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# The Existence of the Constitutional Court in Examining the Law on Ratification of International Treaties Against the 1945 Constitution

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**ABSTRACT**

The Constitutional Court is one of the state institutions in Indonesia that has an important role in upholding the Indonesian constitution. One of the most influential authorities is the judicial review of the law against the 1945 Constitution. In Indonesia itself, international ratifications and international agreements, if they have been recognized and will be adjusted in national law, will be promulgated in one form of law as stated in Article 9 paragraph (2) of Law Number 24 of 2000 concerning International Agreements. In relation to the judicial review authority possessed by the Constitutional Court, this study will examine the extent to which the Constitutional Court based on its authority has reviewed the law on the ratification of international treaties. The research method used in this study is normative with a library study approach that is associated with various laws and regulations related to the topic. This study confirms that the Constitutional Court in examining the law on the ratification of international treaties is very rare because of the small number of applications received. But basically, the Constitutional Court has the authority to examine the law on the ratification of international treaties against the 1945 Constitution.



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## 1. INTRODUCTION

An international treaty that has been ratified and enforced in national law automatically becomes part of Indonesian national law. Based on Article 9 paragraph (2) of Law Number 24 of 2000 concerning International Agreements. It is stated in the article that the ratification of international agreements is ratified through laws or presidential decrees. Thus, improving the law on international treaties is materially the same as the law in general. In Indonesia, the authority to review laws against the 1945 Constitution belongs to the Constitutional Court. As regulated in Article 24 paragraph (2) of the 1945 Constitution which reads as follows "Judicial power is exercised by a Supreme Court and judicial bodies under it in the general court environment, religious court environment, military court environment, judicial environment state administrative court and by a Constitutional Court".

Article 24C paragraph (1) and paragraph (2) of the 1945 Constitution outlines the authority of the Constitutional Court as follows:

a) The Constitutional Court has the authority to adjudicate at the first and final levels whose decisions are final in order to examine laws against the Constitution, decide on disputes over the authority of state institutions whose authority is granted by the Constitution, decide on the dissolution of political parties, and decide on disputes regarding the results. election;
b) The Constitutional Court is obliged to give a decision on the opinion of the House of Representatives regarding alleged violations of the President and/or Vice President according to the Constitution.

In examining laws against the Basic Law, the Constitutional Court often raises debates because the aspects of the law are so broad. One of the debates that arose was regarding the authority of the Constitutional Court to examine international treaties. Hierarchically, it is clear that the Constitutional Court has the authority to examine international treaty laws, but is it substantively authorized? This is the main topic in this research.

## 2. LITERATURE REVIEW

### *2.1 International Treaties in the Perspective of International Law*

a. International Treaties in the Perspective of International LawThe source of law is generally defined as the original source of authority and coercive force of a positive legal product (the origins from which particular positive laws derive their authority and coercive force). Sources of law, including sources of international law, include a formal understanding, namely as a source of formal law and material, namely as a source of material law. Article 38 (1) of the Statute of the International Court of Justice stipulates that the Court, which has the main function to decide any case brought to it, must decide cases based on international law, which includes:
b. International conventions, both general and specific, which are provisions that are expressly recognized by the disputing countries;
c. International custom (international custom);
d. General principles of law recognized by civilized countries;
e. Judicial decisions and the opinions of the most highly quality fied publicists are additional sources of international law[1].[1]

[1] Boer Mauna, *Hukum Internasional: Pengertian Pernanan dan Fungsi dalam Era Dinamika Global* (Bandung: PT Alumni, 2018), 84

The Statute of the International Court of Justice puts international treaties at the top of the list due to protests from newly independent countries at that time which if international law is based on international customs which are considered to be European centric, modern international law (above 1945) will regulate more issues. socioeconomic status and this will not be found in international custom. International treaties are considered more able to provide legal certainty, because written as well as modern international law is more about preventing conflicts between countries, rather than resolving conflicts. From a historical point of view, of the four sources of law, the most important is international custom, because it is the oldest source of law. Meanwhile, from the point of view of the development of international law, the principles of general law play the most role, because they give the International Court of Justice the freedom to find or form new legal rules.

Meanwhile, according to Mochtar Kusumaatmadja the order as contained in Article 38 Paragraph (1) does not in the sense of indicating the order of the most important and foremost. Sources of law in article 38 paragraph (1) can be grouped into two groups, namely primary sources namely international agreements, international customs, general legal principles and subsidiary sources of law namely court decisions. Regarding which source of law is the most important and most important, it depends on the judge's view when deciding a case [2].[2] Hugh Thirlway also gives an opinion by distinguishing between the primary rules (primary rules) and secondary rules (secondary rules) that come from the differences that exist in the national legal system. In every legal system there is a set of principles and rules that describe the rights and obligations of legal subjects of the system which are then known as the main rules. While each system also has rules that are intended to apply what are included in the main rules and how these rules can be realized, applied and changed, which are then known as secondary rules [3].[3]

The existence of these sources of law causes countries to have to follow and obey the main rules, because these rules are available in an international agreement made by countries that bind themselves to the treaty (treaty law). Countries that are participants in an international agreement made under international treaty law must comply with the agreement, because the state is bound by the pacta sund servanda. Indeed, there are no rules stating that the principle is said to be the highest principle in relations between countries bound by international agreements, but as stated in Article 38 Paragraph (1) that in deciding a dispute, it must be based on international law, namely applying treaties and existing international practice, and this is an acknowledgment of the treaty as a source of formal law, while the Statute is a source of material and secondary rules of treaty make-law.

The history of international treaties begins with the convention held in Vienna, Austria in 1969 and is considered the parent of international treaties. The Vienna Convention or the Vienna Convention on the Law of Treaties is an agreement that regulates international law between countries as subjects of international law which took place on 23 May 1969 and entered into force on 27 January 1980. Prior to the 1969 Vienna convention, bilateral agreements were made between countries. and multilateral is held on the basis of the principles and agreements of the countries involved in it [4].[4] International treaties between countries prior to 1969 were regulated based on international custom which was based on state practice and on decisions of the International Court of Justice

[2] Mochtar Kusumaatmaja dan Etty Agoes, *Pengantar Hukum Internasional* (Bandung: PT Alumni, 2003), 23

[3] Jawahir Thontowi dan Pranoto Iskandar, *Hukum Internasional Kontemporer* (Bandung: PT. Refika Aditama, 2006), 54

[4] Sri Setianingsih Suwardi, *Hukum Perjanjian Internasional* (Jakarta: Sinar Grafika,2019), 5

or the International Permanent Court which no longer existed, also based on the opinions of international legal experts.

The Vienna Convention was drawn up by the International Law Commission (ILC) of the United Nation, which began its work on the convention in 1949. During the 20 years of preparation, several draft versions of the convention and commentaries were prepared by the special rapporteur of the ILC. These special rapporteurs were James Brierly, Hersch Lauterpacht, Gerald Fitzmaurice and Humphrey Waldock. By 1966, the ILC had adopted 75 draft articles that formed the basis of its final work. During two sessions in 1968 and 1969, the Vienna Convention was completed so that it could be entered into force on 22 May 1969 and opened for signature the next day.

The 1969 Vienna Convention is considered the parent of international treaties because it first contains provisions or binding codes of conduct in relation to international agreements. This convention regulates all matters relating to international treaties ranging from ratification, reservations to provisions regarding the withdrawal of a country from an international treaty, for example when the United States withdrew from the 1969 Vienna Convention in 2002 ago [5].[5]

The existence of this convention makes agreements between countries no longer regulated by customs that apply internationally, but are regulated by a binding agreement, demanding a high value of compliance from its member countries and can only be changed if there is agreement from all member countries of the Vienna convention. This makes the history of international agreements no longer the same as the rules in previous international customs which can change if there is a new international trend. Thus the 1969 Vienna Convention in the history of international treaties is considered the parent of the arrangements regarding international treaties. This convention is also the first convention that contains arrangements for international treaties, both technical and material arrangements and contains provisions which are a collection of various international customs that have been in force so far, relating to international agreements.

### *2.2 The Position of International Treaties in National Law*

National law and international law are two legal domains which on the one hand are sometimes understood as a unified legal system and on the other hand are sometimes positioned in two different legal system entities and are separated from one another. Both points of view in practice map the relationship between national law on the one hand and international law on the other. Especially regarding the existence and enforceability of international law in the national legal system of a country [6].[6] The view that believes that national law is a sub and part of international law automatically subordinates national law to international law. On the other hand, the view which believes that the existence and effectiveness of international law depends on the acceptance of national law, automatically interprets the existence of international law as interdependence on the recognition and acceptance of a state.

The increasing interpenetration of international law and national law in various aspects reflects the increasingly complex relationship between states and the international community. International treaties as a legal domain that regulates relations between national states indirectly provide a point of view that the existence of international law is closely related to the existence of national states. The birth of countries in all parts of the world is due to different historical, social, political, legal, and

[5] Mush'ab Al Ma'ruf, "Mahendra Putra Kurnia dan Syukri Hidayatullah, Tindakan Amerika Serikat Dalam Menarik Diri Dari Paris Agreement Dalam Kerangka Hukum Internasional", *Jurnal Risalah Hukum Vol 16*, No 2 (2020): 118, https://e-journal.fh.unmul.ac.id

[6] Basak Cali, *The Authority of International Law: Obedience, Respect, and Rebuttal*(Oxford University Press 2015) 137.

cultural backgrounds from each other, thus creating identification that functions as a unifier as a country but also as a differentiator between one country and another. In international law known as the theory of acceptance of international treaties (theory of international law before municipal courts) which is useful for understanding how the acceptance and position of international agreements in national law.

Traditionally, the theory of acceptance of international treaties by states is based on two theories, namely:

*1) Monism Theory*

The theory was developed from the school of natural law. This group assumes that international law and national law are an integrated legal system that cannot be separated. This theory is based on the idea that one unit of all laws that govern human life. Thus, national law and international law are two parts of a larger unit, namely the law that regulates human life. This results in the two legal instruments having a hierarchical relationship. Regarding the hierarchy in the theory of monism, there are two different opinions in determining which law is more important between national law and international law. There are those who consider national law to be more important than international law. This understanding in the theory of monism is referred to as monism with the primacy of national law. Others think that international law is higher than national law [7].[7] Monism with the primacy of national law, international law is an extension or continuation of national law or it can be said that international law is only as national law for foreign affairs. This understanding sees that the unity of national law and international law is essentially international law originating from national law. The reasons put forward are as follows:

a. the absence of an organization above the states that regulates the life of countries
b. The basis of international law that can regulate relations between countries lies in the authority of the state to enter into international agreements that originate from the authority granted by the constitution of each country.

Monoism with the primacy of international law, this understanding assumes that national law originates from international law. According to this understanding, national law is subject to international law which is essentially binding force based on the delegation of authority from international law. In fact, these two theories are used by countries in determining the applicability of international law in countries. Indonesia itself adheres to the dualism theory in applying international law in its national law. The making and ratification of international agreements between the Government of Indonesia and the governments of other countries, international organizations and other subjects of international law is a very important legal act because it binds the state to other international legal subjects [8].[8] Therefore, the making and ratification of an international agreement is carried out based on the law.

The difference between international law and national law according to Anzilotti can be drawn from two fundamental principles. National law is based on the principle that state legislation must be obeyed, while international law is based on the principle that agreements between countries must be respected based on the principle of

[7] Veriena J. B. Rehatta, "Indonesia dalam Penerapan Hukum Berdasarkan Aliran Monisme, Dualisme dan Campuran", *Jurnal Sasi Vol.22* No.1 (2016): 54, https: //fhukum.unpatti.ac.id › article

[8] Hasanuddin Hasim, ''Hubungan Hukum Internasional dan Hukum Nasional dalam Perspektif Teori Monisme dan Teori Dualisme", *Jurnal Hasanuddin Hasim Volume 1*, Nomor 2 (2019): 173 https://journal.uin-alauddin.ac.id

pacta sunt servanda. However, along with the times, the theory of monism has variants, including the opinion: "...without legislation, a treaty may become part of domestic law once it has been concluded in accordance with the constitution and has entered into force for the State [9]."[9] The theory of monism uses the theory of incorporation techniques where the state can apply international law in its national jurisdiction without changing its legal basis or through transformation actions into national legislation.

*2) Dualism Theory*

This theory emerged in the 18th century which puts international law apart from national law (international law is not ipso facto part of municipal law). The dualism theory asserts that there is no special status for international treaties, all rights and obligations created through international treaties have no enforceability in domestic law except through the national legislation process. This theory gives supremacy to national law based on state sovereignty so that international law cannot force a state to comply with it with a transformation technique where the application of international law must be followed by a legislative process to transform international law into part of national law. Apart from the dominance of the monism-dualism theory above, the classical theory has several weaknesses. First, the theory of monism-dualism is ex post which only looks at state practices. Second, the theory of monism-dualism lacks normative content that cannot be used as an argument in court. Third, the theory of monism-dualism is not able to face the overlapping practice of the theory itself in a country. There are several reasons put forward by the flow of dualism to explain this:

i. Sources of law, this understanding assumes that national law and international law have different legal sources, national law is based on the will of the state, while international law is based on the common will of states as an international legal community.
ii. Subjects of international law, subjects of national law are people either in civil law or public law, while in international law are countries
iii. The legal structure, the institution needed to implement the law, in reality there is a court and an executive organ which is only found in national law. The same is not found in international law.
iv. In fact, basically the validity and enforceability of national law is not influenced by the fact that national law is contrary to international law.

Thus, national law remains effective even though it is contrary to international law. As for the consequences of this Dualism View, among others:

a) The rules of one legal instrument cannot be sourced or based on another legal instrument. (no hierarchical problem)
b) There can be no conflict between the two legal instruments.
c) Provisions of international law require transformation into national law [10].[10]

Another consequence is that there is no possibility of conflict between the two legal instruments, which may be renvoi. Therefore, applying international law in national law requires transformation into national law.

[9] Anthony Aust, *Handbook of International Law* (Cambridge University Press 2010), 76.

[10] Sefiani, S.H., M.HUM., *Hukum Internasional : Suatu Pengantar*, (Jakarta: Raja Grafindo Persada, 2011), 86.

### *2.3 Making of International Treaties*

In accordance with Article 6 of the 1969 Vienna Convention, every country has the ability to conclude an international treaty. The definition of international agreement itself is contained in Article 2 paragraph (1) letter a of the 1969 Vienna Convention which stipulates that: "An international agreement concludes between states in written form and governed by international law, whether embodied in a single instrument or in two or more instruments and whatever its particular designation". The article outlines that an international agreement is an agreement in a certain form and name regulated in international law which is made in writing and gives rise to rights and obligations in the field of public law. Basically, the organs that are authorized to regulate international agreements are regulated in the Constitution (Basic Law) of the country.

The authority to form international agreements in Indonesia is based on Article 11 of the 1945 Constitution paragraphs (1), (2), and (3) which affirm that: (1) The President with the approval of the House of Representatives declares war, makes peace and treaties with the state other; (2) The President in making other international agreements that cause broad and fundamental consequences for people's lives related to the burden of state finances, and/or requires amendments or the formation of laws must be approved by the House of Representatives; (3) Further provisions on international agreements are regulated by law". The provisions of Article 11 of the 1945 Constitution (UUD 1945) are the legal basis for Indonesia to form or bind itself to international agreements, both those made with one country (bilateral) and those carried out by Indonesia with many countries (multilateral). In this case, the power to form international agreements is a manifestation of the President's power in international relations in addition to appointing ambassadors and consuls and accepting ambassadors from other countries based on Article 13 of the 1945 Constitution.

The president holds power as both the head of state and as the head of government, so the formation of international agreements by the president can only be distinguished based on the type of agreement signed. For agreements made between heads of state, carried out by the president in his position as head of state; while the agreement between heads of government, signed by the president as head of government. The power of the president to form agreements in his position as head of government is based on Article 4 paragraph (1) of the 1945 Constitution. Since the 1945 Constitution regulates basic matters, the provisions of Article 4 paragraph (1) above give the president broad and not detailed, in this case the president as the holder of government power carries out government affairs which include the life of the state and its people both regarding the relationship between fellow citizens and the relationship between the state and foreign countries [11].[11] Relations between countries (Indonesia) and foreign countries are manifested mainly in the form of international agreements, both bilateral and multilateral.

The President in forming an international agreement as head of state or head of government can be implemented by another official whose position, both in terms of national law and international law, is recognized as having the authority to negotiate and sign an international agreement/approval. According to both international law and Indonesian national law, the official authorized to enter into international

[11] Moh. Kusnadi and Harmaily Ibrahim, *Pengantar Hukum Tata Negara Indonesia* (Jakarta: Budi Chaniago, 1980), 93.

agreements other than the head of state and head of government is the Minister of Foreign Affairs. According to international law, the foreign minister is seen as a state official who is authorized to establish relations directly or through diplomatic representatives abroad with other countries (governments) to conduct negotiations, agreements and so on [12].[12] On the other hand, according to Indonesian national law, the position of the Minister of Foreign Affairs is as assistant to the president in running the government in the field of foreign relations (international relations) with other countries.

Agreements can be drawn up between states or governments or heads of state or government agencies that have accreditation or authority granted by the country that sent them. These provisions are regulated in article 7 (1) paragraphs a and b of the 1969 Vienna Convention in the United Nations: (a) he produces appropriate full powers; or (b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers. The stages of making international agreements include:

a) Negotiation Negotiation is the initial stage of making international agreements carried out by representatives of countries who have been appointed and equipped with full power documents. This document does not become important to be given to the representative of the country if the representative of the country is a person who has a position or position that does have the authority to become a representative of his country in the negotiation stage. The negotiation method in bilateral international agreements is carried out by means of Pourparlers, while for multilateral international agreements usually by means of a diplomatic conference which then the final result of these negotiations will be the acceptance and adoption of the text of this agreement in accordance with Article 9 paragraph 1 of the 1969 Vienna Convention which acceptance and the adoption of the agreement text is carried out based on the agreement of the parties who participated in formulating the agreement text.

b) Signature The next step in making an international agreement is the signatory as described in Article 12 of the 1969 Vienna Convention. The signing of a two-stage international agreement serves as a sign of the binding of the parties to an international agreement, while for a three-stage international agreement it is a form of authentication. against the text of the agreement so that the international agreement can be applied immediately but the parties are not yet bound. In practice, a two-stage international agreement will usually be given a grace period of up to nine months if it passes the specified time, then the parties who wish to

[12] Teresa Vrilda, Peni Susetyorini dan Kholis Roisah, "Implikasi Putusan Mahkama Konstitusi No. 13/PUU-XVI/2018 Terhadap Proses Pengesahan Perjanjian Internasional di Indonesia", *Diponegoro Law Journal Volume 8*, Nomor 4: 2784, https://ejournal3.undip.ac.id/index.php/dlr

bind themselves to the agreement must do so by accession. Bilateral agreements are usually after signing, instruments of the agreement will be exchanged which will then be deposited in their respective foreign ministries. In a three-stage international agreement, the signing as a form of indirect authentication of the agreement text will apply and bind the parties, so in a three-stage international agreement ratification is required [13].[13]

c) Ratification The term ratification is a term used in Indonesia to refer to a ratification but ratification can go through several ways and ratification is a step of binding countries to international agreements (consent to be bound). Article 2 paragraph 1 letter b regulates: "ratification", "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty. " Based on the theory, ratification is the approval of the head of state/head of government on the signature given by the state envoy considering that the state has the right to review the agreement signed by the state envoy before accepting the obligations contained in the international agreement, therefore the state's attachment to the international agreement not retroactive (non-retroactive) Bilateral agreements do not require ratification usually at the final stage in a bilateral agreement the parties will only exchange documents that have been signed and kept in the ministries of foreign affairs of each country. Regarding this form of ratification, there are at least three regulations that form the basis, namely: Law no. 24 of 2000 concerning International Agreements, Law no. 12 of 2011 concerning the Establishment of Laws and Regulations, and Government Regulation Number 68 of 2005 concerning Procedures for Preparing Draft Laws, Draft Government Regulations in Lieu of Laws, Draft Government Regulations and Draft Presidential Regulations. The mechanism for ratification/ratification of international agreements in the form of laws made by the Directorate of Treaties.

## 3. METHODS

This research uses normative research methods. With this approach, namely the invitation approach, case approach, and conceptual approach.

## 4. RESULTS AND DISCUSSION

### *4.1. Legal Basis for Ratification of International Treaties in Indonesia*

In general, arrangements regarding international agreements are regulated in two international conventions, namely the 1969

[13] Eddy Pratomo, *Hukum Perjanjian Internasional (Pengertian, Status Hukum, dan Ratifikasi), (Bandung:* Penerbit PT. Alumni, 2011), 61

Vienna Convention which regulates international agreements in a narrow sense in which the parties are state and state, and for international agreements in which the state and non-state parties, for example international organizations are regulated in the 1986 Vienna Convention. So far, it has not ratified the two conventions, but in fact the government has implemented the contents of the convention [14].[14] Specific arrangements regarding international agreements are regulated in Law Number 24 of 2000 concerning International Agreements (hereinafter referred to as the International Treaty Law).

In the process of making international treaties, one of the important stages is the ratification process. The practice of ratification in Indonesia to date is somewhat uncertain. In the 1945 Constitution of the Republic of Indonesia, not only is there no division of treaties into which groups require and do not require parliamentary approval, but the word ratification itself is not found, especially when it comes to the distinction between approval or ratification of international treaties [15].[15] Ratification is a further legal action of a country to confirm the act of signing that has been done previously. In modern practice, ratification means the official statement of a state to be bound by an international treaty.

The term ratification in Article 1 paragraph (2) of the 1969 Vienna Convention is equated with the terms "approval", "acceptance", and "accession" which means an act to be bound by an international treaty. In the practice of international treaties in Indonesia, the term ratification is translated by the term ratification as can be found in Article 1 point (2) of the International Treaty Law which states that ratification is a legal act to bind oneself to an agreement in the form of ratification, accession, and acceptance. acceptance) and approval (approval). Regarding when an agreement to be bound by a treaty is regulated in Article 14 of the 1969 Vienna Convention.

In order to clarify the conception of ratification from various distortions, it is necessary to distinguish these two legal acts, namely:

a. Internal legal acts are the approvals given by state organs (generally parliament) to the Head of State/Head of Government to bind themselves to an agreement, regardless of whether the entry into force of this agreement must go through a ratification mechanism or not.
b. External legal acts are ratification by the Head of State/Government of treaties that require ratification. The product of this act is in the form of an instrument of ratification signed by or on behalf of the head of state/government.

Arrangements related to external aspects in the ratification of international treaties will certainly differ from one country to another. Therefore, although the 1969 Vienna Convention has substantially regulated ratification, in detail how the ratification must be carried out by a country depends on national law and the legal, political, and constitutional system of each country.

The constitutional basis relating to international agreements in Indonesia is regulated in Article 11 of the 1945 Constitution. The provisions in Article 11 of the 1945 Constitution are very brief so that the government must regulate more clearly regarding issues in the field of international agreements. Prior to the issuance of the Law on International Treaties, Article 11 of the 1945 Constitution was spelled out in a Presidential Letter dated August 22, 1960 Number 2826/HK/1960 which was addressed to the chairman of the DPR regarding the

[14] I Wayan Parthiana, *Hukum Perjanjian Internasional Bagian I*, (Bandung: Mandar Maju, 2018), 3

[15] J.G Starke, *Pengantar Hukum Internasional 2*, (Jakarta: PT.Sinar Grafika, 2008), 601

making of agreements with other countries. The presidential letter provides two ways of ratifying international treaties, namely:

a. Treaties which are ratified through the DPR by law
b. The approval (agreements) for ratification by presidential and DPR decisions is enough to be notified by the Cabinet Secretariat

In its development, this presidential letter did not provide an explanation and was not in accordance with the spirit of reform, so Law Number 24 of 2000 concerning International Treaties was promulgated to provide more legal certainty in the practice of making and ratifying international treaties. The ratification of international agreements into positive law in Indonesia uses a mixed system, namely by the executive and legislative bodies in the form of laws or presidential decrees as regulated in Article 9 paragraph (2) of the International Treaty Law. The President as an executive body has the authority, among others, to make international agreements with other countries, while the scope of authority of the DPR as a legislative body has the authority to approve or reject international agreements that have been made [16].[16]

Article 9 of Law no. 24 of 2000 states that ratification is carried out as long as it is required by the international agreement, this article has provided clarification to Article 11 of the 1945 Constitution concerning "DPR approval". Article 9 has interpreted the term "DPR approval" in terms and criteria that are increasingly limited in relation to international agreements that must be approved by the DPR. Article 9 is normatively a new element because even though in practice it has been implemented, normatively this law emphasizes that only agreements that require ratification/ratification need to be approved by the DPR. Furthermore, article 10 stipulates that "ratification" of international treaties is carried out through law when it relates to:

a) Political, Peace, Defense and National Security Issues
b) Change of territory or determination of the territorial boundaries of the Republic of Indonesia
c) Sovereignty and sovereign rights of the State
d) Human Rights and the Environment
e) Establishment of new legal rules;
f) Foreign loans and/or grants.

Furthermore, Article 11 of Law Number 24 of 2000 stipulates as follows:

a) Ratification of international agreements whose material does not include the material as referred to in Article 10 is carried out by Presidential Decree.
b) The Government of the Republic of Indonesia submits a copy of every Presidential Decree ratifying an international agreement to the DPR for evaluation.

Types of international agreements ratified by Presidential Decree (formerly a Presidential Decree) are Master Agreements concerning cooperation in the fields of Science and Technology, Economics, Trade, Shipping, Commerce, Avoidance of Double Taxation, Cooperation for Investment Protection, Culture and Education as well as agreements-technical agreement [17].[17]

Although there have been divisions regarding which materials need to be ratified by the President in the form of a Presidential Regulation and materials that require ratification by the DPR, it is still possible for differences of opinion between the government and the DPR whether an

[16] Damos Dumoli Agusman, *Hukum Perjanjian Internasional (Kajian Teori dan Praktik Indonesia), (*Bandung: PT Refika Aditama, 2017), 77

[17] Elfia Farida, "Kewajiban Negara Indonesia terhadap Perjanjian Internasional yang Telah Diratifikasi", *Administrative Law & Governance Journal. Volume 3* Issue 1 (2020): 185 https://ejournal2.undip.ac.id

agreement must be ratified by law or sufficient. With the Presidential Regulation, until now there has been no record of disputes between agencies regarding the authority of this ratification and usually this difference is resolved through an Inter-ministerial agreement by taking into account the legal views of the Ministry of Foreign Affairs. However, in the future there is still a chance that there will be differences in perception between the DPR and the Government regarding the authority to ratify and if this happens, it must be resolved in the Constitutional Court. Based on the rules of Articles 10 and 11 of Law no. 24 of 2000 concerning International Treaties, the determination of the instrument of ratification (Law or Presidential Decree) of an international agreement is not based on the form and name (nomenclature) of the agreement, but is based on the material stipulated in the agreement.

If we look at Article 11 of the 1945 Constitution, the mechanism for making laws for the ratification of international treaties must go through the government's initiative and it would be illogical if it was carried out through the initiative of the DPR. Based on the power-sharing system, foreign relations, including making international treaties, are included in the realm of executive power and even as one of the exclusive executive powers. After the internal ratification procedure is completed, then the agreement ratification procedure is carried out in the truest sense, namely an international legal act to bind oneself to the agreement. This action is carried out in the form of submitting the instrument of ratification to the depository, exchanging it with the partner country or submitting notification to the partner country that Indonesia has complied with the internal requirements for the validity of the agreement. The instrument of ratification is a sealed document signed by the Minister of Foreign Affairs.

### *4.2 Constitutional Court in Examining Laws on International Treaties*

Article 24C paragraph (1) and paragraph (2) of the 1945 Constitution outlines the authority of the Constitutional Court as follows:

a. The Constitutional Court has the authority to adjudicate at the first and final levels whose decisions are final to examine laws against the Constitution, decide on disputes over the authority of state institutions whose authority is granted by the Constitution, decide on the dissolution of political parties, and decide on disputes regarding the results election;
b. The Constitutional Court is obliged to give a decision on the opinion of the House of Representatives regarding alleged violations of the President and/or Vice President according to the Constitution.

Thus, the Constitutional Court has a very important role in the interpretation of the constitution (the 1945 Constitution) in Indonesia. Because basically, the Constitutional Court was formed to ensure that the constitution as the highest law can be enforced properly [18].[18] Therefore, the Constitutional Court is usually referred to as the guardian of the constitution, as is the title usually attributed to the Supreme Court in the United States of America.

The affirmation of the norms of Article 24 paragraph (1) of the 1945 Constitution cannot be separated from the essential meaning of the independence of judicial power is absolute for a democratic state based on law (constitutional democratic state) [19].[19] Then, regarding the obligations of the Constitutional Court, it is regulated in Article 24C paragraph (2) of the 1945 Constitution. According to Saldi Isra, there is

[18] Jimly Asshiddiqie, *Perkembangan dan Konsolidasi Lembaga Negara Pasca Reformasi*, Sekretariat Jenderal dan Kepaniteraan Mahkamah Konsstitusi RI, Jakarta: 2006, hlm. 153.

[19] I D. G. Palguna, *Mahkamah Konstitusi & Dinamika Politik Hukum di Indonesia*, Rajawali Pers, Jakarta: 2020, hlm. 181-182.

no significant difference between the authority and obligations of the Constitutional Court, so that the obligations of the Constitutional Court contained in Article 24C paragraph (2) of the 1945 Constitution are actually is also the authority of the Constitutional Court. However, according to the researcher, the obligation of the Constitutional Court cannot be said to be an authority. If it is said to be an authority, it means that something can be done or can't be done (accepted or not accepted), whereas if it is said to be an obligation, then like it or not something is obligatory to be done (must be). In terms of the MK's obligations, it is in terms of giving a decision on the opinion of the DPR regarding alleged violations by the President and/or Vice President. Regarding the alleged violations allegedly committed by the President and/or Vice President, it can be seen in Article 7B of the 1945 Constitution. Further notes by the researcher will be discussed in the discussion sub-chapter regarding the obligations of the Constitutional Court in this study. The following will be discussed one by one regarding the authority of the Constitutional Court and its obligations.

The Constitutional Court's authority in terms of reviewing laws against the Constitution by some experts in Constitutional Law in Indonesia is referred to as "crown authority". The researcher agrees with this statement, considering that the main background for the birth of the Constitutional Court is the establishment of a judicial authority that has the authority to conduct judicial review of the Constitution. Thus, the main thought of the birth of the Constitutional Court was because of the importance of granting constitutional review authority to judicial powers that are free and independent from other state institutions. In the jurisdiction of judicial review of the Constitution, the object of the judiciary is the law, to prove whether the law is contrary to the Constitution or not. The judicial review of the Constitution can be carried out materially (material toetsing) and formally (formele toetsing).

Formal examination is a test related to the process or method of forming a law which is considered by the applicant not to meet the provisions based on the law. Thus, the formal examination will conduct tests on the basis of authority in the formation of laws and procedures that must be followed from the drafting stage to the announcement in the State Gazette which must comply with the provisions applicable to it. At the statutory level, arrangements regarding formal examinations are regulated in Article 51A paragraphs (3) and (4) of Law Number 8 of 2011 concerning Amendments to Law Number 24 of 2003 concerning the Constitutional Court.[20] The understanding that can be developed in the context of understanding the conception of formal testing is very complex, in general the criteria that can be used to assess an object of testing from a formal point of view are the extent to which the above regulations are stipulated in an appropriate form, by the right institution. (appopriate institution) and according to appropriate procedures) [20].[21] Testing whether the law-making process is appropriate or not is the essence of formal testing. Formal testing can be said to be very difficult to do by the Court.

This can be seen from the fact that, up to the time this research was conducted, only one formal examination was received at the Constitutional Court, starting from the Constitutional Court's establishment in 2003. The growing assumption is that the failure of formal testing so far has been caused by the procedure for establishing laws. does not have clear coordinates in the 1945 Constitution [21].[22] However, in the history of

[20] Lebih lanjut diatur di dalam Peraturan Mahkamah Konstitusi.

[21] Tanto Lailam, "Analisis Praktik Pengujian Formil Undang-Undang Terhadap Undang-Undang Dasar 1945", Artikel Pada *Jurnal Pranata* Hukum, 2011, hlm. 148.

[22] Idul Rishan, "Konsep Pengujian Formil Undang-Undang di Mahkamah Konstitusi", Artikel Pada, *Jurnal Konstitusi*, Vol. 18, No. 1 Maret 2021, hlm. 12.

formal examinations in Indonesia, it is not uncommon for dissenting opinions of Constitutional Justices to state that they should be accepted. One example is the dissenting opinion that occurred in the Constitutional Court Decision Number 79/PUU-XII/2014, where two judges The constitution, namely Arief Hidayat and Maria Farida in their dissenting opinion, stated that the Constitutional Court should have accepted the formal review [22].[23] The last dissenting opinion that attracted the attention of the Indonesian people was what happened in the Constitutional Court Decision Number 79/PUU-XVII/2019, where Constitutional Justice Wahiduddin Adams was the only judge who had dissenting opinions from other judges who rejected the formal review of Law Number 19 of the Year 2019 Regarding the Second Amendment to Law Number 30 of 2002 concerning the Corruption Eradication Commission.[24]

However, along with its development, formal testing for the first time was granted in 2021. In the Constitutional Court Decision Number 91/PUU-XVII/2020 regarding formal testing of Law Number 11 of 2020 concerning Job Creation, it was granted for some.[25] The decision of the Constitutional Court Number 91/PUU-XVII/2020 is clearly a monumental decision, because this decision has proven that formal examination in the Constitutional Court is not a necessity and indirectly gives notice to legislators to be more careful. Be careful in forming a law, this is because if the formal review is accepted (in full), then the entire contents of the law will be null and void (no longer enforced).

Material examination is the examination of the law against the 1945 Constitution relating to the content of paragraphs, articles and/or parts of the law which are deemed by the applicant to be contrary to the 1945 Constitution. Thus, the focal point of the material examination is on certain articles or paragraphs which, if accepted will cancel the section, article, paragraph or phrase that is being tested to the Constitutional Court. In the material examination, as Maruarar Siahaan said, that in the material examination, only certain parts, paragraphs, and articles are deemed to be contrary to the constitution and are therefore requested not to have legally binding force only insofar as they relate to parts, paragraphs, and articles. certain of the law in question. Thus, in contrast to a formal review, a material review will not invalidate a law in its entirety, but only part of a part, article, paragraph or phrase that is contrary to the 1945 Constitution. At the statutory level, the regulation on material testing is regulated in Article 51 paragraph (3), 51A paragraph (1), 57 paragraph (1) of Law Number 8 of 2011 concerning the Second Amendment to Law Number 24 of 2003 concerning the Constitutional Court. However, sometimes a material review can invalidate the law in its entirety. This happens because the article being tested is the soul or spirit of the law being tested. One example of a material review that invalidates the entire law is the Constitutional Court Decision Number 01-021-022/PUU-I/2003 concerning the review of Article 16, Article 17 paragraph (3) and Article 68 of Law Number 20 of 2002 concerning Electricity which in this case is tested against Article 33 paragraph (2) of the 1945 Constitution.

Researchers have discussed what laws can be tested by the Constitutional Court, namely legislation at the statutory

[23] Jorawati Simarmata, "Pengujian Undang-Undang Secara Formi Oleh Mahkamah Konstitusi: Apakah Keniscayaan? (Perbandingan Putusan Mahkamah Konstitusi Nomor 79/PUU-XII/2014 dan Putusan Mahkamah Konstitusi Nomor 27/PUU-VII/2009), Artikel Pada *Jurnal Legislasi Indonesia*, Vol. 14, No. 1 Maret 2017, hlm. 44.

[24] https://www.hukumonline.com/berita/baca/lt6092f85bd89f2/mengintip-dissenting-wahiduddin-adams-dalam-putusan-uji-formil-uu-kpk/, diakses, tanggal 30 Oktober 2022.

[25] https://www.hukumonline.com/berita/baca/lt61adb08a7d082/putusan-mk-dinilai-tekankan-perbaikan-substansi-uu-cipta-kerja, diakses, tanggal 30 Oktober 2022.

level. However, the question arises, which laws can be tested in the Constitutional Court, including the laws before the Constitutional Court was formed? Previously, in Article 50 of Law Number 24 of 2003 concerning the Constitutional Court, it was stated that the laws that could be tested in the Constitutional Court were laws promulgated after the amendment to the 1945 Constitution. Based on Constitutional Court Decision Number 066/PUU-II/2004 the Court revoked the provisions of Article 50 of Law Number 24 of 2003 concerning the Constitutional Court. The Court's courage in examining the provisions governing its existence stems from the Constitutional Court's Decision Number 004/PUU-I/2003 concerning the review of Law Number 14 of 1985 where in one of its legal considerations, the Constitutional Court stated that it has the authority to examine laws that were enacted before amendments to the 1945 Constitution [23].[26] Thus, the law that can be tested by the Constitutional Court is hierarchically the law against the Basic Law, while regarding the period of issuance of the law there is no limit (including laws that were formed before the Constitutional Court existed, can be tested by the Constitutional Court). The facts obtained from the Decision of the Constitutional Court Number 004/PUU-I/2003 are that in essence, the Constitutional Court also functions as a positive legislator [24].[27]

Regarding the examination of the law governing international agreements, there is a debate whether the Constitutional Court has the authority to examine it or not. Fajrul Falaakh is one of the experts who said that the Constitutional Court is not authorized to examine the law on international treaties.[28] The reason given by Fajrul Falaakh is that if the Constitutional Court is given the authority to examine international treaty laws, it is feared that international agreements will be cancelled from non-single court forums. The view of rejecting the review of international treaty laws will also be found in the dissenting opinions of constitutional judges Hamdan Zoelva and Maria Farida Indrati in the Constitutional Court Decision Number 33/PUU-IX/2011. In the decision, Hamdan Zoelva is of the view that formally the ratification of international agreements is in the form of laws. In the material aspect, international treaty law cannot be equated with law in general. Because basically international agreements are a form of binding Indonesia in international relations.[29] In essence, Hamdan Zoelva is of the view that there is a fundamental difference between the general law and the international treaty law.[30] Unlike the law in general which is open to discussion and revision, the draft law on ratification only adopts norms that have been agreed upon in an international treaty which there is no chance for revision, unless the international treaty itself provides the possibility for it. Then, the content of the law generally applies directly to everyone in Indonesia, while international agreements only bind the country that makes or is a party to the international agreement. The implementation of the rights and obligations specified in international agreements does not necessarily apply to every citizen as well as the provisions of the law in general, but must be further implemented in laws or other forms of policy. Constitutional Justice Hamdan Zoelva finally confirmed that Law 38/2008 which was tested in the Constitutional Court

[26] Tanto Lailam, "Pro-Kontra Kewenangan Mahkamah Konstitusi dalam Menguji Undang-Undang yang Mengatur Eksistensinya", Artikel Pada *Jurnal Konstitusi*, Vol. 12, No. 4 Desember 2015, hlm. 797.

[27] Herman Schwarz, *The Struggle for Constitutional Justice in Post-Communist Europe*, University of Chicago Press, Chichago and London: 2000, hlm. 17-18.

[28] https://ditjenpp.kemenkumham.go.id/index.php?option=com_content&view=article&id=1402:mk-tak-berwenang-uji-uu-hasil-ratifikasi-perjanjian-internasional&catid=111&Itemid=179, diakses, tanggal 30 Oktober 2022.

[29] Putusan Mahkamah Konstitusi Nomor 33/PUU-IX/2011, hal. 200.

[30] Putusan Mahkamah Konstitusi Nomor 33/PUU-IX/2011, hal. 201.

Decision Number 33/PUU-IX/2011 could not be used as the object of judicial review of the law which was the authority of the Constitutional Court.[31]

Maria Farida Indrati's dissenting opinion emphasizes that legally, the ratification law is different from the law in general.[32] This is because, in terms of format or outward form, the two have very basic differences, especially in the discussion and writing of the body. Laws generally have many norms that can be grouped together. Meanwhile, in the ratification law, there are only two articles, the first article concerning ratification and the second article concerning the time when the law comes into force.[33] In the formation of the law there is also a thorough discussion of the draft law, while in the ratification law, the House of Representatives and the president focus on its ratification, because they cannot change the substance of the law.[34] In addition, the substance of the law is directly addressed to everyone, while the ratification law is only directed to the party who made it.[35] Normatively, based on the 1945 Constitution, the Constitutional Court is indeed authorized to examine the law on the ratification of international treaties, but if the application for review is against the substance in the law on the ratification of international treaties, it is impossible for this to happen, because there is no content material in paragraphs and articles. , and/or parts of the law that may be contradicted with the 1945 Constitution.[36]

However, in fact the Constitutional Court Decision Number 33/PUU-IX/2011, the Court considered that the Constitutional Court had the authority to adjudicate requests for judicial review of Law Number 38 of 2008 concerning Ratification of the Charter of the Association of Southeast Asian Nations).

## 5. CONCLUSION

Basically, the Constitutional Court has the authority to examine laws against the 1945 Constitution. As has been emphasized that international agreements must be regulated in laws or presidential decrees. So hierarchically, international treaty law is parallel to the law in general. The problem is that there is a material dissimilarity in what is contained in the international treaty law with the law in general. However, in reality, there are still cases regarding the judicial review of international treaty laws in the Constitutional Court.

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[31] Putusan Mahkamah Konstitusi Nomor 33/PUU-IX/2011, hal. 202.

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