BOOK: “TREATIES UNDER INDONESIAN LAW”

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Executive Summary

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1. CONSTITUTIONAL AMBIGUITIES CONCERNING TREATIES UNDER INDONESIAN LAW

At present, the legal status of treaties under Indonesian law is still ambiguous in nature. By using traditional monist-dualist theories as tools of analysis and the empirical basis of comparative research, it was revealed that the existing constitutional order of Indonesia has not adequately addressed the legal status of treaties under its domestic law. In practice, there are various constitutional interpretations on their domestic status in Indonesia that are at variance with one another, and mutually negate each another. Different interpretations have led to different outcomes. Such various different interpretations stem from
various constitutional ambiguities that exist in the constitutional order of Indonesia. The ambiguities are created by the following: unclear constitutional provisions, poorly drafted statutory laws concerning treaties, no theoretically informed basis, and inconsistent constitutional practices. The constitutional ambiguities have resulted in legal uncertainty about the precise effect of treaties under Indonesian law.

The remnants of the monist legal approach of the Netherlands had occupied the legal thoughts of many Indonesian scholars in the earlier period of independence. Many scholars viewed that once a treaty enters into force, it binds Indonesia. Thus the question of deciding on its domestic status was considered unnecessary. The influence of Indonesian constitutional experts in the years to come, coupled with the emerging issues of non-self-executing treaties in international practice, apparently affected such monist legal thoughts, which in turn brought up a dualist legal view in scholarly fields.

In subsequent practice, the two conflicting theories have inadvertently influenced the observations of many scholars in Indonesia within their respective spheres. The debate was however conducted without any theoretically informed concept or academic guidance due to a shortage of legal expertise and a lack of international legal references. The domestic order was influenced by the absence of a theoretical backup. Thus the legal construction existed without any necessary concept relevant to the determination of the domestic status of treaties, such as the mode for
granting domestic validity, the hierarchical rank of treaties in domestic law; etc.

The strict separation of the academic disciplines between constitutional law and international law in Indonesia also contributed to the deficiency of the domestic order. The two academic disciplines never collaborated and did not keep each other well-informed. The constitutional order is understood partially, be it from the viewpoint of constitutional law or/and international law that was never approached through a collaborative perspective. Constitutionalists and international law experts in Indonesia interpreted the order in an uncoordinated manner and imposed their own terms in interpreting the constitutional provisions for their own respective academic fields. Both groups of experts understood treaties in their isolated schools of thought and independent perspectives. As a result, the constitutional approach became incoherent because it ignored relevant international aspects of domestic law. The understanding of treaties by international law experts lacked domestic legal aspects. Such rudimentary and incomprehensive outlooks apparently caused and exacerbated the said constitutional ambiguities.

Although the sentiment of nationalism, the culture of resistance or indifference towards the so-called ‘colonial’ international law in Indonesia since the 1960s has been fading away, there was still no great interest among Indonesian scholars to place treaties properly in domestic law
until recently. Policy option is still absent in the constitutional agenda. No
intensive scholarly debate has to date significantly taken place on the
matter. Various factors account for this. From the experiences of the states
under comparative examination, this kind of attitude appears to be
typical in developing countries that have no close connection to the
Western legal tradition, as evidently shown by China. The following
historical facts have contributed to the typical unenthusiastic attitude:
Indonesia developed its own legal system by disconnecting it from the
legal tradition of its former colonial states, its geo-political isolation from
intensive international interactions, and the hostile attitude of Indonesia
towards international law in the earliest phase of independence. The
authoritarian government regime in the aftermath delayed the
development of the constitutional order on treaties. The need for a clear
regime of the domestic aspect of treaties arose only after Indonesia
entered into a democratic system in 1999, 54 years after gaining
independence.

As Indonesia continues its transition toward a fully democratic system,
the question concerning the legal status of treaties to which Indonesia is
bound shall be adequately addressed and their validity under domestic
law shall be constitutionally determined. Their domestic treatment can no
longer rely on discretionary power. To serve this purpose, Indonesia
needs a clear basis for their domestic application as well as their
constitutional legitimacy. Such a clear basis could be achieved by
optimizing the existing legal regime.
There are at least three constitutional ambiguities that need to be resolved with a view to optimize the existing legal regime concerning the status of treaties under Indonesian law:

a. The utmost ambiguity is rooted in the existing constitutional provisions i.e. Article 11 of the Constitution of 1945: *The President, with the approval of the DPR¹, declares war, makes peace, and treaties with other states*, which is considered too simplistic and largely influenced by the provision from the Meiji Constitution. While in Meiji Constitution prescribed that “the Japanese Emperor was empowered to make treaties”), the Indonesian version was only slightly modified through the insertion of the words ‘*with the approval of the House of Representatives*’. Such a formulation has raised many legal difficulties in practice as it may be interpreted that Parliament could be involved in all stages of the treaty-making process and that all treaties are subject to parliamentary approval.

b. The second problem concerns the role of Parliament in treaty-making, in view of existing constitutional practices which arises from the first ambiguity. The practice distinguishes its functions in a strict manner i.e. whether it is within the ambit of legislative

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¹ The Indonesian term DPR (Dewan Perwakilan Rakyat) corresponds to the Indonesian House of Representatives (hereinafter ‘House of Representatives’). The House of Representatives is considered as the Indonesian Parliament. In this writing, the term ‘parliament’ or ‘parliamentary’ will refer to the House of Representatives.
function or otherwise its oversight functions. This has created confusion and brought up a number of versions in the understanding of the outcome of parliamentary participation in treaty-making. According to the Law No. 24 of 2000 on Treaties, the parliamentary approval takes a form of ‘law/Act of Parliament approving treaties’. The choice unintentionally tends to create the said prescription that the determination of the domestic status of treaties would correspond to the legal effect of parliamentary participation. This is in particular when it comes to how one signifies the law approving treaties as the outcome of such participation. On the one hand, the view that parliamentary participation in treaty-making is within the ambit of legislative function has tended to induce the interpretation of the law approving a treaty as a legislative product. On the other, there also appears a view that such participation is within the ambit of the Parliament’s oversight function, which tends to create a strong assertion that the law approving a treaty is merely a formal expression of parliamentary approval.

c. The third relates to the consequence that indirectly took place due to the second ambiguity, which relates to the mode of granting the treaty domestic validity. The choice has created a double interpretation with regard to the law approving a treaty. On the one hand, the view that the law approving treaties is a legislative product has induced the idea that it constitutes a transformation
into domestic law. The other view states that the law is merely a formal expression of parliamentary approval and has led to an approach whereby the treaty, upon its entry into force, is considered as adopted instead of transformed into domestic law. The entry into force of the treaty in international law is considered identical with its entry into domestic law.

2. POLICY OPTIONS

Since neither monism nor dualism is satisfactory, and no single constitutional order subscribes to strict monism or dualism as well as to a stringent mode of adoption or transformation, the idea of establishing a constitutional order on the basis of pure monism and strict dualism is not realistic and therefore should not \textit{per se} serve as policy option. However, the knowledge of the conceptual divide between the two theories is considered as owing great importance towards a proper understanding concerning the different attitudes of states in giving domestic effect to treaties, and provides a clear perspective necessary for a starting point in the formation of policy in the constitutions.

Various approaches in the actual practice of states illustrate that, under both monism and dualism, the distinction between the validity of treaties
under international law and under domestic law becomes inevitable. It is increasingly held in the actual practice that international law and domestic law have their own standpoint in dealing with the relationship between treaties and domestic law by which different outcomes may arise. At this stage international law remains silent on how domestic law should meet treaty obligations. This is because the nature of such obligations is normally that of obligations of result, with the exception of human rights treaties, which have been arguably seen as imposing obligations of conduct. It is therefore not feasible to maintain a policy which holds that the domestic validity of a treaty is dictated by international law, as monism suggests, or to view that a treaty under international law is completely separated from that of a treaty under (which is transformed into) domestic law, as dualism suggests. Actual practice of states demonstrates that both are distinguishable but inextricable. Policy consideration shall therefore include these converging and diverging elements of monism and dualism.

The experiences of the states under review reveal that a constitutional regime regarding the domestic status of treaties is not supposed to change abruptly from one doctrinal approach to another. Building up a legal regime on the basis of the existing constitutional order is more appropriate for Indonesia. It is therefore suggested that Indonesia optimizes its legal regime by reconstructing the existing legal framework rather than creating a completely new framework. The reconstruction should clarify the vague legal constructions and fill the gap that exists in
the current order, resulting from the lack of doctrine. For this purpose Indonesia needs to have clearer constitutional provisions and at the same time it has to fix the existing constitutional ambiguities arising from the distorted practice. The legal concept available at the theoretical level may provide helpful directions.

3. PARLIAMENTARY PARTICIPATION

Indonesia is already equipped with democratic constitutional infrastructures that may serve to build up a clearer legal regime with regard to the question of the status of treaties in domestic law in which parliamentary participation may be well facilitated. There exist sufficient state organs that are basically required for a modern state, *inter alia*, President, Parliament, and also the various types of judicial institutions. The treaty-making power can be properly allocated among the state organs.

The existing constitutional arrangement has, however, invited criticism for its ambiguity. The simple and ambiguous provision under the Constitution as such could be widely interpreted in a manner that Parliament is involved in all stages of the treaty-making process and gives consent to all treaties. The clarification made by Law No. 24 of 2000 on
Treaties which technically modified the original meaning of the provision of the Constitution, has appeared to constitute unintentionally a quasi-constitutional amendment and given rise to the question of constitutionality. For a coherent system, this constitutional defect must be fixed so that all parliamentary powers should only be given effect by the Constitution.

The subsequent practices of treaty-making of the states under review, in light of the proliferation of subject matters that require parliamentary approval, have suggested that parliamentary participation should not necessarily be determined on the basis of a distinction between its legislative function and oversight function. The existing constitutional setting, which tends to regard the law approving a treaty as either merely a legislative product (within the ambit of legislative function) or otherwise merely a formal expression of parliamentary approval, is not helpful in describing the proper role of Parliament. The current democratic system has prompted an extensive participation of Parliament in all matters that are related to political and economic strategic interests as well as matters that may affect the rights and obligations of individuals. In this regard, the outcome of parliamentary approval, in the form of statutory law, shall be attributed to the general function of Parliament without necessarily referring to the distinction between those functions. Parliamentary participation may embrace all matters within the ambit of legislative function, oversight function as well as budgetary
function. Therefore, all functions are equally necessary and should be attached to parliamentary participation in treaty-making.

4. CRITERIA OF TREATIES THAT REQUIRE PARLIAMENTARY PARTICIPATION

The criteria as set out in Law No. 24 of 2000, which are on the basis of a general description of subject matters, are no longer adequate for two main reasons. First, the criteria should be stipulated in the Constitution instead of the lower legislation as it stands now, since this very matter relates to the allocation of constitutional powers which belong to the Constitution. Second, these criteria greatly emphasize on politically-heavy matters concerning the very existence of the state and exclude, in most parts, matters that affect the rights and obligations of individuals which fall under the legislative domain. As apparent from the comparative outlook, legislative power is nowadays vested in Parliament. On the other hand, there is a growing number of treaties intended to produce legislative effects. It is therefore compelling to include matters that are subject to legislation in the criteria. The inclusion of matters of legislation into the criteria will prevent the drafting out of legislation through backroom deals without parliamentary control. Other important matters
that carry political and economic strategic interests of the state may be added to the criteria.

The criteria on the basis of constitutional separation of powers between Parliament and President are apparently more feasible than making a distinction between a political and an executive/technical nature of a treaty. The complexity and wide range of subject matters covered by treaties under globalization have created difficulties in drawing such distinctions in the practice. It is not always easy to assess treaties as technically and politically important. Therefore, other treaties which do not fall into the category of those that require parliamentary approval shall relate to matters that are, according to the Constitution, exclusively under the purview of government powers.

The existing legal framework raised a problem because the subject matters that are qualified to be embodied in a statutory law should be according to a set of criteria, determined by Treaties Law No. 24 of 2000 and Law No. 12 of 2011 on Legislation. The former deals with criteria of treaties that are subject to parliamentary approval in the form of statutory law, and the latter determines what subject matters should be embodied in statutory law. The criteria set out by the two Laws overlap and are uncoordinated, which seemingly reflects the differences in legal thought between experts of constitutional law and international law. They bring about great disparities in terms of their subject matters and thus the two laws need to be synchronized.
The criteria for having a treaty approved in the form of a statutory law need to be revised. As suggested above, it is preferable that the criteria shall be construed on the basis of, and therefore covering, all parliamentary functions. The first criterion concerns treaties that contain subjects of legislative matters. Treaties regulate matters which, according to prevailing regulations, shall be the content of a statutory law. This must then be submitted to Parliament for approval and acquire the order of execution in the form of statutory law. The second criterion concerns matters that effect strategic interests of Indonesia, over which Parliament performs the function of oversight or monitoring control. These may be matters concerning political and economic strategic interests, the application of which will affect the very existence of Indonesia as an independent state. These treaties may not necessarily affect the rights and obligations of individuals and may be outside of legislative matters. The most frequently quoted treaties under this criterion are, *inter alia*, boundary treaties; defense and security treaties; and friendship treaties. For these treaties, the statutory law may only grant authorization to the President to ratify them. The third criterion concerns treaties relating to state budget. This kind of treaty generates financial burdens for which a specific financial plan shall be allocated in the state budget. Loan agreements or memberships to international organizations that involve financial contribution belong to this kind of treaty as well.
As envisaged from the comparative analysis, the government decision determining that a treaty according to its subject matters requires no parliamentary approval may be subject to constitutional dispute. It may lead to the abuse of power and result in arbitrary decisions if the discretion is entirely left to the government unchecked. The model of the Netherlands, where the Parliament is empowered to decide otherwise, would apparently prevent such abuse. Upon the submission of the list of treaties under negotiation to Parliament, the government may indicate that the treaties in question do not require parliamentary approval but, on the contrary, Parliament may decide, on the basis of its own interpretation according to the criteria that the treaties shall be subject to its approval.

5. MODES BY WHICH TREATIES ARE INCORPORATED INTO DOMESTIC LAW

The comparative analysis offers various options concerning the modes for granting domestic validity of a treaty where all of the options have already been interchangeably adopted in the practice and held by scholars in Indonesia. As a former colony of a monist state, Indonesia is not unfamiliar with the monist-adoption mode because it had practiced this approach in its early years of independence and therefore, in terms of legal tradition, its legal system was rooted in a monist basis. The dualist-
transformation mode has also found its expression in the legal practices in Indonesia. Since 1974, there has been a growing tendency which considered the law approving a treaty as constituting transformation by which the treaty becomes valid in domestic law. Now, there exists another variant of the transformation mode where the law approving a treaty is still regarded as a formal expression of parliamentary approval but separate transformation legislation is still required for granting domestic validity to the treaty.

Indonesia is also familiar with providing reference provisions in domestic law by which a treaty may acquire domestic status upon its entry into force. Despite the fact that the mode may effectively give effect to a treaty in domestic law, the scope of this mode is still limited to specific treaties and is not expected to provide a general rule which applies for all treaties. This mode may, however, complement a general mode, particularly in determining the special status of a given treaty with regard to its hierarchical rank.

As a former colony of a monist state, the monist tradition continues to occupy the mindset of policymakers at the Ministry of Foreign Affairs. The Indonesian position towards the UN Human Rights Body can be described as one that is aimed at carrying out its international obligations faithfully at the domestic level, without giving due regard to possible dualist barriers. Historical facts point out that dualism does not belong to
the Indonesian tradition - Indonesia was never influenced by the common law dualist system and it was never persuaded by the dualist thinking of Triepel or Anzilotti. Tendencies to portray a dualist posture in its subsequent legal practices should not to be misunderstood as a proper dualist attitude taken up by Indonesia. It is an expression of public sentiment in Indonesia that international law is nothing but international morality, or that this branch of law is not familiar to Indonesia. In this regard, a dualist perspective is not only seen as unfamiliar to Indonesia but also as not having a basis in its legal system.

Globalization meanwhile has given rise to the need for protecting the legal interests of domestic law in light of the pressures arising from democratic legitimacy. The idea of democratic legitimacy finds its expression in the current political setting where the principle of rule of law (*Rechtsstaat*), democracy, as well as checks and balances are high on the political transformation agenda. The political attitudes arising from the current democratic transition has induced many policymakers to pursue a dualist preference, as has been indicated by a number of cases brought to courts, in which a greater call for shielding domestic law from international intrusion has been expressed. The two aspects shall therefore play an important role in the policy options by which a radical monist as well as a strict dualist mode becomes untenable. The best mode Indonesia could adopt may be reached by reconciling the interest of democratic legitimacy, on the one hand, and removing unnecessary legislative burden, on the other.
The monist-adoption mode had been practiced by Indonesia in the earliest period of independence but was then gradually abandoned in the wake of nationalism and constitutionalist pressure that arose in the subsequent period. The monist character of the first mode might not impress constitutionalists in Indonesia at the present stage, at a time when democratic values play an increasingly important role on the political agenda. Constitutionalists developed a constitutional law during the pre-reform regime in favour of nationalism by which they have been more accustomed to domestic legislations than to treaty rules. The presence of treaty rules in domestic law without the cover of domestic legislation as envisaged by this mode will invite strong resistance from those legal enforcers who are mostly unfamiliar with treaties that have not been incorporated into legislation.

The dualist-transformation may look compatible to the existing legal practice but it is not free from distorted constitutional features. The first concerns the allocation of powers among constitutional organs that are involved in the treaty-making. From the inception of the state, treaty-making power in Indonesia was not under the exclusive competence of the executive. Indonesia has therefore not subscribed to the constitutional distinction between treaty-making by executive and treaty implementation by legislature as is widely known in dualist states. The application of dualist transformation in Indonesia will create a procedure where the same organs will conclude a treaty and transform it into
This procedure will be excessive because there will be two different statutory laws for the same treaty i.e. the law approving the treaty for ratification and the law transforming the treaty into domestic law. In this regard, Indonesia should not subscribe to a mode that requires it to enact two different and separate laws devoted respectively to the conclusion and the granting of municipal validity of a treaty. From a procedural perspective, the mode will overburden the legislative bodies because with the same procedure they are required to enact two different laws for a relatively similar purpose. The two may actually be given effect by virtue of the same and a single law. Furthermore, two different kinds of parliamentary treatment to a treaty will create a dilemmatic question of great constitutional importance i.e. whether Parliament, having granted the approval to the ratification of a treaty, may reject its transformation into domestic law through the same course of action as may occur in the South African system.

The second problem concerns the place of transformed treaties in the legislative structure arising from the system of Stufenbau. Indonesia subscribes to a hierarchical legislative system based on Kelsen’s Stufenbau that, according to the current law, is divided into eight different levels. The complex situation of this legislative hierarchical system, if applied consistently, will create legal difficulties in placing the transformed treaty rightly in light of so many levels of legislation. It will bring about too
many different hierarchical ranks of treaties and give rise to a complex relationship between them in domestic law.

From the substantive perspective, the dualist-transformation mode will not be easily adaptable with regard to certain treaties that are concerned with human values, such as human rights treaties, and financial interests, such as tax treaties. These treaties possess characters that mainly impose restrictions on the free will of the legislatures. The experiences of strict dualist legal systems all over the world have revealed that the dualist principles are increasingly eroded by the intrusive character of human rights treaties in such a way that dualist states are gradually forced to adopt remedial monist-like measures, such as consistent interpretation (Charming Betsy doctrine), the Australian legitimate expectation doctrine (so-called Teoh doctrine), and the British implied incorporation.

The inconsistent views expressed by the Government before the UN Human Rights Bodies have raised significant doubt whether Indonesia is truly applying a dualist approach in respect to human rights treaties. Indonesia has indeed persistently argued that human rights conventions are not self-executing and this view appears to deny their self-executing nature by unconsciously invoking dualist arguments rather than the merits of the provisions. However, Article 7 (2) of Law No. 39 of 1999 on Human Rights provides a general rule which gives effect to human rights treaties whereby the treaties become part of Indonesian law upon their
entry into force. The argument that the Convention is not self-executing, on the one hand, and the existence of reference domestic provisions declaring that the Convention becomes part of domestic law, on the other, will weaken the assertion that Indonesia applies a dualist approach to human rights treaties. In this respect, human rights treaties may form part of Indonesian law but in the same vein this fact should not necessarily imply that treaties have a self-executing character. This feature is closer to the monist model of the Netherlands. However, on the basis of the same Article, the Government in 2013 expressed a contrasting view in favour of direct application. The inconsistent views overturned the consolidation of either approach, and brought about the process of going nowhere.

Having visited the existing legal frameworks in Indonesia with respect to the relations between treaties and domestic law, it is argued that Indonesia should embrace both elements and seek a point of balance between the two dominating approaches. The most suitable mode for Indonesia is the mode that attempts to reconcile the two extreme approaches and at the same time keeps the balance between an international law-friendly attitude, on the one hand, and democratic legitimacy on the other. From the available options offered by the constitutional orders examined, the doctrine of the order of execution (Vollzugslehre), one of the doctrines prevailing in Germany, would be best suited for the Indonesian legal system. Some valid reasons may, inter alia, justify this policy option:
a. The current practice of Indonesia suggests a mixed approach that amalgamates two models: the German dualist model and the monist model of the Netherlands. This is exemplified through the double meaning given to the law approving a treaty in Indonesian practice. The law approving a treaty was rooted in the model of the Netherlands, which was originally intended to authorize the President to ratify the respective treaty. In the subsequent practice, however, it has been gradually understood by most constitutionalists as ‘transforming’ the treaty into domestic law. The amalgamation of the two doctrines altogether will present ambiguities and raise uncertainties pertaining to the legal status of the given treaty in domestic law. The two prevailing models should therefore be reconstructed in a manner that the two converge into a single coherent approach, embracing both elements. Therefore, the precise legal character of the law approving a treaty, which is still unclear and ambiguous, should be clarified. In this regard, the law approving a treaty should be assigned the function of expressing a formal approval of Parliament (as originally envisaged by the framers of the Constitution) and at the same time it should constitute an order of execution of the treaty in domestic law (as demanded by the subsequent practice).
b. The doctrine of the order of execution has encompassed all constitutional concerns that have occupied most Indonesian constitutionalists so far. First, the sovereignty of the state in granting a treaty access to enter in domestic law is well preserved, because it needs domestic authorization in the form of a national legislation. The domestic law authority is well respected in the sense that it is the domestic law that permits the entry of the treaty into domestic law. Second, the role of Parliament as the popular representation in treaty-making is secured, in which therefore, the democratic legitimacy of the treaty could be upheld.

c. The doctrine could also ease the concern of international law experts because it could bridge the gap between treaties and domestic law as expected by them. International law experts would prefer this as having a closely connected relation to a separated one thus the domestic and external procedures, albeit distinguished, are interrelated and form part of an integrated process.

d. The doctrine does not envisage transformation and therefore does not need to equate treaties with the complex structure of Indonesian legislation. The nature of the legislation as required under this doctrine is only an order of execution, instead of a transforming legislation, thus not all levels of legislation are necessarily assigned to serve as orders of execution.
For adopting the doctrine, there are only two fundamental features that need to be clarified under the present Indonesian legal system. The first feature is that of the date of the entry into force of the law approving a treaty, which is presently distinguished from the date of the entry into force of the treaty itself, which shall be made concurrent. Following the German model, the date of the entry into force of the law should be dependent upon the entry into force of the treaty in Indonesia. The second feature concerns the character of the provisions of the treaty to be applied in domestic law. The provisions shall be linked with the international character of the treaty. The provisions of a treaty applied under domestic law shall retain their character as treaty provisions and consequently the interpretation rules shall be governed by international law.

On the basis of this mode, the domestic courts will treat treaty provisions as having the force of law and may directly apply them in a given case before it without the aid of ordinary domestic legislation. The direct application of such treaty provisions could be realized insofar as the provisions are self-executing or capable to be judicially enforced. The question of non-self-executing provisions is not unfamiliar to the Indonesian legislative system. The Constitution and the umbrella laws normally provide general provisions prescribing that their application shall be stipulated in or, implemented by, the lower legislations. Pending the enactment of such implementing legislations, these constitutional and statutory law provisions cannot be enforced by the courts.
6. THE PLACE OF TREATIES IN THE LEGISLATIVE HIERARCHICAL STRUCTURE

In view of adopting a coherent approach consistent with the idea of the order of execution mode, the relationship between the statutory laws and the treaties concerned shall be reconciled by balancing the two different views i.e. that treaties are identical with the laws approving them, and that the two are distinguishable legal instruments. Therefore in order to resolve the perplexity arising from the constitutional practices, the relationship between the two shall be construed according to the following premises:

a. Treaties remain distinct from the laws that give order to their execution; however, the manner in which they are manifested in domestic law should be concurrent in terms of the date they take effect.

b. Under this term, domestic treaty-making and lawmaking are exercised through the same constitutional procedures except in the case of the right to submit the bill, which should remain vested in the president.

c. The statutory laws ordering executions shall serve twofold functions i.e. first, authorizing the president to ratify/accede to a treaty and,
second, granting domestic effect to the treaty upon its entry into force to the state.

d. The Constitutional Court may judicially review the laws ordering the execution of treaties. However, a specific procedure should be set out in order to affirm that the law ordering the execution has a unique character distinct from ordinary laws.

The precise and appropriate place a treaty should occupy in the complex structure of the Indonesian legislative hierarchy would become a complicated question underlying the policy option and bring about dilemmatic problems. The use of the form of law for incorporating a treaty and its integration into the legislative structure might likely imply that the process constitutes a transformation mode. Furthermore, the legislative structure under the current system consists of eight levels of legislations, and it is untenable to have all legislations available to perform as an order of execution of treaties into Indonesian law. A general rule should therefore be devised in order to determine what level of legislation is fitting enough to be used as an order of execution, as well as what subject matters should belong to each legislation.

The question of parallel treaties, commonly known in the German system, may arise: whether or not an order of execution in the form of a statutory order is still required for certain treaties if their provisions have
already been contained in the existing statutory law. The *konkrete Theorie* is preferable, thus these treaties require parliamentary approval and a concrete order of execution. The reason for this is simply that the exact parallel legislation hardly exists, even if a piece of legislation provides *mutatis mutandis* provisions of a treaty, the language used in the legislation differs from the original text of the treaties and may create different interpretations. Parallel treaties thus require their own legitimacy from Parliament.

Other treaties that, according to the subject matters, do not require parliamentary approval should take the form of regulations within the ambit of executive competences i.e. presidential regulations or other administrative regulations depending on the given subject matters and the corresponding competent authorities. Under the prevailing law, there are three levels of executive regulations that belong exclusively within the competence of the President as the Head of Government i.e. government regulations, presidential regulations and ministerial regulations, or regulations enacted by other government organs at the ministerial level.

The form of a government regulation could not be used as an order of execution of a treaty. This kind of law according to Law No. 12 of 2011 concerning Legislations serves only for the purpose of implementing the provisions of a statutory law - a general nature of the provisions of the given law needs to be elaborated or concretized in a number of detailed provisions in the government regulations. Therefore, no government
regulation will be enacted in the absence of a clear stipulation by an existing law. A treaty ordered by a statutory law generally does not require that the provisions of the treaty shall be implemented by a government regulation, because the treaty generally contains a set of autonomous provisions for which no further domestic legislation is necessary, apart from the law ordering the execution of the treaty. The government regulations may however be used as implementing legislation to the law ordering the execution of a treaty, but not within the context of granting domestic validity of such a treaty. It will be only for rendering them as self-executing. For example, if a treaty has been approved through a law and requires that state parties set up a national body for the implementation of the treaty, the government regulation may be used to set up this national body.

The only available regulations that may serve as granting domestic validity of a treaty below statutory law level are presidential regulations, and ministerial or equivalent regulations. It follows that a treaty whose subject matters are only within an exclusive authority of a ministry shall be brought to effect by a ministerial regulation, while a treaty whose subject matters involve the participation of various ministries shall be given effect through a presidential regulation. The given treaty will enjoy rank corresponding to the respective legislation according to the legislative structure.
The use of a legislative format as orders of execution of treaties shall be construed in a manner that may fit the legal tradition of Indonesia concerning legislations. Having inherited the legal tradition of the Netherlands, laws and regulations in Indonesia may commonly be identified by two characteristics i.e. the laws and regulations having regulatory (regeling) character and those having ruling (beschikking) character. The former contains general provisions in an abstract manner and are known as proper laws/regulations, while the latter contains a specific prescription to a concrete circumstance. In respect of laws/regulations approving treaties, they serve only as domestic orders to execute the treaty in domestic law by which the provisions remain embodied in the treaties instead of in the laws/regulations. This order character resembles the kind of laws/regulations that possess a ruling (beschikking) character under which they only contain orders and do not transform or rewrite the provisions of the treaty into the legislation. Therefore, the laws/regulations shall be identified as having ruling (beschikking) character instead of regulatory (regeling) character. This legal construction will ensure that the character of the provisions remain in the form of treaty provisions, as envisaged by the monist-adoption mode.

As the provinces and municipalities/cities are empowered to enact their respective regulations, these regulations might be used as orders of execution of treaties insofar as the subject matters fall into their exclusive spheres. Nevertheless, although the subject matters are within their exclusive powers, the central government’s regulations may
appropriately serve as the execution orders if the treaties are intended to be applicable to the whole territory instead of specific provinces and municipalities/cities. This is possible because these local regulations are not exclusive and they are still subject to central government regulations. In order to address the concern of the provinces and municipalities/cities, there must be a mechanism allowing them to participate in the treaty-making negotiations on matters that are exclusively under their competences.

As has been suggested above, the laws ordering the execution of treaties are legislative products with a distinct feature and therefore are reasonably subjected to constitutional scrutinizing. Indonesia has a Constitutional Court which partially resembles that of the German model. Thus the question of the constitutionality of a treaty by virtue of the law ordering its execution may arise, as is frequently experienced by the German Constitutional Court. The case of the judicial review of the ASEAN Charter which was brought before the Constitutional Court in recent times gave rise to the need to resolve this issue. Even if Indonesia subscribes to an adoption approach which is closer to a monist perspective, there is no democratic reason under the present democratic legal system why the constitutionality of the law ordering the execution of a treaty cannot be tested. On the other hand, the decision by the Constitutional Court that might declare a treaty unconstitutional and therefore null and void will create unnecessary effects by which Indonesia
violates its international obligations. The constitutionality test however should have been taken with a distinct procedure in a way that promotes compliance to international law. The preferred solution for Indonesia is to provide balance between the two premises that mutually negate each other by allowing a treaty to be constitutionally tested without creating unnecessary international obligations. This outcome could be attained by adopting the German practice, and developing greater legal clarification on constitutional procedures. Within this context, Indonesia should prescribe a constitutional procedure, posing some restrictions by which a treaty upon the enactment of the law ordering its execution may be submitted for judicial review to the Constitutional Court within a specific time limit. Within that limit, the President should not ratify the treaty as yet, pending a Constitutional Court ruling on the case. Following the lapse of the time limit, the President may proceed to the ratification and by then no submission of judicial review would be constitutionally acceptable.

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