The Role of the Indonesian Constitutional Court for An Effective Economic, Social and Cultural Rights Adjudication

Heribertus Jaka Triyana
Fakultas Hukum Universitas Gadjah Mada, Yogyakarta, Jl.Socio Justicia, No. 1, Bulaksumur, Yogyakarta, jaka.triyana@mail.ugm.ac.id

Abstract

The Indonesian Constitutional Court has played important roles and functions to protect and fulfill human rights in the Indonesian legal system including the economic, social and cultural rights through its legal power of judicial review. It affirms that the ecosoc rights are legal justiciable rights and they are parts of constitutional mandates. It means that decision on judicial reviews require State to behave in accordance to legal thresholds decided by the Court. Undoubtedly, compliance to the decisions will reveal undeniable facts for fulfilment of state conduct. However, it seems that there are still many considerations, emphasis and excuse to somehow reduce or ignore threshold of application of the Court decisions. Complexity of actors, institutions, authorities, level of implementation, and orientation of particular policies, programs, actions and funds reduces the thresholds.

Key words: justiciable rights, constitutional rights, constitutional mandates, and ecosoc rights

I. INTRODUCTION

It is valuable to note and to deeply review pattern of human rights protection and ejoyment in Indonesia since Indonesia has been actively and progresively committing to human rights standards with specific emphasis on the economic, social and cultural rights (the ecosoc rights) performed by the Indonesian

Constitutional Court (hereinafter the Court).[1] Human rights standards articulate that achievement on the ecosoc rights shall be achieved in accordance with constitutional mandates stipulated by Article 28. Meanwhile, use of power in terms of management of all available resources shall be directed to achieve results determined by that Article *per se*.

Thus, transparent asssessment of the progress and obligation to fulfill of the ecosoc rights can be revealed by means of monitoring state compliance toward the Court decisions through judicial review. State compliance indicates positive endeavour justifying value of state conduct. Novelty lies on fact that realization of the ecosoc rights through judicial reviews delivering another complex problems, challanges and opportunities on how State as the main duty bearer complies with decisions for their effective implementation guaranteeing right holders' justiciability in that sense.

In broader legal scenario, it is also important to note that Indonesia obliges to fulfill and to realize the ecosoc rights under scrutiny of international community. It is caused by the fact that Indonesia has committed to be bound by the International Covenent on Economic, Social and Cultural Rights since it was ratified by the Law Number 11 of 2005. Furthermore, in accordance to Article 7 (2) of the Law Number 39 of 1999 regarding Human Rights, it is crucial to argue that "all international law regarding human rights that have been accepted by Indonesia becoming the law of the land". Consequently, Indonesia has to implement the effectiveness principle. It requires that all provisions of human rights treaties or conventions 'be interpreted and applied so as to make [their] safeguards *practical and effective*'.[2] In this matter, the Court decisions on certain judicial reviews related to laws on the ecosoc rights, such as law on water resources, law on national education system and law on public health have their

[1] *The 1945 Indonesian Constitution* (Undang-Undang Dasar 1945) has been amended fourth times in the following sequences: first Amendment on 19 October 1999; second amendment on 18 August 2000; third Amendment on 10 November 2001 and the fourth amendment on 10 August 2002.

[2] See several legal jurisprudences for examples *Loizidou v Turkey* (Preliminary Objections), European Court of Human Rights (1995) Series A.No.310, 23 February 1995, para. 72; see also *Velasquez-Rodriquez* (Judgment), 29 July 1988, Inter American Court of Human Rights (1988) Series C. No.4, para 167; *Artico v Italy*, European Court of Human Rights (1980) Series A.No. 37, 16; A v UK (Application) No. 15599/1994, Report of 18 September 1997, para 48; see generally Human Rights Committee, General Comment No. 16; ICESCR, Committee, General Comment, No. 5, para 11 (1994).

legal relevance to monitor pattern of state compliance to international standards and principles on realization of the ecosoc rights in Indonesia.

A. Background

There has been many analyses of the role of the Court for economic, social and cultural rights approach and/or for advocacy and adjucitation strategies. Phillipa Venning, for example presents remarkable finding that the Court has been succesfully introduced "a strong judicially enforceable rights" for economic, social and cultural rights in Indonesia.[3] International references quoted by Diana Phillip for instance affirms this stance by stating that "right to water is an implicit but enforceable constitutional rights" within the Indonesian legal system.[4] In her view, enforceable constitutional rights specifically mean that in time of normal as well as in time of humanitarian crisis, State has the obligation to respect, protect and fulfill the human rights to water and held the responsibility of the Government as laid down in the Law on Water Resources must be interpreted in the light of the right to water.[5]

As a legal ratio, in international law, right to water constitute as a basic rights to which enjoyment of human rights depends on the fulfilment of this need. The 1989 Convention on the Right of the Child (CRC) under Article 24 (2) made it obligatory for 'state parties to take appropriate measures to combat disease and malnutrition through the provision of adequate and nutritious food and clean drinking water'.[6] In simple terms, the Court has contributed to safeguard justiciability through judicial review mechanism for a more effective ecosoc rights in Indonesia in the existing laws that may breach or may be inconsistant with the Constitution.[7]

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[3] Phillipa Venning, "Determination of Economic, Social and Cultural Rights by the Indonesian Contitutional Court", *Australia Journal of Asian Law, Vol. 10, No. 1*, 2008 as excerted by Konsitusi, Number 88, June 2014, p. 74-77.

[4] Diana Phillip, "Humanitarian Assistance and the Right to Water: An ASEAN Region Perspective", in Anderj Zwitter, Chirstopher K. Lamont, Hans Joachim Heitze and Joost Herman, *Humanitarian Action: Global, Regional and Domestic Legal Responses*, Cambridge: Cambridge University Press, 2015, pp. 323-324.

[5] *Ibid*. See also the ICC decision on 19 July 2005, Putusan PUU/II/2004 tentang Uji Materi Undang-undnag Nomor 7 Tahun 2004 Tentang Sumber Daya Air.

[6] Markus Burgstaller, *Theories of Compliance with International Law*, Martinus Nijhoff Publisher, 2005, p. 85 and Andrew Guzman, *How International Law Works, A Rational Choice Theory*, Oxford University Press, 2008, p. 22.

[7] Lufthfi Widagdo Eddyono and Mardian Wibowo, "The Fist Ten Year of the Constitutional Court of Indonesia: The Establishment of the Principle of Equality and the Prohibition of Discrimination", *The 1st Summer School of the Association of Asian Constitutional Court and Equivalent Institutions*, Ankara, 6-13 October 2013 , p. 3-4.

In line with the aforementioned analysis, the Court to some extent has developed certain objectively verified indicators (OVIs);[8] orientation of the economic, social and cultural rights fulfilment and/or transparent assessment of the progress;[9] and last but not least certain role and function of the duty bearer *vs.* rights holders (individual and group of individual) within the Indonesian context and perspective for better fulfilment of the ecosoc rights. It thus has positive outcomes in terms of the determination of availibility, acceesibility, acceptability and adaptability indicators for existence of available recources.[10] Nevertheless, it has also widened gaps between normativity and empirical facts; increased legal biases; sharpened overlapping institutions and emerging conflict of norms for the enjoyment and fulfilment of the ecosoc rights.[11] They are most common paradigms reducing effective implementation of the ecosoc' policies, programs, actions and funds in their respective areas, scopes, and functions within the Indonesian legal system.[12]

Needless to say that as the sole gurdian of the Constitution, the Court plays functions as the guardian of the democracy, the protector of the citizen's constitutional rights, and the protector of the human rights.[13] Consequently, the Court guarantees right holders' legal expectation for better enjoyment for the constitutional economic, social and cultural rights. In this scheme, the Court has paved a way to determine thresholds for the ecosoc realization or fulfilment that sholud be fulfilled by the Government when it introduces law, policies, programs, actions and funds. This thresholds represent Constitutional mandates that require Government to behave in certain way to achieve them

[8] Katarina Tomasevski, "Indicators", in Asbjorn Eide (et.all), *Economic, Social and Cultural Rights, A Textbook*, 1995, p. 390.
[9] UNICEF, *A Human Rights Approach to UNICEF Programming for Children and Women: What It is, And Some Changes It Will Bring*, 17 April 1998 and compare with The World Conference on Human Rights: Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, Part I, para 5.
[10] Preamble of the Declaration on the Right to Development, General Assembly Resolution 41/128 of 4 December 1986, http://www.unhchr.ch/html.menu3/b/74.htm; Manfred Nowak, "The Right to Education" in Asbjorn Eide (et.all), *Economic, Social and Cultural Rights, A Textbook*, 1995, p. 196; and The Committee on Economic, Social and Cultural Rights General Comment 13, *The Right to Education (Art. 13)*, 08/12/99, E/C.12/1999/10, CESCR, 8 December 1999, para 1.
[11] Heribertus Jaka Triyana, "The Implementation of the International Norms on Disaster Response in Indonesia", *KLRI Journal of Law and Legislation, Volume 3, Number 1, Korean Legislative Research Institute*, 2013, p. 210-222.
[12] Human Rights Committee, General Comment 3, Article 2, para 1, *Implementation at the national level* (Thirteenth session, 1981), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HR1/GEN/1/Rev.1 at 4 (1994), and General Comment, Human Rights Committee, General comment 13, Article 14, para 3 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 14 (1994), University of Minnesota Human Rights Library, http://www1.umn.edu/humanrts-/gencomm/hrcom13.htm, visited on 15 April 2003.
[13] Jimly Asshiddigie, *Menuju Negara Hukum yang Demokratis*, Jakarta: Setjen Kepaniteraan MK RI, 2008, p.39-40.

and they have no other implied means to interpret. Compliance in terms of state behaviour reveals a fact that ecosoc rights are really justiciable rights under the Constitustion. Consequently, legal expectation of the rights holders may be advocated and adjudicated, so mechanism of checks and balances reduce possible abuse of power, increase public participation and guarantee enjoyment of development results to all citizens.

B. Questions

Based on the aforementioned analysis, this article formulates problem as follows: "to what extent can the Court decisions be affectively implemented in order to fulfill state conduct as required by the effective implementation of the ecosoc rights within the Indonesian legal system?'

II. DISCUSSION

In order to answer the aforementioned problem, this article will be arranged as follows. First, it will discuss judicial mechanism of the court toward adjudication of the ecosoc rights. This section draws legal rationals on the constitutional mandates and functions of the Court as the guardian of the Constitution as well as protector of human rights. Secondly, it will focuses on State compliance toward the Court decisions on the ecosoc rights. This section will analyse State conduct in terms of changes of particular policies, programs, actions and funds enforcing the Court decisions on certain ecosoc rights. It will focuses on water, education and health issues as forms of the ecosoc rights. Increasing quality and quantity of availibility, accessibility, adaptability and acceptability will be concluded to justify elemen of state compliance to the Court decision. Finally, it will propose means of legal advocacy to effectively implement the Court decisions on the ecosoc rights as a legal justiciable rights under the Indonesian Constitution in the future.

A. The Court's Authority to Adjudicate the Ecosoc Rights In the Indonesian Legal System

Under Articles 56 and 57 of the Law Number 24 of 2003 regarding the Constitutional Court ammended by the Law Number 8 of 2011 regarding the

Amendment of the Law Number 24 of 2003 regarding the Constitutional Court, the Court may dismiss, grant and reject judicial reviews lodged before it. Until now, it has received individual as well as groups of individual (legal entities) who claims that their ecosoc rights might have been violated by existing laws. To lodge a judicial review, *ratio personae* and *ratio matriae* shall be cummulatively fulfilled. They may determine different results for human rights advocacy as well as human rights adjudication particularly for fulfilment of the ecosoc rights as determined in the Constitution. These forms of decisions are in line with authority of the Court to examine at the fisrt and final level to judicial review the law against the Constitution; to decide dispute over the authority of state institution whose authority is granted by the Constitution, to decide dissolution of political party; and to decide dispute over result of general election. Furthermore, it has obligation to decide over opinion by the House of Representatives regarding Constitutional allegation committed by the President and/or by the Vice President.

Eventhough they have different effects in nature of human rights advocacy, they complement each other since they can be used to increase accessibility and availibility of resources and to improve acceptability and adaptability of certain duty bearers and rights holders of the ecosoc rights in Indonesia.[14] Public awareness and care have become daily discussion regarding result on certain judicial review decision. Judicial reviews possessed by the Court, as Phillipa Venning argues, could be perceived in two modalities, i.e. as reductionist and as substance approaches.[15] The former qualifies that any efforts for new ecosoc advocacy will have their relevance for improvement and enjoyment of the ecosoc rights in their complexity of performance carried out by states in its simplest means directed to certain targeted groups or results.[16] Meanwhile, the latter touches its relevance on a fact that judicial review decision may have different effects for complex inter relationships among actors, stakeholders, resource

[14] Bennedotto Conforti, "National Court and the International Law of Human Rights", in Bennedotto Conforti and Francesco Francioni (eds), *Enforcing International Human Rights in Domestic Court*, 1997, p. 3; and Henry J Steiner and Phillip Alston, *International Human Rights in Context Law Politics Morals*, Oxford 2nd ed, 2000, pp. 592-920.

[15] Mohamed M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice*, Martinus Nijhoff Publishers, 2008, pp. 3-5.

[16] John Tobin, "Seeking Clarity in Relation to the Principle of Complementarity: Reflection on The Recent Contributions of Some International Bodies," *Melbourne Jounal of International Law, Volume 8*, 2007.

providers and their roles and functions for the ecosoc rights enjoyment since the Court decision strenghtens concepts of invisibility and interdependence of rights.[17] Viewing the Court decisions to any Laws relevant to the ecosoc rights will give fruitful framework of legal analysis based on those two modalities in Indonesia.

As a basic legal concept, judicial review performs as legal tool to reflect will of people for their active participation in the decision making process as well as in its implementation regarding certain acts, policies, programs, actions and funds related to the fulfilment of the ecosoc rights. Judicial reviews is one of the ultimate means to sustain right to development as part of human rights in the Indonesian context and perspective.[18] Thus, it can be understood that judicial review higlights relevance of the human right based approach for better enjoyment of the ecosoc rights in its practical way. In this context, the United Nations High Commissioner on Human Rights (UNHCHR) defines the human rights-based approach as "a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promote and protect human rights".[19] It means that judicial review opens greater chance and more constructive engagement for justiciability of the ecosoc rights possessed by individual and groups of individuals. They are such as minority, vulnerable and marginalised groups, disabled and lesbian, gay, biseksual and transgenders.[20]

Viewed from the legal point of view, the right to development is accepted as part of human rights to which Indonesia is also obliged to, from which the human rights based-approach is developed to empower certain ecosoc rights

[17] Jann K. Kleffner, 2003, "The Impact of Complementarity on National Implementation of Substantive International Criminal Law, *Journal of International Criminal Justice, Vol. 1,* pp. 88-89; and K.L. Doherty and Timothy L.H. McCormack, "Complementarity as a Catalyst for Comprehensive Domestic Penal Legislation', *5 U.C Davis Journal of International Law and Policy*, 1999, pp. 147-180.

[18] Asshiddiqqi, J. "*Otonomi Daerah dan Peluang Investasi*, Paper on Government Conference on Peluang Investasi dan Otonomi Daerah", September 30th 2000, Jakarta, pp. 1-24; and Samhadi. "Pemberantasan Flu Burung Terganjal Koordinasi', Kompas Cyber Media, <http://www.kompas.com/kompas-cetak/0510/01/Fokus/2092258.htm>; Susiloadi, P. "Konsep dan Isu Desentralisasi Dalam Manajemen Pemerintahan di Indonesia", *Spirit Publik* , Volume 3, Number 2 October 2007, p. 7-8; and Christanto, J. "Otonomi Daerah dan Skenario Indonesia 2010 Dalam Konteks Pembangunan Daerah Pendekatan Kewilayahan", Paper (unpublished), 2006, p. 11

[19] United Nations High Commissioner for Human Rights, *Frequently Asked Questions on A Human Rights Based Approach to Development Cooperation*, UN Publisher, 2006, pp. 15-17.

[20] Biro Hukum dan Organisasi Setjen Kemdikbud, *Kajian Pelaksanaan Pemenuhan HAM Bidang Pendidikan di Sekolah*, 2011, pp. 11-17.

holders in the sustainable development process.[21] Consequently, the corpus of the right to development, such as true participation and equality principles[22] play their significance to achieve essential mean of justiciability itself. It is resulted from judicial review decisions of the Court. It emerges as two basic indicators of the human rights-based approach relevant for achievement of transparent assessment of the progress of the ecosoc rights in Indonesia, i.e. quantitative and qualitative indicators. They are enlarged from positive obligation of state toward the ICESCR that "State undertakes to take steps,...to the maximum of its available resourses, with a view to achieving progressively the full realization of the rights recognized in the present covenant".[23] Quantitative and qualitative indicators enforced by the Court through judicial review to certain Laws are substantially relied on this rationals while the Court has to strictly rely on the Constitutional mandates.

As resources for basic elements forming the ecosoc rights, their management is directed to all existing laws, policies, programs, actions and funds exercised by Governments and its delegated partners, such as non state actors, trans national corporations and multinational corporations to their communities. Their interaction are subjected to the application of the corpus of the rights to development effectively. It reveals indicators of the obligation of conduct and of the obligation of result for progressive realization of the ecosoc rights values. Fulfillment of the indicators of availability, accessibility, acceptability and adaptability is used to verify these two obligations for the compliance of State conduct in accordance to the Court decisions in this respective areas.These four indicators are developed by the Committee of the Economic, Social and Cultural Rights in its general comments directed to specific rights contained therein such as the right to development, the right to work, the right to housing, the right to health and the right to education.[24]

[21] Allan Rosas, "Right to Development" in Absjorn Eide in Eide, *op.cit*, no. 9, p. 247.
[22] See all works of Ulrich Petersman, "Human Rights and International Economic Law in the 21st Century: The Need to Clarify Their Interrelationship", *4 Journal of International Economic Law*, 2001, p. 398; Ulrich Petersman, "Constitutionalism and International Organization", *17 Northwestern Journal of International Business*, 1996, p. 145; Ulrich Petersman, , "How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?", *20 Michigan Journal of International Law*, 1999, p. 3; and Ulrich Petersman, "Legal, Economic and Political Objectives of National and International Competition Policies: Constitutional Functions of WTO "Linking Principles" for Trade and Competition", *34 New England Law Review,* (1999).
[23] Article 2 (1) of the International Covenant on Economi., Social and Cultural Rights 1966.
[24] Eide, in *op.cit*, no. 9, p. 89-93.

In line with aforementioned analysis, Indonesia's ratification toward the ICESCR makes Government bound to those obligations.[25] They indeed require the government to take "a commitment to act in accordance with the object and purpose of the ICESCR achieving a visible and meaningful result for its community and creating conducive context where the ecosoc rights can be respected and experienced by its community". The Committee develops further emphasis on these notions as applied for minimum indicators measuring States' compliance to realize progressively the full realization of theses rights.[26] According to Rehman, the examinations to those four indicators have tended to be assessed in a less attention manner by States Parties to the ICESCR.[27] In Indonesia, reluctance to apply supports his argument related to the fact that these examinations are full with political issues for the fulfillment of the Indonesia's obligations toward the ICESCR.[28] In this regard, Katarina Tomasevski designates willingness and capacity as 'indicators of a government to protect and to promote human rights to dissociate unwillingness (lack of commitment) and incapacity.'[29] Therefore, it can be assumed that, in general, through the Court decisions on judicial review Indonesia to some extent has fulfilled its obligations to implement international human rights law from the viewpoint of its constitutional obligation (willingness and capacity).

According to the Committee's point of view, the human rights-based approach conceptual framework can be examined by these four indicators. They are related to two intrinsic values differentiated between the external and internal objective conditions. They are then valued by elements of the true participation from community and by element of equality for enjoyment of the rights to which judicial reviews are relied on for effective ecosoc rights fulfilment. *First*, they place the roles of the government as an active actor for assessment of the accessibility and availability indicators. *Lastly*, requirement of active involvement

[25] Ratified by Act Number 11 of 2005 regarding the Indonesian Ratification to the International Covenant on Economic, Social and Cultural Rights.
[26] Javaid Rehman, *International Human Rights Law, A Practical Approach*, Longman: Pearson Education, 2003, p. 107-108.
[27] *Ibid*.
[28] Heribertus Jaka Triyana, "Pemenuhan Hak Atas Pendidikan dan Kesahatan dalam Kerangka Desentralisasi Daerah di Indonesia", Penelitian FH UGM didanai oleh Unit Penelitian dan Pengabdian Masyarakat FH UGM, 2007, hlm. 27.
[29] Katarina Tomasevski, "Indicators", in ", in Asbjorn Eide, *op.cit*, no. 9,p. 390.

from community for assessment of the adaptability and acceptability indicators is paramount to the first assessment for the implementation of the principle of the fulfilment of the ecosoc rights. They shall be prudently taken into account in essence of all laws, policies, programs, action and funds for the ecosoc rights fulfilment. To sum up, the human rights-based approach for the achievement of the ecosoc rights by means of judicial review from the Court not only places it as "the logical framework of analysis" but also places it as "the objectively verified indicators" for changing existing revealing the equal distributions of rights and duties among stakeholders based upon the true participation and the equality principle in the development process in Indonesia.

Commonly speaking under auspice of preamble of the Constitution, the Court shall render its decision from national goals and national interests, e.g. sustaining sustainable development process in Indonesia and keeping up national resilience. Sustainable development is a common phrase related to the meaning of the right to development in the human rights legal frameworks. Although the right to development is still debatable in terms of its legal rights and its legal duties,[30] it is widely accepted and it is repeatedly voiced by developing and least developing countries when they were negotiating international law instruments affecting their right of self determination for their own development process.[31] Viewed from the legal point of view, the right to development is accepted as part of human rights from which the human rights based-approach is developed to empower local communities in the local sustainable development process.[32] Construed in many Laws, such as Law Number 24 of 2007 regarding the Disaster Management, Law Number 25 of 2007 regarding the Investment, Law Number 13 of 2003 regarding Labour, Law Number 20 of 2003 regarding National Education System, the principle of human rights-based approach is construed extensively

[30] D. Hunter.,*International Environmental Law and Policy*, Foundation Press, New York, 2002, p. 383.

[31] The relationship between foreign investment and human rights can be outlined as follow: *first*, foreign investment as part of economic liberalization enhances human rights because it leads to economic benefits resulting from trade and financial liberalization; *second*, liberalization threatens human rights, and *finally* human rights discourse facilitates economic liberalization. See Orford., A. 'The Subject of Globalization: Economics, Identity and Human Rights" in *Proceedings of the 94th Annual Meeting of the American Society of International Law*, 2000, p. 146-148 compared with US Department of State, *Country Reports on Human Rights Practices*, 25 February 2000 at <http://state.gov/www/global/human_rights/1999_hrp_report/overview.html>, downloaded in July 2002.

[32] Rosas., A. "The Right to Development' in Eide, *op.cit*, no. 9, p. 247.

in almost their sections especially in their preambles and in their explanatory sections to empower community access to development in Indonesia.

According to preamble of the Law Number 24 of 2007 for example, it has its significance for three following rationales. First of all, communities' involvement makes them sustainable from possible social, natural and man-made vulnerabilities. Secondly, the role from vulnerable groups and persons is central in the local development process since it is about their life. Lastly, nobody can understand local opportunities and constraints better than the local communities themselves. These rationales are believed to be deductively relevant with the changing patterns of imminent threat of environemtal degradation, massive flow of capitals ended with privatization, and global investment trends in Asian countries since 1997. Impliedly, they have been inductively perceived as the key strategies for poverty alleviation in the Law No. 25 of 2007.[33] In fact, this Law was lodged to the Court and the Court granted partially for judicial reviews submitted by several non governmental organizations, such as WALHI, API and PBHI[34] and the decision essentially affirms the aforementioned rationales. In its decisions, the Court highlights and keeps national interests and sustainable development by interpreting equal access to land ownership between individual and legal entities to safeguard Indonesian sustainable development through investment.

Developed from the previous section, it can be concluded that judicial review decision by the Court essentially pave a way for better mechanisms to adjudicate the ecosoc rights in a very appropriate, transparent and practical way. Judicial review decisions requires governments to behave under obligations to impose the principle of the human rights-based approach when they decide their development policies particularly for the involvement of private sectors either domestic or foreign investors in terms of market share of management of natural resources and the distribution of benefits. Consequently, it endorses

[33] Triatmodjo., M. "Anatomi Hukum Lingkungan Internasional, Sistem Generik Penyangga Kehidupan Umat Manusia", *Jurnal Mimbar Hukum*, No. 34/II/2000, p. 24; Triyana, H.J. "Legal Aspects of the Maritime Delineation in the Archipelagic Riau Province", Draft of the Maritime Spatial Planning, the Center of Regional Development, Gadjah Mada University, 2008, p. 23; and Triyana, H.J. "Legal Aspects of the Current Spatial Planning", Review Presented on the Workshop with the People Assembly Working Group, Bandung, on November 23rd 2006.

[34] Ecoline Situmorang, "Judicial Review Undang Nomor 25 Tahun 2007 Tentang Penanaman Modal", Workshop Memperkuat Justiciabilitas Hak Ekonomi, Sosial dan Budaya, Yogyakarta, 13-17 November 2007.

communities' active involvement in this process continuously. Substantively, it shall be placed as the main paradigm in a sustainable development achieving the ecosoc rights. Thus, judicial review is understood as a process in which at-risk individual, group of individual or community are actively engaged in the identification, analysis, treatment, monitoring and evaluation of certain laws, policies, programs, actions and funds on the ecosoc rights. It is directed in order to reduce their vulnerabilities and enhance their capacities in the development process regulated by certain law that may breach constitutional thresholds.[35]

B. State Compliance Toward Judicial Review Decision for the Ecosoc Rights Fulfilment

Compliance has different legal meanings. It also contains different legal consequences viwed either from international law or from national law. In international law, compliance relates to fulfilment of certain international obligations in domestic level. Mean of compliance is determined by two mechanisms, i.e. domestication process[36] and its effective implementation.[37] Legally speaking, a domestication process is defined as a national legal process giving legal effect to international law into national legal system by approval, signatory, ratification or by mutually agreed means applying either transformation or incorporation systems.[38] Although this terminology is still debatable,[39] it is commonly understood as "a change of State conduct or behavior in accordance with international law in its domestic affairs."[40] Internal consideration for this change is mainly caused by its own survival, values, economic position and domestic politics.[41] At least, this article freely defines compliance in terms of fulfilement of the ecosoc rights derived from several international conventionsas "national legal process giving binding legal effects to a set of comprehensive international rules,

[35] Imelda Abarquez and Murshed, *Community-based Disaster Risk Management: Field Practitioners' Handbook*, 2005, ADPC, p. 14.
[36] Burgstaller, *op.cit*, no. 7, p.85.
[37] Otley, David, *Management Accounting Research*, "*Performance Management: a Framework for Management Control System Research"*, 1999, pp. 10: 363-382; and Flamholtz, E.G, Das, T.K., & A.S. Tsui, *Toward an Integrative Framework of Organizational Control, Accounting, Organization and Society*, 1985, pp. 35-50.
[38] Article 11 of the Indonesian Constitution 1945; and compared with the *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 244f in Australia.
[39] Guzman, *op.cit*, no. 7. 22.
[40] *Ibid*.
[41] Wetherall, Anthony, *Normative Rule Making at the IAEA: Codes of Conduct*, Paper, Unpublished, 2005, p. 75.

actions, procedures or legal determination applicable to the ecosoc rights, and how they shall be implemented by Indonesia in changing certain behaviors and conduct in fulfilment of obligation of transparent assessment of the progress to its maximum available resources". It emphasise that judicial decision at national level forms this mechanism including decision of the Court on judicial review.

In the national law context, compliance means obedience to follow rules and regulations without any attribution to motives and reasons for compliance from those who are obliged to. Thus, it requires actual conducts for those who bear rights and obligations to behave in certain ways in accordance to these rules and regulations. Obedience to Constitution is a constitutional mandate (*erga omnes*) for all. It can be concluded that actual behavior imposing rights and obligations came from the Court decision is also a mean of compliance obliged by legislative, executive and judicative bodies. Most importantly, legal effect from the Court decision has binding legal character upholding application of the effectiveness principle recognised by the international human rights law. Within the Indonesian legal system, Article 72 of the Law Number 39 of 1999 regarding Human Rights imposes this principle. It requires that "rights and obligations carried out by Government includes effective implementation of human rights in law, politics, economy, social, culture, and defence and other means". Consequently, compliance to Court decision forms peremptory norms in human rights fields that should be practically and effectively enforced.

As a legal framework, the aforementioned facts higlights present Indonesian State structure. Indonesia is a 'representative government under the rule of law principle', in which human rights are recognized, guaranteed and enforced by the Constitution.[42] The skeleton of the Constitution highlights the supremacy of the law, equality before the law,[43] and human rights.[44] They are so fundamentals of the Indonesian judicial system, which consists of impartial, independent

[42] *The 1945 Indonesian Constitution* which has been amended four times; First Amendment on 19 October 1999, Second Amendment on 18 August 2000, Third Amendment on 10 November 2001 and the Fourth Amendment on 10 August 2002.
[43] Chapter IX of the 45 Indonesian Constitution, *ibid*.
[44] Chapter XA, *ibid*.

and competent bodies.[45] Human Rights, i.e. the right to life[46], the right to form family and to have children,[47]the right to education,[48]right to work, right to health, the right to equality,[49] the right to freedom,[50]the right to communication[51] and the right to protection[52] are exhaustively guaranteed by the Constitution. Furthermore, pursuant to Article 28I, the right to life, the right to freedom, the right not to be tortured, and equality before the law are fundamental human rights from which no derogations are permitted. From the constitutional viewpoint mentioned above, Indonesia fulfills its international obligation to implement international human rights obligations in terms of national legislations and of national judiciary systems. Act 39 of 1999 relating to Human Rights[53] supports this legal stance marking a new era of human rights protection in Indonesia, especially to the ecosoc rights. Its contents enlarge area, scope and determination of rights enshrined in the Constitution.

As a legal framework to the ecosoc rights compliance, the Court decisions may result several legal possibilities, i.e. (1). legally null and void; (2). conditionally constitutional; (3). conditionally inconstitutional; and (4). limited constitutional decisions.[54]They determine legal effects for their implementation as a way of measuring compliance to the ecosoc standards from the Constitution. In line with these models, there are two ways of implementing the Court decision on judicial reviews, i.e. self executing and non self executing mechanisms for implementation. The fomer affirms the Court legal personality as the negative legislator since its binding character of its decisions is "equivalent to Law". Equivanlent to law phrase has legal implication because the decision should be announced in the state gazette. Annoucement in the state gazette is one of

[45] Chapter IX. Article 24 determines that Indonesian legal system comprises Indonesian Supreme Court (Mahkamah Agung), Constitutional Court (Mahkamah Konstitusi) and other judicial organs created by law, i.e. ordinary court, religion court, court of martial and administrative court.
[46] Article 28A, *ibid*.
[47] Article 28B, *ibid*.
[48] Article 28C, *ibid*.
[49] Article 28D, *ibid*.
[50] Article 28E, *ibid*.
[51] Article 28F, *ibid*.
[52] Article 28G, *ibid*.
[53] Came into force September 23, 1999, State Gazette 165 of 1999 and in Additional State Gazette Number 3886.
[54] Kepaniteraan dan Sekretaris Jenderal MK, *Model dan Implementai Keputusan Mahkamah Konstitui Dalam Pengujian Undang-Undang: Studi Putusan Tahun 2003-2012*, Pusat Penelitian dan Pengkajian Perkara, Setjen Mahkamah Konstitusi RI, 2013, p. 2.

requirements for public to know its existance to be legally binding. The later requires implementing legislation in order to make them legally binding by means of passing new laws by the House of Representatives and Government. There has been more than 190 Laws that have been lodged before the Court and the Court has granted more than 130 Laws breaching the Constitution while at the same time there are more than 160 judicial reviews have been rejected.[55]

One of important finding confirms that there has been tendency to ignore or to deny the Court decisions since the implementation of the Court decisions require other authoritative bodies. Within the decentralization policy, it is affirmed that local government conduct toward Court decision is far away from effective implementation character. Furthermore, it seems that Court decisions relating to the ecosoc rights refers to non self executing implementation and they need further implementing legislations in order to comply with the Constitution. It needs a long run to measure and consistent efforts in order to reach this threshold for better enjoyment and fulfilment. This pattern may result from the character of the ecosoc rights themselves as positive rights that require positive efforts from the State to its people.[56] Qualification of the frase "right to" to the ecosoc rights stipulates spirit of positive and continue efforts to fulfill them carried out by many state apparatus and state entities.

With regard to critically examine the Court decisions on the ecosoc rights implementation, the cases will be analysed comprehensively. Legal analysis will be drown to draw patterns, orientation and roles and function of the rights holders and duty bearers' rights and obligations under the effectiveness principle in the human rights obligation of conduct and transparent assessment of the progress. Issues of right to education and education funds; electricity and water resource management as parts of basic needs and health will be analysed to reach in-depth analysis to that matters. Factors that may hinder the implementation as well as considerations for implementation will be outlined to reveal element of compliance to the Court decisions. Non self executing implementation will be

[55] *Ibid.* Data was obtained secondarily. The terms more than means that there are more judicial reviews decided by the Court between 2012 and 2015 that have not been calculated because there is no exact number of cases decided by the Court as a primary information.

[56] Ifdal Kasim and Johanes Masenus Aus, *Hak Ekonomi, Sosial dan Budaya, Essay-Esay Pilihan*, Buku 2, ELSAM, 2001, pp. xiv-xv

the most consideration while emphasis to those who have to implement will also be outlined to map possible gap between normativity and empirical facts, legal bias, legal overlapping, legal vacuum and legal conflicts.

B.1. Right to Education and Education Funds

In its decision, the Court has extensively ruled and decided upon right to education and education funds in line with the Constitution thresholds. Decision Number 011/PUU-III/2005 regarding the Judicial Review on Law on National Education System and decision Number 012/PUU-III/2005 regarding the Judicial review on the 2005 State Expenditure Law mark a significant effort toward fulfilment of the ecosoc rights, e.g. right to eduction. Future laws, policies, programs, actions and funds are developed based on these decisions. For example, the promulgation of the Law Number 12 of 2012 regarding the Higher Education System affirms the Court decisons proving that the Law is constitutionally drafted and it has spirits on the strict constitutional thresholds. Based on these decisions, the new law is promulgated in accordance to areas, scopes and spirits of the contitutional thresholds as decided by the Court.

Many comments and analysis have been brought to discuss relevance of these decisions given by NGOs, scholars and legal practitioners.[57] Both decisions highlight national issues and interests in terms of economic resilience and right to regulate of the State to rights to education as one of the public services under the Constitustion. Further, the decisions highlight latest political and economic results, legal considerations and statistical reports shape the contents used for the philosophical determination of the national policy on availibility and accessibility of education.[58] Those are, among others, the constitutional obligations arising from the fourth amendment of the Constitution. It mandates the Government to allocate

[57] Pan Mohamad Faiz, "*Quo Vadis Sistem Pendidikan Nasional, Analisis Kritis Putusan Jilid I, Judicial Review Undang-Undang Sisdiknas*", 2007, paper unpublished; and Heribertus Jaka Triyana, "Komentar Hukum Mengenai Putusan Mahkamah Konstitusi Perkara Nomor 012/PUU-III/2005 Menganai Pengujian UU No. 36 Tahun 2004 Tentang APBN Dalam Kaitannya Dengan Hak Asasi Manusia", *Warta Pendidikan, Setjen Kemdikbud, Vol. 2, No. 1, Tahun 2006*, p. 23.

[58] The preamble draws extensively of the influences of the Indonesian reform, autonomy and globalization as trilogy under which education must follow these legal, economical and political objectives and tendencies.

at least 20% of the national and regional budget to right to education,[59] spirit of autonomy/decentralization of power of the Regional Government, impact of the economic crisis, legal status of the ratification of the CRC in the Indonesian legal system, and fact that more than 6 million children aged between 6 and 15 do not have the right to education.[60]

Furthermore, both decisions affirm pathways of national interests for manpowering human resources for future Indonesian development. The Court granted the judicial review over the Law on National Education partially, especially for the explanation of the article 49 of the Law that breaches the Constitution. It breaches the Constitution because education funds should be covered by a result based orientation rather than covered by step-by step policy. This decision gives rise to a fact that the Contitution is in line with international commitments "to act in accordance with the objects and purposes of the CRC achieving a visible and meaningful results for children and creating a cultural and social context where their rights can be respected and experienced,[61] through available funds. While, at the same time, the Court decided not to accept judicial review to the Law of the 2005 State Expenditure in decision Number 012/PUU-III/2005. This decision made complex substance debate with regard to certain interpretation of duty of state to fulfill the ecosoc rights and determination of phrase of "to maximum available resources". The Court decided in the midle legal stance to determine state obligation of transparent assessment of the progress in order to allocate 20% of funds to education under the Constitution.

For examples, the obligation of the State to implement the CRC by means of its maximum available resources does not apply in this decision. Certain articles in the Law on National Educational System, in essence, stipulate that 'the Government and the State provide *support* for the resources to implement child protection' (emphasis added).[62] The inclusion of the word

[59] Article 31 (4) of *the 1945 Indonesian Constitution*.
[60] See for examples Kompas Cyber Media, *Tiga Juta lebih Anak Usia SLTP Tidak Sekolah*, http://www.kompas.com/kompas-cetak/0104/17/dikbud/tiga10.htm, 17 April 2001, and Kompas Cyber Media, *1,4 Juta Anak Perlu Program Terobosan Pendidikan*, http://www.kompas.com/kompas-cetak/0106/06/dikbud/juta09.htm, 6 June 2001.
[61] *Ibid*.
[62] Articles 22 and 23, *ibid*.

of 'support' can be interpreted to mean that the Government and the State do not want to allocate maximum resources to protect children's rights. Thus, whether the Government is unable or unwilling to fulfil its obligation to protect the rights of the child in this Act may be questioned. Article 9 (1) of the Law supports this conclusion as it omits the obligation of the State and the Government to fulfil the rights of the child to education.[63]

Enshrined in Article 26 (1) of the Universal Declaration of Human Rights (UDHR)[64] and Article 13 (1) of the ICESCR, everyone is entitled to have, receive and exercise the right to education. Right to education is, according to legal interpretation from both human rights instruments, regarded as 'so fundamental that is a non-derogable right.'[65] The Court decision affirms this legal stance. Many statements, declarations and comments support this proposition by revealing the significance and nature of education. Nowak in this regard argues that 'education is regarded as one of the basic means needed by a human being to develop his or her personality.'[66] Next, the Declaration on the Right to Development highlights the role of education as a condition in achieving a comprehensive economic, social, cultural and political process aimed to improve human beings as individuals, and aimed to develop a population based on their active, free and meaningful participation with fair distribution of benefits.[67] This significant fact has become a universal concern stated at the Rio de Janiero Conference to the World Summit on Sustainable Development, Johannesburg 2002.[68]

Further, the Committee on Economic, Social and Cultural Rights also emphasizes that 'education is the primary vehicle to lift or to empower adults and children from poverty, mean to participate fully in development in their communities, and as an effective way to develop human existence.'[69]

[63] It determines that "every child has the right to education for their development based on their talents and interests".
[64] UNGA, 10 December 1948, GA Res. 217A, UNGAOR, 3rd Sess, UN Doc. A/810 (1948).
[65] Geraldine Van Bueren, *The International law on the Rights of Child,* 1995, p.233; and Article 1 of the World Declaration on Education for All (Jomtien Declaration 1990, Thailand).
[66] Manfred Nowak, "The Right to Education", in Eide, *op.cit*, no. 9, p. 196.
[67] Preamble of the Declaration on the Right to Development, General Assembly Resolution 41/128 of 4 December 1986, http://www.unhchr.ch/html.menu3/b/74.htm.
[68] The Office of the High Commissioner for Human Rights, *Human Rights, Poverty Reduction and Sustainable Development: Health, Food and Water*, A Background Paper World Summit on Sustainable Development, Johannesburg, 26 August-4 September, 2002.
[69] Committee on Economic, Social and Cultural Rights General Comment 13, *The Right to Education (Art. 13)*, 08/12/99, E/C.12/1999/10,

Consequently, the assumption that expenditure on education ought to be regarded as an "investment in human capital" which is more beneficial rather than an "investment in physical capital" to sustain development is accepted widely.[70] In line with human rights, education is a 'precondition for the exercise of human rights and aims at strengthening them.'[71] Referring to the Court decision, it seems that the Court to some extent fail to reach these international standards. Substantially, this decision is so camplicated to be implemented factually. Until now, this legal stance has been levelled off to allocate national as well as regional education funds between 6-7,5%.

Articles 28 and 29 of the CRC derived from the ICESCR are devoted to the right of the child to education. Their most significant aim is to complete the description of the objectives and the nature of the child's education enshrined generally in the UDHR and the ICESCR, e.g. education helps the child to realize his/her full potential,[72] including the development of respect for human rights, an enhanced sense of identity and affiliation, an enhanced sense of her/his socialization and interaction with others and with the environment. In legal terms, education involves three main actors who 'may derive different claims from their rights to education: who provides (the teacher, the owner and the parents), who receives (the child, the pupil and the students) and who is legally responsible for the one who receives education (the state, society and the parents).'[73] In this matter, international law mainly imposes duties (obligations) on states to provide, and on children (the pupil and the student) to exercise the right to education. Viewing comprehensively from the Court decisions, they do not give certain patterns to determine their applications so many doubts and biases for their practical implemention untill now.

CESCR, 8 December 1999, para 1; and supported by the World Bank in *Crying Out for Change*, World Bank in three volumes (2002), 235.

[70] See for examples, Walter W. McMahon, Boediono and Abas Gazali, "A New View of Manpower Supplies and Demand in Indonesia: The Need to Use Market Signals and Labor Analysis", *BP3K Departemen Pendidikan Dan Kebudayaan Indonesia* (1991); Van Beuren, above n 67, 232; and Committee on Economic, Social and Cultural Rights General Comment 13, *ibid*.

[71] Nowak, *op.cit*, no. 9, p. 189; and *the Vienna Declaration and Programme of Action*, UN Doc. A/CONF.157/23, part II, para 79.

[72] Van Beuren, *op.cit*, no. 66, p. 232; See also Article 29 of the CRC.

[73] Nowak, *op.cit*, no. 9, p. 190.

States are obliged to provide education to everybody, to ensure that everybody without discrimination has access to education,[74] and to 'combat existing inequalities in the access to and enjoyment of education by legislative and other means.'[75] In these matters, Nowak proposes that 'states are under the obligation to fulfil the right to education by means of positive action, i.e. the obligation of result and the obligation of conduct.'[76] In fact, the fulfillment of these obligations does not meet any ideological or constitutional opposition since the nature and significance of education in major International Human Rights Conventions (the ICESCR and the CRC) are widely accepted. Obligation of results, according to the Committee on Economic, Social and Cultural Rights, exhibits interrelated and essential features when State parties are fulfilling the right to provide education, namely availability, accessibility, acceptability and adaptability of their prevailing conditions. In this regard, States Parties oblige to take steps to the maximum of their available resources, and a lack of resources is never an excuse for not taking such actions.The Court decisions do not reach to these minimum requirements contributing to ignorance and skepticism for fulfilment of right to education.

The preamble of the Indonesian Constitution has an ultimate aim of advancing the intellectual life of the people. This is a core objective of the national education system. Pursuant to the Indonesian Constitution, there are certain legal relationships among who receives, who provides and who is responsible for the fulfillment of the right to education. Or, in other words, the Indonesian Constitution regulates the obligation of State (Government) to its citizens to provide education, and it obliges the Indonesian citizens to exercise their right to education. The Government is obliged to bear the cost of primary education,[77] to develop and maintain a national system of education that increases faith, God-consciousness and noble conduct,[78] to

[74] Convention Against Discrimination in Education 1960, in Geraldine Van Bueren, *International Documents on Children*, (2nd, eds), 1998, pp. 317-322.
[75] Nowak, *loc.cit*, p. 196.
[76] *Ibid*, p. 199.
[77] Article 31 (2) of the Indonesian Constitution.
[78] Article 31 (3), ibid.

prioritize expenditure on education to at least 20% of the State Budget and Regional Budget[79] and to advance science and technology by respecting religious values, for the progress of human civilization and the welfare of the human race.[80] Meanwhile, each citizen has the right to education, and all are obliged to undertake primary education.[81]

With regard to the right of the child to education, the Indonesian Constitution does not explicitly mention this right and viewed from the Decision, there are no certain interpretation to these thresholds. However, the legal notions of 'each citizen' and 'primary education' implicitly express the child's right to education. This interpretation is supported by the legal interpretation and application of Article 28 B (2) which states that "each child has the right to viable life, *growth and development*, and to protection from violence and *discrimination*". Although, to some extent, the Indonesian Constitution is still in "a central based-approach" regarding the right to education, normatively, it conforms to international laws which regulate the right to education (the UDHR and the ICESCR) in particular the CRC. This conformity is in terms of the fulfillment of certain obligations, such as the obligation of result and the obligation of conduct. Consequently, this conformity creates constitutional obligations which have to be realized in factual situation, especially in the factual conditions of education in Indonesia.

A 'cost benefit analysis' states that 'all expenditure on education will be beneficial in the long run as it will create benefits in terms of employment, job training and development.'[82] Therefore, this analysis can be used for measuring the quality of education in Indonesia. Inappropriate expenditure which levels off at 6% until now realizes an inadequate rate of return. Because of a lack of financial resources, the Human Development Index (HDI) and the quality of education valued by the rate of return in Indonesia are still low.[83] This condition is very different from other developing countries such

[79] Article 31 (4), ibid.
[80] Article 31 (5), ibid.
[81] Article 31 (1,2), ibid.
[82] McMahon, Boediono and Gazali, op.cit, no. 71, p.72.
[83] UNDP, *Human Development Report 2002*, UNDP (2002) which reveals that the Indonesian Human Development Index is only 0,684.

as Malaysia, Vietnam[84] and/or even from Latin American Countries.[85] Thus, whilst there is a constitutional framework which incorporates international law regarding the rights of the child to education in Indonesia, this constitutional framework has been hardly match with reality even after the Court decided judicial reviews on the Law on education and law on State expenditure.

Because this constitutional obligation should be implemented in such a way, commitments need to be raised and advocated continously. Efforts to progressively fulfill right to eduction has its constituational interpretation delivered by the Court decisions in that respective judicial reviews. It means that responsible state apparatus shall be reminded to act in certain ways in accordance to constitutional requirements and international obligations. International obligations impose another rationales and reasons to interpret certain constitutional thresholds. It means that every time individual and group of individuals may lodge judicial review before the Court in order to remind government to behave in such a way in accordance to these requirements.

B.2. Right to Water and Electicity

On February, 18, 2015 the Court decided to grant null and void of the Law Number 7 of 2004 regarding Water Resources. Similar to this decision is in the Court decision Number 001/PUU-I/2003 regarding the Judicial Decision over Law Number 20 of 2002 regarding Electricity. The main rationales to lodge judicial review is that water and electicity are "*res commune*" to which Constitution upholds this principle.[86] As Diana Phillip argues, right to water is a contitutional and justiciable rights, so all individuals as well as group of individual has priority to this need while government shall have right to regulate to manage water and electricity as public services to the community.[87] In this decision, viewed from substance approach, the Court

[84] The *Convention of the Rights of Child Periodic Report-Indonesia*, 1993-June 2000, p. 9; see also UNDP, *ibid*, Indonesian Human Development Index is only 0,684 under Vietnam which is 0,688.
[85] Anne Greene, "Sistem Pendidikan Di Amerika Latin dan Indonesia: Suatu Perbandingan", in Murwatie B. Rahardjo, "Aspek Pembiayaan Dalam Memperoleh Kesempatan Pendidikan", F.S. Swantoro, "Peningkatan Kualitas Pendidikan Dasar dan Menengah", all in CSIS, *Refleksi Setengah Abad Kemerdekaan Indonesia*, 1996, pp. 162-222.
[86] Konstitusi, "Swastanisasi Pengelolaan Air", No. 83, 2014, pp. 14-19.
[87] Phillip, *op.cit*, no. 5, p. 323.

emphasise the importance of the right to regulate in the development process that somehow defeating market mechanism guided by maxim of "the least government is the best government". Based on this maxim, dominancy of economic motives driven by market mechanism championed by foreign investors has reduced the autonomy of local communities based on their active, free and meaningful participation, and fair distribution of benefits in the sustainable development process regulated in the Laws.

At the lowest level, communities' self resilience and their self independence of management of their life in terms of increasing availability, accessibility, acceptability and adaptability to all available water and electricity resources have been limited by foreign investors who have capitals. Phenomena of emerging gap between rich and poor local governments, lacking of bargaining position between local authorities and foreign private sectors, and social conflicts have become a turning point for the implementation of the Law Number 7 of 2004 and of the political decentralization's objectives.[88] This gap of management of common resources in essence emerged *vis a vis* between local communities and foreign private sectors directly. As a result, it disrupted communities' everyday life for more than two years[89] causing human lost,[90] infrastructure collateral damages, deterioration of investments in this area and environmental degradation.[91]

The application of the theory of breakdown of natural resources management proposed by Jacqueline[92] and Ribot[93] is truly adopted as the main logical framework for the implementation of the Court decisions relevant to current political decentralization policy and for accepted rationales for regulating foreign investment in Indonesia particularly by local governments.

[88] Dixon, H. "Environmental Scarcities and Violent Conflict Evidence from Cases", *International Security*, Volume 19, Number 1, 1994.
[89] Ballentine, K., and Nitzschke, H., (Eds), *Profiting from Peace: Managing Resource Dimension of Civil Wars*, Lynne Publisher, 2005; and Baiquni, M. and Rijanta, R.. *Konflik Pengelolaan Lingkungan dan Sumber Daya Dalam Era Otonomi dan Transisi Masyarakat*, Paper, 2007, p. 17-19.
[90] Sakai, M. "Konflik Sekitar Devolusi Kekuasaan Ekonomi dan Politik: Suatu Pengantar", *Antropologi Indonesia*, Volume 68, 2002, pp. 5-6; and George. *A Fate Worse Than Debt*, Penguin, Harmondswoth, 1998.
[91] APHI, "Tuntutan Masyarakat Adat dan Alternatif Solusi Konflik Sosial", available at <http://www.rimbawan.com>, last visited on November 25th, 2008.
[92] A. Jacqueline, "Alternative Approaches to Managing Conflict in the Use of Natural Resources", *Presentation Material on International Workshop on Natural resources Management*, Washington D.C., May 2008.
[93] J.C. Ribot, J.C. "Accountable Representation and Power Participation and Decentralized Environmental Management", Unasylva 1999, Volume 50, (1990), p. 56.

This theory opens the chance that "decentralized resources management system by smaller units or local stakeholders (local governments, investors and communities) will increase opportunity of participation from multi stakeholders, increase roles of civil society and open up intensive interaction among stakeholders for resources management at local levels."[94] In simple terms, it reveals that those who have biggest interests will have the biggest access to the management and to the enjoyment of all available resources viewed from the human rights-based principle of the Indonesian political decentralization policy.[95]

However, the application of the above theory has been replaced by the adoption of this economic-driven motive explained by the greedy theory for management of natural resources proposed by Billon.[96] It reveals that "inappropriate management of natural resources driven by economic motives will result scarcities of them in very short period of time benefiting only for few who have the biggest access causing a systemic environmental deterioration that contributes to increasing community's vulnerability toward the natural hazards and lessens communities' capacities as their coping mechanisms." Within the Indonesian political decentralization perspective and the foreign investment law point of view for water and electicity, it has worsened since it was amalgamated with the deprivation and scarcity theory proposed by Ohlsson and by Homer Dixon causing a firm identity to this motivation. Furthermore, the coordination scheme on foreign investment policies between central government and local governments, and among local governments has not been established yet since the Law Number 25 of 2007 with regard to the Law on Water Resources and Electricity only determines it at the strategic and at the operational levels. The application of the "not in my back yard" syndrome and the "profit taking" policy enacted by local governments has caused administrative defects for the coordination scheme

[94] Jacqueline, *loc. cit*.
[95] Ribot, *loc.cit*, p. 56.
[96] Porto, J.G. "Contemporary Conflict Analysis in Perspective" (Chapter One), in Lind, J., et all, Scarcity and Survive: The Ecology of Africa's Conflict, ACTS, Kenya, 1998;.

of foreign investment especially on the common pool resources (CPR) in Indonesia, especially for water.[97]

Analysis from both decisions reveal that they have something in common that they are peremptory and have their status of negative regulations to such matter. It means that they became self executing decision which have direct legal effects. State behavior to some extent prolong for actual changes since they have to rebuild policies, program, actions and funds to that matters. Meanwhile, changes on infrastructures to comply with Court decisions need huge efforts in time and in financial back up. Endurance is the ultimate key success to monitor state complince toward self executing decision of the Court.

C. Means of Effective Advocacy for the Implementation of the Ecosoc Rights

After analysing those facts and decisions, this article submits means and/or approaches that would be valuable for future means of legal advocacy of the ecosoc rights. It proposes nine rationales as the derivatives from the principle of human rights based approach to be taken in all their decision making process concerning their policies on better ecosoc adjudication in Indonesia in relation to the Court decision in terms of reductionist as well as substance approaches.[98] They are oulined below.

First, locals shall have capability of initiating and sustaining their own community developments in terms of substance of human rights. *Second,* the primary requirement for grassroots development lies on local leadership irrespective of role government, private sector and NGO since the Indonesian development process is conducted by way of decentralization policy. *Third,* successful bottom-up strategy include broad-based local participation in comprehensive planning and decision-making activities that promote motivation has been paramount to increase adaptability and acceptability. *Fourth*, educational

[97] Bello. *Dark Victory: The United States Structural Adjustment and Global Poverty*, Pluto Press, London, 2004.

[98] Hodgson., R.L.P. "Community Participation in Emergency Technical Assistance Programmes: Technical Support for Refugees, 1993, WEDC; Grafton, et all. *The Economics of the Environment and Natural Resources*, Blackwell Publishing, 2004; HIVOS, *Disaster Management: Planning and Paradigm in Indonesia*, 11 June 2007.

opportunities should correspond to identify local needs as best practice when local authorities promulgate certain rules and regulation on ecosoc rights in respective areas. *Fifth,* emphasis is directed to improve the utilization and management of local natural resources available there upholding true participation of rights holders of the ecosoc rights either in the formulation as well as in the implementation. *Sixth,* responsible utilization of outside financial assistance is required as long as in accordance with national interests construed in the Constitution. *Seventh,* replication of a community's success is a powerful factor in continuing local initiatives. *Eighth,* responsibility for change rests with those who live in the community for easier justiciability of the ecosoc rights. *Lastly,* various community members and groups in the community may have different perceptions of risk and varying vulnerabilities so that their coping strategies shall be taken into account when government initiates certain law on ecocosoc rights. These normative strategies are based on the belief that rapid local development will support the implementation of the political decentralization policy and can promote a participatory development process from all rights holders of the ecosoc rights.

III. CONCLUSION

Once a blind man is asked to describe an elephant then he touches it. Maybe he states that 'an elephant is a sharp, small long substance and tough'. This was correct because he hold the elephant's tusks. This illustration can be compared with the the role and function of the Indonesian Constitutional Court for its legacy for better and practical ecosoc fulfilment in Indonesia. Ideally, this role should be supported by strong bearers in their specific functions in legislative, judicative and executive bodies to implement the Court decisions respectively. Consequently, greater access to information is a must to open chance for public to know and to receive proper and correct legal bases on the ecosoc rights that still exist and those which breached the Constitution.

When we are discussing the relationship among Constitution, governments behavior, human rights and the implementation of the ecosoc rights in Indonesia,

Anthony Giddens' theory of the Third Way of Social Democracy helps conclude their relationships since it is still at the phase of administrative decentralization.[99] The battle of identity between participatory versus primordial characters of it is one of undeniable empirical facts. Consequently, the Court decisions on judicial reviews has not been implemented as it is expected and actual changes are so difficult to be measured since it needs times and huge efforts on bureucracy in Indonesia.

Giddens' theory reflects this relevance for implementation of the ecosoc rights with regard to dominancy of capitals and markets shares in Indonesia vs. ecosoc rights as public services upholding right to regulate of the government. In simple terms, the third way of politics looks for a new relationship between the individual and the community, a redefinition of rights and obligations between government and its people in time of political transition from centralized government into democratic governmental system. In this situation, local governments as well as the central government have to redefine and to reflect their policies, programs, actions and funds in accordance to the Court rulings which to some extent are not supportive for the achievement of the long terms development policy aims. Do the central as well as local governments of Indonesia realize and have this willingness?

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