8th ASIAN CONSTITUTIONAL LAW FORUM
(Conference Proceedings)

Asian Constitutional Law

RECENT DEVELOPMENTS AND TRENDS

Volume 1

ISBN: 978-604-9969-04-1

SÁCH KHÔNG BÁN

ASSOCIATION FOR ASIAN CONSTITUTIONAL STUDIES | VIETNAM NATIONAL UNIVERSITY, HANOI SCHOOL OF LAW

Volume 1

8th ASIAN CONSTITUTIONAL LAW FORUM
(Conference Proceedings)
ASIAN CONSTITUTIONAL LAW
RECENT DEVELOPMENTS AND TRENDS

ASSOCIATION FOR ASIAN CONSTITUTIONAL STUDIES | VIETNAM NATIONAL UNIVERSITY, HANOI SCHOOL OF LAW

8th ASIAN CONSTITUTIONAL LAW FORUM
(Conference Proceedings)

Asian Constitutional Law

RECENT DEVELOPMENTS AND TRENDS

Volume 1

VIETNAM NATIONAL UNIVERSITY PRESS, HANOI

8th ASIAN CONSTITUTIONAL LAW FORUM
(Conference Proceedings)

ASIAN CONSTITUTIONAL LAW
RECENT DEVELOPMENTS AND TRENDS

6th and 7th December 2019, Hanoi, Vietnam

Volume 1

ASSOCIATION FOR ASIAN CONSTITUTIONAL STUDIES
VIETNAM NATIONAL UNIVERSITY, HANOI
SCHOOL OF LAW

8th ASIAN CONSTITUTIONAL LAW FORUM
(Conference Proceedings)

ASIAN CONSTITUTIONAL LAW RECENT DEVELOPMENTS AND TRENDS

6th and 7th December 2019, Hanoi, Vietnam

Volume 1

VIETNAM NATIONAL UNIVERSITY PRESS, HANOI

EDITORIAL BOARD
Prof. Andrew Harding, Prof. Pip Nicholson,
A/Prof. Nguyen Thi Que Anh,
A/Prof.Vu Cong Giao,
Dr. Bui Tien Dat,
Velizar Damyanov

SELECTION COMMITTEE
Prof. Zhu Lijiang,
Dr. Rosana Bratu,
A/Prof. Vu Cong Giao,
Dr. Bui Tien Dat,
A/Prof. Dang Minh Tuan,
Dr. Ngo Minh Huong,
Dr. Mai Van Thang

CONTENTS

Part 1. RECENT DEVELOPMENTS AND TREND IN PUBLIC LAW: A FOCUS IN ASIA

PREFACE 9

1. LEGAL STATUS OF RATIFIED INTERNATIONAL TREATY UNDER INDONESIAN HIERARCHY OF LAW
   Ni'matul Huda, Dodik Setiawan Nur Heriyanto and Alan Fatchan Ghani W. 11
2. DEVELOPMENT OF ADMINISTRATIVE LAW IN GLOBALIZATION AND INTEGRATION PERIOD: A CASE STUDY OF VIETNAM
   Dr. Phan Thi Lan Huong, Dr. Nguyen Huy Binh 21
3. INTERNATIONAL LAW CLAUSES IN THE CONSTITUTIONS OF NORTHEAST AND SOUTHEAST ASIAN STATES: A COMPARATIVE STUDY
   Prof.Lijiang Zhu 33
4. ACCESS TO JUSTICE AND LEGAL EMPOWERMENT FOR WOMEN: THE CASE OF VIETNAM
   Hoang Thi Bich Ngoc, Associate Professor. Vu Cong Giao 49
5. "HEAVENLY PRINCIPLE (天理), STATE LAW (国法, HUMAN SENTIMENT/COMPASSION)人情" AND NUCLEAR POLICY IN EAST ASIA
   Professor Emeritus Akihiko Morita 64
6. LEGAL AID MOVEMENT AND THE DEFENSE OF CONSTITUTIONALISM IN INDONESIA
   Dr.Herlambang P. Wiratraman, Siti Rakhma Mary Herwati 80
7. LABOUR RELATIONS IN VIETNAMESE LAW: HISTORICAL DEVELOPMENT AND PERSPECTIVES
   Nguyen Hoang Ha 97
8. THE RISE AND DYNAMICS OF 'CONDITIONAL DECISION' IN INDONESIAN CONSTITUTIONAL REVIEW
   Dian Agung Wi caksono and Faiz Rahman 110
9. THE CONSTITUTIONALITY OF COMPULSORY LAND ACQUISITION IN VIETNAM: THE SITUATION AND RECOMMENDATIONS
   Associate Professor Phan Trung Hien 130

10. THE "WAR ON FAKE NEWS" AND THE EMERGENCE OF TRUTH AS A PUBLIC INTEREST IN MALAYSIA, SINGAPORE AND THAILAND
Dr. Lasse Schuldt 143

11. THE NATIONAL ASSEMBLY AND THE POST-LEGISLATIVE SCRUTINY ISSUE UNDER THE CONSTITUTION OF VIETNAM
Dr. Nguyen Thi Hong Yen, LLM. La Minh Trang 164

12. THE POLITICS OF JUDICIAL REVIEW IN AFGHANISTAN: 2004-2019
Dr. Shamshad Pasarlay 179

13. CONSTITUTIONALISM IN SHAPING POLITICAL ORDER OF BANGLADESH
Assistant Professor Lokman Hussain 205

14. THE DEVELOPMENT OF VIETNAMESE CONSTITUTIONALISM: FROM MODERN TO CONTEMPORARY ERA
Professor Dao Tri Uc 220

15. WOMEN'S RIGHT TO POLITICAL PARTICIPATION IN VIETNAM: CHALLENGES AND OPPORTUNITIES SET FORTH BY THE 2013 CONSTITUTION
Dr. Nguyen Binh An 238

16. IMPROVING THE ELECTION LAW IN VIETNAM
Dr. Phan Van Ngoc, Professor Phan Trung Ly 249

17. VIETNAM: CONSTITUTIONS AS SIGNALLING INSTRUMENTS
Professor Pip Nicholson, Dr Do Hai Ha 263

18. SECULAR CONSTITUTIONALISM AND ISLAMIC LAW: ON THE SIGNIFICANCE OF RELIGION IN THE DESIGN OF THE INDONESIAN CONSTITUTION
Ahmad Rofii 272

19. KANT'S *RECHTSSTAAT* AND ITS RECEPTION IN JAPAN
Professor Yasuo Hasebe 291

20. THE MEANING OF THE JAPANESE EMPEROR IN JAPAN'S CONSTITUTIONAL SYSTEM
Associate Professor Shohei Eto 308

21. VIETNAM CONSTITUTIONAL LAW: ESTABLISHMENT AND DEVELOPMENT ORIENTATION
Dr. Phan Thanh Ha 317

22. THE EU EXTERNAL POLICY OF PROMOTING HUMAN RIGHTS AND VIETNAM'S LEGALIZATION OF HUMAN RIGHTS
Dr. Trinh Hai Yen 329

23. LAW ON THE RIGHTS OF JUVENILES IN CRIMINAL PROCEEDINGS: INTERNATIONAL AND VIETNAMESE PERSPECTIVES
Dr. Vu Thi Thu Quyen 342

24. LOCAL GOVERNMENT IN VIETNAM (1946 - 2000) IN COMPARISON WITH CHINA'S AND THE UNITED STATES' SYSTEMS
Pham Quang Huy 356

25. LIMITATION CLAUSE OF HUMAN RIGHTS IN THE 2013 VIETNAMESE CONSTITUTION
Le Quynh Mai 369

26. RIGHTS AS TRUMPS AND ORDER AS COUNTER-TRUMPS: RE-EXAMINING FREE SPEECH THEORY IN AN ERA OF FEAR, HATE AND LIES
Professor Thio Li-ann 380

27. POLICY ON ENFORCEMENT OF IMPRISONMENT SENTENCES IN VIETNAM AND CHINA - FROM THE PERSPECTIVES OF TRADITION, CONSTITUTION AND STATUTORY LAW
Dr. Le Lan Chi 405

28. DECENTRALISATION AND LOCAL GOVERNMENT AUTONOMY IN SOUTHEAST ASIA
Professor Andrew James Harding 419

29. DECONCENTRATION AND DELEGATION OF AUTHORITY IN VIETNAM AFTER THE 2013 CONSTITUTION
A/Prof Nguyen Hoang Anh 435

30. INDEPENDENCE OF JUDICIARY AND JUDGES AND TECHNIQUES OF INTERPRETATION IN JAPAN
Professor Yuichiro Tsuji 448

31. ENSURING THE RULE OF LAW BY THE COURT SYSTEM IN VIETNAM AFTER THE RATIFICATION OF THE 2013 CONSTITUTION: CHALLENGES AND PROSPECTS
A/Prof. To Van Hoa, Dau Cong Hiep, LLM., Dr. Le Thi Thu Mai 468

32. ANALYSING THE DIFFICULTY OF CONSTITUTIONAL REFORM IN THE PHILIPPINES
Michael Henry Yusingco 482

33. LEGISLATIVE REFORMATORY DEVELOPMENTS IN MALAYSIA: A DECADE IN REVIEW
Dr. Nizamuddin Alias 498

34. HUMAN RIGHTS EDUCATION IN THE ARMY: REFLECTION FROM VIETNAMESE CONTEXT
Dr. Nguyen Van Vi 506

35. LEGAL EDUCATION FOR HIGH SCHOOL STUDENTS IN VIETNAM: AN OBSERVATION FROM THE CONTEXT OF HANOI CITY
Dr. Nguyen Thi Thu Huong, Dr Mai Thi Tuyet, Dr Duong Van Khoa 518

PREFACE

The Asian Constitutional Law Forum (ACLF) is recognised as a venue for distinguished scholars and new academics to share their ideas on Asian constitutional law and to expand collabourative research networks. The Forum has been held eight times at prestigious universities in Asia: Seoul National University in 2005, Nagoya University in 2007, National Taiwan University in 2009, University of Hong Kong in 2011, Tsinghua University in 2013, National University of Singapore in 2015, Thammasat University in 2017, and Vietnam National University, Hanoi (VNU) in 2019.

The 8th International Conference of the Asian Constitutional Law Forum ("Asian Constitutional Law: Recent Developments and Trends") provided a scholarly platform for the latest development in the field of constitutional law as well as a valuable opportunity to enable the exchange of experience and the promotion of international collabouration in this field. This was great for the VNU School of Law to host this globally recognised and prestigious academic forum. The Forum's general theme "Asian Constitutional Law: Recent Developments and Trends" covers the following sub-themes: 1) Developments in constitutional law in Asia in the context of globalization and regional cooperation; 2) Developments of administrative law in Asia in the context of globalization and regional cooperation; 3) Debates and trends in constitutionalism in Asia; 4) Universalism and particularism in Asian constitutional systems; 5) Constitutional review in Asia: Debates and trends; 6) Analysing models of developmental states in Asia; 7) Asian constitutional and administrative laws and the global challenges of terrorism, economic migration, human trafficking, environmental degradation, and other non-traditional security challenges.

The Forum welcomed over 250 scholars from almost 30 countries and 4 continents across the world. The Organising Committee received over 160 abstracts and selected over 100 papers to be presented at the conference. Full papers submitted for the Proceedings were subject to scholarly peer-review in several rounds by experts, the Selection Committee, and the Editorial Board. After rigorous peer-review, revision and editing processes, the Editorial Board and the Selection Committee accepted 78 papers for publication in the 8th ACLF Proceedings book. The Proceedings book comprises three volumes: Volume 1 - Recent Developments and Trends in Public Law: A Focus in Asia; Volume 2 - Public Law in Vietnam: Comparative Contexts; and Volume 3 - Thematic Workshop "Constitutional Rights in ASEAN".

We would like to acknowledge the success of the 8th ACLF and the publication of the Proceedings book by thanking the excellent contributions by and efforts of participants, authors, members of the Organising Committee, volunteers, reviewers, the Selection Committee, and the Editorial Board. We would like especially to thank Professor Andrew Harding, Chair of the Association for Asian Constitutional Studies, who has created this opportunity and always been on the journey with us in

organising this Forum. We also would like sincerely to thank Professor Pip Nicholson, Dean of the Law School, University of Melbourne for her support both technically and financially. Thank you also to Dr. Bui Ngoc Son (University of Hong Kong), Professor Sriprapha Petcharamesree (Mahidol University of Thailand), Professor Lijiang Zhu (China University of Political Science and Law, Beijing), Dr. Rosana Bratu (University of Sussex, UK), and Velizar Damyanov (the University of Tsukuba, Japan) for your very timely and valuable support.

In Vietnam, we are grateful for sponsorship from the National Foundation for Science and Technology Development (NAFOSTED) of Ministry of Science and Technology and Asia Research Centre (ARC) of Vietnam National University Hanoi. With great appreciation, we would also like to thank the Australian Embassy Hanoi and Aus4skills for supporting the Thematic Workshop on Constitutional Rights in ASEAN within this Forum. We are also thankful for supports of the Vietnam National University Hanoi, other state agencies and La Thanh Hotel who assisted with organising this event. Last but not least, we express our thanks to the Vietnam National University Press, Hanoi for the editing and publishing this Proceedings Book.

Hanoi, April 2020

The 8th ACLF Organising Committee and Editorial Board Hanoi

LEGAL STATUS OF RATIFIED INTERNATIONAL TREATY UNDER INDONESIAN HIERARCHY OF LAW

Ni'matul Huda[1], Dodik Setiawan Nur Heriyanto[2], and Allan Fatchan Ghani W[3].

Abstract

Indonesia is one of the active country players at international relations to response with the globalization. As a result, Indonesia also ratified many important international treaties. The 1945 Constitution required mutual consent with the legislative members for the Indonesian government to ratify a treaty. Product of mutual consent is statutory law (*Undang-Undang*). However, Law No. 12 of 2011 does not clearly regulate the status of that statutory law under the hierarchy. That statutory law under the same hierarchy of other statutory laws with no connection with treaty ratification. With this position, statutory law also can be reviewed and/or even annulled by the Constitutional Court when its content contradicts with the spirit of the Constitution. Moreover, many treaties require non-reservation which the reduction of the substance will preclude state obligations. Thus, with normative legal methodology, this study is aimed to analyse the legal status of the ratified treaty under the Hierarchy of Law in Indonesia. One of the important results of this study require the government to amend the Law No. 12 of 2011.

Keywords: *Treaty, Ratification, Hierarchy.*

Introduction

As a form of Indonesia's active participation in international relations, Indonesia has ratified many international agreements both bilateral and multilateral. According to Law Number 24 of 2000 concerning International Treaties[4], in order to take effect in Indonesia, the ratification of international agreements that have been agreed must be ratified in the form of a Law or Presidential Decree. Although in Law Number 12 of 2011 concerning Formation of Regulations and Regulations, especially Article 7[5] put the Law into the hierarchy and do not provide differentiation/classification of the Act, but experts are still debating the existence of the classification of the Act.

Experts say that it must be distinguished between the Law in general and the Law on the Ratification of International Treaties. Bagir Manan said that the Law on the Ratification of

1 Professor of Constitutional Law, Faculty of Law, Universitas Islam Indonesia. Email: 904100108@uii.ac.id.

2 Lecturer, Faculty of Law, Universitas Islam Indonesia. Email: dodiksetiawan@uii.ac.id.

3 Lecturer, Faculty of Law, Universitas Islam Indonesia. E-mail: allanfgwardhana@uii.ac.id.

4 Law No. 24 of 2000 on International Treaty, art. 9 (2).

5 Law No. 12 of 2011 on the Legal Drafting of Law, art. 7.

International Treaties was included in the formal law (*formele wet*).[1] For this reason, this Law does not give birth to rights and obligations. For example, in the Law concerning the State Budget which only raises rights and obligations for government administrators only. The general public is not bound by this State Budget Law.

Differences in interpretation related to the differentiation of this Act become the main reason for researchers to conduct a study related to the position of the Law resulting from the Ratification of International Treaties. It is very important to study whether the Ratification Act can be aligned with the Act in general.

Research Method

This research uses normative research methods. The approach used is the statutory approach. This study will examine the theory of legislation, especially related to the hierarchy of laws and regulations in Indonesia so that it can provide an in-depth analysis of the position of the Act on Ratification in the hierarchy of laws and regulations in Indonesia. The legislative approach is very relevant to be used in this study to find out the concepts and the system of legislation in Indonesia.

Monism and Dualism Debate

Based on the current development on international law, there are two theories that have conceptual differences in interpreting the relationship between international law and national law. The two theories are the theory of monism and dualism. If explored in depth, the debate between the two theories which took place since the 17th century[2] put more emphasis on the issue of which is higher between international law and national law, or both have the same position, or which is superior when conflicts occur between the two[3].

According to the theory of monism, international law automatically becomes a unity with the national legal system. International law is considered equivalent to national law. International law can be applied directly without the need for a more specific adoption process in the national legal system. Hans Kelsen[4] argues that there is no need to distinguish between national law and international law, because: the objects of the two laws are the same, namely individual behaviour; both legal methods contain orders to be obeyed; and both are manifestations of only one conception of law or both are part of the same unit as the legal science unit.

In its development, there was a conflict between scholars who understood monism, so that the theory of monism was split into two parts: the monism primacy of national law and the prima monism primacy of international law.

1. Monism primacy of national law

According to this theory, the source of international law comes from national law. National law contributes to the formation of international law. Some of the principles used in international law are

1 Constitutional Court Decision No. 13/PUU-XVI/2018, pp.154-155.

2 Donald R. Rothwell, et.al., *International Law: Cases and Materials with Australian Perspectives,* (Cambridge University Press, Cambridge, 2010), 161.

3 Gerald Fitzmaurice, "The General Principles of International Law Considered from the Standpoint of the Rule of Law", (1957) 92 Receuil des Cours 1, 5.

4 Hans Kelsen, *Principles of International Law,* 2nd edition, (Rinehart and Company, New York, 1966), 433-488.

sourced from national law such as *pact sunt servanda* principle, *nebis in idem*, and the principle of legality. Occurs, if there is a conflict between, then national law must take precedence. The weakness of this theory has no recognition of international law. International law needs recognition to be effective.

The view that national law is superior to international law tends to be considered very abstract and even impossible[1]. In international court practice, international law is the main source of law. National law can be used as a basis for decisions of international courts only if the rules of national law have been regulated in international treaties or are part of customary international law.

2. Monism primacy of international law

According to this theory, the source of national law comes from international law. Wilhem Kaufmann also believes that international law with national law is in a unified legal system where international law is superior[2]. Therefore, if there is a conflict between the two, international law must take precedence. International law applies not only to states but also directly binding to individuals and domestic courts. Lauterpacht argued that placing international law higher than national law will guarantee the rights of every individual[3]. The weakness of this theory is the fact that basically international law is mostly sourced from national law (such as the principles and rules of law) and also from state practices.

The theory of dualism distinguishes that international law and national law each stand alone and differ from each other. Triepel[4] including international law scholars who have the view that international law and national law are naturally two separate legal systems. The first difference can be seen from: the subject of law where the subject of international law is the state while the subject of national law is the individual. The second difference can be seen from the source of law where the source of international law is the joint will of the states (*gemeinwille*) while the source of national law is the will of the state itself. The third difference can be seen from the implementation, national law has a more perfect integrity (subordinate) compared to international law (coordinate). To be able to apply international law in the national legal system, it is necessary to have a transformation process, and vice versa.

Anzilotti[5] argued that the difference between international law and national law can be seen from the underlying principles. National law is based on the principle that rules made by governments and legislative bodies must automatically be obeyed by individuals. Whereas international law is based on the principle of *pacta sunt servanda* where an international law must be obeyed when a country has agreed to abide by the rule.

In its development, the theory of monism and the theory of dualism have weaknesses. The real weakness is that basically a diverse legal system among many countries is not possible to be directly

1 D.P.O'Connell, *International Law,* Volume 1, (Stevens and Sons, London, 1965), 42.

2 Wilhelm Kaufmann, *Die Rechtskraft des Internationalen Rechts und das Verhältnis der Staatsgesetzgebung und der Staatsorgane zu demselben,* 1989. Cited from Damos Dumoli Agusman, *Treaties Under Indonesian Law: A Comparative Study,* (Remaja Rosdakarya, Bandung, 2014), 67.

3 H.Lauterpacht, *International Law: Collected Papers,* (Cambridge, 1970), 151-177.

4 Cited from J. G. Starke, 'Monism and Dualism in the Theory of International Law', (1936) 17 British Yearbook of International Law 66, 66-68

5 Cited from John O'Brien, *International Law,* (Cavendish Publishing Limited, London, 2001), 109.

suited to using the theory of monism or the theory of dualism. So, there is mixed theory. This theory is divided into three types: transformation theory, delegation theory, and harmonization theory. What is meant by transformation theory or special adoption theory is that the rules of international law can apply and be respected as national legal norms if they have gone through a process of transformation in accordance with the national legal system of a country[1]. This transformation process opens up opportunities for each country to make adjustments to international legal arrangements so that they are suitable and in accordance with their national laws. Each country has a model of transforming international law into national law. The *Filartiga* Case[2] is an example of the transformation model undertaken by the United States which adopts customary international law relating to human rights into the US legal system[3]. In this case, the United States Federal Court has the authority to sentence non-American citizens who commit crimes committed outside the United States and enter into violations of international law or any international treaty to which the United States is a party to ratification. This case became a source of precedent in many cases in the United States and later became the source of the birth of the Alien Tort Statute.

According to delegation theory, international law gives the state authority when international law provisions apply in national law and how the provisions in international law can be made and apply to national law[4]. Therefore, there is no need for special rules in the form of laws that specifically regulate what will be adopted from international law to the national legal system. Delegation theory emphasizes the existence of a state constitution which specifically regulates which international laws can be applied in their region.

The rapidly developing international law now gives authority to countries and international organizations whose authority is higher than the institution that forms a country's domestic legislation.[5] International law, especially international treaties agreed by the state, mandates international institutions or bodies to make decisions or take certain actions against a country. This development is then often referred to as the international delegation theory[6]. However in practice, theory of international delegation is in direct contact with and contradicts with state sovereignty[7].

According to the theory of harmonization, international law and national law run dynamically, complementary and complementary. Both international law and national law are in harmonious relations.

Indonesia is in position of ambiguity in practicing of the theories. For customary international law, the existing Indonesian law does not show whether we directly recognize the custom or not.

---

1 Ignaz Seidl-hohenveldern, 'Transformation or Adoption of International Law into Municipal Law', (1963) 12 (1) The International and Comparative law Quarterly 88, 88.

2 *Filartiga v. Pena-Irala,* 630 F2d 876 (2d Cir 1980).

3 Paul R. Dubinsky. 'United States', dalam Dinah Shelton, *International Law and Domestic Legal Systems,* (Oxford University Press, Oxford, 2011), 646.

4 Mohd. Burhan Tsani, 'Status Hukum Internasional dan Perjanjian Internasional dalam Hukum Nasional Republik Indonesia (dalam Perspektif Hukum Tata Negara)' in Directorate General of Law and International Treaty, Indonesian Ministry of Foreign Affairs, *Perjanjian Internasional dalam Teori dan Praktek di Indonesia,* (Ministry of Foreign Affairs, Jakarta, 2008), 2-4.

5 John Yoo, 'UN Wars, US War Powers', (2000) 1 Chinese Journal of International Law 355, 361.

6 Oona A. Hathaway, 'International Delegation and State Sovereignty', (2008) 71 Law and Contemporary Problems 115.

7 Vienna Convention on the Law of Treaties (VCLT) (1969), art. 1.

Though, Indonesia has customary law as part of the living law[1], but it does not mean that international customary law also automatically applied in Indonesia. In certain situations, Indonesia has adopted certain customary international law. However, those adoption is made because of ratification process. For example, Indonesia recognizes the customary rules related to the sea limitation, rights of innocent passage for foreign ships that across Indonesian territorial waters, and other related practice. This recognition has been made because at the same time Indonesia ratified the United Nations on the Law of the Sea (UNCLOS) in 1985.

With regard to the international treaty, Mochtar Kusumaatmadja argued that Indonesia has applied monism theory with international law primacy.[2] Article 22a of Algemen Bepalingen could be the best example in this regard since this provision regulates that Indonesian judges shall adhere to the international law measures.[3] However, in other situation, Indonesia has also applied dualism theory in which under the Law Number 24 of 2000 regulates that in order international treaty to be applied in Indonesia, thus it needs ratification process.

The Hierarchy of Indonesian Law

The existing regulatory system in Indonesia is basically in line with the teachings given by Hans Kelsen[4] regarding *stufenbau des recht* or the hierarchy of law where each rule of law is a tiered arrangement and every lower rule of law is derived from the higher principle. The higher rules are fundamental, abstract, general, or hypothetical. These rules proceed systematically from things that are abstract to positive laws that are individual.

In Indonesia, the 1945 Constitution occupies the highest level in the national legal system so that it becomes the foundation for the national legal system. As a consequence, given the right to test a statutory regulation of the state constitution to guarantee the existence of the constitution as a fundamental law for a legal system.[5]

According to Article 7 of Law Number 12 of 2011 concerning the Formation of Regulations of Laws, the hierarchy of laws and regulations in Indonesia is regulated from the highest to the lowest being: the 1945 Constitution, the Decree of the People's Consultative Assembly, the Laws / Regulations Government In lieu of Laws, Government Regulations, Presidential Regulations, Provincial Regional Regulations, and Regency / City Regulations. Statutory regulations other than those regulated in Article 7[6] remains deemed binding, remains recognized, and has binding legal force insofar as it is ordered by higher-level legislation or is formed based on authority.

---

1 Franz and Keebet Von Benda-Beckmann, 'The Social Life of Living Law in Indonesia', in Marc Hertogh, *Living Law, Reconsidering Eugen Ehrlich,* (Hart Publishing, Oxford and Portland Oregon, 2009), 179.

2 Mochtar Kusumaatmadja and Etty R. Agoes, *Pengantar Hukum Internasional,* (PT. Alumni, Bandung, 2003), 55.

3 *Ibid.*

4 Hans Kelsen, *General Theory of Law and State,* (Russell and Russell, New York, 1973), 112-113.

5 K. C. Wheare, *Modern Constitution,* (Oxford University Press, London, 1971), 2.

6 Jenis peraturan selain yang diatur dalam Pasal 7 meliputi: peraturan yang ditetapkan oleh Majelis Permusyawaratan Rakyat, Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, Mahkamah Agung, Mahkamah Konstitusi, Badan Pemeriksa Keuangan, Komisi Yudisial, Bank Indonesia, Menteri, badan, lembaga, atau komisi yang setingkat yang dibentuk dengan Undang-Undang atau Pemerintah atas perintah Undang-Undang, Dewan Perwakilan Rakyat Daerah Provinsi, Gubernur, Dewan Perwakilan Rakyat Daerah Kabupaten/Kota, Bupati/Walikota, Kepala Desa atau yang setingkat. Law No. 12 Year 2011, art. 8.

The statutory regulation as regulated in Article 7 of Law No.12 of 2011 shows the extent to which the aforementioned regulations have a higher position than the forms mentioned below. The regulation hierarchy also contains legal consequences that the form of regulations or decreases that are of a lower level may not contain material that is contrary to the material contained in a higher form of regulation[1].

There are several principles that must be considered in order to maintain legal order and legal certainty in a national legal system. These principles, among others:

1. Legislation that has a higher status can be used as a basis or legal basis for lower laws and regulations.
2. Lower level legislation must be sourced or have a legal basis from a higher-level legislation.
3. The contents or contents of the lower laws and regulations must not deviate or conflict with the higher-level laws and regulations.
4. A statutory regulation can only be revoked or replaced or amended by a higher regulation or at least the equivalent.
5. Similar laws and regulations when regulating the same material, the latest regulations must be enforced, even if it is not explicitly stated that the old regulation was revoked. In addition, more specific regulations must take precedence over more general laws and regulations.

There are legal mechanisms that are regulated to ensure that these principles are not distorted or violated. Specifically, to guarantee the existence of the 1945 Constitution, the Constitutional Court is given the authority to exercise judicial authority[2] as a legal test of the 1945 Constitution[3]. For this reason, the Constitutional Court has the authority to make the law as an object of justice, which if the law is proven to be contrary to the constitution, then part or all of the contents of the law can be cancelled or no longer valid. So, it is hoped that there will be consistency in the application of basic rules in the constitution into the law. Finally, the statutory provisions under the law will also be consistent in implementing the constitution[4].

Legal Position of Law on Treaty Ratification

The 1945 of Indonesian Constitution regulated that President with the approval from the House of Representative may declare war, make peace, and conclude treaties with other countries. The same article in the Constitution also regulated that the President in making other international agreements that will produce an extensive and fundamental impact on the lives of the people which is linked to the state financial burden, and/or that will require an amendment to or the enactment of a law, shall obtain the approval the approval of the House of Representative. With this constitutional basis, we

1 Nimatul Huda, *Negara Hukum, Demokrasi dan Judicial Review,* (UII Press, Yogyakarta, 2005), 46.

2 Undang-Undang Dasar 1945, Pasal 24 (2) berbunyi sebagai berikut: Kekuasaan kehakiman dilakukan oleh sebuah lembaga Mahkamah Agung dan badan peradilan yang berada di bawahnya dalam lingkungan peradilan umum, lingkungan peradilan agama, lingkungan peradilan militer, lingkungan peradilan tata usaha negara, dan oleh sebuah Mahkamah Konstitusi. The 1945 Indonesian Constitution, Fourth Amandment, art. 24 par. (2).

3 *Ibid.,* art. 24 C par. (1).

4 Mohammad Mahfud MD, *Konstitusi dan Hukum dalam Kontroversi Isu,* (Rajawali Press, Jakarta, 2010), 257-258).

could conclude that treaties which meets certain conditions shall be made with the approval from the House of Representative. As a consequence of the approval from the House of Representative, the ratification of treaty by Indonesia must be in the form of statutory laws or act (*undang-undang*).[1] This means that the House of Representative has an important role to agree or to refuse the government measures to be bound with the certain international treaties.

The constitution is silent to regulate about the position of international law under domestic legal system. It is indeed recognizing the existence of international treaty but it does not specifically mention about the legal status of treaty under domestic legal system. This has been caused a long debate among Indonesian legal scholars. Based on the Law No. 24 of 2000, to be ratified as statutory law or act, treaties have to meet with certain conditions, such as:

a. political, peace, defense, and state security issues;

b. change of territory or determination of the territory of the Republic of Indonesia;

c. sovereignty or sovereign rights of the state;

d. the establishment of new legal rules; and

e. foreign loans and/or grants.[2]

Other than those conditions, treaties ratified by Indonesia must be In the form of Presidential Decree (*Keputusan Presiden*).[3] The Presidential Decree is not relevant since the enactment of the Law No. 10 of 2004 on Legal Drafting *jo*. Law No. 12 of 2011. The character of the Presidential Decree is individual, concrete, and only valid once its completed (*enmahlig*). This is in line with the substance of the treaty in general. Meanwhile the character of Presidential Regulation is general, abstract, and applies continually (*dauerhaftig*).[4] Moreover, the contents of the Presidential Regulation contain material ordered by the Law, material to implement government regulations, or material to carry out the administration of governmental power.[5] Thus, post 2010, ratification of treaty may also in the form of Presidential Regulation (*Peraturan Presiden*).

From the abovementioned explanation, treaty under the Indonesian hierarchy of law is could be in the form of act and Presidential Regulation. As a consequence of the, the Constitutional Court has the authority to review the act which contains ratification of treaty[6] and the Supreme Court has the authority to review the Presidential Regulation which regulates the treaty ratification.[7]

Legal Problems

The researchers at least find three substantial legal problems in relation with the legal position of a treaty under the Indonesian legal system. First, the authority of the Constitutional Court and the

1 Law No. 24 of 2000, art. 9 par. (2).

2 *Ibid,* art. 10.

3 *Ibid,* art. 9 par. (2).

4 Sirajuddin, Faitkhurrohman, Zulkarnain, *Legislatif Drafting Pelembagaan Metode Partisipatif dalam Pembentukan Peraturan Perundang-undangan,* (Setara Press, Malang, 2016), 78.

5 Law No. 12 of 2011, art. 13.

6 The 1945 Constitution, art.24 C par. (1).

7 *Ibid*, art.24 A par. (1). It mentioned that "The Supreme Court shall have the authority …. to review ordinances and regulations made under any law against such law, and shall possess other authorities as provided by law."

Supreme Court to review the treaty ratification in Indonesia disregard the long process of negotiation between the Indonesian government before ratifying international treaty. The ruling of article 9 paragraph (2) of the Law No. 24 of 2000 reduced the normative basis under the article 11 paragraph (2) of the 1945 Constitution. The Constitution mandates that treaty must be under with the approval of the House of Representative or at least in the form of act. However, the Law No. 24 of 2000 opens the form of ratification could be with statutory act or Presidential Regulation with no need for House of Representative approval. Moreover, by giving the power of the Court to review the statutory act on treaty ratification, this will affect the Indonesian commitments to uphold the friendly relations with the other state. Indonesia will also receive direct and indirect sanctions toward the unilateral withdrawal of a treaty[1] depending on the treaty obligations as mutually agreed between the parties.[2]

Second, the Law No. 24 of 2000 has tenuous side in some of its provisions, for example: the legal procedures in the reviewing process of the treaty before ratification (including on how far of the role of the House of Representative in reviewing the treaty) and the legal measures on how treaty should be in form of act which needs House of Representative approval. The absence of the legal measures implicates the ambiguity in practice. The ASEAN Trade in Goods Agreement[3] and the ASEAN Comprehensive Investment Agreement[4] ratified by Indonesia with the form of Presidential Regulation. All of the trade agreements were ratified with the Presidential Regulation[5]. These agreements actually have met the criteria of produce an extensive and fundamental impact on the lives of the people which basically regulated under the constitution.

Third, the legal position of treaty under Indonesian legal system needs to be fixed as well as for the customary international law. Even if the treaty ratification must be in the form of act, but the law must govern on how the substance of the treaty is embodied and enforced within in the Indonesian jurisdiction. With this regard, the Law No. 24 of 2000 shall be amended to provide more detail provision on the structure and drafting of the law on treaty ratification. The treaty must also assist with the translation under Indonesian language in order to be easily understood by the citizens.

Conclusion

As the actor in international relations, Indonesia has the right to be bound by international treaty. However, there has been an ambiguity on the treaty ratification and its legal position under the Indonesian legal system. The current Law No. 24 of 2000 provision that categorized two legal forms of treaty ratification (Act and Presidential Regulation) inconsistent with the 1945 constitution. This study recommends that the Law No. 24 of 2000 must be amended by considering these three important highlights: legal measures to specify the general criteria of the treaty being implemented in

1 Cindy A. Cohn, Note, "*Interpreting the Withdrawal Clause in Arms Control Treaties*", 10 MICH. J. INT'L L. (1989) 849, 853-854. F. Perez, "*Survival of Rights under the Nuclear Non-Proliferation Treaty: Withdrawal and the Continuing Right of International Atomic Energy Agency Safeguards"* (1994) 34 VA. J. INT'L L. 749, 751.

2 John K. Setear, "*An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*" (1996) 37 HARV. INT'L L.J. 139, 146-147. Richard Hyland, "*Pacta Sunt Servanda: A Meditation"* (1994) 34 VA. J. INT'L L. 405, 405-406.

3 Presidential Regulation No. 2 of 2010 on the Ratification of The ASEAN Trade in Goods Agreement.

4 Presidential Regulation No. 49 of 2011 on the Ratification of the ASEAN Comprehensive Investment Agreement.

5 'Jokowi Ratifies Seven Trade Agreements' (*The Jakarta Post*, 14 November 2018) <https://ekon.go.id/berita/print/indonesia-akan-meratifikasi-7.4348.html> accessed 12 December 2019.

Indonesia under the constitution, House of Representative approval mechanism, templates or specific drafting for the effective application of treaty at national level.

Acknowledgement

This paper and the research behind it would not have been possible without the exceptional support from the Indonesian Ministry of Research, Technology, and Higher Education under the Basic Research scheme fund and agreement number: 005/DirDPPM/70/DPPM/PEN. DASAR-KEMENRISTEKDIKTI/III/2019.

Bibliography

Agusman, Damos Dumoli, *Treaties Under Indonesian Law: A Comparative Study,* (Remaja Rosdakarya, Bandung, 2014)

Cohn, Cindy A., Note, "*Interpreting the Withdrawal Clause in Arms Control Treaties*", 10 MICH. J. INT'L L. (1989) 849

Constitutional Court Decision No. 13/PUU-XVI/2018

Dubinsky, Paul R.. 'United States', dalam Dinah Shelton, *International Law and Domestic Legal Systems,* (Oxford University Press, Oxford, 2011)

Filartiga v. Pena-Irala, 630 F2d 876 (2d Cir 1980)

Fitzmaurice, Gerald, "The General Principles oh International Law Considered from the Standpoint of the Rule of Law", (1957) 92 Receuil des Cours 1.

Franz and Benda-Beckmann, Keebet Von, 'The Social Life of Living Law in Indonesia', in Marc Hertogh, *Living Law, Reconsidering Eugen Ehrlich,* (Hart Publishing, Oxford and Portland Oregon, 2009)

Hathaway, Oona A., 'International Delegation and State Sovereignty', (2008) 71 Law and Contemporary Problems 115

Huda, Nimatul, *Negara Hukum, Demokrasi dan Judicial Review,* (UII Press, Yogyakarta, 2005)

Hyland, Richard, "*Pacta Sunt Servanda: A Meditation"* (1994) 34 VA. J. INT'L L. 405

'Jokowi Ratifies Seven Trade Agreements' (*The Jakarta Post*, 14 November 2018) <https://ekon.go.id/berita/print/indonesia-akan-meratifikasi-7.4348.html> accessed 12 December 2019

Kaufmann, Wilhelm, *Die Rechtskraft des Internationalen Rechts und das Verhältnis der Staatsgesetzgebung und der Staatsorgane zu demselben,* 1989

Kelsen, Hans, *General Theory of Law and State,* (Russell and Russell, New York, 1973)

Hans Kelsen, *Principles of International Law,* 2nd edition, (Rinehart and Company, New York, 1966)

Lauterpacht, H., *International Law: Collected Papers,* (Cambridge, 1970)

Law No. 24 of 2000 on International Treaty

Law No. 12 of 2011 on the Legal Drafting of Law

Mahfud MD, Mohammad, *Konstitusi dan Hukum dalam Kontroversi Isu,* (Rajawali Press, Jakarta, 2010)

O'Brien, John, *International Law,* (Cavendish Publishing Limited, London, 2001)

O'Connell, D.P., *International Law,* Volume 1, (Stevens and Sons, London, 1965).

Perez, F., "*Survival of Rights under the Nuclear Non-Proliferation Treaty: Withdrawal and the Continuing Right of International Atomic Energy Agency Safeguards"* (1994) 34 VA. J. INT'L L. 749

Rothwell, et.al., Donald R., *International Law: Cases and Materials with Australian Perspectives,* (Cambridge University Press, Cambridge, 2010)

Seidl-hohenveldern, Ignaz, 'Transformation or Adoption of International Law into Municipal Law', (1963) 12 (1) The International and Comparative law Quarterly 88

Setear, John K., "*An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*" (1996) 37 HARV. INT'L L.J. 139

Starke, J. G., 'Monism and Dualism in the Theory of International Law', (1936) 17 British Yearbook of International Law 66

Sirajuddin, Faitkhurrohman, Zulkarnain, *Legislatif Drafting Pelembagaan Metode Partisipatif dalam Pembentukan Peraturan Perundang-undangan,* (Setara Press, Malang, 2016)

Tsani, Mohd. Burhan 'Status Hukum Internasional dan Perjanjian Internasional dalam Hukum Nasional Republik Indonesia (dalam Perspektif Hukum Tata Negara)' in Directorate General of Law and International Treaty, Indonesian Ministry of Foreign Affairs, *Perjanjian Internasional dalam Teori dan Praktek di Indonesia,* (Ministry of Foreign Affairs, Jakarta, 2008).

Vienna Convention on the Law of Treaties (VCLT) (1969)

Wheare, K. C. *Modern Constitution,* (Oxford University Press, London, 1971)

Yoo, John, 'UN Wars, US War Powers', (2000) 1 Chinese Journal of International Law 355.

NHÀ XUẤT BẢN
ĐẠI HỌC QUỐC GIA HÀ NỘI
16 Hàng Chuối - Hai Bà Trưng - Hà Nội

Giám đốc - Tổng Biên tập: (024) 39715011
Hành chính: (024) 39729436
Biên tập: (024) 39714896
Quản lý xuất bản: (024) 39728806

Chịu trách nhiệm xuất bản: Giám đốc - Tổng biên tập: TS. PHẠM THỊ TRÂM

Biên tập chuyên môn: NGÔ BÍCH VÂN, CHU THỊ THÚY ANH
NGUYỄN ĐỨC HẠNH
Biên tập xuất bản: PHAN HẢI NHƯ
Chế bản: ĐÀO DIỆP
Trình bày bìa: NGUYỄN NGỌC ANH

Đối tác liên kết: Khoa Luật
Địa chỉ: 144 Xuân Thủy, Cầu Giấy, Hà Nội

Sách liên kết

8th ASIAN CONSTITUTIONAL LAW FORUM (Conference Proceedings)
ASIAN CONSTITUTIONAL LAW RECENT DEVELOPMENTS AND TRENDS

Volume 1

Mã số: 2L - 93 ĐH2020
In 100 bản, khổ A4 tại Công ty Cổ phần in và Thương mại Ngọc Hưng
Địa chỉ: Số 296 đường Phúc Diễn, tổ dân phố số 1. P. Xuân Phương, Q. Nam Từ Liêm, Hà Nội
Số xác nhận ĐKXB: 1608 - 2020/CXBIPH/03 - 136/ĐHQGHN, ngày 12/05/2020
Quyết định xuất bản số: 1252 LK-XH/QĐ-NXB ĐHQGHN ngày 11/09/2020