

THE LAW APPROVING TREATIES (“UU PENGESAHAN”): WHAT DOES IT SIGNIFY?

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Abstrak

Pasal 11 Undang-Undang Dasar (UUD) 1945 dan Undang-Undang No. 24 Tahun 2000 tentang Perjanjian Internasional secara umum mensyaratkan adanya “persetujuan” dari Dewan Perwakilan Rakyat (DPR) dalam pembuatan dan pengesahan perjanjian internasional. Perbedaan keduanya adalah bahwa dalam Pasal 11 UUD 1945 tidak secara khusus mensyaratkan bentuk dari persetujuan dimaksud, sementara Undang-Undang No. 24 Tahun 2000 mensyaratkan pengesahan perjanjian internasional dilakukan dengan undang-undang atau keputusan presiden. Perbedaan proses pengesahan perjanjian internasional untuk dapat diberlakukan dalam sistem hukum nasional Indonesia menimbulkan perdebatan, baik di kalangan akademisi maupun praktisi, antara lain: teori monisme-dualisme, status perjanjian internasional dalam hukum nasional Indonesia, maupun implementasi dari perjanjian internasional di Indonesia. Artikel ini dimaksudkan untuk mengeksplorasi makna undang-undang pengesahan perjanjian internasional dan perkembangannya. Perundang-undangan di Indonesia diidentifikasi memiliki dua sifat yaitu: (1) mengatur (regeling) dan (2) menetapkan (beschikking); dan dalam hal pengesahan perjanjian internasional harus diidentifikasi sebagai peraturan yang bersifat menetapkan (beschikking), bukan bersifat mengatur (regeling).

Kata kunci: hukum internasional, legislasi, monisme-dualisme, perjanjian internasional, ratifikasi.

Abstract

Article 11 of the Constitution and Law No. 24 of 2000 on Treaties generally requires the "consent" of the House of Representatives (DPR) in the making and ratification of the treaty. The difference between the two is that Article 11 of Constitution does not specifically mention the form of approval, while the latter requires that the ratification of a treaty is done by act or by presidential decree. The big difference in the process of ratification of the treaty to be applied in the national legal system of Indonesia, has been controversial, both among academics and practitioners, such as the theory of monism-dualism, the status of an international treaty into national laws of Indonesia, and the implementation of international agreements in Indonesia. This article is intended to explore the origin of the meaning of the law approving treaties and to closely observe its development. Laws and regulations in Indonesia may commonly be identified by two characteristics: (1) having regulatory (regeling) character and (2) having ruling (beschikking) character; and in terms of the laws/regulations for approving treaties shall be identified as having ruling (beschikking) character instead of regulatory (regeling) character.

Keywords: International law, legislation, monism-dualism, treaties, ratification.

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Introduction

Article 11 of the Constitution states: "The President with the approval of the House of Representatives declares war, makes peace and treaties with other states' and... in making other treaties shall obtain the approval of the House of Representatives". The legislative history of Article 11 of the Constitution reveals that such an approval from the Parliament does not necessarily take any particular form. The subsequent practices since then, however, have adopted the model of the procedure of the Netherlands by which parliamentary approval takes the form of statutory law. The use of statutory law has successfully worked until now and enjoyed full support from constitutionalist scholars.¹ The practice was then formalized in Law No. 24 of 2000 on Treaties, and recently adopted in Law No. 12 of 2012 on Legislations.

There are an increasing number of arguments supporting this particular practice. As a treaty is commonly intended to create general norms, the proper form that could be produced by legislature in relation to its legislative function is statutory law. Others also held that the only appropriate outcome for an approval from parliament or the outcome of cooperative efforts between the President and Dewan Perwakilan Rakyat (DPR, the Indonesian Parliament) should be a statutory law.² Notwithstanding its controversy, it was also claimed that the use of statutory law to embody an approval from parliament has formed a constitutional (conventional) customary rule.³

Treaties concerning certain matters specified under Law No. 24 of 2000 require parliamentary approval in the form of laws while other treaties

require the approval of the President in the form of presidential regulations. The practice of adopting the form of statutory laws and regulations as embodying expressions of Parliament and presidential approvals to treaties has generated controversy as to the significance of these laws in terms of domestic law. There are at least two different meanings attributed to these statutory laws. On the one hand, it is argued that the laws and presidential regulations ratifying/approving treaties only constitute formal expressions of the parliament and presidential approval. Under the power-sharing system, the laws are the products of checks and balances (oversight/controlling) power of the Parliament. Meanwhile, it is also held that the laws (and presidential regulations) have legislative character whereby treaties so ratified/approved are transformed into domestic law, and become laws/presidential regulations in a proper sense. In this regard, the laws are the product of the legislative powers of the President.

This Article attempt to explore the origin of the meaning of the law approving treaties and to closely observe its development. Having visited the development and the controversy surrounding the issue, this article attempt to redefine the meaning of the law and recommend its course of direction in the future.

Development of the Meaning of the Law Approving Treaties

As influenced by the tradition of the Netherlands, scholars in Indonesia normally make a distinction between laws in the formal sense (*wet in formelezijn*) and laws in the substantial sense

¹ Bagir Manan, "Akibat Hukum di dalam Negeri Pengesahan Perjanjian Internasional (Tinjauan Hukum Tata Negara)," *Focus Group Discussion, Ministry of Foreign Affairs of the Republic of Indonesia – Law Faculty of Padjadjaran University, Bandung* (2008).

² Ko Swan Sik, *The Indonesian Law of Treaties 1945-1990*, Norwell: Kluwer Academic Publishers, Dordrecht, Boston: 1994, hlm 14.

³ Hamid S. Attamimi, "Pengesahan/Ratifikasi Perjanjian Internasional 'Diatur' oleh Konvensi Ketatanegaraan," *Majalah Hukum dan Pembangunan*, 1982, 4, hlm, 346.

(*wet in materielezijn*) as well as between 'regulatory' or 'order of execution' nature of the law. Despite the scholarly controversy, statutory law in Indonesia is normally identified as having either a *regeling* nature with legislative or normative effect (laws in material sense)/ *beschikking* nature only in the sense that they are merely an order (law in formal sense).⁴ It is noteworthy that scholars hardly discussed the nature of the laws approving treaties under the perspective of 'regulatory' or 'order of execution' nature. E. Utrecht, in the earliest period has argued that, considering that the laws express only parliamentary approval, the laws approving treaties possess a formal character only (*wet in formelezijn*).⁵

The latest development, however, overturns this nature in favour of a regulatory nature. Previously, approval for these agreements took the form of a 'presidential decree'. But since 2004, as prescribed in Law No. 10 of 2004 on Legislation (succeeded by Law No. 12 of 2011), the term used for approving these agreements is a 'presidential regulation'. The two terms are different in nature: the presidential decree is only a decision (order) whereas the presidential regulation contains regulatory contents. The changing of the term - from presidential decrees to presidential regulations - may however imply that the mode for the approving of agreements possesses a regulatory (*regeling*) character rather than that of simply an order (*beschikking*).

The survey of the historical context reveals that the meaning of these approving laws has been

attributed differently in different periods. The initial meaning ascribed to the laws was simply intended to express in a formal way the approval of the Parliament to treaties submitted by the Government before the given treaties were ratified at international level. The practice applied the model of the treaty-making procedure of the Netherlands, where the laws are enacted for the purpose of expressing the assent of parliament (Article 11 of the Constitution of Indonesia). The original idea of these laws was well explained by E. Utrecht,⁶ who enlisted procedural steps in treaty making under Article 11 of the Constitution as follows: (1) Adoption of Treaties (*sluiting*), (2) Approval (*persetujuan*) by respective Parliament, (3) Ratification (*pengesahan*) by President, and (4) Promulgating (*Afkondiging*). He further argued that under the Constitution a treaty shall acquire prior approval of the Parliament and such an approval (*persetujuan*) is embodied in an approving law (*goedkeuringswet*).

This original concept had been followed in the practice of treaty-making until 1974, by which the title of the laws always indicated such an expression. The laws expressed approval and therefore they were acts of approval. The title of Law No. 4 of 1951 for example, read 'Law No. 4 of 1951 on Approval to Loan Agreements between the Government of the Netherlands and the Government of the Republic of the United States of Indonesia'.⁷ The earliest practice had also emphasised the difference between: (1) the date of entry into force of the law approving the treaty, and

⁴ Hamid S. Attamimi, "Sekali Lagi tentang Pengertian Keuangan Negara," *Majalah Hukum dan Pembangunan*, 1982, 1, p. 35-41; Asshiddiqie, Jimly, *Pokok-Pokok Hukum Tata Negara Indonesia: Pasca Reformasi*, Bhuana Ilmu Populer, Jakarta: 2007, p. 222-228; Indrati S, Maria Farida, *Ilmu Perundang-Undangan: Jenis, Fungsi, dan Materi Muatan*, Kanisius, Yogyakarta: 2007, p. 51-54.

⁵ E. Utrecht, *Pengantar dalam Hukum Indonesia*, Ichtiar, Djakarta: 1961, p. 120.

⁶ *Ibid.*

⁷ Emphasised by the author, a similar expression ('approval') had been consistently used until 1973 for instance in Law No. 19 of 1952 on Approval to Friendly Treaty between the Philippines and Indonesia; Law No. 2 of 1973 on Approval to Amendment to Article VI of the Statute of International Atomic Energy Agency; the text of the Law may be accessed at: <<http://sipuu.setkab.go.id/index.php>>, [last visited on 9 April 2013].

(2) the date of entry into force of the treaty itself. Law No. 8 of 1960 on the Friendship Agreement between Indonesia and Cambodia clearly states that the agreement shall enter into force on the date of exchange of instrument of ratification in Phnom Penh. Meanwhile, in a separate article, it mentions that the Law enters into force on the date of its promulgation.

The Letter of the president No. 2826 of 1960, which laid down interpretative rules concerning treaty-making procedures, also subscribed to the term 'approval' for this particular purpose. The similar term i.e. 'approval' in the title of the approving law had been consistently used in subsequent approving laws until 1973.

Before 1973, the term 'parliamentary approval' and the term 'ratification' were still clearly distinguished. The term 'ratification' ('*pengesahan*') was used to refer to an international act or external ratification by which Indonesia expressed its consent to be bound by a treaty by means of ratification or accession. In a draft law concerning treaties in 1978, the term 'ratification' was defined as an expression by the President that a treaty binds Indonesia.⁸ The draft reflects the prevailing idea at that given period that once a treaty enters into force for Indonesia, it should mean that it binds Indonesia at international and internal levels at the same time.

Since 1974, the standard title and texts of the laws approving treaties have been modified slightly but give significantly different effects. The expression that these laws only give the effect of an approval has been deleted. The title of the laws no longer uses the term 'approval' (the Law on

approval to the treaty) but instead uses the term '*pengesahan*' (the Law on ratification of the treaty). The term '*pengesahan*' itself is commonly used in legislation making, and means the passing of a bill into statutory law. The term is also called '*ratifikasi*', translated from the term 'ratification'. The laws have therefore been understood as acts of '*pengesahan*' of a treaty instead of acts of approval to a treaty. The confusion increases because the concept of ratification was never distinguished between that of an international level and that of a domestic one. The act of ratification under a domestic level through means of a statutory law is always understood as also an act of ratification of the treaty itself. It will consequently convey the wrong impression that in these cases the power to ratify (at international level) has been shared by president and the house of representatives.⁹

Law No. 42 of 2007, for example, read as 'The Law No. 42 of 2007 on Endorsement (*'ratifikasi*') of Treaty on Extradition between the Republic Indonesia and the Republic of Korea'. Law No. 42 of 2007 consists of two articles: Article 1 reads: '*to endorse a Treaty on Extradition between the Republic of Indonesia and the Republic of Korea*'; and Article 2, states that the Law shall enter into force upon its promulgation. The date of entry into force of the treaty is no longer indicated in the law, as the law is apparently not concerned with the procedure on the part of international level, especially on the date of entry into force of the treaty at that level. The new standard formulation gives a strong impression that the Law is now intended to endorse/ratify the treaty at domestic level and to give effect to it under domestic law without neces-

⁸ Article 1 (f) *Panitia Peninjauan dan Penyusunan RUU Ratifikasi (Interdepartemental) Dep. Kehakiman tentang Rancangan Undang-Undang Republik Indonesia tentang Perjanjian Internasional, dalam Pertemuan 13 April 1978* (unpublished, on file with author).

⁹ KoSwan Sik, *Op. Cit.*, p. 17.

sarily relaying whether or not the treaty has entered into force at an international level. The new format has therefore changed the nature of the laws from merely approving the treaty (with a view of authorizing the president to ratify it at international level) to transforming the treaty into statutory law status.

From a deep research conducted into the available documents pertaining to laws approving treaties, it appears that the legal construction concerning the character of the laws has been shaped mostly by constitutionalists in Indonesia, which brought the subject under the domain of the theory of legislation that prevails in Indonesia.¹⁰ Constitutionalist and international law scholars in Indonesia hardly collaborated in the two areas of law that might overlap. International law scholars are mostly occupied with treaties as international rules, and are not interested in their domestic context. On the other hand, constitutionalists are more interested in dealing with the constitutionalist aspect of the laws approving treaties and hardly examine their international context. The critical overlapping area of the two aspects was ignored, thus leading to overlapping interpretations between the two groups of scholars. Since the laws approving treaties are administered under the guidance of the office of the president, which takes care only of domestic aspects of ratification, they go through the domestic process, hardly taking into account the international aspects of ratification. On the other hand, Indonesia's Foreign Ministry, which is in charge of international procedures, is not overly concerned with the domestic effect of the treaties. The ministry normally assumes that once the treaty enters into force, it is presumed to have been given effect at the

domestic level.

Hamid Attamimi,¹¹ the man in charge at the Office of the President on issues relating to domestic 'ratification', held strongly that laws approving treaties as well as presidential decrees (now presidential regulations) ratifying treaties possess a regulatory nature (*regeling*) and therefore ordinarily mean laws/presidential regulations. Hence logically, they should be seen as having a normative effect. From this perspective, the conclusion seems to be that the laws, which since 1974 are intended to ratify the treaties instead of approving them, embody the contents of the treaty, and are meant to make the treaty enter into force for Indonesia. Albeit not expressly acknowledged, the outcome of this understanding amounts to the transformation of the treaty provisions as is known in the dualist perspective. It might be argued, however, that such a conclusion has been reached unintentionally - without prior knowledge about the international aspects of ratification - whereas in reality the treaty itself has its own terms with respect to its entry into force at the international level, which might differ from the date of entry into force of the law ratifying it.

The Meaning under the Law No. 24 of 2000

Law No. 24 of 2000 on Treaties neither determines nor provides adequate guidance with regard to the character of this kind of laws. Instead, it inadvertently continues to use the term '*pengesahan*' to refer to international acts but at the same time erroneously uses the same term to refer to the passing of laws ratifying treaties. Unfortunately, scholars and practitioners tend to understand the term as referring to domestic acts rather than international acts and consequently

¹⁰ Damos Dumoli Agusman, *Hukum Perjanjian Internasional, Kajian Teori dan Praktik*, Refika Aditama, Bandung: 2010, p. 134-135.

¹¹ Hamid S. Attamimi, *Peranan Keputusan Presiden Republik Indonesia dalam Penyelenggaraan Negara*, Fakultas Pascasarjana, Universitas Indonesia, Jakarta: 1990, p. 227.

interpret the ratifying instrument i.e. laws and presidential regulations or decrees as ordinary legislations transforming the treaties.

The changing nature of the law approving treaties has consequently changed the manner how the domestic status of treaties is understood. Subsequent practices have moved the original basis of treaties from the notion of treaty making to the notion of legislation making, in a way that the mode is tantamount to legislative transformation. The practices have been inadvertently affected by the subsequent legislative construction under Law No. 12 of 2011 on Legislation, where treaties tend to be placed in the hierarchical legislative structure according to the rank of their domestic 'ratifying' instruments. As these instruments could only take the form of statutory laws or presidential regulations, treaties would only have two possible ranks i.e. the law and presidential regulations. On the other hand, such a mode of legislative transformation appears to be inconsistent, because treaties have never been 'transformed' into the form of legislations other than laws or presidential regulations.

The increasing assertion that the nature of the law ratifying a treaty is an ordinary piece of legislation has induced many constitutionalists¹² in Indonesia to treat the law as such to which the rules pertaining to domestic legislation, such as *lex specialis*, *lex superior* and *lex posteriori*, will then apply. As a consequence, most constitutionalists today will tend to conclude that it is the law ratifying the treaty that makes the treaty valid in

domestic law. As most constitutionalists are not familiar with the theoretical debate on methods by which a treaty is valid under domestic law, the term 'dualist-transformation' is seldom used to explain the effect of the law ratifying a treaty. However, when examining the existing theory, the suggested approach is nonetheless a 'dualist-transformation' mode. Most constitutionalists in Indonesia however hold that particular view without giving due regard to, or are not well-informed about, the international aspects of treaty making, where a treaty by its own terms determines its validity under international law.

The subsequent practice of treaty implementation does not however support the assumption that the laws ratifying treaties possess a transformation effect. The normative status of these laws is not fully accepted by the government and legislature, as it appears, *inter alia*, from the legislative behaviours, government views before the United Nations Human Rights bodies¹³ as well as from a number of court decisions that the laws do not automatically serve as a good basis for giving effect to treaty provisions in domestic law. The incorporation into domestic law of the UN Convention on the Law of the Sea 1982 (hereinafter the UNCLOS 1982) is a good example to demonstrate such an ambiguous perception. The UNCLOS 1982 was approved by Parliament for which Law No. 17 of 1985 was enacted. On the basis of the Law, an Instrument of Ratification was deposited to the United Nations Secretary General by which the UNCLOS 1982 entered into force for Indonesia on

¹² Lies Sulistianingsih, *Perjanjian Internasional Dalam Sistem Perundang-Undangan Nasional*, 2010; Bagir Manan, *Loc. Cit.* Romly Atmasasmita, "Pengaruh Hukum Internasional terhadap Proses Legislasi," Working paper delivered at National Legislation Seminar, Legislature of Indonesian House of Representatives, 2008; Jimly Asshiddiqie, <www.jimly.com>, [last visited on 9 April 2013]; Hadhyono, Suparti, "Praktek Penerapan Perjanjian Internasional dalam Putusan Hakim," Focus Group Discussion, Ministry of Foreign Affairs of the Republic of Indonesia-Law Faculty of Airlangga University, Surabaya (2008).

¹³ Respond by Indonesia to the Questions Put by the Rapporteur under UN Committee on the Elimination of Racial Discrimination (CERD) in Connection with the Consideration of the Initial to Third Periodic Reports of Indonesia, 3 (on file with author).

16 November 1994. Law No. 17 of 1985 has never been cited as having given effect to the UNCLOS 1982 under domestic law. Indonesia deemed it necessary to enact Law No. 6 of 1996 on Indonesian Waters, which partly transforms *mutatis mutandis* the provisions of the UNCLOS 1982. Both the Convention and Law No. 6 of 1996 stipulate the same rights and obligations of Indonesia over its waters.

The responses of the Indonesian government to the question of the UN Human Rights Committee were also inconsistent. The Report submitted by Indonesia to the UN Committee on the Elimination of Racial Discrimination (CERD) and Committee on the Rights of the Child (CRC)¹⁴ indicated that in Indonesia, not the entire international Convention is self-executing. The Report to the two Committees further stated that in judicial practice in Indonesia, provisions set forth in international conventions are normally not directly applied. Commonly they are applied first by integrating the provisions into relevant national legislation. If there is a contradiction between the provisions set forth in a convention and national legislation in their application in court, national legislation prevails. So, it is necessary to 'translate' the Convention provisions into national law. However, there is no legal argument available in the report that caused the Government to come to such an indication. Contrary to the view, there are a number of legislations that have already given direct effect to a treaty, and even supremacy to a domestic law.

The absence of a clear argument that supported the indication of non-self-execution under the Report caused puzzlement among scholars with regard to what it meant by the term non-self-executing, or non-directly applicable. It appears

that the term non self-executing or nondirectly applicable has been used to explain the necessity of the treaty to undergo 'transformation', in the sense that the Report equated the term with transformation. If this is the case, it might be argued that the Government has overlooked that human rights norms have received special treatment under Law No. 39 of 1999 on Human Rights. Under the 1999 Law's Article 7 (2), it is stipulated that: *rules of international law concerning human rights that have been accepted by Indonesia form part of Indonesian law*. The clear status given by the Law that all duly ratified human rights treaties are now part of Indonesian law, when the Report's assertion that they are still required to undergo a transformation effect, created a legal anomaly.

In 2013, the Indonesian Government suddenly corrected its previous views in the Report to the United Nations Human Rights Committee on ICCPR. In its response to a similar question listed by the Committee as to whether the provisions of the Covenant are directly applicable by domestic courts and to what extent they are invoked and applied, the Government made a contrasting view from the previous one in which it clearly stated that the provisions are directly applicable in domestic court and invoked Article 7 (2) of Law No. 39 of 1999 as the legal basis to justify direct invocation by judges.¹⁵ This changing view is surprising because Law No. 39 of 1999 already existed when the previous report, which contained contrasting views, was submitted to CERD and CRC. Unfortunately, there is no clear argument or circumstance that brings the Government to rectify its views.

¹⁴ CERD, 71st session, Geneva, 30 July-18 August 2007, UN Doc. CERD/C/IDN/CO/3, 2; Committee on the Rights of the Child, UN Doc. CRC/C/65/Add.23, 7 July 2003, para. 25.

¹⁵ UN Doc. CCPR/C/IDN/Q/1/Add.1, 28 June 2013, para. 1-2.

Furthermore, treaties that concern the international domain are apparently applied directly in domestic law upon their entry into force. The Vienna Conventions on Diplomatic Relations 1961 and on Consular Relations 1963 were ratified by the enactment of Law No. 1 of 1982. It appears that the diplomatic community in Indonesia enjoys privileges and immunities directly from the two Conventions without any domestic legislation. The practice may imply three possibilities in terms of modes of domestic effect of treaties: (1) the Law No. 1 of 1982 transforms the treaty into domestic law; (2) the Law orders the application of the two Conventions in domestic law; (3) the Law authorizes the President to ratify the Convention at international level and thus renders it automatically applicable in domestic level.

Subsequent practice appears to give no clear meaning to the law approving treaties. In the Reform era, in order to provide legal certainty under domestic law, the Indonesian Government and the House of Representatives endorsed a package of tax legislations¹⁶ relating to tax and custom duties under which the diplomatic community was granted privileges. The legislations do not make any reference to the two Vienna Conventions or to Law No. 1 of 1982. This gives rise to the legal question whether these legislations constitute transformation or just implementation of the two Conventions, or whether it clarifies that the role of Law No. 1 of 1982 merely authorizes the President to ratify the conventions at international level. Notwithstanding that there is no difference in the practical outcome, this will inevitably create different legal understandings among officials

concerned with these matters at the policy level. Tax and custom officials have a strong conviction that privileges acquired by diplomats and consuls are derived from the tax legislations and, on the other hand, Foreign Ministry officials refer to the provisions of the Conventions as giving rise to such privileges. This current practice of the laws approving treaties has rendered the meaning increasingly unclear.

Under the Constitution, the powers of the House of Representatives are practically distinguished into three kinds: (1) legislative powers, (2) oversight (monitoring control) powers, and (3) budgetary power, all of which are separate from one another.¹⁷ The contentious debate on the status of the laws approving treaties also refers to the question on whether the laws are the outcome of parliamentary oversight (control) power or otherwise the product of legislative powers. At one end, the drafters of Law No. 24 of 2000 on Treaties, as clearly enshrined in the *travaux préparatoires*, have apparently understood the Parliament's role in treaty making as oversight/controlling power rather than the Parliament's legislative powers.¹⁸ The view is compatible with the idea of monism that dominated the drafters of this Law. Meanwhile, the view that the laws are the product of legislative powers has been advanced by most constitutionalists, such as Bagir Manan, with the argument that a treaty is a norm-making instrument for which the proper form shall be in the legislation.¹⁹ In his dissenting opinion on a judicial review case of Law No. 22 of 2001 on Oil and Gas, Constitutional Court judge Harjono argued that parliamentary approval envisaged in Article 11 of

¹⁶ Article 3 Law No. 36 of 2008 on Income Tax; Article 77 and 85 Law No. 28 of 2009 on Local Tax and Retribution; Article 25 Law No. 17 of 2006 on Custom Duties.

¹⁷ Article 20A (1) Constitution: '*Dewan Perwakilan Rakyat shall hold legislative, budgeting and oversight powers.*'

¹⁸ Article 2 *Tanggapan Pemerintah terhadap DIM RUU-PI* (unpublished, on file with author).

¹⁹ Bagir Manan, *Loc. Cit.*

the Constitution is the outcome of the controlling powers of the Parliament, instead of its legislative powers. The treaty-making power belongs to the President under the oversight of the Parliament, and this differs from the Parliament's legislative powers.²⁰

Controversy on the Status of Presidential Decree No. 36 of 1990 Approving the Convention on the Right of Child

The contentious debate between the proponents of transformation and those against it emerged at the occasion of the implementation of the Convention on the Rights of Child 1989. The Convention was approved through the enactment of Presidential Decree No. 36 of 1990, which is hierarchically lower than a statutory law. It entered into force in Indonesia upon ratification in 1990. The controversy arose in 2004²¹ when the Government of Indonesia prepared to accede to the two Optional Protocols to the Convention adopted in 2000,²² which according to Law No. 24 of 2000 shall require parliamentary approval. This should be done by passing a statutory law.

The proponents of transformation held that it would be untenable to accede to the Protocol by passing a higher piece of legislation (statutory law) while the Convention was endorsed through a lower piece of legislation (presidential decree). They argued that as an ordinary law, the status as well as the effect arising from it shall be governed by Law No. 12 of 2011 on Legislations, where the

rules of legislative hierarchy and *lex superior* contained therein will be applicable. They further argued that since the Convention was backed by a presidential decree, not a statutory law, and from the hierarchical context the former is subordinate to the latter, the Protocols could not be endorsed by a statutory law because doing so would create an unexpected effect by which the domestic status of the Protocols is ranked higher than the Convention. A similar argument has been officially reflected in the Report of Indonesia to the CRC by arguing that the ratification instrument effectively determined its position. If it is ratified by a statutory law, the instrument ratified can be used as a reference for drawing up national law. But if it is ratified by a presidential decree, the ratified instrument cannot be used as a reference for drawing up or amending national law.²³ Therefore, the proponents of transformation suggested that Presidential Decree No. 36 of 1990 'ratifying' the Convention be upgraded to the form of statutory law, because only by this measure the Protocol could be ratified by the law. This assertion has influenced the CRC to the Convention, which in its Recommendation²⁴ encourages the state party to consider the possibility of supporting the ratification of the Convention by an Act of Parliament.

The request for upgrading the presidential decree provoked strong opposition from those who believed that the presidential decree only had an authorizing effect. They argued that the upgrading measure had no effect on the binding nature of the

²⁰ MK, case No. 20/PUU-V/2007, Judicial Review of Law No. 22 of 2001, p. 105-106.

²¹ Damos Dumoli Agusman, *Op.Cit*, p. 134-136.

²² Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict adopted in 2000; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography adopted in 2000.

²³ Committee on the Rights of The Child (CRC), Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding observations: Indonesia, UN Doc. CRC/C/65/Add.23, 7 July 2003, para. 26.

²⁴ CRC, Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding observations: Indonesia, UN Doc. CRC/C/15/Add.223, 26 February 2004, para. 13-15.

Convention to Indonesia because the legal effect of the Convention is not derived from the presidential decree, but from the instrument of ratification deposited by Indonesia to the UN Secretary General. The line of the argument suggests that the cause of this controversy lies with the fallacy of the conceptual meaning of laws ratifying treaties. The laws are not ordinary legislations which shall be subject to the rule of legislation, but they are laws in the formal sense that serve only for the expression of parliamentary approval for the purpose of authorizing the President to ratify the Convention. It is to say that they are *eenmalig* (applicable for one time only) and shall not be subjected to hierarchical principles. From this perspective, it is argued that the ratification of the Protocol by virtue of the enactment of a statutory law presents no legal problem and shall not be construed as violating the hierarchical principle.

Notwithstanding that the respective views still maintain the interpretation concerning the conceptual meaning of the law ratifying the Convention, the idea of upgrading the presidential decree was abruptly dropped, and the Protocols were finally ratified by means of statutory law in June 2012 without necessarily making any changes to Presidential Decree No. 36 of 1990. This suggests that the current trend is in favour of attributing the laws ratifying treaties merely with an authorization effect rather than a transformation effect. The CRC finally abandoned its recommendation when considering the subsequent Report by Indonesia in 2012.²⁵

Judicial Attitude toward the Law Approving Treaties

In the judicial proceedings before various courts in Indonesia, the parties to a dispute as well as the judges normally quote treaties by identifying them under the framework of the laws approving or ratifying them. In a number of disputes before the Supreme Court, for instance, the parties identified the Paris Convention for the Protection of Industrial Property and the Convention establishing the World Intellectual Property Organization in the form of Presidential Decree No. 24 of 1979, which approved or ratified both conventions, or the Bern Convention for the Protection of Literary and Artistic Works in the form of Presidential Decree No. 15 of 1997.²⁶ In a number of cases, the Supreme Court cites the UNCLOS 1982 always together with Law No. 17 of 1985, which ratified the Convention. It cites 'Law No. 17 of 1985 ratifying the Convention on the Law of the Sea 1982'²⁷ but for other cases it mentions 'the Convention on the Law of the Sea 1982 as being ratified by the Law No. 17 of 1985'.²⁸ The Constitutional Court normally uses the same style. In a number of cases it mentions Law No. 5 of 1998 ratifying the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.²⁹

The identification of a treaty by the Court through means of the respective instrument of ratification is not always generally followed. In some cases, the Court directly mentions the treaty without referring to the law ratifying or approving it. In a number of cases the Constitutional Court made use

²⁵ CRC, 31 October 2012, UN Doc. CRC/C/IDN/3-4, para. 4.

²⁶ MA, *Wen Ken Drug case*, No. 106 PK/Pdt.Sus/2011, p. 12.

²⁷ MA, *Pam Ngoc Tam case*, No. 1281 K/Pid.Sus/2008, p. 1.

²⁸ PT. Pontianak, *Le Van Thong case*, No. 104/Pid.Sus/2012, 11; MA, *Vuong Van Tuan case*, No. 162/ Pid.Sus/2011/ PT.PTK, p. 15-16.

²⁹ MK, case No. 21/PUU-VI/2008, Judicial Review of Law No. 2/Pnps/1964, p. 71.

of the provision of the ICCPR without mentioning the law approving or ratifying it.³⁰

In one recent example, the filing of a case in 2010 before the Constitutional Court on the constitutionality of the ASEAN Charter brought forth a particular issue. Representatives from civil society organizations and Non Governmental Organizations filed a judicial review request before the Constitutional Court against Law No. 38 of 2008 on the Ratification of the Charter of the Association of Southeast Asian Nations (ASEAN Charter). They argued that the ASEAN Charter, particularly Article 1 (5) which prescribes a liberal economic market, was in breach of the Constitution. They asserted that the domestic economy should not be trusted to market mechanisms.

During the proceedings, the Government pointed out that Law No. 38 of 2008 which approves the charter was only a formal expression of parliamentary approval for the government to proceed to the ratification of the charter at international level. The Law has no normative effects, because it is not Law No. 38 of 2008 that embodies the provisions of the Charter, but the Charter itself as an international instrument. The Law No. 38 of 2008 does not transform the Charter into domestic law and consequently the review of the Law shall not amount to the review of the Charter as a treaty. The Law No. 38 of 2008 and the Charter are two distinguished but related instruments. The Law is not an ordinary legislation under the legislation making regime as meant by Article 20 of the Constitution (legislative powers). It is only a formal approval of the Parliament under a treaty-making exercise as envisaged in Article 11 of the Cons-

titution (Presidential Powers). The Law simply serves the function of authorizing the President to ratify the charter at international level and does not carry any incorporating effect to domestic law. The Government further argued that the binding force of the ASEAN charter is not derived from Law No. 38 of 2008 but from the legal fact that the Charter by its own terms enters into force in Indonesia upon the deposit of the instrument of ratification.³¹

In its decision on 26 February 2013, with dissenting opinions from two out of ten judges, the court strongly indicated that the ASEAN Charter forms part of Law No. 38 of 2008 which ratified it.³² It means that there is no legal need to distinguish laws approving/ratifying treaties from other ordinary laws. The court needs to make this legal determination in order to assert the jurisdiction that it has competence to deal the case. The court also claimed that the choice of the 'form of law' for approving/ratifying a treaty is erroneous because it will inadvertently subject other state parties, which are sovereign states, to the law of Indonesia. For that reason, the court issued a recommendation that the use of the form of law for approving/ratifying a treaty should be re-examined with a view of replacing it with another form, by arguing that parliamentary approval to a treaty should not necessarily take the form of law.³³

The court decision does not remove the ambiguity of their legal meaning. Despite the awareness of the mistake as a result of using a form of law, the court failed to clarify matters and only worsened the ambiguity. It has not only stated that it is the law that embodies the treaty (ASEAN Charter) but the Court has in clear terms also

³⁰ MK, case No. 140/PUU-VII/2009, Judicial Review of Law No. 1/PNPS/65, p. 296; MK, case No. 065/PUU-II/2004, Judicial Review of Law No. 26 of 2000, p. 55.

³¹ MK, case No. 33/PUU-IX/2011, 20 July 2011, p. 2-6.

³² *Ibid*, p. 181.

³³ *Ibid*, p. 194-196.

interpreted that the law approving/ratifying the Charter binds other state parties. This interpretation is not only erroneous, but also overlooks the significant distinction between domestic aspects and the international law aspect of treaties. It appears that the Court confused Law No. 38 of 2008 with domestic laws concerning international law (*Außenstaatsrecht*), and the ASEAN Charter as a treaty governed by international law. As has been suggested, the decision demonstrated the tendencies of Indonesian constitutionalists who dominate the composition of the existing judges. They failed to take into account the international law aspects of the issue, and concentrated only on their own perspectives.

Conclusion

From the practices explained above, it might be argued that the legal meaning of the laws (including laws and presidential regulations) approving/ratifying treaties and the legal effect arising from these domestic acts is not free from doubt. They might have two different meanings which mutually negate one another. On the one hand, they are meant only to constitute a formal expression of parliamentary approval. On the other the laws are regarded as embodying the treaties. Thus they are intended to have a transformation effect to treaties, so approved from which the domestic binding force of the treaties is derived.

Having inherited the legal tradition of the Netherlands, laws and regulations in Indonesia may commonly be identified by two characteristics i.e. the laws and regulations having regulatory (*regeling*) character and those having ruling (*beschikking*) character. The former contains general provisions in an abstract manner and are known as proper laws/regulations, while the latter contains a specific prescription to a concrete cir-

cumstance. In respect of laws/regulations approving treaties, they serve only as domestic orders to execute the treaty in domestic law by which the provisions remain embodied in the treaties instead of in the laws/regulations. This order character resembles the kind of laws/regulations that possess a ruling (*beschikking*) character under which they only contain orders and do not transform or rewrite the provisions of the treaty into the legislation. Therefore, the laws/regulations shall be identified as having ruling (*beschikking*) character instead of regulatory (*regeling*) character. This legal construction will ensure that the character of the provisions remain in the form of treaty provisions, as envisaged by the monist-adoption mode.

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