Treaties as a Source of National Law in The Perspective of Constitutional Law

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Abstract

The 1945 Constitution of the Republic of Indonesia does not regulate the relations and interactions between treaties and national law. The absence of constitutional norms regarding this matter raises the question of how treaties become a source of national law. This study puts forward the perspective of constitutional law to answer how national law perceives treaties in the dimensions of national law. It argues that the constitutional law paradigm views treaties as a product of the legislative and executive interaction within the framework of the theory of separation of powers. Based on this view, the formation of law is the original power of the legislature, which impacts the obligation to provide legislative consent before treaties can be applied to domestic jurisdictions, as well as placing treaties under the 1945 Constitution. Thus, Indonesia can remain selective in enforcing treaties at the domestic level. The 1945 Constitution paradigm indeed influenced Indonesia's closeness to the teachings of dualism. However, this paper also describes that in using treaties, the Constitutional Court often uses treaties that have yet to be ratified as a basis for strengthening arguments in decisions. This practice shows a shift in the paradigm of dualism to a pragmatic monism paradigm.

Keywords: separation of powers, sources of national law, treaties.

A. Introduction

International law is a law created by humans in a world that is increasingly interdependent with one another.[1] Discourse on the applicability of treaties on national legal jurisdictions will always return to the classical debate regarding the position and relation of international law to national law, which is polarized into two leading schools of thought: monist and dualist.[2] Monism in international law assumes that one legal system applies to all human beings, namely international law. In the view of monism, international law is universal and at the top of the world's legal order, both in terms of validity and primacy.[3] On the other hand, dualists view international law as an entity that is entirely separate from the legal order in the

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1 Jordan J. Paust, "Basic Forms of International Law and Monist, Dualist, and Realist Perspectives," *University of Houston Law Center,* no. 2013-A-11 (2013): 224, https://ssrn.com/abstract=2293188.

2 Atip Latipulhayat (et.al.), "Relasi Hukum Nasional dan Internasional dan Praktiknya di Indonesia" (Higher Research Report Padjadjaran University, 2015), 1.

3 Jordan J. Paust, "Basic Forms of International Law and Monist, Dualist, and Realist Perspectives," 245.

domestic realm. This teaching views that international law only applies at the international level, which consists of a community of independent states. Implementing international law at the domestic level requires transformation through specific formal political processes such as the legislature. The two traditional views above indirectly reflect different perspectives on when a treaty can be categorized as a source of law in the dimension of national law.

The various perceptions about when a treaty can become a source of law impact the various practices of using treaties in court. In Indonesia, for example, in the dimension of constitutional law, the use of treaties by the Constitutional Court in resolving various cases is carried out in different ways. In the case of reviewing the Law Number 38 of 2008 on the Ratification of the Charter of the Association of Southeast Asian Nations (ASEAN Charter), the Constitutional Court stated that implementing the provisions in the ASEAN Charter required action in the form of establishing an implementing law.[4] It means that treaties the state has ratified do not necessarily turn into sources of law that can be applied within the national territory. Such a construction is a shift from the legal construction in the decisions of the Constitutional Court that were already present, namely in the case for reviewing the Law on the Eradication of Criminal Acts of Terrorism, where the Constitutional Court uses various international agreements directly as a source of law.[5] Several international agreements were not international agreements ratified by Indonesia, including the United Nations International Covenant on Civil and Political Rights (1966), the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the International Convention for the Suppression of Terrorist Bombings (1997), and International Convention for the Suppression of Terrorist Financing (1999).

The above conditions raise several questions that are important to answer. First, when could a treaty be interpreted as a source of law?[6] Second, as a product, essentially a communal agreement from two or more sovereigns, how is the relationship between treaties as a source of law and other sources of law? These two questions are essential to know the validity of a treaty as a source of law that will

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4 Decree of the Constitutional Court Number 33/PUU-IX/2011 on the Review of Law Number 38 of 2008, 189.

5 Decree of the Constitutional Court Number 13/PUU-I/2003 on the Review of Law Number 16 of 2003.

6 This question is important, considering Indonesia has no common understanding. For example, the report made by the Delegation of the Republic of Indonesia to the International Covenant on Civil and Political Rights (ICCPR) Committee regarding the implementation of the ICCPR provisions in Indonesia shows an asymmetry in understanding the integration of treaties into the Indonesian legal system and the enforceability of ratified treaties in court. Wisnu Aryo Dewanto, "Penerapan Perjanjian Internasional di Pengadilan Nasional: Sebuah Kritik Terhadap Laporan Delegasi Republik Indonesia kepada Komite Hak Asasi Manusia Perserikatan Bangsa Bangsa tentang Implementasi Kovenan Internasional Tentang Hak-hak Sipil dan Politik di Indonesia," *Padjadjaran Jurnal Ilmu Hukum* 1, no. 1 (2014): 58, https://doi.org/10.22304/pjih.v1n1.a4.

also determine the method of application and the choice of application.[7] Identifying treaties as a source of law and their relationship with other sources of law will help avoid errors of law, either towards an object or a subject.[8] At the most extreme point, a mistake in identifying treaties as a source of law and a mistake in identifying the relationship that must be created between treaties and other sources of law can lead to undermining the constitution's position as the supreme law of the land.[9]

This paper will first explain how the theory of separation of powers, as an idea adopted and developed in Indonesia views treaties. In the next section, it describes what a source of law means according to legal science to justify the position of treaties theoretically as a source of law. In the final part, this paper will explain in an argumentative manner how Indonesia's position is between monism and dualism to identify the position of treaties as a source of national law in Indonesia.

B. Treaties in the Perspective of Separation of Powers Theory

Based on the traditional view, treaties are viewed simply as contracts.[10] In this sense, the state, through its government, promises two-way action mutually beneficial for some issues. Based on the general nature of a contract, the commitments built only have relevance to the parties bound by the contract.[11] Generally, these contracts do not have the articulation of norms that are commonly found in laws and regulations. This view is based on the character of the contract in the private law regime.

However, the modern view sees treaties as a set of general norms that can be directly applied due to the existence of norms governing the enforcing mechanisms.[12] For example, multilateral treaties, such as WTO Agreement and treaties on the European Union,[13] are generally equipped with transnational institutions whose function is to issue certain decisions and regulations binding on state parties.[14] Thus, treaties have the characteristics of a legislative product that can have an influence both on the constitution and on state sovereignty.[15]

As a product of legislation, treaties operate on two legal dimensions: international law and national law. In the dimension of international law, only treaties are characterized as 'law-making treaties' which directly or indirectly create

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7 Bagir Manan, "Ajaran-Ajaran Sumber Hukum Sebagai Dasar Hakim Memutus Perkara Menurut Hukum," (Monograph of Padjadjaran University, 2014), 1.

8 Bagir Manan.

9 Bagir Manan, 2.

10 David Haljan, *Separating Powers: International Law Before National Courts* (The Hague: T.M.C. Asser Press, 2013), 267.

11 David Haljan.

12 David Haljan. See Adi Kusumaningrum, "Recent Development in International Treaties Relating to Aviation: New Standardization of International Air Law," *Padjadjaran Jurnal Ilmu Hukum* 7, no. 2 (2020): 285, https://doi.org/10.22304/pjih.v7n2.a7.

13 Particularly on the Final Act of the 1986-1994 Uruguay Round of Trade Negotiations.

14 For example, the United Nations Charter creates a United Nations.

15 David Haljan, *Separating Powers: International Law Before National Courts,* 289.

international legal norms, either in the form of rights or the imposition of international obligations.[16] Generally, based on international law doctrine, 'law-making treaties' are evidence of the existence of customary international law.[17]

On the other hand, in the dimension of national law, treaties will create or stimulate the formation of national law. Of course, it depends on the form of relations between national law and international law. In countries with dualism, treaties will stimulate the government to form new laws. In contrast, in monistic countries or countries that tend to be pragmatic, treaties do not always require new laws because they have direct enforcement instruments such as the 'self-executing' model. Therefore, the criteria for treaties as a source of international law are fully returned to the dimensions of international law.[18] Vice versa, the criterion of whether a treaty is a source of national law is returned to the dimension of national law.[19]

In the dimension of national law, placing treaties as a source of law in dualism relations is more complicated than placing them in the monism paradigm. It is because the basic principle of dualism is that norms in treaties must first go through a process of transformation into national law. It means that even though a treaty has been in force and is recognized as international law, it does not automatically provide validity and legitimacy as national law.[20] According to this view, more than ratification approval by parliament is required to turn treaties into law. The concept of transformation in the dualism paradigm is rooted in sovereignty. In this concept, the law is an expression of sovereignty as the embodiment of the common will addressed to the owner of the sovereignty itself.[21] That is why transformation is the primary condition for binding a norm for sovereign holders.

From the perspective of the theory of separation of powers, the authority to form regulations is the original power of the legislative branch.[22] It is because the branch of legislative power is considered a manifestation of people's sovereignty which has the authority to regulate people's lives.[23] Three things in people's lives must be regulated through the regulatory function of the legislature are:[24]

(1) Reducing the rights and freedoms of citizens;
(2) Burdening citizens' assets; and
(3) Regulating expenditures by state administrators.

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16 Edgar Bodenheimer, *Jurisprudence* (Cambridge: Harvard University Press, 1970), 281.
17 Edgar Bodenhaimer.
18 Edgar Bodenhaimer.
19 See Article VI the Constitution of the United States.
20 David Haljan, *Separating Powers: International Law Before National Courts*, 1.
21 David Haljan, 93.
22 Jimly Asshiddiqie, *Pengantar Hukum Tata Negara Jilid II* (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI, 2006), 32.
23 Jimly Asshiddiqie.
24 Jimly Asshiddiqie.

On the other hand, in the separation of powers perspective, the executive only carries out the law established by the legislature. If the executive should form a regulation, in that case, it must be delegated directly by the law created by the legislature. It should be more operational and known as a 'legislative delegation of rule-making power.' [25]

The separation of powers theory also mentioned that judicial power only has the right to find the law and not form a new one. This classical doctrine was conveyed by Alexander Hamilton in The Federalist Number 78 as follows.[26]

> *"Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, … The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever."*

However, the law that the judge found could be replaced by the law established by the legislature. It means that the law formed by the legislature prevails over the law created by another branch of power. Therefore, laws formed by the executive or the judiciary that is not based on the law created by the legislature are considered ultra vires and should be declared a nulled regulation.[27]

In the context of a treaty, the separation of powers does not require automatic recognition and enforcement of treaties at the domestic level because there is no involvement of the legislature as a representation of the people to form law in the treaty-making process.[28] This opinion was expressed by Malcolm Shaw as follows.[29]

> *"It follows from this that were treaties to be rendered applicable directly within the state without any intermediate stage after signature and ratification and before domestic operation, the executive would be able to legislate without the legislature. Because of this, any incorporation theory approach to treaty law has been rejected. Indeed, as far as this topic is concerned, it seems to turn more upon the relationship between*

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25 For example, the authority of the president in Indonesia to be able to participate in forming laws, forming Government Regulations, and creating Government Regulations in Lieu of Law is the President's authority in the field of legislation regulated in the 1945 Constitution of the Republic of Indonesia, which is considered a product of the Legislature. See David Haljan. See more Jimly Asshiddiqie, 35.

26 Donald P. Kommers (et.al.), *American Constitutional Law: Essays, Cases, and Comparative Notes* (New York: Rowman and Littlefield Publisher, 2010), 1125. See more Wicaksana Dramanda, "Menggagas Penerapan *Judicial Restraint* di Mahkamah Konstitusi," *Jurnal Konstitusi* 11, no. 4 (2014): 1, https://doi.org/10.31078/jk1141.

27 David Haljan, *Separating Powers: International Law Before National Courts*, 4.

28 David Haljan, 79.

29 Malcolm Shaw, *International Law* (New York: Cambridge University Press, 2008), 148.

> *the executive and legislative branches of government than upon any preconceived notions of international law."*

Based on Shaw's opinion above, a treaty cannot be applied to the domestic level without going through an 'intermediate stage after signature and ratification'. In other words, the applicability of a treaty in national jurisdictions is influenced more by the relationship between the legislative and executive branches at the domestic level than the provisions of international law itself. The relationship between the legislative and executive in enforcing a treaty in the national jurisdiction is known as 'parliamentary consent'.[30]

From the perspective of the separation of powers, three approaches can be taken to apply treaties to national jurisdictions are:

1. Institutional Approach

This approach is carried out by directly involving state institutions or organs that have the authority to establish a treaty that can apply to the national legal system or provide 'normative enforcement' on a treaty.[31] The state organs referred to in this approach certainly differ from country to country, depending on how each country's constitution regulates and provides authority.[32] Therefore, the position and interaction of a treaty with another national source of law will be determined by the hierarchy of organs in a respective country.

2. Presumptive Approach

In contrast to the institutional approach, which involves state organs with the explicit constitutional authority to form laws, this approach involves state organs that are given implicit authority by the Constitution. The implicit authority in question must be a derivative authority to make laws or authority to determine the law, which is stated explicitly in the constitution.[33] The application of treaties through court decisions is an example of this approach.

3. Reflexive Approach

According to Haljan, this approach places treaties as the principles that underlie the meaning and application of national law.[34] However, Haljan refuses to use the principle solely as an instrument for interpreting the law or interpretative

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30 Malcolm Shaw, 149.

31 David Haljan, *Separating Powers: International Law Before National Courts*, 79.

32 From the perspective of the theory of separation of powers, the regarded institutions are state institutions representing the branches of power, namely the legislature, executive, and judiciary. David Haljan, 79.

33 David Haljan, 81.

34 David Haljan, 84.

framework, but more than that, in this approach, treaties must be placed as moral aspirations, which resulting moral obligations to states to implement treaties on their sovereign territory.[35] In other words, this approach places treaties not as provisions that have equal binding force as national law but only as a persuasive norm which not legally mandatory.

C. From Dualist to Pragmatism: Indonesia's Approach Between Monism and Dualism Paradigm

1. The Treaty Making Under the Executive and the Legislative Relation in Indonesia

In the constitutional law literature, the relationship between the executive and legislative power is known by the term 'system of government.'[36] After the amendments to the 1945 Constitution during the 1999-2002, Indonesia's constitutional structure increasingly characterized the doctrine of separation of powers with a presidential system of government.[37] The 1945 Constitution has divided the axis of state power into three branches of power: the legislature, which is represented by the House of Representatives (DPR-*Dewan Perwakilan Rakyat*);[38] the executive, which the President represents;[39] and the judiciary, by the Supreme Court and the Constitutional Court.[40] Based on the 1945 Constitution and existing constitutional practices, the three branches of power have specific functions in forming and implementing treaties. For example, Article 11 of the 1945 Constitution makes the authority to form treaties not only the sole authority of the president but also involves the DPR to consent to certain treaties.[41]

The relationship between Indonesia's executive and legislative power in foreign affairs is not solely in forming treaties regulated in Article 11 of the 1945 Constitution. Article 13 of the 1945 Constitution also shows the relationship between

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35 David Haljan.

36 Bagir Manan, *Menyongsong Fajar Otonomi Daerah* (Yogyakarta: Pusat Studi Hukum Fakultas Hukum Universitas Islam Indonesia, 2005), 250.

37 Susi Dwi Harijanti, "Sistem Pemerintahan Indonesia Pasca Amandemen UUD 1945: Memperkuat Presidensialisme," in *Potret Penegakan Hukum di Indonesia*, Amir Syarifuddin (ed.) (Jakarta: Komisi Yudisial RI, 2009), 77.

38 See the power of the House of Representatives on Article 20 of the 1945 Constitution of the Republic of Indonesia.

39 See on Article 4 (1) of the 1945 Constitution of the Republic of Indonesia: "The President of the Republic of Indonesia shall hold the power of government in accordance with the Constitution."

40 See Article 24 (2) of the 1945 Constitution of the Republic of Indonesia: "The judicial powers shall be carried out by a Supreme Court and by its subordinate judicatory bodies dealing with general, religious, military, state administrative judicial fields, and by a Constitutional Court."

41 Article 11 of the 1945 Constitution of the Republic of Indonesia: "(1) With the approval of the DPR the President may declare war, make peace and conclude treaties with other countries, (2) When entering into other international agreements that entail broad and fundamental consequences for the existence of the people because of links to the state's financial burden and/or because they require amendments to laws or the enactment of new ones, the President needs the approval of the DPR, (3) Further provisions as to international agreements shall be regulated by law."

the president's authority in appointing ambassadors and the authority of the DPR to give consideration.[42] However, the relationship between the president and the DPR in Article 11 differs from that of the president and the DPR, regulated in Article 13. The character of the relationship in Article 11 reflects the solid control relationship of the DPR over the president's authority to form treaties. The strength of this control can be seen from the use of the word 'consent' in Article 11. The meaning of the word 'consent' legally has binding power, determining whether the president will take legal action to bind himself to treaties.

On the other hand, Article 13 only requires the president to 'pay attention to the DPR's considerations' in appointing ambassadors and consuls. It indicates that the DPR's considerations are only 'persuasive' and have no legal consequences if they are not followed up. On this side, the nuances of the controls in Article 13 differ from those in Article 11.[43]

A stronger control relationship between the president and the DPR in forming treaties can be understood from the perspective of the theory of separation of powers. In theory, foreign relations (including the formation of treaties) are an inherent authority of the president as the holder of executive power. Inherent authority is a manifestation of the existence of government.[44] On the other hand, treaties have a regulatory character because they can give rights or impose specific obligations on states and their citizens. This character reflects the function of forming regulations in the executive power, which is the original power of the legislative power.[45] Therefore, executive and legislative authorities are significant in forming laws through treaties.

Regarding the relationship between the president and the DPR, Article 11 of the 1945 Constitution regulates this relationship: First, based on paragraph (1), all treaties made with other countries must be carried out with the consent of the DPR. Second, in paragraph (2), the DPR's consent is also required for 'other treaties' which have broad and fundamental consequences for society related to the burden on state finances and require amendments to laws or enactment of laws. The phrase 'other treaties' refers to agreements made with non-state international law subjects as referred to in the Viena Convention on The Law of Treaties 1986 (VCLT 1986).[46]

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42 Article 13 of the 1945 Constitution of the Republic of Indonesia: "(1) The president appoints ambassadors and consuls, (2) In appointing ambassadors, the President shall consider the considerations of the DPR."

43 Susi Dwi Harijanti and Ali Abdurrahman, "Keterlibatan Dewan Perwakilan Rakyat dalam Pelaksanaan Kekuasaan Presiden di Bidang Hubungan Luar Negeri," (Final Research Report in Faculty of Law Padjadjaran University, 2013), 44.

44 Erwin Chemerinsky, *Constitutional Law Principles and Policies* (USA: Aspen Publishers, 2006), 339.

45 Jimly Ahhddiqie, *Pengantar Hukum Tata Negara Jilid II,* 32.

46 Damos Dumoli Agusman, "Apa Perjanjian Internasional Itu? Beberapa Perkembangan Teori dan Praktik di Indonesia Tentang Hukum Perjanjian Internasional," in *Refleksi Dinamika Hukum Rangkaian Pemikiran Dalam Dekade Terakhir*, Rudi Rizky (ed.) (Jakarta: Perum Percetakan Negara, 2008), 78.

The above relations are further elaborated in Law Number 24 of 2000 on Treaties. Article 10 of the Law states that the president requires the DPR's consent in terms of treaties containing the following materials.[47]

1) Political, peace, defense, and state security issues;
2) Changes in territory or determination of state boundaries;
3) Sovereignty or sovereign rights of the state;
4) Human rights and the environment;
5) Formation of a new law; and
6) Foreign loans/grants.

The Law on Treaties opens the opportunity for a treaty to be ratified without going through the approval of the DPR if it has material on cooperation in the fields of science and technology, economics, engineering, trade, culture, commercial shipping, avoidance of double taxation, and investment protection cooperation, as well as agreements that technical.[48] Treaties with these characters are sufficient to be ratified through a Presidential Decree.[49]

Forming treaties without the DPR's consent aims to shorten the process, which is considered not to have far-reaching consequences. This kind of practice seems typical of a presidential system. The strict separation between the executive and the legislature in a presidential system has given rise to the perception that the consent of the DPR tends to hamper the process of forming treaties, which constitute the exclusive power of the executive.[50] That is why developing executive agreements as instruments to be bound to the treaties without legislative approval is quite common. These instruments are "the back doors" to form treaties in the presidential system.[51]

Article 11 paragraph (2) of the Law on Treaties also requires that the president notify the DPR after ratifying treaties through a Presidential Decree for evaluation.[52] In fact, in the provisions of the elucidation of the article, it is stated that the DPR can ask for the cancellation of treaties that a Presidential Decree has ratified if they are

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47 See Article 10 of Law Number 24 of 2000 on International Treaties.

48 See more on the Elucidation of Article 11 of Law Number 24 of 2000 on International Treaties.

49 Article 7 of Law Number 24 of 2000 on International Treaties.

50 For example, the practice in the United States where executive agreement is more commonly used than a treaty. See David Haljan, *Separating Powers: International Law Before National Courts*, 154.

51 Dames and Moore v. Regan 453 U.S. 654 (1981). In this case, the Supreme Court of the United States stated that, in practice, Congress implicitly approves for the president to act in the form of executive agreements (even if they are related to state finances) without the approval of the Senate. In this case, the president entered into various executive agreements with the Government of Iran to rescue American embassy employees in Iran who were taken prisoner during the Iranian revolution. The institutionalization of executive agreements in the United States are alleged to be effort to form treaties through 'the back door.' Thus, the United States Congress issued the Case-Zablocki Act 1972, which required the president to provide notification of treaties formed without going through the advice and consent of the Senate. See David Haljan, 154. See also David M. O'Brien, *Constitutional Law and Politics* (New York: W.W. Norton & Company, 2008), 250.

52 Article 11 (2) of Law Number 24 of 2000 on International Treaties.

deemed detrimental to national interests.[53] In practice, the rejection and cancellation of international agreements without the approval of the DPR occurred, namely the Defense Cooperation Agreement (DCA) in 2007 between Indonesia and Singapore. The DPR believes that the DCA contains material relating to defense and security, which is qualified as a treaty that requires the approval of the DPR and ratified by law.[54]

The involvement of the DPR in forming treaties has a higher intensity than just approving, as stated in Article 11 of the 1945 Constitution. Based on Article 2 of the Law on Treaties, the DPR is given the authority to be involved since the initiation and initial discussion of the formation of treaties. In Article 2 of the Law on Treaties, the Minister must first consult with the DPR to provide political considerations and take the necessary steps in drafting and ratifying treaties relating to the public interest.[55] The phrase 'public interest' refers to treaty materials, which, according to Article 10 of the Law on Treaties, must obtain the approval of the DPR.[56] Even though being involved from the start of the discussion does not mean that the DPR can also be involved in discussions at the international level, even though the involvement of the legislature in discussions at the international level is a common practice.[57] The provisions of Article 2 can also be interpreted as a phase of deliberation between the executive and the legislature regarding the national interest that is to be achieved or protected through a treaty.

In addition, the DPR's consent in the form of law raises problems. The DPR's consent in the form of the law could make it an object that can be tested in the Constitutional Court, whereas the approval of laws does not contain norms but only ensures that the president can continue binding himself to treaties.[58] It happened when the Charter of the Association of Southeast Asian Nations (ASEAN Charter Case) was brought to the Constitutional Court in 2011. The Petitioner submitted the judicial review of the DPR's approval law on the ASEAN Charter because it was considered to undermine the 1945 Constitution. The DPR's consent in the form of the law creates misperceptions among the public. The public thinks the law is the

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53 The Elucidation of Article 11 (2) of Law Number 24 of 2000 on International Treaties.

54 The Defense Cooperating Agreement (DCA) is a defense agreement signed on 27 May 2007 and rejected by the DPR on 25 June 2007. This agreement was signed in one package with the Extradition Treaty. One of the contents of the defense agreement between Indonesia and Singapore is that Singapore can carry out military exercises and joint exercises with other countries in Indonesia's territory. See Susi Dwi Harijanti and Ali Abdurrahman, "Keterlibatan Dewan Perwakilan Rakyat Dalam Pelaksanaan Kekuasaan Presiden di Bidang Hubungan Luar Negeri," 51.

55 Article 2 of Law Number 24 of 2000 on International Treaties.

56 See Article 10 of Law Number 24 of 2000 on International Treaties.

57 Duncan B. Hollis (ed.), *National Treaty Law and Practice* (Leiden: Martinus Nijhoff Publishers, 2005), 37.

58 See Constitutional Court Decision Number 33/PUU-IX/2011 on Judicial Review of Law Number 38 of 2008 concerning the Ratification of the Association of Southeast Asian Nation Charter against 1945 Constitution of the Republic of Indonesia, 189.

instrument to transform treaties into national law. In contrast, the transformation is carried out differently by forming special laws that regulate the norms of treaties in national laws.[59]

In its decision, The Constitutional Court stated it has the authority to review the DPR's approval law due to the legal form of consent in the form of a law.[60] The Constitutional Court stated that Indonesia has full sovereignty to determine whether Indonesia is bound or bound by a treaty that has been made or is binding in Indonesia.[61] However, the Constitutional Court should have provided a further explanation regarding the impact of a treaty if the DPR's approval law is canceled because it is considered contrary to the constitution. Does the cancellation also abolish Indonesia's international obligations because Indonesia is bound by a treaty? Or is further action needed by the government to end Indonesia's attachment to a treaty?

Based on the description of the executive-legislative relations above, several things need to be noted for the Law on Treaties as follows: First, the involvement of the DPR in the initial stages of initiation and discussion of the formation of treaties as stipulated in Article 2 of the Law on Treaties raises various problems. Among them is the non-regulation of legal consequences if the provisions of Article 2 in the form of consultations or the results of consultations with the DPR are not implemented by the government, in this case, the Minister of Foreign Affairs.[62]

Second, the Law on Treaties needs to provide detailed arrangements regarding the discussion of Indonesia's national interests before being bound by a treaty on the discussion of national interests. The only discussion regarding national interest is in Article 2 of the Law on Treaties on the ministerial consultations with the DPR. The elucidation section of Article 2 states that the minister conveys Indonesia's national interest to be bound by certain treaties. However, this article does not regulate the substance of the intended national interest nor the output of the consultation between the minister and the DPR.

Third, the DPR's consent in the form of law needs to be reviewed. The use of statutory legal forms raises several problems as follows:[63]

1) The use of law in the DPR's consent causes the law to become an object that can be reviewed in the Constitutional Court. As stated by the Constitutional Court in deciding the case for reviewing the ASEAN Charter Law, the law contains the

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59 In Constitutional Court Decision Number 33/PUU-IX/2011, Judge Hamdan Zoelfa and Judge Maria Farida Indrati had a dissenting opinion. The two judges stated that although formal ratification of the ASEAN Charter was carried out as a law, in terms of material, it differs from laws in general that can directly bind citizens. Constitutional Court Decision Number 33/PUU-IX/2011, 189.

60 Constitutional Court Decision Number 33/PUU-IX/2011, 196.

61 Constitutional Court Decision Number 33/PUU-IX/2011, 190.

62 See more on the Elucidation of Article 2 of Law Number 24 of 2000 on International Treaties.

63 Damos Dumoli Agusman, "Status Perjanjian Internasional Dalam Hukum Nasional RI Tinjauan Dari Perspektif Praktek di Indonesia," *Indonesian Journal of International Law* 5, no. 3 (2008): 495, https://doi.org/10.17304/ijil.vol5.3.178.

consent from DPR is a law in the formal sense, which, according to Article 24C paragraph (1) of the 1945 Constitution, is the object of judicial review which is the authority of the Constitutional Court.[64]

2) The use of law in the consent of the DPR creates a perception that the law is an implementation of treaties in the national legal system or is a form of Indonesia's binding to a treaty. It was proven based on the applicant's statement in the ASEAN Charter Law case.[65]

From the perspective of constitutional law, the DPR's consent could be done in the form of a 'DPR Consent Letter' as is the practice when the DPR approves the appointment of heads of state institutions such as the Head of the Indonesian National Police. The DPR's consent in the form of a consent letter will be more suitable to the terminology in Article 11 of the 1945 Constitution. Through a consent letter, it will not be able to make it an object of judicial review and can avoid misperceptions in society as has happened so far.

2. Monism V. Dualism and Indonesia's Perspective

Monism and dualism are the main postulates to see the relationship between international and national law.[66] A country's tendency to one of the postulates above is determined by one of the country's perceptions of international law.[67] From a historical point of view, Indonesia tends to be skeptical about treaties. Since Indonesia's independence, treaties have been interpreted as instruments to preserve colonialism, so international law has always been articulated as 'colonial international law.' [68] This view is also based on treaties with the Netherlands when maintaining independence, which is always considered detrimental to Indonesia.[69] Due to this historical background, Indonesia has become very selective in choosing to be bound by a treaty.[70]

Skepticism towards treaties has also emerged from international law experts in Indonesia. For example, Yamin's opinion states that international law is a Western European creation that does not involve Eastern Europe and Asia.[71] This view has

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64 See Decree of the Constitutional Court Number 33/PUU-IX/2011 on the Review of Law Number 38 of 2008, 95.

65 Decree of the Constitutional Court Number 33/PUU-IX/2011 on the Review of Law Number 38 of 2008, 13.

66 Atip Latipulhayat, "Relasi Hukum Nasional dan Internasional dan Praktiknya di Indonesia," 5.

67 Damos Dumoli Agusman, "Status Perjanjian Internasional Dalam Hukum Nasional RI Tinjauan Dari Perspektif Praktek di Indonesia,"Status Perjanjian Internasional Dalam Hukum Nasional RI Tinjauan Dari Perspektif Praktek di Indonesia."

68 Damos Dumoli Agusman, "Indonesia dan Hukum Internasional: Dinamika Posisi Indonesia Terhadap Hukum Internasional," *Opini Juris Kementerian Luar Negeri* 15 (2014): 20.

69 For example, the results of the Linggarjati negotiations only recognized Indonesian sovereignty as limited to Sumatra, Java, and Madura. See also the results of the Round Table Conference, which imposed the Dutch East Indies debt on Indonesia.

70 Ko Swan Sik, *The Indonesia Law of Treaties 1945-1990* (Netherland: Springer Netherlands, 1994), 737.

71 Muhammad Yamin, *Naskah Persiapan Undang-Undang Dasar Jilid III* (Indonesia: Jakarta, 1960), 48.

transcended time and is shared by contemporary international law experts in Indonesia. For example, Latipulhayat stated that international law is actually 'European values' and 'European culture.' International law is developed to maintain European superiority and hegemony in the world. According to him, international law only internationalizes European law.[72]

Although Indonesia has a close relationship with European legal traditions due to its long history of colonization by the Netherlands, the bitter experience during colonization led to an anti-Dutch and European legal tradition. Therefore, Indonesia chose to disconnect from European law and be bound to the national legal system through the Proclamation of Independence, read by Soekarno on August 17, 1945. This proclamation of independence can be interpreted as a legal action to release attachment to the old legal system and create a new one.

On the contrary, from the constitutional perspective, the reform in 1998 emphasized and strengthened the position of the 1945 Constitution at the top of the national legal order. It is reflected in the norm in the 1945 Constitution after the amendment, which states that the sovereignty of the people is exercised according to the constitution.[73] This norm has legally shifted the notion of popular sovereignty that was initially institutionalized in the People Consultative Assembly (MPR –*Majelis Permusyawaratan Rakyat*) as the highest state institution and replaced it with the notion of legal sovereignty by placing the 1945 Constitution as the supreme law of the land.[74] Thus, it is challenging to be able to declare Indonesian national law as part of a world legal system as the basic philosophy of monism.

The various perceptions above have also influenced the practice of establishing treaties. Although the 1945 Constitution does not regulate the implementation model of treaties, the practice shows Indonesia's closeness to the doctrine of dualism. The manifestation of dualism can be seen from the use of the transformation model in implementing treaties, such as Law Number 19 of 2002 on Copyright as the implementation of the Berne Convention for the Protection of Literary and Artistic Works ratified by Presidential Decree No. 19 of 1997, and Law Number 32 of 2009 on the Environment as the implementation of the United Nations Convention on Climate Change ratified by Law Number 6 of 1994.[75]

This transformation model is also influenced by the government system and the building of Indonesian institutional architecture, which increasingly characterizes the

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[72] Atip Latipulhayat, "Internationalization of International Law: From Hegemony to Harmony of Norms," (5th AsianSIL Biennial Conference*,* 2015)*,* 1.

[73] See Article 1 (2) of the 1945 Constitution of the Republic of Indonesia: "Sovereignty is vested in the people and implemented pursuant to the Constitution."

[74] See Article 1 (2) of the 1945 Constitution of the Republic of Indonesia (before amendment): "Sovereignty is vested in the people and fully exercised by the People's Consultative Assembly."

[75] Wisnu Aryo Dewanto, "Perjanjian Internasional Tidak Dapat Diterapkan Secara Langsung di Pengadilan Nasional: Sebuah Kritik Terhadap Laporan DELRI Kepada Komite ICCPR PBB Mengenai Implementasi ICCPR di Indonesia," *Jurnal Hukum Staatsrecht* 1, no. 1 (2014): 8, https://doi.org/10.52447/sr.v1i1.19.

separation of powers model.[76] In a presidential government system, the foreign relations power is an inherent power of the president. This power is resulting in the need for balancing by other branches. In this case, a transformation model involving the legislative in forming laws to implementing treaties is the answer to the need. The presence of the DPR as a political power which in theory is a representation of the people, is considered to have a high level of transparency to balance the power of the president in exercising his inherent power to form treaties.[77]

In addition, the transformation model will allow Indonesia to remain selective in fighting for its national interests in the dimensions of international law and selectively adopt and apply the values and norms contained in a treaty. Selective is meant to ensure that the provisions and norms of treaties that will be applied do not conflict with the constitution or develop those norms that are adaptive to the values or identity of the Indonesian constitution.

Therefore, by observing a series of processes for the formation of treaties involving the branches of political power, both legislative and executive, there should be harmony between the constitution representing national interests and the treaties formed.[78] Thus, in this perspective, binding treaties must embody national interests in international dimensions and jurisdiction.

However, the presence of harmony, as described above, will depend on the will of the executive and legislature to adequately carry out the entire process of establishing treaties. Suppose there are phases or stages in establishing treaties that must be carried out adequately. Without that, imperfections in formulating national interests can be championed. It may also impact the formulation of norms in treaties that do not reflect national interests, or in an extreme case; it can create norms contrary to the Constitution. The potential for disharmony in treaties with national interests can not only be caused by fulfilling the procedures for establishing treaties; it could also happen due to the dynamic development of community life.

In the meantime, the implication of choosing the law in transforming the norms of a treaty results in the position of norms in treaties being an equal or parallel position with norms in other Laws.[79] If using the approach of the Constitutional Court's decision regarding the judicial review of the ASEAN Charter Law, the ratification law, and the law on the implementation of treaties are laws that were formed by following the applicable procedures as the formation of laws in general,

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76 Jimly Asshiddiqie, *Pengantar Hukum Tata Negara Jilid II*.

77 The opinion that the legislature has higher transparency and accountability than other branches of power was put forward by Rebecca E. Zietlow, "The Judicial Restraint of the Warren Court (and Why it Matters)," *Ohio State Law Journal* 69, no. 2 (2008): 9, http://dx.doi.org/10.2139/ssrn.960144.

78 In several discussions, Atip Latipulhayat interprets this process as balancing international obligation and national interests.

79 To the same degree as formal laws, it refers to the hierarchical provisions of laws and regulations regulated in Article 7 (1) of the Law Number 12 of 2011 on the Establishment of Laws and Regulations.

namely through Article 20 of the 1945 Constitution.[80] Therefore, formally and materially, the law can be the object of judicial review in the Constitutional Court. Therefore, it can also be interpreted that using legal instruments or forms of legislation in the ratification and implementation of treaties is an 'awareness' to place the Indonesian constitution in a superior position to the laws for ratification and implementation of treaties.[81]

Looking back to the general theory of norms, as Kelsen stated in his various theses on 'the pure theory of law.' Based on his opinion, a legal norm is valid because it is formed in a way determined by other legal norms. Forming is the reason for the validity of the established norm.[82] Therefore, from a national perspective, treaties formed through the means and by the organs determined by the constitution will have an inferior relationship to the constitution. This assumption certainly confirms the foundation of the relationship between Indonesian national law and international law within the framework of dualism.

Although the basic principle of the relationship between international law and national law in Indonesia was built on the foundation of dualism, in various decisions of the Constitutional Court, there are nuances of monism that have surfaced. For example, in the judicial review of the ASEAN Charter Law, the Constitutional Court stated that there is a difference between enforcing treaties internally and binding themselves externally. In terms of binding and external enforcement, the Constitutional Court stated that Indonesia must comply with the provisions of Article 2 Section (1) letter b of the 1969 VCLT, which states that 'ratification, acceptance, approval, and accession mean in each case, the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty.' It is certainly an important question, why does the Constitutional Court use the VCLT provisions, which Indonesia has not ratified, instead of the same provisions contained in Article 3 of the Law on Treaties?[83] The opinion of the Constitutional Court indicates that there is a nuance of monism in the Constitutional Court's perspective on the relationship between international law and national law.

Using treaties as a reference in deciding cases at the Constitutional Court is often done. Based on research conducted by Diane Zhang from the University of Melbourne, Australia, on the decisions of the Constitutional Court of the Republic of Indonesia from 2003 to 2008, there were 62 decisions of the Constitutional Court of the Republic of Indonesia that used foreign references, and 52% of them used

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80 See Decree of the Constitutional Court Number 33/PUU-IX/2011 on the Review of Law Number 38 of 2008. See more on Article 20 of the 1945 Constitution of the Republic of Indonesia and Law Number 12 of 2011 on the Establishment of Laws and Regulations.

81 See the provisional hierarchy on Article 7 (1) Law Number 12 of 2011 concerning the Establishment of Laws and Regulations.

82 Hans Kelsen, *General Theory of Law and State* (New Brunswick and London: Transaction Publisher, 2006), 123-124.

83 Article 3 of Law Number 24 of 2000 on International Treaties.

treaties as references.[84] One of the uses of treaties not ratified as a basis for deciding cases was carried out in a landmark case Number 13/PUU-I/2003. On the decision, the Constitutional Court used several treaties as follows: the United Nations International Covenant on Civil and Political Rights (1966), the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the International Convention for the Suppression of Terrorists Bombings (1997), and the International Convention for the Suppression of Terrorist Financing (1999).[85] When the decision was made, the treaties still needed to ratify. No arguments were found regarding the judge's reasons for using these various treaties to decide cases. Nevertheless, on the other hand, in the ASEAN Charter Case, the Constitutional Court explicitly stated that even though the ASEAN Charter had been ratified, it could not be used due to the absence of national law, which transformed it into national law.[86]

The double standard used by the Constitutional Court in terms of using treaties as a source of law strengthens the allegation that they use it pragmatically to strengthen or support their arguments. It can also be interpreted that the Constitutional Court uses non-binding treaties as instruments of interpretation for regulating the meaning and application of national laws. Referring to David Haljan's opinion regarding the approach to using treaties in the dimension of national law, the action taken by the Constitutional Court is a form of reflection on treaties because it places treaties as the principles that make up the regulation and application of national law.[87] The action also shows closeness to monism's teachings.

The reflexive approach taken by the Constitutional Court above is a form of pragmatic monism paradigm. It is the use of certain treaties that have yet to be ratified as an instrument of interpretation without any normative justification or adequate scientific justification. The use of treaties merely to strengthen or support their views on a problem. However, from a positive perspective, it can also be assumed that the use of treaties assumes that treaties are a sound value system or a moral aspiration of world citizens that should be implemented in Indonesia.

Based on the description above, although historically and normatively, Indonesia makes dualism the main foundation in perceiving the relationship between international law and national law, on the practical side, Indonesia displays a nuance or character of legally acceptable monism. It proves that 'Indonesia's pendulum has moved to the middle' in interpreting the relationship between international and national law. It also means that Indonesia no longer rigidly applies dualism. However,

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84 Pan Mohamad Faiz, "Legitimasi Rujukan Hukum Asing Dalam Putusan MK," *Majalah Konstitusi*, no. 83 (2014): 62.

85 See Decree of the Constitutional Court Number 13/PUU-I/2003 on the Review of Law Number 16 of 2003 concerning Eradication of Criminal Acts of Terrorism in the Bali Bombing Incident of 12 October 2002.

86 See Decree of the Constitutional Court Number 33/PUU-IX/2011 on the Review of Law Number 38 of 2008, 195.

87 David Haljan, *Separating Powers: International Law Before National Courts,* 84.

in specific contexts, the monism approach is an option for presenting answers to legal issues brought before the court. This perspective can be called a pragmatic perspective on the relationship between international and national law.

D. Conclusions

In Indonesia, the mechanism for forming treaties is regulated in laws and regulations. Thus, the interaction between the executive and legislative in the formation of treaties reflects the teachings of the separation of powers. Foreign relations are the original power of the executive, while the formation of laws is under the power of the legislature. There is no intense interaction between the executive and the legislature when they want to bind themselves to a treaty. Interaction only occurs in certain treaties. According to the Law on Treaties, it must go through the approval of the DPR, which in practice is done by issuing approval laws. However, the law is not a transformation mechanism to enforce treaties on the domestic dimension but rather approves the executive to be able to take all necessary actions under international law so that the treaties bind Indonesia. Even though it is not stated explicitly in laws and regulations, practice shows that after treaties are binding and enforceable, Indonesia will transform treaty norms into one or more statutory regulations so that treaty norms can be implemented or enforced within its jurisdiction. Thus, treaties are recognized as a source of law after a transformation process is carried out by forming laws and regulations that contain norms in treaties.

Even this form of transformation into statutory regulations is the answer to how the relationship between treaties and other sources of national law is. The relationship will depend on the legal form used to transform the treaty. The legal form of transformation with these statutory regulations can also be read as a will to place treaties under the constitution because whatever choice of statutory regulations are formed to transform treaty norms are statutory regulations that are lower than the constitution and, therefore, may not conflict with the constitution as the supreme law of the land.

The state's perception of international law and the constitution is a factor that determines the form of relations between treaties and national law. Although history shows Indonesia's closeness to the doctrine of dualism that selectively perceives treaties as a source of law, the practice in the Constitutional Court of the Republic of Indonesia has begun to reflect a shift in the interpretation of treaties. This shift occurs not only due to the impetus of globalization, for example, how the world's tendency to perceive international law as a good value system as a result of the world's moral aspirations, but also due to the development of international law in practice, for instance, the practice of formulating treaties that increasingly reflect the character of a legislative product in the perspective of constitutional law.

Using treaties by the Constitutional Court of the Republic of Indonesia also reflects a shift in Indonesia's perception of international law. International law is no

longer considered as an instrument inherited from colonialists to preserve colonialism but as an instrument that can be used to help interpret the case at hand, either used directly as a source of law or used as an indirect source of law by using it as an instrument of interpretation for judges. However, in using treaties in the Constitutional Court, it appears that the court only uses treaties if the norms contained therein can support the court's arguments in deciding cases. It shows a pragmatic monism paradigm in using treaties as a source of law.

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