

## Human Rights Based Litigation in Promoting Disaster Preparedness

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### Abstract

Indonesia grapples with an elevated susceptibility to natural disasters, as highlighted by the 2018 Indonesian Disaster Risk Index (IRBI), placing all provinces within the medium to high risk spectrum. The resulting devastation, losses, and adverse effects are compounded by societal vulnerabilities and a lack of capacity to manage such crises. This study advocates for a human rights-based approach to disaster management, serving as a dual tool to instigate government accountability and empower communities to enhance their resilience. A pivotal focus lies on preparedness as an essential factor, aiming to cultivate capabilities for efficient emergency management and seamless transitions from immediate response to sustained recovery. Recognizing the potential of effective preparedness measures in significantly mitigating the impact of disasters, this paper employs a normative approach, incorporating statutory and court case analyses, to scrutinize the feasibility and challenges of litigation. The objective is to assess the

government's adherence to preparedness requirements, leveraging legal avenues to ensure comprehensive disaster resilience. This research sheds light on the prospects and hurdles of utilizing litigation as a mechanism for prompting government action and fostering a culture of preparedness within the Indonesian context.

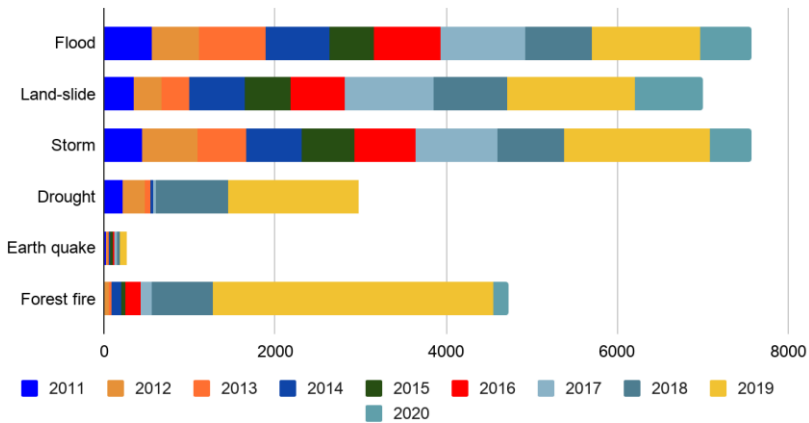
## Keywords

*Disaster Preparedness, Human Rights-Based Litigation, Indonesia*

## I. Introduction

Indonesia is prone to natural disasters. This was shown by the average of Indonesia Disaster Risk Index or *Indeks Risiko Bencana Indonesia* (IRBI), which stated that 16 of Indonesia's provinces are classified in a high-risk disaster areas, and the rest of the 18 provinces are classified in medium risk disaster area (Nugroho et al., 2018). According to National Disaster Agency (*Badan Nasional Penanggulangan Bencana*/BNPB) the frequency of disaster occurrences in Indonesia between 2010 and 2020 is shown in the below graph.

Indonesia Disaster between 2010 and 2020 by BNPB



Source: C. M. Annur, “Apa Bencana Alam yang Paling Sering Terjadi di Indonesia 10 Tahun Terakhir?” <https://databoks.katadata.co.id/datapublish/2020/09/22/apa-bencana-alam-yang-paling-sering-terjadi-di-indonesia-10-tahun-terakhir>.

From the data above, disasters that occurred in Indonesia in the past ten years were mostly hydro-meteorological type (such as floods, storm, and drought), and few others were geological type disasters (such as tsunami or earthquake). The trend of disaster will increase in the future following the issues of global climate change, biodiversity loss, and environmental degradation.

Even though in the chart above, the disasters that happened in Indonesia were mostly natural, disasters are not limited to just natural catastrophes. There is also another dimension related to the role of the people in facing the catastrophe occurred in a disaster. UNDRR defines disaster as a severe disruption of the functioning of a community or society at any scale due to hazardous events interacting with conditions of exposure, vulnerability, and capacity, leading to one or more of the

following: human, material, economic, and environmental losses and impacts (United Nations Office for Disaster Risk Reduction, n.d.-b). By this definition, it shows that disaster also has the vulnerability and the capacity of the human among the factors affecting the impacts of a disaster. The International Federation of Red Cross and Red Crescent Societies, n.d. said that the concept of disasters could be formulated as follows.

$$[(\text{Vulnerability} \times \text{Hazard})]/\text{Capacity} = \text{Disaster Risk}$$

The Hazard is a process, phenomenon, or human activity that may cause loss of life, injury or other health impacts, property damage, social and economic disruption, or environmental degradation (United Nations Office for Disaster Risk Reduction, n.d.-d). The vulnerability aspect in the formula shows that there are social factors in a disaster, both natural and man-made. Vulnerability means the characteristics of a person or group and their situation that influence their capacity to anticipate, cope with, resist, and recover from the impact of a natural hazard (an extreme natural event or process. It involves a combination of factors determining the degree to which someone's life, livelihood, property and other assets are put at risk by a discrete and identifiable event or series or cascade of such events in nature and in society (Ben et al., 2003).

Vulnerability also the condition determined by physical, social, economic, and environmental factors or processes which increase the susceptibility of an individual, a community, assets, or systems to the impacts of hazards (United Nations Office for Disaster Risk Reduction, n.d.-e). Based on the definition,

vulnerability can be seen as a certain kind of situation that influences the capacity of a person or group to anticipate, cope, resist, and recover when exposed to a particular hazard. On the other hand, capacity combines all the strengths, attributes, and resources available within an organization, community, or society to manage and reduce disaster risks and strengthen resilience (United Nations Office for Disaster Risk Reduction, n.d.-a).

To reduce the potential risk of a disaster, we need to do any possible means to minimize the impact. Furthermore we need an approach that could lessen the impact in comprehensive and continuous steps. These measures must be included in disaster management. There are several definitions that UNDRR recognizes related to disaster management. Disaster management is the organization, planning, and application of measures preparing for, responding to, and recovering from disasters (United Nations Office for Disaster Risk Reduction, n.d.-c). While disaster management is a more general concept, there are also deeper and broader concepts that we are going to discuss further in this paper, namely disaster risk reduction (DRR)

Based on International Strategy for Disaster Risk Reduction (ISDRR), DRR is the conceptual framework of elements considering the possibilities to minimize the vulnerabilities and disaster risks throughout a society, to avoid (prevent) or to limit (mitigation and preparedness) the adverse impacts of hazards, within the broad context of sustainable development (United Nations, 2004). Disaster risk reduction is an in-depth concept that covers all essential steps to reduce any risks even before a disaster happens, as well as during and after the disaster. It comprises preventive measures, mitigation, preparedness, response, and recovery.

In this paper, the preparedness stage is a distinct phase to be implemented just before a disaster happens. Preparedness focuses on an actionable plan to reduce the disaster's impact including predicting the disaster and, if possible, preventing it from happening, reducing the potential impact especially for vulnerable people, and responding and overcoming the possible consequences effectively (The International Federation of Red Cross and Red Crescent Societies, 2000). By planning effective preparedness measures, it could potentially save millions of lives. This was proven in Jamaica, where the Red Cross volunteers announced that a hurricane was coming 48 hours in advance to the potentially affected areas. No deaths were reported in La Independencia, Guatemala, during the hurricane season in October 2005 due to early warning systems conducted by the volunteers who announced upcoming evacuation over loudspeakers and television fields (The International Federation of Red Cross and Red Crescent Societies, 2006).

The preparedness stage is part of the responsibilities of the states to ensure that every aspect of the communities and institutions are taking part according to the plan so that the risk of disaster that may cause suffering to the people can be prevented and alleviated. In disaster risk reduction, each individual, group, community, and institution has different roles and takes part in response operations. Based on the International Federation of Red Cross and Red Crescent Societies, the public authority or the government has an important role specifically to communicate and coordinate the plans with each government agency, and non-governmental institutions involved in disaster preparedness and response so the government can improve said planning to be more effective and efficient to reduce the risk of the disaster. The

preparedness stage includes a few actions: hazard, risk, and vulnerability assessment; public training and education; resource mobilization; preparedness planning and strategy; and early warning systems and information management.

In Indonesia, the preparedness stage has been known as one of the problems in reducing the risk of disasters. It was shown in 2018 when a tsunami hit Donggala, Palu, and killed more than 1200 people; it was found that several preparedness problems occurred during the disaster. The system built to anticipate the tsunami was not working properly, namely, in this case, the BTS tower that was destroyed. Thus people failed to receive the text message alerts, there were no sirens along the beach, any of the open water tsunami buoys had not been working since 2012, and there was no observation center or equipment near enough to Palu to measure the tidal changes (Singhvi et al., 2018). Moreover, the infrastructures to accommodate evacuation for tsunamis could have been more decidedly inadequate, especially because the risk of tsunamis on the coast of Sulawesi is more likely to happen.

This research attempts to answer the question: what are the prospects and challenges for the human rights approach to the litigation for implementing disaster preparedness? This paper looked up to some previously written research, such as Sharaningtyas's (2016) research which aimed to link the model of a civil law suit and the justiciability of the right to a clean and healthy environment, and Sembiring & Baihaqie's (2020) research which discussed doctrinal issues that are likely to arise in Indonesia's climate litigation. Meanwhile, this research focuses on the fulfillment of preparedness measures by the state in broader types of disasters, not only climate-related ones.

## II. Method

This paper uses normative approach, namely statutory and court case approach to understand and answer legal issue. The application of a normative approach in this paper, specifically through a statutory and court case analysis, involves a methodical examination of legal frameworks and judicial decisions relevant to the subject matter. The term "normative" pertains to the establishment and analysis of norms, standards, or principles within a legal context. In this context, the focus is on understanding and addressing legal issues related to disaster preparedness measures in Indonesia.

Firstly, a statutory approach involves an in-depth examination of existing laws, regulations, and statutes pertinent to disaster management and preparedness in Indonesia. This includes scrutinizing the language, intent, and implications of relevant legal provisions. By dissecting the legislative framework, the paper aims to assess the adequacy and clarity of the legal infrastructure governing disaster preparedness.

Secondly, a court case approach involves delving into judicial decisions or precedents related to disaster management or preparedness. This entails analyzing how courts have interpreted and applied the law in past cases, providing insights into legal interpretations, precedents, and potential gaps or ambiguities in the legal system. Examining court cases helps to understand how legal principles have been practically applied and interpreted in the context of disaster preparedness, offering valuable perspectives on the legal landscape.



Overall, the normative approach utilized in this paper aims to provide a comprehensive understanding of the legal issues surrounding disaster preparedness in Indonesia by examining both the statutory framework and relevant court cases. This method allows for a nuanced exploration of the legal landscape, facilitating informed analysis and recommendations for improving government compliance and societal resilience in the face of natural disasters.

### III. Human Rights-Based Approach in Disaster Context

It cannot be denied that disaster impacts human rights enjoyment. The losses and damages resulting from disasters may cause deprivation of the right of life, right to adequate housing or standard of living, right to food and water, right to health, and many more. Human rights are also hard to fulfil in disasters because it must face uneasy conditions, such as restricted access, scarcity of resources, or inadequate facility. Nevertheless, Inter-Agency Standing Committee (IASC) Operational Guidelines on The Protection of Persons in Situations of Natural Disasters stated that the people affected and unaffected by disasters shall enjoy the same rights and freedoms. It is as stated below,

*Persons affected by natural disasters (affected persons) should be recognized and treated as persons entitled to enjoy the same rights and freedoms under international human rights law as others in their country and to not be discriminated against on the basis of their race, color, sex, disability, language, religion, political and other opinion, national or social origin, property, birth, age or other*

*status. Targeted measures to address specific assistance and protection needs of women and children and particular categories of affected populations, including but not limited to older persons, persons with disabilities, persons living with HIV/AIDS, single heads of households and child-headed households, internally displaced persons or members of ethnic or religious communities and indigenous peoples, do not constitute discrimination if, and to the extent that, they are based on differing needs.*

Incorporating a human rights-based approach (HRBA) in disaster-laws and related policies can arguably reduce individuals' vulnerability and enhance resilience by providing empowerment through law for the justice-seeking (Costa & Pospieszna, 2015). According to United Nations Development Group (2003), there are some principles in HRBA, namely:

- a. universality and inalienability, which means that all people everywhere in the world are entitled to them, and the human person in whom they inhere cannot voluntarily give them up;
- b. inter-dependence and inter-relatedness, which means the realization of one right often depends, wholly or in part, upon the realization of others;
- c. equality and non-discrimination, which means all individuals are equal as human beings and by virtue of the inherent dignity of each human person and their entitlement of human rights are without discrimination of any kind;
- d. participation and inclusion, which means that every person and all peoples are entitled to active, free and meaningful participation in, contribution to, and enjoyment of civil, economic, social, cultural and political development in which human rights and fundamental freedoms can be realized; and

- e. accountability and rule of law means that states and other duty-bearers are answerable for the observance of human rights and must comply with the legal norms and standards enshrined in human rights instruments.

HRBA support mechanisms that ensure that the rights of human beings are realized and safeguarded.<sup>[16]</sup> According to human rights law, the state bears the primary duty or responsibility to protect and fulfil people's rights. The State has an obligation to prevent loss of lives, including losses of economic and social assets, and to prevent other human rights violations, whether caused by human or natural forces. On the other side, human beings as right-holders can claim their rights and demand from duty-bearers for their fulfillment. Regarding right-holder and duty-bearer relationship, the use of HRBA has an advantage by bringing clarity about who is entitled to what *vis-à-vis* whom. People also can claim for the responsibility of the state for the fulfillment of human rights (Costa & Pospieszna, 2015). In particular, this claim can be implemented by a seeking-justice mechanism such as court litigation.

#### IV. Cases involving HRBA in Disaster Context

Claim for protection or fulfillment of human rights can also include preparedness measures such as access of information, early warning systems, and pre-disaster training and education. With rights litigation, people can contribute to better regulation for implementing preventive actions needed for everyone, evaluate

regulation; make sure there are no rights violated during a disaster. Several cases are supporting this kind of claim. The first case is *Tătar and Others v. Romania*. This case is about an environmental accident in January 2000. The case happened at the breach of the Baia Mare Aurul gold dam, releasing 100.000 m<sup>3</sup> of cyanide-contaminated waters into the environment. After the violation, the company operating the gold mine did not halt and continued its operation. This caused significant concerns for villagers living nearby about their exposure to dangerous levels of sodium cyanide. The applicants of this case complained based on article 2 of ECHR (right to life) because this disaster was putting their lives in danger. However, in this case, the court considered that the claim could be brought under article 8 of ECHR (right to respect for private and family life) because the applicants did not have access to adequate measures to protect the rights of persons in interest. The Court also considered that access to sufficient and detailed information is a crucial aspect of article 8 European Convention of Human Rights (ECHR) when managing dangerous facilities which carry pollution or disaster risk for surrounding communities. The case acknowledged various aspects of information access, including obligations to carry out and provide access to risk assessment studies, information about actual exposure to harm, or future safety measures in case of recurring events (Hesselman, 2019).

The second case is *Budayeva and Others v. Russia*. The applicants sued this case after the Russian authorities failed to mitigate the mudslides that happened in the town of Tyrnauz, in the mountain district near Mount Elbrus, in July 2000. In this disaster, the Russian authorities were responsible for the loss of lives and homes and for putting the people of Tyrnauz in threat.

The Court found that the Russian authorities had breached article 2 ECHR in its substance and procedural aspects.<sup>[18]</sup> Based on the decision of the court, the Russian authorities had violated the right to life in the failure to protect the residents of Tyrnauz from mudslides because the authorities could not justify its failure to implement land planning & emergency relief policy and also inability to maintain the infrastructures to reduce the risk of the mudslide, thus making the residents of Tyrnauz more vulnerable when facing such hazard.<sup>[18]</sup> The Court also found that there was a lack of any state investigation of the mudslide accident. In sum, the ECHR concluded that the government could not reasonably explain its neglect regarding these matters and other recommended DRR measures (such as repairing the defense infrastructure) and ruled that article 2 ECHR was violated. The cases mentioned above support the argument of using rights-based in litigation settings to take into account state responsibility, especially in redressing individuals' loss (Hesselman, 2019).

## V. Prospects and Challenges

The lawsuit is a claim for rights that aims to provide legal protection provided by the court to prevent the *eigenrichting* (Mertokusumo, 2002). According to Mertokusumo, there are two essential principles regarding lawsuits in civil justice system. Firstly, the *point d'interet point d'action* principle means that there must be an interest to submit the case. Secondly, *actori incumbit probatio* principle means that whoever argues something must prove it (Iqbal, 2012). Lawsuits evolved not only as a justice-seeking mechanism among individuals but also to put state actors or institutions to accountability and responsibility. Besides the

civil lawsuit, there are other types of suit frequently used to demand responsibility of the state, especially in cases that involve public interest, namely citizen lawsuits (CLS). CLS has grown and is commonly known in *common law system* countries since they put precedence or judicial decision as main source of their legal system. CLS has the same principle as *action popularis*, which involves public interest that every citizen can claim because they all have the right to protect the public interest.<sup>[14]</sup> CLS development is closely related to environmental cases as in the United States or India (Sharaningtyas, 2016).

Although there are still no guidelines or regulations regarding CLS in Indonesia, the Indonesian court accepted this type of lawsuit for the first time in Central Jakarta District Court Decision Number 28/Pdt.G/2003/PN.JKT.PST (Sharaningtyas, 2016). Besides, in 2013 Supreme Court issued Decision Letter (DL) Number 36/KMA/SK/II/2013 concerning the Enactment of Guidelines for the Handling of Environmental Cases. The DL regulates some provisions regarding CLS in environmental cases. It states that the requirements for filing a citizen lawsuit are as follows: (1) plaintiffs are one or more Indonesian citizens who are not legal entities; (2) the defendants are government and/or state institutions; (3) the basis for the lawsuit is in the public interest; (4) the object of the lawsuit is the omission or non-fulfillment of legal obligations; (5) notification/summons must be submitted within 60 working days before the existence of the lawsuit and it is mandatory, and if there is no notification of the lawsuit, it must be declared not accepted; and (6) notification/summons from potential plaintiffs to potential defendants with a copy to the Chairman of the local District Court.

It is also stated that the contents of the short notification/summons from the prospective plaintiff to the potential defendant in writing contain: (1) information on the perpetrator of the violation and the institution relevant to the violation; (2) the type of violation; (3) legislation that has been violated; (4) what is meant by public interest is the interest of the environment and the interests of living things that are potentially or already affected by environmental pollution and/or damage; (5) it is not allowed to file claims for monetary compensation; and (6) CLS trial procedure refers to HIR/Rbg (Indonesia's civil procedural law).

In a recent development, there are also various court decisions that have shown that several victims of a disaster filed lawsuits against the government demanding an appropriate implementation on disaster preparedness. According to Palangkaraya District Court Decision Number 118/Pdt.G.LH/2016/PN.Plk, human rights-based approach to disaster preparedness was considered one of the aspects that had to be done by the Government, and plaintiff demanded some preparedness activities such as the establishment of early warning systems, evacuation guidelines, and training for people to mitigate the forest fire. In that case, the plaintiffs were Indonesian citizens affected by the forest fire in Palangkaraya in 2015. The plaintiffs formulated arguments by citing several human rights articles both in the constitution (UUD 1945) and acts (Human Rights Act and Environment Management and Protection Act), especially rights for a healthy and sound environment (Article 28D UUD 1945). The defendants consisted of the President of the Republic of Indonesia, the Minister of Environment and Forestry, Minister of Agriculture, Minister of Agrarian and Spatial Planning/Head of

National Land Agency, Minister of Health Affairs, Minister of Domestic Affairs, Governor of Central Kalimantan, and Central Kalimantan House of Representative. They argued that the defendants had not taken adequate and maximum measures to prevent or mitigate the forest fire and its impact on people's health. Minimum resources such as health-mask or medicine were also part of the plaintiff's argument on how unprepared the defendants were. The court concluded that the defendants committed an unlawful act by the government and ordered the defendants to issue rules and policies related to disaster preparedness.

Similarly, in Balikpapan District Court Decision Number 99/Pdt.G/2019/PN.Bpp, plaintiff, also demanded the local government to make regulations about the environmental information system, including early warning system, to anticipate the impact of oil spilling. The case involved, on one side, the people who were impacted by oil-spilling in Balikpapan bay, and on the other side, the government (Governor of East Kalimantan, Regent of Penajam Paser Utara, Mayor of Balikpapan city, Minister of Environment and Forestry, Minister of Transportation, and Minister of Marine and Fisheries). As in the former case, the plaintiff also cited Article 28D UUD 1945 in their argument. The court decided that the defendants committed an unlawful act by the government and demanded to create regulation concerning the environmental information system that includes early warning system.

Although there is a possibility regarding the prospect of implementing disaster preparedness through the CLS mechanism, some challenges also need to be considered. *Firstly*, there still need to be regulations or guidelines about citizen lawsuits. Although the Supreme Court issued CLS guidelines, it is only for environmental



cases. The lack of laws that govern CLS may have an effect of unclear court competence that should adjudicate the CLS cases and no common understanding regarding the scope and limitation of the CLS (Susanti & Widyaningtyas, 2017). *Secondly*, there needs to be more court officials with the capacity to comprehend environmental cases primarily scientific data supporting the arguments given. In the standard procedure litigation in Indonesia, judges tend to play a passive role in the court. Thus, in order to improve the quality of each environmental decision, arguments that the experts submit before the court need to be strong and accurate. Besides that, still lacks judges who have environmental expertise certification. In 2018, of 3846 active judges in Indonesia, only around 22% of them already had environmental expertise certification. This shows that the concern for environmental issues has yet to be in focus, let alone disaster preparedness measures that need to be done (Savitri & Aqil, 2020). *Thirdly*, disaster preparedness roles spread in multi-actors and institutions. This was shown in court decision number 118/Pdt.G/LH/2016/PN.Plk about the case of the forest fire in Central Kalimantan in 2015, where there needed to be more certainty on which stakeholder has the responsibility in aiding the people during the forest fire haze in 2015. Integration and coordination reaching all various actors and institutions were one of the highlighted points in the government's response regarding the forest fire. Based on the plaintiffs' arguments, there hasn't been any focused response that was made during the forest fire, as it was already known that Indonesia's bureaucratic rigidity still plays a part even in times of disaster.

Indonesia has not yet established umbrella regulations for disaster management, making it difficult to have a systematic

disaster preparedness (Vermonte & A.D., 2019). *Lastly*, problems related to the execution court verdict by the government. This problem is also connected with the lack of substantive regulation on CLS. In comparison with the ECHR execution mechanism, a Committee of Ministers examines the state's obligations based on the court decision, whether the measures taken by the state are appropriate or unsatisfying. This mechanism is still lacking in Indonesia, as there is no regulation to guard how the court decision is executed, particularly how rules and policy are created as part of the judgement response (European Court of Human Rights, n.d.).

## VI. Conclusion

In conclusion, based on several court decisions, rights-based litigation can be prospective in fulfilling appropriate measures during a disaster. In Indonesia, this approach could be the solution to access better the fulfillment of the disaster preparedness measures that have to be done by the public authority proven in the decision letter Number 118/Pdt.G.LH/ 2016/PN.Plk and 99/Pdt.G/2019/PN.Bpp, and usually in the context of disaster preparedness, this approach is taken through a citizen-lawsuit. However, there were also the challenges of rights-based litigation. Especially in Indonesia, the regulation for citizen lawsuit-the most common type of lawsuit for right-based approach still needs to be improved so the procedures can be ambiguous or uncertain. The regulations for disaster preparedness measurements and distribution of authority to the government are also lacking, thus

making it challenging to address the issue of the fulfillment of the measurements needed.

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