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International Treaties within the Legislations Hierarchy: Comparative Study between Indonesia and France

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Abstract

This paper compares the position of international treaties in the hierarchy of laws and regulations in Indonesia and France. Using normative juridical methods by utilizing a comparative approach, this paper seeks to find similarities and differences in the legal systems of Indonesia and France aimed at finding solutions in overcoming legal problems in Indonesia. This study finds that Indonesia does not place international agreements in a special position in the hierarchy of laws and regulations in Indonesia. The ratification of international agreements into the national legal system in Indonesia is carried out through the Law on international agreements related to political, peace, defense, and state security issues. Meanwhile, international agreements that cover other than these issues are established through Presidential Decrees. On the other hand, France places international treaties in a higher position than ordinary law and lower than the constitution in the hierarchy of French legislation, and allows constitutional amendments to accommodate international treaties declared unconstitutional by the Constitutional Council. The unclear position of international agreements in Indonesia can cause problems if domestic rules conflict with the provisions of international agreements. International law holds that a conflict with domestic rules is not a reason for default from its obligation to fulfill an agreement, unless the agreement is contrary to the basic rules of a

country. To ensure the implementation of the principle of pacta sunt servanda in international agreements and the harmonization of international agreements with national provisions, international agreements need to be given a special position in the hierarchy of laws and regulations.

Keywords: international treaties; hierarchy; legislations;

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Abstrak

Tulisan ini membandingkan kedudukan perjanjian internasional dalam hierarki peraturan perundang-undangan di Indonesia dan Prancis. Menggunakan metode yuridis normatif dengan memanfaatkan pendekatan perbandingan, tulisan ini berupaya untuk menemukan persamaan dan perbedaan pada sistem hukum Indonesia dan Prancis yang ditujukan untuk menemukan solusi dalam mengatasi permasalahan hukum di Indonesia. Penelitian ini menemukan bahwa Indonesia tidak menempatkan perjanjian internasional pada kedudukan khusus dalam hierarki peraturan perundang-undangan di Indonesia. Ratifikasi perjanjian internasional ke dalam sistem hukum nasional di Indonesia dilakukan melalui Undang-Undang bagi perjanjian internasional yang berkaitan dengan isu politik, perdamaian, pertahanan, dan kemanan negara. Sementara, perjanjian internasional yang mencakup selain isu-isu tersebut ditetapkan melalui Keputusan Presiden. Di sisi lain, Prancis menempatkan perjanjian internasional ditempatkan pada kedudukan yang lebih tinggi dibandingkan undang-undang biasa dan lebih rendah daripada konstitusi pada hierarki peraturan perundang-undangan Prancis, dan memungkinkan adanya amandemen konstitusi guna mengakomodasi perjanjian internasional yang dinyatakan inkonstitusional oleh Dewan Konstitusional. Ketidakjelasan kedudukan perjanjian internasional di Indonesia dapat menimbulkan permasalahan jika aturan domestik bertentangan dengan ketentuan perjanjian internasional. Hukum internasional memandang bahwa pertentangan dengan aturan domestik bukanlah alasan untuk mangkir dari kewajibannya dalam memenuhi perjanjian, kecuali jika perjanjian tersebut bertentangan dengan aturan dasar sebuah negara. Untuk menjamin

terimplementasinya prinsip pacta sunt servanda dalam perjanjian internasional serta harmonisasi perjanjian internasional dengan ketentuan nasional, maka perjanjian internasional perlu diberikan kedudukan khusus pada hierarki peraturan perundang-undangan.

Kata Kunci: *perjanjian internasional; hierarki; peraturan perundang-undangan*

A. Introduction

Recent developments in the international world, especially since the end of World War II, the Cold War, and the emergence of modern globalization, led to increasing reliance and integration of Indonesians into the international community, which led to increasing global trade and less barriers in international interactions. This increasing reliance of nations on the international community is not restricted on the traditional aspects of international relations, but also affects the other aspects, such as the environment, economy, culture, and others.

Such interactions often necessitate some sort of international legal framework, usually in the form of international treaties, especially in trade, since countries usually possess their own national laws that are often contradictory with other countries. Thus, a written consensus among countries is considered necessary on the international level to ensure the compatibility and harmonization of differences in the global interactions, as

well as to guarantee a legal certainty among all parties concerned.

The increasing number of international treaties that are signed and ratified in recent years signified the importance of international treaties as an instrument to solve global problems, especially those involving climate change, human rights, trade, and health. However, Indonesia's constitution apparently pays only little attention to the international law. The Preamble of the 1945 Constitution mentions Indonesia's participation in the maintenance of world order in the virtue of independence, eternal peace, and social justice,[1] but the authority to conduct international affairs can only be found on Article 11 Paragraph (1) that states, the President, with the approval of the House of Representatives, has the authority to declare war, make peace, and conclude treaties with other countries. Article 11 Paragraph (2) subsequently states that, the President, when concluding the international treaties that give the extensive and fundamental consequences of the livelihood of the people related to the financial burden of the state, and/or compelling any amendment or the

[1] Sefriani, *Hukum Internasional: Suatu Pengantar*, 8th Edition (Depok: Rajagrafindo, 2018).

creation of laws, requires the approval of the House of Representatives.

In those cases, the participation of the House of Representatives in the ratification of international treaties with fundamental consequences on the livelihood of the people of the Republic of Indonesia, is part of the parliamentary function to control[2] and limit the President's considerable authority in foreign relations, to ensure that the President cannot arbitrarily set Indonesia to enter into the international treaties that do not align with the national interests. The legitimate participation of a country to an international treaty is usually carried out through ratification, a process that manifests the principle of sovereignty,[3] in which a state possesses a full authority and freedom to enter into treaties, to immediately ratify treaties, to postpone ratification, or even reject the treaties. In Indonesia, ratification of international treaties can be done in the form of law or a Presidential Decree.

[2] Merdiansa Paputungan and Zainal Arifin Hoesein, "Limitation of Presidential Power to Submit the Foreign Loan Agreement After Constitutional Reform," *Jurnal Konstitusi* 17, no. 2 (August 19, 2020): 388–412, https://doi.org/10.31078/jk1728.

[3] Gerald L Songko, "Kekuatan Mengikat Perjanjian Internasional Menurut Konvensi Wina Tahun 1969," *Lex Privatum* 4, no. 4 (2016): 46–54.

International treaties ratified as law require the approval of the House of Representative, as these international treaties revolve around the political, state defence, international peace, and national security issues that affect the livelihood of the people of the Republic Indonesia. The international treaties which scope are not covering the mentioned issues can be ratified in form of Presidential Decree and only require notification to the Parliament.

However, Article 11 of the 1945 Constitution does not explicitly provide a specific place for the international instruments within the Indonesian legal hierarchy. Article 11 Paragraph (3) mandates the international treaties to be ratified into laws. The sort-of issue comes to the surface as Indonesian government passed Law Number 24 of 2000 on International Treaties[4] prior to the existence of Article 11 paragraph (3), which was added into the 1945 Constitution on the third amendment on November 10, 2001. Meanwhile, the hierarchy of laws and regulations in Indonesia is regulated by Law Number 12 of 2011 on the

[4] Firdaus Firdaus, "Kedudukan Hukum Internasional Dalam Sistem Perundang-Undangan Nasional Indonesia," *FIAT JUSTISIA:Jurnal Ilmu Hukum* 8, no. 1 (November 5, 2015), https://doi.org/10.25041/fiatjustisia.v8no1.285.

Formation of Legislations still does not explicitly mention international law in the Indonesian legal hierarchy.

Principally, the concept of hierarchy of legislature is necessary to ensure the legality of the legal instruments. For example, a law can only be passed through the legislature procedures to ensure that there is no constitutional violation in the bill as the 1945 Constitution is deemed as the supreme law. Also, in order to ensure that the executive decrees do not violate the laws or acts, there must be at least three level of hierarchy that can be used as a basis for judicial review, namely constitution, ordinary laws, and other regulations.[5] Currently, the position of the international treaties within the Indonesian legal hierarchy can potentially cause problems, especially considering that principles and values contained in the international treaties may differ and even conflict with Indonesian domestic law. For instance, the conflict between domestic norms and international treaties can be seen in the restrictions on food importation restrictions-related provisions in Law

[5] Franz Merli, "Principle of Legality and the Hierarchy of legislature," in *Strengthening the Rule of Law in Europe : From a Common Concept to Mechanisms of Implementation* (Bloomsbury Publishing, 1999), http://ebookcentral.proquest.com/lib/univie/detail.action?docID=4749058.

Number 18 of 2012 concerning Food that led to series of disputes involving Indonesia and the other countries at the World Trade Organization (WTO), due to such restrictions are considered as a violation of the General Agreement on Tariffs and Trade (GATT) and the Agreement on Agriculture (AoA).[6] Article 46 Paragraph 1 of the Vienna Convention on the Laws of Treaties (1969) states that:

> *A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance*."

These conflicts may cause problems at some point if Indonesia refuses to implement the international treaties domestically due to incompatibility with national laws, because such conflicts not only hinder the compliance of treaties, might as well damage Indonesia's reputation in the eyes of the international community.

France, on the other hand, possesses different paradigms regarding the placement of international

[6] Bella Oktaviani, "Kasus DS-477 Dan DS-478 Indonesia-New Zealand-America Importation of Horticultural Products, Animals and Animal Product Dikaitkan Dengan Prinsip Penghapusan Hambatan Kuantitatif," *Dharmasisya* 1, no. 3 (2021): 1169–86.

treaties in its national laws, as they intend to integrate the international norms into the local norms. In France, the international treaties are hierarchically positioned above the laws and yet below the Constitution. The formation of laws in France generally cannot contradict with the Constitution, international treaties, and EU laws. From the elaboration provided above, this paper will compare the hierarchy of legislature in Indonesia and France. Several[7] studies[8] that also have discussed the issue of the position of international treaties in the hierarchy of legislature. Simon Butt, for example, states that international law in Indonesia is not included in its hierarchy of laws.[9] Meanwhile, Savitri in comparing the process of examining the constitutionality of international agreements between

[7] Mr. Aminoto And Agustina Merdekawati, "Prospek Penempatan Perjanjian Internasional Yang Mengikat Indonesia Dalam Hierarki Peraturan Perundangundangan Indonesia," *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 27, No. 1 (February 15, 2015): 82, Https://Doi.Org/10.22146/Jmh.15912.

[8] Rahadian Diffaul Et Al., "Dilema Pengaturan Kedudukan Hukum Internasional Di Dalam Konstitusi Indonesia," *Mimbar Hukum* 36, No. 1 (June 9, 2024): 26–60, Https://Doi.Org/10.22146/Mh.V36i1.11985.

[9] Simon Butt, "The Position of International Law Within The Indonesian Legal System," *Emory International Law Review* 28, No. 1 (January 1, 2014), Https://Scholarlycommons.Law.Emory.Edu/Eilr/Vol28/Iss1/1.

Indonesia and France, alluded to the hierarchy of international agreements in France.[10]

This study expands upon previous studies by focusing more on the hierarchy of legislature and possible conflict of norms between Indonesia's national law and international treaties, with France as a point of comparison. Both Indonesia and France adopt the Continental European legal system, and also recognize the existence of types of hierarchies of norms.[11] However, France places the international treaties higher than its national laws in their hierarchy of legislature, but still lower than the Constitution. Indonesia, on the other hand, sets that certain treaties require the House of Representatives approval. Yet, the 1945 Constitution does not provide any clarity on the role of international law in Indonesia's domestic legal systems.[12] This paper uses a normative legal method with a comparative approach to compare the legal system of Indonesia and France in order to find similarities and differences, as well as to

[10] Dewi Savitri, "Constitutional Preview and Review of International Treaties: France And Indonesia Compared," *Constitutional Review* 5 (May 31, 2019): 039, https://doi.org/10.31078/consrev512.

[11] Savitri.

[12] Butt, "The Position of International Law Within the Indonesian Legal System."

understand how the international treaties positioned in the hierarchy of laws in Indonesia may lead to the presence of contemporary problems, then comparing it with France to find solutions to the problems above. The sources of this paper are obtained mainly from secondary data, consisting of primary legal materials in the form of laws and regulations and international agreements. Secondary legal materials in the form of articles, books, and news sources are also utilised to enrich this study.

B. Discussion

The hierarchy of legal norms is created because of the relationship between two different legal norms, where the legitimacy of a type of legislation is determined by the level of its position on the laws and regulations that are above it .[13] Several reasons that support the concept of hierarchy are: some laws are considered superior because they reflect the fundamental values of a nation, legitimately placed as higher-ranked in comparison to other laws, and because they are drafted and issued by certain institutions.

[13] Jacques Ziller, "Hierarchy of legislature: Hierarchy of Sources and General Principles In European Union Law" (Rochester, February 1, 2014).

For example, laws passed by the parliamentary/legislative institutions are considered superior compared to the executive orders issued by the executive branch institutions, as the parliament is the representative institution elected by the people. In essence, the existence of the hierarchy of legislature is a consequence of the legal character inherently found in the legal norms[14] to ensure that such laws do not violate the constitution, or an executive decree does not violate superior laws passed by the parliament.

In order to address the existence of a hierarchy of legal norms, some thinkers such as Kelsen conceptualized law as a dynamic system of norms (*Nomo dynamics*), namely a system of tiered norms in a hierarchical order, where lower norms in hierarchy are sourced from higher norms in its hierarchy, while the higher norms are sourced from norms that are even higher in hierarchy up to the top norm at the pyramid of norms, which cannot be derived from other norms and tends to be hypothetical and fictitious, called basic norms or Grund norm.[15]

[14] Ziller.

[15] Cahya Iradi Arimba, "Hans Kelsen's Nomostatics and Nomodinamics Legal Theory," Justice Voice 2, no. 2 (June 2, 2024): 55–63, https://doi.org/10.37893/jv.v2i2.773.

The Indonesian legal system adheres to the Kelsenian view. It is shown by the explicit existence of a hierarchical system of norms contained in the the Formation of Legislation Law,[16] which Article 7 elaborates as follow:

1. The 1945 Constitution of the Republic of Indonesia (UUD 1945);
2. People's Consultative Assembly Decision (Tap MPR);
3. Laws (*Undang-Undang*) and Government Regulations in Lieu of Laws (*Peraturan Pemerintah Pengganti Undang-Undang)*;
4. Government Regulations (*Peraturan Pemerintah*) ;
5. Presidential Regulations (*Peraturan Presiden*) ;
6. Provincial Regulations (*Peraturan Daerah Provinsi*);
7. Regency/City Regulations (*Peraturan Daerah Kabupaten/Kota*) ;

However, neither the 1945 Constitution nor the Law on the Formation of Legislation mentions the international treaties in its hierarchical system of norms.[17] In addition, the Law on the Formation of Legislation does not

[16] Arimba.

[17] Miftakhul Nur Arista and Ach. Fajruddin Fatwa, "Hubungan Hukum Internasional Dan Hukum Nasional," MA'MAL: Jurnal Laboratorium Syariah Dan Hukum 1, no. 4 (2020).

differentiate between Law that is drafted and passed by the national stakeholders and Law that functions to pass the international treaties into the national legal system.[18] Article 10 of the Law on International Treaty states that international treaties which contents impact the lives of many people, such as treaties concerning security, human rights, the environment, and politics are ratified in the form of a law (*undang-undang*). Meanwhile, international treaties which contents do not concern the above issues are ratified in the form of a Presidential Decree (*Keputusan Presiden*).

International treaties ratified into a Presidential Decree tends to be more procedural and technical which necessitates their implementation in a short time.[19] Prior to the existence of the Law on International Treaty, the provisions of Article 11 of the 1945 Constitution were interpreted through Presidential Letter Number 2826/HK/1960, which differentiates international

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[18] Nurhidayatuloh, "Dilema Pengujian Undang-Undang Ratifikasi Oleh Mahkamah Konstitusi Dalam Konteks Ketetanegaraan RI," *Jurnal Konstitusi* 9, no. 1 (May 20, 2016): 113, https://doi.org/10.31078/jk915.

[19] Erlina Maria Christin Sinaga and Grenata Petra Claudia, "Pembaharuan Sistem Hukum Nasional Terkait Pengesahan Perjanjian Internasional Dalam Perlindungan Hak Konstitusional," *Jurnal Konstitusi* 18, no. 3 (February 15, 2022): 677, https://doi.org/10.31078/jk1839.

treaties in two types, treaties ratified by law and agreement ratified by presidential regulations.[20] However, Constitutional Court Decision No. 13/PUU-XVI/2018 interprets that parliamentary approval required for the ratification of treaties is not merely limited on subjects mentioned in Article 11 Paragraph (1) and (2) of the 1945 Constitution, which implies that every ratification of international treaties requires the parliamentary participation.[21] Still, both the Law on the Formation of Legislation and Law on International Treaty doesn't specifically place international treaties in a position in the hierarchy of legal regulations.[22] Meanwhile, France explicitly recognizes the existence of international law in its national legal system. Paragraph 14-15 of the Preamble of the 1946 French Constitution states that, "*the French Republic respects the rules of public international*

[20] Nanda Indrawati, "Praktik Ratifikasi Perjanjian Internasional Pasca Putusan Mahkamah Konstitusi Nomor 13/PUU-XVI/2018," *Law, Development and Justice Review* 3, no. 1 (May 25, 2020): 99–120, https://doi.org/10.14710/ldjr.v3i1.7890.

[21] Rahadian Diffaul Barraq Suwartono and Vania Lutfi Safira Erlangga, "Dilema Pengaturan Kedudukan Hukum Internasional Di Dalam Konstitusi Indonesia," *Mimbar Hukum* 36, no. 1 (June 9, 2024): 26–60, https://doi.org/10.22146/MH.V36I1.11985.

[22] Galuh Candra Purnamasari, "Kewenangan Mahkamah Konstitusi Dalam Melakukan Judicial Review Terhadap Undang-Undang Ratifikasi Perjanjian Internasional," *Refleksi Hukum: Jurnal Ilmu Hukum* 2, no. 1 (March 21, 2018): 1–16, https://doi.org/10.24246/jrh.2017.v2.i1.p1-16.

law…subject to reciprocity, France consent to limitations of its sovereignty necessary to the organization and preservation of peace." French legal system provides the means for the ratification and publication of international treaties and conventions, which establishes a legal regime similar to the entry into force regime in domestic law, thus there is no need to transform an international legal norm into international law.[23] In other words, international law can be applied the same way as domestic French law without any need to adjust their form. Thus, the French legal system outright adopts the monist theory in their relationship between national/domestic law and international legal provisions. [24]

Similar to Indonesia, the French legal system also recognizes the existence of a hierarchy of legislature, which generally assumes that a type of regulation that is higher in the hierarchy can prevail a lower regulation. The

[23] Vincent Kronenberger, "A New Approach to the Interpretation of the French Constitution in Respect to International Conventions: From Hierarchy of legislature to Conflict of Competence," *Netherlands International Law Review* 47, no. 03 (December 21, 2000): 323, https://doi.org/10.1017/S0165070X00001017.

[24] Kronenberger.

hierarchical system of legal norms in France are as follow:[25]

1. Constitutional Laws, which consists of :
    a. The 1958 French Constitution;
    b. The principles of human rights and national sovereignty enshrined in the Declaration of the Rights of Man and of the Citizen 1789;
    c. The Preamble of the 1946 French Constitution;
    d. Charter for the Environment;
2. International Treaties that are ratified, published, and subject to reciprocity, and EU laws;
3. *Lois* or Law made by the parliament, which consists of:
    a. Organic Laws/Institutional Acts (*lois organiques*), namely laws specified by the Constitution, usually related to institutional fields such as the status of the Constitutional Council

[25] Raymond Youngs, *English, French & German Comparative Law*, Third Edition (London: Routledge, 2014).

or the functioning of the government;[26]

   b. Ordinary Laws (*lois ordinaires*), other laws enacted by the Parliament;

4. Regulations (*le pouzoir reglementaire*), namely the law-making power of the executive. Consists of:
   a. *Decrets*, regulations enacted by the President or the Prime Minister;
   b. *Arétés*, regulations enacted by Ministers.

One of the features of the French Constitution is the distinction between parliamentary norms and executive norms which provides a hierarchical distinction between Acts issued by the parliament and regulations issued by the executive branch institutions.[27] The hierarchy of legal regulations formed by the legislature/parliament is higher

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[26] Boldizsár Szentgáli-Tóth, "Organic Laws and the Principle of Democracy in France and Spain," *Pro Futuro* 9, no. 4 (June 2, 2020), https://doi.org/10.26521/Profuturo/2019/4/6717.

[27] Ziller, "Hierarchy of legislature: Hierarchy of Sources and General Principles In European Union Law."

than that of executive legal products.[28] In addition, The French legal system also recognizes some form of internal hierarchy among types of laws (both made by the parliament), where organic laws can be considered higher and can order the issuance of derivative laws.[29]

In its hierarchy of legislature, France adheres to the principle of the superiority of international law.[30] Article 55 of the French 1958 Constitution states that, "*treaties or agreements duly ratified shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party*." France's adherence to the monist theory of international law primacy, where the international treaties and European Union (EU) laws are considered as one entity with the French domestic law and hierarchically considered higher than Law. In French courts, the principle of the superiority of international law started with a Constitutional Council (*conseil constitutionnel*) decision on 19 June 1970, where the Treaty on the

[28] A'an Efendi, "Problematik Penataan Jenis Dan Hierarki Peraturan Perundang-Undangan," *Veritas et Justitia* 5, no. 1 (June 26, 2019): 20–48, https://doi.org/10.25123/vej.3172.

[29] Efendi.

[30] Savitri, "Constitutional Preview and Review of International Treaties: France And Indonesia Compared."

European Economic Community, after its ratification and publication is considered higher than Laws.[31]

The ratification of international treaties in France requires parliamentary approval and, in certain circumstances, a constitutional amendment. Both international treaties and EU laws in France are normatively subject to the French Constitution as the supreme law of the land. The doctrine of constitutional superiority developed in France was stated by the Constitutional Council in *Decision 2006-540 DC* on 27 July 2006, where EU directives cannot conflict with the principles that are essential to the constitutional identity of France.[32] However, Article 54 of the French Constitution allows a constitutional amendment in the event a treaty is found to be unconstitutional. During the process of ratification, if a treaty allegedly contains clauses that contrary to the Constitution, the President, the Prime Minister, the President of the Senate, the President of the National Assembly, and at least sixty Members of the National Assembly or sixty Senators, can request a referral

[31] Youngs, *English, French & German Comparative Law*.

[32] Zoltán Szente, "Constitutional Identity as a Normative Constitutional Concept," *Hungarian Journal of Legal Studies* 63, no. 1 (December 21, 2022): 3–20, https://doi.org/10.1556/2052.2022.00390.

to the Constitutional Council. If the Constitutional Council decides that the provision contained in the treaty to be unconstitutional, then the treaty cannot be ratified before a constitutional amendment takes place.

The constitutional amendment phenomenon can be witnessed in the process of ratification of the Maastricht Treaty (Treaty on the European Union) in France, which initially was hampered due to its contrary nature to the French Constitution as declared by the Constitutional Council. The Constitutional Council, in Paragraph 14 Decision 92-308 DC of April 1992, mentions that when an international agreement for the establishment of a permanent international organization with decision-making powers on the basis of transfer of power by the Member States is found to have a clause that contradicts with the Constitution or threatened the "essential conditions for the exercise of national sovereignty," then its ratification requires a constitutional amendment.

The French government at that time held a constitutional amendment through a referendum which won narrowly and led to the amendment of the French Constitution to accommodate the ratification of the Maastricht Treaty. In its constitutional amendment, France succeeded in, explicitly, accommodating the

position of the European Union in the 1958 Constitution.[33] Article 88-1 of the French Constitution reads, "*The Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December, 2007*."

In France, there are two scenarios regarding the results of the decision to test the constitutionality of an international treaty.[34] First, if the treaty is found to be constitutional by the Constitutional Council, the treaty can be ratified through the approval of the French parliament. Second, if the Constitutional Council declares that an international treaty is unconstitutional, a constitutional amendment process will be carried out through an absolute majority votes (two-thirds) in a joint session of the National Assembly and the Senate, or through a referendum.[35]

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[33] Youngs, *English, French & German Comparative Law*.

[34] John Bell, "External Dimensions of the French Constitution ," *Virginia Journal of International Law* 57, no. 3 (2017): 495–514, https://doi.org/10.17863/CAM.25367.

[35] Bell.

As France still generally allows constitutional amendments to accommodate international treaties, it is safe to say that the French Constitution does not have supremacy over the international treaties.[36] Ultimately, the decision to amend the constitution to comply with international treaties in France is closer to a political decision, whether to hold a referendum or a joint session of the two houses, rather than a legal decision.[37]

In general, the position of international treaties in the hierarchy of (national) norms can be seen through the hierarchy of authority.[38] In the context of international treaties, this depends on what type of institution that ratifies the treaty. Treaties ratified by the executive branch institutions are hierarchically equivalent to executive decrees. In Indonesia, such treaties are equal to a Presidential Decree. Treaties ratified with the approval of the legislature are hierarchically equivalent to a Law. If

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[36] Julianna Sára Traser et al., "The Principle of the Primacy of EU Law in Light of the Case Law of the Constitutional Courts of Italy, Germany, France, and Austria," *Central European Journal of Comparative Law* 1, no. 2 (December 9, 2020): 151–75, https://doi.org/10.47078/2020.2.151-175.

[37] Traser et al.

[38] Kemal Gözler, "The Question Of The Rank Of International Treaties In National Hierarchy Of Legislature A Theoretical And Comparative Study *," 2016, http://www.anayasa.gen.tr/rank-of-treaties.pdf.

the ratification of a treaty is conducted through a constitutional amendment, then the treaty can be said to be hierarchically equivalent to a constitution.

When addressing the relationship between domestic norms and international norms, the existence of two major doctrines, namely monism and dualism, is impossible to be ignored. Monism views that both national law and international law are a unified legal system assumed to be coherent and consistent.[39] Monism assumes that national law and international law are inherently the same entity that opens a possibility of a hierarchical relationship between the two.[40] Thus, on this basis, international law can be applied directly to the national legal system. There are two types of monism. *First*, the national law primacy monist, which considers that national norms takes precedence over international norms, and *second*, the international law primacy monist, which considers that international norms takes precedence over national

[39] James Crawford, "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect," *American Journal of International Law* 96, no. 4 (October 27, 2002): 874–90, https://doi.org/10.2307/3070683.

[40] Andi Tenripadang, "Hubungan Hukum Internasional Dengan Hukum Nasional," *Jurnal Hukum Diktum* 14, no. 1 (2016): 67–75.

norms.[41] One of the main principles in international law is the principle of sovereignty, which allows every nation to freely choose to bind itself to a rule of international treaty or not. In this case, when a country binds itself to an international agreement, the primacy of international law applies, and domestic legal provisions need to be adjusted to international legal rules, especially considering the voluntary nature of international treaties.[42]

Essentially, freedom of states to participate in an international treaty is already an expression of a nation's sovereignty, and the choice to bind themself to a treaty signifies willingness to obey the treaty in good faith. Consequently, subsequent formation of domestic norms must not violate mutually agreed international treaties. However, the basis of the treaty-making power of a state is typically derived from national rules of a country, usually in the form of a constitution.[43] According to Kelsen, international legal norms are generally incomplete, so they must be supplemented with national legal

[41] Hasyim, "Hubungan Hukum Internasional Dan Hukum Nasional Perspektif Teori Monisme Dan Teori Dualisme," Mazahibuna 1, no. 2 (2019), https://doi.org/10.24252/mh.v1i2.10623.

[42] Firdaus, "Kedudukan Hukum Internasional Dalam Sistem Perundang-Undangan Nasional Indonesia."

[43] Firdaus.

regulations, or in other words, international legal norms need to delegate towards national legal norms.[44]

Dualism, on the other hand, views the national law and international law as two different legal systems that independent from each other. Dualism considers that national law regulates relations among citizens and relations between the state and its citizens. Meanwhile, international law regulates relations among states.[45] Since international law and national law are deemed as two different animals, the provisions of norms in international law cannot be directly applied in courts, and if conflict of norms arises, then determining which one prevails is usually up to the national legal system.[46] In dualist countries such as England and Canada, the question about the placement of international treaties in the hierarchy of national law is irrelevant, because the international legal system itself is conceived separately from the national legal system. If a dualist country wants to apply international legal norms into its national laws, then the international legal norms must be transformed to suit the

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[44] Hans Kelsen, *General Theory of Law and State* (New Brunswick: Transaction Publishers, 2006).

[45] James Crawford and Ian Brownlie, *Brownlie's Principles of Public International Law*, 8th Edition (Oxford: Oxford University Press, 2012).

[46] Crawford and Brownlie.

national legal system, only by then can these rules be applied by the national courts.[47]

In addition, there are two theories regarding the implementation of international law in national law, namely the transformation theory and the incorporation theory. In transformation theory, norms originating from the international legal system need to be transformed into the national legal paradigm in order to be properly fit into the national legal system. This theory is generally used by countries that adhere to the dualist doctrine as a logical consequence of the separation between the international legal norms and national legal norms.[48] The incorporation theory is generally adopted by monist countries. This theory views that norms derive from the international law do not need to be transformed into the national legal paradigm. Instead, the international legal norms, according to the incorporation theory, can automatically become part of the national legal system upon application. Therefore, there is no necessity to create new laws to legalise the implementation of international legal norms.

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[47] Gözler, "The Question of The Rank of International Treaties In National Hierarchy of Legislature A Theoretical and Comparative Study *."

[48] Firdaus, "Kedudukan Hukum Internasional Dalam Sistem Perundang-Undangan Nasional Indonesia."

Whether a country adopts a dualist or monist approach can be figured out in their constitution. For instance, Article 55 of the French Constitution implies that France adopts a monist approach due to its automatic incorporation into the national law. The Indonesian 1945 Constitution, unfortunately, does not provide a clear answer on its approach,[49] but the Indonesian court practices show that both approaches can be applied at the same time.[50]

Although, it is interesting to learn that Indonesia actually recognizes that the international legal norms can be applied directly to Indonesian domestic norms with reference to various provisions of international instruments (in this case adopts a monist theory).[51] Indonesia's Supreme Court in Decision No. 1974 K/Pdt/2004 applied the precautionary principle contained in the 1992 Rio de Janeiro Conference during a

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[49] Dewa Gede Palguna and Agung Wardana, "Pragmatic Monism: The Practice of the Indonesian Constitutional Court in Engaging with International Law," *Asian Journal of International Law* 14, no. 2 (July 1, 2024): 404–24, https://doi.org/10.1017/S2044251323000723.

[50] Butt, "The Position of International Law Within the Indonesian Legal System."

[51] Ari Wirya Dinata, "The Dynamics Of Ratification Acts Of International Treaty Under Indonesian Legal System," *Jurnal Hukum Dan Peradilan* 10, no. 2 (July 31, 2021): 197, https://doi.org/10.25216/jhp.10.2.2021.197-218.

landslide case on Mount Mandalawangi, because this principle is considered to be *jus cogens*, thus it can be directly applied to Indonesian law.[52]

However, the courts in Indonesia also sometimes consider that international legal norms cannot be directly applied to the national legal system, which provides that legal transformation process is necessary in order to make the international instruments legally binding for Indonesia(in this case adopts a dualist theory).[53] One example of dualist thinking in Indonesia's court can be found in Constitutional Court Decision on its judicial review in Law No. 1/PNPS/1965. According to the Constitutional Court, Article 18 ICCPR (International Covenant on Civil and Political Rights) itself has been transformed into Law Number 39 of 1999 on Human Rights.[54] While such inconclusiveness may provide flexibility for governmental institutions to use any theories that suit their interest, this approach may led to

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[52] Sefriani, *Hukum Internasional: Suatu Pengantar*.

[53] Damos Dumoli Agusman, *Treaties Under Indonesian Law: A Comparative Study* (Bandung: Remaja Rosdakarya Offset, 2014), https://books.google.co.id/books?id=MNRNDwAAQBAJ&printsec=copyright&redir_esc=y#v=onepage&q&f=false.

[54] Dian Khoreanita Pratiwi, "Kewenangan Mahkamah Konstitusi Dalam Pengujian Undang-Undang Ratifikasi Perjanjian Internasional," *Jurnal Yudisial* 13, no. 1 (September 7, 2020): 1–19, https://doi.org/10.29123/JY.V13I1.268.

unpredictable outcomes in the Constitutional Court.[55] Interestingly, the Human Rights Law itself was enacted before Indonesia ratified the ICCPR on 28 October 2005 through Law Number 12 of 2005, so that the provisions of the ICCPR had been transformed into national law in Indonesia when the Human Rights Law was enacted, even though at that time Indonesia had not yet ratified the ICCPR.

In Constitutional Court Decision No. 38/PUU-IX/2011 concerning possible unconstitutionality of free trade in the ASEAN Charter, as ratified in Law Number 38 of 2008 shows that the Constitutional Court still has the authority to review ratification laws. In their dissenting opinions, Constitutional Judges Hamdan Zoelva and Maria Indrati considered that the ratification law could not be equated with the other laws, and therefore the case should be dismissed. The implication is that because in the ratification law the norms contained in the international treaties are placed in the appendix, not the main body of the text (which consists of only two articles confirming the ratification), the Constitutional Court considers that both

[55] Palguna and Wardana, "Pragmatic Monism: The Practice of the Indonesian Constitutional Court in Engaging with International Law."

the ratification law and the attached text of the treaty as a single unit.[56]

Although international treaties are considered as one of the sources of law in Indonesia,[57] Indonesia itself does not explicitly state international treaties as part of national law, and international treaties are never specifically placed in the hierarchy of legal regulations.[58] In addition, the implementation of ratified international treaties in Indonesian national law is also unclear whther treaty norms are directly applicable or necessitates transformation.[59] Thus, the hierarchy of international treaties in Indonesia are equal towards whatever form of legislation in its ratification. For example, treaties ratified by a law (*undang-undang*) are considered equal to other

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[56] Purnamasari, "Kewenangan Mahkamah Konstitusi Dalam Melakukan Judicial Review Terhadap Undang-Undang Ratifikasi Perjanjian Internasional."

[57] Hikmahanto Juwana, "Kewajiban Negara Dalam Proses Ratifikasi Perjanjian Internasional: Memastikan Keselarasan Dengan Konstitusi Dan Mentransformasikan Ke Hukum Nasional," *Undang: Jurnal Hukum* 2, no. 1 (October 28, 2019): 1–32, https://doi.org/10.22437/UJH.2.1.1-32.

[58] Dinata, "The Dynamics Of Ratification Acts Of International Treaty Under Indonesian Legal System."

[59] Andi Sandi Ant.T.T. and Agustina Merdekawati, "Konsekuensi Pembatalan Undang-Undang Ratifikasi Terhadap Keterikatan Pemerintah Indonesia Pada Perjanjian Internasional," *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 24, no. 3 (February 1, 2013): 459, https://doi.org/10.22146/jmh.16120.

laws, and treaties ratified by Presidential Decree are considered equal to other Presidential Decrees.

Moreover, in dealing with the possibility of conflicting norms between international treaty and national laws, there are three general legal principles addressing conflict of norms.[60] Firstly, the principle of *lex superior derogat legi generali,* or if conflicting norms have differing hierarchical relationships, then the hierarchically higher norm overrides the lower norm. Secondly, the principle of *lex posterior derogat legi priori,* if the conflicting norms have a similar hierarchical relationship, then the newer norm overrides the older one. Thirdly, the principle of *lex specialis derogat legi generali* if the conflicting norms have a similar hierarchical relationship and enacted at the same time, then the more specific norm overrides the general norms. In Indonesian context, If there is a conflict of norms between international treaties and national laws, then one way to resolve this problem is to first look at the type of hierarchy between these norms. If a treaty ratified in the form of Presidential Decree conflicts with a law, the law can override the provisions of the treaty.

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[60] Gözler, "The Question of The Rank of International Treaties In National Hierarchy of Legislature A Theoretical and Comparative Study *."

Secondly, if a treaty ratified by a Law conflicts with another Law, then we look at the time of their enactments. The norm enacted at a later date overrides the earlier norm, and so on. However, it is important to note problems that arise from this solution, because these legal principles can be excluded in certain circumstances, at the same time there are no fixed provisions regarding under what circumstances these principles are followed or need to be excluded.[61]

The weakness of this approach is that it does not rule out other problems that may arise if a domestic law violates existing international treaty obligations. Even if one can follow the legal principles *lex posterior derogat legi priori* which means the provision in domestic law overrides the provisions found in the treaty, failing to follow the provisions of international treaty can cause problems with other countries in the realm of diplomatic relations, especially since treaties are meant to be performed in good faith. This possibility is even higher due to the increasing role of Indonesia in the international

[61] Gözler.

world, which often requires Indonesia to sign and ratify various treaties to sustain such roles.[62]

One example of the conflict between international law and national law provisions can be seen in the import restriction policy related to horticultural products, food, and livestock. This policy was then disputed by several countries, such as Brazil, New Zealand and the United States at the World Trade Organization (WTO) because it was considered to be in conflict with the rules in the General Agreement on Tariff and Trade (GATT) and the Agreement on Agriculture (AoA).[63] The Dispute Settlement Body (DSB) Panel of the WTO stated that existing regulations in Indonesia are not in accordance with GATT and AoA, and therefore it is necessary to revise the laws and regulations in Indonesia to suit the provisions found in GATT and AoA.[64]

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[62] Dinata, "The Dynamics of Ratification Acts of International Treaty Under Indonesian Legal System."

[63] Reskyana Lukman and Indra Kusumawardhana, "Standing Above The Leviathan: Implikasi Difusi Norma Perdagangan WTO Ke Dalam Kebijakan Impor Pangan Indonesia Pada Tahun 2018-2022," *TheJournalish: Social and Government* 4, no. 4 (October 10, 2023): 362–79, https://doi.org/10.55314/TSG.V4I4.581.

[64] "Kalah Dari Gugatan Amerika Dan Brazil Di WTO, Pemerintah Akan Revisi Undang-Undang Terkait Pangan - Indonesia for Global Justice," accessed February 8, 2025, https://igj.or.id/2019/11/18/kalah-dari-gugatan-amerika-dan-brazil-di-wto-pemerintah-akan-revisi-undang-undang-terkait-pangan/.

In addition, Indonesia was also subject to trade sanctions from the United States through 350 million US dollars trade retaliation because Indonesia was considered to have failed to fulfil the DSB recommendations.[65] In responding to this situation, Indonesia is seeking to harmonize national regulations so that they comply with existing provisions in international agreements, by revising Ministry of Agriculture Regulations and Ministry of Trade Regulations,[66] as well as amending several provisions of the law above through the Omnibus Job Creation Law.[67]

In the above example, we can see that if there are a conflict between national regulations and international treaties, then the government may try to revise the conflicting national regulations to comply with the provisions of the treaties. However, this still poses a problem in the hierarchy of norms because it has not

[65] "Kalah Dari Gugatan Amerika Dan Brazil Di WTO, Pemerintah Akan Revisi Undang-Undang Terkait Pangan - Indonesia for Global Justice."

[66] Lukman and Kusumawardhana, "Standing Above The Leviathan: Implikasi Difusi Norma Perdagangan Wto Ke Dalam Kebijakan Impor Pangan Indonesia Pada Tahun 2018-2022."

[67] M. Paschalia Judith, "Tuntutan WTO Dikabulkan Lewat RUU Cipta Kerja, Kedaulatan Pangan Tergerus," 2020, https://www.kompas.id/baca/ekonomi/2020/10/09/tuntutan-wto-dikabulkan-lewat-ruu-cipta-kerja-kedaulatan-pangan-tergerus.

inherently resolved the existing conflict of norms. For example, if a newly formed law turns out to conflict with a previously ratified international treaty. In default, without the government actively revising said law, then the principle of *lex posterior derogat legi priori* may apply, thus the national law takes precedence over the norms of the international treaties. If this happens, it will very likely harm Indonesia in the eyes of the international world and subject Indonesia to lawsuits or even sanctions for failing to fulfil its obligations.

Regular domestic laws overriding international treaties may potentially violate the basic principle of an international treaties, *pacta sunt servanda,* where every party bound by the provisions of an international treaty is obliged to comply with the treaty in good faith, which give birth to the responsibility of the state to comply with treaties agreed upon.[68] *Pacta sunt* servanda serves as a fairly basic principle for international treaty because it is the foundation to implement international treaties in accordance with the consensus made by the parties.[69]

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[68] Salma Laitupa, Eka Dewi Kartika, and Fadly Yasser Arafat J., "Eksistensi Hukum Internasional Terhadap Hukum Nasional Dalam Pembuatan Perjanjian Internasional," *Amsir Law Journal* 3, no. 2 (March 10, 2022): 63–75, https://doi.org/10.36746/alj.v3i2.61.

[69] Harry Purwanto, "Keberadaan Asas Pacta Sunt Servanda Dalam Perjanjian Internasional," *Mimbar Hukum - Fakultas Hukum*

The parties to a treaty may not take any action that could potentially conflict with or hinder the implementation of the objectives of the international agreement, whether before or after the agreement comes into force.[70] Due to how fundamental this principle is in the functioning of international treaties, domestic authorities must adjust existing domestic regulations to international treaties, and also ensure that future laws and regulations do not contain rules that conflict with the provisions of previous international agreements.

By binding itself to an international treaty, the country is subject to the rules of the treaty and obliges said country to implement the provisions of the treaty. Said country cannot arbitrarily declare that it is not subject to an international treaty already in force. If a country decides to withdraw from an international treaty, then said country must follow the provisions of the withdrawal contained in the treaty. In addition, according to Article 27 Vienna Convention on the Law of Treaties 1969 (1969 VCLT) a country cannot use the provisions contained in its national law as a justification for evading its obligations

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Universitas Gadjah Mada 21, no. 1 (February 23, 2012): 155, https://doi.org/10.22146/jmh.16252.

[70] Purwanto.

under international law.[71] This principle is also found in the Article 3 Responsibility of States for Internationally Wrongful Acts of 2001 established by the United Nations International Law Commission (ILC),[72] which states that a state actions that are considered as internationally wrongful if said action violates international law, regardless of whether such action is lawful according to national laws. Article 30 and Article 31 of the Responsibility of States for Internationally Wrongful Acts of 2001 provides legal consequences for states violating their international obligations, namely the duty to cease the act, guarantees of non-repetition, and reparations.

Meanwhile, in Article 46 Section (1) of the 1969 VCLT essentially states that a conflict with national law cannot be used as a reason to invalidate a state consent to be bound, with the exception that, "*violation was manifest and concerned a rule of its internal law of fundamental importance*."[73] Article 46 Section (2) states that, "*a*

[71] Dian Khoreanita Pratiwi, "Kewenangan Mahkamah Konstitusi Dalam Pengujian Undang-Undang Ratifikasi Perjanjian Internasional," *Jurnal Yudisial* 13, no. 1 (September 7, 2020): 1, https://doi.org/10.29123/jy.v13i1.268.

[72] Fetty Eucharisti, "Responsibility of States for Internationally Wrongful Acts.," *Jurnal Hukum Internasional* 5, no. 1 (2007): 133–66.

[73] Setyaningsih Suwardi and Ida Kurnia, *Hukum Perjanjian Internasional* (Jakarta: Sinar Grafika, 2019).

violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and good faith."

Although Indonesia itself did not ratify the 1969 VCLT, the provisions contained in the 1969 VCLT were previously based on, and already become customary international law, and Indonesia itself accepts and implements existing practices,[74] and never openly and continuously reject said customary international law (persistent objector), which means the provisions in the 1969 VCLT can also bind Indonesia as a third country if such treaties evolve into a customary international law.[75]

If an international treaty has been ratified and entered into force, then the provisions contained in the international treaty can be used as a guideline in resolving disputes or legal problems. The perspective of international law with an internationalist approach tends to prioritize the principle of treaty security, where the obligation to comply with the rules of the international

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[74] Sinaga and Claudia, "Pembaharuan Sistem Hukum Nasional Terkait Pengesahan Perjanjian Internasional Dalam Perlindungan Hak Konstitusional."

[75] Danel Aditia Situngkir, "Terikatnya Negara Dalam Perjanjian Internasional," *Refleksi Hukum: Jurnal Ilmu Hukum* 2, no. 2 (September 14, 2018): 167–80, https://doi.org/10.24246/jrh.2018.v2.i2.p167-180.

treaty is prioritized over the provisions of its domestic law, with special exceptions for domestic rules that are constitutional in nature.[76]

During a conflict of obligations, where a country fails to carry out its obligations under international law, does not mean that contradicting national legal norms are automatically invalid, but international law itself resolves conflicts between national and international law through the concept of state responsibility.[77] In this case, another country that feels wronged by domestic laws that violates international treaties mutually agreed upon can file a dispute against allegedly violating countries.[78] One solution to solve this inherent problem of hierarchy of legislature in Indonesia is to generally adopts the monist principle, to place international treaties normally ratified by laws which hierarchically higher than Law, but still subordinate to the Constitution, in order to ensure treaty

[76] Hannah Woolaver, "From Joining to Leaving: Domestic Law's Role in the International Legal Validity of Treaty Withdrawal," *European Journal of International Law* 30, no. 1 (May 24, 2019): 73–104, https://doi.org/10.1093/ejil/chz003.

[77] Crawford, "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect."

[78] Afidatussolihat, "Pengujian Undang-Undang Ratifikasi Perjanjian Asean Charter Oleh Mahkamah Konstitusi," *JURNAL CITA HUKUM* 2, no. 1 (June 1, 2014), https://doi.org/10.15408/jch.v1i1.1459.

security and the good faith of the state in complying with its international obligations, and to minimize the possible conflict between national law and international law. The House of Representatives as an important manifestation of the people's sovereignty possesses an important role in the ratification process of an international treaty, where they have the authority to reject the ratification of a treaty that is considered unaligned with the national interests. Thus, their participation is necessary in the ratification of treaties in the future.

However, the placement of international treaties above Law can also cause problems, that is, there is a hierarchical difference between the two even though the basis of their validity is exactly the same, as in, both the ratification of treaties and Law usually requires similar majority in the House of Representatives, and there are two types of norms that ordinary law must comply with, namely international treaty and the Constitution, both of which may have conflicting norms.[79] One effort to prevent such conflict is to allow judicial review of treaties by placing them at a lower hierarchy than the Constitution, or in

[79] Gözler, "The Question of The Rank of International Treaties In National Hierarchy of Legislature A Theoretical and Comparative Study *."

other words, unconstitutional treaties cannot be ratified. Such provisions are contained in Article 54 of the French Constitution, Article 6 paragraph 5 of the Armenian Constitution, and Article 8 paragraph 2 of the Moldavian Constitution.[80] In France, the placement of the constitution as the supreme law of the land allows for a judicial preview of treaties by the Constitutional Council, to ensure that resilience of the Constitution and the harmonization of the Constitution, international agreements and Law.

C. Conclusion

The position of international treaties in the hierarchy of laws and regulations in Indonesia is still unclear. In the Law on International Agreements, international agreements that contain provisions that affect the livelihood of the people such as security, human rights, the environment, politics, and so on are ratified through Law, while international treaties whose content does not concern those matters are ratified through Presidential Decrees. France, on the other hand, which adheres to the monist theory, places international treaties

[80] Gözler.

in a higher hierarchical position than domestic laws, yet lower than the Constitution.

However, the principle of constitutional supremacy over international treaties in France is not fully applicable due to the possibility for constitutional amendments to accommodate international treaties. The current position of international treaties in the hierarchy of laws in Indonesia can cause problems in the future, because in cases of conflict of norms between Law and international treaties, an active role from the government and the parliament is required to amend said law, to ensure that Indonesia fulfills its international obligations. Unfortunately, if the government and the parliament ignores such matters and does not strive for harmonization, then problems will arise if treaty norms are set aside by national norms, due to the possibility of conflict with other countries due to failure to fulfill international obligations. One solution for Indonesia to avoid conflicts between national laws and international treaties is to specifically provide a space for the international treaties within the hierarchy of laws and regulations in Indonesia. In order to ensure a harmonious relationship between domestic regulations and international law, a minor amendment of the Law on the

Formation of Legislation is required to place the ratified treaties in a higher position than the domestic laws and regulations, depending on the ratification process. In addition, to ensure that international treaties are aligned with the 1945 Constitution, the revision of Law on Constitutional Court might be necessary to enforce constitutional norms in international treaty, and to create specific mechanism of judicial review or judicial preview of treaties through the Constitutional Court, to avoid further caseload.

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