THE DYNAMICS OF RATIFICATION ACTS OF INTERNATIONAL TREATY UNDER INDONESIAN LEGAL SYSTEM

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Abstract
The Ratification Act is a legal product that states Indonesia's commitment to an international treaty. The constitutionality of these laws has been tested before the Constitutional Court. In its decision, the Constitutional Court stated that the Ratification Acts is the object of judicial review as stipulated in article 24 C paragraph (1) of the 1945 Constitution. Even though there were two differences of opinion in the verdict on the ASEAN Charter Ratification Laws review, namely the Justice: Hamdan Zoelva and Maria Farida. The two judges categorized the Laws on the Ratification of International Treaties, not in the category of laws reviewed by the Constitutional Court. This decision explains the position of the Ratification Law in the Indonesian legal system and its future implications. This paper discusses the position of the Ratification Acts under the Indonesian legal system and the implications that will occur after the future Constitutional Court decisions on the development and relations of national law and international law. This writing uses secondary data and also primary, secondary, and tertiary legal material. This writing found the inconsistency of Indonesia in making ratification acts of International Law. It emerges that implication to the status of ratification acts. Moreover, The Constitutional Court decision tries to clarify ratification acts under the Indonesian legal system.

Keywords: Ratification Acts, Judicial Review, International Law

Introduction

Globalization is a phenomenon that *conditions sine qua non.*[1]Globalization not only projected the close relationship amongst nations without boundaries in the economic, political, socio-cultural but also contaminated in a legal term as the framing of the world's life.

According to Hans J Morgenthau, *domestic and international politics is nothing but two different manifestations of all the same: a power struggle. The manifestations differ in two unequal worlds, for each of them presents an unequal moral, political and social state.*[2]

Morgenthau thought is certainly quite uniform considering the interests of each regime struggled are different. In the study of international relations, inter-state interaction must bring the national interest of each country to be united in mutually beneficial cooperation for each country. In comparison, the national regime requires state action in inter-nation relationships that benefit the national interest and protect the people.

Therefore, Indonesia, as one of the subjects of international law.[3] Must play its international political role well through various international forum, either multilateral, regional, or bilateral relations, so that the national interest of Indonesia can be fought in cooperation which is beneficial for the people of Indonesia itself.

Whether or not the relationship between nations is well within the framework of the relationship between the two countries (bilateral) or

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[1] Latin, the dictionary of the law of complete edition, is the absolute requirement or in English is called "Absolute (ly) condition." The Sine Qua condition is also not known as the theory first coined in 1873 by Von Buri, the legal expert and former president of the German Reichsgericht (the Supreme Court). Von Buri says that any condition or all factors that participate or together cause a result and can not be eliminated from the sequence of causal factors must be considered causa.

[2] Hans J Morhenthau, *Politic among nations* translatio*n* (Jakarta: Yayasan Pustaka Obor Indonesia, 2010), p. 56.

[3] The state is the subject of international classical law other than the state; there are a number of other international legal subjects such as international organizations, the International Red Cross, the Holy See, the Rebels, the Multinational Cooperation, and others read more Mochtar Kusumatmadja, Introduction to International Law (Bandung: Sinar Grafika, 2005), P. 12.

between several countries (multilateral forums).[4] Participates in influencing the existence of law enforcement in each country. In valid reasoning, such circumstances can be proclaimed as a response for each country to the global agreement.

Often foreign relationships alter a legal order of law in a country either directly or indirectly. It is a logical consequence of acceptance, ratification[5]Accession or various means of ratification of an international agreement.

It is understood that under the Montevideo Convention of 1933[6], the constitution[7] is not a constitutive requirement in the formation of a state. However, it does not mean that the constitution has no significant role in the country's administration because the constitution is the main guidance in the practice of national and state life. Even

[4] International relations is the relationship between cross-border international community members. Another definition states that international relations refer to external relations between nations. According to Law No. 39/1999 on Foreign Relations, which uses foreign relations as an international relation, activities concerning regional and international aspects undertaken by the government at the central and regional levels or institutions, Business, political organization, civil society organization or Indonesian citizen. Read more Sefriani, The Role of International Law in Contemporary International Relations (Jakarta: Rajawali Press, 2016), p. 2.

[5] Article 3 of Law Number 24 of 2000 regarding the International Treaty states that: The Government of the Republic of Indonesia binds itself to international treaties through the following means:

A. Signing;

B. Endorsement;

C. Exchange of agreement documents / diplomatic notes;

[6] Article 1 of the Montevideo Convention of 1933 states the State Eligibility Requirements (Constitutive Requirements) consist of 3 elements: (1) the existence of permanent residents; (2) the existence of certain areas; (3) the existence of a sovereign government into and out; meanwhile, the declarative requirements are (4) the ability to establish relationships with other countries. In J.G. Starke, Introduction to International Law, tenth edition (Jakarta: Sinar Grafika, 2003), p. 127.

[7] Constitution comes from the Latin, constitutio. This term is related to the word "juice" or "ius" which means law or principle. The languages referenced by the constitution term are English, German, French, Italian, Spanish, and Dutch. For the definition of a constitution in English, the Dutch language distinguishes constitutie and Grondwet, while German language is between verfassung and Gerundgesetz. In fact, in German, the constitution is distinguished between Gerundrecht and Gerundgesetz as between Grundrecht and Grondwet in Dutch. Read more Jimmly Asshiddiqie, Economic Constitution, (Kompas: Jakarta, 2015), p. 3.

because of the importance of the constitution in the modern era, constitutionalism is deeply rooted in the foundations of the state; as C. J. Freidrich describes, *"constitutionalism is an institutionalized system of effective regularized restraints upon governmental action*." Once, the vital existence of the constitution in America was termed The Supreme Law of The Land.[8]

However, the constitution is not the only source of constitutional law, several other sources of constitutional law also play an essential role. Especially in the field of constitutional law in general *(verfassungrechtslehre*), which is usually recognized as a source of constitutional law is as follows:[9]

1. Constitution and Legislation;
2. Judicial Jurisprudence;
3. The Constitutional Conventions;
4. International Laws;
5. Doctrine of Constitutional Law.

This means that each source of constitutional law can also be a source of formation for other sources of law. As a constitution can materially become a source in the formation of international law *vis versa.*

Various theories explain the relationship of international law and national law, such as the mazhab of legal monism, namely the mazhab of law which assumes that there is no barrier between the norms of international law with national legal norms. Both are united and are interconnected. The mazhab of monism consists of the primat of international law and the primat of national law. The primat of national law means that national legal norms are higher than the norms of international law. The establishment of international legal norms should be based on and refer to national legal norms *vis versa* primat international law.

Legal dualism separates international law from national law. The mazhab of dualism strictly separates the relationship between the norms of national law and the norms of international law. This mazhab assumes that different regimes govern the two legal norms. So

[8] Jimmly Asshiddiqqie, Constitution & Constitutionalism of Indonesia (Jakarta: KonPress, 2005), p. 24-25.

[9] Jimmly Assiddiqqie, Introduction to the Constitutional Law Volume 1 (Jakarta: Secretariat General and Registrar of the Constitutional Court, 2006), p. 159.

to make acceptance of an international norm, the legal norm must be made legal transformation first. If not, then the legal norms can not apply or have no binding power.[10]

In other words, the mazhab of dualism is viewed as two norms system which is regarded as valid simultaneously from the same point of view, the person must also assume a normative relationship between the two, it must assume the existence of a norm or condition governing mutual relations. If not, then unresolved contradictions between the norms of each system can not be avoided.[11]

The development of the two theories is the theory of transformation and special adoption theory. This theory states that positivists regard the rules of international law as not directly applicable in national law. Therefore, to enforce both systems requires a special adoption process, namely international law adopted into national law.

This form of adoption is through ratification. The positivists consider that international law and national law are two entirely separate and structurally distinct systems. The international legal system can not offend the national legal system unless the legal system permits it by means of the constitution to be permitted entry into national law.

These theories try to outline the position and arrangement of international law in a country's national law. However, in fact, in Indonesia, the paradigm of arrangement and existence of international law is still obscure and gives rise to multiple interpretations.

The public began to question the existence of international law in Indonesia's national legal domain when there is a test of the Ratification of the ASEAN Charter to the Constitutional Court. The ratification of this law becomes the discourse between the two legal experts, namely the constitutional law expert *vis a vis* international law expert. There is a different perspective in seeing this legal phenomenon.

Because in the future, the public sees a threat when the Constitutional Court declares the Ratification Bill as the object of its testing and accepts or grants the petition in question, the position of

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[10] Boer Mauna, International Law: Definition, Roles and Functions in the Era of Global Dynamics (Bandung: Alumni, 2005), p. 12.

[11] Hans Kelsen, Normative Legal Basics (Bandung: Nusa Media, 2008), p. 337

the Ratification Law is seen as a law in a material sense which is temporarily binding in international law review clearly states that the enforcement of the norm in The international agreement will only take place if the binding conditions as determined in the Act have been fulfilled. Instead, it lies in the process of internal ratification. In international legal studies, the ratification activities of international treaties are an internal process of the state to reaffirm the results of negotiations in the negotiating table produced for further review whether they are in accordance with the provisions of national law. Then how could the Constitutional Court test such a norm regarding its constitutionality.

This paper discusses the Decision of the Constitutional Court Number 33/PUU-IX/2011 concerning the Review of Law Number 38 of 2008 on the Ratification of the ASEAN Charter. This paper limits the discussion to the dynamics of relations between international law and national law after this decision. Using the type of normative research and secondary data, primary legal materials, secondary legal materials, and tertiary legal materials.

The Status Quo of Ratification Act under Indonesia Laws

As an institution born after the reformation, the Constitutional Court has the authority to examine the validity of laws against the constitution. Concerning testing, there are 2 test models, namely formal testing and material testing. Formal testing is an assessment of the procedures for establishing regulations. While material testing is an assessment of the substance of the regulations.[12] In the examination of the ASEAN Charter Ratification Law, what is carried out is a material examination, namely the substance of the Ratification Law, which is considered contrary to the constitution

The Constitutional Court accepts the petition for judicial review, and there will be legal consequences under international law that will be faced because Indonesia has ratified the treaty and declared that it is bound and committed to implement it. Even the provisions of international norms on international treaties between countries (The

[12] Nurhidayatulloh, 2012, "The Dilemma of Testing the Ratification Law by the Constitutional Court in the Context of Indonesian Constitution," Jurnal Konstitusi Volume 9, Nomor 1 Maret 2012, p 120

Vienna Convention on The Law of Treaties)[13] expressly state that a country cannot immediately withdraw itself from the treaty after ratifying the international agreement, especially because the agreed international agreement is contrary to the constitution. It is therefore important to be thorough before agreeing to an international agreement.

Each branch of science, both constitutional law and international law has different theories and concepts regarding this issue. Damos Dumoli says that

"Experts in constitutional law in Indonesia and international law were busy in their respective spheres of expertise and viewed treaties from their specific perspective. For constitutional law experts, treaties are merely and theoretically a source of constitutional law. For internationalists, treaties are legal documents under international law. Internationalists have no interest to deal with their domestic status".[14]

Differences in the thinking of international jurists and constitutional law in Indonesia have caused problems. However, a qualified understanding of each expert becomes essential to disentangle the red thread of this issue so as not to happen the *status quo* in which the ratified international treaties that are contrary to the norm of the constitution, let alone to change the value of a constitution itself.

It should be noted that this debate arose because the post-amendment of the 1945 Constitution of the Republic of Indonesia in 1999-2002 does not implicitly state the position of international treaties as the embodiment of international law in the national legal order. Such political policy can be proved where international treaties have never been placed in the hierarchy of legislation. More can be seen in the table below:

Table 1: Comparison of the sort order of law in Indonesia [15]

TAP MPRS No XX/MPRS/1966	TAP MPR NO/III/MPR/ 2000	UU NO 10 Tahun 2004	UU No 12 Tahun 2011
1. UUD	1. UUD	1. UUD	1. UUD

[13] Read more about the Vienna Convention 1969

[14] Damos Dumoli, Treaties Under Indonesia Law: A Comparative Study (Jakarta: Rosda International, 2014), p. 16-17.

[15] The table is processed by to show the various hierarchies of laws and regulations that have prevailed in Indonesia in various legal instruments

2.	TAP MPR/S	2.	TAP MPR/S	2.	UU/Perppu	2.	TAP MPR
3.	UU/Perppu	3.	UU	3.	PP	3.	UU/Perppu
4.	PP	4.	Perppu	4.	Perpres	4.	PP
5.	Kepres	5.	PP	5.	Perda	5.	Perpres
6.	Peraturan Pelaksanaan lainnya	6.	Perda		*PerProp *Perkab/Kota *Perdes	6. 7.	Perda Prov Perda Kab/Kota

Therefore, it is necessary to have a clear mechanism and define the international agreement's position to uphold legal certainty in interpreting international agreement as an integral part of Indonesia's source of applicable law. If this does not find common ground, it will be a threatening time bomb in the development of national law. Moreover, we know that Indonesia is increasingly playing a significant, vital, and high-frequency role in international fora, which inevitably requires forming an international agreement to run the cooperation. The hope of keeping the constitutional values of the international treaties agreed upon by the government is important to consider. There will be no later international treaties contrary to the constitution or a condition that undermines the spirit of Indonesian constitutional values. The status quo certainly does not place the constitution as the highest norm in the country.

Testing the ASEAN Charter's ratification passed in Decision of the Constitutional Court Number 33 / PUU-IX / 2011. Raises a *quo vadis* status of the Law of Ratification of international treaties. Because the rejection of this petition can be interpreted that basically, the Ratification Act is the object of judicial review by the Constitutional Court. The rejection verdict means Indonesia received that norm stated on the ASEAN Charter as the legal norm; meanwhile, the substantive norm was unconstitutional to the political economy article (Article 33 UUD 1945). So the verdict indicates the constitutional amendment by the verdict itself. Why, Because the verdict which rejected to review article 5 ASEAN Charter containing liberalization of the economy means that liberalization economy is constitutional. Moreover, a dissenting opinion from 2 (two) judges of the Constitutional Court, namely Maria Farida and Hamdan Zoelva, indicates that the Law of Ratification Is not the object of the judicial review of the law which the Constitutional Court can do.

Whereas it should be in any country, the constitution must be the supreme law whose existence becomes the basis and guideline of the practice of national and state life; therefore, constitutional amendment due to the ratification of international treaties can be regarded as unconstitutional.

International treaties are "International Agreements are agreements, in certain forms and names, which are set out in international law which is made in writing and creates rights and obligations in the field of public law."[16]. In addition to Law Number 37 of 1999[17] on Foreign Relations also provides an understanding of international agreements. Read more are as follows: "international treaties are agreements in any form and title provided for by international law and made in writing by the Government of the Republic of Indonesia with one or more countries, international organizations or other international legal subjects, and incurring rights and obligations to the Government of Indonesia Is public law. "[18]

Meanwhile, international legal instruments also provide the following definition of international treaties: according to the Vienna Convention of 1969,[19] *"international treaties are agreements held by two or more states which aim to affect certain legal consequences."*[20] Similarly, the Vienna Convention of 1986,[21] States that *"International treaties are international agreements governed by international law and signed in writing between one or more countries and between one or more international organizations, international organizations."*

[16] Article 1 Sub-Article a of Law Number 24 of 2000.

[17] Promulgated on September 14, 1999, in the State Gazette Number 156 of 1999 and Supplement to the State Gazette Number 6423.

[18] Article 1 Sub-Article 3 of Law Number 37 of 1999.

[19] The Vienna Convention 1969 has the official name of The Vienna Convention on The Law Treaty, abbreviated as VCLT. It is an international law that is the Law Making Treaty and regulates the international treaties made by the state with the state as the subject of international law.

[20] Enzo Cannizzaro, The Law of Treaties Beyond the Vienna Convention (London: Oxford University Press, 2011), p. 182.

[21] While the Vienna Convention of 1986 is an international rule governing international treaties made by the state with legal subjects outside the country such as international organizations.

While some experts also provide the understanding of international agreements as follows:[22]

1. Oppenheimer-Lauterpact, "An international treaty is an intergovernmental agreement that creates rights and obligations between parties."
2. Dr. B. Schwarzenberger, "International treaties are agreements between the subjects of international law that give rise to binding obligations in international law, may be bilateral or multilateral. The legal subjects in question are international institutions and countries ".
3. Prof. Dr. Mochtar Kusumaatmaja, S.H. LLM defines, "International treaties are agreements held between nations that aim to create certain consequences."

The Constitutional Court's Decision on the Ratification of the ASEAN Charter Act No. 38 of 2008

Article 7 of Law Number 12 of 2011 regarding the Establishment of Laws and Regulations stipulates that hierarchically the position of the 1945 Constitution is higher than the Laws; therefore, any provisions of the Laws shall not be contradictory to the 1945 Constitution. If there are provisions in the Act contrary to the 1945 Constitution, such provisions may be applied for review through the Mechanisms Testing mechanism.

Many laws ratify international agreements since Indonesia independence, and the Constitutional Court has examined 1 law, namely Laws No. 38 of 2008, and decided that Article 1 number (5) and Article 2 paragraph (2) letter n of the ASEAN Charter are not contradictory to the 1945 Constitution.

The Constitutional Court (MK) issued a decision of the petition for judicial review of law no. Laws No. 38 of 2008 on the Ratification of the Charter of the Association of Southeast Asian Nations or better known as the ASEAN Charter. In the ruling, the Constitutional Court has the authority to examine the Act of Ratification of the ASEAN Charter. However, in the main matter of the case, the Constitutional Court believes the Petitioners' arguments stating that the ASEAN Charter is inconsistent with the 1945 Constitution are unreasonable

[22] Mochtar Kusumaatmaja, Introduction to International Law (Bandung: Alumni, 2000), p. 6.

under the law. Constitutional Justices Maria Farida Indrati and Hamdan Zoelva have a dissenting opinion[23], which holds that the Act of Ratification of the ASEAN Charter is not an object of judicial review of the law against the 1945 Constitution, which is the authority of the Constitutional Court.

Based on Article 9 paragraph (2) of law no. Act No. 24 of 2000 on the International Treaty, the ratification of an international agreement is not only the domain of the law but also the domain of Presidential Decree (Presidential Decree) or Presidential Regulation (No. 24 of 2000) Law No. 10 of 2004 on the Establishment of Laws and Regulations, Keppres is no longer a product of regulatory legislation that is regulatory). Based on Law no. 3 of 2009 on the Supreme Court and also Law no. 48 of 2009 on Judicial Power and Law no. Law No. 12 of 2011 on the Establishment of Laws and Regulations, the Supreme Court is authorized to examine legislation under laws allegedly contrary to law. Under the hierarchy of the Presidential Decree and the Perpres under the law, international treaties endorsed by the Presidential Decree or Perpres may be tested in the Supreme Court.[24]

The attitude of the Court that seemed dilemmatic and hesitant in deciding the case, on the one hand, the Constitutional Court is of the opinion that it is authorized to examine the ASEAN Charter because it is an annex and an integral part of Law no. 38 of 2008. However, on the other hand, the Constitutional Court, in its consideration, argues that the choice of legal form of ratification of international agreements in the form of formal laws, in particular, the ASEAN Charter passed with Law No. 38 of 2008, needs to be reviewed. The dilemma of the Constitutional Court is based on Article 11 of the 1945 Constitution, which does not mention that the form of international treaty approval is a law, but states that the President with the approval of the

[23] Dissenting opinion is a different opinion from the constitutional judge on a case because he has different beliefs related to a case with a majority of most of the judges vote in the panel of judges is concurring opinion is the opinion of different judges see the problem that is facing but has the same conclusion but with the basis of argumentation different.

[24] Ni Ketut Aprilyawathi, 2015, " The Authority of the Constitutional Court in Reviewing Laws Resulting from the Ratification of Multilateral International Treaties", Jurnal Yuridika volume 30 No 1, (Surabaya: Fakultas Hukum Universitas Airlangga Press), p 158

Parliament to make an international agreement, so that when associated with lawmaking, the laws are a legal form Which is made by the President and the People's Legislative body, but this does not mean that every legal product made by the President with the People's Legislative Assembly is in the form of Laws.

Dr. Harjono S.H., M.C.L, as outlined in his Politic book. International Treaty Law (1999) on the use of lex posterior derogate lege priori principles and testing mechanisms against international agreements. Dr. Harjono SH, M.C.L explained that the testing of an international treaty because can result in the termination of a treaty. In contrast, the termination of the agreement had its procedure as specified by Article 42 paragraph (2) of the Vienna Convention 1969 on International Agreements. On that basis, Dr. Harjono, S.H., M.C.L summed up the need for a limited immunity to the Presidential Decree, which contains the ratification of an international treaty as the object of material testing by the Supreme Court. The same analogy must also apply to the law containing the post-election international agreement of the Constitutional Court. Article 56 paragraph (1) of the Vienna Convention of 1969 affirms that the state can not withdraw from international treaties if no articles allow or regulate unless approved by all contracting states. Article 27 of the 1969 Vienna Convention expressly prohibits States from using their domestic law to justify their failure to carry out their international obligations.

Article 5 paragraph (2) of the ASEAN Charter states, "*Member States shall take all necessary measures, including the effective enforcement of appropriate domestic legislation, to effectively implement the provisions of this Charter and to comply with all obligations of membership."*

Whereas the Petitioners' petition should not be accepted as for a reason there is a fundamental difference between the laws in general and the international treaty ratification law, which are among others:

In the process of deliberation of the draft laws in general, deliberations of the draft law are carefully reviewed against each norm which would become the norm of the bill, which is very open to revision (amended, deleted, or supplemented). At the same time, the Ratification Bill only adopts the agreed norm in an international agreement that does not exist opportunities to be revised. The Parliament and the Governments which discuss together the draft of the ratification bill, can not amend the norms of the International

treaties to be ratified by Indonesia - unless the treaty itself allows for that - as it involves matters agreed upon by the participating countries to discuss and approve International agreements;

The content of the laws generally applies directly to every person in Indonesia, whereas the international treaty is binding only on the state making or the party of the treaty. The material of the treaty is the agreement of the parties (the subject of international law), which makes international treaties based on the principles of international law, such as the principle of pacta sunt servanda.[25]

The denial of this principle of pacta sunt servanda can lead to legal uncertainty and confusion in relations between countries because easily international agreements are offended by using national legal grounds.

The Process of Establishing International Agreements in Indonesia

Each country has its provisions on the validity of an international agreement within its country. Some countries embrace monism, such as the Netherlands, where the enforceability of the treaty will automatically apply without first having to ratify. However, on the other hand, there is also a state that in the formation of international agreements must first be the process of ratification, this is as adopted in Indonesia.

The function of legislation relates to the authority to determine regulations that bind citizens with binding and limiting legal norms. Jimly Asshidiqqie argues that the implementation of functions in the formation of laws involves four forms of activity, namely:[26]

[25] Dian Khoreanita Pratiwi, 2020, "The Authority of the Constitutional Court in Reviewing the Act on the Ratification of International Treaties
l," Jurnal Yudisial Volume 13 No 1, (Jakarta: Komisi Yudisial) p.8

[26] Galuh Candra Purnamasari, 2017 " The Authority of the Constitutional Court in Conducting Judicial Review of International Treaty Laws, "Jurnal Ilmu Hukum: Refleksi Hukum Volume 2 No 1, (Yogya: Universitas Kristen Satya Wacana), p, 4

1. lawmaking initiative
2. discussion of the draft law
3. approval of the ratification of the draft law
4. granting binding approval or ratification of international treaties or agreements and other binding legal documents

In Indonesia, in entering the provisions of international treaties, it has indirectly adopted a special adoption system, namely, where the parliament must approve prior approval to declare attachment to the agreement.[27]

The Ratification Laws pursuant to Article 1 shall contain the provisions of the ratification of an international treaty by containing a statement enclosing a copy of the original or original manuscript along with its translation in the Indonesian language. Whereas Article 2 contains provisions regarding the time of its entry into force.[28] This is, of course, different from the usual law set by the president and the House of Representatives with many article content and formation procedures clearly defined in Law Number 12 of 2011 on the Formation of Legislation. Even in the formation of legislation, the Parliament or the Government must prepare an academic script as a scientific basis for why the law is important.[29]

The process of harmonizing the material content of international treaties with the 1945 Constitution and also the law. Harmonization is an attempt to harmonize, adjust, stabilize and round up the conception of whether an international agreement is contradictory to or not with the 1945 Constitution or law. This harmonization process can at least be carried out in the process of preparing the Academic Paper and in the process of drafting laws and perpres.

Since the enactment of Law no. 12 of 2011, Academic Paper is an obligation that must be fulfilled in every drafting of law and draft of local regulation. The academic manuscript is the text of the research result or the study of law and other research results on a certain problem which can be scientifically justified about the arrangement of the problem in a Draft Law, Draft of Provincial Regulation, or Draft

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[27] Ibid

[28] Jimly Asshiddiqie, Subject to the Act (Jakarta: Rajawali Press, 2010), p. 158

[29] Yuliandri, The Formation of legislation (Jakarta: Rajawali Press, 2010), p. 98.

of Regency / City Regulation as solution to the problem and The legal needs of the community. The academic texts in the drafting of the Rule of Ratification of the International Agreement not only contain the reasons or backgrounds of why Indonesia needs to enter into an international agreement, but the correct and proper Academic Paper is an academic script containing: the background and objectives to be achieved; Theoretical studies and empirical practice; Review and harmonize or harmonize with the 1945 Constitution and related laws and regulations; As well as philosophical, sociological and juridical grounds. The presence of good and correct academic texts at least the readiness of the government and the People's Legislative Assembly when dealing with cases of judicial review of laws enacting international treaties.

Hamdan Zoelva, "that the law of ratification is merely a form of Indonesian binding to an international treaty, and merely as a form of adoption of an international treaty which does not necessarily apply as a law that can bind citizens."

The fundamental difference between the laws in general with the law of ratification, namely:[30]

1. The law applies to every person in Indonesia, whereas the treaty applies to the country as the subject of international law and is subject to the principle of "*pacta sunt servanda."*
2. Implementation of rights and obligations in international treaties does not necessarily apply to every citizen, as set out in Article 5 Paragraph 2 of the ASEAN Charter.

The material of the legislation that its material must be regulated by law containing:[31]

1. Further regulation on the provisions of the 1945 Constitution of the Republic of Indonesia;
2. The order of a law to unite with the Act;
3. Ratification of the International Treaty;
4. Follow-up on the Constitutional Court's decision; and
5. the legal needs of the community

[30] Afidatussolihat, 2014, " Review of the Act on Ratification of the ASEAN Charter by the Constitutional Court", Jurnal Cita Hukum, Volume II, No 1, (Jakarta: Fakultas Hukum UIN Jakarta press), p. 154

[31] Ahmad Yani, Establishment of Responsive Legislation: Notes to Law Number 2011 on the Establishment of Legislation (Jakarta: KonPress, 2013), p. 59.

Maria Farida, Substantively legislation, the contents of the international treaty ratification law differ from the general laws, especially on the part of the discussion and the body. In the Act of ratification consists of only two parts, whereas for the laws in general, the body consists of guidelines, in which many norms are divided into:[32]

1. General provisions
2. Regulated subject matter
3. Criminal provisions (if required)
4. Transitional provisions (if required)
5. Closing Provisions

A dissenting opinion in the decision of the Constitutional Court is a manifestation of independence in the power of the judiciary. Independence in the judicial power is guaranteed in the Constitution of Article 24 of the 1945 Constitution of the Republic of Indonesia junto Judicial Power Law. The dissenting opinion indicates to the reader that a decision of MK a qou is not made in the same consensus voice due to the difference in seeing a problem. Dissenting is a manifestation of the freedom of thought of each judge. In the case of judicial review of this ratification law, the judge has no unanimous vote but is split in the 7: 2 vote composition of 7 (seven) judges of the Constitutional Court 2 (two) of which have different opinions, namely Hamdan Zoelva and Maria Farida.

Hamdan Zoelva's argument refers to the logic of thought used regarding the testing of the Perpu. The plural is known at the time of the Perpu test, in particular the Perpu KPK in the Decision of the Constitutional Court Number 138 / PUU-VII / 2002. However, the perpu as one of the laws and regulations that procedurally only formed by the president in accordance with its constitutional authority, namely Article 22 of the 1945 Constitution of the Republic of Indonesia and in the form of clothing, refers to two types of legislation namely PERPU: Government Regulation in Lieu of Law or government regulation Because the president makes it. However, the material of the charge is the same as the ordinary law only formed in an emergency. So that at the time raises a debate about the rights of the material test from the perpu itself. Finally, in the decision of the Court

[32] Ibid

No. 138 / PUU-VII / 2002, the Constitutional Court mentions that the Perpu becomes part of the Court's authority to test it.

One of the basic arguments of the verdict is that the Constitutional Court sees from the content approach of the Perpu, which is similar to the laws in general but is made in a crunching matters only. Thus referring to the logic of legal thinking, Hamda Zoelva sees that the approach used is a material/content approach that is not regulated formally or the form of its regulation of whether the law or the government's substitution of its law.

Therefore, based on this reasoning, Hamdan Zoelva mentioned that the dress of the ratification of the international agreement is true of the law. But the material content in it is not the same as the law in general. Because the Ratification Law is no more as a notification/statement of attitude from the Indonesian government to bind itself to an international treaty (consent to be bound by a treaty)

There is a fundamental difference between the laws in general and the law's ratification of international treaties, among others:[33]

1. In the process of deliberation of the draft law in general, deliberations of the draft law are thoroughly conducted on every norm which will become the norm of the bill, which is very open for revision, whereas the Ratification Bill only adopts the agreed norm in an international agreement which has no chance to be revised unless there is an exception in The international agreement.
2. The content of the Act generally applies directly to every person in Indonesia, whereas the international treaty is binding only on the making country or the party of the treaty.
3. The exercise of the rights and obligations set out in the treaty does not necessarily apply to every citizen as well as the provisions of the Act in general but must be further implemented in law or other forms of policy.

Based on these considerations, Hamdan Zoelva explained that the granting of the law on the approval of the House of Representatives on international agreements as stipulated in Article 9 and Article 10 of Law Number 24 of 2000 on International Treaties is inappropriate and can even harm Indonesia due to the form of Law -The Indonesian

[33] The decision of the Constitutional Court Number 33 / PUU-IX / 2011 was terminated on February 26, 2013

state will find it challenging to make adjustments or re-review proposals for an international agreement. In addition, Indonesia will have difficulty in performing reciprocal actions when other countries violate international agreements, as it is very likely that a participating country violates the agreement, while Indonesia can not do the same because it would violate Indonesian national law. The approval of the House of Representatives on international agreements as referred to in Article 11 of the 1945 Constitution shall be done only by a form of regular endorsement which is not in the form of a law, similar to the approval of the Parliament on the declaration of war.

According to Maria Farida, Act No. 38 of 2008 on the Ratification of the Charter of the Association of Southeast Asian Nations (Charter Association of Southeast Asian Nations) is the Laws on the ratification of which serves to make the ratification of an agreement made by the government with other countries or international bodies.[34]

Legally, both based on Law Number 10 of 2004 as well as Laws Number 12 of 2011 on the Establishment of Laws and Regulations, the arrangement of the Act of ratification of international agreements are placed in a place different from the laws in general and the legislation - other invites because they have different formats.

Differences in both settings are not without reason. Setting body of laws in general (including the regulation of other legislation) formulated in 98 (ninety-eight) guidelines because of the substance in the body of the Act in general (including the regulation of other legislation) consists of much the norm as outlined Into articles which can then be grouped into 1) General Provisions; 2) Regulated subject matter; 3) Criminal provisions (if required); 4) Transitional Provisions (if required); And 5) Closing Provisions.

This is different from setting the Laws on Ratification of International Treaties are only two guidelines because the substance in the body of the Act consists of only two articles, namely Article 1, which contains the ratification of international agreements and include any statement Attach a copy of the original manuscript as well as its translation in Indonesian, and Article 2 which contains the provisions regarding the date of entry into force of the Act.

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[34] Ibid Constitutional Court Decision Number 33 pp. 207

On the substance in the body of the Act in general, the forming of Laws both House of Representatives and the President will address the overall design of the Act, both preamble, the legal basis, and also of Article 1 until the final chapter, so that if there are An opinion or an improvement they can change it or even eliminate it. This is different from the discussion of the draft Laws on Ratification of International Treaties because both the House of Representatives and the President focus on the ratification issue only, and they can not change the substance of an international treaty that the Government has done to the state (ity) or organization Other international. Thus, the enactment of the law on the Ratification of the International Treaty does not bind every person/society but binds the contracting party only, in accordance with the principle that the treaty binds the parties that make it *(pacta sunt servanda).*

Conclusion

1. The polemic and uncertainty of Indonesia in determining the position of the status of the international treaty in the constitution results in the application of the binding power of a confusing international treaty because, under various conditions, sometimes Indonesia recognizes the norms of international law directly applicable by using and citing various provisions of international instruments. So that indicating Indonesia is a country that embraces the mazhab of monism. On the other hand, sometimes, Indonesia does not impose international treaties as a norm that can be directly increased in its national law so that it requires a process of legal transformation into the national legal so that the provision can have the power of binding (legally binding) or can be said to refer to the teachings of the school of legal dualism. Such conditions can be understood and prevalent in many third world countries (developing countries) that do not yet have a good maturity to examine the relationship between these two legal regimes, i.e., the international legal regime *vis a vis* national law. So that at the bottom of the international treaty arrangement in some constitution that ever applied in Indonesia have not found the red thread. Even the final outcome of the amendment of the 1945 Constitution of 2002 still leaves a problem that needs to be solved sooner.

2. Although the decision of the Court No. 33 / PUU-III / 2013 regarding the examination of the ASEAN Charter Ratification Act was rejected by the Constitutional Court. However, the verdict was rejected, indicating that the Ratification Law is part of the object that the Constitutional Court can test. Although basically, the decision is final as characteristic of the decision of the Constitutional Court, but different opinions indicate that there are still inequalities in the logic and construction of existing law related to this issue. In connection with the analysis of the content of the Ratification Act, two judges then have different views related to it. This is stated in the disagreement section of the a quo decision.

Suggestions

1. Indonesia needs to reinforce its position in seeing international treaties in constitutional law, whether embracing monism with the primacy of international law or monism with the primacy of national law or the dualism of international law. With this clarity, it will provide legal certainty about the behavior of any international agreements that have been ratified in Indonesia itself. So that does not cause polemic and debate that never runs out. In addition, a firm attitude will respond to every international agreement that will be made by the government towards a better and more careful.

2. Indonesia needs to re-examine the use of the form of law in the ratification of international treaties. For the use of the nomenclature of this law causes a variety of interpretations related to the legal consequences caused by the material content of the International Treaty Law is not the same as the law in general. According to the authors of the advice given, Hamdan Zoelva could be one alternative in parse this issue. That is no longer interpreted as the attitude of the government's ratification of a PI by forming the Ratification Law of the PI but as it did when the President declared war only. So no longer cause confusion in looking at the status of the Act PI.

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