THE LEGAL STATUS OF TREATY/INTERNATIONAL AGREEMENT AND RATIFICATION IN THE INDONESIAN PRACTICE WITHIN THE FRAMEWORK OF THE DEVELOPMENT OF THE NATIONAL LEGAL SYSTEM

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ABSTRACT

The article's objective is to explore and analyse the definition of treaty or international agreement in the perspective of Indonesian Law, the concept of ratification under Indonesian Law and the legal status of treaty or international agreement in the Indonesian Legal System. This is driven by the assumption that the current Indonesian legal system does not provide certainty to all of the three questions. This article henceforth will further recommend amendments in the Indonesian legal system in order to answer the three presented questions. By using descriptive qualitative analysis, the results show that the entire executive, legislative, as well as judicative branches of Indonesia are required to reform the current system in order to solve the three core issues. Some recommendation that can be take into considerations, such as to revise the definition of treaty/international agreement under Articles 1(1) of the Law No. 24 of 2000 and Article 8(d) of the Law No. 17 of 2003 to align with the provisions of Articles 2(1)(a) of the Vienna Convention 1969 and 2(1)(a) of the Vienna Convention 1986, in order to include elements of an international agreement.

Keywords: Treaty, International Agreement, Vienna Convention on the Law of Treaties 1969, Vienna Convention on the Law of Treaties 1986, Indonesian Legal System, Constitutional Law.

INTRODUCTION

Globalization is here and the advancement of science and technology allow borderless interaction become easier. Croucher (2004) defined globalization as a process of blending or homogenization by which the people of the world are unified into a single society and function together. This process is a combination of economic, technological, sociocultural and political forces (for a useful consideration in economic field, Kurniawan, 2017). States encounter in the globalization era promotes conclusion of agreements or treaties whether it is bilateral, regional, as well as multilateral. Indonesia has become party to numerous international agreements and obligated to implement it. The contemporary practice with regard to the dynamics of negotiating, forming, ratifying a treaty has become main issue in inter-state relations. It is related to a wide range of subjects including trade, investment, defence, social cultural and tourisms. Recent multilateral treaty, such as the Trans-Pacific Partnership (TPP), the Paris Agreement under the

United Nations Framework Convention on Climate Change 2015, as well as new model of bilateral investment treaty, has obtained special attention by the international community.

The Indonesian public generally understood "treaty" or "international agreement" as any kind of agreement that have cross-border/transnational nature. Thus, some viewed the Helsinki MoU between the Government of Indonesia and the Free Aceh Movement as international agreement. This is due to the fact that the negotiation is conducted in a foreign country and facilitated by foreign agency. Similarly, MoU between Indonesia and Vietnam with regard to purchase of rise by Indonesia are considered as an international agreement, by the mere fact that it has transnational nature. The Public is not entirely wrong; the Indonesian domestic law does not have a uniformed definition of what constitute a treaty. This has caused confusion in the domestic audience. Generally, international agreements or treaties are incorrectly understood as cross border agreements both in public as well as private law domain. Common mistake that occurred in Indonesia is to mix between international agreements with international contract. Basically, the term "contract" can be generally defined as an agreement which binds the parties concerned. In other words, a contract is an agreement which is enforceable by law. To have an agreement, there must be an offer and acceptance of that offer (Kian & Chim, 2001; Maryan, 1973).

In other countries which are more advance in their legal system, civil law as well as common law countries, the choice of legal politics has been determined at the end of the World War II. They have decided between the monist and dualist, between incorporation and transformation. Despite the fact that Indonesia has become party international agreements, Indonesia is yet to have a clear legal politic in its national law. In the region, a country such as Thailand, China and Vietnam choose the mixed approach, but has a firm ground to upheld international law if there is a conflict between international and national law. Following the introduction, this article will elaborate the current practice in Indonesian system with regard to various international law instruments. It will also discuss two main theories on how international law is perceived by national law, namely the monist and dualist theory. This article then will continue by elaborating the three core problems in Indonesian national practice namely 1) ununiformed definition of international agreement or treaties; 2) concept of ratification of international agreements in national law; and 3) legal status of international agreements in domestic legal system. As a closure, this article will conclude and make recommendations.

THE CORE PROBLEMS IN THE INDONESIAN CURRENT PRACTICES

The current stage of the practice of Indonesia in domestic legal system has caused three core problems namely 1) ununiformed definition of international agreement or treaties; 2) concept of ratification of international agreements in national law; and 3) legal status of international agreements in domestic legal system.

Definition of Treaty/International Agreements

The Vienna Convention on the Law of Treaties 1969 provides a clear criterion on the definition of treaty/international agreement. The term "treaty" defined as international agreements in general, not just those who are titled as treaty. Accordingly, it provides elements of "treaty" (ILC Draft Articles with Commentaries, Yearbook of the International Law Commission Vol. II, 1966). Kaczorowska-Ireland (2010) further stated that when an instrument

fulfils all the criteria, it is considered as treaty. In this regard, the Vienna Convention 1969 stipulates as follows, "An international agreement concluded between States 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". Thus, according to Kaczorowska-Ireland (2005) the fundamental elements of a treaty are:

- Concluded by states
- In written form
- Governed by international law (creates rights and obligation under international law; and this is the second example of listed material.

The name or title of the instrument, whether it is a treaty, agreement, arrangement or others, does not account towards classification as international agreement (Mauna, 2005). The Vienna Convention 1986 provides similar stipulation as an international agreement governed by international law and concluded in written form (i) between one or more States and one or more international organizations; or (ii) between international organizations, whether that agreement is embodied in a single instrument or in two or more instruments and whatever its particular designation (Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986, 25 ILM 543; Fathan, 2005).

Law No. 24 of 2000 adopts this definition, which stipulates "Every agreement in public law, govern by international law and entered by the government with state, international organization or other international law subject." Despites these criteria both in the Vienna Conventions and the Law No. 24 of 2000, public misunderstanding continue to exist in practice. Almost all documents signed by the government of Indonesia are treated as a treaty. Nevertheless, the Ministry of Foreign Affairs has made classification as follows:

- Agreements as defined by Vienna Convention 1969 and Vienna Convention 1986 as well as Law No. 24 of 2000.
- Agreements that have international character but not govern by public international law (loan agreement, sales agreement, etc.).
- Documents that have no legal binding power (joint statement, declaration, minutes of meeting, etc.).

Taking into account the dynamic of inter-state relations and globalization, Indonesia needs to actively response in order to benefit it national interest in the legal reform in domestic system. The Law No. 24 of 2000 needs to be amended by providing further elaboration so it will be in accordance with the Vienna Convention 1969 and the Vienna Convention 1986. The Law No. 24 of 2000 also need to be amended in order to be in line with the Law No. 17 of 2003 on State's Finance. Clarity in differentiating between loan agreements that govern by public international law and those who are not are required. This clarity will end the debate who are entitled to give full powers to sign the agreement in questioned, whether it is the Minister of Foreign Affairs or the Minister of Finance.

The Concept of Ratification

The concept of Ratification is based on international law. But in its development, the concept of ratification is started to be discussed in domestic law, particularly constitutional law. In Indonesian national law, ratification defined as consent by a state organ regarding the act of

the government to enter into an international agreement or a confirmation of a state organ regarding the act of the government to sign an international agreement. Ratification need to be understood from two perspective, national law or internal procedure and international law or external procedure. From national law or internal procedure perspective, ratification is understood as the act of approval by the executive and legislative branch that served as a legal basis in order for Indonesia to perform the external procedure. This refers to the separation of power between the executive, legislative and judicative, as introduced by John Locke and Monstesquieu (Moore, 2001). On the other hand, from international law or external procedure perspective, ratification is understood as legal deeds of a state to express it consent to be bound by an international agreement in a form of ratification, accession, acceptance or approval.

Indonesian Constitutional Law defined the concept of ratification only as an internal procedure. Indonesian Law defined ratification as "approval" of the House of Representative, which is the legislative branch as reflected in Article 11 of the Constitution. However, in practice, particularly through the application by Law No. 24 of 2000, the definition of "approval" was shifted from internal to external perspective. In practice, Indonesia does not have a firm rule on how to deal with an international document, whether or not ratification is required or not.

Suryokusumo (2008) explained Indonesia's practice in dealing with two agreements with similar character, within the same time period, but were treated differently. The Special Agreement concerning the submission of the Case Concerning Pulau Ligitan and Pulau Sipadan to the International Court of Justice 1998 was ratified by the Indonesian Government. However, the New York Agreement between the Indonesian Government, Secretary General of the United Nations and the Government of Portugal concerning Referendum for East Timor 1999 was not ratified. There are views expressing that the New York Agreement should have been ratified by Law, due to the fact it has implication to the sovereignty of Indonesia, in particular to the Province of East Timor. The criteria at that time, based on Presidential Letter No. 2826/HK/1960, both agreements are agreements that have significant implication to Indonesia's sovereignty. Nevertheless, there are pragmatic views that stated the significant implication are on the decision of the ICJ and the result of the referendum, while the agreements itself are procedural in nature.

Regardless the various views, it cannot answer the fact that Indonesia treated the two agreements differently. There was even a further question, why the Special Agreement was ratified by Presidential Decree, not with Law. One might assume that these were due to the fact that in that time political considerations were heavier than legal considerations. Another example is the Timor Gap Treaty 1989. This Agreement was signed on 11 December 1989 and ratified by Indonesia through Law No. 1 of 1991. After the Independence of Timor Leste, the handover of the Timor Gap Authority from the Indonesian Government to the Government of Australia and Timor Leste was done only by the Exchange of Letters of 1 June 2000. The Letters basically a termination of the Timor Gap Treaty. However, the Law No. 1 of 1991 is still in force. The implication of the Exchange of Letters of 1 June 2000, nor the general implication of the ratifying instruments, were never receive the attention from the House of Representative, possibly due to the fact Indonesia was in transition from President Soeharto to President BJ Habibie.

The Legal Status and Application of Treaty/International Agreement in National Law

Neither the Government nor the general public are able to understand the legal status and application of treaty/international agreement in the national law system. The Indonesian Constitution, particularly in Article 11 as amended, did not indicate any policy on the status of international agreement in national law. Thus, there are two schools of thoughts. First, those who consider ratification is sufficient to place international agreement in domestic system and those who consider a particular national legislation is required to transform international agreement to the domestic system (Slyz, 1995; Franck & Thiruvengadam, 2003). In developed countries, this problem is solved by enacting national legislation that specifically addressed the position of international law as well as international agreement in their domestic legal system. In this regard, Indonesia needs to adopt of the view that reflect the legal nationalism but taking into consideration the role and function of international agreement in inter-state relations.

In a number of practices, Indonesia adopts the monist view and in other practice it adopts dualist view. For example of the dualist view, Indonesia has ratified the United Nations Convention on the Law of the Sea (UNCLOS) with the Law No. 17 of 1985, but ten years later it enacted Law No. 6 of 1996 on Indonesian waters. For example of the monist view, Indonesia has ratified the Vienna Convention on Diplomatic Relations 1961 and the Vienna Convention on Consular Relation 1963 through the Law No. 1 of 1982 and the Conventions has been used for legal basis in domestic system without any particular national legislation. Based on these practices, the current Indonesian legal system did not answer the question on whether or not a particular national legislation (other than the ratifying law) is necessary or not? And whether this particular national legislation is a substantive or procedural in nature.

An option for solution is to combine the monist and the dualist view, through a new dynamic combination doctrine, but with a clear criterion on how to treat each category of treaty/international agreement. For agreements that can be categorized as treaty contract, incorporation through ratification is sufficient, thus upholding the monist view. For law making treaties, transformation to domestic through a particular national legislation is necessary, thus upholding the dualist view. Another benefit of this combine approach is Indonesia can uphold its full sovereignty principle. If the treaty is already in line with Indonesian national law, then incorporation through ratification is sufficient. If the treaty requires adjustment or amendment of national law, then the treaty needs to also be transformed to domestic legal system through particular legislation.

Law No. 24 of 2000 is aiming towards orderly of the legal system, but due to its procedural nature it did not provide certainty whether it upholds the monist (incorporation), dualist (transformation) or combination view. The 1945 Indonesian Constitution needs to provide room to accommodate the intersection between international law and domestic law. Similarly, the Indonesian Constitutional Law also has to enable this.

In order to apply the incorporation theory, Indonesian legal system need to determine the status and position of treaty/international agreement in the hierarchy of the domestic legal system. First, Article 11 of the Constitution 1945 needs to be amended to clarify the status of treaty and international agreement. Second, the Law No. 10 of 2004 also need to be amended and its amendment needs to specify the position of international agreement in the hierarchy of the Indonesian legislation. At the bare minimum, it should specify that international agreement is in the same level with Law or Government Regulation, depending on whether the agreement was ratify by Law or Government Regulation.

CURRENT PRACTICES IN INDONESIAN LEGAL SYSTEM

In referring to a treaty or an international agreement, states in their practice also use combination of nomenclature, including *Joint Statement, Protocol, Charter, Joint Declaration, Final Act, Process Verbal, Memorandum of Cooperation, Side Letter, Reciprocal Agreement* (in the form of diplomatic note), *Letter of Intent, Minutes of Meeting, Aide Memoire, Demarche, Letter of Agreement, Memorandum of Agreement, Letter of Understanding, Memorandum of Cooperation, Record of Understandings or* other names as agreed by the parties. Similarly, Indonesia also uses various nomenclatures in its practice. The following highlights in Indonesian experience will be discussed, to show the current dilemma in its domestic legal system. Letter of Intent (LoI) between Indonesia and the International Monetary Fund (IMF) sparked debates among legal academician and practitioner. Some part of Government viewed the LoI is not a treaty, thus ratification is not required. On the other hand, some, particularly the politician, viewed that it is a treaty because of the substance of the LoI have significant implication to the fundamental economic interests, thus approval from the Parliament and ratification is required.

Although eventually the LoI was ratified, it leads to another debate regarding the authority of the executive and legislative branch. It also leads to the needs to amend Article 11 of the 1945 Constitution that currently enshrined in paragraph (2) and (3). Looking at the substance of the LoI, it can be categorized as a treaty, without affected by the name/title, because it was made by international law subjects and creating rights and obligations in public law. Based on the LoI example, it can be concluded that definition of treaties or international agreement is not based on the name/title of the agreement, rather than based on the substance and the parties/subject of the agreement and its effect on creating rights and obligation in public law.

Another example is the Constitutional Court Decision on Case No. 20/PUU-V/2007 concerning review of Law No. 22 of 2001 regarding Oil and Gas. On one hand, this case is a reflection of public misunderstanding of definition of treaties/international agreement. On the other hand, it is a landmark decision for the development of treaty law in Indonesia. In this case, a number of the House of Representative member as applicant questioned the wording of Article 11 paragraph 2 of the Law No. 22 of 2001, which stipulates "Every signed Cooperation Contract must be reported to the House of Representative in writing," to be contradictory to Article 11 of the Constitution. According to the applicant, Cooperation Contract is a treaty/international agreement, thus it has to be approved by the House of Representative and reporting is not sufficient.

The Constitutional Court in its consideration shed a light in the public distortion by stating that "Cooperation Contract in accordance with Article 11 paragraph (2) of the law No. 22 of 2001 is not a treaty within the meaning of Article 11 of the Constitution. The Court ultimately decided to decline the applicant request. Status of loan agreements also has a definition controversy. This is caused by the shifting of governing law in a loan agreement. Conventional loan agreement is understood as a private international law agreement and governed by a particular national law. Thus, loan agreement is not "governed by international law" within the meaning of international agreement according to the Vienna Convention on the Law of Treaties 1969 as well as Law No. 24 of 2000 regarding International Agreements (Agusman, 2010).

The increasing number of loans between states as well as between states and international organizations makes the demand to shift the dominance of national law as governing law to international law become tangible. Creditors, particularly from the First World, including Germany and other international financial institution feel safer if the loan agreement have a

public law characteristic in compare to private law characteristics (Delaume, 1962). A nomenclature dilemma also exists due to lack of uniformity and understanding of the definition of treaties/international agreement. Although the Vienna Convention did not put title of agreement/nomenclature as a decisive factor, public in most cases use title/nomenclature as the decisive factor to decide whether the document in question is a treaty or not. Treaty, convention, agreement are commonly regarded as treaty/international agreement while agreed minutes, memorandum of understanding (MoU) or record of discussion are regarded as non-treaty (Aust, 2000).

Indonesia has the tendency to place treaty as higher than agreement and agreement is higher than MoU, followed by arrangements and exchange of notes. This practice is generally unintentional and has led to practice to use particular nomenclature for particular scope of agreements. For example, the term agreement is commonly used for umbrella agreement and the term MoU as well as arrangement for further provisions in implementing the agreement. This practice continues although Law No. 24 of 2000 did not differentiate between the nomenclatures. Indonesia is also facing a problem with regard to the legal status of treaty/international agreement under national law. Until now, there is no firm confirmation on the hierarchy and legal status of treaty in Indonesian national law. Because the hierarchy is unclear, it creates further problem in domestic law sphere due to the lack of public policy space that was supposed to be governed by Indonesian Constitutional Law.

There are two doctrines on relations between international law and national law. The first is dualist theory that viewed international law and national law as two different systems. As a consequence, "transformation" from international law to domestic law is required. The conversion process altered the character of international law to become domestic law, thus the norms are considered as a national law product and part of the legal system hierarchy (Kusumaatmadja & Agoes, 2003). The second theory is Monist Theory that viewed international law and national law as one system. International law applies to domestic law without transformation process. If there is a similarity of norm between the international law and domestic law, then the domestic legislation only considered as implementation of the international law. In this regard, international law is still considered to have an international norm characteristic (Suryokusumo, 2008).

Indonesian literature noted the opinion of Kusumaatmadja (2003), which stated that Indonesia tends to adopt the monist system and giving priority to international law. In this regard, the international law will trump over the domestic law. He suggests that in the future Indonesia should take a firm stance to uphold the Monist System to answer the dynamic relation between international and national law. Indonesia's attitude will determine the status of treaty/international agreement, giving direction towards consistency in applying treaty or international agreement, as well as to determine how far international law may influence the domestic law with regard to its implementation. As a party to various treaties, Indonesia has the obligation to implement it with good faith.

Treaty law in theory has clearly placed national law in relation to international law. Article 26 of the Vienna Convention on the Law of Treaties stated the fundamental principle called *pacta sunt servanda,* agreement is binding upon the parties and the parties have to apply it in good faith. The next problem is regarding the definition of approval or ratification of treaty/international agreement in the Indonesian legal system. The root of the problem is its conception in international law. It then develops to national legislative system, which may use different term to refer to this process. The national legal system generally defined approval or

ratification as action by the legislative branch to approve the action of the executive branch to enter into agreement or to sign an agreement.

Approval or ratification need to be viewed from two perspective, internal (national) and external (international). From internal perspective, approval or ratification is a matter of Constitutional Law; whereas the national law govern the scope of authority of the executive and legislative with regard to enter into international agreement. The internal perspective also dictates the required legislation as the basis for Indonesia to execute the external procedure. From external perspective, approval or ratification is an action of state to express its consent to be bound by a treaty/international agreement. The format of this consent to be bound is by submitting instrument of ratification, accession, acceptance or approval, as required by the treaty itself (the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty) (Agusman, 2009).

The elaboration of the three problems above demonstrated a common underlying problem: Article 11 of the Constitution does not provide clear guidance on the status of treaty/international agreement in national legislation system. Hence, it is required multi-interpretation. Article 11 Paragraph (2) of the Constitution reads as follow: "The President in making other international agreement that created significant and fundamental effect to the livelihood of the people that relates to state financial burden, and/or required amendment or enacting a Law must be done by approval of the House of Representative."

The substance of Paragraph (2) shows the importance of the role of the House of Representative in serving as a control mechanism in making international agreement. However, it did not shed any light to the common underlying problem. Likewise, the Law No. 24 of 2000 regarding International Agreements does not provide any solution to the common underlying problem. The Law govern procedural order from the making to terminating international agreements. However, it does not provide any solution.

CONCLUSION

Based on the elaboration above, there are three main points that we can conclude:

- Definition of treaty/international agreement under Indonesian law is unclear. The Law No. 24 of 2000 need to adjust its provisions with the provisions of the Vienna Convention on the Law of Treaties 1969 and 1986;
- Indonesian legal system has not provides clear regulation regarding the hierarchy and status of treaty/international agreement as well as its implementation. This clarity is necessary due to its effect to application of the international agreement in domestic law;
- Indonesian legal system has not provided clear definition and legal concept of ratification. Different approach in viewing the concept of ratification by international law and domestic law requires Indonesia to have a firm regulation to put the concept of ratification in its right place that is an expression of consent to be bound by a state to a treaty/international agreement.

The entire executive, legislative, as well as judicative branches of Indonesia are required to reform the current system in order to solve the three core issues. Some recommendations that can be taken into considerations are:

- To revise the definition of treaty/international agreement under Articles 1(1) of the Law No. 24 of 2000 and Article 8(d) of the Law No. 17 of 2003 to align with the provisions of Articles 2(1)(a) of the Vienna Convention 1969 and 2(1)(a) of the Vienna Convention 1986, in order to include elements of an international agreement; by subject of international law (including non-state entities); in written

form; governed by international law and creating rights and obligation in public law and whatever form (whatever the title).

- To amend the wordings of a number of national legislations as an improvement of 1 paragraph to Article 11 of the Constitution as follows, "International agreement which has been ratified by the Government (incorporation and transformation) is become Indonesian National Law". Adding 1 paragraph to Article 11 of Law No. 24 of 2000 as follows, "Indonesia is bound by International agreement which has been ratified by Law or Presidential Regulation." Moreover, the add of 1 paragraph to article 7 of Law No. 10 of 2004 as follows, "Status of ratified International Agreements are equal with Law/Government Regulation in lieu of the Law".

- To modify Article 9 of the Law No. 24 of 2000 by adding 1 paragraph to differentiate internal and external view of ratification and the said paragraph to be read as follows, "Approval includes both internal and external procedures".

Clarity in domestic legal system is necessary, particularly when it comes to the relation between international and national law. Therefore, Indonesia should priorities to reform its national law in order to avoid confusion with regard to treatment of international instruments, its implementation, its hierarchy, as well as its ratification or other means to expressed consent to be bound.

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