PRACTICES AND THE IMPLEMENT ABILITY OF INTERNATIONAL TREATIES IN INDONESIAN LAWS

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ABSTRACT

Carrying out the obligations arising from the international agreements that have been concluded in good faith is a moral and ethical international law that must be carried out by the subjects of international law. International agreements create obligations, and also give birth to certain rights for the parties to the agreement. This research examines legal norms in the text of the 1945 Constitution, statutory regulations and court decisions and other legal policies as a form of implementation of international obligations arising from international treaties, international customary law and decisions of organizations and international courts in Indonesia. The findings show that in practice, the implementation of international obligations in Indonesia can be seen when exercising in the role of the judiciary in Indonesia which will only interpret a rule that has been established by parliament as a legal basis. This practice theoretically refers to the dualism theory in the doctrine of transformation, where international treaties must first be transformed into national regulations before they can be enforced as a legal basis by courts in making decisions.

Keywords: Legal Principles, International Treaties, International Obligations, International Law, National Law.

INTRODUCTION

Indonesia is part of the international community and has international obligations arising from agreements with other countries and with international organizational entities. It is also possible for international obligations to arise from international customs so that the state has *"an opinion of juris sive necessitates"* (Bederman, 2001). International obligations can also arise from decisions of international organizations or international courts. In the international community, international agreements have a major role in relations between countries or the interaction between other international legal subjects and are a necessity in the global order (Merdekawati & Sandi, 2016). Through international treaties, countries or international legal subjects outline the basics of cooperation between them, regulate various activities in relations between countries, solve various problems between them and also resolve various problems between countries or resolve various global issues for the sake of mutual survival organized in a forum, namely the international community (Fon & Parisi, 2007; Winarno, 2011)

Carrying out the obligations arising from the international treaties that have been

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concluded in good faith is a moral and ethical international law that must be carried out by the subjects of international law (Kondykerova, 2013). Besides, the agreement creates obligations, and also creates certain rights for the parties who make the agreement. The position or role of international agreements as a source of international law in recent developments is very important considering several reasons, among others, that international agreements guarantee legal certainty because they are made in writing; international treaties regulate important common matters in the relationship of international legal subjects (Wolfrum, 2011).

Previous research, among others, discussed the application of International Treaties by the National Courts, especially the Constitutional Court, the status of International Treaties based on dualism, the nature of the law to ratify international treaties and the legal consequences of constitutional review of the ratification of international treaties (Dewanto, 2009; Bakar, 2014). Research on the discussion of the repositioning of the political concept of international treaty law in order to achieve legal order in Indonesia by providing recommendations on the need for revision of article 11 of the 1945 Constitution, revision of Law No. 24/2000 and Law No. 12/2011 and other studies discussing the prospect of placing international agreements in the hierarchy of laws in terms of prospects and challenges (Puspitawati & Kusumaningrum, 2015; Aminoto & Merdekawati, 2015). Furthermore, this paper discusses the implementation of international obligations with a normative and juridical approach to discuss the dynamics of law and the application of international obligations in the national legal system in the Indonesian context.

RESEARCH METHODS

The research method used in this research is doctrinal research, which is research that examines the doctrine, principles, norms in the text of laws and regulations. This research examines legal norms in the text of the constitution, statutory regulations and court decisions and other legal policies as a form of implementation of international obligations arising from international treaties, international customary law and decisions of organizations and international courts in Indonesia. The data used are secondary data from primary and secondary legal materials and the analysis used is descriptive analysis.

The Existence of International Law in the National Law System

The implementation of international obligations which must be realized in national laws and regulations, national court decisions or other national legal policies is basically the acceptance of international law as part of the national legal system. The acceptance of international law by national law means that it also talks about the existence of international law in the national legal system. Based on the traditional approach, the existence of international law in the national legal system has been debated for a long time using the doctrinal approach of dualism and monism (Kirchmair, 2018).

According to the dualism which is rooted in the theory that the binding power of international law is based on the will of the state, international law and national law are two legal systems or legal instruments that are separate from one another, it is said that *"the essential difference of international law and municipal law consists primarily in the fact that the two*

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systems regulate different subject-matter" (Ian, 1973). The consequence of this flow is the need for "transformation" legal institutions to convert international law into national law based on the laws and regulations applicable to this conversion procedure. By converting these international legal principles into national law, the character will change into a national legal product and act as national law and comply with and enter into the order of national laws (Agusman, 2008; Harahap, 2018).

Monism, which places international law and national law as part of a unified legal system, is a consequence of the basic norms of all laws (Dixon, 1993). National law and international law are basically two aspects of a legal system, which as a whole is a universal legal system that binds humans, both individually and collectively, so that international law can be said to be binding on individuals collectively (states), whereas national law bind the individual (Dewi, 2013). If there is national legislation regulating the same problem, the intended legislation is only an implementation of the intended international law.

International law does not stipulate that the State must choose the doctrine of dualism or monism. The application of this doctrine to state practice illustrates the dynamics underlying its political preferences. The implementation of international obligations by States in relation to the application of international law or international treaties in national law and in courts. According to the theory of incorporation of International Law, it can be applied in National Law automatically without special adoption. International law is considered to be integrated into National Law. This theory applies to the application of customary international law and universal international law. International law applies within the scope of national law without having to go through a process of transformation (Barnard, 2015). There are two theories in the application of international law, namely the theory of transformation and the theory of delegation. Based on the theory of transformation, the application is when it has been transformed into National Law formally and substantively. The theory of transformation is based on a positivist view that the rules of international law cannot be directly applied and "*ex proprio vigore*" is applied in national law. Likewise, on the other hand, international law and national law are completely separate legal systems and structurally are different legal systems. To be applied into the National Law, a special adoption process or special incorporation is required. According to delegation theory, the constitutional rules of International Law delegate to each State's constitution the right to determine when and how the provisions of International Treaties apply in National Law.

The existence of international law in the national legal system cannot be separated from the existence of international treaties. International agreements between countries are born from the existence of relations between countries that make agreements, so that the realization of these international relations is contained in an international agreement (Purwanto, 2009). The implementation of international obligations basically must be based on the principle of Pacta Sunt Servanda as a force to enforce international law. This Pacta Sunt Servanda embodiment is the principle that binds an agreement for the parties who make it (Bahri & Hafidz, 2017). This is regulated in Article 26 of the 1969 Vienna Convention which reads, "*Every agreement in effect binds the parties to that effect and must be carried out by them in good faith.*" The principle of Pacta Sunt Servanda is considered as a fundamental norm which forms the basis for the force of the application of international law and international treaty law (Purwanto, 2009). According to Hans Kelsen (2006), the binding power of international law comes from international customs,

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and this binding power is based on the pacta sunt servanda principle as a norm or basic rule (Purwanto, 2009).

International Obligations in Practice

In practice, the implementation of international agreements is manifested in implementing legislation which is a law or implementing regulations for national law formed by a country after ratifying an international treaty (Andi & Merdekawati, 2012). There are cases of international obligation practices related to international treaties, where some of the provisions have to be transformed first into several provisions and some are directly applicable to the rules.

Some of these regulations, for example, UNCLOS 1982 which was ratified by Indonesia in Law No. 17/1985, which still require Law no. 6/1996 concerning Waters; The TRIPs Agreement which was ratified by Law No. 4/1994 was then implemented through several IPR laws (Copyright, Trademark, Patent, Plant Variety, Industrial Design, Trade Secret and Layout Design of Integrated Circuits). As for the implementation of international agreements that are realized through court decisions without implementing legislation, for example the Ratification of the New York Convention 1958 concerning the Recognition and Implementation of Foreign Arbitration Awards was ratified through Presidential Decree No. 34/1981. Several cases of the implementation of foreign arbitration decisions have been decided by the Central Jakarta Court. Other examples include the 1961 and 1963 Vienna Conventions on Diplomatic/Consular Relations which were ratified by Law No. 1/1982. The 2006 MA fatwa regarding the land case of the Saudi Arabian Embassy directly refers to the principle of diplomatic immunity in Article 31 of the 1961 Vienna Convention on Diplomatic Relations as a binding rule in Indonesian national law without having to rely on the provisions of national legislation.

Regarding the field of criminal law, there are international treaties which consist of several different parts, such as the UN Convention Against Transnational Organized Crime 2000 (UN Convention Against Transnational Organized Crime) and the 2003 UN Convention Against Corruption (UN Convention Against Corruption), of which there are sections large, namely First, in the meaning of material-substantial, namely crimes or criminal acts that can only be applied if the legal substance has been transformed first into a criminal law provision. Second, in the formal-procedural sense, namely cases such as extradition, mutual cooperation in legal matters, cooperation between law enforcement officials, cooperation in recovering assets, where this form of cooperation in the procedural sense can be directly applied at the international level as well as in national/domestic levels.

Indonesia implements international legal norms or international agreements without a formal process or without having to declare consent to be bound by international agreements (consent to be bound) or what is called the adoption of international agreements. For example, Indonesia adopted the principles or norms in the Rome Statute into Law Number 26/2000 on Human Rights and previously Indonesia adopted the principles of the Covenant on Civil and Political Rights and the Covenant on Social, Economic and Cultural Rights of 1966 with Law Number 39/1999 on Protection Human rights before the two Covenants were ratified by Indonesia. Indonesia applies the principles of international treaty law stipulated in the 1969 Vienna Convention through Law Number 24/2000 concerning international treaties without ratifying the 1969 Vienna Convention.

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There are several references in examining the implementation of international agreements in Indonesia. The first is international treaty in the field of criminal law (material or formal or material formal), where this must be related to the principle of legality in criminal law. For example, international criminal law conventions on extradition, mutual assistance in criminal matters, cooperation between law enforcement officials, return of assets, can be implemented directly within national jurisdictions even though there is no rule of law in national legislation. Second, an international treaty in the field of human rights can be applied directly because it relates to the inherent rights of every individual. The third is international treaty whose substance is a combination of the codification and progressive development of international law that can be applied directly in national jurisdictions. Fourth, an international agreement whose substance is the formulation of a new international law rule as a consequence of advances in science and technology can be an alternative whether it needs to be transformed or not, depending on the weight of the international agreement. Fifth, an international treaty whose provisions require the transformation of national laws as implementing rules, while several other provisions can be applied directly. Sixth, an international agreement whose technical substance is operational can be applied directly in national jurisdictions. Seventh, an international treaty that can be applied directly which does not require implementing rules (Parthiana, 2017).

Kusumaatmadja & Agoes (2013) stated that the implementation related to international agreements in domestic law does not really need to be a problem because it does not really affect many people or if the problem is very technical and has a limited scope. For example, in the International Treaties Convention, the Diplomatic Relations Convention and the ICAO Convention, if there is an inconsistency between domestic laws that have not been changed, the only thing that will determine is whether a country is bound or not is whether the agreement is legally binding or not. However, Indonesian laws require formal implementing regulations as a prerequisite for their effectiveness, but this is usually not the case with agreements that have been adhered to by Indonesia, especially not related to the 1958 New York Convention which is strictly adhered to by Presidential Decree No. 34/1981.

The practice of implementing international obligations based on the decisions of international courts, for example, is Indonesia's ratification of the New York Convention 1958, ratifying the New York Convention on 5 August 1981 with Presidential Decree Number 34 of 1981. Article 3 of the Convention stated that every participating country must recognize the arbitration decision as binding and enforcing it in accordance with the rules of procedure in the region (Gautama, 1995). Indonesia carries out this obligation through the provisions of Law Number 30 of 1999 concerning Arbitration. Based on the authority to handle issues of recognition and implementation of International Arbitration Awards is the Central Jakarta District Court. Furthermore, Article 66 states that International Arbitration Awards are only recognized and can be enforced in Indonesian territory if they meet the following conditions that are submitted by an arbitrator or arbitral tribunal in a country with which the Indonesian state is linked to an agreement, either bilaterally or multilaterally, regarding recognition and implementation of International Arbitration Awards (Sunyowati, 2013). The decision falls within the scope of trade law. The decision is not against public order; Obtain executor from the Chairman of the Central Jakarta District Court; If the State of Indonesia is one of the parties to the dispute, it obtains execution from the Supreme Court and then delegates it to the Central Jakarta District Court. This provision was previously regulated in Supreme Court Regulation No.

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1 of 1990 (PERMA No. 1/1990) which stipulates that the results of foreign arbitration decisions in countries that also ratify the New York Convention can be implemented by registering the decision at the Central Jakarta District Court. The practice of fulfilling this international obligation implicitly illustrates the transformative and cooperative doctrine of the doctrine (Wijaya et al., 2017; Rahmah & Handayani, 2019).

International law does not oblige a country to adhere to dualism or monism. In practice, the choice of prioritizing National Law or International Law is determined by ethnic preference or political preference. Indonesia does not firmly accept the theory of incorporation, but Indonesia seems to tend to secretly use the theory of incorporation in applying customary international law and universal international law. The practice of implementing international obligations through decisions of Indonesian courts that use the basis of international agreements is one example of the Class action case with Perhutani Government in West Java. Apart from the Vienna Convention case mentioned above, Indonesians. Class action was carried out against Perhutani (a state-owned forestry company) on the grounds that the forest area had been mismanaged, causing landslides; and argued that the government failed to monitor Perhutani's activities. The first court and the Supreme Court made a decision adopting the 15th principle of the Rio De Janero 1992 Declaration, namely the principle of prudence and the judge acknowledged that this principle had not been adopted in environmental law in Indonesia. However, the Supreme Court judge's consideration was that first, it was not wrong to apply the law by adopting international law in order to fill the legal vacuum. Furthermore, National Judges can use the rule of international law if they see it as jus conges. The Supreme Court's reference to the "*legal vacuum*" consideration may be based on the provisions contained in the Basic Judicial Powers Act of 1970 which is now published in Article 10 of Law No. 48 of 2009 which prohibits the court from refusing to examine, hear, and decide the case brought before them on the basis of the law does not exist or is not clear This provision provides a way for Supreme Court judges to apply international law directly to this landslide case (Butt, 2014).

Several decisions of the Constitutional Court which adopted international treaties, namely, among others: (1) The Judgment of the Material of Law Number 26 Year 2000 regarding Human Rights Courts (Law on Human Rights Courts) uses the ICCPR instrument; (2) The Constitutional Court's Decision on Material Examination on Law Number 22 Year 1997 on Narcotics (Narcotics Law), the Constitutional Court interprets narcotics crimes contained in the Narcotics Law as part of the most serious crimes classified in Article 6 of the ICCPR. The Constitutional Court stated that this interpretation was a systematic interpretation method using the 1969 VCLT; (3) The Constitutional Court Decision of 2003 concerning a petition for reviewing Law Number 16 of 2003 concerning Stipulation of Government Regulations in lieu of Law Number 2 of 2002 concerning Enforcement of Government Regulations in Lieu of Law Number 1 of 2002 concerning the Eradication of Criminal Acts of Terrorism (Terrorism Law), refers to the ICCPR and Rome Statute; (4) The Constitutional Court Decision Number 1/PUU-VIII/2010 concerning the Judicial Review of the Juvenile Court Law, the Constitutional Court stated that all international legal instruments can only be used as comparisons in determining the age limit of children, but international legal instruments cannot be used as a test point in assessing the constitutionality of the child age limit. Several international treaties that refer to these decisions are international treaties in which Indonesia is not yet a party (state party), however, the agreement norm is a universal norm derived from customary law, so that the

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decision reflects the judge applying the principle of necessitate jurisprudence.

CONCLUSION

The practice of implementing international obligations between Indonesia can be seen when it is carried out within the jurisdiction of their respective countries. The role of the judiciary in Indonesia will only interpret a rule that has been established by the DPR as a legal basis. This is seen as based on the dualism theory in the doctrine of transformation, where international treaties must first be transformed into national regulations before they can be enforced as a legal basis by courts in making decisions. It is possible that the implementation of international obligations by the courts, especially in relation to the enforcement of human rights, judges base their decisions by referring to the principles in the field of human rights, even though Indonesia is not yet a party and the judge argues that human rights principles have become customary international law that is morally binding. This differs from the role of a judiciary with a common law system such as Malaysia where the rule of international law can be directly used by judges in deciding a case based on the doctrine of incorporation, especially with regard to the implementation of obligations under human rights law or universal principles. This means that international law can be applied directly without a national legislative process. Nevertheless, in practice the implementation of international obligations from universal principles which later become part of international agreements must first go through a process of legal transformation. Except where there is no clarity, it can be explained that Malaysia applies two approaches, namely through the doctrine of incorporation and transformation as a rule of law.

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