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Sentencing over Objection to Mobilization as Military Reserve: An analysis of National and International Laws

Abdul Madjid

Faculty of Law, Universitas Brawijaya, Indonesia
Email: majid@ub.ac.id

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Abstract: *Law Number 23 of 2019 concerning National Resource Management for State Defense does not regulate conscientious objection, which refers to the right of a person to refuse to participate in a war or military service on the grounds of religion and morality. Their absence in such services is replaced by other responsibilities such as working in public health services, providing security, and being involved in other social services. Article 77 Paragraph (1) of Law Number 23 of 2019 expressly provides for sentences that should be imposed on those who refuse to serve as a military reserve, where the rule is not in accordance with the principle of conscientious objection which gives a person the right to refuse on the basis of conscience. This research discusses the legal consequences of the enactment of two rules regarding military service and the application of different conscientious objections. This study applied normative juridical methods and approaches to examine the consistency and relevance of various statutes and government regulations that govern conscientious objection. This study also used conceptual and statutory approaches to explore why conscientious objection is considered a ground for refusal to participate in conscription according to International Human Rights Law. The findings revealed that the conception of defense and compulsory military service in Indonesia does not leave any chance to guarantee the rights of citizens to refuse to participate in military service according to the conscience and belief of every individual (conscientious objection). This is in contrast to the regulatory provisions of international human rights ratified by Indonesia under the International Covenant on Civil and Political Rights. Additionally, there is a need for clear arrangements regarding conscientious objection and the requirements that must be met by citizens who submit these principles for the rejection of military service in Indonesia.*

Keywords: *sentence; conscientious objection; mobilization; military reserve.*

I. Introduction

Each state is required to give attention to state defense in international relations, including the influences or interruptions coming from other states that may threaten the sovereignty of a state. Activities through the diplomacy of defense strengthen the partnership between states and grow the influences and interests brought by dominant players in

global politics. Cottey and Forster elaborated diplomatic activities in defense as follows:[1]

a. bilateral and multilateral relations between senior and civil military defense officials
b. deployment of defense attachés in another state
c. bilateral defense partnership agreements
d. training for foreign military personnel and civil personnel of defense
e. improving suggestions on democratic control over armed forces, defense management, and military engineering
f. exchange of military personnel and military unit and battleship visit

States have taken several measures to reinforce their state defense within their military forces. One of these measures, implemented through national policies, is related to state military reinforcement. Indonesia is one of the states that have comprehensive national policies concerning state defense. One of the regulations reinforcing Indonesia's defense refers to the policy concerning military reserve as a reflection of conscription or state defense.

In terms of conscription, Indonesia has a long history of struggles for its independence, and the doctrines of universal defense are provided for in the 1945 Constitution of the Republic of Indonesia (UUD 1945). From history, it is obvious that Law Number 66 of 1958 concerning conscription governs the rights of citizens to refuse to participate in conscription implicitly according to their conscience, which is described as conscientious objection.[2] Citizens' refusal to participate in military service, as stated in the statute, involves reasons such as health and education. The Conscription Law also regulates the basis for refusal as well as appeals against a decision of the selection of the participants of conscription.

Indonesia enacted regulations concerning military reserve to realize the practice of conscription or state defense, as outlined in Article 28, Section IV of Law Number 23 of 2019 concerning National Resource Management for State Defense. The military reserve constitutes citizens, natural resources, artificial resources, and national infrastructure and facilities, and it is set to help manage national resources within the confines of national defense to tackle threats that may come from military and nonmilitary sources. Law Number 23 of 2019 concerning National Resource Management for State Defense also regulates sanctions for objectors, specifically Article 77 Paragraph (1), which states:

> *"Every person in military reserve intentionally refusing to come to the call of military mobilization or committing deception to divert himself/herself from the mobilization as intended in Article 66 Paragraph (1) is subject to four-year imprisonment."*[3]

However, Law Number 23 of 2019 concerning National Resource Management does not include any regulatory provisions concerning the rights of citizens to refuse to participate in conscription on the grounds of belief and conscience, which is commonly known as the right of conscientious objection under International Human Rights Law. Black's Law Dictionary defines conscientious objection as follows:

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1 A. Cottey and A. Forster, "Reshaping Defence Diplomacy: New Roles for Military Cooperation and Assistance," in *Adelphi Paper No 356* (New York: Oxford University Press, 2004).

2 Endro Tri Susdarwono, "Analisis Terhadap Wajib Militer Dan Relevansinya Dengan Rancangan Undang-Undang Komponen Cadangan," *Khatulistiwa Law Review* 1, no. 2 (2020): 134.

3 Article 77 Paragraph (1) of Law number 23 of 2019 concerning National Resource Management for State Defense

> "*A person who for moral or religious reasons is opposed to participating in any war, and who may be excused from military conscription but remains subject to serving in civil work for the nation's health, safety, or interest*."

Therefore, conscientious objection refers to the right of a person to refuse to participate in wars or military service due to moral and religious grounds. Following this refusal, the person concerned may be transferred by the state to other civil tasks in public health services, security, and any other social services to compensate for missed military service.

In line with the above definition, Article 1 of Human Rights Commission Resolution of the United Nations (UN) Number 77/1998 defines conscientious objection "as the right of every person to refuse to participate in military service because of conscientious objection and religious grounds as stipulated in Article 18 of the Universal Declaration of Human Rights and Article 18 of the International Covenant on Civil and Political Rights".[4] Conscientious objection to military service stems from the conscientious principle emerging from morality, ethics, humanity, and religion.[5] Conscientious objection is also recognized in every individual who intends to participate in military service. The International Covenant on Civil and Political Rights was ratified by Indonesia through Law Number 12 of 2005 concerning the Ratification of the International Covenant on Civil and Political Rights.

Forceful conscription, which may involve prosecuting and sentencing (imprisonment or capital punishment) those who refuse, is seen by the UN as a violation of human rights, especially the right to live, the right to freedom and safety, the right to freedom of thought, the right to belief and conscience, and the right to religion. In 1960, the Human Rights Commission of the UN, represented by the Sub-commission of Improvement and Protection of Human Rights, scrutinized the issue of the right to refuse to participate in conscription as a right recognized as part of the freedom of religion and belief that must not be discriminated. The issue was then discussed in a meeting with the theme "The Role of Youth in the Protection and Promotion of Human Rights," which discussed the right to refuse military service. At that time, the sub commission appointed two special rapporteurs. The recommendations made at the meeting were a) "States must recognize (through law):[6] (a) the right of persons who for reasons of religious, ethical, moral, humanitarian or other similar beliefs refuse to perform military service; and b) In view of the objections to military conscription that in the past military force was often used to carry out the agenda of apartheid and ethnic cleansing (genocide) as well as for the illegal occupation of foreign territories, it is advisable for the state to absolve from military service".

Issues regarding the right to refuse military service continue to arise in the practice of countries that implement compulsory

[4] Elizaveta Chmykh et al., "Legal Handbook on The Rights of Conscripts," in *Legal Handbook on The Rights of Conscripts* (Geneva: DCAF-Geneva Center for Security Sector Governance, 2020), 55. see also: CCPR General Comment No 22

[5] *Conscientious Objection to Military Service* (New York: United Nations, 2012), 7–9.

[6] "The Role of Youth in the Promotion and Protection of Human Rights, Including the Question of Conscientious Objection to Military Service, Adopted at the 60th Meeting on 11 March 1992," UN Commission on Human Rights, n.d., https://www.refworld.org/docid/3b00f0c618.html.

military service. This military service aims to strengthen a country's defense when there is a threat, especially during armed conflict against the other country. Indonesia has such regulations pertaining to military service in an effort to utilize human resources for national defense as expressed in Law No. 23 of 2019 concerning Management of National Resources for national defense. Conscientious Objection Indonesia has ratified the International Covenant on Civil and Politics.

The validity of the practice is discussed when individuals refuse to participate in conscription simply to follow their conscience and beliefs that hold them back from getting involved in any forms of violence, the use of weapons, and murder. When this is the case, the people refusing to do so are not appropriately protected because of the absence of regulatory provisions concerning conscientious objection, and they are prone to sentencing as outlined in Article 77 Paragraph (1) of Law Number 23 of 2019 concerning National Resource Management for State Defense. Therefore, analyzing the policy regarding sentencing over refusal to military mobilization as a military reserve and the perspective of international and national laws and their juridical implication is essential.

This analysis applies normative juridical methods, an approach used to examine legal systems as well as the consistency between statutes and their relevance. This study also applied conceptual and statutory approaches to analyze the law concerning conscientious objection as a ground to refuse conscription according to International Human Rights Law.

II. Legal Materials and Methods

This article comprises a normative legal research utilizing the legal conceptual approach and the statute approach. The primary legal materials that were utilized are international regulation and Indonesian regulation related to conscientious objection and military service. This article also utilized the legal material analysis technique of prescriptive analysis and legal syllogism and a conceptual approach to draw conclusions.

III. Result and Discussion

The Right to Conscientious Objection from the Perspective of International and National Laws

a. Provisions regarding Conscientious Objection under International Law

Since the mid-19th century, the term conscientious objection has been used to refer to those refusing to participate in conscription as they follow their conscience. Two of the published works known to have been relevant to conscientious objection back in the century are the report by the New York Assembly Committee on the Militia and the Public Defense Report Number 170, 4 March 1841. This publication is intended to assist civil society and non-governmental organizations in the defense of rights based on conscience and provide a better understanding of these rights. The Concise Oxford English Dictionary (twelfth ed.) defines the word "conscience" as "an inner feeling or voice viewed as acting as a guide to the rightness or wrongness of one's behavior." Conscientious objection applies not only to militia but also to other purviews demanding the involvement of moral decisions such as in law, medicine, and the development of nuclear technology for the sake of state defense (notably, in some cases,

some people decided to quit from the development of nuclear weapons following their awareness of the danger it poses to humanity). However, since the mid-20th century, the term conscientious objection has been specifically used to refer to the refusal to conscription following a conscientious consideration or belief.

The definition of conscientious objection also stems from legal experts and philosophers. Peter Rowe, a professor of military law and humanitarian law at Lancaster University, agrees with the two definitions above. He contends that the implementation of conscription should also accommodate conscientious objection as the right to believe that is owed to every individual in armed forces among other rights such as the right to worship, to congregate, and to be involved in an organization, which are all rights guaranteed by instruments of human rights and recognized in military routines. The Head of International Community for Military Law and War Law, Peter Brock, confirms that conscript soldiers refusing military service simply because they follow their conscience can offer other services such as noncombatant military service or civilian alternative service. Therefore, conscientious objectors (COs) can skip military service. Kees Bertens, a professor of philosophy and ethics at Universitas Atmajaya, has defined conscientious objection as the right to refuse to participate in conscription as a compulsory task a citizen has to meet due to conscience. Bertens further defined such a person as a CO.[7]

The implementation of conscription in several states, which comes with the prosecution against the refusing individuals and sentencing (imprisonment and capital punishment), is seen by the UN as a violation of human rights, especially the right to live, the right to freedom and safety, the right to the freedom of thought, the right to believe and to follow one's conscience, and the right to religion. Following this perspective, in 1960, the Human Rights Commission of the UN, represented by the Sub-commission of Improvement and Protection of Human Rights, scrutinized the issue regarding refusal to conscription being recognized as part of the right to freedom of religion and belief that no one should be discriminated.

In 1970, this issue was agreed upon by the Human Rights Commission of UN in a meeting agenda "*Peran Kaum Muda dalam perlindungan dan Pemajuan Hak Asasi Manusia*," which discussed the right to refuse to serve in the military. In 1981, the Sub-Commission brought two petitioners who submitted their final petition in 1984. This petition encouraged states to recognize under their laws:

a. A person's right to refuse to serve in the military on the grounds of religion, ethics, morality, humanity, or belief. The state should voice the right to refuse for those with beliefs that restrict them from serving in the military under any circumstances.
b. The person's right to be exempt from military service/conscription due to the awareness of violence and the violation of human rights caused by the war, recalling that in the past, the military was often used to give way to apartheid, genocide, and illegal occupation.
c. The person's right to be exempt from joining armed forces due to concerns regarding the use of mass destruction

[7] Kees Bertens, *Etika* (Jakarta: Gramedia Pustaka Utama, n.d.).

> weapons and other types of weapons proscribed by international law because they may cause humans to unnecessarily suffer.

In 1987, the Commission adopted Resolution 1987/46, encouraging states to recognize the right to refuse to participate in conscription, which also considers the right to freedom of thought, the right to belief, and the right to religion. Furthermore, in 1989, the right to this refusal was recognized by the Commission in Resolution 1989/59, which encouraged states to draft a statute intended to give exemption to COs from military service to ensure their human rights would remain protected. The Commission's views on the right to refuse to participate in conscription are based on Article 3 and Article 18 of the UDHR regarding the right to live, the right to freedom and safety, the right to the freedom of thought, the right to belief, and the right to religion. In 1993, through Resolution 1993/84, the Commission encouraged states that required conscription for citizens to have substitutes for the conscription to accommodate noncombatant civilians, and the states were to ensure that these substitutes would not be seen as a punishment.

The UN Human Rights Committee issued General Comment Number 22/1993 of Paragraph 11, which evaluated the implementation of ICCPR, especially for the right to the freedom of thought, to religion, and to use of conscience:

> "*The Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article18, in as much as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief."*

Since the compulsory requirement for citizens to join armed forces is likely to raise conscientious objection issues, there should be a complaint mechanism available. The Committee asserted that the guarantee of the right to conscientious objection must be ensured in terms of all responsibilities in the armed forces. The case of Paul Westerman v. the Netherlands brought about the term "total objector," meaning that not only do citizens have the right to refuse to join any armed forces, but they may also refuse other forms of military service, including noncombatant ones. Westerman, whose petition was turned down by the government, had to serve a nine-month jail sentence because he refused to wear a military uniform and comply with military rules. In this case, he should have been considered a CO.

In 1995, the Human Rights Commission of the UN in Resolution 1995/83 further moved to offer protection to those refusing to join conscription that is legally inextricable from the right to the freedom of thought, the right to belief, and the right to religion as guaranteed under Article 18 of the UDHR and Article 18 of ICCPR. The Commission further strengthened the protection of the right to refuse to join conscription (conscientious objection) under Resolution 1998/77, issued on 22 April 1998 in the 58th session of the Commission.

Resolution 1998/77 confirms that conscientious objection is a legal part of the right to the freedom of thought, the right to belief, and the right to religion, considering that citizens selected for conscription may choose to refuse. The Commission suggested that states should set institutions responsible for making independent and impartial decisions on whether a CO has the attention they need and ensuring that their needs are met and they are not discriminated against.

Under international law, conscientious objection is recognized under Article 1 of the Commission on Human Rights Resolution of the UN Number 77/1998, which states:[8]

> "*Draws attention to the right of everyone to have conscientious objections to military service as a legitimate exercise of the right to freedom of thought, conscience and religion, as laid down in Article 18 of the Universal Declaration of Human Rights and Article 18 of the International Covenant on Civil and Political Rights*"

This right is part of the right to the freedom of thought, the right to follow one's conscience, and the right to religion, as outlined in Article 18 of the UDHR and Article 18 of ICCPR. This principle was derived from the principles regulating the right to follow one's conscience, including the belief emerging from morals, ethics, humanity, and religion, and it is recognized for every individual to perform their tasks.

Articles 5 and 6 of Resolution 1998/77 require each state to take measures to refrain from imposing any sentencing or punishment on COs following their refusal to conscription. These measures are intended to protect the economic, social, cultural, civil, and political rights of the citizens. Article 4 of the Resolution encourages states that make conscription compulsory in the absence of regulatory provisions concerning conscientious objection to ensure that alternative civilian service is made available for the sake of public interest. Civilian service may involve social work and other public services relevant to the COs, and this alternative must not be seen as punishment.

In circumstances where COs are forced to leave their states due to the threat of punishment imposed by the government or due to fear of possible prosecution or torture following their refusal to conscription amidst the absence of the regulatory provisions concerning conscientious objection, Resolution 1998/77 encourages other states to grant them asylum by referring to the 1951 Refugee Convention, which also serves as a juridical basis of the Resolution (Article 7 of the Resolution).

Resolution 77/1998 also recommends that states with conscription should provide information on the status of COs, procedures, and requirements to receive the status for citizens serving conscription, including armed forces. Every person also has a chance to get the status of a CO before, during, and after he/she serves the conscription or military service (Article 8 of the Resolution).

In terms of the regulatory provisions concerning conscription set by states that come along with criminal sentencing regarding the refusal to conscription, the UN views these as being a violation of human rights, especially the right to live, the right to freedom, and safety. This explains why the UN held sessions to scrutinize and formulate regulations regarding the right to refuse to join conscription. Regarding conscientious objection and the essence of the implementation of this principle in conscription, Peter Rowe, among other experts, asserts that the practice of conscription should constitute conscientious objection as the right to belief along with the right to worship, to congregate, and to participate in an organization of those in armed forces, all of which are recognized as

[8] Commission on Human Rights, Resolution 1998/77.

human rights and form part of military routines.[9]

Under circumstances where conscript soldiers have a chance to pick noncombatant military service or civilian alternative service, military law and the law of war restrict them from refusing to serve in military service due to conscience.[10] States recognize the right to conscientious objection to military service by implementing policies that allow citizens to pick alternatives to military service. The right to conscientious objection was observed by several states even during world war. During World War II, conscript soldiers were widely used, and this condition led to the birth of policies concerning conscientious objection, especially in states that deployed conscript soldiers. Many states have also enacted national legislations that govern conscientious objection, and some have even entrenched this right in their constitutions. This is further corroborated by the fact that states practicing conscription have ratified and adopted the UDHR and ICCPR, meaning that they must also protect the right to conscientious objection.

b. Provisions of Conscientious Objection in National Law

Indonesia ratified the International Covenant on Civil and Political Rights through Law Number 12 of 2005 and adopted the Universal Declaration of Human Rights through Law Number 39 of 1999 concerning human rights. Notably, the rights protected by these two instruments also include the right to conscientious objection.

Conscientious objection is related to policies governing conscription that have been adopted by the Indonesian government. Conscription features in the history of Indonesia, starting from its independence, when the doctrine of universal defense was recognized in the 1945 Constitution of the Republic of Indonesia. However, the right to conscientious objection is not fully protected because of the influential concept of compulsory state defense that features in the doctrine of universal defense.

Three philosophical grounds justify the enforcement of conscription in Indonesia, namely, the universal defense of Indonesia, state defense, and *si vis pacem para bellum*.[11] The first ground refers to the system of state defense whose implementation is based on the awareness of the rights and obligations of all citizens, the belief in an individual's capacity to survive, and the need to protect the sovereignty and independence of Indonesia.[12] The use of the term universal in these circumstances implies the involvement of all citizens and all national resources, national infrastructure, national facilities, and all areas of Indonesia as a whole unity of defense. In other words, all national resources are empowered to support state defense.

The second ground refers to the enforcement of conscription as the responsibility of Indonesian citizens. The implementation of the state defense concept represents demands toward citizens to embrace nationalism or a sense of belonging to the state, as governed by positive law in Indonesia, which protects people's rights and imposes obligations that

[9] Peter Rowe, *The Impact of Human Rights Law on Armed Force* (New York: Cambridge University Press, n.d.).

[10] Ibid.

[11] A. Ridwan Halim, *Evaluasi Kuliah Filsafat Hukum* (Jakarta: Ghalia Indonesia, 1987), 226.

[12] *Buku Putih Pertahanan Indonesia 2008* (Departemen Pertahanan Republik Indonesia, 2008), 45.

they should fulfill. State defense is embodied in the system of universal state defense that responds to military threats by positioning Indonesian Armed Forces as the main defenders backed up by military reserve and other supporting components such as citizens, natural resources, artificial resources, and national infrastructure and facilities.

The third philosophical ground refers to the adage *si vis pacem para bellum,* meaning whoever upholds peace and love should be prepared for war or, in other words, a "fight is the only way and it knows no limit to bring peace."[13] Military defense mainly constitutes the utilization of national resources, including the function of military defense within the framework of facing military threats that may be represented by military reserve and supporting reserve and within the framework of civil defense, according to the function and authority of government institutions outside defense.[14]

Departing from these three philosophical grounds, the Indonesian government came up with a regulation-making process concerning conscription for citizens of Indonesia. Law Number 66 of 1958, in article 12 part 1 (d), allows citizens to raise their objections against conscription according to their beliefs and human rights. This provision protects the right to conscientious objection as regulated in Article 10 of Conscription Law, which states that conscription is not for those with certain circumstances or those who may suffer from it when they are forced to join the conscription.[15]

This regulation also applies to those holding official positions in religious or humanity organizations that do not allow participation in conscription. In 2019, the Indonesian government drafted Law Number 23 of 2019 concerning National Resource Management for State Defense, which replaced Law Number 66 of 1958 concerning Conscription. Law Number 23 obligates citizens to serve as a military reserve as a form of conscription and state defense carried out by citizens.

Military reserve is regulated by Section IV of Law Number 23 of 2019 concerning National Resource Management for State Defense. Article 28 of the law describes military reserve as constituting citizens, natural resources, national artificial resources, and national infrastructure and facilities, all prepared for the management of national resources for state defense to face military, nonmilitary, and hybrid threats. Article 77 (1) of Law Number 23 also governs sanctions:[16]

> *"Every person in military reserve intentionally refusing to come to the call of military mobilization or committing deception to divert him/her from the mobilization as intended in Article 66 Paragraph (1) is subject to four-year imprisonment"*

The above statement implies that this statute does not protect citizens' right to refuse to join conscription on the grounds of belief and conscience or, as it is commonly referred to under International Human Rights Law, the right to conscientious objection. However, Indonesia protects this right under national regulations preceded by ratifications of

[13] Departement of Defense of the Republic of Indonesia*;* Regulation of the Minister of Defence Number Per/23/M/XII/2007 concerning Doctrine of State Defense.

[14] Ibid p. 46

[15] Article 10 of Law Number 66 of 1958 concerning Conscription

[16] Article 77 of Law Number 23 of 2019 concerning National Resource Management for State Defense

international instruments such as ICCPR and international human rights conventions.

The absence of regulatory provisions concerning citizens' right to conscientious objection is likely to result in a violation of human rights. This statute asserts that those above eighteen, working as civil servants, working in private institutions, or are ex-army soldiers, are required to serve in military reserve and participate in military training. Members of military reserve are distributed to the Indonesian navy, army, and air force and deployed to battlegrounds to offer support to the Indonesian Armed Forces. Therefore, those involved in military reserve are combatant members, and they must comply with the provisions of military law and international law of war.

Those who refuse to participate in conscription are not offered any form of protection, and they are prone to a jail sentence and other prosecutions. Notably, the absence of clear provisions regulating conscientious objection in Law Number 23 of 2019 is likely to lead to this unfair situation. This study explores the concept of the right to conscientious objection as part of human rights and the chance and the challenge given by the implementation of the international community, especially in Indonesia, which is a state that recognizes the obligation of state defense.

The sentence imposed on those who refuse to participate in conscription is contradictory to what has been adopted and ratified by Indonesia. Several international human rights instruments governing conscientious objection serve as the basis for states to make policies governing conscription. Article 18 of the Universal Declaration of Human Rights states:[17]

> *"Everyone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship, and observance."*

Furthermore, Article 18 of the International Covenant on Civil and Political Rights states:[18]

a. Everyone shall have the right to freedom of thought, conscience, and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice, and teaching.
b. No one shall be subject to coercion that would impair his freedom to have or to adopt a religion or belief of his choice.
c. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
d. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children conform with their own convictions.

Both articles mention several rights that are guaranteed by the state under national

[17] Article 18 of The Universal Declaration of Human Rights.

[18] Article 18 of International Covenant on Civil and Political Rights.

regulations, and these forms of freedom apply to all regulatory provisions governing citizens and their obligation to join conscription. The Human Rights Council Resolution Number 24/77 of 2013 states that "each state has to take measures to refrain from imposing any sentencing or punishment on COs following their refusal to conscription and from repeated sentencing, and the state should be aware that repeated sentencing violates the principle of *nebis in idem.*"

Resolution 1998/77 asserts that conscientious objection is a valid part of the right to freedom of thought, the right to belief, and the right to religion, and it encourages those in military service to exercise their right to conscientious objection. The Commission asserts that states should establish institutions responsible for making independent and impartial decisions when ascertaining whether conscientious objection has been rightfully exercised. Additionally, states are required to take into account the needs of COs and ensure that the objectors are not discriminated against.

Articles 5 and 6 of Resolution 1998/77 assert that states should refrain from imposing any punishment and condemnation on COs following their refusal to conscription. This is intended to guarantee the protection of the economic, social, cultural, civil, and political rights of citizens. Article 4 of the Resolution encourages states that make conscription compulsory, especially states that have no regulations governing conscientious objection, to allow citizens to provide alternative services to compensate for the missed conscription. Alternative services may include social work and public services relevant to the needs of the COs, and these services must not be seen as a punishment.

Considering the provisions of Article 18 of the UDHR and Article 18 of ICCPR, it can be argued that Law Number 23 of 2019 concerning National Resource Management for State Defense does not guarantee citizens' rights to conscientious objection. Furthermore, Article 77 of Law Number 23 criminalizes conscientious objection to military service and prescribes a four-year jail term for COs. This article is a clear indication that some national laws contradict the provisions of the international instruments that Indonesia has adopted and ratified, such as the UDHR and ICCPR. This certainly has juridical implications on the enforcement of the policies set by the government concerning the obligation of citizens to serve in the military.

Juridical Implications of the Legal Loophole in Regulations Governing Conscientious Objection to Mobilization in Military Reserve in Indonesia

The policy of the Indonesian government concerning military reserve, as reflected in Law Number 23 of 2019 concerning National Natural Resource Management for State Defense, violates the right to conscientious objection implied in the UDHR and ICCPR, which are both international instruments adopted and ratified as part of national law in Indonesia. This raises questions as to the juridical implication of the enforcement of the policy governing military reserve since Indonesia is bound by the international instruments it has ratified.

When deciding whether a treaty is considered a law within a national system, states follow the incorporation doctrine or a transformation approach. Selecting doctrines is deemed to be part of an internal procedure for ratifying a treaty. As a regulation that further governs the formulation of Article 11

of the 1945 Constitution of the Republic of Indonesia, which states that "the President with the approval of the House of Representatives declares war, makes peace and treaties with other countries," more specific rules about the internal procedure of the ratification of treaties in Indonesia is governed by Article 9 Paragraph (2) of Law Number 24 of 2000 concerning treaties, which states that "The approval of treaties as intended in Paragraph (1) is given under a statute and presidential decree."

This provision is perplexing because it combines both internal and external ratification procedures. It seems to imply that a treaty can be ratified through both internal and external procedures under a statute or presidential decree yet it is not a statute or presidential decree that ratifies a treaty; it is ratified by instruments of ratification/accession/acceptance/approval made by the minister of foreign affairs. Statutes and presidential decrees only represent the internal procedures of ratification.[19]

Under article 9 of Law Number 24 of 2000 concerning international treaties does not completely discuss the substance of the internal procedures followed in the ratification of treaties. Consequently, there are several interpretations of this provision becoming an obstacle in the implementation of rules. The first interpretation opines that a statute or presidential regulation ratifying a treaty transforms a treaty into national law. The second interpretation suggests that a statute or presidential regulation results from the approval given by the DPR and the President incorporating a treaty into national law. Therefore, treaties should apply in Indonesia in their original conditions as is the norm under international law.

The last interpretation sees a statute or the appointment of a president as a representation of the approval of the DPR or President to be bound to treaties. That is, Indonesia needs another specific legislative product to convert the substance governed in a treaty into national law. These varied interpretations, especially the third interpretation, clearly indicate that Law Number 24 of 2000 concerning treaties does not separate internal and external procedures of treaties in Indonesia. The ratification understood in the statutory theories is far different from that of the external procedures. Additionally, the ratification given by the DPR in the form of treaty ratification law is not about the binding of treaties; that is, it does not reflect what is intended in Article 2 (1) b of the Vienna Convention on the Law of Treaties 1969.[20]

The varied interpretations about the status of treaties in the system of national law in Indonesia and the mechanism of the enforcement of treaties in the legal system in Indonesia are an indication that Article 11 of the 1945 Constitution of Indonesia needs urgent revision to give legal protection to international law in general and treaties in specific. The revision of Article 11 of the 1945 Constitution of the Republic of Indonesia should embrace the following provisions:

a. The authority of the president to negotiate and sign treaties with other states

[19] Damos Dumoli Agusman, *Hukum Perjanjian Internasional Kajian Teori Dan Praktik Indonesia* (Bandung: Refia Aditama, 2010), 76–78.

[20] *Article 2 subsection (1) b Vienna Convention on The Law of Treaties 1969* states: "*"ratification," "acceptance," "approval" and "accession" mean in each case the international* act so named whereby a State establishes on the international plane its consent to be bound by a Treaty

b. Approval from the DPR in the internal ratification of treaties. This approval should not be made in the form of a statute; instead, it should be made in the form of a resolution or a decree. This procedure applies to treaties, widely affecting the finance of the state and/or anything that requires changes or legislative drafting.
c. The position of treaties within the system of national law in Indonesia that sets statutes or statutory regulations under statutes should not be applicable if the enforcement contravenes the provisions of treaties in Indonesia.

The implementation of treaties in a state is intended to determine the position of treaties in the system of national law. The Vienna Convention on the Law of Treaties 1969, which is the legal basis for the drafting and enforcement of treaties, prioritizes treaties over national law, as outlined in Article 27: "*a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty*." However, member states are not bound to position treaties in higher ranks in the system of national law. Article 27 of the Vienna Convention on the Law of Treaties 1969 is simply meant to prevent any likelihood of national law being used to justify violations of treaties.[21]

When international law contravenes national law, each state has a right to decide which law should be deemed reliable. Article 27 of the Vienna Convention on the Law of Treaties (now Article 23 bis) provides that "*A party may not invoke the provision of its internal law as a justification for its failure to perform a treaty*." Therefore, international law does not require a state to follow either dualism or monism. From a political point of view, national law is the primary law. Conversely, from a sympathetic viewpoint toward internationalism, international law should be prioritized.[22]

International relations in Indonesia are affected by the foreign policy that Indonesia complies with, and this policy serves as a guideline for the state to set regulations regarding international relations. International relations are not only determined by foreign policy, but treaties also affect these relations. Foreign policy guides Indonesia to determine which streams to follow, and it is affected by the condition of international citizens in international law. Since the beginning of its independence, Indonesia has adhered to free and active foreign policy, even when the east and west wings were separate.

According to free and active foreign policy, dualism tends to lean more toward home affairs and creates narrow access to international relations for Indonesia. Mochtar Kusumaatmadja opines that[23]

> *"The heaviest burden brought by the dualism is an absolute separation between national and international laws, and it never gives satisfactory justification implying that national law frequently complies with international law. The fact that the national law that applies occasionally contravenes*

[21] Ximena Fuentes Torrijo, "International Law and Domestic Law: Definitely an Odd Couple," *University of Puerto Rico Law Review* 77 (2008): 483, http://www.law.yale.edu/documents/pdf/sela/XimenaFuentes English_.pdf.

[22] Mohd. Burhan Tsani, "Status Hukum Intenasional Dan Perjanjian Internasional Dalam Hukum Nasional Republik Indonesia (Dalam Perspektif Hukum Tata Negara)," in *Perjanjian Internasional Dalam Teori Dan Praktek Di Indonesia* (Direktorat Jenderal Hukum dan Perjanjian Internasional Departemen Luar Negeri, 2008), 2–3.

[23] Mochtar Kusumaatmadja and Etty R. Agoes, *Pengantar Hukum Internasional* (Bandung: Alumni, 2004), 60.

> *international law does not represent structural differences as voiced by dualists, but it rather serves as evidence showing the ineffective nature of international law."*

The above statement implies that the Indonesian policy reflected in Law Number 23 of 2019 concerning National Resource Management regarding the obligation to serve as a military reserve in Indonesia and the sanctions imposed by the Indonesian government when a citizen refuses to serve as a military reserve contradicts the national law that represents the adoption and ratification of international law. In terms of the provisions prioritizing treaties or international law ratified by Indonesia, other national regulations that follow the ratification must comply with the ratified regulations. This is intended to prevent any legal conflict between international and national regulations according to what is mandated by Article 27 of the International Convention on Treaties, which requires treaties to be prioritized over national law when it comes to the implementation and adjustment of national law by a state.

IV. Conclusion and Suggestions

The policy reflected in Law Number 23 of 2019 concerning National Resource Management for State Defense does not protect citizens' right to conscientious objection. Moreover, Article 77 of the Law criminalizes conscientious objection. These two articles contradict the provisions of the international treaties that Indonesia has adopted and ratified such as the UDHR and ICCPR. This has juridical implications for the implementation of the policies made by the government that require the citizens to serve as military reserves for the sake of state defense.

Additionally, the policy reflected in Law Number 23 of 2019 concerning National Resource Management for State Defense regarding the availability to be part of military reserve and the criminal sanctions imposed by the government when citizens refuse to serve as military reserve also contradict other national regulations that support the ratification and adoption of international law. In terms of the provisions prioritizing treaties or international law ratified by Indonesia, other national regulations that follow the ratification are required to comply with the ratified regulations. This is intended to prevent any legal conflict between international and national regulations as provided for under Article 27 of the International Convention on Treaties.

Therefore, Law Number 23 of 2019 concerning National Resource Management should be revised to protect the right to conscientious objection to serve as a military reserve to safeguard the basic rights of Indonesian citizens and ensure compliance with the provisions of ICCPR, which Indonesia has ratified.

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