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CORRUPTION AS A VIOLATION OF THE RIGHT TO EDUCATION IN INDONESIA: A CONSTRUCTIVIST APPROACH

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Abstract

This paper analyzes the relationship between corruption and realization of human rights in a specific case, the realization of the right to education by utilizing human rights standards concerning the right to education as the parameter of human rights realization. An Indonesian case law about corruption of Bantuan Operasional Sekolah funds in Malang is selected as primary legal data in this paper to provide empirical evidence one of the cases of corruption in education sector. Norm entrepreneurship as part of constructivist theory is selected to explain the phenomenon of emerging scholarly studies and discussion about corruption as a violation of human rights and this paper aims to draw the link between corruption and its negative impact to the realization of human rights in case analysis.

Keywords: Corruption, Human Rights, Violation, Indonesia

Abstrak

Tulisan ini menganalisis hubungan antara korupsi dan realisasi hak asasi manusia, dalam kasus spesifik, realisasi hak atas pendidikan dengan menggunakan standar hak asasi manusia tentang hak atas pendidikan sebagai parameter analisis realisasi hak asasi manusia. Sebuah putusan hukum tentang korupsi dana Bantuan Operasional Sekolah di Malang dipilih sebagai data hukum primer dalam tulisan ini untuk memberikan bukti empiris tentang korupsi di sektor pendidikan. Norm entrepreneurship sebagai bagian dari Constructivist Theory dipilih untuk menjelaskan fenomena munculnya studi akademik dan diskusi tentang korupsi sebagai pelanggaran hak asasi manusia and tulisan ini bertujuan untuk membuat garis hubungan antara korupsi dan dampak negatifnya terhadap realisasi hak asasi manusia dalam analisis kasus.

Kata kunci: Korupsi, Hak Asasi Manusia, Pelanggaran, Indonesia

I. INTRODUCTION

Children's rights are human rights once and for all. Children are the future of a nation, whether a nation would develop or ruined, it depends on how they treat the children. In the legal corpus of children's rights, there are various rights that have to be respected, protected and fulfilled by the government to ensure the maximum mental and physical development of children. Education is a pivotal element for children, anywhere. The growth of a nation is supported by the upward social mobility of its citizen and education plays an important part in the progress of making the upward social mobility. Education prepares the next generation with knowledge and experience to survive and develop. In macro perspective, accessibility of quality education can guarantee higher development level of a nation.¹ However, since the establishment of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC) that guarantee the existence of the right to education for children, the state of education for children is far from ideal.² Ideally, primary education should be free and available for all children as it is written in Article 13, 14 of the ICESCR and Article 28 (1) (a) of the CRC.³ The legal wordings of Article 14 of the ICESCR are;

“Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.”⁴

Indonesia as the State Party to the ICESCR and CRC, is striving to achieve that ideal through the establishment of *Bantuan Operasional Sekolah*, a program that is designed to eliminate school fees and thus aimed to ensure the enjoyment of the right to free primary education.⁵ The state of primary

¹ Article 29 of the *Convention on the Rights of the Child*, 1577 *United Nations Treaty Series* 3, November 1989; The Committee on the Rights of the Child, *General Comment Number 1, Aims of Education*, CRC/GC/2001/1, (17 April 2001), paragraph 1.

² United Nations, *International Covenant on Economic, Social and Cultural Rights*, 993 *United Nations Treaty Series* 3, (16 December 1966), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx>. Accessed 12 August 2016.

³ Ibid; The Committee on the Rights of the Child, *General Comment Number 5, General Measures of Implementation of the Convention on the Rights of the Child (Arts. 4, 42 and 44, para. 6)*, CRC/GC/2003/5, (27 November 2003), paragraphs 5-6.

⁴ Article 14 of the ICESCR.

⁵ The Commission on Human Rights, *Sixtieth Session, Report Submitted by the Special Rapporteur on the Right to Education*, E/Cn.4/2004/45, (15 January 2004), paragraph 26, p. 12; The Committee on Economic, Social and Cultural Rights, *Implementation of the International Covenant on Economic, Social and Cultural Rights, Initial Report Submitted by*

education in Indonesia, based on the observation of the Committee on Economic, Social and Cultural Rights, is challenging because the primary education in Indonesia is not free yet and in some rural areas, the amount of school is not adequate to provide quality primary education for all children.⁶ On empirical level, corruption in education sector is pervasive and rampant in Indonesia and *Bantuan Operasional Sekolah* is not immune from corruption.⁷ Constitution of Indonesia mandated the Government to allocate twenty percent of its spending for education sector.⁸ This allocation is vulnerable to be

States Parties under Article 16 and 17 of the Covenant, Indonesia, E/C.12/IDN/1, (29 October 2012), paragraphs 244-250, pp. 61-63; The Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Initial Report of Indonesia*, E/C.12/IDN/CO/1, (19 June 2014), paragraph 36, p. 12; Human Rights Council, *Twenty First Session, Universal Periodic Review, Indonesia, Review of the Working Group*, A/HRC/21/7, (5 July 2012), pp. 18-22.

⁶ The Committee on Economic, Social and Cultural Rights, *Concluding Observations on Indonesia, Initial Report*, UN. Doc. E/C.2/IDN/CO/1, (19 June 2014), paragraph 36.

⁷ Indonesia ranked 88th of 168 countries rated by Transparency International. From the measurement number of 0 to 100, from 0 to represent highly corrupt situation and 100 to represent very clean situation, Indonesia scored 36 from 100. Corruption perception index: “The [Corruption Perceptions Index](#) ranks countries/territories based on how corrupt a country’s public sector is perceived to be. It is a composite index, drawing on corruption-related data from expert and business surveys carried out by a variety of independent and reputable institutions.”

<https://www.transparency.org/country/#IDN>, accessed 8 September 2016; World Bank, *Combating Corruption in Indonesia, Enhancing Accountability for Development*, (12 November 2003), p. 31.

⁸ The Constitution of the Republic of Indonesia, Chapter XIII, Article 31, fourth alteration;

- “1. Each national shall entitled to education,
2. Each national shall follow basic education and the Government shall finance the same,
3. The Government shall exert to hold a national educational system to improve the faith and devotions as well as noble morals in the framework of developing the national life,
4. The State shall give priority to educational budget of at least twenty percent of the national budget and of regional budget to fulfil the need for holding the national education,
5. The Government shall improve the science and technology by holding high religious norms and national unit for civilization progress and welfare of mankind.”

The importance of Article 31 (4) has been reiterated in the case before the Constitutional Court in 2008 concerning the budget allocation. The Government allocated less than twenty percent of the national budget for education (the budget allocation was fifteen point six percent in 2008) and the Court decided that the action of the Government was not in conformity with Article 31 (4). The Court reiterated the significance of education that is protected by the Constitution in Article 31. This decision strengthened the obligation of the Government to give utmost focus to the budget allocation in education by allocating twenty percent of the national budget for education. Constitutional Court Decision, number 13/PUU-VII 2008, Jakarta, (13 August 2008), paragraphs 21-22.

See also, Smeru Research Institute, *The Implementation of the School Operational Assistance Program 2005*, (July-September 2006), pp. 1-36; World Bank, *Education Notes, EFA in Indonesia: Hard Lessons about Quality*, (May 2003), pp. 1-3. The official name of the program in English is School Operating Fund, cited from the National Report for the Committee on Economic, Social and Cultural Rights by the Government of Indonesia, E/C.12/IDN/1, (29 October 2012), paragraphs 244-250, pp. 61-63. See also, World Bank, *Implementation Completion and Results Report on A Loan in the Amount of US \$ 1, 1 Billion*

corrupted by irresponsible hands of corruptors whom are abusing their power and trust for their own private gain.⁹ Therefore, due to this phenomenon, this paper analyzes the relationship between corruption in education sector, *Bantuan Operasional Sekolah* is chosen as the specific study variable in this research due to its designed nature as the step taken by Indonesia to realize the right to education. The notion of corruption as a violation of human rights is emerging in this contemporary era.¹⁰ Several scholarly works have addressed this problem by using theoretical approaches. In this paper, constructivism in the branch of norm entrepreneurship theory is utilized as the tool of analysis. Constructivism approach seeks to explain how international norms are created, accepted and internalized by states.¹¹ This theory focuses on the process of international legal making in international relations. This paper analyzes the existence of corruption in *Bantuan Operasional Sekolah* program and the international legal obligation of Indonesia to realize the right to education by the use of constructivist approach.

II. THE RIGHT TO EDUCATION UNDER INTERNATIONAL AND REGIONAL LEGAL CONTINUUM

The right to education is one of the human rights and it is protected under international, regional and national legal *continuum*. Human rights core concept is human dignity that every woman, man and child are given a set of rights that is inherent to their existence because of the principle of humanity. Based on the naturalistic point of view, every human being has human rights because of the natural state of being human.¹² The development of human

to the Republic of Indonesia for A School Operational Assistance, Knowledge Improvement for Transparency and Accountability, ICRI546, (27 June 2003), pp. 1-69; World Bank, *Spending More or Spending Better: Improving Education Financing in Indonesia*, (March 2013), pp. 1-44; World Bank, *Toward 2015, Spending for Indonesia's Development, Shaping the Prospects of A Middle Income Country*, (August 2009), pp. 1-134.

⁹ See organizational report and scholarly works concerning corruption in Indonesia, The Committee on Economic, Social and Cultural Rights, *Preliminary report of the Special Rapporteur, Ms. Christy Mbonu, Corruption and Its Impact on the Full Enjoyment of Human Rights, in Particular, Economic, Social and Cultural Rights*, E/CN.4/Sub.2/2004/23, (7 July 2004), p. 7; Joanna MacMillan, "Reformation and Public Corruption: Why Indonesia's Anti-Corruption Agency Strategy Should be Reformed to Effectively Combat Public Corruption?", *Emory International Law Review*, Vol. 25 (2011), pp. 587-630.

¹⁰ Human Rights Council, *Twenty Third Session, Resolution Adopted by the Human Rights Council, the Negative Impact of Corruption on the Enjoyment of Human Rights*, A/HRC/RES/23/9. (20 June 2013) paragraph 2, p. 2.

¹¹ Chynthia Weber, *International Relations Theory: A Critical Introduction, Third Edition* (Routledge: New York, 2010) p. 16, 33 and 38; Shima Baradaram et al., "Does International Law Matter?", *Minnesota Law Review*, Volume 97 (2013) pp. 743-837; Martha Finnemore and Katharyn Sikkink, "International Norm Dynamics and Political Change", *International Organization*, Volume 4, Number 52 (Autumn 1998) pp. 807-907.

¹² Shiv R. S. Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justice*, (Hart Publishing: Oxford, 2007) p. 52.

rights was started by the formulation of civil and political rights as the first generation of human rights, subsequently, the economic, social and cultural rights were formulated as the subsequent formulation of human rights concept. The third generation of human rights is the right to development that is mainly influenced by the community based approach to the concept of human rights.

All human rights are interdependent and indivisible, every single human right is interconnected one to another human rights.¹³ As exemplified in this narrative, that in order to assure the full enjoyment of the right to education, the Government has to pay attention into the realization of the right to health. If children were sick due to the lack of access for quality primary health care then they would never be able to study well and maximize the use of educational resources that the State Party has invested in them. Under international law, human rights are protected under the Universal Declaration of Human Rights and subsequently by the twin Covenants, the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR.¹⁴ The development of human rights protection focuses on the subject based approach to the concept of human rights that human rights are being specified in the form of subjects who hold these rights, *inter alia*, the CRC that focused the regulation on the rights of the child and the Convention on the Elimination of All Discrimination Against Woman that focused the regulation on the rights of woman. The development of human rights protection went further into the establishment of regional human rights treaties, as exemplified by the creation of the European Convention on Human Rights and the Inter-American Convention on Human Rights.

The existence of regional human rights instruments is strengthening the legitimacy of human rights itself, in Europe, there are the Revised European Social Charter¹⁵, the Council of Europe Framework Convention for the

¹³ Christian Tomuschat, *Human Rights: Between Idealism and Realism, Second Edition*, (Oxford University Press: New York, 2008) p. 37.

¹⁴ United Nations General Assembly, *Universal Declaration of Human Rights*, UN GA Res 217 (III), 3rd Session, Supp. No. 13, UN Doc A/810(1948)71; Paulo César Carbonari, *Human Dignity as A Basic Concept of Ethics and Human Rights* in Berma Klein Goldewijk, et al., *Dignity and Human Rights, the Implementation of Economic, Social and Cultural Rights* (T. M. C Asser Press: Antwerp, 2002) pp. 35-44. Universal Declaration of Human Rights itself is not a legally binding instrument and categorized as soft law in international law, however, it has strong legitimacy as one of the sources of international human rights law. See in, Article 38, United Nations, *Statute of International Court of Justice* (26 June 1945), 33 *United Nations Treaty Series* 993; Jack Donnelly, *Universal Human Rights in Theory and Practice, Third Edition*, (Cornell University Press: New York, 2013) pp. 24-27; Philip Alston and Ryan Goodman, *International Human Rights, the Successor to International Human Rights Context*, (Oxford University Press: New York, 2013) p. 144; Rhona K. M. Smith, *Textbook on International Human Rights, Fourth Edition*, (Oxford University Press: New York, 2010) p. 37; Javaid Rehman, *International Human Rights Law, Second Edition*, (Pearson Education Limited: Harlow, 2010) pp. 80-82; <http://www.ohchr.org/en/udhr/pages/introduction.aspx>; <http://legal.un.org/avl/ha/udhr/udhr.html>. Accessed 12 August 2016.

¹⁵ Article 17, Council of Europe, *Revised European Social Charter*, CETS Number 163 (1 July 1999).

Protection of the National Minorities¹⁶, the European Union Charter of Fundamental Rights¹⁷. In American region, there are the Charter of the Organization of American States¹⁸, the American Declaration of the Rights and Duties of Man¹⁹ and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights²⁰. However, in Asia region, the development of human rights legal regime is not as strong as the European and Inter American region. Nevertheless, the Asian Human Rights Declaration is a milestone for the formulation of a stronger regional legal corpus of human rights in Asia.²¹

On national level, the State Party to international or regional human rights treaties is legally binded to implement the obligations under the treaties after the process of ratification. The international, regional and national legal *continuum* concerning human rights then became a legal corpus that is exponentially develop from time to time. Indonesia has ratified the ICESCR through the Law number 11 of 2005 and the CRC through the Decision of the President number 36 of 1990. Indonesia is legally bound to implement the provisions under those treaties, however, in international human rights compliance mechanism, there is no legal enforcement mechanism to assure that human rights are implemented legalistically by the State Parties. With regard to the compliance mechanism, Europe has pioneered the concept of regional human rights court that was established to guard the implementation of the European Convention on Human Rights.²²

The European Human Rights Court has judged human rights cases and through these judicial decisions, it has given significant contribution towards human rights protection on national, regional and international level. In ASEAN, there is no regional human rights court yet, therefore, to assess whether a State Party has been working to carry on its legal obligations, the one and only mechanism that exists is international human rights monitoring system by the respective human rights committees. International human rights monitoring system concerning economic, social and cultural rights and the

¹⁶ Article 12 to 14, Council of Europe, *Council of Europe Framework Convention for the Protection of the National Minorities*, CETS Number 156 (1 February 1998).

¹⁷ Article 14, European Union, *European Charter of Fundamental Rights*, 213 *United Nations Treaty Series* 222 (3 September 1953).

¹⁸ Article 49, Organization of American States, *Charter of the Organization of American States*, 1609 *United Nations Treaty Series* 119 (30 April 1948).

¹⁹ Article XII, Organization of American States, *American Declaration on the Rights and Duties of Man*, OEA/Ser.L.V/11.82.Doc.6.rev (1992).

²⁰ Article 13, Organization of American States, *Additional Protocol to the American Convention on the Human Rights in the Area of economic, Social and Cultural Rights*, OAS Treaty Series 69 (16 November 1999).

²¹ ASEAN, *Asian Human Rights Declaration*, Phnom Penh (18 December 1999). The Declaration is adopted in 2012. Gerard Clarke, "The Evolving ASEAN Human Rights System: The ASEAN Human Rights Declaration of 2012", *Northwestern Journal of International Human Rights*, Vol. 11, Issue 1 (2012) pp. 1-27.

²² Several cases concerning human rights issue have been decided by the European Court of Human Rights, *inter alia*, *Handyside v. UK*, (7 December 1976) ECHR, 5493/72, paragraphs 49-50.

rights of children is conducted by the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child. Every four years, the State Party has to submit national reports that consist of the implementation of the provisions. These reports will be assessed by the Committees and a concluding observation will be made in order to give recommendations to the State Party on what should it improves concerning the realization of human rights. Individual communications mechanism contributes positive impact towards the realization of human rights in the world, however, Indonesia has not ratified yet the individual communications mechanism from the ICESCR and CRC.

Article 13 and 14 of the ICESCR protects the right to education by legally obliging the State Party to recognize the right of everyone to education. The recognition itself, shall be followed by several obligations, inter alia, the State Party aims to achieve primary education free and compulsory for all. The nature of State Party obligation under the ICESCR is positive obligation.²³ The State Party has to take measures to progressively realize the rights protected under the ICESCR, the obligation is immediate in nature and there are several efforts conducted by international actors to clarify further the State Party obligation towards the ICESCR. The right to education is then strengthened by the existence of Article 28 of CRC that obliges the State Party to recognize the right of every child to education and the State Party has to progressively and on the basis to equal opportunity make the primary education free and compulsory for all children.

The right to education is important philosophically for child development and their intellectual well being. Pragmatically, the right to education is a key to social mobility. One of the characteristics of a developed nation is high quality education as the foundation to prepare highly qualified human resources. Therefore, the right to education is a platform for children' characters and morality because education shapes individual' perspectives and early education plays significant contribution to the development of children's characters and moral compass. Education is also a guarantee for children's bright future, education is a means and also an end in itself. That is how essential education is for personal development and how it impacts the development of a nation on macro level analysis.

III. CORRUPTION IN EEDUCATION SECTOR: BANTUAN OPERASIONAL SEKOLAH AS THE KEY PROGRAM TO REALIZE THE RIGHT TO EDUCATION

Corruption is as old as the civilization itself. No society ever left untouched by the crime of corruption. Philosophically, corruption is an act of immorality, as defined by Transparency International (TI) and World Bank

²³ Ellie Palmer, *Human Rights in Perspective: Judicial Review, Socio-Economic Rights and the Human Rights Act*, (Hart Publishing: Oxford, 2007) p. 14.

(WB) that corruption is the abuse of power for private benefit.²⁴ Defining corruption is not a simple task because corruption takes myriad forms from bribery to solicitation.²⁵ On international level, the United Nations Convention Against Corruption (UNCAC) is the main treaty on anti-corruption measures. Before the UNCAC, there was a long history in the making of an international convention concerning anti-corruption. The fight against corruption was begun by, *inter alia*, the United States of America (USA).²⁶ The USA promulgated the Foreign Corrupt Practices Act (FCPA) to address the problem of foreign bribery.²⁷ After FCPA, the awareness to fight corruption increased globally, the Organization of Economic Development (OECD), WB, TI and many international organizations whether public or private in their respective nature, started to initiate movements to address the problem of corruption worldwide.²⁸ The UN initially formulated the United Nations Convention against Transnational Organized Crime (UNTOC) in 2000 as the international legal basis to address the problem of transnational organized crime.²⁹

Regional legal *continuum* on corruption are myriad, there are European Union Convention Drawn Up on the Basis of Article K. 3 of the Treaty on the European Union, on Protection of the European Communities' Financial Interests³⁰, Protocol I to the Convention on the Protection of the European Communities' Financial Interests³¹, Protocol II to the Convention on Protection of the European Communities' Financial Interests³² and Convention on the Fight against Corruption involving Officials of the European Communities or Official of Member States of the European Union³³. Several legal instruments

²⁴ www.transparency.org/about_us, accessed 12 August 2016; World Bank, 'Helping Countries Combat Corruption, the Role of the World Bank', 1995-2005, (World Bank: Washington D. C., 2005) p. 77.

²⁵ Hongying Wang and James D. Rousseau, "Transparency International and Corruption as An Issue of Global Governance", *Global Governance*, Volume 7 (2001) pp. 25-49.

²⁶ Martine Boersma, *Corruption: A Violation of Human Rights and A Crime under International Law*, (Intersentia: Cambridge, 2012) p. 73.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ The Convention was the follow up action of two resolutions from the General Assembly on the topic of the International Code of Conduct for Public Officials and the UN Declaration Against Corruption and Bribery in International Commercial Transactions in 1996. General Assembly Resolution International Cooperation Against Corruption and Bribery in International Commercial Transaction Resolution in 1998 and 1999; Carlos Castresana, *Prosecution of Corruption Cases and Respect of Human Rights, Review Meeting*, The International Council on Human Rights Policy, Geneva (28-29 July 2007) pp. 1-15.

³⁰ European Union, *European Union Convention Drawn Up on the Basis of Article K. 3 of the Treaty on the European Union, on Protection of the European Communities' Financial Interests*, ETS 2007, No. 166 (22 July 1995).

³¹ European Union, *Protocol I to the Convention on the Protection of the European Communities' Financial Interests*, ETS 2007, No. 169 (27 September 1996).

³² European Union, *Protocol II to the Convention on Protection of the European Communities' Financial Interests*, ETS 2010, No. 8 (19 June 1997).

³³ European Union, *Convention on the Fight against Corruption involving Officials of the European Communities or Official of Member States of the European Union*, Official Journal C 195/1 (26 May 1997).

were created by the Council of Europe, Criminal Law Convention on Corruption³⁴ and Civil Law Convention on Corruption³⁵. In Inter-American region, there are Inter-American Convention Against Corruption³⁶. African Union also has several legal instruments to combat corruption, the Southern African Development Community of the West African States Protocol on the Fight Against Corruption in 2001 and the African Union Convention on Preventing and Combating Corruption in 2003.³⁷ In Asia, the only official document that addressed the problem of corruption and means to combat corruption is the Asian Development Bank Framework Policy on Anti-corruption and Integrity by the Asian Development Bank.³⁸

According to the Concluding Observations on Indonesia's Thirty-fifth report under Article 44 of the CRC, the Committee affirmed that Indonesia has taken measures to implement the right of the child through the incorporation of the rights of the child into the Constitution and CRC's provisions into the national law through the Law number 23 of 2002 and the Law number 35 of 2014 concerning Child Protection.³⁹ However, the recommendation from the Committee highlighted on how inadequate the program that has been implemented by the Government of Indonesia to respect, protect and fulfil the right to education for children.⁴⁰ Corruption in grand scale distorts the fund that should have been used for development and this paper aims to analyze and explain that corruption in education sector hampers the realization of the right to education.

The right to education in Indonesia is protected by Article 28 (C) and 31 of the Constitution.⁴¹ *Bantuan Operasional Sekolah* is the main program of the

³⁴ Council of Europe, *Criminal Law Convention on Corruption*, CETS No:173, 2216 *United Nations Treaty Series* 225 (27 January 1999).

³⁵ Council of Europe, *Civil Law Convention on Corruption*, CETS No:174, 2246 *United Nations Treaty Series* 168 (15 May 2003).

³⁶ Organization of American States, *Inter American Convention Against Corruption*, (29 March 1996). Carlos A. Manfroni, *The Inter-American Convention against Corruption, A Commentary*, (Lexington Books: Maryland, 2003) p. 1.

³⁷ John Mukum Mbaku, "The International Dimension of Africa's Struggle Against Corruption", *Asper Review*, Vol. X (2010) pp. 35-78; Kolawole Olaniyan, "The African Convention on Prevention and Combating Corruption: A Critical Appraisal", *African Human Rights Journal*, Vol. 4 (2004) pp. 74-92.

³⁸ M. Sornarajah, "South East Asia and International Law", *Singapore Journal of International and Comparative Law*, Vol. 2 (1997) pp. 637-644. Following adoption of ADB's policy, ADB and OECD established the Asia Pacific Anti Corruption Initiative in 2001 (ADB and OECD, *ADB and OECD Anti Corruption Initiative for Asia and the Pacific, Combating Corruption in the New Millennium*, Tokyo, 30 November 2001). This policy sets action plans for States to combat corruption, however, this is not a legally binding instrument. See also, Jina Kim, *Development of Regional Human Rights Regime: Prospects for and Implications to Asia*, (Tokyo Foundation: Tokyo, 2009) pp. 57-101.

³⁹ Article 1 (2), 1 (12), 9 (1), 48 and 49.

⁴⁰ The Committee on the Rights of the Child, *Thirty fifth Sessions, Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: Indonesia*, CRC/C/15/Add.223 (26 February 2004) pp. 12-13.

⁴¹ "Article 28

Government to eliminate school fees, thus realize the right to education, especially the right to free primary education. The legal basis for *Bantuan Operasional Sekolah* are the Law number 17 of 2003 concerning State Finance, the Law number 20 of 2003 concerning the National Education System, the Government Regulation number 48 of 2008 concerning education financing and the Government Regulation number 17 of 2010 concerning the establishment and management of education. In 2005, Indonesia reduced the subsidy for fuel and changed the allocation of the subsidy to fulfil social needs, *inter alia*, health and education.⁴² The program is intended to shift the financial obligation of the parents of guardian of the child to the Government.

Bantuan Operasional Sekolah has three main goals, those are, to waive the fees for every primary and secondary student in public schools, waive fees in any form for every poor student, either in public schools or private schools and reduce the burden of the cost of the school operation to every student in private schools.⁴³ *Prima facie*, *Bantuan Operasional Sekolah* is an interesting program to realize the right to education in Indonesia. Eliminating school fees of primary and secondary education is a difficult but attainable task of State party of the ICESCR and CRC. Indonesia has taken efforts to realize the right to education through the establishment of *Bantuan Operasional Sekolah*, however, further studies has to be conducted concerning the existence of corruption in this program to determine whether corruption amounts to a violation of human rights when corruption happened in this program.

IV. CORRUPTION AS A VIOLATION OF THE RIGHT TO EDUCATION: A CONSTRUCTIVIST APPROACH

Due to the vague legal wordings of ICESCR provisions, the justiciability of economic, social and cultural rights is never be as certain as the civil and political rights. However, several human rights organs of the UN have taken measures to clarify further the obligation of the State Party under the ICESCR. One of the measures is the formulation of the obligation of conduct and result that emphasizes the idea of act and result from any governmental measures in realizing economic, social and cultural rights. The obligation of conduct is defined as the State Party is taking action that has been reasonably calculated to realize the enjoyment of human rights. The obligation of result demands the

Every person shall have the right to develop him/herself through the fulfilment of his/her basic needs, the right to get education and to benefit from science and technology, arts, culture, for the purpose of improving the quality of his/her life and for the welfare of the humankind.” Constitution of the Republic of Indonesia.

⁴² The Committee on Economic, Social and Cultural Rights, *Implementation of the International Covenant on Economic, Social and Cultural Rights, Initial Report Submitted by States Parties under Articles 16 and 17 of the Covenant, Indonesia*, E/C.12/IDN/1 (29 October 2012) paragraphs 244-250, pp. 61-63.

⁴³ Ministry of Education and Culture, *The Minister of Education and Culture Regulation Number 101 of 2013 concerning the Technical Guidance of the Use and Financial Accountability of Bantuan Operasional Sekolah of 2014* (4 December 2013) p. 3.

State Party to achieve specific targets to satisfy a detailed substantive standard. The Maastricht Guidelines took the example of the realization of the right to health that the obligation of result concerning the right to health is, *inter alia*, the reduction of maternal mortality.⁴⁴ The obligation of result uses the 1994 Cairo International Conference on Population and Development and the 1995 Beijing Fourth World Conference on Women as the parameters of the substantive standards.⁴⁵ However, the example of obligation of conduct and result is very limited in the development of international human rights law.

Even though the Guidelines is not legally binding in nature, it contributes to clarify the State Party human rights obligation.⁴⁶ Based on Article 2 (1) of the ICESCR, the State Party has to take steps to realize the economic, social and cultural rights with aim to progressively realize the rights. The provision does not specifically set any precise schedule of the realization of human rights, therefore, based on the positivist perspective, the wordings in Article 2 (1) do not clearly regulate when and how these rights should have been implemented by the State Party.⁴⁷ Due to this situation, there were several efforts taken by the Committee on Economic, Social and Cultural Rights and scholars to formulate clarification works in order to weight more legal precision to the ICESCR. The Committee has already formulated several General Comments to the ICESCR, the right to education is further explained in the General Comment Number 13.⁴⁸

The Committee on Economic, Social and Cultural Rights formulated a framework to assess the realization of the right to education;

⁴⁴ International Commission of Jurists, "Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights", UN. Doc. E/CN.4/1987/17, *Human Rights Quarterly*, Volume 9 (1987) pp. 122-135; International Commission of Jurists, "Maastricht Guidelines on Violation of Economic, Social and Cultural Rights", *Human Rights Quarterly*, Volume 20, No. 3 (1998) pp. 695-697.

⁴⁵ The Maastricht Guidelines for the Violation of Economic, Social and Cultural Rights, paragraph 7.

⁴⁶ The Committee on Economic, Social and Cultural Rights, *Background Paper Submitted by Dr. Audrey Chapman and Dr. Sage Russell, Senior Programme Associate, Science and Human Rights Programme, American Association for the Advancement of Science (AAAS), Washington D. C., Day of General Discussion: Right to Education, Violations of the Right to Education, Nineteenth Session, Geneva, 16 November-4 December 1998, E/C.12/1998/19, (30 November 1998) paragraphs 12-15.*

"15. The Maastricht Guidelines represent an important step forward in enabling States parties and NGOs to monitor economic, social and cultural rights effectively. Since their drafting less than two years ago, they have achieved wide currency and, like the Limburg Principles before them, appear to be well on their way to becoming *de facto* international standard, in this case for conceptualizing violations of economic, social and cultural rights."

See also, Sital Kalantry, Jocelyn E. Getgen and Steven Arrig Koh, "Enhancing Enforcement of Economic, Social and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR", *Human Rights Quarterly*, Vol 32 (2010) pp. 253-310.

⁴⁷ The Committee on Economic, Social and Cultural Rights, *General Comment Number 3, The Nature of the States Parties Obligations, Fifth Session, UN. Doc. E/1991/23, Annex III (1990) paragraphs 6-9.*

⁴⁸ The Committee on Economic, Social and Cultural Rights, *General Comment Number 13, HRI/GEN/1/Rev. 9 (Vol 1), 63, Preliminary Report of the Special Rapporteur on the Right to Education, E/CN.4/1999/49 (13 January 1999) Part II.*

*“Availability: functioning educational institutions and programmes have to be available in sufficient numbers, through a public education system and allowing private parties to establish non-public schools.
 Accessibility: educational institutions and programmes have to be accessible to everyone, without discrimination on any ground, also implying physical and economic accessibility.
 Acceptability: the form and substance of education, including curricula and teaching methods, have to be relevant, culturally appropriate, of good quality and in accordance with the best interests of the child; this includes a safe and healthy school environment.
 Adaptability: education has to be flexible, so that it can adapt to the needs of changing societies and communities and respond to the needs of students within their specific social and cultural context, including the evolving capacities of the child.”⁴⁹*

Concerning constructivist approach in taking further this evidence into the international legal making, Finnemore and Sikkink explained that norm entrepreneurship is a process of norm-making in international relations which is conducted by the subject of international law.⁵⁰ Norm has its cycle, the first cycle is the norm emergence that is indicated by the process of persuasion by the norm entrepreneurs. The second cycle is the norm acceptance by the States through the means of ratification. The last cycle is the norm cascade that the norm is internalized within States.⁵¹ Constructivism opens a new dimension of explanation in the emergence of a new norm in international relations. Any norm could be emerged as long as this norm is being proposed, accepted and internalized by the subjects of international law. The number of subjects whom agreed with the norm entrepreneurship quantitatively determine the success of norm entrepreneurship.⁵² The existence of Maastricht Guidelines is an evidence for norm entrepreneurship in the making of concept with regard to the violation of economic, social and cultural rights.

The notion of corruption as a violation of human rights has been proposed by several scholars. Boersma stated that, corruption amounts to a violation of the right to education because corruption discriminates people's chance to access education and failure to take anti-corruption measures in education sector constitutes a violation of the immediate obligation to progressively realize the right to education.⁵³ In the *status quo*, the Human

⁴⁹ *Ibid.*

⁵⁰ Martha Finnemore and Katharyn Sikkink, “International Norm Dynamics and Political Change”, *International Organization*, Volume 4, Number 52 (Autumn 1998) pp. 807-907; Katharyn Sikkink, “Transnational Politics, International Relations Theory and Human Rights”, *PS: Political Science and Politics*, Volume 31, Number 3, (September 1998) pp. 516-523.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ Martine Boersma, *Corruption: A Violation of Human Rights and A Crime Under International Law?*, (Intersentia: Antwerp, 2012) pp. 250-251.

Rights Committee and Committee on Economic, Social and Cultural Rights has cooperatively drafted the Joint General Comment Number 1 concerning the relationship between corruption and human rights.⁵⁴ Concerning the right to education, both committees analyze the impact of corruption to the realization of human rights by utilizing the AAAA framework as the assessment parameter.⁵⁵

The Committees explained that corruption severely affected the availability of education, embezzlement practices of public funds, corruption in procurement and diversion of school textbooks creates substandard quality of goods and services for education.⁵⁶ Accessibility criterion is a complex criteria that is divided into four subcriteria, those are Non-discrimination, economic accessibility, physical accessibility and quality. As each subcriteria elaborated further by the Committees, corruption caused discrimination because the practice of bribery within the public school system, as exemplified in the school admission can hamper meritocracy.⁵⁷ Bribery directly violates the principle of non-discrimination because rich parents can pay bribes in the admission process while those who are not financially capable cannot enter education.⁵⁸ Favouritism as another form of corruption violates the principle of non-discrimination because as stated in Article 13 and 14 of ICESCR in conjunction with Article 28 of CRC that education should be compulsory for all. Non-discrimination is the heart of human rights concept because non-discrimination principle emphasizes the equality between human being. Human rights concept emphasizes that all men are created equal and each with dignity of a human person. Discrimination thus, is a violation towards this concept and in this case, corruption is a means to do discrimination in education sector.

Economic accessibility or affordability criterion focuses on how fees are impediment towards equal quality education. When a school demands bribes from its students, only students who can afford the price of bribery whom can continue his or her education.⁵⁹ This practice, thus constitutes a discrimination and subsequently by logical tracking, it amounts to a violation of the right to education. Physical accessibility criterion regulates that education should be physically accessible by children. Based on the assessment of the Committees, the physical accessibility criteria can be violated by corruption because corruption in procurement of school building can lead to distorted decision making.⁶⁰ Upon the acceptability criteria, the Committees explained that the impact of corruption is not so present in this criterion, however, embezzlement of fund creates a domino effect that begins with the lack of fund for the

⁵⁴ *Ibid.*

⁵⁵ Katrien Beeckman, "Measuring the Implementation of the Right to Education: Educational versus Human Rights Indicators", *International Journal of Children's Rights*, Volume 12 (2004) pp. 71-84.

⁵⁶ *Op. Cit.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

teachers that may give results in lower quality of education.⁶¹ Adaptability criterion requires that education if flexible, in order to adapt to the needs of changing societies and communities and to respond to the need of students within diverse social and cultural settings, however, the Committees do not elaborate further the example of corruption that amounts to a violation of adaptability criteria in the draft General Comment.⁶²

An Indonesian case law concerning corruption in education sector was chosen to exemplify the relationship between corruption and the realization of the right to education. There is a case of embezzlement by the means of fraud conducted by an ex school headmaster in Malang, East Java.⁶³ The convicted embezzled *Bantuan Operasional Sekolah* funds and the loss of state funds amounted to Rp 555.140.000,00 (five hundred fifty five millions and one hundred forty thousand rupiah).⁶⁴ The students deserved to obtain Rp 120.000,00 (one hundred and twenty thousand rupiah) per each child and they could not obtain those funds because of corruption.⁶⁵ Corruption in this case, as analyzed by the AAAA standards;

Table 1

Criteria ⁶⁶	Definition ⁶⁷	Case Analysis
Availability	Functioning educational institutions and programmes have to be available in sufficient numbers, through a public education system and allowing private parties to establish non-public schools.	The availability criteria could never be achieved because the fund that should have been used to provide educational institutions and programs cannot be obtained by the State Party. The availability should have been enjoyed by the students but corruption reduces the funds significantly, in the exemplified case, each children should

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ District Court of Surabaya, *Republic of Indonesia* “Decision Number: 01/Pid.Sus/TPK/2015/PN.Sby” (25 Mei 2015). See also the Report from Corruption Eradication Commission concerning corruption in education sector, Corruption Eradication Commission, *Annual Report 2013*, (Corruption Eradication Commission: Jakarta, December 2013) www.kpk.go.id, pp. 83 and 89. Accessed 12 August 2016.

⁶⁴ *Ibid.*, pp. 73-78.

⁶⁵ *Ibid.*

⁶⁶ The Committee on Economic, Social and Cultural Rights, *General Comment Number 13*, HRI/GEN/1/Rev. 9 (Vol 1), 63, *Preliminary Report of the Special Rapporteur on the Right to Education*, E/CN.4/1999/49 (13 January 1999) Part II.

⁶⁷ *Ibid.*

		have been given Rp 120.000,00 per student to reduce their financial burden thus removing barriers to education, however, the funds were embezzled and the availability criteria could not be fulfilled.
Accessibility	Educational institutions and programmes have to be accessible to everyone, without discrimination on any ground, also implying physical and economic accessibility.	The main function of <i>Bantuan Operasional Sekolah</i> is to reduce and subsequently eliminate school fees in order to provide the highest level of accessibility for the children to enter quality education. However, due to corruption, the children should have had Rp 120.000,00 to reduce their school fees but they would never obtain it. Corruption eliminates these fees and thus, <i>ipso facto</i> , hampers the realization of the right to education. Corruption has a direct negative impact towards accessibility criteria, especially the economic accessibility.
Acceptability	The form and substance of education, including curricula and teaching methods, have to be relevant, culturally appropriate, of good quality and in accordance with	Corruption reduces the opportunity for the school to provide quality education for children. The funds that had been corrupted by the convicted should have been used to improve quality education like providing textbooks

	<p>the best interests of the child; this includes a safe and healthy school environment.</p>	<p>that create a good academic environment for students.</p>
<p>Adaptability</p>	<p>Education has to be flexible, so that it can adapt to the needs of changing societies and communities and respond to the needs of students within their specific social and cultural context, including the evolving capacities of the child.</p>	<p>Corruption gives negative impacts towards culture. Corruption is hampering moral education of children, when there are corrupt practices happening in education sector, children are exposed to the culture of corruption that makes the moral education severely hampered. Children would perceive that corruption is a normal situation in their regular circumstances because it is perpetuated by many perpetrators and this is also perpetuating the culture of corruption. Children are the next generation of a nation, whether a nation will combat corruption successfully or not, it depends on how the State Party, hand in hand with society, educates anti-corruption education to children. The evolving capacities of children are pivotal elements in education. “Children see, children learn” is a classic assumption that children learn from</p>

		<p>what they see. If children were placed in an environment where corruption was rampant and pervasive then children would observe that corruption is a normal activity, therefore, the State Party has to take effective anti-corruption education to prevent this process and save the next generation from the perpetual corruption cycle. Effective anti-corruption measures is <i>a condition sine qua non</i> for successful realization of the right to education.</p>
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Based on table 1, it can be observed that corruption plays significant role in blocking the efforts of the State Party to realize the right to education. This is the evidence that makes a connection between corruption and human rights is important to ensure the full realization of human rights and also combating corruption at the same time.

Boersma explained in her dissertation that the State Party has the duty of progressive realization under the ICESCR and this duty has the requirement of immediate effect towards the rights holder.⁶⁸ The obligation of non-discrimination as protected in Article 2 (2) of the ICESCR is interpreted as the violation of human rights happened when the State Party failed to take measures to address educational discrimination.⁶⁹ Corruption is a means of discrimination by treating people differently from people who can afford to pay the bribes and who cannot. This is a practice of discrimination, thus violates the duty of progressive realization under the ICESCR, especially Article 13. Boersma asserted also that the State party has an immediate obligation to take deliberate concrete and targets steps as regulated in Article 2 (1) of the ICESCR and the failure to take steps due to corruption constitutes a violation of Article 13.⁷⁰ Since Article 14 is the prerequisite for the maximum realization of Article 13 then corruption also violates Article 14 because the detailed plan

⁶⁸ Martine Boersma, *Op Cit.*, pp. 425-429.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

to make primary education free for all will never be achieved when corruption still exists in the education sector.

The State Party also bounded by the typology of human rights obligations that the State party has to respect, protect and fulfil the right to education.⁷¹ The obligation of respect is being violated by corruption because corruption can hinder access to education and, *ipso facto*, violates the obligation under Article 13 of ICESCR.⁷² The State Party under the obligation to protect, has to take measures to prevent third parties from interfering with the enjoyment of the right, however, in Indonesia, corruption is defined in a limited manner that a criminal act amounts to corruption only when the State fund is involved. This legal limitation creates a legal vacuum for private sector corruption of corruption that is perpetrated by non state actors. These kind of corrupt practices can violate the obligation to protect.⁷³ The obligation to fulfil or facilitate requires the State Party to take positive measures to enable and assist individuals and communities to enjoy the right to education.⁷⁴ Boersma contended that under Article 13, the State Party has the principal responsibility for the direct provision of education in most circumstances.⁷⁵ The concrete actions of the State Party concerning the obligation to fulfil is myriad and it ranges from actively developing school system, building classrooms, delivering programs, providing teaching materials, training teachers and paying them domestically competitive salaries.⁷⁶ However, in case analysis, it can be seen palpably that corruption eliminates the fund that should have been used to take concrete measures to fulfil the right to education, thus corruption amounts to a violation of human rights because of its direct negative impact towards governmental measures in realizing the right to education. The concept of minimum core obligation of the State party is important to be taken as a parameter in the realization of the right to education.⁷⁷ The State Party has to

⁷¹ Olivier de Schutter, *International Human Rights Law*, (Cambridge University Press: Cambridge, 2010) p. 242; Maria Sepulveda, *The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights*, (Intersentia: Utrecht, 2003) p. 16; Asbjørn Eide, *Right to Adequate Food as A Human Right*, UN. Doc. E/Cn.4/Sub.2/1987/23, paragraph 29 as reprinted also in *UN Human Rights Study Series*, Number 1, U.N. Sales No. E.89.XIV.2, 1989, The Committee on Economic, Social and Cultural Rights, *Concluding Observations on Iceland, Fourth Report, Forty Ninth Session*, Un. Doc. E/C.12/2012/SR.43-33, paragraph 6.

⁷² *Loc. Cit.* Boersma.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ The Committee on Economic, Social and Cultural Rights' concept of minimum core obligations concerning the right to education are:

"To ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in Article 13 (1) ICESCR; to provide primary education for all in accordance with Article 13 (2) (a); to adopt and implement a national education strategy which includes provision for secondary higher and fundamental education; and to ensure free choice of education without interference from the State or third parties, subject to conformity with 'minimum educational standards' (Article 13 (3) and (4))." The Committee on Economic, Social and Cultural Rights, *General*

ensure that the most basic forms of education is available for the right holders on a non-discriminatory basis and it is protected under Article 13 (2) of the ICESCR. When corruption happened and caused the failure of the State Party to meet these standards, then it constitutes as a violation of the right to education.⁷⁸

The Joint Draft General Comment from the Human Rights Committee and Committee on Economic, Social and Cultural Rights has cooperatively drafted a Joint General Comment Number 1 concerning the relationship between corruption and human rights is another milestone in the process on norm entrepreneurship concerning corruption as a violation of human rights. The analysis within the Draft should have been endorsed by as many States as possible to enhance the progress of international norm making. Corruption on empirical level as exemplified in the case analysis, fits perfectly with the theoretical hypothesis of corruption as a violation of human rights. The negative impact of corruption towards the realization of human rights is palpable and direct. The embezzlement of *Bantuan Operasional Sekolah* funds has directly caused the failure of State Party to meet the challenges in progressively realize the right to education.

V. CONCLUSION

Corruption within *Bantuan Operasional Sekolah* Program amounts to a violation of the right to education as guaranteed by Article 13 and 14 of the ICESCR in conjunction with Article 28 of the CRC. Empirical evidence based on the case law concerning embezzlement of *Bantuan Operasional Sekolah* funds in Malang that was analyzed by the AAAA standards from the General Comment Number 13 concerning the Right to Education from the ICESCR has affirmed the hypothesis on corruption as a violation of the right to education. When corruption happened, as exemplified in the case of embezzlement, the funds that should have been used to eliminate school fees as a means to realize the right to education could not be utilized as ideal as possible. This evidence-based-analysis strengthened the process of norm entrepreneurship about corruption as a violation of human rights that has been advocated by human rights scholars and international human rights bodies. The Joint Draft General Comment from the Human Rights Committee and Committee on Economic, Social and Cultural Rights has cooperatively drafted the Joint General

Comment Number 13, The Right to Education, adopted at Twenty-first Session of the Committee on Economic, Social and Cultural Rights, E/C.12/1999/101 (8 December 1999) paragraph 57; Katharine G. Young, "The Minimum Core of Economic, Social and Cultural Rights: A Concept in Search for Content", *Yale Journal of International Law*, Volume 33 (2008) pp. 113-174; Audrey Chapman and Sage Russel, ed., 'Introduction' in *Core Obligations: Building A Framework for Economic, Social and Cultural Rights*, (Intersentia: Antwerp, 2012) p. 9; Mervat Rishmawi, *A Commentary on the United Nations Convention on the Rights of the Child, Article 4, the Nature of the States Parties Obligations*, (Koninklijke Brill NV: Leiden, 2006) p. 34; *United Nations Special Rapporteur on the Right to Primary Education*, Sixty Eighth Session, A/68/29/4 (9 August 2013) paragraph 114, p. 22.

⁷⁸ Ibid.

Comment Number 1 concerning the relationship between corruption and human rights is the concrete evidence on how the process of norm entrepreneurship is happening in this contemporary era and this process has to be supported by evidence of corruption in the main human rights program of the State Party, in this study, Indonesia.

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