

## **Justiciability of Economic and Social Rights in Indonesia: The Importance of Ratifying the Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights (ICESCR)**

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### **Abstract**

This article aims to analyse how the Indonesian government complies with obligations enshrined in the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Furthermore, this study will assess how the national law provides justiciability as well as redress if the violations of socio-economic rights occur. The protection of socio-economic rights in Indonesia is enshrined in the Constitution, the Human Rights Law Act, and other thematic acts; such as the Children Protection Act, Labour Act, etc. However, some violations have occurred these days both by commission and omission of the government, such as in the Lapindo and Mesuji case. These two cases show that the rights to adequate housing, work, health, healthy environment, and rights to land have been severely violated. In the case of Lapindo, the decision of the court regarding the violations of socio-economic rights was unreasonable; they did not even put the element of tort into consideration for their decision concerning the human rights norm. For the second case, the process of legal settlement is still ongoing. Thus, the government has to establish a comprehensive policy to redress the violation of the socio-economic rights as these rights are not justiciable before the national law. If national law does not provide enforcing element, citizens will have no place to file a complaint for the violation of socio-economic rights. The Optional Protocol to the (OP to the ICESCR) provides individual communication to the Committee (CESCR). Reflecting from the cases of Lapindo and Mesuji, this paper will elaborate how the OP to the ICESCR guarantees the justiciability of socio-economic rights.

**Keywords:** individual communication, justiciability, economic and social rights, state obligation, Committee CESCR

## **Justisiabilitas Hak-hak Ekonomi dan Sosial di Indonesia: Pentingnya Meratifikasi Protokol Tambahan Kovenan Internasional Hak-hak Ekonomi, Sosial, dan Budaya (KIHESB)**

### **Abstrak**

Artikel ini bertujuan untuk menganalisis kepatuhan pemerintah Indonesia terhadap kewajiban memenuhi hak ekonomi, sosial dan budaya (ekosob). Selain itu artikel ini akan menguji bagaimana hukum nasional menyediakan justisiabilitas termasuk ganti rugi jika pelanggaran terjadi. Perlindungan hak ekosob di Indonesia terdapat dalam berbagai hukum

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nasional, seperti Undang-undang Dasar Tahun 1945, Undang-undang Hak Asasi Manusia, serta undang-undang tematik lainnya (Undang-Undang Perlindungan Anak, Perburuhan dan lain-lain). Meskipun demikian pelanggaran hak bidang ekososob masih sering terjadi baik secara sengaja maupun lalai, antara lain kasus lumpur Lapindo dan kasus Mesuji. Pemerintah harus mengeluarkan kebijakan yang bersifat komprehensif untuk penegakan hukum dalam hal terjadi pelanggaran hak ekososob, karena hak-hak ini tidak dapat diadili dalam hukum nasional. Jika hukum nasional memiliki unsur penegak hukum tersebut, maka warga negara tidak dapat mengajukan komplain atas pelanggaran. Protokol Tambahan atas Kovenan Internasional tentang Hak-hak Ekonomi, Sosial, dan Budaya (OP) menyediakan komunikasi individual kepada Komite Ekososob (CESCR). Berkaca dari kasus lumpur Lapindo dan Mesuji, maka artikel ini akan memperinci bagaimana Protokol Tambahan akan menjamin justisiabilitas hak ekososob warga negara.

**Kata Kunci:** komunikasi individual, justisiabilitas, hak-hak ekonomi dan sosial, kewajiban negara, komite CESCR

## A. Introduction

The opinion that Economic, Social, and Cultural (ESC) rights are vague, inherently of a positive nature which required positive measures for their implementation, and resource dependent<sup>1</sup> becomes the departure point in discussing the justiciability of these rights in this article. Although international law recognizes ESC rights as genuine rights, a lively and contentious debate over the ideological and technical nature of these rights is still ongoing.<sup>2</sup> The debate about the justiciability of ESC rights has become an issue since the development of human rights.

It is generally believed that the plight of the poor should be dealt with by the state. Under the International Human Rights Law regime, e.g. Article 2 (1) International Covenant on Civil and Political Rights (ICCPR) and Article 2 (1) International Covenant on Economic, Social and Cultural Rights (ICESCR), states are the main party to carry out legal obligations in order to protect the basic rights of their respective nationals. Thus, it has the obligation to enact policy that will improve the standard of living of its nationals. However, it is debatable as to whether states are under a legal and justiciable duty to take certain policy steps in order to address the social and economic needs of individuals.<sup>3</sup> This question concerning the

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1 Malcolm Langford, "The Justiciability of Social Rights: from Practice to Theory", in: Malcolm Langford (ed), *Social Rights Jurisprudence, Emerging Trends in International and Comparative Law*, Cambridge: Cambridge University Press, 2009, pp. 3-45, at 30.

2 Jackbeth K. Mapulanga Hulston, "Examining the Justiciability of Economic, Social and Cultural Rights", *The International Journal of Human Rights*, Vol 6, No. 4, 2002, pp. 29-48, at 36.

3 *Ibid.*

implementation of the protection of ESC rights is at both domestic and international levels.

The adoption of (OP to the ICESCR or OP) by the United Nations (UN) General Assembly on 10 December 2008 brought a new era for socio-economic rights justiciability. This OP established individual communications to ensure that the violation of socio-economic rights are heard before the Committee of Economic Social and Cultural Rights (CESCR).

This article aims to understand the justiciability of economic and social rights in Indonesia, and to assess whether Indonesia needs to ratify the OP to give better justiciability of socio-economic rights to its citizens. To address the purposes above, The Author will first discuss briefly about socio-economic rights and the debate on the justiciability issue on international level. Secondly, The Author will discuss the minimum obligation of the states on economic and social rights. Thirdly, The Author will assess the protection and the justiciability of economic and social rights in Indonesia. Then, I will discuss about the OP about its content and its contribution for states ratifying it. Finally, the conclusion will be given based on the analysis in the previous sections.

## **B. Socio Economic Rights and the Debate on the Issue of Justiciability at International Level**

ESC rights are aimed to protect, maintain and advance the fulfilment of basic human needs, determinants of quality of life and cultural values consistent with human dignity both as individuals or groups. They include rights related to the workplace, social security, family life, cultural life, access to housing, food, water, health care, and education. These rights, along with civil and political rights, require protection. The failure of the state to protect those rights may prove fatal or in some contexts may give rise to serious violation of human rights.<sup>4</sup>

The full enjoyment of ESC rights has been seen as requiring resource allocation: both money and human resources.<sup>5</sup> On the contrary, it is argued that civil and political rights simply require the state to refrain from interfering with individual freedoms.<sup>6</sup> However, such statement is not completely true as human rights are universal,

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4 M. Foster, *International Refugee Law and Socio-Economic Rights: Refugee from Deprivation*, New York: Cambridge University Press, 2007, Chapter 5.

5 Mashood Baderin and Robert McCorquodale, "The International Covenant on Economic, Social and Cultural Rights: Forty Years of Development", in: Mashood Baderin (eds), *Economic, Social and Cultural Rights in Action*, Oxford: Oxford University Press, 2009, p. 6.

6 Cisanga Puta-Chekwe and Nora Flood, "From Division to Integration: Economic, Social, and Cultural Rights as Basic Human Rights", in: Isfahan Merali (eds.), *Giving Meaning to Economic, Social and Cultural Rights*, Philadelphia: University of Pennsylvania Press, 2001, pp. 39-51, at. 42.

indivisible, interdependent, and interrelated.<sup>7</sup> Both types of rights need resources allocation and refraining from state interference.<sup>8</sup> Certain ESC rights such as the right to form and join trade union (Article 8 ICESCR) also require the state not to interfere. On the other hand, some civil and political rights, such as the right to legal aid (Article 14 (3) (d) ICCPR),<sup>9</sup> free and fair elections (Article 25 (b) ICCPR), also need a very high investment to ensure their full enjoyment.

The wording of ESC rights has caused difficulty to ascertain legal obligation of states. This fact has encouraged the view that ESC rights are not justiciable.<sup>10</sup> Nevertheless, development in these recent years has shown that some countries, through their domestic courts, have tried to examine ESC rights.

One of many examples is the decision of the Constitutional Court of South Africa on the *Grootboom* case.<sup>11</sup> This case was related to the right to adequate housing and was brought before the Court to assess the constitutional compatibility of a housing policy implemented by the government. The Court decided that the eviction of a group of homeless people from their informal settlements without providing temporary shelters of an appropriate standard is unreasonable and unconstitutional. Article 26 (1) of The Constitution stipulates that everyone has the right to have access to adequate housing.<sup>12</sup> Therefore, The Court decided that the government had failed to make adequate provision for homeless people.<sup>13</sup>

In regard with the right to health, Delhi Court interpreted that the right to health is inalienable with the right to life.<sup>14</sup> The Court decided that there is a consistency between the decision and the regulation in International Human Rights Laws which have been ratified by India, such as Article 25 Universal Declaration of Human Rights (UDHR), Article 10 and 12 ICESCR, Article 12 and 14 Convention to Eliminate All Forms

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7 Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14-25 June 1993, UN Doc.A/CONF 157/24, Part I, at 20.

8 Daphne Barak-Erez and Aeyal M. Gross, "Introduction: Do We Need Social Rights; Questions in the Era of Globalization, Privatization, and the Diminished Welfare State, in: Daphne Barak-Erez (eds), *Exploring Social Rights; Between Theory and Practice*, Oxford: Hart Publishing, 2007, pp. 1-17.

9 International Covenant on Civil and Political Rights, New York, 16 December 1966, United Nations, Treaty Series, Vol. 999, p.171 and Vol. 1057, p. 407.

10 Michael J. Dennis and D.P. Stewart, "Justiciability of Economic, Social and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?", *The American Journal of International Law*, Vol. 98, No. 3, 2004, pp. 462-515, at 464.

11 Constitutional Court of South Africa, *The Government of South Africa and others v. Irene Grootboom and others*, 2001 (1) SA 46 (CC), October 4, 2000.

12 The Constitution of The Republic of South Africa No. 108 of 1996.

13 *Ibid*, at 95S.

14 High Court of Delhi, *Laxmi Mandal v. Deen Dayal Harinagar Hospital & Ors*, W.P.(C) Nos. 8853 of 2008, 4 June 2010.

of Discrimination Against Women (CEDAW) regarding the reproductive health; Article 22 and 27 the Convention on the Rights of the Child (CRC).<sup>15</sup> The Court decided that the State failed to fulfil the obligations stipulated in those instruments; therefore, the State had violated the right to health of its nationals.<sup>16</sup>

These cases demonstrated that ESC rights are actually real, not vague, and justiciable. In other words, ESC rights are subject to judicial enforcement of the national jurisdiction. Hence, all human rights are equal and should be treated without discrimination. The enjoyment of all human rights cannot be separated, as it was affirmed in the World Conference on Human Rights in Vienna in 1993 that: "All human rights are universal, indivisible, and interdependent and interrelated and the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis".<sup>17</sup>

### C. States Minimum Obligation Under ICESCR

The concept of core minimum obligation is articulated in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights<sup>18</sup> and in the General Comment (GM) No. 3, on the Nature of the State Parties Obligations provided by the CESCR. This obligations reflect a universal absolute bottom-line of obligations under each of the rights in the ICESCR, which has to be respected, protected and fulfilled by all state parties, regardless of their level of economic development.<sup>19</sup> Once a state has reached the bottom-line, it could not take retrogressive measures, because it might constitute the limitation of the enjoyment of these rights.

The GM No. 3 emphasizes the relation between minimum core obligations and minimum essential levels of right.<sup>20</sup> With regard to different situations of state parties in which ESC rights have limited *de facto*; and the policies adopted in these contexts, such as economic crisis, severe poverty, armed conflict and natural or man-made disasters, states are still obliged to guarantee the enjoyment of "basic economic, social and cultural rights, as part of minimum standards of human rights"<sup>21</sup>. Hence,

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15 *Ibid.*

16 *Ibid.*

17 Vienna Declaration and Programmes of Action, note 7.

18 The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights is officially adopted by CESCR under documents E/C.12/2000/13 in 2 October 2000.

19 Amrei Muller, "Limitations to and Derogations from Economic, Social and Cultural Rights", *Human Rights Law Review*, Vol. 9, No. 4, 2009, pp. 557-601, at 579-580; see also: General Comment 14, General Comment 15, and General Comment 19; see also: The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, published in UN Doc. E/CN.4/1987/17, Annex (1987).

20 CESCR, General Comment No. 3, the Nature of States Parties Obligations (Art. 2), UN. Doc. E/C.12/14/1990.

21 CESCR, Concluding Observations regarding Israel, 31 August 2001, E/C.12/1/Add.69.

the aim of minimum core obligation approach is to accommodate states to fulfil their obligations although they have inadequate resources required for the enjoyment of ESC rights. Minimum core obligations list the actions or requirements in minimum level which should be met by states with the aim to achieve the enjoyment of minimum essential levels of a right in question. It might occur when a state claims that it could not meet the minimum obligations; however it should demonstrate its inability to justify its claim.<sup>22</sup>

The GM No. 3 does not determine minimum state obligations, but it provides useful examples in its guidance. The CESCR has started to fill the gap by identification of states obligations under ICESCR in its GM No. 4 and other subsequent GMs.<sup>23</sup>

The realization of ESC rights also requires three types or levels of state obligations which are the obligations to respect, protect, and fulfil.<sup>24</sup> These three levels of obligation have the same proportion and cannot be isolated from one another. The full enjoyment of human rights will be achieved by involving the performance of all duties.<sup>25</sup>

Obligation to respect entails obligations not to interfere with the enjoyment of the rights in question. To respect ESC rights, states are obliged not to adopt laws or other measures that do not conform to ESC rights protected by international human rights treaties.<sup>26</sup> For example, obligation to respect the right to health obliges states not to deny access to health facilities due to a discriminatory basis.<sup>27</sup>

Obligation to protect requires states to prevent the interference from the action of the third parties.<sup>28</sup> States are not only responsible for the acts committed by its organs but also responsible for its failure in preventing and protecting from abuses committed by third parties.<sup>29</sup> At this level, the obligation requires state to enact the regulation to stipulate the behaviour of individuals/groups/entities which have/may have an impact on the enjoyment of human rights.<sup>30</sup> Nowadays, the private entities are the source of threat of violation. The real example is oil company which sometimes **breaks** the right (f.e. the fume or the noise of the industrial plant) of the

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22 CESCR, General Comment No. 3, the Nature of States Parties Obligations (Art. 2), UN. Doc. E/C 12/14/1990.

23 Audrey Chapman and Sage Russel, "Introduction", in: Audrey Chapman (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Antwerpen-Oxford-New York: Intersentia, 2002, p. 10.

24 A. Eide, *The Right to Adequate Food as a Human Right*, UN Doc E/CN.4/Sub.2/1987/23.

25 Magdalena Sepulveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, Antwerp: Intersentia, 2003, pp. 165-184.

26 *Ibid.*

27 CESCR, General Comment No. 14.

28 Manisuli S Senyonjo, *Economic, Social and Cultural Rights in International Law*, Oxford: Hart Publishing, 2009, p. 24.

29 Magdalena Sepulveda, note 25, p. 222.

30 *Ibid.*

people surrounding the drilling area.<sup>31</sup> Therefore, obligation to protect does not stop only in the enactment of legislation but includes the willingness of state to take the necessary measures to enforce it as well.

The obligation to fulfil obliges states to take appropriate legislative, administrative, budgetary, judicial and other measures for the full realization of the rights.<sup>32</sup> Obligation to fulfil requires the state to take positive action to ensure that human rights are protected rather than only to refrain from interference or take steps to prevent others from interfering with the enjoyment of human rights.<sup>33</sup>

A general legal obligation provision in ICESCR is stipulated under Article 2(1); which "... to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures". States are obliged to take steps to achieve progressively the full realization of the rights stipulated in the Covenant. This obligation is immediate (within a short reasonable time) and not qualified or limited by other considerations.<sup>34</sup> The only limitation is the lack of available resources. However, the ICESCR imposes obligations which are of immediate effect.<sup>35</sup> Furthermore, the steps taken should be "deliberate, concrete, and targeted".<sup>36</sup> States are obliged to comply with the obligation to take steps to the maximum of their available resources, even in time of crisis, particularly for the protection of the vulnerable groups.<sup>37</sup>

The term "available resources" is not limited to the resources available within the State but also resources available through international assistance and cooperation from international communities.<sup>38</sup> The author believes that international cooperation between developed, developing and, least developed States will create a better protection and realization of all human rights, in particular ESC rights. There

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31 European Court of Human Rights (ECtHR), *Lopez Ostra v. Spain*, Judgment, 09 December 1994, ECtHR Series A303-C; see also: ECtHR, *Guerra and others v. Italy*, Judgment, 19 February 1998, ECtHR Reports 1998-I.

32 The Maastricht Guidelines, *Loc. cit.* 31.

33 Colin Fenwick, "Minimum Obligations with Respect to Article 8 of the International Covenant on Economic, Social and Cultural Rights", in: Audrey Chapman (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Antwerp-Oxford-New York: Intersentia, 2002, p. 71.

34 *Ibid*, p. 313; see also: CESCR in General Comment No. 3, General Comment No. 13, General Comment No. 14; the Limburg Principle No. 16.

35 General Comment No. 3.

36 *Ibid*.

37 Magdalena Sepulveda, *Op cit.*, note 25, p. 314.

38 *Ibid*, p. 315; see also: Note 39.

might not be general international obligations for developed States to provide assistance. However, such obligations would arise in the context of disaster relief and humanitarian assistance.<sup>39</sup> States which do not possess appropriate resources are obliged to actively seek assistance to ensure the full realization of ESC rights of all people in their territories.<sup>40</sup> In practice, the supervision of the State's compliance regarding the obligation to take steps to the maximum of their available resources raises a complex problem. Available resources have been interpreted as the only resources available within a State. Thus, the developing and least developing countries cannot comply with the obligation because they declared that there are not enough resources within their countries.

Another problem is the wording of "progressive implementation". This has been interpreted that ESC rights can be fulfilled in a long period of time. However, some ESC rights should be fulfilled immediately.<sup>41</sup> Some of ESC rights are capable of direct application by judicial and other organs in the domestic system.<sup>42</sup> These include right to equal treatment (non-discrimination, Article 3); right to fair wage and remuneration for work of equal value (Article 7 (a) (i)); right to form and join trade union (Article 8); right to protection and assistance for children and young people (Article 10 (3)); right to primary education, right to liberty for parents to choose education for their children, right to freely establish educational institutions (Article 13 (2) (a), (3) and (4) respectively); and right to take part, enjoy, and benefit from cultural life (Article 15 (3)). Therefore, States cannot use the wording "progressively" to compromise their obligation of fully realizing the rights recognized in the Covenant.

#### **D. Socio Economic Rights in Indonesia and Their Justiciability**

Human rights norms are recognized under the Constitution of the Republic of Indonesia of 1945 (the Constitution) and some other laws, for example Human Rights Act, Children Protection Act, Environmental Act, and Domestic Violence Act, etc. However, this Part will deal only with the human rights regulated in the Constitution and the Human Rights Act No. 39 Year 1999.<sup>43</sup> In addition, the ICESCR has been

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39 General Comment No. 12; see also Magdalena Sepulveda, *Op cit.*, note 25, pp. 370-378.

40 General Comment No. 4; General Comment No. 5; General Comment No. 6; General Comment No. 11; Concluding Observations Armenia E/2000/22; Concluding Observations Sri Lanka E/1999/22; Concluding Observations Nigeria E/1999/22; Concluding Observations Suriname E/1996/22; see also: Magdalena Sepulveda, *Op.cit.*, note 25, pp. 376-377; Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, Oxford: Clarendon Press, 1995, pp. 136-144.

41 Note 39.

42 *Ibid.*

43 Indonesian Act No. 39 of 1999 concerning Human Rights.



ratified by Indonesian Government in 2005 by Act No. 11 Year 2005. Thus, the ICESCR should be seen as domestic law which is justiciable before the court in order to protect the rights of Indonesians.

The Constitution, which was drafted before the Indonesian independence on 17 August 1945 and promulgated a day after the independence, has been amended four times by The Majelis Permusyawaratan Rakyat (The Indonesian People Consultative Assembly). After the Second Amendment in 2000, the entire provisions on human rights in the Constitution gave an extremely solid ground for the efforts of protection, fulfilment, and advancement of human rights. The substance on human rights can be classified into civil-political rights, economic, social, and cultural rights.

The ESC rights recognized by the Constitution are:<sup>44</sup> right to work and to obtain a fair and proper remuneration in working relationship; right to develop oneself through the fulfilment of basic needs; the right to obtain education and the benefits of science and technology, arts and culture; right to advance oneself in striving for his/her rights collectively; right to live a physically and mentally prosperous life, and to obtain proper and healthy environment; right to health service; right to facilities and special treatment to obtain equal opportunity and benefit in order to reach equality and justice; right to social security; and the right to communicate and to obtain information.

In addition, the Amended 1945 Constitution also sets forth the rights usually categorized as a group of special rights and the rights to development, for example the right to healthy environment. It affirms that the protection, promotion, enforcement and fulfilment of human rights shall be the responsibility of the state, particularly the government.<sup>45</sup>

The Indonesian Human Rights Law Act stipulates diverse type of human rights. The Act recognizes human rights and human freedom.<sup>46</sup> In this part, the Act combines civil political rights; economic, social and cultural rights and the rights to development, as well as women and children rights. It recognizes the right to life; marry and bear children; self- development; justice; freedom of the individual; welfare; women rights; children rights. Furthermore, the Act explains each of the rights included in these divisions. Interestingly, the ESCR rights are recognized under the welfare rights. These include:<sup>47</sup> right to own property, work, join and form trade union, place to live and adequate standard of living, social security necessary for the

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44 Constitution of the Republic of Indonesia of 1945, Articles 28 C, 28D, 28 E, 28 F, 28 G, 28H, 28I.

45 *Ibid*, Article 28I.

46 Articles 9 to 66 of Indonesian Act No. 39 of 1999 concerning Human Rights.

47 *Ibid*, Articles 36-42.

existence of an adequate standard and for the development of his well-being; special facilities and care for the disabled, children, elderly and pregnant women.

The Indonesian Human Rights Act affirms that the principal responsibility for protecting, promoting, upholding, and fulfilling human rights lies in the hands of the government.<sup>48</sup> It stipulates the human rights norms more detailed than in the Constitution. The special provisions concerning the rights of women and children show that these two categories received greater attention and protection. Thus, the Constitution and the Human Rights Act provide solid protection for ESC rights.

Furthermore, Indonesia has ratified the ICESCR. As a result, this Covenant has been recognized as one of the instruments to protect human rights in Indonesia. This recognition is stipulated in Article 7 of the Human Rights Law Act. It states that all the international human rights instruments ratified by Indonesia are legally binding, and are thus enforceable in Indonesian domestic courts. In addition, it stipulates that the violations of human rights are subject to all legal means in domestic and international level. In accordance to the exhaustion of local remedy principle, Indonesian may also employ legal enforcement provided by international instruments ratified by the government after they employed all domestic legal means.

However, it is not certainly the case for ESC rights violation. Indonesian could not employ the international mechanism, because the government has not yet ratified the OP to the ICESCR which enables individual to file complaint before the Committee after all the domestic mechanisms have been employed. Thus, Indonesians may only rely on the domestic regulations for the justiciability of ESC rights.

In regard to these human rights regulations, Indonesia can be considered a country with an extensive regulation in human rights provisions. However, given its economic difficulties and large population, Indonesia faces great challenges in guaranteeing the fulfilment of human rights enshrined in the domestic laws. Nevertheless, the difficulties arise should not be treated as an excuse for not properly fulfilling the enjoyment of such rights. As Indonesia has accepted the obligation to respect, to protect, and to fulfil ESC rights, it should employ all available resources to maximum at the domestic and international level in order to fulfil the enjoyment of ESC rights of its nationals. The question that should be addressed is “is there any justiciability mechanism provided by national laws?”

The word justiciability in a broad meaning entails the existence of a judicial or a quasi-judicial review mechanism under which rights may be invoked.<sup>49</sup> A right is justiciable if a judge could apply it in a specific case and the application may result in a

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48 *Ibid*, Articles 1(1) and 8.

49 *Ibid*.

further determination of the right's meaning.<sup>50</sup> Based on the definition above, it can be seen that as norms, ESC rights in Indonesia are justiciable.<sup>51</sup> However, when it comes to the application of the norms by judges in a specific case, justiciability is questionable.

A very good example to be discussed is the *Lapindo* case. On May 29, 2006, mud and gases began erupting from the gas exploration field of *Lapindo Brantas Incorporated* (LBI), one of the biggest Indonesian oil-drilling companies.<sup>52</sup> The disaster has caused damage to the lives of many. The mud flood as of now has engulfed 1,810 houses as well as 18 schools, 2 government offices, 20 factories and 15 mosques;<sup>53</sup> people have been displaced from their homes.<sup>54</sup> The mud has now covered about 450 ha of land, which includes six villages, paddy fields and sugarcane plantations as well as part of the Sidoarjo highway.<sup>55</sup>

According to human rights law regime, the Government holds the main responsibility to take care of the victims as well as their loss. However, the LBI should be responsible as well. The Government has enacted some regulations concerning the compensation for the victims.<sup>56</sup> The regulation stipulates that LBI should cover the loss in the immediate disaster zone, while the government is responsible for both the infrastructure and the people in affected villages on the fringes of the zone. Until now, compensation has not been distributed completely.

Concerning the mud flow disaster, there were two cases brought before the general courts. The first case was brought by the Indonesian Legal Aid Foundation (YLBHI) before the Central Jakarta District Court. It claimed that the government and LBI had been negligent to provide sufficient protection to the victims. The claim was based on the unlawful act of the government by violating the obligation to protect the people's rights enshrined in the Constitution and Human Rights Law Act; especially rights to work, housing, education and health care. The claimant requested the court to give an order to the respondents to enact the policy to stop the disaster and protect the affected people. Also, the government should enact the policy that LBI has to

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50 Kitty Arambulo, *Strengthening the supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and Procedural Aspects*, Antwerp: Intersentia, 1999, p. 55.

51 Article 7 of the Indonesian Act No. 39 of 1999 concerning Human Rights..

52 World Health Organization (WHO), "Hot Mud Flow, Sidoarjo, East Java, Emergency Situation Report", 24 November 2006, p. 1

53 *Ibid*, at 2.

54 *Ibid*.

55 *Ibid*.

56 Erna Dyah Kusumawati, *The Role of the Indonesian Human Rights Commission and National Courts in Facilitating the Justiciability of Economic, Social and Cultural Rights (A Case Study on the Hot Mud Flow Disaster in East Java Province, Indonesia)*, Unpublished Thesis, The Netherlands: University of Groningen, pp. 13-17.

assure all the expenses for the disaster mitigation and compensation.<sup>57</sup>

The Court rejected YLBHI's claim on the ground that it failed to prove negligence.<sup>58</sup> The decision is based on the evidences and witnesses brought by all the parties.<sup>59</sup> The Court found that the government and LBI did not violate people's rights and they have performed its duty in giving protection and aid to the victims.<sup>60</sup> The District Court decision was affirmed by the Decision of the Court of Appeals on June 13<sup>th</sup>, 2008<sup>61</sup> and the decision of the Supreme Court on April 3<sup>rd</sup>, 2009.<sup>62</sup>

The second case was brought by *Wahana Lingkungan Hidup Indonesia* (WALHI) before the District Court of South Jakarta<sup>63</sup> against Lapindo and five other companies, as well as the Indonesian President, the Energy and Environment Ministers, and local officials over the mudflow disaster. WALHI based its claim under "legal standing" provided by Article 38 of the Act No. 23 Year 1997 on the Environment.<sup>64</sup> WALHI requested LBI to be responsible by compensating the dwellers of eight sinking villages in that area which caused 8,200 people to evacuate with 9,000 workers losing their jobs. In addition, WALHI asked LBI to fund the effort to stop the mudflow.<sup>65</sup>

However, based on the evidence brought before the Court, the judges ruled that the mudflow in Sidoarjo district was a 'natural disaster', and was not caused by gas drilling by LBI as alleged by the claimant.<sup>66</sup> In addition, the Court affirmed that the government has the responsibilities over the victims based on the Constitution.<sup>67</sup> The Court also stated that LBI has the same responsibilities with the government;<sup>68</sup> however, it did not explain further concerning the action that should be carried out in fulfilling the obligation. After the decision, WALHI filed an appeal to the Court of

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57 Decision of the District Court of Central Jakarta, No. 384/Pdt.G/2006/PN.JKT.PST, 22 November 2007, pp. 29-30. The original text is in Bahasa Indonesia and translation is provided by the author. The hard copy of the document is at the author's hand.

58 *Ibid*, pp. 289-290.

59 *Ibid*, the Consideration part, at pp. 276-285.

60 *Ibid*, at p. 288.

61 The Decision of Court of Appeals of Jakarta (*Pengadilan Tinggi Jakarta*), No. 136/PDT/2008/PT.DKI., 13 June 2008.

62 The Decision of Supreme Court of Indonesia, No. 2710 K/Pdt/2008, 3 April 2009, pp. 59-60. The decision is available at <http://putusan.mahkamahagung.go.id/putusan/4ab3686d57b25e6ab6c6b5501dc014c6>, translation is provided by the present author.

63 The case is registered under No. 284/Pdt.G/2007/PN.Jak. Sel., The hard copy of the decision is at the author's hand. Translation provided by the author.

64 *Ibid*, p.5.

65 *Ibid*, pp. 21-22.

66 *Ibid*, pp. 193-196.

67 *Ibid*, p. 197.

68 *Ibid*.

Appeals. The Court of Appeals of Jakarta affirmed and adopted the decision taken by the District Court.

These two cases represent a negative precedent of the recognition and the protection of ESC rights in Indonesia. The claims did not request the compensation for the victims. Rather, they requested the political will of the government to seriously take measures in protecting the rights of the victims. However, in the consideration of the judges, it said nothing concerning the ESC rights and human rights instruments at the international level as well as domestic level, though the claimant brought the issue of the violation of human rights enshrined in some Indonesian acts, especially in the Constitution and the Human Rights Act, e.g. right to housing, the right to healthy environment, the right to access the health service, as well as some children rights to grow in a clean and healthy environment. The Courts did not even consider these rights at all, despite the claimants of these two cases asked the Courts to rule over the slow response of the government constitutes violation of human rights enshrined in the Constitution and the Human Rights Act.

The author argues that these decisions were not thoroughly considered from the aspect of the human rights elements. The Courts were having difficulties in interpreting the human rights norms, although the norms are stipulated in the national laws. The Courts have to interpret the norms more progressively in advancing the justiciability of ESC rights, in particular if the norms are worded in the claims. The Courts have the obligation to rule over all the norms invoked by the claimants and relate them to the evidences brought by the parties, then it can decide as to whether the tort is proven.

Problem also arose when LBI was only willing to pay for redress for people living in the immediate disaster zone, this certainly brought big loss for people living outside. However, by some changes in the regulations, the responsibility of redress for Living people outside the immediate zone is at the hand of the government<sup>69</sup> Although LBI promised to pay for compensation, some people who live in the immediate disaster zone did not receive compensation as mandated by the presidential regulations.

In September 2013, they logged a petition to the Indonesian Constitutional Court. They claimed that the Article 9 (1) of the Act No 15 Year 2013 concerning the Amendment of the Act No. 19 Year 2012 on the 2013 State Expenditure is in contrary to Articles 28 D(1), 28 H (4) and 28 I (4) of the Constitution.<sup>70</sup> The State Expenditure of

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69 Presidential Regulation No. 14 of 2007 concerning the Sidoarjo Mudflow Mitigation Agency (BPLS); Presidential Regulation No.48 of 2008, Presidential Regulation No. 40 of 2009, Presidential Regulation No. 68 of 2011 and Presidential Regulation No. 37 of 2012.

70 Decision of the Indonesian Constitutional Court No. 83/PUU-XI/2013.

2013 lays budget which was spent to pay the redress for the victims of mud flow disaster. They were supposed to receive the compensation based on some changes on the Presidential regulations enacted previously. However, the compensation scheme was considered to be unfair and discriminatory. Thus, the enactment of the law on State Expenditure has violated their rights. The Constitutional Court ruled that the government should be responsible for the compensation process and should make sure that LBI will securely pay the redress.

This decision is indeed one step ahead for Indonesians in relations with claims to redress the violation of ESC rights. Although the Court did not clearly say that there is a violation of ESC rights, but it did recognize that all people, whether those who live inside or outside immediate disaster zone, should be treated equally and should receive compensation.<sup>71</sup>

Other examples are the *Mesuji* case which happened both in Lampung Province and Palembang, South Sumatera Province.<sup>72</sup> In these cases, the rights to land of the people were violated because of the government policies in giving the land to the plantation companies did not take the side of the people's interest.<sup>73</sup> The policy has made the companies expropriated the people's land. The dispute is still going on and there is no settlement yet concerning the land. People cannot occupy their land while most of them depend on agriculture. The government should pay more attention to solve this problem. The dispute concerning the land expropriation should be solved in comprehensive ways, because such problems are very complex, either from the parties involved or the loss experienced by each party.

The cases discussed above gave negative precedents, however some positive precedents have been shown. Other cases related to the economic and social rights also have been adjudicated before Indonesian Courts. These cases; e.g., were *Ujian Nasional* case (National Exam), TKI *Nunukan* (Migrant Workers) case. In these cases, the courts had ruled in favor to the plaintiffs. These cases were accepted in a form of legal standing which actually is not "really" recognized in Indonesian legal system. Some judges have accepted "legal standing" with a view that violation of ESC rights do exist. Thus, the Court ruled that the governments should change the policy which violate the people's rights. In the *Ujian Nasional case*,<sup>74</sup> the Supreme Court

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71 *Ibid.*

72 Erna Dyah Kusumawati (et.al), "Penyelesaian Hukum Dugaan Pelanggaran Hak Ekonomi dan Sosial Melalui Peraturan Hak Asasi Manusia (Studi Kasus Konflik Mesuji)", Research Report, LPPM: Sebelas Maret University, 2012, pp. 26-39.

73 *Ibid.*, pp. 57-61.

74 See for example the Court decisions on National Exam case, No. 2596K-PDT-2008, 14 September 2009 jo No. 377/PDT/2007/PT DKI, 6 December 2007, jo 228/Pdt.G/2006/PN JKT PST, 21 Mei 2007

strengthened the decisions of the Court of First Instance and the Court of Appeals, that the national exam violates students rights and it is against the law. The Government was under obligation to amend the regulation concerning the exam. Although, there are judges who have “human rights” perspective and rule in favour to the victims, other judges think otherwise and they do not have the obligation to follow the previous judgment in the similar cases. Indonesian judges are free to decide cases based on their interpretation on the legal basis claimed by the claimant as well as on their knowledge of law. This has made some discrepancies of decisions within similiar cases.

From the cases discussed above, it is known that ESC rights are justiciable. There are indeed available mechanisms provided by Indonesian law to adjudicate these rights, i.e. the General Court, mediation mechanism by the Indonesian Human Rights Commission, as well as the Constitutional Court. However, as with the two cases in Mud Flow disaster, general courts have not elaborated the human rights norms in their decisions. Lack of human rights perspective will be the case which was inhibiting the adjudication. Only after the decision of Constitutional Court which ruled human rights norms both at international and national level. Unfortunately, the decision of the Constitutional Court only abrogate laws that is either against the Constitution or violate human rights. Although, the judgment is final, the implementation of the decision will only depend on the willingness of the government to change the laws in question. Thus, the redress for the victims is still uncertain. This fact brings the need to ratify the OP to the ICESCR which will enable the victims to employ the international mechanism after the exhaustive of local remedies.

#### **E. Ratifying the OP to the ICESCR: The Future of Socio Economic Rights Justiciability in Indonesia**

The OP to the ICESCR was adopted by the UN General Assembly, on December 10<sup>th</sup>, 2008.<sup>75</sup> The OP was entered into force three months after the date of the deposit of the tenth instrument of ratification or accession.<sup>76</sup> It was entered into force on 5 May 2013, after Uruguay become the tenth country ratifying it. To date, there are twelve parties.<sup>77</sup>

The OP has a feature which can be said as an advanced step toward the justiciability of ESC rights. Based on this OP, The CESCR can receive and consider

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75 The OP to the ICESCR, GA Res 63/117, 10 December 2008, A/RES/63/117; UN. Doc.A/63/435; C.N.869.2009.

76 *Ibid*, Article 18.

77 [https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=1&mtdsg\\_no=IV-3-chapter=4&lang=en#Participants](https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=1&mtdsg_no=IV-3-chapter=4&lang=en#Participants).

communications, both from individuals or group of individuals.<sup>78</sup> This feature shows that ESC rights are actually real and not vague. The other features resemble the procedures in other UN human rights treaties (f.e. ICCPR and CEDAW) which are state reports, interstate communications and inquiry procedures.

Concerning the complaint mechanism, the OP imposes standard review by the CESCR to “consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant”.<sup>79</sup> This article has made on-going disputes about the potential application, and has become the main challenge of the CESCR to face related to the interpretation of the word ‘reasonable’.<sup>80</sup> However in heeding the consideration, CESCR should consider ‘a range of possible measures’ which has been taken by the state parties.

When examining the individual communications, the CESCR should employ legal standards enshrined in the Covenant as well as states obligation set forth in the Covenant concerning ESC rights. The OP also empowers the CESCR to issue interim measures to protect individuals from irreparable harm<sup>81</sup>, and obligates states parties to take all appropriate measures to ensure that individuals under their jurisdiction are not subject to any form of ill-treatment or intimidation as a consequence of communicating with the CESCR.<sup>82</sup> In addition, the OP establishes the inquiry procedures which is confidential, and enables the CESCR to do potential onsite visits, where it might receive reliable information indicating ‘grave or systematic violations’ of the ICESCR's rights by a state party.<sup>83</sup>

The OP is worthwhile to be ratified. Although, up to present there has been no proof yet, especially in case law under the OP, that ratifying it will increase the protection of economic and social rights. However, certain claim based on another OP (OP to the ICCPR) which was brought before the Human Rights Committee (HRC) had led to a change of laws, policies, and programmes of Governments around the world. For example, the case of *F. H. Zwaan-de Vries v. The Netherlands* led to the determination that the Netherlands was in breach of the ICCPR due to legislation that granted unemployment benefits to married men but not to married women. The HRC established that the legislation was discriminatory on grounds of sex and marital

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78 The OP to the ICESCR, *Op. cit.*, Article 1 and 2.

79 *Ibid*, Article 8 (4).

80 Brian Griffey, “The ‘Reasonableness’ Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights”, *International Human Rights Law Review*, 11:2(2011), pp. 275-327, at 278.

81 OP to the ICESCR, *Op. cit.*, Article 5 (1).

82 *Ibid*, Article 13.

83 *Ibid*, Article 11.



status. The law, then, was amended to eliminate the requirement for married women to prove that they were the breadwinner or were permanently separated from their husband in order to obtain benefits.<sup>84</sup> There was also a case brought under the OP of the CEDAW, which was related to ESC rights, i.e. right to receive information concerning the sterilization procedure.<sup>85</sup> Based on these cases, the author argues that ratifying the OP of ICESCR will lead to positive attitude of member states, in protecting, respecting and fulfilling the economic and social rights.

Based on the features stipulated in the OP as well some cases described above, the author argues that ratifying the OP is very urgent and crucial for Indonesia. The OP promises the adjudication of claims based on ESC rights. With regard to justiciability, Indonesian law guarantees the justiciability for human rights violation enshrined in the human rights instruments at both national and international instruments which have been ratified. However, due to some implementation problems, this guarantee was not fully fulfilled yet. According to the two cases described in the previous section, socio-economic rights in Indonesia were not really justiciable. Therefore, ratifying the OP will enable Indonesian citizens to employ international mechanism to protect their rights after employing all the available national mechanisms. In addition, the protection and fulfilment of socio economic rights will be better and more effective, as there is a monitoring and an enforcement system at the international level to examine the steps and measures taken by Indonesian government to fully achieve the fulfilment of the socio-economic rights.

## F. Conclusion

It can be said that the debate on nature of socio-economic rights being vague and not justiciable has ended. By the adoption of the OP, the justiciability of the socio-economic rights has become clearer than before. The states are under their obligation to comply with the obligation stipulated in the Covenant. If they did not, individuals can communicate with the Committee about the violation after employing all available mechanism at the national level. The OP promises “to put to rest some of the most persistent criticisms regarding the adjudication of claims based on economic, social and cultural rights, criticisms that generally prevail only at the level of the abstract”.<sup>86</sup> The author believes that the ratification of the OP will provide

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84 *F. H. Zwaan-de Vries v. The Netherlands*, Communication No. 182/1984, April 9, 1987, UN Doc. Supp. No. 40 (A/42/40) at 160.

85 *A.S. v. Hungary*, Communication No. 4/2004, CEDAW/C/36/D/4/2004, August 14, 2006. Based on the Committee's Recommendation, Hungary amended the Public Health Act to ensure that women received proper information regarding sterilization procedures.

86 Michael J. Dennis and David P. Stewart, Note 10.

more adjudication mechanism for the socio-economic rights violation in Indonesia, especially if people could not rely on the national mechanism in adjudicating their rights, as discussed in previous sections. In addition, ratification will encourage Indonesian government to comply with its obligations under ICESCR. Also, in tackling the lack of human rights perspective of the Judges, the government should also establish program which could increase the ability and capability of the courts in interpreting human rights norms stipulated both in national and international instruments. Therefore, it will enhance the role of the courts in adjudicating economic and social rights.

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