

# IMPLEMENTING TREATIES IN MUNICIPAL COURTS

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## *Abstract*

*In regard to the implementation of treaties in municipal courts, treaty is divided into self-executing and non-self-executing. A self-executing treaty is defined as a treaty that its implementation does not need an implementing legislation. However, a non-self-executing treaty needs an implementing legislation to have it enforced in national courts.*

## *Abstrak*

*Terkait dengan implementasinya di pengadilan nasional suatu negara, perjanjian internasional digolongkan menjadi perjanjian internasional self-executing dan non-self-executing. Perjanjian internasional self-executing adalah perjanjian internasional yang dapat diimplementasikan secara langsung di pengadilan tanpa implementing legislation, dan perjanjian non-self-executing adalah perjanjian internasional yang tidak dapat langsung diimplementasikan di pengadilan tanpa adanya implementing legislation.*

**Keywords:** *implementation, treaty, self-executing, non-self-executing, municipal court.*

## **A. Background**

Treaties are utilized by international courts in resolving cases amongst States. However, treaties are also sometimes applied by judges in municipal courts in order to settle cases in regard to the rights and duties of individuals. In some States treaties are regarded as part of their national law. In other States, treaties are merely regarded as one of the legal sources for judges to solve disputes. Whether or not treaties can be directly implemented in States' municipal courts are determined largely by the doctrine of primacy of law. Theoretically in this regard, there are two major streams of jurisprudence,

namely monism and dualism. According to monism, international and national laws are solitary legal system which are inseparable; therefore if there is a conflict between these two legal rules, the international law will prevail. On the other hand, dualism reckons that international and national laws are two different and separate legal systems which exist in their own planes. In dualism, national laws and international laws will not conflict because the primacy of law is granted to the national laws.

Treaties, according to monist States, are directly incorporated into the States' legal systems therefore they can be directly

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implemented in their municipal courts. On the other hand, as said by dualistic States, treaties cannot be directly applied in States' municipal courts unless the treaties are already transformed into a form of national law such as Acts of Parliament or other legal forms recognized.

In order to identify whether a State follows monism or dualism jurisprudence one can refer to the state's constitution. If the treaties enjoy the higher position than national laws the State is categorized as a monist State and otherwise. For example, in the US Constitution, Article 6 rules that "...all Treaties...shall be the supreme law of the Land". Article 55 of French Constitution 1958 states that "treaties or agreement duly ratified or approved shall upon publication, prevail over Acts of Parliament..." Additionally, Article 15 Paragraph 4 of the Russian Constitution explains:

The general recognized principles and norms of international law and the international treaties of the Russian Federation shall constitute part of its legal system. If an international treaty of the Russian Federation established other rules than those stipulated by the law, the rules of international treaty shall apply.

Theoretical views of monism and dualism are not the factor involved in the applicability of international law in States' municipal courts. In practice, judges may determine whether or not the provisions

of treaties can be directly applied in the municipal courts. The power of the judges implements treaties or not creates the concept of self-executing and non-self-executing treaties. This concept of self-executing and non-self-executing treaties emerged in the US courts when the judges attempted to interpret Article 6 of the US Constitution. The judges questioned if all treaties ratified by the US Government were the supreme law of the land or not.

This article considers the Montesquieu theory on Separation of Powers between Executive and Legislature in relation to the integration of treaties into States' legal systems and the power of the judiciary in implementing international law in municipal courts by comparing the implementation of treaties in the US, Indonesia, France, the Netherlands and Australia.

## **B. Discussion**

### **1. Self-Executing and Non-Self-Executing Treaties**

The concept of self-executing and non-self-executing treaties firstly introduced by US judges in relation to interpreting Article 6 of the US Constitution which states "...all Treaties...shall be the supreme law of the Land". In monist States, international law can be by self-execution or non-self-execution depending on judges who determines the provisions of the treaty.<sup>1</sup> However, in dualist States all treaties are regarded as non-self-executing because in order to be integrated

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<sup>1</sup> Tom Ginsburg, "Locking in Democracy: Constitutions, Commitment and International Law", 38 *N.Y.U. J. Int'l & Pol.* 707, 2006, p. 713.

into the States' legal systems it needs an implementing legislation to be effective.<sup>2</sup> The implementing legislation is an Act of Parliament issued by the Legislature to give effect to the treaty in the national law.

The various interpretations of the US judges on Article 6 of the US Constitution created uncertainty in the legal status of ratified treaties in the US courts.<sup>3</sup> Some judges have opined that all ratified treaties must be self-executing in the courts; however other judges assume that not all treaties can be directly implemented in the US courts.<sup>4</sup> Judge Marshall firstly exposed the concepts of self-executing and non-self-executing treaties in the case of *Foster*<sup>5</sup> where he wrote "a treaty can be directly implemented if whenever it operates of itself without the aid of any legislation provision."<sup>6</sup> In this case, Judge Marshall indicated that the treaty used in the trial was non-self-executing by impliedly saying that "...the notion being that some treaties do not operate themselves but require domestic legislation to carry them."<sup>7</sup>

When the court decides that a treaty is non-self-executing, it means the court rejects to implement provisions of the treaty.<sup>8</sup> In

*Whitney v. Robertson*<sup>9</sup> the US Supreme Court states "When the [treaty] stipulations are not self-executing they can only be enforced pursuant to legislation to carry them in to effect..."<sup>10</sup>

Moreover, in the discussion on the distinction between self-executing and non-self-executing treaties, the New Zealand Law Commission quoted from the judgment of the Supreme Court of Cyprus as follow:

Only such provisions of a Convention are self-executing which may be applied by organs of the State and which can be enforced by the Courts and which create rights for individuals, the govern of affect directly relations of the internal life between individuals, and the individuals and the State or the public authorities.<sup>11</sup>

Vázquez has adopted a four-part formulation to determine whether a treaty is self-executing or non-self-executing. The four parts are: intend based, justiciability, constitutionality and private right of action doctrines.<sup>12</sup> First, the intend-based approach looks at the intention of making a treaty, that is whether the treaty is able to be directly implemented or not. In certain

<sup>2</sup> Alf Ross, 1947, *A Textbook of International Law: General Part*, Longmans, Green and Co, London-New York-Toronto, pp. 61-62.

<sup>3</sup> Jordan J. Paust, "Self-Executing Treaties", *American Journal of International Law*, Volume 82, Issue 4, 1988, p. 766.

<sup>4</sup> *Ibid.*

<sup>5</sup> See: *Foster v. Neilson*, 27 U.S. (2 Pet) 253 314 (1829).

<sup>6</sup> Malvina Halberstam, "International Human Rights and Domestic Law Focusing on U.S. Law, with Some Reference to Israeli Law", 8 *Cardozo J. Int'l & Comp. L.* 225, *Cardozo Journal of International ad Comparative Law*, 2000, p. 234.

<sup>8</sup> David Sloss, "The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties", 24 *Yale J. Int'l L.* 129, *Yale Journal of International Law*, 1999, p. 144.

<sup>9</sup> See: *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

<sup>10</sup> David Sloss, *Op.cit.*, p. 146.

<sup>11</sup> Sir Kenneth Keith K.B.E., "The Application of International Human Rights Law in New Zealand", 32 *Tex. Int'l L.J.*, 1997, p. 405.

<sup>12</sup> Carlos Manuel Vázquez, "The Four Doctrines of Self-Executing Treaties", *American Journal of International Law*, Volume 89, Issue 4, 1995, p. 700.

cases, treaty-makers intentionally negotiate a treaty that is “judicially unenforceable” therefore its implementation in the court needs a legislative action.<sup>13</sup> Second, the justiciability doctrine observes that the court will apply the rules of international law if the provisions of a treaty create the rights for individuals.<sup>14</sup> Third, the constitutionality doctrine notices the power of judiciary to examine whether the substance of a treaty falls into the constitutional competence of treaty-makers or law-makers.<sup>15</sup> If it falls into the power of law-makers, which is Congress so the treaty is non-self-executing.<sup>16</sup> Fourth, the private right of action doctrine bestows upon the court to examine if the substance of a treaty creates the rights for individuals as a result the individuals can benefit provisions of a treaty as a legal source to make legal standing in the court.<sup>17</sup>

Further, Vázquez comments that there are two things that make a treaty to become non-self-executing in the court. Firstly, “the treaty provisions are not justiciable” so the court is unable to apply the provisions of a treaty correctly because the provisions are too general or only inspirational, thus the application needs further explanations. Secondly, the treaty itself is not justiciable when the treaty’s term call for domestic implementing legislation before becoming

part of sovereign parties’ legal regimes”.<sup>18</sup> Article 2 of International Covenant on Civil and Political Rights (ICCPR) states that “Each State Party to the present Covenant undertakes to take necessary steps in accordance with its constitutional processes and with the provision of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized (in the Covenant).”<sup>19</sup> Nevertheless to decide the self-executingness of a treaty is finally given back to the court in each legal system.<sup>20</sup>

A non-self-executing treaty has no legal effect in the court; however judges remain able to use the non-self-executing treaty as a tool to interpret national laws if the substances are not in conflict with the norms of international law.<sup>21</sup>

In Indonesia, self-executing and non-self-executing treaties require “legislative action” in order to come into force; however the term of legislative action is different. Scholars think that the legislative action is the act of Parliament to ratify a treaty. Therefore, any treaty that needs ratification is assumed as non-self-executing, but if a treaty does not require ratification, merely signature, it is regarded as self-executing. The writer strongly argues this understanding because this is essentially wrong and very

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<sup>13</sup> *Ibid.*, pp. 700-709.

<sup>14</sup> *Ibid.*, pp. 710-717.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, p. 718.

<sup>17</sup> *Ibid.*, pp. 719-721.

<sup>18</sup> *Ibid.*, p. 722.

<sup>19</sup> *Ibid.*

<sup>20</sup> Kenneth L. Port, “The Japanese International Law “Revolution”: International Human Rights Law and Its Impact on Japan”, 28 *Stan. J. Int’l L.* 139, 1991, p. 153.

<sup>21</sup> Jordan J. Paust, *Op.cit.*, pp. 781-782.

misleading. If we go back to the Montesquieu theory on Separation of Power, it is very clear the authority of Executive is to make and ratify a treaty in international level. The legislative action is when the ratified treaty is going to be integrated into the national law of state where it needs approval for the Parliament. Moreover, when the Parliament has approved it, it becomes the jurisdiction of judiciary to implement it in the court.<sup>22</sup>

## 2. Status of Treaty in States Constitution

In several States that follow uncoded Roman law such as Germany, Austria, and Italy, the rules of international customary law enjoy a high status in their legal systems. Article 25 of the German Constitution (*Grundgesetz*) states that “the general rules of public international law constitute an integral part of federal law. They take precedence over statutes and directly create rights and duties for the inhabitants of the federal territory.”<sup>23</sup> Further, the 1920 Austrian Constitution states that “the generally recognized rules of international law are regarded as integral part of federal law.”<sup>24</sup> Additionally, Article 10 of the Italian Constitution states that “the Italian legal order conform itself to generally recognized rules of international law.”<sup>25</sup>

Further, international law is also recognized in Russian courts as stated in Article 15 paragraph 4 of 1993 Russian.<sup>26</sup>

In Mexico, international law enjoys the same status with the federal law of Mexico and the courts are bound to give primacy to treaties over State law, other than Mexican Constitution. In Japan, a treaty has the same legal status with the national statutes of Japan, however the rules of a treaty can be directly implemented in Japanese courts as ruled by Article 98 paragraph 2 Japanese Constitution which states “The treaty concluded by Japan and the established law of nations shall be faithfully observed.”<sup>27</sup>

In fact, there are many States that do not set the status of treaties in their constitutions. In Malaysia, a ratified treaty does not *ipso facto* become part of Malaysian law before the Parliament of Malaysia approves and issues an implementing legislation to make the treaty enforced.<sup>28</sup> The Malaysian Constitution does not regulate the status of treaties in its legal system, as well as the primacy of law issue if there is a conflict between international law and national law of Malaysia. In *P.P. v. Wah Ah Jee*<sup>29</sup> it was stated that “the Courts here must take the law as they find it expressed in the Enactment. It is not the duty of a judge or magistrate

<sup>22</sup> Writer’s conclusion from several discussions with Indonesian legal scholars.

<sup>23</sup> See: The German Constitution (*Grundgesetz*).

<sup>24</sup> See: The 1920 Austrian Constitution.

<sup>25</sup> Antonio La Pergola and Patrick Del Luca, “Community Law, International Law and the Italian Constitution, *American Journal of International Law*, Volume 79, Issue 3, 1985, p. 601.

<sup>26</sup> Gennady M. Danilenko, “The New Russian Constitution and International Law”, *American Journal of International Law*, Volume 88, Issue 3, 1994, p. 456.

<sup>27</sup> Kenneth L. Port, *Op.cit.*, pp. 153-154.

<sup>28</sup> Abdul Ghafur Hamid & Khin Maung Sein, “Judicial Application of International Law in Malaysia: A Critical Analysis”, *The 2<sup>nd</sup> Asian Law Institute (ASLI) Conference*, Chulalongkorn University, Bangkok, Thailand, on 26-27 Mei 2005, pp. 1-2.

<sup>29</sup> See: *P.P. v. Wah Ah Jee*, (1919) 2 F.M.S.L.R. 193. F.M.S. Supreme Court.

to consider whether the law so set forth is contrary to international law or not.”<sup>30</sup>

In Canada and Australia, the separation of powers doctrine between Legislature and Executive has an effect on ratified treaties made by the Executive. The treaties do not have legal effect in municipal courts of these two States before being approved by the Parliament. In Canada, the Federal Government negotiates and ratifies treaties with other States but the Government cannot assure if the treaties can be implemented or not in Canada. It is because there is differentiation on State obligations in international and national levels. The State obligation in international level is granted to the Federal Government for the purpose of making treaties. But, when the ratified treaties need to be implemented, the treaties must be approved by the Federal Parliament or Provincial Parliament if the effects of the treaties involve the provinces.<sup>31</sup> The practice in Australia is more or less similar with the practice in Canada. The Commonwealth Government enjoys the power to make treaties with other States without intervention from the Commonwealth Parliament, but in relation with the implementation in Australia it is the power of the Commonwealth Parliament to decide whether it approves or not.<sup>32</sup>

In Indonesia a treaty is not regarded as a source of law in courts, The Indonesian Constitution (UUD 1945) does not set forth the legal status of a treaty even if the rules of ratified treaty are in conflict with the laws of Indonesia. Moreover, Article 7 of Act Nr. 10 Year 2004 on Formulation of Legislation shows that a treaty is not a formal legal source for Indonesian judges in resolving disputes. In Article 7 of this Act the hierarchy of legal rules in Indonesia consists of Constitution, Act, Government Regulation, Presidential Regulation, and Municipal Regulation.<sup>33</sup>

### 3. Integration of Treaty into States' Legal Systems

There are two well-recognized theories that States draw upon to integrate treaties into their legal systems, namely incorporation theory and transformation theory.<sup>34</sup>

According to the incorporation theory, international law can be automatically incorporated into a State's legal system without legislative action as long as the rules of international law are not in conflict with present national laws.<sup>35</sup> Under this theory, two types of incorporation emerge: hard and soft. The hard incorporation type reckons that the use of the rules of international law should not infringe the common and statute laws.<sup>36</sup> However, the soft incorporation type consi-

<sup>30</sup> *Ibid.*, p. 8.

<sup>31</sup> Melanie Mallet, "A Primer on Treaty Making and Treaty Implementation in Canada", *Original Contribution*, p. 2.

<sup>32</sup> See: <http://www.dfat.gov.au/treaties>, pp. 7-12.

<sup>33</sup> See: Indonesian Act Nr. 10 Year 2004 on Formulation of Legislation.

<sup>34</sup> Andrew Mitchell, "Genocide, Human Rights Implementation and the Relationship between International and Domestic Law: Nulyarimma v. Thompson", 24 *Melb. U. L. Rev.* 15, 2000, p. 26.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

ders that the use of the rules of international should not infringe the statute law only.<sup>37</sup>

Conversely, the transformation theory argues that the rules of international law are not part of national law of a State, therefore they must be first transformed into a statute recognized in each State.<sup>38</sup> This theory also produces two types of transformation, which are hard and soft transformations. The hard type of transformation believes that the integration of international law can only be carried out by legislative action.<sup>39</sup> On the other hand, the soft type considers that the rules of international law can be applied from either legislative action or judicial decisions.<sup>40</sup> The soft transformation is the same with an indirect incorporation method where the rules of international law are used as a tool to interpret national laws if the substance is not incompatible with the international law.<sup>41</sup> The indirect transformation method actually is argued to be more acceptable by the international society in order to reduce the debate on monism and dualism because this method allows the courts to amend the national law as required by international standards, especially in relation with the rights for individuals.<sup>42</sup>

In each State the process of the integration of a treaty into its national legal system obviously different. In the United

States, the separation of powers doctrine is firmly and clearly implemented. The doctrine aims to avoid abusive of power from one institution to the others. In regard to a treaty, the President has an exclusive power to negotiate treaties, but the President must obtain approval from the Senate to ratify the treaties.<sup>43</sup> The Senate has power to approve or disapprove any treaty submitted by the President in order to protect the interest of the US and to limit the implementation of the treaties in courts.<sup>44</sup>

In Indonesia, the legal source of integration of a treaty into Indonesian law can be found in Article 11 UUD 1945 that states “the President with the consent from DPR is to declare war, to make peace and international agreements with other States.” This article is then elaborated in Act Nr. 24 Year 2000 on Treaty. The practice of integrating treaties in Indonesia’s legal system is quite similar to the US practice. The President has power to make and negotiate treaties, however when the President wishes to ratify treaties he must have approval from Parliament (DPR). In Indonesia, a dualist country, all ratified treaties need to have implementing legislation issued by the Parliament in order to be judicially enforceable in courts. Nevertheless, in some cases, the President may also issue

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*, p. 27.

<sup>39</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>41</sup> Duc.V. Trang, “Beyond the Historical Justice Debate: The Incorporation International Law and the Impact on Constitutional Structures and Rights in Hungary”, 28 *Vand. J. Transnat’l L.*, 1995, p. 27.

<sup>42</sup> *Ibid.*, pp. 28-30.

<sup>43</sup> Aalt Willem & Philipp Kiiver, 2007, *Constitutions Compared: An Introduction to Comparative Constitutional Law*, Intersentia, Antwerpen, p. 8.

<sup>44</sup> *Ibid.*



a presidential regulation to make a treaty enforced, however, the regulation can be revoked by the Parliament if its existence is not beneficial for the national interest of Indonesia.<sup>45</sup>

The constitutional system in France is very interesting to explore because France has two executive leaders, the President and the Prime Minister. The President is elected by the people of France through a general election. The Prime Minister is pointed by President. However, the Prime Minister is not responsible to President, but to Parliament.<sup>46</sup> The President has an exclusive power to make international treaties without intervention from the Parliament.<sup>47</sup> Hence, the Parliament has power at the national level to agree or disagree with treaties made by the President in order to be nationally adopted.<sup>48</sup> According to Article 55 of the 1958 French Constitution, all ratified or approved treaties must be published in order to look at the legal status of the treaties in courts.<sup>49</sup>

The Netherlands is a monarch State with a parliamentary system.<sup>50</sup> The head of

the State is the King or Queen. Further, the head of government is administered by the Prime Minister.<sup>51</sup> The power to make treaties belongs to the Executive Government.<sup>52</sup> The Dutch Parliament is not involved in the making of treaties, however the Parliament is always informed about negotiated treaties that are in progress in order to avoid an irreversible accomplishment to Parliament.<sup>53</sup> Ratification of treaties by the Dutch Government does not *ipso facto* make treaties enforceable in the Dutch courts before being approved by the Parliament.<sup>54</sup> Moreover, in order to have the force of law in the Dutch legal system all ratified or approved treaties must be published in the State Gazette (*Tractatenblad*) as set out in Article 93 of *Grundwet*.<sup>55</sup>

Historically Australia has a very close relationship with England, as indicated in its Constitution in section 1 “The Queen is the apex of the legislative structure” and section 61 “The Queen is also a Chief of Executive.” However, for day to day administration the Queen is represented by a Governor-General.<sup>56</sup>

<sup>45</sup> See: Article 18 of Act Nr. 24 Year 2000 on Treaty.

<sup>46</sup> Aalt Willem & Philipp Kiiver, *Op.cit.*, p. 25.

<sup>47</sup> *Ibid.*

<sup>48</sup> See: Article 53 of 1958 French Constitution: “Peace treaties, commercial treaties, treaties or agreements relating to international organization, those that commit the finances of the State, those that modify provisions which are matters for statute, those relating to the status of persons, and those that involve the cession, exchange or addition of territory, may be ratified or approved only by virtue of an Act of Parliament. They shall not take effect until they have been ratified or approved.”

<sup>49</sup> Thomas M. Franck & Arun K. Thiruvengadam, “International Law and Constitution-Making”, 2 *Chinese J. Int’l L.* 467, 2003, p. 481.

<sup>50</sup> Andre Nollkaemper, “The Application of Treaties in the Netherlands”, *Working Paper, Amsterdam Center of International Law, University of Amsterdam*, 2008, p. 4.

<sup>51</sup> See: Article 42 paragraph 1 *Grundwet* states: “The Government shall comprise the King and the Minister.”

<sup>52</sup> Andre Nollkaemper, *Loc.cit.*

<sup>53</sup> *Ibid.*

<sup>54</sup> See: Article 91 of *Grundwet*: “The Kingdom shall not be bound by treaties, nor shall such treaties be denounced without the prior approval of the Parliament.”

<sup>55</sup> “Provisions of treaties or of resolutions by international institutions that are binding all persons by virtue of their contents shall become binding after they have been published.”

<sup>56</sup> R.D. Lumb, 1984, *The Constitution of Commonwealth of Australia: Annotated*, Fourth Edition, Butterworths, p. 7.



In regard to the integration of a treaty into Australia's legal system, it is the power of the Executive Federal Government to negotiate, sign, ratify and terminate treaties with other States.<sup>57</sup> According to the High Court, the Federal Executive through the Crown's representative possesses exclusive and unfettered treaty making power.<sup>58</sup> In regard to the non-involvement of Parliament in making treaties, Gareth Evans, former Australian Foreign Affairs Minister, writes:

The Constitutional power to enter into treaties is one that belongs to the Governor-General in Council. The Commonwealth Parliament, in consequence, has no formal function to exercise by way of review or oversight of international Conventions, treaties and agreements which Federal Government is considering signing.<sup>59</sup>

However, Evans also states that ratified treaties cannot be automatically implemented in Australia's legal system without the approval of the Commonwealth Parliament. It is mentioned in Section 61 of the Australian Constitution that there is differentiation of power to make treaties and to implement treaties. The power to make treaties is enjoyed

by the Federal Executive, but the power to implement treaties in Australia's legal system is the Commonwealth Parliament.<sup>60</sup> The Commonwealth Parliament passes implementing legislation makes the treaty enforceable in Australian courts.<sup>61</sup> It is firmly said by the High Court in *Dietrich*<sup>62</sup> in regard to the legal effect of ratification of ICCPR in Australia that "Ratification of the ICCPR as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specify legislation is passed implementing the provisions."<sup>63</sup> Interestingly, in regard to the issuance of implementing legislation, sometimes the Commonwealth Parliament of Australia does not mean to make a ratified treaty become enforceable in the courts, but it merely approves the act of ratification done by the Executive Federal, therefore the ratified treaty remains inapplicable in the courts.<sup>64</sup> There must be a clause in the implementing legislation indicating that the issuance of the Act is to make the treaty provisions enforceable in Australia.<sup>65</sup> For example, in the 1975 Racial Discrimination Act (Cth), in the preamble of this Act shows

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<sup>57</sup> Brian R. Opeskin & Donald R. Rothwell, "The Impact of Treaties in Australian Federalism", 27 *Case W. Res. J. Int'l. L.*, 1, 1995, p. 5.

<sup>58</sup> *Ibid.*

<sup>59</sup> Gareth Evans, 1995, "International Treaties: Their Impact on Australia", speech delivered on the *International Treaties Conference*, Canberra, Australia, retrieved from <http://www.australianpolitics.com/foreign/treaties/85-09-04treaties-evans.html>.

<sup>60</sup> *Ibid.*

<sup>61</sup> Rosaline Balkin, "International Law and Domestic Law", in Sam Blay, Ryszard Piotrowicz & Martin Tsamenvi (Ed.), 2005, *Public International Law: An Australian Perspective*, Second Edition, Oxford University Press, Victoria, p. 122.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*, p. 123.

<sup>65</sup> *Ibid.*

that “This Act was intended in particular to make provisions for giving effect to the [Racial Discrimination] Convention.”<sup>66</sup>

#### 4. Implementing Treaty in Municipal Courts

It is the power of the judiciary to apply the rules of international law in the courts. The implementation of treaty in municipal courts is closely related to the nature of the treaty itself whether the treaty is self-executing or non-self-executing. The self-executingness of treaty can only be observed in monist States such as the United States, France and the Netherlands. In dualist States such as Indonesia and Australia, all treaties are regarded as non-self-executing.

In the United States, courts are used to applying the rules of international law in settling cases. In *Ware v. Hylton*<sup>67</sup> the court decided that the United States was bound by the rules of international customary law because other States also accepted the rules therefore there was no reason to reject the rules in the US courts.<sup>68</sup> Moreover, in *Paquette Habana*<sup>69</sup> the court applied the international customary law to solve a case between the United States and Spain. In the verdict, Judge Gray mentioned that

“International law is part of our law, and must be ascertained and administered by the courts of justice...”<sup>70</sup>

However, in certain cases an international treaty cannot be applied by courts due to the provisions of the treaty being considered as non-self-executing. When the courts determine that a treaty is non-self-executing it means the courts indicate that the provisions of the treaty cannot be applied as a source of law.<sup>71</sup> The non-self-executing treaty will not have the force of law in the United States courts unless the Congress enacts implementing legislation for treaty.<sup>72</sup>

The US Senate has authority to agree, with or without conditions, to each treaty submitted to it by the President.<sup>73</sup> Moreover, the Senate also has the power to reject the treaty.<sup>74</sup> The Senate may reveal conditions to the treaty before President ratifies it such as reservations, understandings or declaration (RUDs).<sup>75</sup> These RUDs essentially will restrict the implementation of the treaty in the courts.<sup>76</sup> The involvement of the US Senate in deciding the self-executingness of treaty has been exercised in several human rights treaties such as ICCPR, Torture Convention and Genocide Convention.<sup>77</sup> In ICCPR the Senate reserved Article 6 Paragraph

<sup>66</sup> *Ibid.*, pp. 124-125.

<sup>67</sup> *See: Ware v. Hylton*, 3 U.S. (3 Dall) 237.

<sup>68</sup> George Slyz, “International Law in National Courts”, 28 *N.Y.U. J. Int’l. & Pol.* 65, 1997, p. 89.

<sup>69</sup> *See: Paquette Habana*, 175 U.S. 677 (1900).

<sup>70</sup> George Slyz, *Loc.cit.*

<sup>71</sup> David Sloss, *Op.cit.*, pp. 144-145.

<sup>72</sup> Curtis A. Bradley, “International Delegation, the Structure Constitution and Non-Self-Executing”, 55 *Stan. L. Rev.* 1557, 2003, p. 1587.

<sup>73</sup> Jordan J. Paust, Joan M. Fitzpatrick & Jon M. van Dyke, 2000, *International Law and Litigation in the U.S.*, West Group, USA, pp. 219-220.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> Chrissy Fox, “Implication of the US’ Reservations and NSE Declaration to the ICCPR for Capital Offender and Foreign Relations,” *Comments, 11 Tul. J. Int’l & Comp. L.* 303, 2003, p. 305.

5 in regard to death penalty for juvenile, as well as declares that “The Covenant will not create a private cause of action in US courts.”<sup>78</sup> In *Domingues v. Nevada*,<sup>79</sup> the court of Nevada refused Domingues’ contention that the United States had infringed Article 6 Paragraph 5 of ICCPR in regard to the death penalty for juvenile because the US Government had reserved the article therefore the verdict was legitimate.<sup>80</sup> In Torture Convention, the Senate approved the intention of the President to ratify the Convention with several conditions including “The provisions of Article 1 through 16 of the Convention are not self-executing.”<sup>81</sup> Moreover, in the Genocide Convention, the US Senate declared that “The President will not deposit the instrument of ratification until after the implementing legislation referred to in Article V has been enacted.”<sup>82</sup>

In France, the determination of the self-executingness of a treaty is made by the Constitutional Court (Conseil d’État) and Cassation Court (Cour de Cassation). Nevertheless, in some cases the decisions of the Constitutional Court have precedence over the decisions of the Cassation Court. In determining the self-executingness of the Child Convention, the Cassation Court concluded that the Convention is a non-

self-executing treaty because Cassation Court examined Article 4 paragraph 1 of the Convention grammatically that “States Parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention...”<sup>83</sup> Further, the Court opined that the provisions of the Convention did not create the rights for individuals but merely for the States Parties. On the other hand, the Constitutional Court argued that to decide the self-executingness of the Child Convention the provisions of the Convention must be examined individually and separately.<sup>84</sup> Consequently, Articles 3 paragraph 1 and 16 of the Convention were regarded as self-executing provisions, but Article 9 was considered as a non-self-executing provision.<sup>85</sup>

Even though a treaty is higher than national law in France, the treaty is lower than the French Constitution, therefore if there is inconsistency between the rules of a treaty with the Constitution, the later will prevail. This can be observed in *Sarran et Levacher*<sup>86</sup> case where the Constitutional Court affirmed that international treaties have no higher legal status than the French Constitution.<sup>87</sup>

<sup>78</sup> *Ibid.*, p. 306.

<sup>79</sup> See: *Domingues v. Nevada*, 961 P. 2d 1279, 1280 (Nev. 1998), cert. denied 526 U.S. 1156 (1999).

<sup>80</sup> Chrissy Fox, *Op.cit.*, p. 319.

<sup>81</sup> Lori Fisler Damrosch, “The Role of the US Senate concerning “Self-Executing and Non-Self-Executing” Treaties, 67 *Chi-Kent L. Rev.* 15, 1991, p. 520.

<sup>82</sup> *Ibid.*, p. 522.

<sup>83</sup> Roger Errera, “Convention on the Rights of the Child-Distinction between Self-Executing and Non-Self-Executing Articles”, Case Comment, *P.L. 1997 Win.*, 1997, p. 723.

<sup>84</sup> *Ibid.*, p. 724.

<sup>85</sup> *Ibid.*, pp. 724-725.

<sup>86</sup> See: *Sarran*, Re (Unreported, October 30, 1998) (CE (F)).

<sup>87</sup> Claudina Richards, “*Sarran et Levacher*: Ranking Legal Norms in the French Republic”. Case Comment, *E.L. Rev.* 2000, 25(2), 2000, p. 192.

Treaties enjoy high legal status in Dutch courts. A ratified or approved treaty upon publication is higher than Dutch law, even the Constitution.<sup>88</sup> It is the power of courts to determine whether or not the treaty submitted in the courts are self-executing or non-self-executing. The courts usually will examine the nature, wordings, content and parties' intention before concluding that the treaty is self-executing or not. The courts are very careful to decide a treaty to become self-executing mainly human rights treaties because it will affect the national legal system and the society.<sup>89</sup> A civil case heard by the court in regard to the involvement of the Dutch Army in bombing Kosovo was decided by the court that Article 2 paragraph 4 of UN Charter is considered as a non-self-executing provision because the article does not intend to protect the rights of individuals.<sup>90</sup>

In Indonesia, treaties are not regarded as one of the sources of law in Indonesian courts. Nevertheless, the main issue in the implementation of treaties in Indonesia's legal system is the debates amongst legal scholars that confuse the judiciary in developing legal interpretation of treaties.<sup>91</sup> The judges seem to have no confidence to apply international

law in the Indonesian courts. The first case in regard to the implementation of treaties in Indonesia was *Navigation Maritime Bulgare (NMB) v. PT Nizwar*<sup>92</sup> where the court of Central Jakarta agreed with the decision of the Arbitration Court of London to order PT Nizwar to pay a sum of money to NMB. The legal basis used by the court was the 1927 Geneva Convention. The existence of this Convention became a debate amongst legal scholars because the Convention was ratified by the Dutch Government when Indonesia was under its occupation.<sup>93</sup>

However, a problem arose when the Indonesian Supreme Court (MA) overturned the decision of the Court of Central Jakarta for three reasons, namely (i) decisions of foreign tribunal cannot be executed in Indonesia, (ii) Indonesia does not have to comply with treaties ratified or approved by the Dutch Government, and (iii) the existence of Presidential Decree (Keppres) Nr. 34 Year 1981 does not make the 1958 New York Convention enforceable in Indonesia without implementing legislation.<sup>94</sup>

This MA decision created legal uncertainty in Indonesia's legal system because the MA did not understand the meaning of implementing legislation. The

<sup>88</sup> E.A. Alkema, "Constitutional Law", in Jeroen Chorus, Piet-Hein Gerver & Ewoud Hondius (Ed.), 2006, *Introduction to Dutch Law*, Fourth Revised Edition, Kluwer Law International, p. 326.

<sup>89</sup> *Ibid.*

<sup>90</sup> Gerrit Betlem & Andre Nollkaemper, "Giving Effect to Public International Law and European Community Law before Domestic Courts: A Comparative Analysis of the Practice of Consistent Interpretation", 14 *Eur. J. Int'l L.* 569, 2003, p. 578.

<sup>91</sup> Sudargo Gautama, 1992, *Indonesia dan Arbitrase Internasional*, Alumni, Bandung, pp. 68-71. This is also the writer's conclusion after observing several cases heard in Indonesian courts as well as the decision of the Indonesia Supreme Court.

<sup>92</sup> See: *Navigation Maritime Bulgare v. PT. Nizwar*. XI Y.B. Comm. Arb. 508 (1986), Supreme Court of Indonesia, Aug. 20 1984.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*, pp. 17-18.

Keppres issued by the President was an implementing legislation of the 1958 New York Convention to give the Convention the force of law in Indonesia. The problem was more complicated when MA issued PERMA Nr. 1 Year 1990 as an implementing legislation of the 1958 New York Convention. MA should not have issued the PERMA because it is not the power of the judiciary to issue implementing legislation because the implementing legislation is a product of Parliament.

Further, in Indonesia the power of the judiciary to interpret and to apply the law has been systematically amputated by lawyers. According to Montesquieu theory it is the exclusive power of the judiciary to interpret and to apply the law. However, in reality most lawyers and non-lawyers in Indonesia attempt to interpret the law without regard to the interpretation made by the courts. The Bibit-Chandra case is an intriguing case where the power of the court has been undermined by the lawyers. In this case there was a serious debate between the police and the defendant lawyers in regard to the right of visit for lawyers.

Article 70 paragraph 1 Criminal Procedure Law indicates that lawyers at any time have the right to contact and to talk to defendants. In this case the police restricted the lawyers of Bibit and Chandra to visit the defendants only on Tuesday and Thursday at 10 a.m. to 2 p.m. This certain restriction was

protested by the lawyers by interpreting the terms “at any time” was within office hours from Monday through Friday. This subjective interpretation was unacceptable to the police. The lawyers should have submitted this matter to the Constitutional Court in order to obtain legal and legitimate interpretation so that it can be used as a legal basis to every individual whose constitutional rights are violated.

In Australia, High Court judges have enormous authority to implement the rules of international law in their cases. In *Chow Hung Ching*,<sup>95</sup> Justice Dixon decided that “International law is not a part but is one of the sources of our law.”<sup>96</sup> However, Justice Starke reckoned that “the rules of international law shall be accepted and adopted by our domestic law.”<sup>97</sup> Moreover, Justice Latham opined that “International law was not as such part of the law of Australia, however a universally accepted principle of international law would be applied by our courts.”<sup>98</sup>

Most of the High Court judges are reluctant to apply international law directly because international law is more suitable as a guiding principle for the courts to develop legal construction.<sup>99</sup> It is said by Judge Kirby in *Jago*<sup>100</sup> that “it would be an ‘error’ to incorporate international human rights law, as such, into Australian domestic law, it was appropriate to use statements of international law as a ‘source’ of filling a lacuna in the

<sup>95</sup> See: *Chow Hung Ching v. the King* (1948) 77 CLR 449.

<sup>96</sup> Rosaline Balkin, *Op.cit.*, pp. 117-118.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

<sup>100</sup> See: *Jago v. District Court of New South Wales* (1988) 12 NSWLR 558 (CA).

common law of Australia or for guiding the courts as to practice of Australian courts as to proper construction of the legislative provision in question.”<sup>101</sup>

In *Dietrich*,<sup>102</sup> the High Court decided that ratification of ICCPR had no direct legal effect in the courts without the existence of an implementing legislation issued by the Commonwealth Parliament. However, in 1995 High Court made a legal breakthrough in *Teoh*<sup>103</sup> where the court used the Child Convention as the source of law to interpret Australian immigration law even though the Convention had not yet been approved by the Parliament to incorporate into Australian law. In this case, Justices Mason and Deane revealed their opinions, which are “(i) where a statute or subordinate legislation is ambiguous, the courts should favor that construction which accords with Australia’s obligations under a treaty or international convention to which Australia is a party, and (ii) the provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law.”<sup>104</sup>

## 5. Factors Affecting the Implementation of Treaties in Municipal Courts

From the discussion above it is clear that primacy of law and the legal tradition are influential factors in the implementation of a treaty in national courts. However, the most influential factor in regard to the implementation of treaties is the bravery of judges in making legal breakthroughs. In fact, it is deeply affected by the legal structure and culture developed in the judicial system of each State. In common law system, judges are recognized as law-makers therefore they have enormous power to develop rules of law through judicial precedent.<sup>105</sup> More importantly they are more independent than civil law judges because they are not governmental officials.<sup>106</sup> Olivier Moreteau writes “The civil law judge contributes to the law but does not create it.”<sup>107</sup> This thought is derived from the past experiences in ancient France where the power of the courts was and therefore became corrupted.<sup>108</sup>

Civil law judges actually perform civil services. The judges are educated to be judges. Psychologically, civil law judges are not independent even though they are *de jure* independent, because they are under

<sup>101</sup> Rosaline Balkin, *Op.cit.*, p. 119.

<sup>102</sup> See: *Dietrich v. the Queen* (1992) 177 CLR 292.

<sup>103</sup> See: *Minister of State for Immigrants & Ethnic Affairs v. Teoh* (1995) 183 CLR 273.

<sup>104</sup> Michael Legg, “Indigenous Australians and International Law: Racial Discrimination Genocide and Reparations”, 20 *Berkeley J. Int’l L.* 387, *Berkeley Journal of International Law*, 2002, p. 392.

<sup>105</sup> Charles H. Koch, Jr., “Envisioning a Global Legal Culture”, 25 *Mich. J. Int’l L.* 1, *Michigan Journal of International Law*, 2004, p. 58.

<sup>106</sup> Kristen Marie Hansen, “Note, the US Legal System Common Values, Uncommon Procedures”, 69 *Brook. L. Rev.* 689, 2004, p. 70.

<sup>107</sup> *Ibid.*, p. 100.

<sup>108</sup> Charles H. Koch Jr., *Op.cit.*, p. 25.

supervision of higher judges<sup>109</sup>, they are also within the control of the government.<sup>110</sup>

In Indonesia, the different views of common law and civil law often become a hot topic in legal debates. Inconsistency of verdicts by judges, according to some legal scholars, are highly influenced by the civil law system which does not recognize a *stare decisis* principle, therefore one case to another similar case, the verdicts can be very different. The author thinks that it is not about the *stare decisis* principle or not, but it is about the morality of law enforcement officials that are degraded and corrupted.

Further, in Indonesia, there is an assumption that in monist States, they are more open toward the existence of international law, but the assumption is not entirely true because dualist States are also open to utilize the rules of international law in settling cases by interpreting national law at the level of international law standards. In Canada, for example, judges exercise the norms of international law as guidance to interpret the national law. In *Suresh*<sup>111</sup> case, the court of Canada used ICCPR and Torture Convention as a tool to interpret the Canadian Charter and the Canadian immigration law. In fact, these two international treaties were not yet approved by the Federal Parliament of Canada to be part of Canadian Law. However, the court bravely interpreted the two national laws similar to the treaties. The

court at last concluded that “international law rejects deportation if torture will occur, even when national security interests are at stake. This is the norm which best informs the content of the principles of fundamental justice under section 7 of the Charter.”<sup>112</sup>

### C. Conclusion

The concept of self-executing and non-self-executing treaties has influenced the implementation of treaties in the courts. This concept is only recognized in monist States, such as the United States, France and the Netherlands. However, in dualist States, such as Indonesia and Australia, all treaties are regarded as non-self-executing. Nevertheless, in monist States, they also recognize non-self-executing treaties, therefore ratified or approved treaties must be carefully examined by the courts in order to determine whether the treaties are self-executing or non-self-executing. If the treaties are regarded as self-executing the courts are willing to implement them in trial, but when the treaties are considered as non-self-executing, the courts will reject to apply the treaties to resolve cases.

In each State, the process of implementing treaties in the national legal system is very different. In the United States, the President must obtain approval from the Senate prior to ratification. This is similar to the situation in Indonesia. However, in

<sup>109</sup> *Ibid.*, p. 38.

<sup>110</sup> Frank B. Cross, “Identifying the Virtue of the Common Law”, 15 *Sup. Ct. Econ. Rev.* 21, 2007, p. 45.

<sup>111</sup> See: *Suresh v. Canada (Minister of Citizenship & Immigration)* (2002) 1 S.C.R. 3.

<sup>112</sup> Hugh M. Kindred, “The Challenge of Internalizing International Conventional Law: The Experience of Australia, England, and Canada with Ratified Treaties”, in Christopher P.M. Waters (Ed.), 2006, *British and Canadian Perspectives on International Law*, Martinus Nijhoff Publishers, Leiden/Boston, pp. 402-403.



France, the Netherlands and Australia the Executive does not need approval from the Parliament in order to ratify a treaty. Ratification in these States means a mere confirmation to make the treaty enter into force. In order to implement a treaty, the treaty needs to have approval from the Parliament of each State. The implementation of treaties in municipal courts highly depends on judges that is whether or not the judges are willing to use the rules of a treaty to settle cases or

to interpret contradicted national law in line with the rules of international law. The rules of international law should be observed as one of the legal sources for the courts to resolve cases that involve rights for individuals. Sometimes a State arbitrarily abuses the law to maintain power. When the State becomes the actor in violating individuals' rights it is the obligation of international law to restore the rights of individuals.

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