

The Status of International Treaties in the Indonesian National Law

Elfia Farida¹, Adya Paramita Prabandari²
{elfiaundip@gmail.com¹, adyaprabandari@gmail.com²}

^{1,2}Faculty of Law, Diponegoro University, Semarang, Indonesia

Abstract. The intensity of the relations between States is increasing nowadays. This relationship is marked by the many agreements made by States and States, as well as between States and non-States institutions, set out in the international treaties. Indonesia's practices and status of international treaties in the Indonesian law are analyzed based on normative juridical approach. The technique is by performing historical searches on the practices and applications of international treaties in Indonesia. In relation to the enactment of international treaties in Indonesian national law, Indonesia made a separation (based on the Theory of Dualism), such as the United Nations Conventions on the Law of the Sea (UNCLOS) that has been ratified by Law Number 17 Year 1985 but still needs the implementation law (process of transformation) that is the Law Number 6 Year 1996 regarding the Indonesian Waters. On the other hand, in the Human Rights field, Indonesia applied the Theory of Monism with the primacy of international law (process of incorporation) as in the Decision of the Constitutional Court Number 85/PUU-XI/2013 on the Judicial Review of the Law of the Republic of Indonesia Number 7 Year 2004 regarding Water Resources against the 1945 Constitution of Indonesia. In consideration of its decision, the Court is based on Article 33 Paragraph (3) of the 1945 Constitution, especially on water resources. In its conclusion, the Court stated that access to water is a part of human rights. This is reinforced by Article 12 Paragraph (1) of the ICESCR on the right for health. As it is known, Indonesia has ratified ICESCR through Law Number 11 the Year 2005. Thus Indonesia practiced both the Theory of Dualism and Monism, while the legal status of international treaties in Indonesian law is as a source of national law, either through the process of transformation or the process of incorporation.

Keywords: international treaties, Indonesian national law

1. Introduction

The intensity of the relations between States is increasing nowadays, resulting in the intensive contact between international law and national law. The relation between States and between States and non-States institution have become so broad and complex. This complicated relationship is marked by the many agreements made by States and States, as well as between States and non-States institutions, set out in the international treaties.

The international treaty becomes one of the main preferences for the international community seeking legal provisions that can be applied as a rule in the face of a juridical issue. As specified in Article 38 paragraph (1) of the Statute of the International Court of Justice, international treaties are the primary source of law for international law.

International treaties govern relations between States both bilaterally and multilaterally, which resulted in obligations for the States under the agreed agreement, with States as the parties responsible for carrying it out in good faith [1].

Article 2 Paragraph (1) of the Vienna Convention on the Law of Treaties 1969 defines

international treaty as: "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or two or more related instruments and whatever its particular designations."

Meanwhile, the definition on international treaties based on Article 1 Paragraph 1 of the Act Number 24 the Year 2000 is: "agreement in a particular form and name, which is governed by international law which is made in written form and creates rights and obligations in the field of public law."

Each party that has been bound by an international treaty is obliged to carry it out. However, as time progress, the character of international agreements not only regulate the behavior between States, as well as between States and non-State institutions. This concerns the external aspects of relations between States, as well as between States and non-State institutions. Also, international treaties will affect the behavior of the state itself (internal aspect), so it will touch its citizens thus will bear the rights and obligations for its citizens.

There are two theories related to the obligations, namely the enactment of international law and national law. Both theories are the Theory of Dualism and the Theory of Monism. Theory of Dualism emphasizes that the rules of the international legal system and national law are two separate systems. Positivists have adopted this theory like Triepel and Strupp. It is said that the relationship between international law and national law is based on state supremacy and the vast difference between the two. Meanwhile, the Theory of Monism accepts that international law and national law is unity. Lauterpacht (a naturalist) argues that the primary function of all laws is related to the welfare of individuals and supports the supremacy of international law as the best method to make it happen. This genre believes that the rule of international law can color the international order for moral and justice purposes based on respect for human rights and the well-being of individuals [2].

The increasing international public relations in various aspects arises the need for the arrangement of relationships that touch the national community. Community relations are about various aspects of life that reflect the ideals of society, such as human rights, disease eradication, family relationships, and so forth. Thus, international treaties are used as a means of achieving commonalities in dealing with and regulating certain public relations in each of their national legal [3].

As a part of the international community, Indonesia has also bonded itself to several international treaties. Thus Indonesia has the obligation and responsibility to carry it out in good faith. Therefore, this paper will further analyze the practices of the international law (in this case is the international treaties) in the Indonesian national law and the status of the international treaties in the Indonesian national law.

2. Methodology

The research method used in this paper is normative juridical because it emphasizes on the secondary data by studying and reviewing the principles of law and the rules of positive law derived from the literature materials existed both in the international law and the Indonesian national law regime. The data used are secondary data, which consists of: (1) primary legal materials, (2) secondary legal materials, and (3) non-legal materials. Based on the types and sources of data needed in this research, the data collection techniques in literature and document study. The data collected will be analyzed qualitatively using a historical approach.

3. Findings

3.1. Theories as to the Relation between International and National Law

Starke: “The two principal theories are known as monism and dualism. According to monism, international law and state law are concomitant aspects of the one system---law in general; according to dualism, they represent two entirely distinct legal systems, international law having an intrinsically different character from that of state law. Because a large number of domestic legal systems are involved, the dualist theory is sometimes known as the ‘pluralistic’ theory, but it is believed that the term ‘dualism’ is more exact and less confusing” [4].

“There are two basic theories, with several variations in the literature, on the relationship between international and domestic law. The first doctrine is called the dualist (or pluralist) view, and it assumes that international law and municipal law are two separate legal systems which exist independently of each other. The central question then is whether one system is superior to the other. The second doctrine, called the monist view, has a unitary perception of the ‘law’ and understands both international and municipal law as forming part of the same legal order. Kelsen formulated the most basic version of the monist approach. In his view, the ultimate source of the validity of all law is derived from a basic rule (‘Grundnorm’) of international law. Kelsen’s theory led to the conclusion that all rules of international law were supreme over municipal law, that a municipal law inconsistent with international law was automatically null and void and that rules of international law were directly applicable in the domestic sphere of states.” [5].

This controversy [between monism and dualism] turns on whether international law and national law are two separate legal orders, existing independently of one another—and, if so, on what basis it can be said that either is superior to or supreme over the other; or whether they are both part of the same order, one or other of them being supreme over the other within that order. The first view is the dualist view, while the second is the monist view [6].

“In reality, the opposing schools of dualism and monism did not adequately reflect actual state practice and were thus forced to modify their original positions in many respects, bringing them closer to each other, without, however, producing a conclusive answer on the true relationship between international law and municipal law. As a rule of thumb, it may be said that the ideological background to dualist doctrines is strongly colored by adherence to positivism and an emphasis on the theory of sovereignty, while monist schools are more inclined to follow natural law thinking and liberal ideas of world society.” [5].

The Fitzmaurice doctrine: "to overcome the conflict between the monist and dualist schools by challenging their common premise that there exists a common field in which the two legal orders both simultaneously have their spheres of activity. The two systems do not conflict since they operate in different spheres, each being supreme in its field. There may, however, occur a conflict of obligations, or an inability on the part of the State, on the private plane, to act in a manner required by international law. In such cases, if nothing can be, or is, done to deal with the matter, local law will still be valid, but the State will, on the international plane, have committed a breach of its international obligations for which it will be held responsible." [7].

The practical relevance of the doctrines; “On a practical level, whether the municipal courts follow the monist, dualist, or Fitzmaurice approach to the relationship of international law and municipal law, the matter will be determined by the constitutional law of the State concerned. The reception of the treaty law into domestic law will be determined by the constitutional tradition of the State concerned. Once again, many of the civil law States of

continental Europe accept, as a general premise, that treaty upon their ratification form part of domestic law. The approach of common law systems is frequently more confusing. In the US, for example, a treaty may only be ratified with the approval of two-thirds of the Senate (unlike the UK where no parliamentary involvement is required for the conclusion of a treaty). US court has made a distinction between 'self-executing' and 'non-self-executing' treaties. As a result, self-executing treaties, which confer certain rights upon citizens, rather than being primarily a 'compact between independent nations,' will become part of the US domestic law immediately upon entry into force of the relevant treaty and will be applied by US courts in the same as federal laws. This is not the case of non-self-executing treaties. They require legislation to implement them into US domestic law." [7].

Some of the theories in the relationship between international law and national law are (a) *Monism theory* that international obligations and state rules are two facets of the same phenomenon, both derived from a unified order of legal conception; (b) *Dualism Theory*, that rules in the international law and national law are distinguished from each other and cannot mean that one can influence or override others. International and national laws are essentially different in that each system regulates different issues; (c) *Specific Adoption Theory*, that international law can be applied in a country's national legal field only if the national law allows it and ratifies it specifically as international treaties; (d) *Transformation Theory*, that international law and national law are two distinct legal systems, working separately and hence, before any international rule or principle can affect national jurisdiction, it must be clearly and specifically transformed into regulation national legislation by means of appropriate constitutional mechanisms such as ratification or accession by parliament; (e) *Delegation Theory*, that the constitution of a country permits to arrange that international treaty can be applied in national law. As such, there is no need for either the specific ratification or the transformation of international law in any case. International laws can be applied in national law by existing procedures and systems in each country according to their constitution; (f) *Incorporation Theory*, that international law automatically forms part of national law without ratification by parliament. This theory refers to international customary law, and the different rules are applied to international treaties [8].

3.2. The Practices of the International Treaties in the Indonesian National Law

Based on Article 11 of the Vienna Convention 1969, the consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constitution a treaty, ratification, acceptance, approval, or accession, or by any other means if so agreed. However, under contemporary treaty practices, a signature, especially in a multilateral treaty, typically does not make the State a party to this particular treaty. Signing the treaty is merely a sign that the contents of the text of the treaty have been negotiated and agreed by the parties. However, that does not mean that the States promises to implement the contents of the treaty. The States will become parties to the treaty by an act of ratification or accession [9].

In accordance to the provisions of Article 26 of the Vienna Convention 1969, each party that has been bound by an international treaty is obliged to carry it out with good faith (based on the principles of *Pacta Sunt Servanda*). Furthermore, it may not invoke the provisions of its internal law as a justification for its failure to perform a treaty. Thus a State cannot withdraw from an international treaty on the ground that the provisions of the treaty are in contrary with its national law.

"The enforcement of international treaties by transnational actors and by the rule of law institutions within nations that join the treaty. In particular, internal enforcement mechanisms are a crucial force pushing countries to comply with international treaties. They are also a key

influence on countries willing to join such treaties in the first place. The collateral consequences of treaty membership—that are the likely consequences for, among other things, foreign aid and investment, trade and domestic political support. Collateral consequences arise when domestic and transnational actors premise their actions toward a state on the state's decision to accept or reject international legal rules.”[10].

As a part of the international community, Indonesia has also bound herself to several international treaties. If based on the theory, then a State will adhere to only one theory, whether the Theory of Dualism or the Theory of Monism. However, in practice, Indonesia does not explicitly state which theory it adheres to.

For example, although Indonesia has ratified the United Nations Convention on the Law of the Sea (UNCLOS 1982) with the Act Number 17 the Year 1985, it still requires an implementation law that is the Act Number 6 the Year 1996 concerning the Indonesian Waters. Another example is the ratification of the Convention on International Interest in Mobile Equipment (Cape Town Convention) and its Protocol on Matters Specific to Aircraft Equipment with Presidential Decree Number 8 the Year 2007. Not enough just by that ratification, the Government then revised the Act Number 15 the Year 1992 on the Civil Aviation with the Act Number 1 the Year 2009 in which there are several provisions from the Cape Town Convention. Both examples show that Indonesia adheres to the Theory of Dualism, as Hikmahanto Juwana's opinion that for such international treaties that are law-making treaties, then the State must transform them into national legislation (the process of transformation) [11].

However, on the other hand, Indonesia has also practiced the Theory of Monism. For example, the Vienna Conventions on Diplomatic Relations 1961 and the Vienna Conventions on Consular Relations 1963 that has been ratified with the Act Number 1 the Year 1982 which is used by the Indonesian Supreme Court to resolve the Saudi Arabia Embassy land case. The Supreme Court decision refers to the principle of diplomatic immunity based on Article 31 on the Vienna Convention 1961, in which the ratified convention is directly used as a binding rule in Indonesian national law without having to rely on the provisions of national legislation. This has opened a new concept for the existence of international treaties within Indonesian law [12].

Another example is on the area of human rights. Judges may refer directly to international provisions concerning human rights. For example, Decision of the Constitutional Court Number 85 / PUU-XI / 2013, with the first case of judicial review of Act Number 7 the Year 2004 on Water Resources to the 1945 Constitution. In consideration of its decision, the Court based on Article 33 Paragraph (3) of the 1945 Constitution, especially on water resources. In its conclusion, the Court stated that access to water is a part of human rights. This is reinforced by Article 12 paragraph (1) of the Convention on Economic, Social and Cultural Rights (ICESCR) on the right to health. As it is known that ICESCR has been ratified by Indonesia through Act Number 11 the Year 2005 [13].

Furthermore, Article 7 paragraph (2) of the Act Number 39 the Year 1999 on the Human Rights has firmly and explicitly stated that "the provisions of international law which have been accepted by the State of the Republic of Indonesia concerning human rights become national law." "When a treaty provides for rights or obligations to be conferred on persons, they can be given effect only if they are made part of the domestic law (the law in force within a State) of the parties and with provisions in that law for enforcement." [14].

This shows that Indonesia does not adhere to the theory of Dualism and the process of transformation, but directly bound in the obligation to implement and comply with all provisions of international treaties that have been ratified without the need to create the

implementing legislation [15]. It is enough to incorporate the norms of international treaties through the mechanism of self-binding (signature, ratification, or accession) to the particular international treaties (the process of incorporation) [12].

4. The Status of International Treaties in the Indonesian National Law

Article 1 Paragraph (3) of the Constitution of the Republic of Indonesia stated that "The State of Indonesia is a State based on the rule of law." Therefore every branch of power within the state in carrying out his duties and authority must base himself on the prevailing norms, both written and unwritten.

In relation with international treaties, Indonesia has not firmly assigned the position of the international treaties which have bound Indonesia into the national legal system, whether binding in its status as a norm of an international treaty or binding on its status as a norm of the national act or presidential decree [16].

The provision of Article 11 of the Constitution only emphasizes that the authority to make and ratify international treaties is the President, with approval from the People's Representative Council. Act Number 24 the Year 2000 concerning the International Agreements also does not explain the relationship between international treaties and national law. It only explains that an act or presidential decree ratify international treaties without explaining further whether this international treaty is equivalent to an act, as the provision in Article 7 of the Act Number 12 the Year 2011 concerning the Establishment of Laws and Regulations does not place international treaties as part of the laws and regulations in Indonesia. Further, Article 22a of Algemene Bepalingen (AB) states that judges' powers are limited by exceptions established by international law. This may imply that Article 22 AB places international law above national law. However, there is no further explanation of whether it is customary international law, international treaty law, or something else.

The unclear legal status of an international treaty in Indonesian national law resulted in inconsistencies in practice [17]. However, when viewed from its practice, the legal status of international treaties in Indonesian national law is to remain a source of law, whether the process through transformation or incorporation.

5. Conclusion

Relating to the international treaties, Indonesia implements both theories, whether the Theory of Dualism or the Theory of Monism. The legal status of international treaties in Indonesian national law is to remain a source of law.

References

- [1] D. R. Rothwell, S. Kaye, A. Akhtar-Khavari, and R. Davis, *International Law (Case and Materials with Australian Perspectives)*. Cambridge: Cambridge University Press, 2011.
- [2] M. N. Shaw, *International Law*, 5th ed. Cambridge: Cambridge University Press, 2003.
- [3] K. S. Sik, "Beberapa Aspek Kenisbian dan Kesamaran Perjanjian Internasional," *Indones. J. Int. Law*, vol. 3, 2006.
- [4] J. G. Starke, *Introduction to international law*, 10th ed. London: Butterworths, 1989.
- [5] P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th Revise. 1997.

- [6] D. Harris, *Cases and Materials on International Law*, 7th ed. Thomson Reuters, 2010.
- [7] A. Kaczorowska, *Public International Law*, 4th ed. Routledge, 2010.
- [8] S. Suryokusumo, *Pengantar Hukum Internasional*. Jakarta: Tatanusa, 2008.
- [9] C. A. Bradley, "Unratified Treaties, Domestic Politics, and the U.S. Constitution," *Harvard J. Int. Law*, vol. 48, no. 2, pp. 307–336, 2007.
- [10] O. A. Hathaway, "Between Power and Principle: An Integrated Theory of International Law," *Univ. Chicago Law Rev.*, vol. 72, p. 469, 2005.
- [11] H. Juwana, *Hukum Internasional dalam Perspektif Indonesia Sebagai Negara Berkembang*. Jakarta: Yarsif Watampone, 2010.
- [12] D. D. Agusman, *Hukum Perjanjian Internasional: Kajian Teori dan Praktik Indonesia*. Bandung: Refika Aditama, 2010.
- [13] H. S. Asnawi, "Politik Hukum Putusan MK Nomor 36/PUU-X/2012 dalam Upaya Mengembalikan Kedaulatan Negara dan Perlindungan HAM," *J. Konstitusi*, vol. 13, no. 2, 2016.
- [14] A. Aust, *Modern Treaty Law and Practice*. Cambridge University Press, 1999.
- [15] M. Kusumaatmadja, *Pengantar Hukum Internasional*. Bandung: Alumni, 2003.
- [16] E. Pratomo, *Hukum Perjanjian Internasional: Dinamika dan Tinjauan Kritis Terhadap Politik Hukum Indonesia*. Jakarta: Elex Media Komputindo, 2016.
- [17] S. Sefriani, *Peran Hukum Internasional Dalam Hubungan Internasional Kontemporer*. Jakarta: RadjaGrafindo Persada, 2016.