

**A BREAKTHROUGH IN DEALING WITH
THE PROBLEMS OF HARMONIZATION OF
INTERNATIONAL LEGAL STANDARDS IN INDONESIA:
*Towards a better protection of the right to freedom
of religion and belief***

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A. Introduction

Indonesian people are **tolerant society, respecting for cultural and ethnic diversity,**

This nation uphold the motto of *Bhineka Tunggal Ika* means **Unity in Diversity**

Historical and socio context

Pancasila as the country's **fundamental philosophy for life of society** for decades

Islamic groups as **majority** **have no desire at all to realize the law exclusively** for Muslims themselves.

B. Progress in recognizing the right to freedom of religion

In 1993

The establishment of National Human Rights Commission

In 1999

Act Number 39 Year 1999 about Human Rights (Art. 4, 22, 8)

the Convention on the Elimination of All Forms of Racial Discrimination (ICERD) by Law No. 29 of 1999

In 2000

The amendment of Constitution of Indonesia Republic Year 1945 (Art. 29 (2), 28E, 28I, 28J)

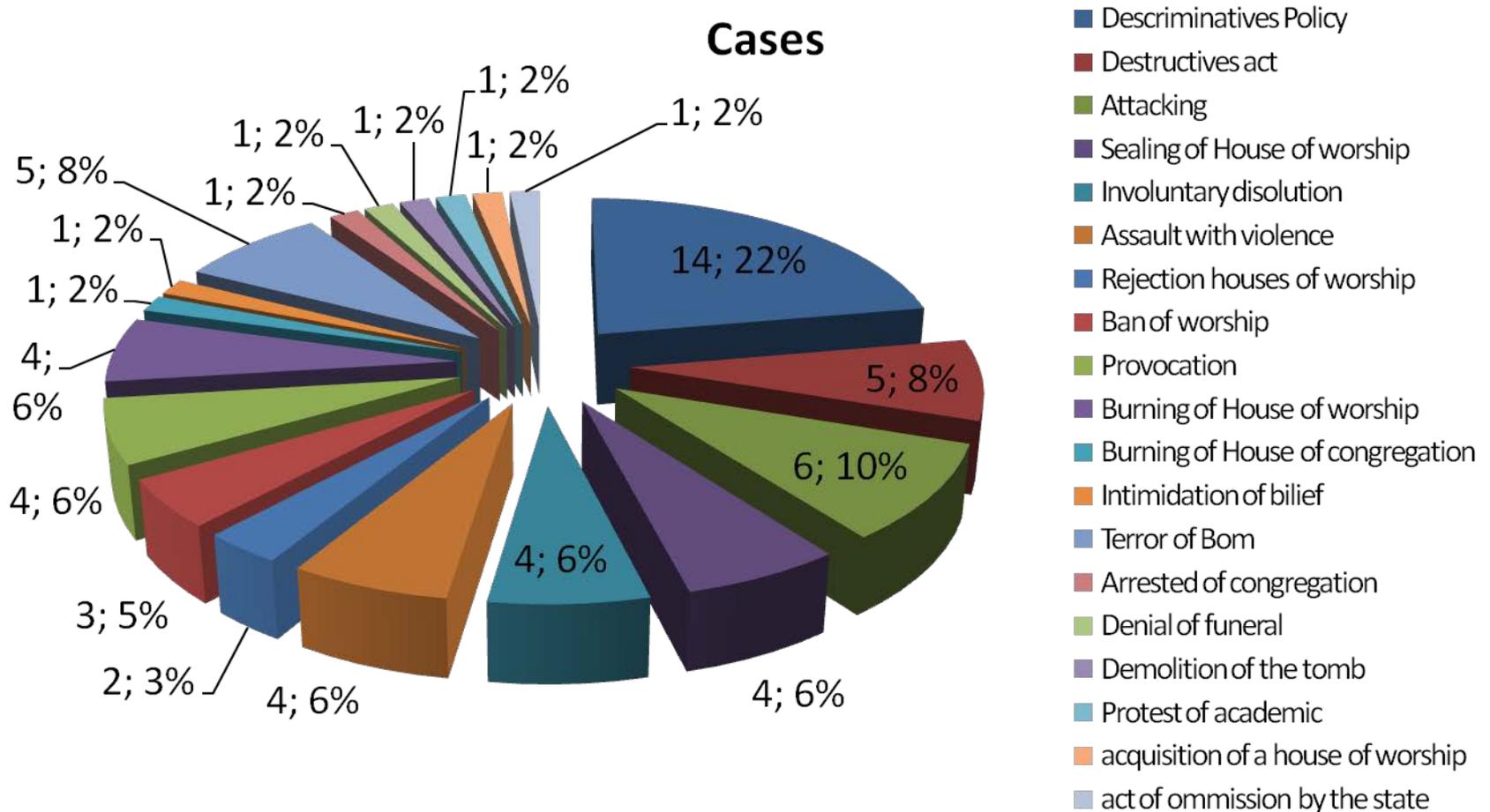
In 2004
The Establishment of Constitutional Court of Indonesia Republic And Judicial Commission of IR

In 2005

Indonesia ratified the ICCPR 1999 through the Act Number 12 Year 2005 and others related instrument

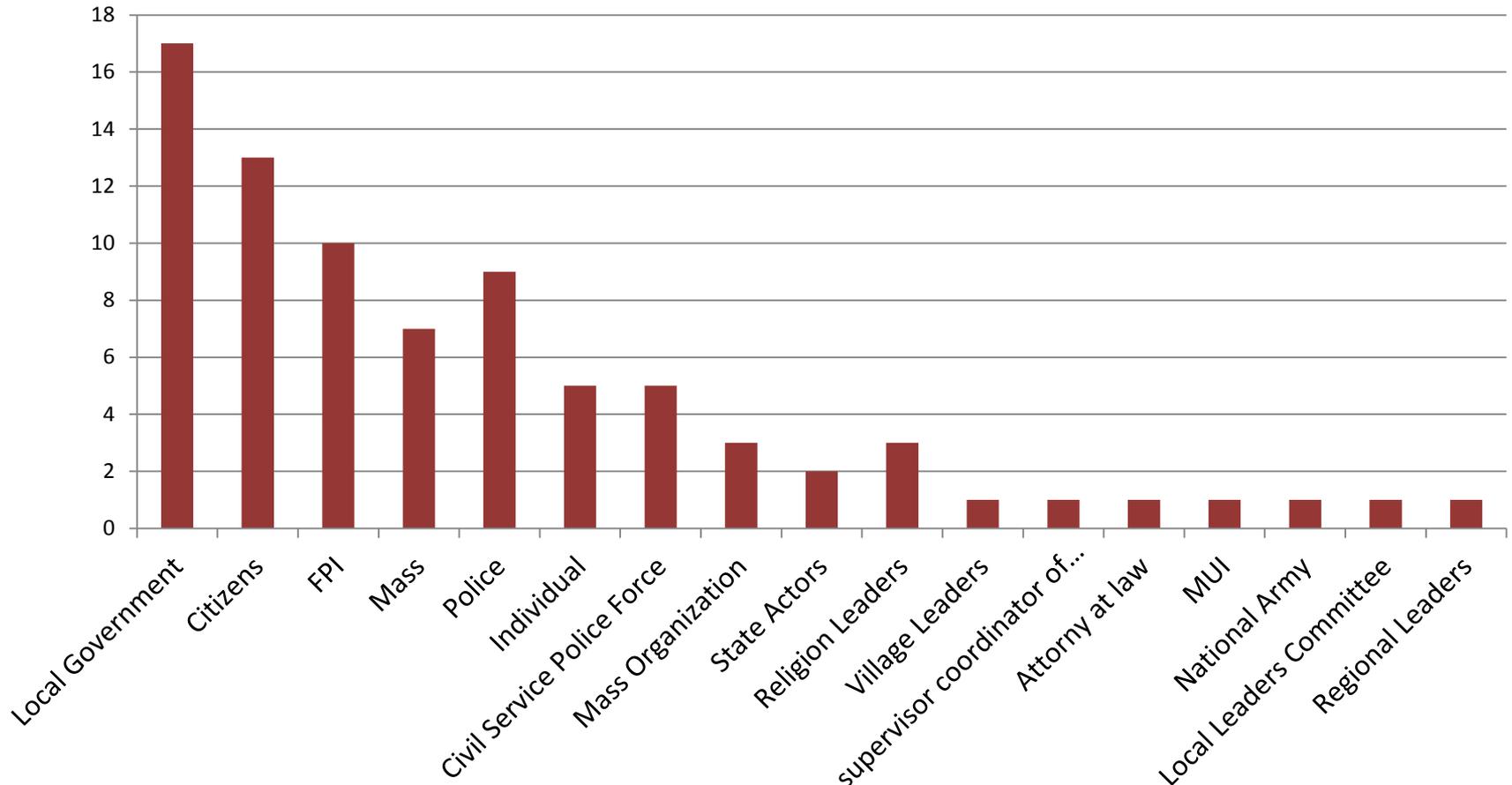
Indonesia also considering General Comment of the IICPR Number 22 Elimination of All Forms of Intolerance and of Discrimination Based on Religion

C. Violation forms of religious freedom



Source: Annual Human Rights Report of ELSAM 2011

Category of religious freedom violators



Source: Annual Human Rights Report of ELSAM 2011

D. Problems of harmonization of international legal standards into domestic law

Indonesia seems **ambivalent** for choosing between a **monistic or a dualistic legal system**

In term of the right to freedom of religion **Constitution of Indonesia Republic Year 1945 is not fully compatible with the ICCPR**

Several regulations issued by local government still **potentially discriminates minority right to freedom of religion and belief**

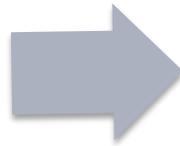
Government agencies and community council have **issued some regulations beyond their authority and leads some actions violate the right of others to freedom of religion and belief**

**How Indonesia deal with these problems
and what are ways as breakthrough?**

1. Indonesia seems ambivalent between as a country with monistic or dualistic system of law

the ratification of the ICCPR means that its provision is incorporated in the national legal order and therefore directly applicable.

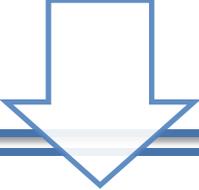
- But in fact the ICCPR provisions become part of the domestic law needs specific legislative measures to that effect.



the Constitutional Court of Indonesia consider the ICCPR as sources of law when construct legal arguments in many cases as well as the case of judicial review of the Act Number 5/PNPS/1969

- no judge of general court in Indonesia shall apply the provisions directly as sources of law when construct legal argument such as in the case of Sunni vs Syiah in Sampang (2012)

1.1. What can citizen do when he/she feeling violated by certain provisions which incompatible to the right guaranteed by Indonesia Constitution (or international legal standards ratified by Indonesia)?



Overcomes:

Citizen whose feeling violated by the certain provision of the Act **could claim before the Constitutional Court through judicial review mechanism.**



Breakthrough:

1. Once the Constitutional Court decide that the Act is compatible with Constitution and valid, **they could address different provisions of the same Act to reviewed by Constitutional Court again and again. Eventhough Constitutional Court decision Number 140/PUU-VII/2009 still strengthens the validity of the Act Number 5/PNPS/1969 jo 156a Penal Code, citizens still have opportunity to propose judicial review of these Act by pointing its different its provisions.**



2. If a person crimilized by certain Act that the provision is incompaible with constitution and if the decision made by Supreme Court is already exhausted , he shall brings the case before **the Constitutional Court through constitutional complaint mechanism**

1.2. what can be done by the citizen when he **criminalized by discriminatory regulation?**

Overcomes:

In practice, citizen who is being criminalized by the existence of discriminatory regulations **can ask assistance to human rights defenders or Lawyer to defend his case at all levels of the judiciary.**

Breakthrough:

Once the academic community considers that the judgment does not meet the indicated aspect of legal certainty, justice and expediency, **they perform a public examination of the judge's decision and send it to the Judicial Committee for further action/**

2. In term of the right to freedom of religion Constitution of Indonesia Republic Year 1945 is not fully compatible with the ICCPR

Indonesia Constitution 1945

Unclearly distinguished between the right to external freedom and internal freedom of religion and it can be subjected to the restrictions by law based on **religious values considerations**.

According to Art. 28J (2) stated that: "In exercising their rights and freedoms everyone shall be subject to the restrictions established by law solely for the purpose of securing due recognition and respect for the rights of freedoms of others and to meet the demands of a just based on considerations of morality, **religious values**, security and public order in a democratic society".

ICCPR 1966

Clearly distinguished between external freedom and internal freedom of religion (non derogable one). Only for external freedom that can be restricted by law based on protect public safety, order, health, or morals or the rights and freedoms of others considerations **except religious values**

According to Art. 18 (3): "Freedom to manifest one's religion or belief can only be restricted by law and are necessary to protect public safety, order, health, or morals or the rights and freedoms of others. "

2.1. Issues related to the article in the constitution that are not in line with the ICCPR or other international legal instruments ratified by Indonesia, what had been done and what a breakthrough?

Overcomes:

At the national action plan for human rights 2011-2014 made by the Indonesian government has included the agenda of harmonization and evaluation of laws that overlap between each other.

Breakthrough:

Society encourages the realization of the idea of the fifth amendment of the constitution of Indonesia immediately taken to include human rights issues that are still not in line with the standards of international human rights law as part of that must be followed

3. Several regulations issued by local government are potentially discriminates the right to freedom of religion and belief.

The results of the assessment of the National Commission on Human Rights stated that in 2010 there were 3200 local regulations in Indonesia that potentially violate human rights, and 900 of them have been canceled by the ministry in the state

Various local regulations in which regulate on matters relating to the issue of religion has clearly come out of the local authorities as stipulated in the law on local government because it is the authority of the central government

Regulation of a dimensionless area of human rights is also a potential lead to horizontal conflict and contrary to the motto Unity in Diversity as a nation's character

3.1. How to deal with several regulations issued by local government that are potentially discriminate the right to freedom of religion and belief?

Overcomes: National Commission on Human Rights urged the Ministry of Domestic Affairs to evaluate the draft regulation of local regulations that potentially violate human rights to be canceled. On the other hand through judicial review the Supreme Court also evaluated and canceled the various regulations are considered contrary to the law in a higher position, including the violation of norms of human rights guaranteed in the constitution.

Breakthrough: With the enactment of Law No. 12 year 2011 about the making of legislation can be used as a basis for increasing the human resources capability to draft the regulation properly and the evaluation of various laws in local governments that are considered to violate human rights norm guaranteed in the constitution as the law in a higher position.

4. Government agencies have issued regulations out of their authority

JOINT DECISION OF THE MINISTER (JDM) OF RELIGION, PROSECUTOR GENERAL AND MINISTER OF DOMESTIC AFFAIRS OF THE REPUBLIC OF INDONESIA NoUMBER 3 of 2008 ON THE WARNINGS AND COMMANDS TO ADHERENTS, MEMBERS, AND / OR MEMBERS OF THE MANAGEMENT OF THE JAMAAH AHMADIYEH INDONESIA (JAI) AND CIVIC SOCIETY

JDM has no basis legitimacy.

The position of the JDM weak for not being part of the hierarchy of legislation.

Ministry of Domestic Affairs Decree 477/74054/BA.01.2/4683/95 on November 18, 1978 which states that there are five religions in Indonesia, namely Islam, Protestantism, Catholicism, Hinduism, and Buddhism

The regulation is often used as the basis of legitimacy by certain parties to mislead other religions.

This provision is also a frequent childbirth discrimination against citizens who espoused religious beliefs are not included in the main religion or religious official.

Minister who has administrative authority but make public regulation by stated illegal and legal religion.

community council or organizations have issued so called fatwa beyond their authority and leads some horizontal conflicts

CONGRESS NATIONAL ASSEMBLY VII of ULAMA INDONESIA IN 2005 COUNCIL DECISION OF ULAMA INDONESIA RELEASED *FATWA* No. 11/MUNAS VII/MUI/15/2005 HAS DECLARE THAT AHMADIYAH AS FALSE AND MISLEADING

The restriction of external freedom should be regulated by law not by community council / non state agency such as MUI.

It also leads wide scalation of horizontal conflicts among religions community
(majority vs minority)

SOME RELIGION RADICAL COMMUNITY ORGANIZATIONS DO INRESPECT TO HUMAN RIGHTS NORM BY PUSHED LOCAL GOVERNMENT AND APPARATUS TO PROTECT THEIR ABUSES

There is only individual responsibility when religion radical organizations do violence towards minority groups or do provocations and or inrespect with other religion.

How to deal with state organs or community council organizations who have issued so called fatwa beyond their authority and leads so much debate and horizontal conflicts among religions?

Overcomes:

So far the efforts made by the government for the actions of radical organizations in the name of religion or freedom of religion was limited to legal action by asking **individual accountability** for one's found

Breakthrough:

Hold accountable individual is not enough to prevent a recurrence of violence by radical religious organizations. Therefore, various existing provisions such as **the Law Number 8 Year 1985 about Community Organization needs to be completely upheld** if there's organization that violate the law or committing violence it can be frozen and or otherwise have no legal standing anymore.

Recommendation

1. By taking into account a principle of state obligation to respect human rights of all citizens, it is very urgent that the idea of **fifth amendment of Constitution of Indonesia Republic Year 1945 should be realized soon** in order to harmonize and synchronize the Human Rights legal standards into domestic law.
2. In order to guarantee the constitutional rights of all citizens to pursue their constitution rights without any discrimination, **mechanism of constitutional complaint should be recognized by law** and supported by all members of Constitutional Court as part of their task as the guardiance of constitutions.

3. **The National Action of Human Rights Year 2011-2014 released by government must be true implemented** and must be controled regularly by People Representative and National Commission of Human Rights and widely socialized to all people.
4. In respect to human rights values that has become universal valuaes, **Indonesia needs to developing an intensive and congcreet effort to stop the violations of the right to freedom of religion** by penalting a person who violate freedom of religion or by asking responsibility to the community organization who did the wrongdoing.

5. **A non judicial awareness such as training or exchange experience to the leaders of civil society organizations** about the importance of respect of human rights especially the right to freedom of religion and belief should be done continually with the support of the international community in order promote the principles of mutual respect and understanding.

Thank you for your kind attention.