THE ASSESSMENT OF RIGHT OF THE CHILD TO EDUCATION
IN THE CRC IN INDONESIA:
A CRITICAL ANALYSIS FROM ACT 20 OF 2003

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ABSTRACT

The Convention of the Rights of the Child shall be implemented within all aspects of the child by Parties States. Consequently, the promulgation of Act 20 of 2003 regarding the National System of Education shall comply with the basic principles of the Convention because Indonesia ratifies the Convention and children are the main stake holder on the assessment of the right of the child to education.

This essay tries to examine provisions in the Act whether they comply with the basic principles of the Convention, i.e. non-discrimination (Article 2), best interests of the child (Article 3), right to life, survival and development (Article 6), and participation of child (Article 12) for effective implementation of the Convention applied by the Act.

It reveals that certain provisions in the Act do not conform to those basic principles.

As a result, it is better that the Act shall be amended by applying those principles.

I. Introduction

For two years, the Indonesian Government and the House of Representatives (Dewan Perwakilan Rakyat (DPR)) had tried to comprehensively amend the National Education System Act 2 of 1989 before they promulgated Act 20 of 2003 regarding National Educational System on July 8, 2003 (hereinafter the Act).

There are two official reasons to amend the existing Act. Firstly, Act 2 of 1989 was a product of the Orde Lama (Old Regime) representing the central power and the state’s ideological purposes. Secondly, due to a change of regime, the act was assumed to no longer accommodate the current situation inspired by political reform, autonomy and globalization.

Although the Act does not explicitly mention the aim for implementing the right of the child to education in the Convention of the Rights of Child (hereinafter the CRC), its contents regulate the right of the child to education. Many achievements in the Indonesian First Periodic Report to the Committee of the Rights of the Child have been taken into consideration to create provisions on the right of the child to education in this Act.

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It is critical to note and analyze the broad spectrum of education in the Act by applying the basic principles and provisions of the CRC in which education is guaranteed as a fundamental right. This essay, therefore, aims to justify whether the Act as an act of national framework for educational system complies with the basic principles and provisions of the CRC for the effective realization of the right of the child to education.

It will argue and focus on the application of the basic principles of the CRC, i.e., non-discrimination (Article 2), best interest of the child (Article 3), right to life, survival and development (Article 4), and participation of child (Article 12) based upon certain provision in the Act. In doing so, this essay will examine human rights in Indonesia as a general framework, legal status of the CRC within the Indonesian legal system, and the application of the basic principles and provisions of the CRC in the Act.

II. Human Rights in Indonesia

International Human Rights Law is binding on all States and their agents, including law enforcement officials. Moreover, most of the international human rights conventions obligate many states to take certain measures with regard to the provisions contained therein, whether by creating domestic legislation or by other effective implementation. But the most important obligation is that states have to ensure that all individuals enjoy their rights within their territories and their jurisdictions. Or, in simple terms, states have to implement the effectiveness principle which requires that provisions of human rights treaties or conventions be interpreted and applied so as to make [their] safeguards practical and effective (emphasis added).


3. General Comment 3, id.

4. Alonso argues that the phrase was included as a reflection of the parties' desire to obtain the widest possible applicability of the Convention, Phillip Alston, The Legal Framework of the Convention on the Rights of the Child, in Teaching Materials for International Law and Children's Rights 2003, the University of Milwaukee Law School, p. 150. (Hereinafter 'Teaching Materials').

It is accepted that a state's human rights obligations under the Convention extend to the persons it sends abroad, even if those persons are not the country's own citizens, as Professor Peace finds in 'The Jurisprudence on Expulsion' (1995), 89 American Journal of International Law, 511–563, 512. Professor Peace finds that the international human rights obligations of States are owed to all persons who are deprived of national and international protection; that is, all persons who are considered to be stateless or who are in a situation of no effective protection. See the ruling of the European Court of Human Rights in the case of Zehra and others v. Turkey, Series A No. 376 (1990) 1992. Professor Peace finds that the international human rights obligations of States are owed to all persons who are deprived of national and international protection; that is, all persons who are considered to be stateless or who are in a situation of no effective protection. See the ruling of the European Court of Human Rights in the case of Zehra and others v. Turkey, Series A No. 376 (1990) 1992. Professor Peace finds that the international human rights obligations of States are owed to all persons who are deprived of national and international protection; that is, all persons who are considered to be stateless or who are in a situation of no effective protection. See the ruling of the European Court of Human Rights in the case of Zehra and others v. Turkey, Series A No. 376 (1990) 1992.

Therefore, states have the ultimate obligation to implement and enforce human rights, although there are many other mechanisms to implement and to enforce them. These include, for example, reporting to the Human Rights Committee (international mechanism), and complaints to the European and American Human Rights Tribunals (regional mechanisms), whose aims are complement each other. A state can create domestic legislation relating to certain international human rights conventions by ratifying the conventions. Those conventions are then enforced by its national court to prosecute, to punish perpetrators of human rights abuses, or to give remedies to the victims.

The legal status of the international treaties or conventions on international human rights law in Indonesia is determined by means of approval, signature, ratification, or by other mutually-agreed means. In practice, ratification is mainly applied by giving international human rights treaties or conventions the form of an act. As a result, after the ratification, international human rights treaties or conventions become binding, enforceable and concurrent with national legislation.

Therefore, the ratification of the Convention on the Political Rights of Women 1953, the International Convention on the Rights of Child, the ILO Convention No. 18 concerning Minimum Age for Admission to Employment, the ILO Convention on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 2000, the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment 1984, the International Convention on the Elimination of Racial

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* Crostetti, ibid; supported by Francioni, “The Inadmissibility of International Human Rights Enforcement: Reflections on the Italian Experience”, in Crostetti and Francioni, ibid, p. 15.

* The penal sanction for violations of human rights are found in many domestic legislation, such as in Dharmap v Penn India (1980) 600 F 2d 976 (2nd Cir), see Beth Stephens and Michael Ratner, International Human Rights Litigation in US Courts (1996), 10 applying the Alien Claim Torture Act 22 USC at 1350 (1988). The notion remedy means that where there is a right, there is a remedy, which is used to make human rights abuse claim, see Stephen Holmes and Cass R. Sunstein, “The Cost of Rights: Why Liberty Depends on Taxes”, (1999) in Steiner and Alston, Op Cit, No. 10, p. 208. In Indonesia, the term of remedy means that the government has to give compensation, restitution and rehabilitation according to Articles 35 of the Act 26/2000 concerning Human Rights Tribunals.


* Ratified by Presidential Decree 36 of 1990.

* Ratified to Act 20 of 1999.


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Disproportion 1966 and the International Convention on the Suppression and Punishment of the Crime of Apartheid make it binding on Indonesia to implement the aforesaid obligations.

Consequently, Indonesia has obligations toward those conventions which cumulatively cover preventive measures, monitoring compliance, compensatory measures and other measures. Preventive measures include the dissemination of human rights law and its application into legislative provisions, while monitoring measures mean that Indonesia has to cooperate with the United Nations Human Rights Organizations or other institutions to monitor the law enforcement of human rights in Indonesia such as making reports for the implementation of the Torture Convention in 1999 and the Indonesian First Periodic Report to the Committee of the Rights of the Child in 2006.

Indonesia is a representative government under the rule of law, in which human rights are recognized, guaranteed, and enforced by the Indonesian Constitution. The skeleton of the Indonesian Constitution highlights the supremacy of the law, equality before the law, and human rights. The concepts of the supremacy of the law and equality before the law are fundamentals of the Indonesian judicial system, which consists of impartial, independent and competent bodies. Human Rights, i.e., the right to life, the right to form family and to have children, the right to education, the right to equality, the right to freedom, the right to communication and the right to protection are exhaustively guaranteed by the Indonesian Constitution.

Further, pursuant to Article 28i, the right to life, the right to freedom, the right not to be tortured, and equality before the law are fundamental human rights from which no derogations are permitted.

From the constitutional view point mentioned above, Indonesia fulfills its international obligations to implement international human rights in terms of national legislation. Act 29 of 1999 relating to Human Rights supports this proposition which marks a new era with regard to the legal recognition of human rights, including the rights of the child.

Footnotes:

29. The 1945 Indonesian Constitution which has been amended four times: First Amendment on 19 October 1999, Second Amendment on 18 August 2000, Third Amendment on 10 November 2001 and the Fourth Amendment on 10 August 2002.
30. Chapter II. of the 65 Indonesian Constitution. ibid.
31. Chapter XA. ibid.
32. Chehay EI. Article 24 determines that Indonesian legal system is comprised by Indonesian Supreme Court (Mahkamah Agung), Constitutional Court (Mahkamah Konstitusi) and other judicial system created by law, i.e., ordinary court, regional court, court of military and administrative court.
33. Article 28i. ibid.
34. Article 28R. ibid.
35. Article 28C. ibid.
36. Article 283. ibid.
37. Article 282. ibid.
38. Article 282. ibid.
39. Article 28F. ibid.
40. Article 28I. ibid.
III. The Legal Status and The Implementation of the CRC in Indonesia

Indonesia ratified the CRC by the Presidential Decree 36 of 1990. Consequently, Indonesia is bound to fulfill three main obligations for its effective implementation: an obligation of result, an obligation of conduct and an obligation of transparent assessment of progress. These obligations reveal that Indonesia bears "a commitment to act in accordance with the object and purpose of the CRC achievement as a visible and meaningful result for children and creating a cultural and social context where their rights can be respected and experienced". However, arising from this ratification, several legal aspects based upon duties to respect and ensure, pursuant to Article 2 and Article 4 for measures of implementation of the CRC need to be analyzed.

First of all, the status of this Presidential Decree is problematic in the Indonesian legal system. Consequently, the CRC general principles and principles, i.e. non-discrimination (Article 2), consent interest of the child (Article 3), right to life, health, and development (Article 6), and participation of child (Article 12) cannot be used as a legal basis or legal reference for drawing up national laws or for amending provisions in certain acts which are in contrast with those general principles. This is because a presidential decree ranks below an act as a source of law in the Indonesian legal system, and usually governs certain provisions in an act. As a result, many acts do not conform to the principles of the CRC.

Secondly, the declaration for CRC ratification, ratified as the Indonesian reservation on certain Articles of the CRC, also creates legal and political obstacles to its effective implementation. The declaration states that: "[...the] ratification of the CRC by the Republic of Indonesia does not imply the acceptance of obligations going beyond the constitutional limits nor the acceptance of any obligations to introduce any rights beyond those prescribed under the Constitution.

With reference to the provisions of Articles 1, 14, 16, 19, 21, 22 and 29 of the Convention, the Government of the Republic of Indonesia declares that it will apply these Articles in conformity with its Constitution."

The Articles mentioned above obligate Indonesia to take certain measures to implement the CRC. Therefore, the implementation of these Articles is limited and determined by the Indonesian Constitution which has been

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27 Ibid.
28 Article 2 in the Indonesia legal system, the hierarchical structure of sources of law is in the Indonesian Constitution, High Constitutional Assembly decision (Keterangan Majelis Permusyawaratan Rakyat/MPR), acts, presidential decree, and other executive decisions better in central government or in regional ones.
29 Airah Giono, "Peraturan Perundangan Perlindungan Pelanggaran Hak Anak Indonesia", in Jurnalisme Anak Pendekat (1993) and See Sakou Kita, 'Referensi Undang-Undang di Aspek Diri Anak Anak', http://www.tekstutazia.com/ak/douk2-anak.rak, 25 February 2003, Examinors of this fact are, inter alia, Article 1 (23) of Act 4 of 1997 relating to Child Welfare which stipulates that 'a child is a person who is under 21 and has not been emancipated'. This means, for example, that a 17-year-old person who has been married loses his rights as a child within the meaning of the Act. Further, Article 96 Act 23 of 1997 concerning Child Labor, on essence determines that 'it is permitted for children to work due to force circumstances'. As a result, other articles in the Act which aims to protect children's rights become irrelevant, and are not enforceable because of biased interpretation of the notion 'force of circumstances'.
amended to guarantee human rights to a considerable extent including children’s rights. Therefore, the declaration becomes relevant in the current situation and only adds a complexity to an effective implementation of the CRC. As a result, the question arises: do the House of Representatives and the Government realize these legal prerequisites and have the political will to implement the CRC within the meaning of the current constitution and obligations?*

The aforementioned facts and realities are indicators of the need to effectively implement International Human Rights Law regarding economic, cultural and social rights in Indonesia. In particular, the CRC, Katarina Tomasevski designates willingness and capacity as indicators of a government to protect and to promote human rights toassociate unwillingness (lack of commitment) and incapacity. Therefore, it can be ascertained that, in general, Indonesia has fulfilled its obligations to implement international human rights law from the viewpoint of its constitutional obligation (willingness and capacity).

From the CRC implementation viewpoint, Indonesia has gone some way to address and to effectively implement and fulfill the CRC’s obligations. However, unwillingness is a major problem which can be indicated by the following: First, the Government fails to act on the effective principle of ensuring and respecting the CRC’s obligations under Article 2. Second, the House of Representatives and the Government make a sufficient effort to take appropriate legislative, administrative and other measures to persuade Article 4 of the CRC. This unwillingness is due to the lack of political considerations mentioned above.

IV. The Right of the Child to Education: The Indonesian Perspective

Emerged in Article 26(1) of the Universal Declaration of Human Rights (UDHR) and Article 13(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), everyone is entitled to achieve, receive and exercise the right to education which is according to legal interpretation from both human rights instruments, regarded as “an fundamental right that is non-derogable right”. Many statements, declarations and comments support this proposition by revealing the significant and nature of education.

Nowask in this regard suggests that “education is regarded as one of the basic means needed by a human being to develop his or her personality”. Next, the Declaration on the Right to Development highlights the role of education in a condition in achieving a comprehensive economic, social, cultural and political process aimed to improve human beings as individuals, and aimed to develop a population based on their active, free and meaningful participation with fair distribution of benefits.
This significant fact has become a universal concern stated at the Rio de Janeiro Conference to the World Summit on Sustainable Development, Johannesburg 2002.

Further, the Committee on Economic, Social and Cultural Rights also emphasized that “education in the primary vehicle to lift up or to empower adults and children from poverty, meant to participate fully in development in their communities, and as an effective way to develop human existence”.

Consequently, the assumption that expenditure on education ought to be regarded as an “investment in human capital” which is more beneficial rather than an “investment in physical capital” to sustain development is accepted widely. In line with human rights, education is a “precondition for the exercise of human rights and aims at strengthening them”.

Articles 28 and 29 of the CRC derived from the ICESCR are devoted to the right of the child to education. Their most significant aim is to complete the description of the objectives and the nature of the child’s education enshrined generally in the UDHR and the ICESCR. E.g., education helps the child to realize his/her full potential, including the development of respect for human rights, an enhanced sense of identity and affiliation, an enhanced sense of her/his socialization and interaction with others and with the environment.

States are obliged to provide education to everybody, to ensure that everybody without discrimination has access to education, and to ‘combat existing inequalities in the access to and enjoyment of education by legislative and other means’.

In these matters, Nowak proposes that ‘states are under the obligation to fulfill the right to education by means of positive action, i.e. the obligation of result and the obligation of conduct’. In fact, the fulfillment of these obligations does not meet any ideological or constitutional opposition since the nature and significance of education in major international Human Rights Conventions (the ICESCR and the CRC) are widely accepted.

Obligation of results, according to the Committee on Economic, Social and Cultural Rights, exhibits interrelated and essential features when State Parties are fulfilling the right to provide education, namely availability, accessibility, acceptability and adaptability of their prevailing conditions.

In this regard, States Parties obliged to take steps to the maximum of their available resources, and a lack of resources is never an excuse for not taking such actions.

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* Van Vuuren, Op.Cit, No. 41, p. 232; See also Article 29 of the CRC.


The above duties also apply to the fulfillment of the right to education contained therein, particularly the right to
education in the CRC because of the indivisibility and
interdependence concepts of rights, and the
best legal guidance or best practice principle.
Article 28 of the CRC manifest the obligation of
result to implement the right of the child to
education by articulating to: all free and
compulsory primary education, available and
accessible secondary education, accessible
higher education, and available and accessible
educational and vocational information and
guidance to all children. Nowak, supported by
Van Thuren, add other obligations of result,
namely that "programmes of special education
should be established for the handicapped", and
that "elimination of ignorance and illiteracy
should be regarded as a priority 36.

Intervention law also imposes duties and
obligations on individuals to exercise the right
to education. In fact, "education is one of the
few human rights for which it is universally
agreed that the individual has a corresponding
duty to exercise this right 37. The rationale for
this obligation is that illiteracy and inequality
tend to increase and become profound global
universal concerns 38. Further, education, as a
process involving support from the legal
actions of who receives, who provides, and
who is responsible for education, mainly
requires the active participation of individuals
(children) as an integral factor to determine the
success, aims and objectives of education.

Although the CRC mainly imposes the
duties on the States in its majority, Articles, a
rights-based approach introduces and imposes
the obligation of the child to exercise the rights

37 Nowak, Ibid., p. 197; See also the World Declaration on Education for All, Op. Cit., No 45
40 Paris, Ibid.
41 Article 31 (2) of the Indonesian Constitution.
42 Article 31 (3), Ibid

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to at least 20% of the State Budget and Regional Budget and to advance science and technology by respecting religious values, for the preservation of human civilization and the welfare of the human race. Meanwhile, each citizen has the right to education, and all are obliged to undertake primary education.

With regard to the right of the child to education, the Indonesian Constitution does not explicitly mention this right. However, the legal notions of ‘each citizen’ and ‘primary education’ implicitly express the child’s right to education. This interpretation is supported by the legal interpretation and application of Article 28 B (2) which states that “each child has the right to viable life, growth and development, and to protection from violence and discrimination.”

The factual conditions of education in Indonesia relate to two underlying problems, namely the concept of education, and the role of Government to determine the quality of education. First, the concept of education in Indonesia emphasizes the importance of religious values rather than other aspects of life such as human rights and the advancement of the intellectual life of the people. As a result, each religion tries to impose its values in schools without giving space to other aspects of educational values such as love and affection, honesty, sincerity and tolerance.

The negative effects are that the major religion has its place in the education system in Indonesia, and tolerance, as one of key aspects for the advancement of human rights, tends to be reduced and loses its significance.

Next, it gives rise to formal education rather than informal education. In 1998-1999, 39.8% of street children, 13% lost the opportunities to continue their study. They have lost their access to education because the allocation of education in 1999-2003 was only 6% of the total State Budget allocated only to formal education.

Finally, it focuses on a centralized curriculum which ultimately cannot accommodate local potential, and which contains a wide range of academic disciplines from primary education to higher education. As a result, this concept contributes to the conceptual failure of education. The implementation of the state curriculum signifies a ‘central-based approach’. With respect to personal and aptitude development, a centralized and homogenized curriculum offers very little opportunity for developing respect for different abilities of children, dangers Indonesian unity, and hinders the development of local potential. Komtoringrat, a prominent sociologist, argues that “the Indonesian society is comprised of a mix of cultures, religions, social groups and attitudes, and that the Indonesian society has a different way of thinking that

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cannot be regulated in onlone way, especially on education. 5

Further, Ribert argues that 'in each level of education, it is compulsory to take a number of subjects which vary and contain wide range of disciplines. Thus, children or even teachers can not afford this burden. Consequently, the creativity of students cannot be developed. 6

The other problem is the role of government. This role is mainly focused on problems of expenditure to increase human resources such as teachers, school facilities, libraries, leisure and sports. Or, in terms of international law, this problem is mainly concerned with the realization of the obligation of result.

Expenditure on education comes from the State Budget, society and international funds. However, the main source of funding that is the State Budget which increased from 3.9% in 1972/1973 to 15% in 1982/1983. It decreased to 13% in 1996/1997 and since that time it reduced to 6% in 2001/2002. 7 Support from society and international funds also decreased due to the impact of economic crisis and the enactment of the economic recovery policy in Indonesia.

A 'cost benefit analysis' states that 'all expenditure on education will be beneficial in the long run as it will create benefit in terms of employment, job training and development.

Therefore, this analysis can be used for measuring the quality of education in Indonesia. Inappropriate expenditure which levels off at 6% until now realizes an inadequate rate of returns. Or, because of a lack of financial resources, the Human Development Index (HDI) and the quality of education valued by the rate of return in Indonesia are still low. 8 This condition is very different from other developing countries such as Malaysia, Vietnam, and/or even from Latin American Countries.

Thus, whilst there is a constitutional framework which incorporates international law regarding the rights of the child to education in Indonesia, this constitutional framework does not match the reality.

References:


9. See generally Yat A. Langis, An Analysis of the Role of Social Safety Net Scholarship in Reducing School Drop Out During the Indonesian Economic Crisis, UNICEF, (2000), and Peter Stolker, Beyond Kritzer: The Social Legacy of Wibowo’s Financial Crisis, UNICEF, (2006). This is supported by reasons that in reality, the fulfillment of the obligation of result under the ICESCR and the CRC has met for financial reasons. Primary education is not free because parents have to spend a lot of money in uniforms, supplementary text books and have other related expenses, such as contributions for the maintenance of buildings and for parents-teacher associations. Furthermore in the elementary schools and higher education, school fees are relatively expensive, the location of the schools is not accessible to prospective students and the selection system is based on catchment area. It relation to development of human resources, the Government also tries the same thing, in particular how to improve teacher welfare.


11. UNICEF Human Development Report 2002, UNICEF (2002) which reveals that the Indonesian Human Development Index is only 0.684.

12. The Convergence of the Rights of Child Periodic Report-Indonesia (1993-June 2000), Op.Cit., No 4, p 9. we also UNICEF, idl, Indonesian Human Development index is only 0.684 under Vietnam which is 0.685.


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V. The Act Analysis within the CRC on the Right of the Child to Education
To analyze the Act, the general principles of the CRC will be used to discuss certain thematic articles grouped under three main issues for the fulfillment of the right of the child to education. First, whether the principles of the right to life, survival, and development and the right to participation (Articles 6 and 12) are applied, reflected, and highlight the objectives, aims, and philosophical determinations of education. Second, whether the principle of the best interests of the child (Article 3) has been taken into consideration to formulate and signifies the role of the Government roles. Third, whether the principle of non-discrimination (Article 2) applies to whole aspects of education in the Act.

VI. The Aims, Objectives, and Philosophical Determination of Education
Article 6 of the CRC contains two significant interrelated-legal principles, i.e., the holistic approach concept of the nature of the right to life, survival and development and the accessibility concept of the realization of the right to life, survival, and development undertaken by States Parties

The holistic approach concept upholds that Article 6 of the CRC envisages child development as his or her spiritual, moral, and social development based upon the promotion of the fullest potential of the child’s personality, talents and abilities, and provides act as if the child were a passive and silent being. Therefore, active participation is a condition for the assessment of the rights of the child.


4 Article 6 stipulates that “(1) States Parties recognize that every child has the inherent right to life, and (2) States Parties shall ensure to the maximum extent possible the survival and development of the child” see also States Pams, Op Cit, No. 35. p. 11.


7 UNICEF, Op Cit, No. 3., p. 13.

8 Derricott, Op Cit, No. 81.


10 Ibid.

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Article 8 and 12 of the CRC are important for the assessment of the rights of the child to education enshrined in Article 28 and 29. In particular, their importance relates to the aims and objectives of education. Under Article 29 of the CRC, the aims and objectives of education derive from the holistic concept of the child’s development for the full potential of the child, including development of respect for human rights. The Committee of the Rights of the Child stresses the components, elements and philosophical determination of the aims and objectives of education under Article 29. The Committee gives an authoritative interpretation by emphasizing the interrelationship between international human rights conventions or declarations, and it upholds the nature of the holistic approach to child development. This includes the recognition of non-formal education to empower the child by developing his or her skills, human dignity, self-esteem and self-confidence, the balance between access and the content of education in response to challenges marked by technology, other related phenomena and globalization, and the direction of a wide range of values to overcome the boundaries of religion, nations built across many parts of the world. In a short term, the Committee of the Rights of the Child reveals that tolerance, a wide range of aspects, and objectivity reflect an appropriate balance to promote the physical, mental, spiritual and emotional aspect of children to participate fully and responsibility in free society.

In the CRC, the aforementioned concepts and guidance principles, to some extent, have been incorporated in certain Articles, namely Articles 2, 3, 17(1-3), 18 (1), 19, 27, 37 and 38. However, several aspects are not in conformity to those concepts and guidance principles. There will be analyzed for the 28th of the Act: the National Education System creates ambiguity or inconsistency in relation to its contents.

Composed of XXII chapters and 77 articles, Article 28, the Act broadly regulates the extent of schooling and emphasizes only formal education. Van Buren argues that the right to education reveals that there is a difference between schooling, "draw a picture and education, draw a I education" based on the Campbell and Cassius v. United Kingdom case. On this matter, the Committee of the Rights of the Child also takes similar view, by stating that "education in this context goes for..."
beyond formal schooling to embrace a broad range of life experience and learning processes..."

As a result, the Act legitimizes re-
emphasizing the existing conceptual failure in the education system in Indonesia1, ignores the significance of non-formal education and neglects the concept of the 'empowerment of the poor' in the assessment of the economic, social and cultural rights as exemplified in the World Summit on Sustainable Development in Johannesburg 2002... Thus, the Act denies the right of the child to education that is the needs of certain groups, such as street children in Indonesia.

Secondly, the aims and objectives of education in Article 4 contribute to instability and only emphasize one dimensional value (religious value) ignoring the holistic concept of the principles of the rights to development and survival. Textual analysis supports this proposition. Composed of XXI chapters and 77 articles the Act only twice mentions the words, 'to intellectually stimulate' in Chapter I, Article 1 (General Provisions) and in Chapter II Article 3, whilst it mentions 16 times the words, 'to enhance belief and/or religious values'. Therefore, the question can be asked as to whether or not this is an 'Act of National Education Systems' or an 'Act of National Religious Education Systems'.

According to the interpretation of Article 29 of the CRC, the Committee of the Rights of the Child states that 'Parties States agree that education should be directed to a wide range of values to overcome the boundaries of religion, nation, culture built across the world... If part of the importance of this provision lies precisely in its recognition of the need for a balanced approach to education in reconciling diverse values through dialogue and respect for difference. In line with this guidance, Koentjoreningrat's argument that Indonesia is comprised of a mix of cultures, values and religions, so that tolerance and understanding are significant elements for Indonesian development. This argument becomes relevant as it entails the core objectives and the aims of education within the Indonesian context...

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2  See discussion on page 20 or in 'The Right of the Child to Education and the Indonesian Perspective' above.
3  Huschon, an expert on education, argues that this perception causes negative effects for the home based education, and non formal education does not develop. See Kompas Cyber Media, "Huson: Roman di Banten Pendidikan", http://www.kompas.com/kompas-cetak/k050501/diskripsi/p019.htm, May 1, 2000.
6  Article 4 of the Draft states that "The home of national education are to form religiously human beings, noble conduct, wealth, intellectually capable, responsible citizen for the welfare of the society and the State".
7  Damansingray, a member of CBE, an educational NGO, critically examine this composition and reaches a conclusion that this Draft does not contain national education which should be neutral, tolerance and recognize diversity of values, religions, cultures and practices; see Kompas Cyber Media, "R S U Pendidikan Yang 'Ikut Mencerdaskan", http://www.kompas.com/kompas-cetak/k030518/opci/p187297.htm, 18 March 2003.
9  See F.S. Swanson, "Pentingkah Kualitas Pendidikan Dasar dan Menengah?".
Third, in the Act’s decision making process, children as the ultimate stake holders (estimated more than 30 million children aged 7-17) in the right to education have not given their views or they have not been given the opportunity to express their views. In other words, a rights based-approach within the meaning of Article 12 of the CRC does not apply as there have been no opinions, views or participation from children in the preparation, discussion and promulgation of the Act. Child NGOs and/or even the National Child Commission have not made any contribution or given their views on behalf of the child in the formulation of the Act. Thus, the accountability of the Government within the international community can be questioned 48.

V2. The Government Roles
Article 3 of the CRC guided by the best interests of the child principle applies to actions affecting children undertaken by the State, the court of law, administrative authorities, legislatures bodies, private social welfare institutions even within the family 49. Or in simple terms, the best interests principle is to be applied by all decision makers, whether public or private, when acting in any matter concerning children 50. Under Article 3 of the CRC, the application of the best interests principle relates to two conditions in general, i.e. certain ways of application and the use of the article ‘a’ in the phrase ‘a primary consideration’ 51. The best interests principle can be applied in certain ways within the meaning of the CRC 52, namely for a particular interpretation, for mediation to resolve confusion between rights, and for justification of the existing laws of the States Parties.

The above conditions raise questions about how to measure ability compliance of the States Parties to apply the best interest principle effectively when they make policies and allocate resources affecting children. Applying Tomasevski’s indicators, willingness and capacity are relevant to the application of the best interest principle in the protection and promotion of children’s rights. These indicators can be used as a measure to identify unwillingness (lack of commitment) and incapacity in the Act as follow:

V2.1. The Allocation of Resources (Money)
Under Articles 9, 46, 49 and 52 (4), there is an overlapping duty between the State and society for the allocation of resources (money) or education. In particular, the overlapped duty is caused by Article 9 which determines that ‘society obliges to contribute resources support on education’.

However, this formulation creates a legal ambiguity between education as a right for every Indonesian citizen and the State which has the obligation to fulfill this right for its citizens 53. Or, in simple terms, this formulation is in breach of major international human rights conventions, such as the ICESCR, and the CRC and of the Indonesian Constitution because the formulation of Article 9, formulation reduces or even voids to omit the State’s obligation to allocate resources for the enjoyment of the right of the child to education.

In the Act, Article 49 is dedicated to the application of the Article 11 (4) of the
In the Act, the principle of non-discrimination does not apply to particular circumstances differentiated by physical and economic conditions and by religion for the enjoyment of the right of the child to education. Further, State has the obligation to ensure that there is no discrimination in education in their jurisdiction.

In view of the above, the principle of non-discrimination, to some extent, has not been fulfilled since the Government and the House of Representatives intentionally and unintentionally legitimize many aspects of discrimination in the Act.

In the Act, especially Articles 32, the principle of non-discrimination, to some extent, does not apply or is not taken into consideration in the formation of those Articles. Here, the Government and the House of Representatives unintentionally create further discrimination, i.e., exclusivity for disabled persons (Article 32) by separating them from ordinary school. Thus, the most relevant question in this regard is 'where is the equal footing for children who are disabled and poor (economically disabled) for the enjoyment of the right of the child to education to develop their full potential?'

93 Although it is agreed to allocate 20% of the State Revenue to education, other aspects, such as debt and international pressure for the economic recovery are still the priority, see Kompas Cyber Media, Anggaran Pendidikan Minimal 20 Persen dari APBN Tanpa APBD, http://www.kompas.com/kompas/ctiki/ 025047/1446/diungkap.htm, August 7, 2002.


98 See Article 1, ibid.

It is argued that the formulation of that Article has the purpose or effect of nullifying or impairing equality of treatment and education and is particular of depriving any person or group of persons (children) of access to education at any level. On a simple term, that Article are in breach of the Indonesian obligation under Article 2 of the CRC to ensure that the rights recognized shall be accorded to, and enjoyed by each child without discrimina-

Although there are many mechanisms to cover 'the pega' in respect to the same access to education, such as the enactment of the National Foster Parents Movement and Gerakan Nasional Orang Tua Anak (GN OTA), Social Safety Net (SSN) or Jaringan Pemenuhan Social (JPS) and free primary education or Program Wujud Belajar Sembilan Tahun (Wajib), such applications are not legally enforced by means of an act and they are dependent upon available funds which should be in conformity with international funds policies, such as the World Bank and IMF(12).

Another aspect of discrimination in the Act is discrimination based on religion through application of Articles 1, 4 and 12. Such provision creates discrimination in practice. Thus, discrimination will emerge in practice due to societal composition based on religion in certain regions in Indonesia. In this respect, therefore, the Government and the House of Representatives intentionally legitimize discrimination based on religion by ignoring factual conditions in certain regions, and by expecting tolerance and diversity of values in the Indonesian societal composition in schools.

V. Conclusion

Ideally, this Act should be composed of all elements (aspects) to describe, regulate and fulfill the broad notion of 'education' rather than place an emphasis on certain aspects and neglect other components. Thus, non-

conformity, inconsistency, inappropriateness and overlapped provisions emerge as main weaknesses viewed from the CRC general principles on the assessment of the right of the child to education in Indonesia. Non-conformity, inconsistency, inappropriateness and overlapped provisions in the Act hinder children as the main stakeholders of the right to education, from enjoying their right to education in Indonesia. This is because the general principles and the rights base-approach of the CRC, to some extent, do not apply or receive less attention in the formulation of the Act. Further, the Indonesia's obligations under the CRC, i.e., to ensure, respect and protect the right of the child to education are not effectively guaranteed, enforced and fulfilled by the Act, especially in the fulfillment of the obligation of result, since the Act is not properly formulated based on those principles.


Walter W. McMahon, Boediono and Abas Gazali, “A New View of Manpower Supplies and Demand in Indonesia: The Need to Use Market Signals and Labor Analysis”, BPJK Departemen Pendidikan Dan Kebudayaan Indonesia (1991);
World Bank, Crying Out for Change, World Bank in three volumes (2002); 