

ILO Convention No. 169:

Why Indonesia Should Ratify

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Abstract—The Indonesian constitution states that the state recognizes and respects indigenous peoples in Indonesia. However, various existing laws and regulations have not been able to realize this. In addition, many regulations that have not been synchronized, and overlapping provisions are also a challenge for the recognition and protection of indigenous peoples' rights. Until now, there are no special provisions that nationally regulate indigenous peoples. In 1989, the ILO agreed to the ILO Convention no. 169 which forms the international basis for the recognition and respect of indigenous peoples. The research method used is normative legal research with an emphasis on comparative law research, in particular comparing the rules of positive Indonesian law with international provisions relating to indigenous peoples. This study finds that the ratification of the ILO Convention is important so that there are clear provisions for respecting the rights of indigenous peoples in Indonesia.

Keywords—*ILO Convention, indigenous peoples, Indonesia, ratify*

I. INTRODUCTION

Data from the World Bank states that there are about 370-500 million indigenous people worldwide, spread over 90 countries. Although these indigenous people make up only 5 percent of the global population, they account for about 15 percent of the very poor. The life expectancy of indigenous peoples is estimated to be nearly 20 years lower than the life expectancy of non-indigenous peoples worldwide.

The fact that occurs in various parts of the world is that indigenous peoples lack formal recognition of their lands, territories and natural resources, in addition, this group is often the last group to receive basic services and basic infrastructure. In addition, indigenous peoples also experience barriers to access to justice and barriers to participating in the political process and decision-making, especially in matters related to the interests of their groups.

Based on the 2010 population census, BPS (Central Statistics Agency) states that Indonesia has 1340 ethnic/ethnic groups, with the majority composition being Javanese, namely 41.71%, the next largest ethnic group is Sundanese, which is

15.41%. while for the number of indigenous peoples, there is no definite data on the number of indigenous peoples in Indonesia. This happens because of various factors, including the terms and definitions used for who belongs to this community group are still varied. The second factor is the absence of a serious survey to calculate the number of indigenous peoples [1]. Meanwhile, data published by AMAN (Alliance of Indigenous Peoples of the Archipelago) states that there are 2359 indigenous communities throughout Indonesia with approximately 17 million individual members.

Article 18B paragraph (2) of the 1945 Constitution states "The state recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with community development and the principles of the Unitary State of the Republic of Indonesia, which are regulated by law". In addition, the provisions in Article 28I paragraph (3) state that "Cultural identity and rights of traditional communities are respected in line with the development of times and civilizations". So that there is clearly recognition and respect for indigenous peoples in Indonesia as well as recognizing and respecting the human rights of these indigenous peoples as recognition and respect for the human rights of other citizens.

As one of the minority groups, indigenous peoples are a vulnerable community, meaning that they are vulnerable to experiencing violence and oppression as well as being victims of law violations, whether committed by individuals, government officials or law enforcement or those committed by the state.

In 2019 the report from Komnas HAM stated that there were 53 reports of human rights violations from indigenous peoples, where the parties who were reported to have committed human rights violations were the judiciary, the central government (ministry), local governments, corporations and the police. This is related to allegations of human rights violations on the sense of security, the right to obtain justice and the right to welfare [2].

After the end of the new order, the government issued several laws and regulations such as Law No. 39/1999 on Human Rights (UU No. 39/1999); Law No. 26 of 2000 on

Human Rights Courts (Law No. 26 of 1999); Law No. 23 of 2002 on Child Protection (Law No. 23 of 2002), and Law No. 40 of 2008 on the Elimination of Racial and Ethnic Discrimination (Law No. 40 of 2008), with the aim of providing human rights protection to citizens, but in fact these provisions have not provided maximum protection for minority groups, especially indigenous peoples. For this reason, it is necessary to consider ratifying international provisions governing indigenous peoples to become part of Indonesia's positive law, including ILO Convention No. 169 on the Indigenous and Tribal Peoples Convention.

II. METHODS

The research method in this study is normative legal research, namely legal research based on secondary data which includes personal data/documents, public data and data based on binding power [3]. Soerjono Soekanto then divided normative legal research into several groups, namely research on legal principles, research on legal systematics, research on legal synchronization levels, research on legal history and research on comparative law [4]. The chosen research is research on the level of legal synchronization, namely the rule of national law and the rule of international law. Data is collected from various written sources, such as the laws and regulations in Indonesia, and international treaties and other sources of international law. Including articles related to ILO Convention No. 169. Then, the data obtained were analyzed qualitatively by using a systematic data interpretation method.

III. RESULTS AND DISCUSSION

The struggle to obtain the rights of indigenous and tribal peoples who were deprived of unilateral laws and policies from the state, has been going on since the 1990s. This movement has even reached the United Nations. This movement was initiated by community groups in developed countries, where indigenous peoples have been separated from their lands, natural resources and the cultural values they adhere to [5].

The basis of the formulation of ILO Convention No. 169 (hereinafter referred to as the Convention) is respect for the culture and life of indigenous peoples and the recognition of the rights they have. This recognition is based on the recognition of the right to maintain and strengthen the culture and institutions of indigenous peoples and the right to participate effectively in any decisions of the authorities that will affect them.

The Convention promotes respect for the culture, way of life, traditions and customs inherent in indigenous peoples. The principles in the Convention also emphasize that indigenous peoples have values that must be maintained.

However, The Convention consists of 46 articles that contain minimum standards for respect for the rights of indigenous peoples, such as respect for land ownership by indigenous peoples, natural resources within their territory, recognition of traditional knowledge, and self-determination through consultation mechanisms.

Currently a number of 23 countries have ratified the Convention. Countries that have ratified include Norway, Denmark, Argentina, Brazil, the Netherlands, Spain, Mexico, Colombia and the Central African Republic. By ratifying the Convention, the state has an obligation to harmonize national provisions with the Convention and take actions in accordance with the provisions of the Convention, besides that the state also has the obligation to periodically report the results of the implementation of the Convention.

In the provisions of positive law, there are several laws that indirectly also make indigenous peoples as regulated subjects. Some of these provisions include Law no. 39 of 1999 concerning Human Rights, Law no. 41 of 1999 concerning Forestry, Law no. 22 of 2001 concerning Oil and Gas, Law no. 27 of 2003 concerning Geothermal, Law no. 7 of 2004 concerning Water Resources, Law no. 18 of 2004 concerning Plantations, Law no. 31 of 2004 concerning Fisheries.

In addition, several international agreements that have been ratified by Indonesia are the Convention on the Elimination of All Forms of Racial Discrimination/CERD 1965 (ratified by Law No. 29 of 1999); International Covenant on Civil and Political Rights/ICCPR 1966 (ratified by Law No. 12 of 2005); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (ratified by Law No. 5 of 1998); United Nations Convention on the Rights of the Child 1989 (ratified by Presidential Decree No. 39 of 1990), and International Covenant on Economic, Social and Cultural Rights 1966 / ICESCR (ratified by Law No. 11 of 2015).

The term commonly used in international provisions concerning indigenous peoples is indigenous people. Internationally there are several provisions governing indigenous peoples, including the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which was adopted by the UN General Assembly on September 13, 2007 and Indonesia is one of the countries that signed the UNDRIP. However, the provisions of UNDRIP are soft law, meaning that the provisions contained in UNDRIP are guidelines for countries, but do not have binding legal force as hard law.

In 1989 the ILO adopted Convention No. 169 on Indigenous and Tribal Peoples with a view to bridging the dialogue between the government and indigenous peoples living in a country. Another purpose is to protect the human rights of indigenous peoples so that they can exercise control over their customary institutions, way of life and economy and to develop and maintain their identity, language and religion.

ILO Convention No. 169 is a revision of the ILO Convention No. 107 which was adopted in 1957 due to concerns that ILO Convention No. 107 will perpetuate the philosophy of assimilation and paternalism. ILO Convention No. 169 provides space for the development of UNDRIP 2007. And important issues related to ILO Convention No. 169 is that this document is a legally binding document. Where countries that are parties to the Convention have an obligation to comply with the provisions contained in the Convention.

For Indonesia, several examples show that indigenous peoples are a vulnerable and marginalized group, including the prohibition imposed by Swiss investors from conducting business activities in Saparua District, Central Maluku Regency. The investor forbade the indigenous people of the State of Paperu to perform traditional sasi ceremonies in the management of marine resources in the Tanjung Souino area. The reason for the ban is that tourists feel disturbed by the economic, social and cultural activities carried out by the people in Tanjung Souino, which is located close to the Cape Paperu Resort and Spa owned by the Swiss investor [6].

A report issued by ELSAM (Institute for Community Studies and Advocacy) states that in 2017-2018 it was reported that 7 indigenous peoples groups and 58 members of indigenous peoples were victims of violence, both security forces and individuals [7].

In addition to the events above, the reality is that the existing laws and regulations also marginalize the existence of indigenous peoples, for example the provisions in Law no. 41 of 1999 concerning Forestry. Prior to that, a material test was carried out regarding the provisions in Article 50 paragraph (3) letters e and i, which state that "Everyone is prohibited from: (e) cutting down trees or harvesting or collecting forest products in the forest without having the right or permission from the competent authority. and (i) herding livestock in forest areas that are not specifically designated for this purpose by the competent authority". After a judicial review was conducted at the Constitutional Court, the Court decided that Article 50 paragraph (3) letters e and i were contrary to the 1945 Constitution and had no binding legal force, and the provisions of that article were excluded for people who lived for generations in the forest and did not intended for commercial purposes [8].

Several provisions in ILO Convention 169 provide protection for indigenous peoples, this is because ILO Convention 169 revises ILO Convention 107, namely that the protection of indigenous peoples is based on respect for their culture, and the belief that indigenous peoples have the right to live with the identity they have. and the right to choose their way of development.

Other provisions in ILO Convention 169 are the rights of indigenous peoples as human beings and fundamental freedoms without discrimination, respect for the provisions of customary law and the right for indigenous peoples to maintain their own customs and institutions. In addition, in this Convention the government is also obliged to respect the cultural values associated with the land or territory of the indigenous peoples. This aims to ensure effective protection of the rights of indigenous peoples.

Several things that cause the Convention to not be implemented properly are the neglect of the principles in the Convention and the lack of involvement of indigenous peoples in establishing the existing rules [9].

Article 10 of Law no. 24 of 2000 concerning International Agreements, stipulates the categories of International Agreements that require the approval of the DPR RI (House of Representatives), namely those related to issues of: (1) political issues, peace, defense, and state security; (2) changes in the territory or determination of the boundaries of the territory of the Republic of Indonesia; (3) state sovereignty or sovereign rights; (4) human rights and the environment; (5) establishment of new legal rules; (6) foreign loans and/or grants. If observed, the Convention is one of the international agreements that requires the approval of the DPR RI to be valid in Indonesia. This is because the ratification of the Convention will later lead to new legal rules that will affect the social dimension of citizens, especially indigenous peoples. Thus, the ratification process will use the means of forming a law, which is in accordance with Article 20 of the 1945 Constitution "The House of Representatives holds the power to form laws".

If the Indonesian government ratifies ILO Convention 169, then the Convention binds the government to implement the provisions contained in the Convention. For this reason, the ratification of ILO Convention 169 becomes an important matter for the protection of indigenous peoples. However, the ratification of the Convention, according to Syafrudin Bahar [10] a member of Komnas HAM for the period 2002-2007, was related to a substantial matter, namely the government's reluctance to recognize the rights of indigenous peoples, especially land rights. This is because, according to Syafrudin, the government's program will be hampered if negotiations are carried out with indigenous peoples when they will use their lands/territories.

IV. CONCLUSION

As a country that has hundreds of ethnic groups and consists of various indigenous peoples, it is proper for the government to provide protection and respect for indigenous peoples. However, until now the government has not issued a special law related to indigenous peoples. Whereas in the international context, Indonesia has signed the UNDRIP. For this reason, one of the efforts that must be made to protect and respect indigenous peoples and their rights, the government must immediately ratify ILO Convention 169 concerning Indigenous and Tribal Peoples Convention.

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