

“Climate Change Litigation in Indonesia from a Theoretical Point of View”¹

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1. The Story of Climate Change Litigation Thus Far

There are a number of pressing problems that climate change litigation across various jurisdiction have encountered in their daily legal practices, but out of the many problems that this paper can address, what I find to be most intriguing and theoretically challenging is the problem of duty of care and causation.

It has been a sort of common misconception in most attempted climate litigation in which the Plaintiff argued that a climate duty of care is owed based on the volume of emission emitted by the Defendant. Departing from such perspective, it is not surprising to witness that in almost all climate litigation cases the defendants have always been energy and utility companies—otherwise know as Carbon Majors. A common argument adduced by the plaintiffs in almost all of these cases have been on the grounds of justice. They claim that it is only fair to hold these Carbon Majors² defendants liable for climate change simply because they discharge emission in an extravagant manner. Still another argument is that these defendants are more able to bear the burdens of compensating climate change related losses than others in general could.³

These arguments, when properly understood, are made out of a “purely” distributive justice concern; and this is why it is problematic since tort law, on the other hand, subscribes to the concept of corrective justice. The difference between distributive and corrective justice relates to the difference between a situation where justice is oriented towards creating a new

¹ This is an abridged from the original draft paper that will be included in a forthcoming publication (Jolene Lin and Douglas A. Kysar, "Climate Change Litigation in the Asia Pacific", forthcoming). The original version of this paper was also co-authored with Dr. Andri G. Wibisana. Please do not circulate or cite this paper without the permission of the author.

² The term used is based on a study cited in a research funded by Heinrich Böll Stiftung. The ‘Carbon Majors research’ provided an account of carbon dioxide emissions from 1751- 2013 attributable to oil, coal and gas producers (the ‘Carbon Majors’). These findings were published in 2013 in an article in the journal *Climatic Change*, where researcher Richard Heede found that approximately 65% of carbon dioxide released by humans can be traced to the Carbon Majors. Furthermore, the study found that half of those emissions have occurred since 1986. The research attributed 3.52% of carbon emissions to ChevronTexaco, 3.22% to ExxonMobil, 3.17% to Saudi Aramco, 2.47% to BP, 2.22% to Gazprom, and 2.12% to Shell. Of the Carbon Majors, 56 of them are crude oil and natural gas producers, 37 are coal extractors (including subsidiaries of oil and gas companies), and 7 are cement producers. Of the entities still in existence, 54 are headquartered in Annex I countries, and 31 are in non-Annex I countries. However, I do not limit the term “carbon majors” only to those companies mentioned above and, instead, choose to use the term to refer to actors with extremely high-emission activities. See: Keely Boom, Julie-Anne Richards and Stephen Leonard, *CLIMATE JUSTICE: THE INTERNATIONAL MOMENTUM TOWARDS CLIMATE LITIGATION*, 16 (2016).

³ See: Samantha Lawson, *The Conundrum of Climate Change Causation: Using Market Share Liability to Satisfy the Identification Requirement in Native Village of Kivalina v. Exxonmobil Co.*, 22(2) *FORDHAM ENVIRONMENTAL LAW REVIEW* 433, 482 (2010).

state of affairs (distributive justice), and one where its purpose is to restore a certain equilibrium (corrective justice).⁴ Based on corrective justice understanding of tort law, someone does not get to be liable, by law, for climate change just because they emit excessively.

The second problem with climate change litigation, as I have mentioned earlier, relates to causation issues. According to Gerrard, no specific weather events can be attributed to GHG emissions. Indeed, there may be more severe natural catastrophes, but there has always been natural variability behind all these events.⁵

We are still unable to determine hitherto what sort of catastrophes (damages) that are exclusively and only caused by climate change. To be precise, according to Kysar, a harm can only be probabilistically linked to an antecedent cause, due to the inability of the available science and its analysis to cluster individual contribution to the inflicted harm.⁶ If one's emission suffices to meet a set of condition for climate change, then it is unarguable that every breathing human being would fit such description of emission sufficiency "probabilistically", since one's emission need only fit a part, be it big or small, of the magnanimous concert emission of his fellow men.

2. The Indonesian Experience: Climate Change as a "Secondary-Tort Claim"

The difficulty of conventional climate tort *per se* is that the claims are made under the heading of climate negligence/nuisance. What if such climate claims are made as a class of damage under the nuisance-based tort for other issues, just like in the Indonesian case?

The Indonesian climate tort cases are novel and unique in two different sense. First, it addresses climate change not as the primary tort suit, that is climate tort *per se*, but rather as a secondary tort suit. Second, instead of pursuing claims for climate damages, the plaintiffs in these cases, especially in illegal logging and forest fire cases, pursued claims for emission abatement costs.

List of Cases:

- a. Illegal Logging: 1.) *MoE v. PT. Selatnasik Indokwarsa and PT. Simpang Pesak Indokwarsa* (District Court of North Jakarta, 2010); and 2.) *MoE v. PT. Merbau Pelalawan Lestari*.
- b. Forest Fires: *MoE v. PT. Kalista Alam* case. In *MoE v. PT. Kalista Alam*,

Similar logic for calculating losses due to GHG emissions from wildfires can also be found in other rulings, namely: *MoEF v. PT Bumi Mekar Hijau* (2015), *MoEF v. PT. Jatim Jaya Perkasa* (2016), *MoEF v. PT. National Sago Prima* (2016), and *MoEF v. PT. Waringin Agro Jaya* (2017), and *MoEF v. PT. Ricky Kurniawan Persada* (2017). Except in the *MoEF v.*

⁴ Izhak England, *CORRECTIVE & DISTRIBUTIVE JUSTICE: FROM ARISTOTLE TO MODERN TIMES*, xi (2009).

⁵Michael B. Gerrard, 'What Litigation of a Climate Nuisance Suit Might Look Like' (2011), 121 *YALE LAW JOURNAL* 135, 139.

⁶ Douglas A. Kysar, *What Climate Change Can Do About Tort Law?*, 41 *ENVIRONMENTAL LAW* 1, 62 (2011).

PT. National Sago Prima (2016), in all rulings, the courts granted the plaintiff's claims, including emission reduction costs for GHG emissions released from the wildfires.

3. Climate Change Litigation as a Secondary-Tort Claim from A Non-Instrumental Theory of Tort Law Point of View

The Indonesian experience defensible from non-instrumental theories of tort law.⁷ From a non-instrumental approach, tort law is understood as a rights-based mechanism in which private recourses towards wrongs and losses are made possible under the law. The rights-based approach understands tort law as a function in which we are granted such rights. In this regard, McBride argues that “the coercive rights that we can assert against other people...and to determine what remedies will be available when those rights are violated...by other people.”⁸ Standing within this theoretical camp are the corrective justice theory⁹, responsibility theory¹⁰, and civil recourse doctrine.¹¹

In Indonesia's constitution and its environmental regulation, one understands that the State has a legal standing based on trusteeship, that is the State is the rightful owner of all the natural resources within the Indonesian territory. Hence, a destruction to any of those natural resources constitute harms to the State's protected interest. From a civil recourse doctrine perspective, the violation of such protected interests generates a right to action for the State to seek for recourse to the court in order to exercise the State's rights to obtain a remedy for its losses.

Employing civil recourse doctrine in a climate litigation scenario may also help us to understand why some climate torts may be remedied with a regulatory injunction, why some others, like the Indonesian experience, with compensatory damages. Civil recourse doctrine is also useful in explaining how secondary-tort can be normatively possible. In the Indonesian climate secondary-tort claims, civil recourse doctrine provides the theoretical underpinning that justifies the attribution of wrongfulness from the primary tort to the secondary-tort claim: if the forest burning and illegal logging are deemed tortious, what makes one think the emission arising from it as innocent?

⁷ See: Jules Coleman, Scott Hershovitz, and Gabriel Mendlow, *Theories of the Common Law of Torts*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta, ed. Winter, 2015), available at: <<https://plato.stanford.edu/archives/win2015/entries/tort-theories/>>. [Non-instrumental approach to tort law understands tort law as a way of giving expression to certain moral or political principles.]

⁸Nicholas J. McBride, 'Rights and the Basis of Tort Law', in: RIGHTS AND PRIVATE LAW (2012), 351.

⁹ See: Ernest Weinrib, CORRECTIVE JUSTICE (2012); and Ernest Weinrib, THE IDEA OF PRIVATE LAW (2012)

¹⁰ See: Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, in PHILOSOPHY AND THE LAW OF TORTS (Gerald Postema, ed., 2001), p. 72-130; Stephen R. Perry, *Torts, Rights, and Risk*, in: PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS (John Oberdiek, ed., 2014), p. 38-64; and Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA LAW REVIEW 449 (1992).

¹¹ See: John C. P. Goldberg and Benjamin C. Zipurksy, *Tort Law and Responsibility*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS (John Oberdiek, ed., 2014), p. 17-37

Civil recourse doctrine, in this sense, justifies how liability can be imposed towards the defendant's positive emission discharge (i.e. carbon discharge from forest burning). The Indonesian court was uninhibited with the question of causation and the unreasonableness of the defendant's emission; given that the question of such unreasonableness has been resolved according to the merits of the primary tort and also that a causal link has been established by understanding that no emission arising from a tortious act can ever be deemed as "causally" innocent.

From a responsibility theory of tort law, the distributive justice aspect of tort law is concerned in determining to what extent is an act wrongful and to what extent should an agent be responsible for the harms arising from such wrongful act. It is a question on how distributive justice can be localized in a corrective justice view of tort law.

This relates to the issue of liability apportionment. As demonstrated in the Indonesian experience, the plaintiff will not be troubled into having to prove the exact details of the amount of climate change damage that the defendant should compensate, because the apportionment of liability in the Indonesian case relates not to climate change damages, but rather liability apportionment is based on the portion of the defendant's tortious forest burning and illegal logging. The distributive justice issue is addressed by holding the defendants liable for climate change mitigation based on both their contribution in impairing the forest's ability to reduce emissions (negative) and the emission discharged (positive).

From a corrective justice perspective, in the Indonesian experience, the plaintiffs to a climate change tort have avoided the issue of causation and emission "unreasonableness" altogether by claiming for restoration costs, i.e. emission reduction costs, and not climate change induced damages. In this sense, corrective justice explains how the plaintiffs claim for restoration is correlative to the breach of the defendant's duty in burning the forest and cutting down trees illegally. Since compensation can only be given when there is an actual loss (i.e. the burnt forest & illegal logging), the cost of restoration for emission reduction is normatively qualified to be inserted as a loss under the compensation for the value-loss of burning the forest and chopping down the trees illegally. Climate change liability for emission reduction restoration, in this sense, is understood as negative emission. As part of the consequential damage from the forest destruction, negative emission reflects those emissions that would potentially be captured by the existence the forest had the defendant not destroy it. But then, but-for their tortious forest destruction, a certain amount of emission that could have been reduced now remains active in the atmosphere and contributes to causing climate change.

4. Concluding Remarks

The Indonesian climate tort cases are novel and unique in two different sense. First, it addresses climate change not as the primary tort suit, that is climate tort *per se*, but rather as a secondary tort suit. Second, instead of pursuing claims for climate damages, the plaintiffs in these cases, especially in illegal logging and forest fire cases, pursued claims for emission abatement costs.

The most important achievement of this novelty is the way climate litigation may proceed without mistaking the appropriate ethical underpinnings in tort law and how it may be addressed appropriately in climate tort cases. By constructing climate change as a secondary tort to illegal logging and forest fire torts, the way climate change is argued does not contradict with the demands of corrective justice; given that illegal logging and forest fire cases do in fact fit the ethical-conceptual nature of corrective justice in tort law. At the same time, the goal of distributive justice is also satisfied by holding those defendants liable according to their emission contribution.