The Legal Provisions of Indonesian Law System on International Agreements

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Abstract. International treaties are one of the sources of international law and at the same time a form of manifestation of international cooperation between subjects of international law. Legal Provisions are necessary for the state to have in determining firmly the status and position of international treaties in the national legal system. This is a fundamental problem for Indonesia, which does not have Legal Provisions related to the position of international agreements, resulting in inconsistencies in the application of international agreements in the national legal system in Indonesia. The purpose of this research is to know the legal provisions of national law on international treaties in Indonesia and how the practice of implementing international treaties in Indonesia's national legal system. This research is legal research using primary legal materials and secondary legal materials. The method of analysis was carried out using qualitative analysis. The results of this study show that Indonesia does not yet have Legal Provisions that strictly regulate the position of international agreements in national law, and the practice of implementing international agreements so far is by using the incorporation and transformation approach.

Keywords: Legal Provisions; International Agreements; National Law

1 Introduction

In the middle of globalization, agreements in international cooperation are a result of increased engagement in the international community between countries and international organizations. These numerous agreements are expressed in the form of international agreements that span a wide range of topics such as politics, economy, trade, law, defense, socio-culture, and so on. [1] Agreements between countries serve a fundamental purpose and might even serve as a source of international law. The ability of a country to join into international agreements is a translation of the Montevideo Convention of 1933, which deals with a country's declarative aspect, namely recognition from other governments.

General arrangements regarding international treaties are contained in the 1969 Vienna Convention on the Law of International Treaties. Pacta Sunt Servada, as established in Article 26 of the 1969 Vienna Convention, is a fundamental concept of international treaty law that asserts that an agreement is binding on the parties who make it and is implemented in good faith. According to this concept, a state cannot use national law as an excuse for failing to fulfill its duties arising from international treaties. As a result, any country that signs an international agreement is obligated to implement it in its domestic legal system.

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In terms of the position and implementation of international treaties in national legal systems, there have traditionally been two schools of thought: monism and dualism. The application of this school is represented in the Legal Provisions or National Laws of various countries, particularly developed ones, which expressly embody the norms regarding the standing of international law in national law.[2] These Legal Provisions show whether a country uses the schools of monism, dualism, or a combination of the two to determine the status and position of international treaties in its domestic legal system.

As a sovereign country, Indonesia establishes contacts with other countries in a variety of sectors, as evidenced through bilateral and multilateral international accords. However, Indonesia lacks solid legal provisions governing the status and position of international accords. In terms of international agreements, Article 11 paragraph 1 of the Republic of Indonesia's 1945 Constitution provides that "the President declares war, makes peace, and signs treaties with other countries with the permission of the House of Representatives."

The House of Representatives must approve an international agreement if it has a broad and fundamental influence on people's lives in relation to the state's financial burden and/or needs modifications to the creation of laws. Further provisions regarding international agreements are regulated in Law Number 24 of 2000 concerning International Agreements which regulates the internal aspects of the treaty-making process.

Basically, to identify the position of international treaties in national law, Article 11 of the Republic of Indonesia's Constitution of 1945 is insufficient to serve as a solid foundation for determining the position of international treaties in the Indonesian legal system. This is due to the fact that the constitution only describes the President's and House of Representatives' capacity to create international agreements without explaining the position of international law. This is in contrast to the industrialized countries of the globe, such as England, the United States, the Netherlands, and several other countries, which have clearly controlled the status and position of international agreements in their national legal systems by Legal Provisions.

According on this background, the topic that will be explored is how Indonesia's national legal provisions for international treaties are applied, as well as how the practice of implementing international agreements in Indonesia's national legal system is carried out. The goal of this study is to learn about the legal provisions of Indonesian national law on international treaties, as well as the legal provisions and practices of implementing international accords in the Indonesian legal system.

2 Research Methods

This is normative research that looks at international and national regulations relating to international treaties. The study uses a regulatory approach. The data used is secondary data, which includes both primary and secondary legal materials. The primary legal materials consist of the 1969 Vienna Convention and Law No. 24 of 2000 concerning International Treaties. Secondary legal materials consist of books, journals and various literatures related to this topic. The gathered data were qualitatively examined utilizing the deductive thinking method.

3 Results and Discussion

International Agreement

International treaties are an important aspect of international law and one of the sources of international law that emerge as a result of interactions between countries and international organizations. International agreements are used as regulations, main guidelines, and normative principles for states and international organizations in carrying out international interactions in a good and peaceful manner as an instrument of international law. The International Court of Justice has emphasized that international agreements can give legal certainty that binds the parties to each other in carrying out contacts between one or more countries in various interests.

Experts also have a lot to say about definition of international treaties. Mochtar Kusumaatmadja explains international agreements, which are agreements formed between members of the international community with the goal of causing specific legal effects. As a result, for an agreement to be considered international, it must be signed by subjects of international law who are members of the international community. [3] According to Article 2 paragraph (1) of the 1969 Vienna Convention the definition of an International Treaty is "An International Agreement concluded between States (and International Organizations) in written form and governed by International Law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

According to Article 2, an international treaty is an agreement between two or more countries in which they enter or plan to enter into a legal relationship controlled by international law.[4] An international agreement is defined in Law Number 24 of 2000 as a written agreement governed by international law, where the agreement can be created in a predetermined form and name and the agreement creates rights and duties in the realm of public law.

Based on the 1969 Vienna Convention, an International Treaty must have five main elements, namely : (1) states or international organization as international legal subject, (2) agreement on a single object (3) governed by International Law Commission; (4) made in written form); and (5) enter into binding force). International treaties are known by a variety of names, some of which denote a difference in procedure, or at the very least in formality. Some international treaty names or words, such as Convention), Protocol, Agreement, Arrangement, Statute, Declaration, Modus Vivendi, Final Act, General Act.[5] The various terms of this international agreement are connected to the regulated interests.

The primary types of international agreements are: (1) international agreements made by the head of state. In this situation, the international treaty is intended to serve as a binding agreement between sovereigns and heads of state; (2) International agreements made between governments. Usually used for special and non-political agreements; (3) International agreements made between countries (inter-states). This agreement is made expressly or implicitly as an agreement between countries; (4) The appropriate state ministers, usually the respective foreign ministries, can negotiate and sign an agreement; (5) It could be an inter-departmental agreement reached by representatives of various government agencies.[6]

Based on their nature, international agreements are divided into two types, namely agreements which are grouped into Law Making Treaty, and Treaty Contract. Law Making Treaty is a collection of international treaties that are usually drafted jointly by a number of countries. This group's agreements are built on a shared desire to solve challenges. This international agreement has an open membership, which means that participants can come from anywhere in the globe as long as they agree to abide by the norms of the agreement. [7] Treaty Contract is a type of international agreement that is typically used for bilateral international agreements.

The treaty contract solely spells forth the rights and responsibilities of the parties that signed it. Treaty contracts, according to Mochtar Kusumaatmadja, are agreements that are comparable in nature to conventional contracts in the sphere of civil law, but only result in rights and responsibilities between the parties that entered into the agreement.[8] The principles of free consent, good faith, and pacta sunt servada must be respected in the creation of international agreements, according to the Vienna Convention of 1969. These three principles are the most important ones to remember when forming an international agreement and managing diplomatic relations with governments around the world.

A country must go through the phases of forming an agreement, which include negotiation, signature, and ratification or ratification. In international practice, international agreements are not necessarily binding on participating countries, because international agreements must be distinguished into international agreements made in two stages, and agreements made using three stages. An agreement with three stages is one that still needs to be ratified in order for countries to be bound by it, both as participants and as non-participants in international agreements. Ratification is derived from the notion of International Treaty Law, which is always viewed as an act of confirmation by a State against the legal activities of its officials who have signed a treaty as a sign of acceptance to be bound by the treaty. Ratification is effectively a confirmation in terms of Covenant Law.

This confirmation is required because, in the early stages of international agreement creation, communication challenges and geographical distances between countries were elements that necessitated space for each State to approve each agreement signed by its representatives. However, as time has passed, it has begun to be acknowledged and developed in each country's constitutional legislation, which is employed for the same purpose, namely international agreements. In constitutional law, ratification is always considered as a state organ's approval of the government's action to make an agreement, or as that organ's confirmation of the government's signing of an agreement. [9]

According to the Vienna Convention of 1969, ratification is an international act in which a country declares an agreement to be bound by an international treaty. The following are the reasons for ratification:

a. The state has the right to have the option to re-examine the agreement that its ambassador has signed before carrying out the agreement's obligations
b. The states have the right to withdraw from participation in international treaties if the country concerned so wishes.
c. Frequently, international treaties suggest a change or adjustment to a country's domestic law.
d. The democratic principle requires the government to consult the people when deciding whether or not to confirm an international agreement. [10]

Enforcement of International Treaties in National Law

The theory of acceptance of international treaties is based on the theory of monism and the theory of dualism. The theory of monism developed from the school of natural law. Monists claim that international law and national law are an integrated and inseparable legal system. The theory of monism is based on the supremacy of international law, which means that if there is a dispute between international and national law, international law will take precedence. The enforcement strategy utilized by the monism theory to enforce international agreements in national law allows a state to apply international law in its national jurisdiction without modifying its legal basis or transforming it into national legislation. In general, this enforcement technique produces a self-executing international agreement, which means that international agreements can be enforced directly inside national jurisdiction. [11]

The Monism theory establish the Delegation Theory which claims that the constitutional standards of international law confer a delegation to every state constitution, namely the right to select when the articles of an international treaty apply and how these provisions are implemented into national law.[12] The procedures and methods employed by the concerned country are a continuation of the process established under the international agreement. As a result, National Law is regarded as a continuation of International Law.

The Dualism theory separates international and national law. According to the dualism theory, the constitution says that international treaties have no special standing, and that all rights and duties acquired by international treaties have no enforcement in domestic law till the national legislation process is completed. The dualism theory employs a transformation technique, in which international law must be applied first, followed by a legislative process to convert international law into national law. As a result, the output of this translation approach is non-self-executing or non-applicable treaties before the transformation operation is completed.[13]

Position of International Agreements in Indonesian Law System

The legal provisions of national law for international agreements reveal the status and position of international agreements in a state's law system. The existence of legal provisions, both in the constitution and in national legislation, is viewed as the existence of legal provisions relating to international accords. The status of international agreements in national law is determined by two theories, namely monism theory and dualism theory. In this case, Legal Provisions are required to decide if a country adheres to the school of monism, dualism, or even a combination of both when it comes to implementing international agreements in its national law system.

The legal system in each state also influences the theory embraced by that state. The legal provisions of industrialized states, such as those that follow the Common Law system (the United Kingdom and the United States), have clearly resolved to adhere to dualism theory. States having a civil law system (Germany, the Netherlands, and France) follow the monism theory. Even South Africa, a developing state, has combined the two theories to establish the place of international treaties in its national law.

As a part of the international community, Indonesia is bound by international agreements both bilateral and multilateral. At the beginning of independence, international agreements are formed based on Article 175 of the Constitution of the Republic of Indonesia (RIS), which stipulates that the President must make and approve all treaties and other agreements with foreign countries. As an additional regulation, Article 120 of the Provisional Basic Law (UUDS) 1950, which has the same substance as Article 175 of the RIS Constitution. Furthermore, the formation of international agreements is regulated in Presidential Letter No. 2826/HK/ 1960 concerning making of agreements with other countries, followed by an amendment to the Republic of Indonesia's 1945 Constitution, which was perfected in Law 24 Number 2000 concerning International Agreements. [14]

Regarding the implementation of international agreements, Article 11 paragraph (1) of the Constitution of the Republic of Indonesia which states that the President with the approval of the House of Representatives declares the role, makes peace and agreements with other countries. Then in paragraph (2) it is stated that the President in making other international agreements that cause broad and fundamental consequences for people's lives related to the burden of state finances, and/or requires amendments or the formation of laws must be approved by the House of Representatives. Further provisions regarding international treaties are regulated in the Law on International Treaties which regulates the internal aspects of the treaty-making process.

In this case, Article 11 of the Constitution of the Republic of Indonesia is the only constitutional basis to determine the position of international treaties in Indonesian national law. Basically, the provisions in Article 11 of the 1945 Constitution of the Republic of Indonesia do not clearly explain the status and position of international agreements in national law. The constitution only explains the authority of the President and his relationship with the DPR in making international agreements. The Law on International Treaties also does not explicitly determine the status and position of international treaties in national law. This law only regulates the mechanisms and procedures for the formation of international agreements.

Damos Dumoli Agusman explained that, there are several factors that cause indecision in the Law on International Treaties, namely: (a) the legislators were influenced by the thinking that developed at that time which indicated that Indonesia adhered to monism with the primacy of international law; (b) this law is only a codification of the practice of the Indonesian state regarding the making of international agreements which were previously based on the Letter of the President of the Republic of Indonesia No. 1826/HK/1960; (c) the academic world at that time did not or did not provide answers/doctrines regarding the relationship between international law and national law; (d) Indonesian jurisprudence has not contributed to the identification of this issue so it is hardly a juridical issue that needs attention.[15] The absence of explicit norms in the constitution regarding the position of international law creates a barrier in the issue of the applicability of international treaties in national courts. The Law on International Treaties also does not provide clear direction on how the domestic effects of international treaties ratified by Indonesia will be. [16]

Application of International Treaties in Indonesian National Law

The absence of strict Legal Provisions on the position of international treaties results in the diversity of practices in the application of international treaties, not only in national legislation, but also in the practice of national courts on the application of international law. In practice, the application of international treaties in Indonesia's national legal system is inconsistent. This can be seen in the application of international treaties with monism and dualism at the same time without any firmness through Legal Provisions regarding the position of international agreements. Indonesia applies a transformation and incorporation approach to enforce international law within the scope of national law.

The practice of the transformation approach carried out in Indonesia is very clearly seen in the ratification of the United Nations Convention on the Law of the Sea 1982 (UNCLOS 1982) through Law Number 17 of 1985 concerning Ratification of the United Nations Convention on the Law of the Sea Nation on the Law of the Sea), and then ratification was carried out again through Law Number 6 of 1996 concerning Indonesian Waters. In this case, even though an international treaty has been ratified by law, other laws are still needed for implementation at the national legal level.[17] Indonesia's practice in implementing UNCLOS 1982 is a reflection of the dualism school. If observed in more detail, the implementation of the dualism school in Indonesia is hard, where international agreements can become part of national law through legislative actions only.

Besides, Indonesia applies a transformation approach, but on the other hand, Indonesia also applies an international treaty incorporation approach in national law. This can be seen in several cases that show the characteristics of the monism school, such as the ratification of the 1961 Vienna Convention and the 1963 Vienna Convention on Diplomatic and Consular Relations through Law Number 1 of 1982 concerning Ratification of the 1961 Vienna Convention and the 1963 Vienna Convention. used as a legal basis for Indonesia to grant immunity rights and privileges to the diplomatic and consular corps in Indonesia. The

jurisprudence of the Supreme Court has also made direct reference to this Convention without having to rely on national legislation.

This can be seen in the 2006 Supreme Court Fatwa regarding the case of the Saudi Arabian Embassy which refers directly to the principle of immunity as regulated in the 1961 Vienna Convention as a binding rule in Indonesian national law.[18] The practice of the Supreme Court shows that the courts still consider international treaties to be self-executing treaties. This is in line with what Simon Butt stated in his research which states that the practice of using international law by the Supreme Court and the Constitutional Court is still inconsistent. [19]

The absence of legal provisions related to the position of international treaties in the Indonesian national legal system is increasingly causing confusion when there is a conflict between national law and international law which in this case is an international agreement. In the current era, the view that an international agreement must be in harmony with national law as contained in Article 4 of the Law on International Treaties which states that in making international agreements must be guided by national interests and based on the principles of equality, mutual benefit, and equality. taking into account both national law and applicable international law. The implementation of this principle was seen in the negotiation of the Economic Partnership Agreement between Indonesia and Japan in 2007. By referring to Article 4 of the International Treaty Act, this agreement can only be completed and signed after the issuance of Law Number 25 of 2007 concerning Investment.

However, through this law there is also room for overriding national law, as stated in Article 10 e concerning the formation of new legal rules. long. Practice in Indonesia has shown that the formation of new legal rules actually replaces the old ones, namely in Law No. 17/1985 on the Ratification of UNCLOS 1982 which replaced Law No. 4 Prp/1960 on Indonesian Waters. In this case, the agreement can be negotiated with a view to later changing national law. [20]

The ambiguity regarding the position of international treaties in the Indonesian national legal system is also due to the Indonesian legal system which does not explicitly construct ratification in the international law dimension (external ratification) with ratification in the national legal dimension (internal ratification). In the context of external ratification, ratification of international treaties is a legal act to bind oneself to an international agreement in the form of ratification, accession, acceptance and approval as regulated in international law.

Meanwhile, internal ratification is Indonesian national law which regulates the legislative and executive powers to bind themselves to international agreements.[21] Thus, if external ratification is defined as a confirmation, then internal ratification can be in the form of confirmation in the sense that a state organ confirms the actions of the government that has signed an agreement, and it can also take the form of an agreement in which the state organ gives prior approval of the agreement to be signed.

In the Indonesian legal system, internal ratification in this case the involvement of the House of Representatives is to accept or reject international agreements that have been made by the government and not to approve international agreements that will be made. So far, internal ratification has been interpreted as the approval of the House of Representatives and not as a confirmation of the executive's actions in making international agreements. The lack of clarity regarding the meaning of the ratification of international treaties clearly has an impact on the conflict between international law and national law.

4 Conclusion

Based on the description it can be concluded that:

a. Indonesia does not yet have Legal Provisions that regulate the status and position of international treaties in the Indonesian legal system which has an impact on inconsistency in the application of international agreements in national law, not only in the legislative process, but also in the judicial system. Therefore, it is necessary to immediately establish Legal Provisions, both in the Constitution and in the form of Laws.
b. The inconsistency of the application of international agreements in the national legal system (products of legislation and the judicial system) shows that the application of international agreements uses an incorporation and transformation approach, even the approach is carried out in one legislation product. The ambiguity of the position of international agreements is also evident in the different interpretations regarding the ratification of international agreements contained in the 1945 Constitution of the Republic of Indonesia and Law Number 24 of 2000 concerning International Agreements. In this case, Legal Provisions are also needed to provide an explanation of the meaning of ratification or ratification of international treaties.

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