RES MILITARIS
REVUE EUROPEENNE D ETUDES EUROPEAN JOURNAL OF MILITARY STUDIES
Social Science Journal

Dynamics And Practices Of The Implementation Of International Treaties In Indonesian Laws

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Abstract:

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

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

Introduction

Indonesia is part of the international community and has obligations from agreements with other countries and international organizational entities. Treaties are a valuable tool for policymakers because they are both legally binding and symbolically powerful signals of commitments of states that ratify (Westren, 2022). It is also possible for international obligations to arise from international customs so that the state has "an opinion of Juris sive necessitates" (Bederman, 2001); it is an established and recognized doctrine among states (Dahlman, 2012). International obligations can also arise from decisions of international organizations or international courts. In the international community, international agreements have a major role in relations between countries or the interaction between other international legal subjects and are necessary in the global order (Merdekawati & Sandi, 2016). For The countries or international legal subjects, international treaties/agreements are the basics of

cooperation between them, regulate various activities in relations between countries (Nešović & Jerotijević, 2018), or resolve various global issues for the sake of mutual survival organized in a forum, namely the international community (Fon & Parisi, 2007; Winarno, 2011).

Carrying out the obligations arising from the international treaties that have been concluded in good faith to international public order (Basaran, 2021) Is a moral and ethical international law that must be carried out by the subjects of international law (Kondykerova, 2013). Besides, the agreement creates obligations and certain rights for the parties who agree. The position or role of international agreements as a source of international law in recent developments is very important considering several reasons, among others, that international agreements guarantee legal certainty because they are made in writing; international treaties regulate important common matters in the relationship of international legal subjects (Rybicki & Ziemblicki, 2020).

The implementation of international obligations explicitly or implicitly does not exist in the constitution, international treaty laws, or other national legislation. Existing regulations are more focused on regulating the making and ratification of agreements (Sidharta, 2018). The regulation is based on customary international law because, until now, Indonesia has not ratified the 1969 Vienna Convention. The Indonesian national legal system also does not clearly describe whether Indonesia adheres to the Monime or Dualism system (Wija Atmaja et al., 2018). This inconsistency impacts the implementation of international obligations and creates legal uncertainty among legislators and law enforcement officials when applying the legal norms of an international treaty.

Previous research, among others, discussed the application of International Treaties by the National Courts, especially the Constitutional Court, the status of International Treaties based on dualism, the nature of the law to ratify international treaties and the legal consequences of constitutional review of the ratification of international treaties (Sukarno, 2016; Dewanto, 2009; Bakar, 2014). Research on the discussion of the repositioning of the political concept of international treaty law to achieve legal order in Indonesia by providing recommendations on the need for revision of article 11 of the 1945 Constitution, revision of Law No. 24 of 2000 and Law No. 12/2011 and other studies discussing the prospect of placing international agreements in the hierarchy of laws in terms of prospects and challenges (Puspitawati & Kusumaningrum, 2015; Aminoto & Merdekawati, 2015). Furthermore, this paper discusses the implementation of international obligations with a normative and juridical approach to discuss the dynamics of law and the application of international obligations in the national legal system in the Indonesian context. This paper aims to discuss the dynamics of implementing policies and practices for implementing international obligations and discuss future policy options.

Research Methods

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

The Existence of International Law in the National Law System

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

According to dualism which is rooted in the theory that the binding power of international law is based on the will of the state, international law and national laws are two legal systems or legal instruments that are separate from one another; it is said that "the essential difference of international law and municipal law consists primarily in the fact that the two systems regulate different subject-matter" (Ian, 1973). The consequence of this flow is the need for “transformation” legal institutions to convert international law into national law based on the laws and regulations applicable to this conversion procedure. By converting these international legal principles into national law, the character will change into a national legal product and to be a fundamental standard of behaviour in contemporary international law concerns (Uçaryılmaz, 2020) and then act as national law and comply with and enter into the order of national laws (Agusman, 2008; Harahap, 2018).

Monism, which places international law and national law as part of a unified legal system, is a consequence of the basic norms of all laws (Agusman, 2017; Dixon, 1993). National law and international law are two aspects of a legal system. It is a universal legal system that binds humans, individually and collectively, so international law can be said to be binding on individuals collectively (states). In contrast, national law binds the individual (Dewi, 2013). If national legislation regulates the same problem, the intended legislation is only an implementation of the intended international law.

International law does not stipulate that the State must choose the doctrine of dualism or monism. Applying this doctrine to state practice illustrates the dynamics underlying its political preferences. The implementation of international obligations by States regarding the application of international law or international treaties in national law and courts. According to the theory of incorporation of International Law, it can automatically be applied to National Law without special adoption. International law is considered to be integrated into National Law. This theory applies to the application of customary international law and universal international law. International law applies within the scope of national law without going through a process of transformation (Barnard, 2015). There are two theories in applying international law, namely, the theory of transformation and the theory of delegation. Based on the theory of transformation, the application is when it has been transformed into National Law formally and substantively. The transformation theory is based on a positivist view that the rules of international law cannot be directly applied, and "ex proprio vigore" is applied in national law. Likewise, on the other hand, international and national laws are completely separate legal systems and structurally different legal systems (Bahri & Hafidz, 2017). A special adoption process or incorporation is required to apply to the National Law. According to delegation theory, the constitutional rules of International Law delegate to each State's constitution the right to determine when and how the provisions of International Treaties apply in National Law.

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

The Dynamic of The Implementation of International Treaties Policy

The State of Indonesia is part of the international community and carries out obligations arising from agreements with other countries and other international entities. Since its independence, Indonesia has signed and implemented 5920 international agreements and deposited 4000 international agreements. The implementation of international obligations is not explicitly regulated in the Indonesian Constitution and regulated about powers given the authority to make international agreements or treaty-making power, which is contained in Article 11 of the 1945 Constitution (Article 11 paragraph 1 of the 1945 Constitution, 4th Amendment):

1. The President, with the approval of the House of Representatives, declares war, makes peace and treaties with other countries;
2. The President, in making other international agreements that have broad and fundamental consequences for the lives of the people related to the burden of state finances and require amendments or the formation of laws, must be approved by the House of Representatives; and
3. Further provisions on international agreements are regulated by law." This amendment to the 1945 Constitution clarifies the status of international agreements in Indonesian National Law, where the provisions regarding International Agreements are stated in Law No. 24 of 2000 concerning International Agreements.

The implementation of international obligations in the national legal system, besides being contained in the 1945 Constitution, is also regulated in Law No.24 of 2000 on International Agreements and Law No.37/1999 on Foreign Relations. The International Treaty Law regulates an agreement in a certain form and name that gives rise to rights and obligations in the field of law. This law was made as a continuation of the Letter of the President of the Republic of Indonesia No.2826/HK/1960, which was no longer in the spirit of reform.

Before 2000 Indonesia made agreements based on conventions in the sense of constitutional law (the practice of constitutional practice based on unwritten laws), which was guided by Presidential Letter No.2826/HK/60 (Roisah, 2015). Even the article that regulates the ratification of international agreements in the International Treaty Law of 2000 is considered contrary to Article 11 of the 1945 Constitution and was sued at the Constitutional Court (MK) in 2018. In the end, there was a new interpretation and change of "phrases" in Article 10 of the 2000 International Treaty Law, which is based on the Decision of Constitutional Court No.13/PUU-XVI/2018. Previously, Article 11 of the 1945 Constitution

did not explain the interpretation of the word "agreement" in more detail. It was only after the issuance of Presidential Letter No.2826/HK/60 that the phrase "agreement" in question did not mean all agreements with other countries but only important agreements with political interests in the form of treaties or treaties. Based on Presidential Letter No.2826/HK/60, referring to Article 11 of the 1945 Constitution, the Government will submit to the DPR to obtain DPR approval only agreements in the form of treaties, while other agreements in the form of agreements are submitted to the DPR only for information.

Based on the explanation of the phrase issued through Presidential Letter No.2826/HK/60, Law No.24/2000 concerning International Agreements was formed, where Article 10 it is explained international agreements that will be ratified when they relate to a) political issues, peace, defence and national security; b) changes in the territory or determination of the boundaries of the territory of the Republic of Indonesia; c) sovereignty or sovereign rights of the state; d) human rights and the environment; e) establishment of new legal rules, and f) foreign loans and grants. However, based on the decision of the Constitutional Court No.13/PUU-XVI/2018 stated, "Article 10 of Law No.24/2000 is contrary to the 1945 Constitution and has no legal force to bind conditionally as long as it is interpreted that only the types of international agreements as mentioned it is in the letters a to f in Article a quo that requires the approval of the DPR so that law ratifies only those types of agreements."

The existence of a decision on Article 10 of Law No. 24/2000 is considered contrary to the 1945 Constitution, especially in Article 11 paragraph (2), which reads, "……. Cause broad and fundamental consequences for people's lives related to the burden of state finances and require changes or the formation of laws", while Article 10 of Law No. 24/2000 only mentions several agreements, while in developments that occur in international relations increasingly beyond the needs of its fulfilment, and still within reasonable limits and influential in the national interest of Indonesia. So Article 10 of Law No. 24/2000 is considered too narrow in meaning and unable to answer all needs directly related to fulfilling the constitutional mandate.

This is then emphasized in Article 10 paragraph (1) of Law No. 12/2011 concerning the Establishment of Legislation which states that the content that must be regulated in forming the law includes further regulations regarding the 1945 Constitution; Law orders to be regulated in Law; ratification of certain international agreements; follow-up to the decision of the Constitutional Court; and the fulfilment of legal needs in society. The fulfilment of legal needs in society must be considered in the content material in forming laws; this is compared to the meaning of Article 10 of Law No. 24/2000, which is considered to have only partial meaning according to what is stated in the sound of the article so that the need for the implementation of other international agreements that continue to grow is very difficult to enter.

International Obligations Practice in Indonesia

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

Some of these regulations, for example, UNCLOS 1982, which Indonesia ratified in Law No. 17/1985, which still requires Law no. 6/1996 concerning Waters; The TRIPs Agreement, which was ratified by Law No. 4/1994, was then implemented through several IPR laws (Copyright, Trademark, Patent, Plant Variety, Industrial Design, Trade Secret and Layout Design of Integrated Circuits). As for implementing international agreements that are realized

through court decisions without implementing legislation, for example, the Ratification of the New York Convention 1958 concerning the Recognition and Implementation of Foreign Arbitration Awards was ratified through Presidential Decree No. 34/1981. The Central Jakarta Court has decided several cases of the implementation of foreign arbitration decisions. Other examples include the 1961 and 1963 Vienna Conventions on Diplomatic/Consular Relations, ratified by Law No. 1/1982. The 2006 MA fatwa regarding the land case of the Saudi Arabian Embassy directly refers to the principle of diplomatic immunity in Article 31 of the 1961 Vienna Convention on Diplomatic Relations as a binding rule in Indonesian national law without relying on the provisions of national legislation.

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

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

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

Kusumaatmadja & Agoes (2013) stated that the implementation of international agreements in domestic law does not need to be a problem because it does not affect many people or if the problem is very technical and has a limited scope. For example, in the

International Treaties Convention, the Diplomatic Relations Convention and the ICAO Convention, if there is an inconsistency between domestic laws that have not been changed, the only thing that will determine whether a country is bound or not is whether the agreement is legally binding or not. However, Indonesian laws require formal implementing regulations as a prerequisite for their effectiveness, but this is usually not the case with agreements that have been adhered to by Indonesia, especially not related to the 1958 New York Convention, which is strictly adhered to by Presidential Decree No. 34/1981.

The practice of implementing international obligations based on the decisions of international courts, for example, is Indonesia's ratification of the New York Convention 1958, ratifying the New York Convention on 5 August 1981 with Presidential Decree Number 34 of 1981. Article 3 of the Convention stated that every participating country must recognize the arbitration decision as binding and enforce it by the rules of procedure in the region (Gautama, 1995). Indonesia carries out this obligation through the provisions of Law Number 30 of 1999 concerning Arbitration. Based on the authority to handle issues of recognition and implementation of International Arbitration Awards is the Central Jakarta District Court. Furthermore, Article 66 states that International Arbitration Awards are only recognized and can be enforced in Indonesian territory if they meet the following conditions that are submitted by an arbitrator or arbitral tribunal in a country with which the Indonesian state is linked to an agreement, either bilaterally or multilaterally, regarding recognition and implementation of International Arbitration Awards (Sunyowati, 2013). The decision falls within the scope of trade law. The decision is not against public order; Obtain executor from the Chairman of the Central Jakarta District Court; If the State of Indonesia is one of the parties to the dispute, it obtains execution from the Supreme Court and then delegates it to the Central Jakarta District Court. This provision was previously regulated in Supreme Court Regulation No. 1 of 1990 (PERMA No. 1/1990), which stipulates that the results of foreign arbitration decisions in countries that also ratify the New York Convention can be implemented by registering the decision at the Central Jakarta District Court. The practice of fulfilling this international obligation implicitly illustrates the doctrine's transformative and cooperative doctrine (Wijaya et al., 2017; Rahmah & Handayani, 2019).

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

provision provides a way for Supreme Court judges to apply international law directly to this landslide case (Butt, 2014).

Several decisions of the Constitutional Court which adopted international treaties, namely, among others: (1) The Judgment of the Material of Law Number 26 of 2000 regarding Human Rights Courts (Law on Human Rights Courts) uses the ICCPR instrument; (2) The Constitutional Court's Decision on Material Examination on Law Number 22 of 997 on Narcotics (Narcotics Law), the Constitutional Court interprets narcotics crimes contained in the Narcotics Law as part of the most serious crimes classified in Article 6 of the ICCPR. The Constitutional Court stated that this interpretation was a systematic interpretation method using the 1969 VCLT; (3) The Constitutional Court Decision of 2003 concerning a petition for reviewing Law Number 16 of 2003 concerning Stipulation of Government Regulations in lieu of Law Number 2 of 2002 concerning Enforcement of Government Regulations in Lieu of Law Number 1 of 2002 concerning the Eradication of Criminal Acts of Terrorism (Terrorism Law), refers to the ICCPR and Rome Statute; (4) The Constitutional Court Decision Number 1/PUU-VIII/2010 concerning the Judicial Review of the Juvenile Court Law, the Constitutional Court stated that all international legal instruments could only be used as comparisons in determining the age limit of children. Still, international legal instruments cannot be used to assess the constitutionality of the child age limit (Sukarno, 2016). Several international treaties that refer to these decisions are international treaties in which Indonesia is not yet a party (state party). However, the agreement norm is a universal norm derived from customary law, so the decision reflects the judge applying the principle of necessitating jurisprudence.

Conclusion

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

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