Opportunity to utilize the citizen lawsuit mechanism for environmental protection

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Abstract. Citizen lawsuits have become an adequate mechanism to control government actions related to environmental issues. The dynamics of citizen lawsuit decisions are developing positively, but behind the absence of regulation, the pattern of decisions is highly dependent on judicial activism. Meanwhile, constitutional guarantees only sometimes make the Government improve to manage responsibilities in environmental management. This paper uses normative legal research methods. A citizen lawsuit with an environmental aspect is a form of environmental right that includes access to information, the right to participate, and access to justice. Public distrust of the Government in environmental governance is manifested in civil lawsuits as a form of citizen control over government actions. Public trust finally transferred to the judiciary with a breakthrough in the citizen lawsuit mechanism based on judicial activism. This evidence can be seen from the characteristics of the Judge's decision that have led to something constructive in environmental management by assessing that the Government and the Defendants have committed acts against the law. However, it has not explicitly used rights-based arguments and the principle of intergenerational justice in the environment and natural resource conflicts.

1 Introduction

1.1 Background

Head of the National Disaster Management Agency (BNPB), Lt. Gen. Suharyanto, said, "Throughout 2022, there were 3,542 natural disasters in Indonesia", consisting of 1,530 floods, 634 landslides, 1,067 climate crises, and 252 land/forest fires. The disaster left 8,762 people, with 856 dead and 42 missing, 8,762 dead, 856 dead, and 42 missing. From the disaster data, the climate crisis must be a significant concern. The results of the 2019 YouGov survey with several respondents, 30,000 people in 28 countries, show that most of the world's population believes that humans are fully or partially responsible for the current climate crisis. As many as 93% of the total respondents in Indonesia think that humans are responsible for the climate crisis.[1]

According to Law Number 32 of 2009 concerning environmental protection and management, the State, as the duty bearer, is responsible for the environment. The State must ensure sustainability, balance, integration, benefit, prudence, justice, ecocoreigion, biodiversity, pollutant pays principle, encourage participation and local wisdom, and good governance. Unfortunately, through the Government, the State tends to be negligent in its efforts to protect the environment and bring the perpetrators of environmental destruction to justice. Civil society and environmentalists are suing the Government for taking actions that damage the environment through various permits, omissions, or lack of dealing with corporations or business entities that result in environmental damage.[2, 3]

The citizen lawsuit mechanism proposed by civil society to the Government aims to emphasize four aspects, namely (a) responsibility in protecting the environment; (b) revoking policies that have been issued; (c) creating a new norm (negative legislative) from the Judge so that it becomes environmental law; and (d) imposing recovery obligations by corporations or individuals who commit environmental crimes. Several citizen lawsuits were filed by the community in this context, for example, (1) a lawsuit for air pollution in the DKJ Jakarta area and several other big cities at the Central Jakarta District Court with case Number 527/PDT.G/2012/PN.JKT.PST; (2) lawsuit for air pollution due to forest fires by corporations filed at the Palangka Raya District Court with case Number 118/Pdt.G/LH/2016/PN Plk; and (3) a claim for water privatization which is detrimental to the environment and the people of DKJ Jakarta was submitted to the Central Jakarta District Court in case Number 527/PDT.G/2012/PN.JKT.PST.

Based on this sample, this paper will focus on analyzing three main aspects, first, how is the perspective of citizen lawsuits as a government control mechanism in environmental protection; second, an analysis of the characteristics of judicial decisions. Furthermore, third, challenge the application of judicial activism in
environmental lawsuits. As a consideration, the Supreme Court has issued Circular Number 36/KMA/41/2013 concerning the Enforcement of Guidelines for Handling Environmental Cases, encouraging Judges to be progressive, use scientific evidence, and innovate with their decisions.

This paper has a novelty because it will focus on the aspects mentioned above, centring on the relationship between citizen lawsuits, analysis of the characteristics of decisions, and their relation to intergenerational justice. In comparison, Rini Astuti's research focuses more on the role of youth in international justice as a form of participation in determining public policy in the Anthropocene era, introduced by Paul Crutzen to strengthen ecosystems on earth.[4] Yanis Rinaldi's paper on the Concept of Justice in the Management of Natural Resources descriptively emphasizes the concept of justice in managing natural resources based on international justice theory from the Principles of the Rio Declaration.[5] The study of Lailiy Muthmainnah concludes that the environmental damage and the threat of an ecological crisis in Indonesia are not only caused by a management paradigm that is still anthropocentric but also influenced by inequality in access and distribution of resources and capital.[6] Based on the previous study, this paper posits to fill the gap in the discussion of intergenerational justice with the decision of a citizen's lawsuit regarding natural resources and the environmental governance in Indonesia.

1.2 Method

This paper was written and analyzed using normative legal research. The legal research information counts on the primary legal material by examining theories, conceptual approaches, statute approaches, and court decisions related to this research. Therefore, this normative research is related to the inventory of cheerful legal instruments, legal principles, doctrines, legal findings in cases in concreto, legal systematics, and legal comparisons. Furthermore, this paper is based on a study of documents or literature based on the materials described and analyzed previously.

2 Discussion

2.1 Citizens' control of government

Public or citizen lawsuits are often used as an innovative legal instrument to support the Government to run according to the corridor. Nonetheless, in the context of practice in Western countries, Adelman and Glicksman divide citizen lawsuits into three categories, namely (a) filed against private entities or public agencies for allegedly violating their responsibilities; (b) lawsuits against the federal or State Government for non-compliance with mandated statute; and (c) citizen lawsuit filed against a government agency that does not take action or response as stipulated in the law.[7]

Some examples of citizen lawsuits filed by civil society and environmental activists against the Government in Court include:

a. The lawsuit for the privatization of drinking water in the province of DKI Jakarta was filed by WALHI, accusing the Government of neglecting residents' access, drinking water supply, and environmental issues. The Judge decided the lawsuit and final, starting from the case at the Central Jakarta District Court 527/PDT.G/2012/PN.JKT.PST. Junto DKI Jakarta High Court Decision Number 588/PDT/2015/PT.DKI junto Supreme Court Decision No. 31 K/Pdt/2017.

b. The lawsuit by environmental activists and residents on behalf of Arie Rompas and al. against the President of the Republic of Indonesia for being negligent in the forest fire incident. The lawsuit was tried at the Palangkaraya District Court with case No. 118/Pdt.G/LH/2016/PN.Pkl. Forest.

c. The air pollution lawsuit was filed by actress Melani Subono and al., whom the Jakarta Legal Aid Institute authorized. This lawsuit was submitted to the Central Jakarta District Court No. 374/PDT.G/LH/2019/PN.JKT.PST against the President of the Republic of Indonesia, the Minister of Environment and Forestry, the Minister of Home Affairs, the Minister of Health, and the Governor of DKI Jakarta, who was deemed negligent in preventing air pollution in the National Capital.

d. Citizen lawsuit by resident Hermanto et al., a resident of the City of Surabaya, over the attempt to convert the function of the Sepat Dam for the benefit of a housing company that harms the environment. This lawsuit was filed by residents against the Surabaya City Government, which issued a permit at the Surabaya District Court with case number 200/Pdt.G/2019/PN Sby.

Several decisions on citizen lawsuits in Indonesia make it explicit that there is an intersection between the Court's authority and the rights of citizens dealing with government responsibilities. Based on the typology of the decision, the citizen's lawsuit mechanism is recognized and has become a mechanism for citizen control over government responsibilities. Although there is no regulation yet, this mechanism is commonly used. The fourth decision are on the same line, namely based on the right to a good and healthy environment, as regulated in Article 28H paragraph (1) of the 1945 Constitution. From this point on, environmental management considered the privilege of policymakers, has become an essential issue for human rights defenders, judges, and other stakeholders.

Citizens, individually or in groups, act as plaintiffs against the government and state institutions as defendants. Citizens' lawsuits are based on public interest considerations, which means that evidence regarding the volume of damage or loss is not the dominant factor.[8] A citizen lawsuit with the object of the lawsuit regarding negligence or omission of government obligations requires more complicated facts and evidence. Therefore it is essential to reinforce the phrase public interest and strengthen victim representation, such as class action lawsuits.[9]

In the air pollution lawsuit, the public interest of the plaintiff is based on three root issues, i.e., (a) polluted
Jakarta air quality, (b) weak monitoring of Jakarta air quality, (c) national and regional air quality standards are not sufficient to protect Jakarta's public health.[10] Meanwhile, from the forest fire lawsuit, the public interest of the plaintiff is based on the description of the extensive and massive forest fires since 1997, the extensive losses and victims, and the defendants' weak response and mitigation efforts. From the public interest argument, the defendants of the two lawsuits were declared to have committed an unlawful act.

Meanwhile, in the water privatization lawsuit, the plaintiff's public interest points to the private sector's management of Jakarta's water. This lawsuit indicates state losses in water management that the provincial government budget must bear. In essence, the Government still needs to carry out its legal obligations. This lawsuit postulated that the public interest received a response and underwent a lengthy legal process.[11] At the appeal level, cassation, and judicial review, debates around the lawsuit's legal object, mainly in the form of a state administrative decision, and the involvement of the private sector as the defendants coloring the legal process. The Judge questioned the corporation's involvement in the citizen's lawsuit at the appeal and review level. The guidelines from the Supreme Court have regulated the possibility of a lawsuit being directed against a private party for participating in organizing the public interest.

The different discourses can be analyzed in the Sepat Reservoir lawsuit. The public interest, the basis of the lawsuit, departs from the transition of the Sepat reservoir's status and function, which was initially shared by the residents collectively but became lost with the change of function and status. Meanwhile, the lawsuit, ideally leading to the loss of public interest due to the Government's actions, is ruled out by the chronological flow and specific forms of government actions considered against the law. This issue triggers the intervention of a third party as a plaintiff for intervention, even though the third party does not carry out the public interest but is harmed by the Sepat Reservoir lawsuit.

From public interests stated in the citizen's lawsuit, this issue becomes a touchstone against the Government's actions as the holder of state obligations. So that the decision against a citizen's lawsuit has the character of correcting unlawful acts committed by the Government, this lawsuit is considered standard in environmental management are packaged with fulfillment of human rights is the responsibility of the state, especially the government." State obligations in environmental management are packaged with sustainable development and the principle of intergenerational justice.[13]

2.2 Valuing judicial decision characteristics

It analyses several samples of decisions related to citizen lawsuits; almost all postulated unlawful acts by the authorities known as onrechtmatige overheidsdaad. An unlawful act occurs when the Government does not try to enforce the law (a harmful act), and the act causes a loss. Technically, the unlawful rules act is categorized into four things: actions that are contrary to the rights of others; actions that are contrary to their legal obligations; actions that are contrary to decency, and actions that are contrary to prudence or necessity in good social relations.[14]

In the air pollution lawsuit, the Capital City Movement Advocacy Team Coalition (the Initiative to Clean the Air of the Universal Coalition) uses the arguments of Articles 1365 and 1366 of the Civil Code. Unlawful acts committed by the Government for not carrying out its obligations in protecting the public from exposure to air pollution and its negligence in not taking action or law enforcement against polluters.[15] In a forest fire lawsuit, an unlawful act indicates that the Government does not have clear and measurable efforts to control land/forest fires and ensure environmental sustainability. Meanwhile, in the decision on water privatization, the DKI Provincial Government is considered to have committed an unlawful act by cooperating with the private sector and harming state finances.

In these decisions, the Judge has two points of the same opinion. First, the Judge correctly places the construction of the President as Head of Government based on Article 4 paragraph (1) of the 1945 Constitution, which is responsible for the execution of the executive role, which must manage and protect the interests of citizens. In carrying out his duties, the President is assisted by the vice president and several state ministries led by ministers of State to regional heads. Therefore, if the obligation is not carried out properly, it is considered an act contrary to its legal obligations. Second, the assessment of government negligence is based on two aspects: the formation of regulations (legislation) as a basis for fulfilling obligations and aspects of the prosecution involving law enforcement for the perpetrators.

Observing the decision of the Sepat reservoir, the Judge’s mindset did not lead to a public interest test that was violated due to the Government's actions but led to proving the civil relationship between the Government and a third party who intervened. As a result, the character of the public interest that becomes the spirit of the citizen's lawsuit needs to be more visible. Hence, the citizen's lawsuit will become an ordinary civil dispute with formal evidence. Interestingly, in the decision related to the case of third-party intervention, the plaintiff is considered to have violated the law because he filed a citizen lawsuit without a clear legal basis. From the decision of the Sepat Reservoir, it can be observed that there is a shift in the
understanding of judges from citizen claims to civil disputes when third-party intervention dominates. The character of the Judge’s decision in each case can be seen in several contexts and perspectives or even from the level of legal effort. Analyzing the Judge’s response to the facts, the first-level decision becomes the basis for looking at the nature of the decision. An overview of the composition of judges’ decisions can be illustrated in the following figure.

![Fig. 1. Composition of judge's decisions in citizens' lawsuit in environmental issues.](image)

Based on Figure 1, the composition of citizen lawsuit decisions contains at least three aspects. First, unlawful acts committed by the Government correlate with the defendant's negligence as an unlawful act. Second, the examination of the Government's legal actions, as stated in the lawsuit, is based on the public interest. This aspect is intertwined with the first aspect. Exception, in the decision of the Sepat Reservoir, the examination leads to the relationship and civil rights of third parties to the object of dispute. The decision negates the aspect of public interest, which should be the dominant part of the Judge’s mindset in formulating the decision. Third, to collect the Government's legal obligations as Defendants. In a broader context, the legal obligations are within the scope of state responsibilities related to protecting, promoting, enforcing, and fulfilling human rights, as referred to in Article 281 paragraph (4) of the 1945 Constitution. The third aspect can be seen as punishing the defendants for performing their legal obligations.

However, based on the analysis of the fourth court decision, the Judge did not consider the human rights perspective in deciding the case. This situation controversy with fundamental characteristics of the environment and natural resources cases are related to the responsibility of the State (Government) to ensure the fulfillment, protection, and enforcement of the implementation of the principle of justice.[16] This principle of justice is cohesive between applying the principle of intergenerational justice and shared responsibility in using natural resources and preserving the environment. Applying these principles accurately and precisely is a crucial element for the discourse on justice between generations and the distribution of natural resources.

This obligation is also related to Indonesia's commitment to signing the Rio Declaration on Environment and Development (2012) to strengthen concepts and theories about intergenerational justice. Page argues that the theory of intergenerational equity is compatible with the idea that the current generation should "debt" future generations. Therefore, it is not arbitrary to damage the environment and climate system. Therefore, what is passed down to the next generation is a resource that is no less abundant than what is inherited from the previous generation. Meanwhile, Campos said, a theory of intergenerational justice involves studying the moral and political status of the relations between present and past or future people, specifically, of the obligations and entitlements they can generate.[17]

Simultaneously, the Judge's mindset recognizes and understands the importance of environmental policy principles requiring judicial activism to respond to living justice. Private parties or corporations are the defendants in deciding to privatize water, and exposing the State's financial losses is prominent. Based on the public interest requested, the decision annuls the Government's legal action in the cooperation agreement that caused state financial losses. Corporations are also considered to have responsibilities in environmental aspects. Therefore, including a corporation in a citizen's lawsuit with an environmental object is justified. In the macro context, companies are now subject to human rights responsibilities.[18]

### 2.3 Challenge for judicial activism implementation

In law enforcement breakthroughs, citizen lawsuits characterized by the environment are a form of the Government's failure to provide constitutional guarantees for environmental management. Thus, the citizen's lawsuit is a form of public distrust of the Government and leaves the public's trust in the judiciary. Referring to the 1945 Constitution, Article 1 paragraph (3) stipulates that Indonesia is a state of the law; thus, all state or government administration and public affairs must be based on recognized legal instruments. Kelsen's theory of favorable legislation stipulates that the parliament's authority to form laws and regulations is a function. It is also stipulated in Article 20, paragraph (1) of the Indonesian Constitution that the parliament is the holder of the legislative mandate. Referring to Article 7 paragraph (1) of Law No. 11 of 2012 concerning the Formation of Legislation, the highest hierarchy in Indonesia is the constitution to the lowest order, namely Regional Regulations. The regulation's existence is recognized and has legal force if its formation is based on the higher law mandate or based on authority.

However, in practice, the mechanism of regulation formation can also be based on judges' decisions, manifesting the courts' independence to provide citizens with justice and legal certainty. The formation of regulations or orders for policy formulation through decisions by judges in Oreste Pullicino’s view in Judicial Legal Reasoning in the Framework of the Equality
Between Judicial Activism and Self-Restraint is called judicial activism. Judges decide on various situations and conditions, especially morality.[19]

The judicial role under the Supreme Court is the authority to enforce law and justice based on Pancasila and the 1945 Constitution if the State, through the Government, obeys or is not responsible for ensuring the continuity and preservation of the environment as regulated in Article 2 of Law No. 32 of 2009 concerning Environmental Protection and Management. Based on the characteristics of the decisions discussed in the previous section, there is a dimension in that judges have implemented a culture of judicial activism as a mechanism for forming regulations or norms that must be obeyed. In exercising judicial power, the Judge, in their decision, orders the revocation or formation of laws and regulations, especially in conflicts over natural resources and the environment.

Referring to the Forest Fire Decision, one of the decisions ordered the Government to issue seven implementing Regulations on Law Number 32 concerning the environment, which is very important for preventing and mitigating forest and land fires by involving community participation. The seven rules are (1) environmental capacity; (2) environmental quality standards; (3) environmental damage standards due to forest and land fires; (4) the environmental and economic instruments; (5) environmental risk analysis; (6) procedures for dealing with environmental pollution/damage; and (7) The environmental restoration procedures regarding the air pollution lawsuit ordered the Government to issue an implementing Regulation on Law Number 32 concerning the environment, which is very important for preventing and mitigating forest and land fires by involving community participation.

Based on the analysis of the Air Pollution Decision, there are two major decisions, namely onrechtmatige overheidsdaad by the President and Regional Heads in protecting the right to a good and healthy environment, as well as ordering the formulation of policies and strategies as well as action plans for controlling air pollution, distributing emissions, as well as focusing on targets and involving public participation. The DKI Jakarta Provincial Government, Governor Anis Baswedan, stated that he had not appealed against the decision. There are two reasons based on this consideration: to accelerate air pollution control in the capital city and to immediately follow up with the preparation of regulations and law enforcement for air polluters. One of them is the emission test policy for motorcycles and cars. Meanwhile, in the Sepat Reservoir Decision, the plaintiff’s argument highlights the public interest and the right to a good and healthy environment which unlawful acts by the Government were not visible. As if covered by the interests of third-party intervention, proof of unlawful acts by the Government is eroded by formal evidence in civil cases.

The Judge's choice to implement judicial activism in Indonesia is juridically based on two arguments, namely: First, Article 5 paragraph (1) of Law No. 48 of 2009 concerning Judicial Authority which instructs judges and constitutional judges to explore, follow, and understand the legal values and sense of justice that live in a society which aims to fulfill the ideals and sense of justice, so that provide flexibility to judges to follow the progress of science in the field of law. Second, encouragement and incentives from the Supreme Court as a follow-up to decision no. 36/KMA/SK/II/2017 concerning implementing Guidelines for Handling Environmental Cases. The Supreme Court encourages judges to be more careful in proving by applying scientific evidence and deciding with judicial activism, even on environmental cases that have a broad impact, even though the evidence is still limited. The Judge's obligation to adapt and absorb social conditions as well as legal reform, in Pollicino's view, is a legitimate expression of the judiciary as a form of control of the doctrine. Judges were seen as inanimate, robot-like spokesmen of the law.[14]

Observing the previous discussions, one way that can be done to make new adaptations in the application of the concept of intergenerational justice is through the mechanism of public lawsuits and decisions of judicial activism. Allen CK in Law in the Making explains that forming favorable regulations through parliament is not the only way to reform the law. Adapting from the courts with judicial activism or special techniques through judiciary institutions (as in the common law system), they can bridge the disparity between law and reality with ideal justice. Maine says it is a supplementary or remedial jurisdiction; without it, the law will be at a fatal stalemate.

A critical note as a discourse on the implementation of judicial activism also occurred centuries ago, especially the debate between Austin and Bentham, who called this judicial activism "miserable sophistry." Several other criticisms of judicial activism have been made by politicians or commentators distracted by their "interests." They considered that the Judge’s decision was inappropriate and deviated from the limits of the judicial function. In countries belonging to the civil law tradition, it is considered inconsistent with Montesquieu's famous description of the Judge as merely the mouthpiece of the law.

Therefore, judicial activism is not always interpreted negatively. Kmiec formulates two advantages of judicial activism in origin and current meanings of judicial activism. The first is a manifestation of the principle of checks and balances against state authorities and government systems, therefore does not simply annul legislation but ensures that the legislature's product is under the constitution. Secondly, judicial activism is vital in upholding human rights.[20] In Article 28 of the 1945 Constitution and various laws on ratification of international covenants, human rights have been regulated and formulated to be fulfilled, obeyed, and enforced by the State through the Government. For this reason, it is essential to open space for judges' freedom in the context of judicial activism, which focuses on the principle of intergenerational justice in environmental management.

3 Conclusion

Based on the overall analysis and discussion described above, the authors conclude that the citizen lawsuit mechanism related to environmental lawsuits is a form of control and demands State responsibility to guarantee
environmental rights. This citizen lawsuit is a form of Procedural Environmental Rights that is pursued through the mechanism of the judiciary. Responding to citizen lawsuits, the Court, through Judges in their decisions, has the same character, characterizing the Government's actions as unlawful because they do not enforce environmental laws or allow environmental crimes to occur. The judges have yet to characterize the Government's actions as violating human rights, especially the right to a healthy and clean environment. Decision considerations have yet to adopt fundamental principles such as sustainability and intergenerational justice. Likewise, the basis for deciding on judicial activism, as referred to in the Supreme Court circular letter in environmental cases, has yet to be fully implemented by judges. This paper tries to challenge the judiciary to be more progressive so that judges, in deciding environmental lawsuits emphasize considerations based on the rights and obligations of the State. It is hoped that the environment will be maintained, the development will continue to apply sustainability principles, and justice between generations can be achieved.

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