The urgency of the constitutional preview of law on the ratification of international treaty by the Constitutional Court in Indonesia

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1. Introduction

Article 4 Paragraph (2) the Law Number 24 Year 2000 on International Treaty stipulates that in making international agreements, the Government of the Republic of Indonesia shall be guided by the national interest and based on the principles of equality, mutual benefit, and with regard to both applicable national law and international law. The existence of a provision that international treaties must be guided by national law, clearly indicates that international treaties that can be ratified are in line with the 1945 Constitution of the Republic of Indonesia as the supreme law of the land. According to Article 10 of the Law Number 24 Year 2000, ratification of an international treaty is carried out in the form of a law if it relates to: (i) matters of politics, peace, defense and state security; (ii) changes to the territory or the determination of the territorial boundaries of the Republic of Indonesia; (iii) sovereignty or sovereign rights of the state; (iv) human rights and the environment; (v) the establishment of a new legal code; (vi) foreign loans and/or grants.

Through the Decision of the Constitutional Court of the Republic of Indonesia Number 13/PUU-XVI/2018, the Article 10 of Law Number 24 Year 2000 is declared contrary to the 1945 Constitution and does not have legally binding force conditionally. The Constitutional Court emphasized the criteria for international treaties whose ratification needed to be approved by the Parliament as regulated in Article 11 paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which stated that: "Creates broad and fundamental consequences related to the burden on state finances and/or necessitates changes or formation of laws." (Constitutional Court, 2018). Thus, it becomes increasingly relevant to have a review of the material for the ratification of international treaties that will be ratified by law.

Based on the existing data, according to the Ministry of Law and Human Rights, as of July 29, 2011, 296 international treaties have been ratified by Indonesia (Director General of Legislation of the Ministry of Law and Human Rights, 2011). Of course, that number is very much. On the other hand, the existence of an international agreement is an implementation of the association and relations between countries that are realized through international agreements or international treaties, both bilateral and multilateral in nature (Dixon et al., 2016). Indonesia's participation in this international agreement is a means of increasing cooperation to provide benefits for both Indonesia and other participating countries in international agreements or international treaties. Moreover, the practice of Indonesia's involvement in participating in international agreements is also based on the provisions in Article 11 of the 1945 Constitution which stipulate that the President with the approval of the parliament makes peace and agreements with other countries. But on the other hand, it must also be ensured that the contents of the international agreements ratified are in line with the 1945 Constitution of the Republic of Indonesia and are in line with the values and life of the Indonesian people. Therefore, juridically and conceptually, Law on the Ratification of International Treaty has the potential to be reviewed by the Constitutional Court.
In France, before an international treaty is ratified, the Government or the Parliament (which proposes it) is obliged to request the consideration of the Council of Constitutional (Constitution of the Fifth Republic of France, 1958). Article 54 of the French Constitution states that: "If the Constitutional Council, on a referral from the President of the Republic, from the Prime Minister, from the President of one or the other Houses, or from sixty Members of the National Assembly or sixty Senators, has held that an international undertaking contains a clause contrary to the Constitution, ...". According to this provision, the French Council of Constitutional may reject the proposed ratification of international treaties on the grounds that they are contrary to the Constitution. Article 55 of the French Constitution regulates the legal consequences when the Constitutional Council approves the proposed ratification of international treaties. When the French Council of Constitutional approves the ratification of an international treaty, the international treaty has a higher position than the law established by the French Parliament (Rogoff, 2006).

As mandated by the Indonesian Constitution, that the Constitutional Court has the authority to examine laws. Thus, in line with this given authority, this study analyzes the possibility of constitutional review of the ratification of laws resulting from international treaties by the Constitutional Court.

2. Methodology

This study uses a normative juridical method. Legal materials used in this research include primary legal materials and secondary legal materials. The technique of collecting legal materials is carried out through literature studies. The approaches used in this research are: (i) the legal case approach, to analyze the importance of constitutional review of the Law on the Ratification of International Treaty and (ii) the conceptual approach (Marzuki, 2006) which is used to analyze and formulate the concept of Constitutional Preview of the Law on the Ratification of International Treaty by the Constitutional Court. To provide comprehensive analysis, this research conducted interview with Constitutional Law expert. The result of interview will be used to present the genuine conception from the perspective of constitutional law about the use of the Law on the Ratification of International Treaty by the Constitutional Court.

3. Result of the research

a. Review of the Constitutionality of Laws on the Ratification of International Treaty by the Constitutional Court

In 2011, Law Number 38 Year 2008 concerning the Ratification of the ASEAN Charter was submitted for review to the Constitutional Court. The Petitioners argued in their Petition that the ratification of the Charter of the Southeast Asian Nations (ASEAN Charter) through Law Number 38 Year 2008 contradicts the foundation of the national economy as stipulated in Article 33 of the 1945 Constitution of the Republic of Indonesia. The request for review of Law Number 38 Year 2008 by the Constitutional Court became a polemic among legal scholars because of the presence of that Law as a follow-up form of the ratification of the ASEAN Charter. According to the Government side, the attachment of the ASEAN Charter to Law Number 38 Year 2008 is purely in the framework of formality that indicates the text of the ASEAN Charter has been approved by the Parliament.

The petitioners submitted this problem to the Constitutional Court based on Article 24C paragraph (1) of the 1945 Constitution (Constitutional Court, 2002) jo. Article 1 point 3 of Law Number 8 Year 2011 concerning the Constitutional Court which stated that the Constitutional Court has the authority to examine laws against the 1945 Constitution (Law No. 8 of 2011 on the Amendment of Law No. 24 of 2003 on Constitutional Court, 2011). However, the law submitted to the Constitutional Court is not a usual statutory law, but a law related to the ratification of international treaty. The Constitutional Court through Decision Number 33/PUU-IX/2011 decided to reject the application for judicial review of the law on the ratification of the ASEAN Charter on the grounds that the petitioners' arguments were not justified according to law (Constitutional Court, 2011).

In the decision, the Constitutional Court stated that the Court has the authority to adjudicate Case No. 33/PUU-IX/2011 on the application for testing of the Law No. 38 of 2008 on the Ratification of the ASEAN Charter. The legal considerations in paragraph (3.4) stated that "Considering that the Petitioners' petition is a test of the constitutionality of legal norms, namely Article 1 (5) and Article 2 (2) (n) ASEAN Charter which is an attachment and an inseparable part of Law No. 38 of 2008 (vide Article 1 of Law No. 38 of 2008), thus, the Court has the authority to try a quo petition."

The consideration of the Constitutional Court Decision No. 33/PUU-IX/2011 can be acknowledged that the obligations imposed on a country by international treaties because the parties, in this case, are the countries as subjects of international law. This is also in accordance with the principle of pacta sunt servanda. In addition, the Constitutional Court also argued that the choice of form of ratification of international treaties in the formal form of statutory laws can be reviewed (Sidharta, 2020).

As for the case No. 33/PUU-IX/2011, the Constitutional Court decision rejected the petition. However, what should be noted is that the Constitutional Court has argued that it has the authority to examine the Law on the Ratification of International Treaty. That could open up opportunities for similar testing at a later date.

Furthermore, on February 14th, 2018, petitioner submitted Law Number 24 Year 2000 concerning International Treaties for examination before the Constitutional Court. The petitioner argued that many international agreements were detrimental to the people, and without involving the community in every process of making and ratifying these international agreements. In fact, international treaties that have been ratified and/or ratified by the Government have had a broad impact on people's lives, both in terms of economy and trade. However, the public was not given a mechanism to control every international agreement that was ratified. This is because the authority to approve the Parliament as a representative of the people is eliminated in Law Number 24 Year 2000 concerning International Treaties. The Petitioner argued that the provisions of Article 2, Article 9 paragraph (2), Article 10, Article 11 paragraph (1) of Law Number 24 Year 2000 does not in accordance with the 1945 Constitution of the Republic of Indonesia.

With regard to the Petitioners' arguments, the Constitutional Court through the Decision Number 3/PUU-XVI/2018 decided, among other things, that: Article 10 of Law Number 24 Year 2000 contradicts with the 1945 Constitution and does not have legally binding force conditionally as long as it is interpreted that only the types of international agreements as mentioned in letters (a) to (f) in Article 10 require the approval of the Parliament. Hence, ratification of treaties in the area as mentioned under Article 10 has to be carried out by statutory law.

After considering the Constitutional Court's decision which confirms that the Court has the authority to examine the ratification of international treaties, apart from proposing the need for amendments to Law No. 12 of 2011 and Law Number 24 Year 2000, researchers suggest the need to provide the Constitutional Court the authority to conduct a constitutional preview of the draft of Law on the Ratification of International Treaty before it is approved by the Parliament. While the technical regulations are enacted under the statutory law, the constitutional preview shall also be constitutionally regulated under the 1945 Constitution by formulating additional authority for the Constitutional Court (Susi Dwi Harjianti, 2019).

b. Constitutional Preview of the Law on the Ratification of International Treaty by the Constitutional Court

Based on the legal position of the statutory regulations, there are 2 (two) reviewing models. First, the a posteriori reviewing model of
statutory regulations when it is still in the form of a draft or not legally valid (preview). Second, the a priori reviewing model of statutory regulations when it is legally valid (review) (Austriala et al., 2011). In the concept of judicial review, particularly with regard to reviewing by judicial powers, it is also necessary to distinguish between the terms judicial review and judicial preview. Review means looking at, assessing, or re-testing, which comes from the words ‘re’ and ‘view’. Meanwhile, ‘pre’ and ‘view’ or preview are activities to look at something before the perfect state of the object being viewed (Austriala et al., 2006; Tarigan, 2020).

In relation to the object of statutory law, it can be said that when a law is not yet official or perfect as a binding law for the public, and when the law has officially become law, there are two different circumstances (Hamidi and Mutik, 2011). If the law is already valid as law, then the examination of it can be called a judicial review. However, if the status is still a draft of a law, then the examination of it cannot be called a judicial review, but a judicial preview (Austriala et al., 2006). This means that when a judicial body is given the authority to review a legal product that has not been ratified, the review is included in the ex-ante review qualification.

The ex-ante review mechanism is not only an effort to synchronize the draft of a law against the constitution, but also as an effort to harmonize the draft with other related laws. This harmonization is important to prevent the existence of several overlapping laws (W. Nalle, 2013). The concept of ex-ante review does not require a correspondence between norms and facts. Ex-ante reviews are in fact preventive in nature because they are aimed at the draft of a law, not at the law that has already been enacted. It is sufficient for examiners to see whether the norms in a bill are synchronized with the norms in the constitution. Thus, the possibility of constitutional losses after the enactment can be minimized. Apart from maintaining the constitutionality of the law, aspects of quality improvement can also be achieved through an ex-ante review mechanism. The bad quality of legislation is not only due to the unconstitutionality of laws, but also disharmony with other laws and poor methodology in the legislative process. Disharmony between laws can result in over-legislation, even legal uncertainty due to differences in regulations (W. Nalle, 2013).

If ex-ante review is related to constitutionality testing, this mechanism is called a ‘preventive constitutional review’ or ‘a priori constitutional review’, which some scholars prefer to call a ‘constitutional preview’, rather than a ‘constitutional review’. Why is it considered more appropriate to be called a ‘preview’ rather than ‘review’, because the tests carried out were ‘a priori’ and ‘preventive’ in nature before the draft of a law in question officially became a law (legislative act) which was binding for the public. By doing so, it means that the test is carried out on legal products that have not been officially passed into law. After a draft of a law is ‘previewed’ and declared not to contradict the constitution, then the draft can be promulgated as a law that binds for the public (Austriala et al., 2010).

Constitutional Court Decision Number 13/PUU-XVI/2018 needs to be used as a basis for changes, especially in providing norms related to the criteria/conditions for international agreements which require it in the form of a law. Constitutional Court Decision No. 13/PUU-XVI/2018, still requires the approval of the Parliament. This decision also strengthens the criteria for international treaties whose ratification needs to be approved by the Parliament and ratified in the form of a statutory law as regulated in Article 11 paragraph (2) of the 1945 Constitution. The criteria include having broad and fundamental consequences for the lives of the people related to the burden on state finances and/or require a burden on state finances, and/or require changes or formation of laws. Of course, this criterion still raises a variety of interpretations considering that the norm is still very broad. Thus, it is necessary to consider to the limitations/measurements/parameters of the criteria given by Article 11 paragraph (2) of the 1945 Constitution to provide legal certainty.

Even if the ratification of an international treaty is carried out in the form of a law, it is necessary to distinguish between the law in general and the law that ratifies international treaties. The procedure for ratifying international treaties needs to be clarified in the provisions of Law No. 12 of 2011 in conjunction with Law No. 15 of 2019 concerning the Formation of Laws and Regulations. If indeed the Constitutional Court is given the authority to carry out a constitutional preview of an international agreement before it is ratified, then the process of planning for a law to ratify international treaties needs to be added to the constitutional preview procedure.

In addition, the format of the draft of a law for ratifying international treaties needs to be adapted into existing developments related to the ratification of international treaties. The best example is in the context of Indonesia’s ratification of the 2019 Indonesia-Australia Comprehensive Economic Partnership Agreement. Both Indonesia and Australia signed this bilateral agreement on March 4, 2019. Indonesia then ratified it into national law or in the form of Law Number 1 Year 2020 on February 28, 2020. The Exchange of Notes (J. L. Weinstein, 1952; United Nations, 2005) between Indonesia and Australia will be carried out later on May 6, 2020. After that, in accordance with the agreed Bilateral Agreement, the Agreement will only come into effect on July 5, 2020. Problems arise where the agreement comes into effect according to Indonesian national law on February 28, 2020, while according to international law, the agreement will take effect only on July 6, 2020. There is a problem in practice: the tariff reduction has been carried out by Indonesia on February 28, 2020, even though the international agreement will only take effect on July 5, 2020. In this case, Indonesia is disadvantaged if it follows the process because it has reduced the tariff 3 (three) months before the bilateral agreement comes into effect. Thus, in this research it is proposed that the provision related to the validity of the law which recently stated that “This law comes into force on the date of promulgation” (Law No. 12 of 2011 on the Formation of Laws and Regulations, 2011). It needs to be changed to “This law comes into force on the date of the agreement of the international treaties”.

Based on the description above, it is urgent to grant the Constitutional Court the authority to conduct a constitutional preview of the Law on the Ratification of International Treaty. The 1945 Constitution of the Republic of Indonesia has delegated significant authority to the Constitutional Court as the guardian of the constitution. This has a consequence that the Constitutional Court functions as the sole interpreter of the constitution. The constitution as the highest law regulates the administration of the country based on democratic principles and one of the functions of the constitution is to protect human rights guaranteed in the constitution. Therefore, the Constitutional Court also functions as the guardian of the democracy, the protector of the citizens’ constitutional rights and the protector of human rights. The strategic position of the Constitutional Court is providing consideration to the government and the Parliament to approve or not the draft international agreement that will be made/ratified on the basis of whether or not there is a conflict with the constitution, then it does not interfere with the agreement that has already been made if later a petition for review appears before the Constitutional Court.

This research provides five main reasons to empower the Constitutional Court of authority to conduct a constitutional preview. First, the existence of the Constitutional Court is a consequence of the principle of constitutional supremacy which, according to Hans Kelsen, requires a special court to ensure the conformity of lower legal rules with the legal rules above (Kelsen, 1961). It is possible that the Law on the Ratification of International Treaty may contradict the 1945 Constitution. Therefore, when the President is about to make an international agreement, the Constitutional Court can be involved to test the constitutionality of the international agreement based on the principle of constitutional supremacy.

Second, the involvement of the Constitutional Court in examining the constitutionality of international agreements is carried out in order
realize the synchronization and harmonization of international treaty norms against the values and norms contained in the 1945 Constitution.

Third, the involvement of the Constitutional Court in examining the constitutionality of international treaties will not reduce the role of the Parliament in approving the Law on the Ratification of International Treaty, because the involvement of the Constitutional Court is an a priori review. Precisely with the presence of the Constitutional Court to be involved in the formulation of Law on the Ratification of International Treaty will present checks and balances as well as to create a national legal system that supportive with international relations but also remains based on the sovereignty of Indonesian national law.

Fourth, the Constitutional Court’s involvement in conducting a constitutional preview was carried out before the Parliament provided approval. Thus, the Constitutional Court’s opinion regarding the constitutionality of international agreements could be used as a consideration for the Parliament to provide approval or not to provide approval to international agreements that would be ratified by law.

Fifth, granting constitutional preview authority must be carried out by amending the provisions of Article 11 and Article 24C of the 1945 Constitution which regulate the procedures for ratifying international treaties in general and the authority of the Constitutional Court. The amendments to the two articles are at the same time to emphasize that the granting of the authority for the constitutional preview has a constitutional basis as well as constitutional importance. In addition, to avoid debates regarding whether ordinary laws can also be carried out a constitutional preview. Therefore, the importance of this amendment will emphasize that the Constitutional Court only conducts a judicial preview, only specifically on the Law on the Ratification of International Treaty, while the judicial review system remains applicable to other laws.

4. Conclusion

The Constitutional Court Decision No. 33/PUU-IX/2011 and 13/PUU-XVI/2018 provide an opportunity that the Constitutional Court can conduct the examination of the Law on the Ratification of International Treaty. This study proposes that the Constitutional Court be given the authority to conduct a constitutional preview of the Law on the Ratification of International Treaty. For this purpose, there are five reasons to consider: (1) in order to uphold the supremacy of the constitution; (2) the involvement of the Constitutional Court in examining the constitutionality of international agreements is carried out in order to realizing the synchronization and harmonization of international treaty norms against the values and norms contained in the 1945 Constitution; (3) The involvement of the Constitutional Court in examining the constitutionality of international agreements will not reduce the role of the Parliament in approving the Law on the Ratification of International Treaty, because the involvement of the Constitutional Court is a priori review; (4) the involvement of the Constitutional Court in conducting a judicial constitutional preview was carried out before the Parliament gave its approval. Thus, the Constitutional Court’s opinion regarding the constitutionality of international agreements could be used as a consideration for the Parliament to give a perse the purpose of or not giving approval to international treaties to be ratified by law; (5) The granting of constitutional preview authority must be carried out by amending the provisions of Article 11 and Article 24C of the 1945 Constitution which regulate the procedures for ratifying international treaties and the additional authority of the Constitutional Court. The amendments to the two articles are at the same time to emphasize that the granting of the authority for the judicial constitutional preview has a constitutional basis as well as constitutional importance.

Declarations

Author contribution statement

N’matul Huda, Dodik Setiawan Nur Heriyanto, Allan Fatchan Gani Wardhana: Conceived and designed the experiments; Performed the experiments; Analyzed and interpreted the data; Contributed reagents, materials, analysis tools or data; Wrote the paper.

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The authors declare no conflict of interest.

Additional information

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