

CLASS ACTION AGAINST THE NON-IMMEDIACY OF RATIFICATION OF THE 1990 MIGRANT WORKERS CONVENTION

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Abstract

Ratification of treaties in Indonesia can be regarded as mere political acts, as ratification itself does not yet rule for its enforcement in Indonesia's jurisdiction. As stipulated in Article 11 of the 1945 Indonesian Constitution, these ratifications are still subject to consent from the Indonesian House of Representatives (DPR) as they are the appointed institution in Indonesia with treaty-making powers. The act of ratification by the Indonesian Government is regarded as a ratification only in the international sense, where such action would only make the treaty enter into force internationally, but not internally within Indonesia. This paper seeks to analyze the legal implications which signature and ratification of international treaties may hold in the Indonesian government. Such is done by studying the class action lawsuit for Indonesia being signatories the Convention on the Protection of the Rights of All Migrant Workers and Member of Their Families and its failure continue to further ratify the Convention.

Keywords: class action lawsuit, ratification, treaty.

Intisari

Ratifikasi perjanjian internasional merupakan tindakan politik yang memerlukan persetujuan dari Dewan Perwakilan Rakyat (DPR) sebagai lembaga dengan *treaty-making power* sebagaimana yang diatur oleh Pasal 11 UUD 1945. Tindakan ratifikasi oleh Pemerintah Indonesia hanya bermakna sebagai ratification hanya dalam *the international sense*, yakni membuat perjanjian tersebut berlaku di level internasional, bukan berlaku di wilayah hukum Republik Indonesia. Artikel ini menganalisis proses and implikasi hukum diratifikasinya dan ditandatanganinya suatu perjanjian internasional oleh Pemerintah Indonesia dengan menelaah gugatan *class action* yang dilakukan terhadap Pemerintah Indonesia mengenai belum diratifikasinya Konvensi Buruh Migran.

Kata Kunci: gugatan *class action*, ratifikasi, perjanjian internasional.

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A. Introduction

Several years in retrospect, the Indonesian government was preoccupied facing a number of lawsuits in relation to treaties. The first of these claims was filed by a non-governmental organization to the Constitutional Court with respect to Act No. 38 of 2008 on the Legalization of the Charter of the Association of Southeast Asian Nations against the Amended Constitution of 1945. In this case, designated 33/PUU-IX/2011, the claimant presented a set of material norms, which claimed that Articles 1(5) and 2(2)(n) of the Act No. 38 of 2008 are against Articles 27(1) and (2) as well as 33(1), (2) and (3) of the Amended Constitution.

Furthermore, on April 5, 2011, 165 claimants from various institutions and societies filed a Class Action against the Indonesian government, c.q. the President, the Vice President, the Minister for Foreign Affairs, the Minister for Law and Human Rights, and the Minister for Labor and Transmigration, to the District Court of Central Jakarta. One of the legal bases for this Class Action, designated 146/Pdt/G/2011/PN.JKT.PST, is the wrongful act of the Indonesian government by having not yet ratified the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990 (hereinafter, "Migrant Workers Convention").

The Class Action was resulted from the Indonesian government's ignorance for the wellbeing of Indonesian migrant workers abroad, especially the household assistants, who have ever so often been abused and treated inhumanely by their employers. The Claimants deemed that the Indonesian government has conducted a wrongful act of negligence, in that it has failed in providing adequate legal protection of its citizens, and especially in that it fails to issue an Act of Law which would otherwise provide protection of

Indonesian workers abroad.¹

Talking about treaties is basically talking about the executive authority to make and ratify an international agreement as well as the legislative authority to approve of whether said international agreement may be implemented in Indonesian territory. From Montesquieu's concept of the separation of powers, the Indonesian system regarding the incorporation of an international agreement into the national legal system is impure. In fact, a norm of international law which has been ratified by the President and approved of by the House of Representatives (DPR) can be not immediately applicable, nor made reference to as a legal basis, in court.

The impurity of separation of powers in Indonesia is evident in Article 11 of the Amended Constitution of 1945, which says that the President in entering into an agreement with another State must only do so with the approval of the DPR, because they are the State institutions with treaty-making powers. The common practice has been that, while the President has entered into an agreement with another State, the agreement cannot be ratified because the DPR has yet to give its approval. In contrast, States which have adopted the pure concept of the separation of powers strictly divide the functions of the executive with those of the legislative, where the executive is authorized in conducting 'external affairs', such as entering into and ratifying treaties without the intervention of the legislative, while the legislative is in charge of the 'internal affairs', where the signed and ratified treaties shall not take effect at the national level unless the legislative approves of their implementation.

Based on the foregoing, logically in Indonesia if the DPR has approved of a treaty and the President c.q. the Minister for Foreign Affairs has ratified or acceded into said treaty, then the treaty shall apply within Indonesian territory

¹ Dewan Koordinator Indonesia Support Facility, "Berharap Keadilan pada Putusan Akhir Gugatan terhadap Pemerintah Indonesia dan DPR RI", <http://dk-insufa.info/in/release/733-berharap-keadilan-pada-putusan-akhir-gugatan-terhadap-pemerintah-dan-dpr-ri>, accessed on 3 September 2012.

once the government has registered its ratification or accession into the UN Secretary General, as stipulated in Article 102(1)² of the UN Charter. However, in reality the existing practice is not such. This is due to the fact that Indonesia is not a monistic State, unlike, for example, the United States of America. Therefore, even if the President has ratified the treaty and the DPR has approved thereof, the treaty may not be directly applicable in Indonesian courts.

In light of the Class Action case above, the Indonesian government has actually signed the Migrant Workers Convention but has yet to ratify it – leading to the Class Action on the basis that the Indonesian government has conducted a wrongful act in its negligence in immediately ratifying the Convention. The most fundamental question would be related to the assertion that whether the non-immediacy of the Indonesian ratification of the Migrant Workers Convention, i.e. on April 12, 2012 – eight years since the Indonesian date of signing, would constitute a wrongful act. This essay aims at analyzing and explaining a number of issues regarding the meaning of signature, ratification and accession to an international agreement, as well as the integration process of international agreements into the Indonesian legal system and the legal status of an international agreement in Indonesia. Additionally, near the end, this essay will also explain about the legal implication of the ratification of the Migrant Workers Convention towards Indonesian workers abroad.

B. Discussion

1. Meaning of Signature, Ratification, and Accession to a Treaty

The signing of a treaty is universally regulated under the 1969 Vienna Convention on the Law of

Treaties. Indonesia has yet to ratify the Convention, but the government has indeed considered the norms contained within the Convention to be reflective of customary international law, so even without ratification the Convention has become a source of law in Indonesia.³

Customary international law is one of the sources of law available for a judge to use in obtaining the legal grounds to make a decision – as has been stipulated in Article 38(1) of the Statute of the International Court of Justice. However, not all customs can be referred to by a judge as a legal ground; it has to be in the form of a customary law. Customary law is defined as customary practices with legally binding powers. In order for a custom to become a norm of customary international law, there needs to be two conditions: the existence of State practice and *opinio iuris sive necessitatis*.⁴ In practice, customary norms can be accepted as international law if there is no objection by States to abide thereby.⁵

In this modern era, States put more priorities on legal certainty, obtainable when relations among States are inscribed onto an international agreement. Nevertheless, in states with non-codified Roman Law, customary international law still ranks higher in the legal hierarchy. One example is Germany, which used to be a positivistic State but underwent a dark positivism era during the Hitler governance due to his famous governmental slogan, “An order is an order, no matter what.” As a consequence, during Hitler’s regime if the law demands the mass murder of the Jewish people, then it has to be done because the law has said so. Since then Germany has changed into prioritizing the values in the society, namely those of adequacy or appropriateness. Now Germany upholds customary

² “Every treaty and every international agreement entered into by any member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.”

³ Arief Havas Oegroseno, “Research on Application of International Law in International Arena”, *Paper*, The 2nd Training on International Legal Research for Lecturers, Center for International Law Studies, Faculty of Law Universitas Indonesia, Depok, 3-9 September 2006.

⁴ Peter Malanczuk, 2002, *Modern Introduction to International Law*, Seventh Edition, Routledge, London/New York, p. 39.

⁵ Mochtar Kusumaatmadja, 1976, *Pengantar Hukum Internasional*, Bina Cipta, Bandung, p. 103.

international as one of the sources of law in its national courts.⁶

Matters pertaining to a treaty are universally regulated within the 1969 Vienna Convention on the Law of Treaties. Categorization of treaties has sparked the emergence of new terms, such as, in terms of participant: bilateral, regional, and multilateral treaties; in terms of structure: law-making treaties and treaty contracts; in terms of objects: political and non-political treaties; and in terms of its implementation in national courts: self-executing and non-self-executing treaties.⁷

Are States obliged to be bound by a treaty? According to Brierly, there are two reasons for States to be attentive of the norms of international law, which are based on the basic rights doctrine and the positivism doctrine. The basic rights doctrine explains that the principles of international law are the main principles for the States, whereas the positivism doctrine argues that international law is a set of rules accepted by the States and binding for those who have accepted, but not binding for those who have not.⁸ Even though Brierly stated that the norms of international law are the basic rules for the States, he did not refute the fact that not all States are willing to accept and abide by the existing norms of international law.

Furthermore, States can bind themselves to a treaty by means of signature, signature *ad referendum*, ratification or accession.⁹ However, Boer Mauna emphasized that the consent to be bound by a treaty is sufficiently expressed through signature or ratification.¹⁰ This means, according to O'Connell as quoted by Budiono Kusumohamidjojo, signature can be the final act of a full-powered representative of a State to a treaty

negotiation as well as the expression of his or her country's approval of the Final Act of the treaty. Afterwards, a signature is a symbol of a State's official consent on the contents of a treaty.¹¹ In Article 12(2)(b)¹² of the 1969 Vienna Convention the term signature *ad referendum* is oft used with respect to multilateral treaties, where signature marks the beginning of what will eventually lead to ratification.¹³

After the signing of a treaty, ratification usually follows, although Schwarzenberger disagreed to the assertion that ratification is compulsory – i.e. if the treaty itself does not require ratification, then a signature is sufficient expression of consent to be bound by that treaty. Similarly, O'Connell mentioned that “ratification is only required when the treaty so specifies or so implies.”¹⁴

The meaning of ratification according to the 1969 Vienna Convention can be observed in Article 2(1)(b), which says 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.”

Kaczorowska argues that the process of ratification is usually used to describe two separate procedural actions, which are ratification in the international sense and ratification in the municipal sense. The former refers to a procedure undergone in order for the treaty to be implementable universally, whereas the former is a formal action conducted by an authorized institution of a State.¹⁵ In other words, ratification in the international sense is the absolute authority of an executive body to make and ratify a treaty, while ratification in the municipal sense is the action of the legislative

⁶ George Slyz, “International Law in National Courts”, *New York University Journal of International Law and Politics*, Vol. 28, No. 1 & 2, Fall 1995 & Winter 1996, p. 95.

⁷ Edy Suryono, 1984, *Praktik Ratifikasi Perjanjian Internasional di Indonesia*, Remaja Karya, Bandung, pp. 13-16.

⁸ Sam Suhaedi Admawiria, 1968, *Pengantar Hukum Internasional I*, Alumni, Bandung, pp. 39-41.

⁹ Rebecca Wallace, 1992, *International Law*, Second Edition, Sweet & Maxwell, London, p. 222.

¹⁰ Boer Mauna, 2001, *Hukum Internasional: Pengertian, Peranan dan Fungsi dalam Era Dinamika Global*, Alumni, Bandung, p. 116.

¹¹ Budiono Kusumohamidjojo, 1986, *Suatu Studi terhadap Aspek Operasional Konvensi Wina 1969 tentang Hukum Perjanjian Internasional*, Bina Cipta, Bandung, p. 5.

¹² “The signature *ad referendum* of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty.”

¹³ Boer Mauna, *Op.cit.*, p. 119.

¹⁴ Edy Suryono, *Op.cit.*, p. 24.

¹⁵ Alina Kaczorowska, 2002, *Public International Law*, Old Bailey Press, London, pp. 227-228.

body to approve of whether or not the treaty which has been ratified by the executive may be incorporated into the national legal system of that State.

Accession is more or less similar to ratification, Article 15 of the 1969 Vienna Convention emphasizes that accession is an expression of consent to be bound by a treaty. The difference between accession and ratification lies on the fact that accession is the act of a non-negotiating State to that treaty, whereas ratification requires that the State be a negotiating State.¹⁶

In the case of the 1990 Migrant Workers Convention, Article 86(1)¹⁷ provides that the Convention is subject to ratification, therefore, without which no State can be bound to this Convention. The signature imprinted by the Indonesian government may be interpreted as official approval by the government of the contents of the Convention. According to Article 18¹⁸ of the 1969 Vienna Convention on the Law of Treaties, the government of Indonesia subsequently has been under a moral obligation to not “defeat the object and purpose of [the] treaty” by the delay in ratifying the Convention or by the fact that the Convention has not yet been universally implementable.

Article 1(b) of Act No. 24 of 2000 on International Agreements defines the term legalization as “a legal act of expressing the consent to be bound by an international agreement, in the form of ratification, accession, acceptance and approval.”

Furthermore, Article 3 of the same Act also regulates the methods through which the Indonesian government expresses its consent to be bound by an international agreement, while

Article 6 of the Act explains the process of concluding an international agreement as well as the twofold meaning of signature, which are of the official sign of approval of the agreement’s text or of an expression of consent to be bound by the agreement. In the explanatory section it is elaborated that signature on an international agreement requiring a legalization does not amount to expression of consent to be bound by that treaty until that treaty has been legalized.

Ratification of a treaty is a political decision of a State which consents to be bound by the norms of international law. A State’s willingness to ratify depends a great deal on the authorities with treaty-making power, which in this case are the executive body and the legislative or the parliament.

In Australia, the Commonwealth Parliament holds three essential authorities in supervising the administration of government: (i) control of executive; (ii) control of expenditure; and (iii) control of taxation.¹⁹ One of the functions under control of executive is with respect to the approval of a treaty which has been ratified by the Commonwealth Government – where the Commonwealth Government is required to obtain the approval of the Commonwealth Parliament for the treaty to be implementable in Australia.²⁰ Ratification of a treaty still binds Australia at the international level in relation to the entry into force of that treaty and in the relations with other States when a legal dispute arises at the International Court of Justice. The rationale behind this Australian practice is the doctrine of separation of powers, which differentiates the functions of each State institution in the governmental system.²¹

¹⁶ Budiono Kusumohamidjojo, *Op.cit.*, p. 8.

¹⁷ “The present Convention shall be open for signature by all States. It is subject to ratification.”

¹⁸ “A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (1) it has signed the treaty or has exchanged instrument constituting the treaty subject to ratification, acceptance, or approval, until it shall have made its intention clear not to become a party to the treaty; or (2) it has expressed its consent to be bound by the treaty, pending its entry into force of the treaty and provided that such entry into force is not unduly delayed.”

¹⁹ Jimly Asshiddiqie, 2007, *Pokok-Pokok Hukum Tata Negara Indonesia*, Bhuana Ilmu Populer, Jakarta, p. 302.

²⁰ Gareth Evans, “International Treaties: Their Impact on Australia”, *Speech*, International Treaties Conference, Canberra, 4 September 1995.

²¹ Rosalie Balkin, *International Law and Domestic Law*, in Sam Blay (Eds.), *et al.*, 2005, *Public International Law: An Australian Perspective*, Second Edition, Oxford University Press, Victoria, pp. 122-123.

The non-immediacy of ratification of the 1990 Migrant Workers Convention by the Indonesian government is by no means a situation of negligence which could incur liability, due to the fact that ratification is a political act of the authority. Besides, the ratification of the 1990 Migrant Workers Convention on April 12, 2012 did not create any impact on the Indonesian workers abroad, due to the fact that Indonesian laws cannot deal with the alleged abusers of the workers, most of whom are non-Indonesian citizens. Instead, the ratification of the Convention will greatly benefit the foreign workers in Indonesia, because the norms of the Convention must be transformed into a national Act and the Indonesian government is bound to fulfil its obligations under the Convention.

2. Treaties in the Indonesian Constitutional System

The 1990 Migrant Workers Convention was ratified by Indonesia in 2012, eight years after it was signed by the government. This naturally has invited many questions and even caused a Class Action against the government, noting its negligence and violation of human rights.

In the Indonesian constitutional system, there actually is a clear distinction of authority between the President and the House of Representatives (DPR) with respect to making an international agreement. The President is authorized to make and ratify a treaty, whereas the DPR holds the power of control by giving its approval prior to ratification of that treaty by the President and the registration of that treaty to the UN Secretary General.

The Indonesian constitutional system follows the separation of powers, thereby creating impure functions of the President c.q. the Minister for Foreign Affairs in concluding a treaty because of the “intrusion” by the DPR’s considerable authority in deciding whether the treaty concluded

by the President may proceed to ratification. If the DPR has bestowed its approval, then once the President has ratified the treaty it also becomes applicable within the Indonesian territory by virtue of a national Act which legalizes said treaty.

This concept is still imitative of the checks and balances concept of the United States of America. However, this has been unsuccessfully implemented in Indonesia due to the fact that Indonesia is not a monist State, while the United States is. In the United States the norms of international law can be directly implemented in its national courts even without an implementation Act at the national level – although still subject to certain requirements, whereas in Indonesia this cannot be done on account of clash with Indonesia’s dualism perspective, whereby international law must undergo a “costume change” or be transformed into an implementation Act at the national level in order for it to be applicable in the national courts.

Indonesia is a dualist State with 90% of hard transformation and 10% of soft transformation. Indeed, according to dualism both of the schools are quite critical in looking at the existence of international law within the national legal system: the hard transformation school’s view is that international law can be part of national law by virtue of a legislative action, whereas the soft transformation school sees that international law can only be part of national law following both legislative and judicative actions. In Indonesia the judges are not allowed the opportunity to venture into “second-guess legislation,”²² meaning that they are very rarely utilizing the norms of international law as a source of law in making an interpretation of national law due to the DPR’s dominant authority as lawmaker.

The existence of national Acts legalizing a treaty is quite perplexing both to academics and practitioners for reasons of multiple interpreta-

²² Ina Nazarova, “Alienating Human from Right: US and UK Non-Compliance with Asylum Obligations under International Human Rights Law”, *Fordham International Law Journal*, Vol. 25, No. 5, June 2002, p. 1360.

tions, e.g. whether the Act serves as the DPR's approval in accepting the treaty as part of the national law following its ratification by the President c.q. the Minister for Foreign Affairs or just a form of approval per se as a legal ground for the President to determine the next steps. The debate continues on a monism-dualism level: if the former, then the treaty which will be/has been ratified by the President will be applicable in Indonesia after the implementation Act has been issued. This Act will only contain two provisions, the second one stating that "the Act apply since the date it is issued." Additionally, the Act will have as annex the treaty which will be/has been ratified.

Nevertheless, judging from the practice of the implementation of international law in Indonesia through national legislation, the Acts legalizing the treaties conforms more to the latter interpretation, which sees that the Act will serve only as approval to the President per se without making the treaty applicable in Indonesia. For example, the Presidential Decision No. 19 of 1997 legalizing Berne Convention for the Protection of Literary and Artistic Works in fact did not bestow legal power for the Berne Convention to be applicable in Indonesia, because the norms contained in the Berne Convention is incorporated into Act No. 19 of 2002 on Copyrights.²³ This rendered the meaning of "apply" in the second Article of the legalization Act even more unclear. Taking Indonesia's dualism with its hard transformation model, the word "apply" is actually addressed to the government and the DPR, so that when making an Act they must look back at the ratified norms of international as "one of the sources of law," therefore the Articles of the national Act will not be contradictory to the international obligations which the Indonesian government has consented to fulfil.

This Indonesian practice is in fact very unusual for a dualist State, because the existence of two legally binding national Acts with different legal powers invokes multiple interpretations among both the academics and the practitioners. The transformation Act binds all the components of the Indonesian people, while the legalization Act only binds the two State institutions, i.e. the President and the DPR as the treaty-making authorities.

3. Legal Status of Treaties in Indonesia

How did the 1990 Migrant Workers Convention, following the ratification by the Indonesian government, become "part of our law" or "one of the sources of our law"? "Part of our law" infers that the Convention must be treated as national law, but this of course is contrary to Article 7(1) of Act No. 12 of 2011 on the Formulation of Statutory Regulations,²⁴ wherein international law is not included as an admitted source of law in Indonesia.

Therefore, treaties must be changed or transformed into some form of statutory regulations which are admissible in Indonesia under Article 7(1) of the aforementioned Act No. 12 of 2011. Act No. 6 of 2012 on the Legalization of the International Convention on the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families is not the Act that transformed the 1990 Migrant Workers Convention, because the Act is only the procedural approval from the DPR to the President, pursuant to Article 11(1) of the Amended Constitution of 1945, before the President may proceed to ratification and registration of the Convention.

The confusion resulting from the irregularity of this Indonesian practice will become a burden for the judges, because not all of them are of the same view as to the legal status of treaties in Indonesia, i.e. whether a legalization Act is

²³ A discussion with Abdulkadir Jailani (Head of the Sub-directorate for Political and Security Agreements, Ministry of Foreign Affairs Republic of Indonesia), subsequently delivered in the Indonesian Constitutional Court in an Expert Witness capacity representing the Government of the Republic of Indonesia c.q. the Ministry of Foreign Affairs, 23 August 2011.

²⁴ "The types and hierarchy applicable to regulations comprise of: (1) 1945 Constitution, (2) MPR Decree, (3) Act/Law and Government Regulation in lieu of Law, (4) Government Regulation, (5) Presidential Regulation, (6) Regional Regulation, (7) Regency/City Regulation."

sufficient in making the 1990 Migrant Workers Convention applicable in Indonesia or should there be another national Act issued which will transform the Convention the way Act No. 19 of 1997 did to the Berne Convention.

In the end such uncertainty has resulted in an application for a judicial review at the Indonesian Constitutional Court as well as one for a Class Action at the District Court of Central Jakarta. Albeit the difference in the contents of the application, it is evident that in the case concerning the ASEAN Charter the applicants have failed to comprehend the intended meaning in the Act concerning the legalization of international agreements in Indonesia, whereas in the case concerning the 1990 Migrant Workers Convention the applicants also have failed to comprehend in that they pointed out in one of their claims the Indonesian government's failure to ratify the Convention constitutes a wrongful act – a claim which the judges rejected on the grounds of insufficient evidence because the government remained in its commitment to ratify the Convention.²⁵

Referring to the categorization of treaties from their implementation in national courts, all treaties in Indonesia are non-self-executing treaties, which means all treaties, including the 1990 Migrant Workers Convention, cannot be directly applicable in national courts without an implementing legislation or Act. In other words, neither the Migrant Workers Convention nor its legalization Act has legal power in court, instead it is the transformation Act passed by the DPR which will become legal grounds for a judge to decide on a case.

Similarly, in Canada all treaties are non-self-executing. Just because a treaty is entered into and ratified by the Canadian government does not guarantee that it shall be applicable in

Canadian territory unless there is approval by the Federal and/or Provincial Parliament – making unapproved treaties only having legal relations with the Canadian government. Interestingly, the Canadian practice tends more to the soft transformation school, where the applicability of a treaty to be incorporated into the Canadian law depends not only on an action by the legislative, but also the judiciary.²⁶ Even though the Canadian process of integration of a treaty is different from the Indonesian, the status of treaties in respective States is the same, which is that they cannot be applicable in court without the existence of implementing legislation. In other words, all treaties are non-self-executing. Ratification by the Canadian Federal government of a treaty is only meant to make the treaty applicable universally; it does not guarantee that said treaty will be implementable in Canada unless with the approval from the Federal and/or Provincial Parliament. If the Federal and/or Provincial Parliament never approved of the implementation of the treaty which has been ratified by the Canadian Federal Government, then the norms of international law therein will never have any legal effect on the Canadian people. However, this does not prevent the judges to refer to the norms within the treaty as a source of law or reference in conducting an interpretation of the law.

4. Ratification of the 1990 Migrant Workers Convention Does Not Guarantee Protection of Indonesian Workers Abroad

Looking at the Indonesian constitutional system with respect to treaties, ratification by the Indonesian government of the various treaties does not have any legal effect on anyone whatsoever, except for the respective executive and legislative bodies who will eventually cooperate in drafting the transformation Act, which will personify the provisions in the 1990 Migrant Workers

²⁵ A discussion with Agusman Damos (Consul General of the Republic of Indonesia in Berlin, Germany) and Abdulkadir Jailani (Head of the Sub-directorate for Political and Security Agreements, Ministry of Foreign Affairs Republic of Indonesia) in the Class Action case designated 146/Pdt/G/2011/PN.JKT.PST, Group Erga Omnes, 27 August 2012.

²⁶ Christopher Harland, *Domestic Reception of International Humanitarian Law: UK and Canadian Implementing Legislations*, in Christopher P.M. Waters (Eds.), 2006, *British and Canadian Perspectives on International Law*, Martinus Nijhoff, Leiden/Boston, p. 29.

Convention into some form of statutory regulations applicable in Indonesia.

The history of Indonesia's expressions of consent to be bound by treaties has seen several anomalies which are academically confusing. In the colonial times, Indonesian law originated from the Netherlands – this is evident because a great many of the legal terms in Indonesian law are in Dutch and several codifications of law, such as the Criminal Code (KUHP), the Civil Code (KUHPer), as well as the Procedural Criminal and Civil Laws are basically Dutch laws translated into Indonesian. Yet, if traced further back, Indonesian law in fact originated from France, because the French occupied the Netherlands in 1806-1810, during which the former introduced the legal codification of the rules existing thus far in the latter.²⁷

Both France and the Netherlands have similar tradition as regards to their consent to be bound by treaties. They understand consent to be bound in two aspects: international and national. Using the model of pure separation of powers, the executive – in this case the President – can freely enter into agreements with other States, but these treaties, which may have been entered into, signed, or ratified, will only bind the States at the international level, because they have only just fulfilled the first requirement, which is ratification in the international sense. In order for it to be nationally binding, ratification in the municipal sense must be fulfilled by means of approval by each State's Parliament. Afterwards, in order for them to be able to be referred to in national courts, the treaties must be publicized in the State Gazette.²⁸ This is pursuant to Article 55²⁹ of the 1958 French Constitution

and Article 99³⁰ of the Grundwet. Furthermore, Article 94³¹ of the Grundwet explains that if a conflict should arise between a treaty and an Act issued by the Dutch government, then the treaty shall prevail. Similarly, according to French law a ratified and publicized treaty takes precedence over an Act issued by the French government.

This condition means that international law takes precedence over national law in both France and the Netherlands, and that international law is “part of the municipal law” instead of a “source of law” in the two States, so that the judges may refer to the norms of international law directly in court. In other words, both France and the Netherlands are monist States.

Does Indonesia follow the same procedures as its colonist? As it turns out, Indonesia does not follow the model of pure separation of powers and tends more to adopt the United States' checks-and-balances model – which still presents an anomaly at the implementation level. Legislative intervention in treaty affairs is very dominant, where the executive – the President – cannot ratify a treaty unless the Senate (in the case of the United States) or the DPR (for Indonesia) grants its approval. Once the United States Senate bestows its approval, the President can then ratify, register and subsequently publicized the treaty to the UN Secretary General, and only then will the treaty be binding for the United States of America both internationally as well as nationally. This is because the two elements as mentioned by Kaczorowska, i.e. ratification in the international sense and ratification in the municipal sense, have been fulfilled. Article 6 of the United States Constitution implies that the United States of

²⁷ Wikipedia, “History of the Netherlands”, http://en.wikipedia.org/wiki/History_of_the_Netherlands, accessed on 10 September 2012.

²⁸ E.A. Alkaema, Constitutional Law, in Jeroen Chorus, *et al.*, 2006, *Introduction to Dutch Law*, Kluwer Law International, 4th Edition, The Hague/Boston, p. 326.

²⁹ “Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.”

³⁰ “Provisions of treaties and of resolutions by international institutions, which may be binding on all persons by virtue of their contents shall become binding after they have been published.”

³¹ “Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.”

America is a monist State,³² whereby treaties prevail over the national laws, whether Federal law or laws of the States.³³ This is why the norms of international law which have been ratified by the United States government are considered as “part of municipal law” on par with federal laws, or are sometimes referred to as “federal common law.”³⁴

In Indonesia, the practice and procedure of treaty ratification have actually fulfilled the two abovementioned elements. The approval of the DPR is bestowed by means of the Act on the Legalization of International Agreements, followed by the ratification by the Indonesian government, registration and publication to the UN Secretary General. Logically, treaties which have been ratified by the Indonesian government bind Indonesia as a whole, both at the international or national levels. In other words, treaties in Indonesia should have been “part of the municipal law,” thus making Indonesia a monist State the way France, the Netherlands and the United States of America are. Nevertheless, that logic crumbles as the norms of national law and everyday practices do not seem to be heading toward the aforementioned direction.

Normatively there is not any rule in Indonesia, whether in the Amended Constitution of 1945 or in the other statutory regulations, that emphasizes on which law shall prevail in the event of conflict between a ratified treaty and the national law. The norms of international law are not even a source of law for Indonesian judges because Article 7 of Act No. 12 of 2011 on the Formation of Statutory Regulations does not include treaties as admissible

law in Indonesia.³⁵ The absence of provision on the legal status of treaties may be concluded as Indonesia’s dualist characteristic, in that treaties need to be transformed first into some form of admissible national laws.³⁶

In the case of judicial review at the Indonesian Constitutional Court regarding Act No. 38 of 2008 on the Legalization of the Charter of the Association of Southeast Asian Nations against the Amended Constitution of 1945, designated 33/PUU-IX-2011, it is evident that there is an understanding that the Act legalizing a treaty is considered as the Act transforming the treaty in Indonesia, therefore it is eligible for judicial review, just as any other Act.

The confusion is understandable, because the practice of integration of treaties into the Indonesian legal system has created an anomaly. It is always mentioned in an Act legalizing a treaty, specifically in Article 2, that “this Act shall apply on the date it is issued.” The legalization Act is not a transformation Act that describes the ratified treaty.³⁷ The legalization Act holds two meanings: first, it is the approval of the DPR to the President for him to ratify the treaty and, second, it renders the treaty applicable.³⁸ The meaning of “applicable” here is also debatable, especially regarding for whom it is applicable. Damos Dumoli Agusman argues that it should be understood as “applicable” for the President to be used as legal grounds for the ratification of the particular treaty.³⁹

From the history of the emergence of law in Indonesia, the model of treaty publication into the State Gazette, as practiced by France

³² “All treaties shall be the supreme law of the land.”

³³ Alfred T. Goodwin, “International Law in the Federal Courts”, *California Western International Law Journal*, Vol. 20, No. 2, 1989-1990, p. 159.

³⁴ Louis Henkin, “International Law as Law in the United States”, *Michigan Law Review*, Vol. 82, 1984, p. 1561.

³⁵ “1) 1945 Constitution; 2) MPR Decree; 3) Act/Law and Government Regulation in Lieu of Law; 4) Government Regulation; 5) Presidential Regulation; 6) Regional Regulation; and 7) Regency/City Regulation.”

³⁶ Wisnu Aryo Dewanto, “Memahami Arti Undang-Undang Pengesahan Perjanjian Internasional di Indonesia”, *Jurnal Opinio Juris*, Vol. 4, Januari-April 2012, p. 18.

³⁷ *Ibid.*, pp. 24-25.

³⁸ Wisnu Aryo Dewanto, 2011, “Perjanjian Internasional *Self-Executing* dan *Non-Self-Executing*”, *Dissertation*, Doctorate Program of the Faculty of Law Universitas Gadjah Mada, Yogyakarta, p. 156.

³⁹ A discussion with Damos Dumoli Agusman, Rahmat Budiman and Abdulkadir Jailani as well as other colleagues at the Ministry of Foreign Affairs of the Republic of Indonesia, Jakarta, 23 August 2011.

and the Netherlands, becomes implausible. It is impossible that, following publication into the State Gazette, the treaty becomes applicable in Indonesia on account of the State's dualism. It is also impossible that the Act publicized into the State Gazette is a transformation Act, due to its two-Article substance. Therefore, the meaning of "applicable" here is intended for the treaty itself, in that, since all treaties pose certain requirements for its entry into force and applicability, the treaty shall be applicable subject to its own requirements. In other words, the treaty shall be "applicable" for Indonesia at the international level, not at the national level, even though the treaty might have been approved by the DPR.

Furthermore, if further understood, the Act legalizing a treaty is not regulated under the same Article with the rest of the statutory regulations under the Amended Constitution of 1945; but since it uses the same nomenclature ("Act"), it is often considered as being the same as other Acts. The Act legalizing a treaty relates more with Article 11 of the Amended Constitution of 1945, specifically regarding treaty-making power, whereby the President upon the DPR's approval enters into a treaty. This relation is political, in accordance with the principle of the separation of powers, where the executive is authorized to enter into and ratify a treaty, whereas the legislative functions internally, i.e. approving or disapproving the treaty made by the executive under certain requirements. The other, general statutory Acts are under Article 20 of the Amended Constitution of 1945 regarding the legislative function of the DPR, so that the Acts which they issue may be subject to judicial review by the Constitutional Court if it is suspected as being unconstitutional.

So far the practice of integrating treaties into the national legal system involves the legislative body, the DPR, making the transformation Act to incorporate the ratified norms of international

law in order for them to be applicable in Indonesia, e.g. the ICCPR, ratified by Act No. 12 of 2005 but was personified into Indonesian law by means of Act No. 39 of 2009 on Human Rights; the United Nations Convention on the Law of the Sea of 1982 (UNCLOS), ratified by Act No. 17 of 1985 and incorporated into Indonesian law through Act No. 6 of 1996 on Indonesian Waters and Act No. 5 of 1985 on the Indonesian Exclusive Economic Zone; and the United Nations Convention on Climate Change, ratified by Act No. 6 of 1994 but effective for application in Indonesia following the issuance of Act No. 32 of 2009 on the Environmental Protection and Management. From these phenomena it may be drawn out that the meaning of "applicable" in Article 2 of the Act legalizing a treaty is actually meant for the government and the DPR to recollect and reflect that there are norms of international law which have been mutually agreed upon and which must be implemented in Indonesia.⁴⁰

That said, from the practice of the Indonesian constitutional system regarding the integration of treaties into the national legal system, the ratification of the 1990 Migrant Workers Convention did not create any legal effect for Indonesian workers, especially those working abroad. In other words, the ratification of this Convention did not amount to anything, except that it increased the number of States parties bound thereto in relation to the Convention's entry into force. On the contrary, this Convention will have great impact on foreign workers in Indonesia, because the Indonesian government is under obligation to adjust the standard of protection for foreign workers in its territory, as stipulated under the Convention.

C. Conclusion

Based on the foregoing, several conclusions can be drawn out, which include: **Firstly**, the Class Action against the non-immediacy of the

⁴⁰ Wisnu Aryo Dewanto, *Op.cit.*, p. 27.

Indonesian government in ratifying the 1990 Migrant Workers Convention is inadmissible, because ratification of a treaty is not an obligation for the States. **Secondly**, the Legalization Act No. 6 of 2012 is not the transformation Act of the 1990 Migrant Workers Convention, because the legalization Act is a form of formal approval by the DPR to the President for him to ratify the treaty pursuant to Article 11 of the Amended Constitution of 1945. **Thirdly**, the ratification of the 1990 Migrant Workers Con-

vention by the Indonesian government did not have legal effect and guarantee of legal protection for Indonesian workers abroad; it only increased the number of States Parties to the Convention. **Fourthly**, the ratification of the 1990 Migrant Workers Convention instead provides a lot of benefits to foreign workers in Indonesia, because the Indonesian government is bound to apply a standard for the protection of foreign workers in Indonesia, as stipulated in the Convention.

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