"DEMOCRACY, CONSTITUTIONS & DEALING WITH THE WORLD"

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Session 2: International Treaties and the Indonesian Constitutional System

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1. *What is the status of international law in domestic law in your country? Does the Constitution specify the status of international law? And how are international treaties entered into in your country?*

There is no definite answer regarding the status of international law within the Indonesian constitutional system. Article 11 of the 1945 Indonesian Constitution is the only provision that regulates international law. It states that:

> *(1) With the approval of the House of Representatives, the President may declare war, make peace and conclude treaties with other countries;*
>
> *(2) In making other international treaties which will produce an extensive and fundamental impact on the lives of the people which is linked to the state financial burden, and/or which will require an amendment to or the enactment of an act, the President shall obtain the approval of the House of Representatives;*
>
> *(3) Further provisions regarding international treaties shall be further regulated by law.*

These provisions emphasize that the power to make international treaties is primarily held by the President as the head of state, with the exception that treaties that have major consequences for the public require the approval of the House of Representatives, in their role as representatives of the people. Although Article 11 regulates the treaty-making process, it is very short and simple. It does not explain the position of treaties within the Indonesian domestic law once they have been ratified. It also ignores other sources of international law such as customary law.[1]

The reason why the Constitution pays so little attention to international law cannot be separated from the context of its formation. The Constitution was formed when Indonesia was still a Japanese colony during the Second World War.[2] As a result, the substance of the 1945 Constitution is heavily influenced by the then-current Meiji Constitution of Japan which also did not regulate the position of international law in detail. This influence was reflected in many passages of the 1945 Constitution; for

[1] See Simon Butt, 'The Position of International Law Within the Indonesian Legal System' (2014) 28 Emory International Law Review 1, 1.

[2] The 1945 Constitution was drafted from June to August 1945, mostly by the Investigating Committee for the Preparation of Independence (*Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia or BPUPKI*). This institution was formed by the Japanese colonial administration between May to June 1945.

example, the formulation and wording of Article 11(1) closely resembles Article 13 of the Meiji Constitution.[3]

The lack of provisions regulating international law was also influenced by the attitude of the framers of the 1945 Constitution, who had a strong anti-Western sentiment as a result of Indonesia's horrible experiences under Dutch colonialism prior to the Second World War.[4] International law was seen as originating heavily from the West; as a result the Framers regarded it as a Western product that only benefitted colonial powers to further their reign.[5] This is reflected in the actions of Indonesia's first President, Soekarno (who also one of the main architects of the 1945 Constitution), who at one stage led Indonesia to withdraw from the United Nations in 1965.[6]

After Soekarno's regime ended in 1966, his successor, Suharto, took a friendlier position toward international law, as evidenced by his decision to bring Indonesia back to the United Nations. However, he also maintained some degree of suspicion toward international law, particularly those laws related to human rights. During his authoritarian rule, which lasted until 1998, Indonesia – together with Singapore and Malaysia – became the main initiators of the "Asian values" concept, which rejected the universalism of human rights.[7] This attitude towards international law – which to some extent still exists within the Indonesian public – influences Indonesian politicians, who often do not see the urgency or necessity in providing clarity on the position of international law in Indonesian domestic law.

Further guidance regarding the adoption of international law in Indonesia was provided by *Law No.24 of 2000 on International Agreements* (see more discussion below). However, this law still does not explain in detail the position of international law within the Indonesian legal system. As with the 1945 Constitution, the Law on International Agreements focuses more on which institutions are authorized to represent Indonesia in the process of treaties negotiation and how treaties are to be signed and ratified.

2. *Is it relevant to distinguish treaties from other forms of international agreements for this purpose, or to distinguish between different types of treaties?*

In accordance with Articles 9 and 10 of the *Law on International Agreements*, for treaties that focus on issues that affect the lives of many people (described in Article 10 A-F to include issues such as politics, human rights, defense and security, and environmental matters) ratification must be performed through *Undang-undang* (a law or statute), which requires approval from the House of Representatives.[8] For treaties outside those issues, the ratification process can be performed through a *Peraturan Presiden* (Presidential Decree), which is a lower-level legislation that does not require

[3] Article 13 of the Meiji Constitution declared that "The Emperor declares war, makes peace, and conclude treaties". See Damos Dumoli Agusman, *Treaties Under Indonesian Law: A Comparative Study* (Rosda 2014) 213.
[4] See David Bourchier, *Illiberal Democracy in Indonesia: The Ideology of the Family State* (Routledge 2015) 66.
[5] Agusman (n 3) 7.
[6] See Frances Livingstone, 'Withdrawal from the United Nations: Indonesia' (1965) 14 Int Comp Law Q 637.
[7] See Knut D. Asplund, 'Resistance to Human Rights in Indonesia: Asian Values and Beyond' (2009) 10 Asian-Pacific Journal on Human Rights and the Law 27, 27.
[8] This is also in line with Article 11 of the 1945 Constitution.

approval by the legislature.[9] This suggests that Indonesia has chosen to distinguish treaties based on their substance; in accordance with Article 11(2) of the Constitution, where treaties touch on issues of substantial interest to the general public, the ratification process must include the consent of the people through the House of Representatives.

In 2018, the Indonesian Constitutional Court issued a decision (*Treaty Ratification Case*) that clarified in more detail the types of international treaties whose ratification must done through enactment of a Law, and thereby broadened the role of the legislature in the treaty-making process.[10] According to the Court's decision, even some international treaties that cover issues outside those explicitly mentioned in Article 10 A-F of the *Law on International Agreements* should be ratified by a specific Law, especially if the House of Representatives considers that the relevant treaty may have a broad impact on the general public.[11] The Court emphasized the need for the Government, as the main international actor in the treaty ratification process, to always consult with the House of Representatives, especially during the early stage of the treaty-making process.

3. Does the implementation of international law in domestic law create any theoretical or practical problems? Is there any debate in your country about the ways in which international law is absorbed into domestic law?

Although the *Law on International Agreements* explains in detail how international treaties are to be signed and ratified, the Law does not provide any explanation about the position of ratified treaties within the Indonesian legal system, especially about how the ratified treaties take effect. This has led to differences of opinion amongst Indonesian legal scholars regarding the position of ratified treaties.

Most Indonesian legal scholars believed that Indonesia follows the doctrine of dualism, which views international law and national law as two separate legal systems. Therefore, even where treaties have been ratified through a process which involved the enactment of a Law by the House of Representatives, it is still argued that the treaty cannot directly take effect in the Indonesian legal system until transformed by legislation specifically aimed at implementing the substance of the treaties.[12] Alternatively, some scholars – including the drafters of the *Law on International Agreements* – assume that Indonesia's follows the doctrine of monism,[13] which believes that the international treaties that has been signed can be implemented immediately even if the treaties is yet to be officially ratified. These competing views have created uncertainty in the process of implementing ratified treaties, and this uncertainly has been reflected in the different approaches taken by the two of Indonesia's apex courts, the Supreme Court and the Constitutional Court.

Under Soeharto's authoritarian regime (1966 - 1998), the Supreme Court was the reigning high court for all civil and legal matters in Indonesia, and it leaned more towards the dualist doctrine. For example, in 1984 the Supreme Court refused to enforce the United Nations *Convention on the*

[9] See Article 11 of the Law on International Agreement.
[10] See the Indonesian Constitutional Court Decision No. 13/PUU-XVI/2018.
[11] Ibid 263-264.
[12] See Butt (n 1) 9; See also Wisnu Aryo Dewanto, 'Status Hukum Internasional dalam Sistem Hukum Indonesia' (2009) 21 Mimbar Hukum 325, 336.
[13] Butt (n 1) 7.

Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) which at that time had already been ratified by Indonesia through a Presidential Decree No. 34 of 1981.[14] In its decision, the Supreme Court stated that the ratification does not make a treaty automatically applicable to the State. The Supreme Court also emphasized that to be implemented in a court, it is necessary to have separate legislation that implements the substance of the ratified treaty.[15]

After Indonesia transitioned to democracy in 1999 – which included the establishment of a new Constitutional Court with the power to conduct a judicial review – there were several decisions from the Supreme Court and the Constitutional Court which gave the impression that ratified treaties could be implemented directly in Indonesia, without the formation of legislation that implements its substances. The most obvious examples can be found in the two cases decided by the Supreme Court in 2000 and 2006, concerning land disputes involving the Embassy of Saudi Arabia and the Embassy of Malaysia respectively. In both cases, the Supreme Court rejected the claim against the land used by the two embassies on the grounds that both were protected by the principle of diplomatic immunity in the *Vienna Convention on Diplomatic Relations 1961* which Indonesia had ratified through Law No. 1 of 1982.[16] This was despite the fact that when the case was decided, Indonesia had yet to produce legislation that specifically implemented the principle of diplomatic immunity in the Vienna Convention.[17]

Since its establishment in 2003, the Constitutional Court has often referred to international treaties in its decisions, especially in support of decisions relating to the protection of citizens' rights.[18] in the *Death Penalty Case* (2007) which called on the Constitutional Court to decide om the constitutionality of the death penalty provisions in the *Narcotics Law*, the Court referred to several treaties that had been ratified by Indonesia – such as the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* (ratified through the Law No. 7 of 1997) and the ICCPR (ratified through the Law No. 12 of 2005) – to prove that the existence of the death penalty does not contradict with human rights.[19] In this case, the Constitutional Court did not discuss at all whether the provisions they referred to in the two treaties had been incorporated into Indonesian domestic law or not. In some cases, the Constitutional Court has even referred to international treaties that have not been ratified by Indonesia in deciding their cases. For example, in the *Bali Bombing Case* (2003),[20] the Constitutional Court used several international law instruments including Article 4 of the *International Convention of Civil and Political Rights* (ICCPR) to declare a retroactive clause in the *Anti-Terrorism Law* unconstitutional, despite the fact that at the time of the decision, Indonesia had yet to ratify the ICCPR.[21]

[14] The Supreme Court Decision No. 2944K/Pdt/1983.
[15] Agusman (n 3) 381-382.
[16] See the Supreme Court Decision No. 111K/TUN/2000 in Ibid 398.
[17] Ibid 399.
[18] Bisariyadi, 'Referencing International Human Rights Law in Indonesian Constitutional Adjudication' (2018) 4 Constitutional Review 249, 262.
[19] The Indonesian Constitutional Court Decision No. 2-3/PUU-V/2007.
[20] The Indonesian Constitutional Court Decision No. 013/PUU-I/2003.
[21] Indonesia formally ratified the ICCPR in 2005 through Law No. 12 Year 2005. While the *Bali Bombing Case* was decided by the Constitutional Court in 2003.

Although the cases discussed above give an impression that there has been a paradigm shift towards monism regarding the status of treaties that have been ratified, it should be noted that there are other decisions from the Constitutional Court which also affirm that international treaties – including those that have been ratified – cannot be used as a sole basis for making decisions in the context of judicial review. For example, in the *Children's Court Law Case* (2010),[22] although it is clear that the Constitutional Court uses treaties that have been ratified (such as the *Convention of the Rights of the Child*) as the main reference to increase the age limit for children to be tried in court from eight to twelve years old, the Court also emphasized that "International legal instruments… could not be used as a tool of review to decide the constitutionality of the age of responsibility for children".[23]

The uncertainty regarding the status of ratified treaties in domestic law finally reached its climax in 2011, when the Constitutional Court was asked by the Coalition of NGOs to decide about the constitutionality of Law No. 38 of 2008 which ratified the ASEAN Charter (*Asian Charter Case*).[24] In this case, the applicants did not ask the Court to overturn the Law for procedural reasons. Instead, they challenged the substance of the ASEAN Charter itself, asserting that the purpose of the ASEAN Charter – which is to establish a single market with a free flow capital – contradicted the 1945 Constitution. In its decision, the Constitutional Court, when rejecting the claimants' petition, declared that the Law which ratified the ASEAN Charter also bound Indonesia to the substance of the Charter.[25] At first glance, this interpretation seemingly suggests that a treaty can be applied immediately in the domestic system as long as it has already been ratified through the Law.[26] However, the Constitutional Court also stated in this case that they rejected the claimants' petition on the basis that Indonesia had yet to implement the obligations stipulated in the Charter and therefore there was no contradiction with the Constitution (yet).[27]

The outcome of the *Asian Charter Case* is that the Constitutional Court still failed to clarify the position of international treaties within the Indonesian domestic legal system. The Constitutional Court's interpretation shows that, on the one hand, ratification through a Law makes the treaty binding on Indonesia. On the other side, there is still no guarantee that the ratified treaty will automatically be applied to the Indonesian domestic system because its enforcement is determined by the actual will of the Indonesian Government to implement it.

4. Are there any other aspects of the experience of your country with the entry into international arrangements and their implementation and activation, which might throw light on the issues raised by this theme?

At the end of the day, the ambiguity surrounding the status of treaties in domestic law in Indonesia cannot be separated from the inherent flaws in the 1945 Constitution, which did not provide enough clarity regarding the relationship between international law and domestic law. This has forced the Constitutional Court to play a more active role in clarifying the status of treaties within the Indonesian

[22] Agusman (n 3) 407.
[23] See the Indonesian Constitutional Court Decision No. 001/PUU-VIII/2010, 151.
[24] The Indonesian Constitutional Court Decision No. 33/PUU-IX/2011.
[25] Ibid 194.
[26] Agusman (n 3) 413.
[27] The Indonesian Constitutional Court Decision No. 33/PUU-IX/2011, 196.

constitutional system. This was exemplified in the *Treaty Ratification Case*, where the Court clarified the role of the legislature in the treaty-making process. However, as shown in the *ASEAN Charter Case*, there is also no guarantee that the Constitutional Court will adequately fill any loopholes.

Ideally, in order to clarify the status of treaties that have been ratified, there is an urgent need to amend the 1945 Constitution. Interestingly, the Constitutional Court has actually implicitly acknowledged the importance of amending the international law provisions in the 1945 Constitution; in their decision for the *ASEAN Charter Case*, the Court suggested that the current practices of ratifying societally impactful treaties through Law needed to be reassessed.[28] Whether this is actually done in practice remains to be seen.

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[28] Ibid 196.

Vienna Journal on International Constitutional Law. He also regularly writes about the development of Indonesian constitutional law in some constitutional law blogs.