Court if everyone had complied with the law, especially the environmental and human rights laws.

Landfires and haze disrupt the community's right to a clean and healthy environment.

³³ H. Achmad Romsan et al., *TanggungJawab Negara Terhadap Kebakaran Lahan Di Propinsi Sumatra Selatan: Dampak Kebakaran Lahan Terhadap Kesehatan Masyarakat* (Yogyakarta: Bildung Publisher, n.d.).

³⁴ Romsan et al.

³⁵ Those top ten diseases are 1) URTI, 2) Muscles problems, 3) High Blood Pressure, 4) Diarrhea and cholera, 5) another upper respiratory disease, 6) skin allergic, 7) infectious skin disease, 8) Asthma, 9) Intestinal disease infections, 10) Bronchitis.

If one refers to Article 69, paragraph (1), letter (h) clearly states that “everyone is prohibited to use fire to clear and burn the land.”³⁶ Under this provision, the locals and the palm plantation company that carried out the burning had infringed the provisions of Article 69 above. The smog and haze violate the people's right to a good and healthy environment, which is considered a human right. This right is a constitutional right, as guaranteed in the 1945 Indonesian Constitution and is a legal right protected by the Human Rights Law 1999. In Part I, concerning the "Right to Life", Article 9, paragraph (3) declares that "Everyone has the right to a good and healthy environment." This right is also expressly mentioned in Article 3 letter (g) of the 2009 Law No.32 concerning the EMA to “ensure the fulfilment and protection of rights to the environment as part of human rights.” Furthermore, Article 65, paragraph (1) emphasises this environmental human right: “Everyone has the right to a good and healthy environment as part of human rights.”

The smog and haze during the long dry season violate people's rights to a good and healthy environment. In other words, the smog and haze from the land fire have infringed on people's environmental human rights. Based on the three legal instruments above, the 1945 Indonesian Constitution, the 2009 Law No. 32 on the Environment, and the 1999 Law No. 39 on Human Rights, the violation of people's environmental human rights is also considered a violation of human rights. Consequently, everyone who considers their rights infringed can submit their claim to this Human Rights Court as regulated in the 2000 Law No. 26 on Human Rights Court.³⁷ Up to the present time, environmental cases are mostly filed at the District Court.³⁸ For instance, amongst other cases submitted to the District Court Jakarta are *the Minister of Environment and Forestry v. PT. Bumi Mekar Hijau (BMH)* (2015) and *the Minister of Environment and Forestry v. PT. Waringin Agro Jaya (WAJ)* (2015). In context, the Human Rights Court established by the Law of 2000 no 26 is only provided for a legal basis to hear crimes against humanity and genocide crime. In its progress, this Human Rights Court only resolved 17 cases of serious human rights violations that occurred, including the 1965-1966 incident, the mysterious killing in 1982-1985, the Talangsari 1989, Trisakti, Semanggi I and II, the May 1998 riots, the forced disappearance of people 1997-1998, Wasior 2001-2002, Wamena 2003, Murder of a *Dukun Santet* (Witch Doctor) in 1998, Simpang KAA Incident in 1999, Jambu Keupok 2003, Rumah Geudong 1989-1998, Timang Gajah 2000-2003 and Paniai Case in 2014. All of these incidents have been investigated by the National Commission of Human Rights (*Komnas HAM*). Among the human rights cases, only four, East Timor, Tanjung Priok, Abepura and Paniai, have already had court decisions. However, the results have not provided justice for the victims. Individuals whose environmental human rights are violated still cannot utilise the above mechanism. As a result, their individual environmental human rights cases remained solved through the district courts,³⁹ although the result needs to reflect the people's environmental justice.

³⁶ H. Achmad Romsan, “On the Protection of the Environmental Management, State Gazette 2009 No. 140,” n.d.

³⁷ Romsan.

³⁸ Romsan.

³⁹ Romsan.

The need for a special Environmental Court under the General Court in Indonesia⁴⁰

The increasing complexity of environmental disputes and the current absence of court decisions do not reflect environmental justice in protecting human rights to the environment. The establishment of a special environmental court in Indonesia which is under the General Court is crucial. There were many environmental disputes between communities, industries, and palm plantations during the application of the first EMA No.4 of 1978, EMA 23 of 1997 and EMA 32 of 2009.⁴¹ The disputes can be grouped into several categories. That is “(1) The community that fights pollution for the sake of the environment, (2) the community that fights pollution for the sake of their economic survival, and finally, (3) the community that fights pollution for the sake of human survival and environmental conservation.”⁴² In Indonesia, most cases are within the second category, the community that fights pollution for economic survival.⁴³

It was further stated that the right to life is a fundamental human right that can be linked to environmental conditions. As a result, any violation of environmental rights will also disrupt the enjoyment of human rights. Courts specialising in the environment must be established to alleviate this problem and deal with the complexity of environmental disputes. The right to a decent environment is a constitutional right protected in the 1945 Constitution, human rights, and environmental law. Therefore, any violation of human rights against a protected environment must be handled by a court that specialises in that matter.

It is noted that the political foundation for the creation of an environmental court originated from the 1972 Stockholm Declaration on Human Environment⁴⁴ and the 2002 Johannesburg Principle on the Role of Law and Sustainable Development,⁴⁵ which encourages the State to create new mechanisms for settling environmental issues. Principle 17⁴⁶ which declares, "Appropriate national institutions must be entrusted with the task of planning, managing or controlling the environmental resources of States to enhance environmental quality." Furthermore, Principle 21 of the Stockholm Declaration⁴⁷ also provides for “States have, by the Charter of the United Nations and the principles of international law, the sovereign right to exploit their resources according to their environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction." Thus, two national institutions need to create new institutions. The Ministry for Environment was already established in 1978⁴⁸ and the Environmental Court. The latter, in paragraph (b), mentions that “[T]he improvement in the level of public participation in environmental decision making,

⁴⁰ Achmad Romsan and Zuzanna Mohamed Isa, “The Establishment of Environmental Court in Indonesia’ (Penubuhan Mahkamah Alam Sekitar Di Indonesia),” *JUUM* 20 (2016): 63–70.

⁴¹ David Nicholson, *Environmental Dispute Resolution in Indonesia* (Leiden: Kitlv press, 2009).

⁴² Romsan and Isa, “The Establishment of Environmental Court in Indonesia’ (Penubuhan Mahkamah Alam Sekitar Di Indonesia).”

⁴³ Romsan and Isa.

⁴⁴ Environmental Law Guideline Principles 1, “The 1972 Stockholm Declaration on Human Environment,” n.d.

⁴⁵ Johannesburg, “Principle on the Role of Law and Sustainable Development,” 2002.

⁴⁶ Declaration of the United Nations Conference on the Human Environment, “A/CONF.48/14/Rev.1,” n.d.

⁴⁷ Environment.

⁴⁸ The State Ministry for Development and Environmental Supervision, “Kementerian Negara Pengawasan Pembangunan Dan Lingkungan Hidup,” n.d.

access to justice for the settlement of environmental disputes and the defence and enforcement of environmental rights, and public access to relevant information.”⁴⁹

In this context, creating an environmental court will support the implementation of Principle 10 of the Rio Declaration, which sets out three fundamental rights as key pillars of sound environmental governance. The “access rights” has crucial role in promoting transparent, inclusive, and accountable environmental governance. Thus, granting access to environmental information, public participation in environmental decisions and access to justice also sounded by the 1998 Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters. Herein, creating an Environmental Court will alleviate the burden of the District Court Judge and improve the environmental litigation process. A statement delivered by Chaskalson, C.J.⁵⁰ supports the formation of the environmental Court where “laws are ineffective unless they are implemented, and much environmental law exists but has not been enforced, and the deficiency in the knowledge, relevant skills and information in regards to environmental law is one of the principal causes that contribute to the lack of effective implementation, development and enforcement of environmental law at the national and local levels.”

Frankly speaking, the embryo of the establishment of the Environmental Court is derived from the collaboration of the International Union for the Conservation of Nature/IUCN,⁵¹ the United Nations Environmental Programme/UNEP⁵² and the 2002 Rio Declaration, which provided the opportunity to set up the Environmental Court. The product of the collaboration above has resulted in more than 354 specialised environmental courts and tribunals (ECTs) created in forty-one countries.⁵³ Each environmental Court is established uniquely and handles environmental issues, political institutions, cultural and religious norms, and advocacy pressure. However, in general, they all have much in common and much to learn from one another.⁵⁴

However, the formulation of this new mechanism has pros and cons. Counter-arguments,⁵⁵ for example, relate to issues regarding legal and factual complexity, opposition to the fragmentation of the justice system, reluctance to include environmental law, preferring gradual reform of the public court system, sufficient caseloads, and additional costs. Although many domestic laws can handle and resolve environmental disputes, certain difficulties will arise when dealing with issues involving communities versus industry and palm oil plantations.⁵⁶

⁴⁹ Global Judges Symposium, “The Johannesburg Principle on the Role of Law and Sustainable Development,” n.d.

⁵⁰ Kurukulasuriya and K.A Powell, “History of Environmental Courts and UNEP's Role,” *Journal of Court Innovation*, 2013, 269–76.

⁵¹ IUCN, “Established in 1948 through the Statutes of 5 October 1948,” n.d.

⁵² UNEP, “UN Conference on Environment and Development,” 2013.

⁵³ G. Pring and C. Pring, “Greening Justice: Creating and Improving Environmental Courts and Tribunals,” n.d., <http://www.moef.nic.in/downloads/public.../>.

⁵⁴ S. C. Whitney, “The Case for Creating A Special Environmental Court System-A Further Comment,” 1973.

⁵⁵ G. Pring and C. Pring, “Specialized Environmental Courts and Tribunals at the Confluence of Human Rights and the Environment,” n.d.

⁵⁶ Romsan, “On the Protection of the Environmental Management, State Gazette 2009 No. 140.”

As Avgrerinopoulou⁵⁷ said, “... Even if an environmental case solely involves actors within the national border, a national court may not be willing to adjudicate actions taken by its government.” In many cases, national laws impose legal constraints that limit the mandate of the Court to judge and alter governmental action. Another pro to the creation of the Environmental Court Tribunal such as Whitney⁵⁸ who presumes that “some form of environmental court or system of court is necessary or desirable in the sense that such specialised court or system would produce significant benefit to relief the workload problem faced by the regular federal judiciary both in the short and the long term.”⁵⁹

Pring and Pring have identified several issues relating to “access to justice, such as lack of legal and technical expertise, high litigation costs, delay, decision quality, lack of public information and participation, and public trust, which are all seen as limiting access to environmental justice.”⁶⁰ Therefore, the need to have an independent judiciary is critical in the implementation, development and enforcement of environmental law, and members of the judiciary, as well as those who contribute to the judicial process at national, regional and global levels, are important partners in promoting compliance and implementation and enforcement of international and national environmental laws.⁶¹

In this respect, hundreds of specialised environmental courts and tribunals with different backgrounds and characteristics have been created in several countries.⁶² An environmental court is seen as very important in dealing with the power imbalance between the victims of environmental pollution and big companies.⁶³ In this context, the individual environmental human rights violation should have been fully protected if, at the ASEAN level, the so-called ASEAN Human Rights Court had been established as it is similar to that of the European Human Rights Court (EHRC). The EHRC accommodates the individuals' claim of their environmental human rights violation.⁶⁴ Although the European Convention on Human Rights does not directly regulate the right to a healthy environment, the European Court of Human Rights has nevertheless been asked to develop its case law on environmental issues because implementing certain rights in the Convention can be harmed by environmental damage and exposure to environmental risks. In this case, any violation of environmental rights will be considered a human rights violation. People cannot enjoy their human rights if their right to the environment is infringed. As a result, several environmental human rights cases were filed at the EHRC, which violate the right to life, as cases relating to dangerous industrial activities, as in the case of *Öneryildiz v. Turkey*;⁶⁵ the natural disasters exposure to nuclear radiation, as in

⁵⁷ D. T. Avgrerinopoulou, “The Role of International Judiciary in the Settlement of Environmental Disputes and Alternative Proposal for Strengthening International Environmental Adjudication,” 2003.

⁵⁸ Whitney, “The Case for Creating A Special Environmental Court System-A Further Comment.”

⁵⁹ The Pollution of Kalitapa Semarang in 2005, “Dealing the Conflict Resolution Outside the Courtroom Which Is Called Alternative Dispute Resolution (ADR),” n.d.

⁶⁰ Pring and Pring, “Greening Justice: Creating and Improving Environmental Courts and Tribunals.”

⁶¹ “No TitleThe 2002 Johannesburg Principles on the Role of Law and Sustainable Development Adopted at the Global Judge-Es Symposium Held in Johannesburg,” 2002, <http://www.unep.org/Documents.Multilingual/Default.asp?ArticleID=3115& DocumentID=259> .

⁶² Pring and Pring, “Greening Justice: Creating and Improving Environmental Courts and Tribunals.”

⁶³ J. Ebbesson and P. Okowa, “Environmental Law and Justice in Context,” *Environmental Law*, 2010, 167–69.

⁶⁴ Factsheet – Environment and the ECHR, “Environment and the European Convention on Human Rights,” n.d.

⁶⁵ “The Applicant’s Dwelling Was Built without Authorisation on Land Surrounding a Rubbish Tip Used Jointly by Four District Councils,” 1993.

Murillo Saldias and Others v. Spain;⁶⁶ the industrial emissions and health as in the case *Smaltini v. Italy*;⁶⁷ *Affaire O.R v Grece*,⁶⁸ *LCB v. the United Kingdom*,⁶⁹

A case related to industrial emissions and health is *Smaltini v. Italy*. It concerns “the effect of environmental nuisance caused by the activity of steelworks on the health of the first applicant, who died from leukaemia. Her husband and children, who have pursued the application, alleged in particular that the existence of a causal link between the harmful emissions from the plant and the development of her cancer had been demonstrated.”⁷⁰ Another interesting case is *Florea v. Romania*⁷¹ stated that:

“Prohibition of inhuman or degrading treatment (Article 3 of the Convention) which relates to passive smoking in detention. In 2002, the applicant, who had chronic hepatitis and arterial hypertension, was imprisoned. For approximately nine months, he shared a cell with between 110 and 120 other prisoners, with only 35 beds. According to the applicant, 90% of his cellmates were smokers. The applicant complained in particular of overcrowding and poor hygiene conditions, including having been detained together with smokers in his prison cell and the prison hospital. In the latter case, the Court observed that the applicant had spent approximately three years in detention, living in very cramped conditions, with an area of personal space falling below the European standard. As to the fact that he had to share a cell and a hospital ward with prisoners who smoked, the Court noted that the applicant had never had an individual cell and had had to tolerate his fellow prisoners' smoking even in the prison infirmary and the prison hospital, against his doctor's advice. However, a law in force since June 2002 prohibited smoking in hospitals, and the domestic courts have frequently ruled that smokers and non-smokers should be detained separately. It followed that the detention conditions to which the applicant had been subjected had exceeded the severity threshold required by Article 3 of the Convention, violating this provision.”⁷²

Although there are several individual cases relating to environmental human rights violations filed at the European Human Rights Court, and if the ASEAN Human Rights Court had been established, it does not mean that the National Human Rights Court of Indonesia, as regulated in the 2000 Law No. 26 on the Human Rights Court is less beneficial for the victims of environmental pollution and environmental degradation. As in the case of the African Court of People's and Human Rights, it will be used by the African people if they consider that the prediction made by the judge at the National Court of Human Rights does not satisfy the parties. That is why the breakthrough made by the EHRC should have been a good example for the Indonesian judges of the Human Rights Court in examining and adjudicating cases related to individual rights violations relating to environmental human rights. Even though the 2000 Law No. 26 on the Human Rights Court Human Rights Court only hears cases related to genocide and crimes against humanity.

CONCLUSION

⁶⁶ “The Applicant’s Dwelling Was Built without Authorisation on Land Surrounding a Rubbish Tip Used Jointly by Four District Councils.”

⁶⁷ “The Applicant’s Dwelling Was Built without Authorisation on Land Surrounding a Rubbish Tip Used Jointly by Four District Councils.”

⁶⁸ “The Applicant’s Dwelling Was Built without Authorisation on Land Surrounding a Rubbish Tip Used Jointly by Four District Councils.”

⁶⁹ “The Applicant’s Dwelling Was Built without Authorisation on Land Surrounding a Rubbish Tip Used Jointly by Four District Councils.”

⁷⁰ ECHR, “Environment and the European Convention on Human Rights.”

⁷¹ “The Applicant’s Dwelling Was Built without Authorisation on Land Surrounding a Rubbish Tip Used Jointly by Four District Councils.”

⁷² ECHR, “Environment and the European Convention on Human Rights.”

In Indonesia, the right to a good and healthy environment is a constitutional right, for it is guaranteed in the 1945 Indonesian Constitution. Also, it is a legal right since it is protected by two legal instruments, The 1998 Human Rights Law No. 39 and the 2009 Environmental Protection and Environmental Management No. 32. It is sad to say that the three legal instruments above are not fully protected the violation of people's environmental human rights. Because there are many environmental human rights violation cases during and after the promulgation of the EMA 1972, the EMA of 1997 and the EMA of 2009 are adjudicated to the District Court. Those cases are not filed to the Human Rights Court as formulated in Law No. 26 of 2000 dealing with the Human Rights Court. The problem lies in the objectives of the promulgation of the 2000 Law No. 26 on the Human Rights Court, which is for prosecuting crimes of genocide and crimes against humanity. Herein, the Human Rights Court has no jurisdiction over environmental human rights cases. As a result, many environmental human rights cases were filed at the District Courts during and after the promulgation of the three EMAs. The verdicts of the Court are not fully environmental justice for the people. There are some alternatives for solutions. First, the Human Rights Court judges should make a breakthrough like the European Human Rights Court judges. However, the Indonesian Human Rights Court has no jurisdiction over the cases by interpreting that the right to life is closely related to the environment. As a result, violating individual environmental rights is seen as an infringement of human rights. The second alternative is to extend the jurisdiction of the Indonesian Human Rights Court through the amendment of Law No. 26 of 2000 to include environmental cases. The third alternative is to include environmental human rights as a crime against humanity. The fourth is establishing the Environmental Court as a special court under the General Court. With the increasing industrial development in Indonesia, the conflict between society and industry will increase and be unavoidable. Hence, establishing the Indonesian Environmental Court under the General Court is urgent in defending the people's environmental rights.

Regarding the land fire and haze in the province of South Sumatra are annual problems the people face, especially during the long dry season. Many claimed that the traditional peasants in the low land of South Sumatra practice slash-and-burn cultivation, causing land fires and creating smog and haze, which always occur during the long and dry seasons. Fire is the fastest, easiest, and cheapest way to clear the land. There are four districts in South Sumatra where huge areas of peatlands and most land fires occur in the lowland areas of the Regions of Ogan Ilir, Ogan Komering Ilir, Banyuasin, and Musi Banyuasin. The government has given these peatland areas a permit for palm plantations. The characteristic of peatland is watery during the wet season and very dry during the dry season. As a result, it is easy to ignite to fire. Furthermore, during the long dry season, the company hires workers to burn to clear the land. It was recorded that severe land fire smog and haze in 2015, 2016, 2017, 2018, and 2019 were the cause of human failure to eradicate the disaster, but there was also el-Nino's impact. The smog and haze produced by land fires affected hundreds of thousands of people in the affected areas who suffered from upper respiratory disease. Also, the economic activities and schools are closed, and transportation is disrupted. The smog and haze also affect air pollution in neighbouring countries such as Malaysia and Singapore.

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