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Legal Analysis on Interlink between International and National Instruments Towards Woman Rights in Indonesia

Tri Lisiani Prihatinah, Ph.D.¹

International instruments such as the Universal Declaration on Human Rights, the Internasional Covenants on Civil and Political Rights and Social and Cultural Rights, and the Convention for the Elimination of Discrimination Against Women (CEDAW) have led to what has been called a juridical revolution. Under these international instruments, the idea of all these rights including woman rights has been constitutionalized in almost all countries and practically all countries are now committed internationally to respect and ensure the woman rights of their citizens. In this paper international instruments relating the woman rights and their domestic enforceability are covered. Using juridical-normative approach, we discuss the domestic enforceability of international woman rights in Indonesia. The result showed that although women are guaranteed equality under Indonesian Constitution, considerable gaps exist between de jure and de facto equality for women. When there is a conflict within a monist approach, Indonesia tends to follow a doctrine of national law primacy. In a case of instruments conflict between woman rights at national/local instruments and international one, then international instrument is put aside.

Keywords: Asian approach, international law, rational choice theory, economic theory

I. Introduction

Eleanor Roosevelt in 1948 predicted that human rights would be important traits that come into the global public consciousness. International instruments such as the Universal Declaration on Human Rights, the Internasional Covenants on Civil and Political Rights and Social and Cultural Rights, and the Convention for the Elimination of Discrimination Against Women (CEDAW) have led to what has been called a juridical revolution. Indonesia has international and national liability on woman rights issues. The main source of these international responsibilities arises from the international agreements and decisions of the United Nations. In this paper international instruments relating the woman rights and their domestic enforceability will be covered. We will discuss the domestic enforceability

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of international woman rights in Indonesia. This paper will cover general discussion on the differences of signing and ratifying international agreements and their binding effect. Indonesian obligations on woman rights will have special emphasis in this paper, the key principles of international law such as supranational and direct effects will be discussed in order to understand the enforceability and binding effects of international woman rights.

The issue of woman rights has been covered under the most important international body, i.e. United Nations. The United Nations has important role for preparing international agreements, General Assembly Resolutions, gathering conferences and forming committees focusing on human rights and woman rights. The binding effects of these actions or decisions on member states are different. The constitutional agreements of each organisation will be determined by the effects.

As a member of the United Nations, Indonesia has an agreement on the issue regarding woman rights and some other agreements on human rights are also applicable to woman rights. Indonesia is a party to the following agreements regarding woman rights, such as Convention on Elimination of all forms of discrimination against women (CEDAW)- Law No. 7/1984, Law No 4/1979 of Children Prosperity, Law No 23/2002 of Children Protection, Law No 3/1997 of Children Court, Presidential Decision No 36/1990 of Ratification on Children's Rights Convention. Therefore it is crucial to discuss the meaning of signing an international agreement, whether it will raise any rights for individuals in our case woman rights.

II. Methodology

This research was performed by using juridical-normative approach through researching relevant literature. The secondary data that has been collected and then to be analysed juridical-qualitative way in order to make it come true for supporting the justification them judicial-descriptively.

III. International Agreement and Its Consequences

In the last decade, the government has made efforts to identify gender-biased laws and amend them accordingly to remove discrimination. Twenty one laws were identified by the government as being discriminatory towards women – not all have undergone revisions as yet, and several that have still contain some discriminatory provisions according to the CEDAW Committee.² Examples include the amended Law on Citizenship which still does not provide women with the same rights as men to retain or transmit their citizenship. The process of decentralization has raised some concerns on implementation and enforcement of legislation at the local level – there is uneven recognition and enforcement of women's rights in different regions, including Aceh, and a number of local laws and regulations have been established in recent years that discriminate against women on the basis of culture and religion. In promoting the government 'zero-tolerance policy' on violence against women, a number of related laws targeted at eliminating violence has been enacted, including the Law on Domestic Violence (2004), the Victim Protection Law (2006), and the Law on Anti-Trafficking (2007).

When the agreement is signed it does not necessarily mean that the agreement will enter into force in the international scope. The agreement might require a certain number signatories to ratify the agreement or set a date for entry. The agreements will raise rights and will be applicable once it is in force. One important point to consider is the possibility of reservation. According to the Vienna Convention on the Law of Treaties, Art 2 (1/d):

"... reservation means a universal statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a ratify, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application of the state,..."

The Convention permits ratification subject to reservations, provided that the reservations are not incompatible with the object and purpose of the Convention. Some States parties that enter reservations to the Convention do not enter reservations to analogous provisions in other human rights

² CEDAW Implementation Sc Asia, 2010, available at website http://cedaw.seasia.org/by_region.html, accessed 6 September.

treaties. A number of States enter reservations to particular articles on the ground that national law, tradition, religion or culture are not congruent with Convention principles, and purport to justify the reservation on that basis. Some States enter a reservation to article 2, although their national constitutions or laws prohibit discrimination. There is therefore an inherent conflict between the provisions of the State constitution and its reservation to the Convention. Some reservations are drawn so widely that their effect cannot be limited to specific provisions in the Convention.

If a country has a reservation on an international agreement the liability will be determined accordingly. For example Indonesia when signing the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1984 put a reservation clause on Article 29 paragraph 1 until Indonesia fulfilled the necessary requirements in the national law:

Article 29, Paragraph 1 – “Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.”

This reservation is considered permissible because it is not deemed incompatible with the object and purpose of the Convention. Furthermore once a country signs an agreement it does not indicate that the agreement is binding in the domestic context. It is according to the national law how the international agreement will enter into force in the domestic context and will be binding. For some countries further procedure is not required for an international agreement to be binding, it is sufficient to sign the agreements. These agreements are called self-executing agreements. Treaties concluded by the European Union maybe self-executing that they are binding within the domestic legal systems without formal incorporation.³ (Browlie, 2003, 48). However countries such as Indonesia require a ratification process for the agreement to be binding. Just signing the agreement

³ Ian Bowlie, 2003, *Principle of Public International Law*, Oxford, England, 6th Edition, p.48.

will not fulfill this requirement. The national laws will determine the procedure for ratification.

For Indonesia the agreement level hierarchical order and the ratification procedure is regulated under the Indonesian Constitution especially Article 11 (2). According to this Constitution, before it was amended, President as an executive body had more power for executing international agreements because and to do so President did not need any approval from legislative body. However the approval from legislative body is needed after it is amended especially for the issues which effects to Indonesian life widely and fundamentally related to financial burden.

Article 11 (2): The ratification of treaties concluded with foreign states and international organisations on behalf of the Republic of Indonesia, shall be subject to adoption by the Indonesia Legislative Body by a law approving the ratification.

It can be concluded that international agreements have to be ratified by the legislature in order to be binding. The agreements mentioned above regarding woman rights whether under the United Nations or by other organisations have to be ratified. This process might take years. For example Indonesia signed the Convention on Elimination of all forms of discrimination against women (CEDAW) (1980) but ratified the Convention on 1984.⁴ Overall the position of Indonesia within the international instruments especially for the position of women as shown in the following table.

Indonesia ratified the Convention in 1984, entering one reservation to Article 29, paragraph 1. The country's initial report was reviewed by the CEDAW Committee in 1988, followed ten years later by the review of its combined 2nd and 3rd reports. In 2000, the country signed the CEDAW Optional Protocol, but has not yet ratified it. Its 4th and 5th combined reports were examined in August 2007, at the 39th CEDAW session. Indonesian NGOs submitted an alternative report, the result of broad consultations involving about 50 national and local women organizations, in a coordinated process considered significantly more inclusive and comprehensive than a decade earlier. There was dialogue between government and NGOs during the drafting period – the government body tasked with drafting the state report included representatives from civil society, while NGOs shared the

⁴ CEDAW Se Asia, 2010, available at website http://cedaw-seasia.org/by_region.html, accessed 6 September.

findings of their Independent Report with relevant government agencies before the CEDAW session in New York.

Indonesia				
Date of Accession / Ratification	Reservations	Optional Protocol	Reporting Status	Coordinating Agency for CEDAW Implementation
29 July 1980 (signed); 13 Sept 1984 (ratified)	Article 29, paragraph 1	Signed 28 Feb 2000, not yet ratified	- Initial report examined at 7th session, 1988 - Combined 2nd and 3rd reports examined at 18th session, 1998 - Combined 4th and 5th reports examined at 39th session, 2007 - Combined 6th and 7th reports due in 2009	Ministry of Women Empowerment (MOWE)

Source: CEDAW Se Asia, 2010, available at website http://cedaw-seasia.org/by_region.html, accessed 6 September.

The Government of the Republic of Indonesia does not consider itself bound by the provisions of article 29, paragraph 1 of this Convention and takes the position that any dispute relating to the interpretation or application of the Convention may only be submitted to arbitration or to the International Court of Justice with the agreement of all the parties to the dispute.

The most important rule of international law is *Pacta Sunt Servanda*. According to the Vienna Convention on the Law of Treaties, Art 26, "*Pacta Sunt Servanda*". Every treaty in force is binding upon the parties to it and must be performed by them in good faith. Once the treaty is ratified according to Article 11 (2) of the Indonesian Constitution, it will be binding and has to be performed in a good faith. Sometimes the agreement might also require changes to the existing national law. Otherwise there will be international responsibility and liability. To understand the conflict issue between international and national or even local laws, we have to point out the relationship between international law and national law. It is also important to understand the application of international obligations in national level.

IV. Monist and Dualist Approaches

The issue is whether international law and national law are components of a single body of law or not. If they were not in the same body of law, then there would not be any conflict among them. However, if they were components of a single body of law then we have to discuss the situation of conflict and possible solutions. For Indonesia, it is common to see conflict between human rights/ woman rights issues, Indonesian's obligations under its international law and its national or even local law. The question is to the national law to determine which one prevails or is there international law on this issue?⁵

For Indonesia as mentioned earlier that it is again regulated under the Indonesia Constitution Law Year 1945 Article 11 (2) for vital issues, therefore national law has a position over international agreements/ laws. Indonesian Law No. 37 Year 1999 about international agreement, Indonesia has the doctrine of monist approach with primacy of the national law. It means, in a process of executing international agreements Indonesia has to legalize with national law.

The points to discuss will be: what constitute international agreements regarding basic rights and freedoms? Are the agreements on woman rights include in this definition? Are all human rights agreements included in this definition? In brief after signing international agreements the agreements

⁵ Martin Dixon, 2004, *Textbook on International Law*, Oxford, England, 5th Edition p.24.

are ratified by the legislature in order to be binding. The results on this binding agreements usually can be formed into the Act, but according to Harjono another form than Act is also applicable for ratifying international agreements. Once the agreements are ratified according to national procedure, the national law regarding basic rights and freedoms will prevail over the international agreements if they conflict. There are also UN General Assembly Resolutions on woman rights. As mentioned above resolutions do not usually create binding law and each international organisation determines the effects of recommendations and resolutions in its constitutional agreements. (UN Charter Art 13). However formal resolutions accelerate the formation and development of customary international law or may be a declaratory of existing customary international law.⁶

V. Conclusion

Indonesia has international, national and local liability on woman rights issues. Indonesia is a party to many agreements. Some of these agreements are specifically regarding woman rights and some are general agreements on human rights that are also applicable to woman rights. Although women are guaranteed equality under Indonesian Constitution, and the country was one of the first in Southeast Asia that ratified the CEDAW Convention, considerable gaps exist between de jure and de facto equality for women. When there is a conflict within a monist approach, Indonesia tends to follow a doctrine of national law primacy. It means when there is a conflict between woman rights at national/local instruments and international one, then international instrument is put aside. In order to minimize the conflict, attempts have been made to revise discriminatory legislation, demonstrating progress towards gender equality. However, many laws still continue to discriminate against women.

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