

The Authority of the Constitutional Court in Reviewing International Agreements: Case of ASEAN Charter Review

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ABSTRACT

This study discusses the authority of the Constitutional Court of the Republic of Indonesia in reviewing international agreements, focusing on the ASEAN Charter case. The results of the study indicate that the Constitutional Court does not have the authority to review international agreements, because its duties are limited to reviewing laws against the Constitution. Therefore, the Constitutional Court's decision to review laws related to the ASEAN Charter is considered inconsistent with applicable legal provisions. The implications of this review on Indonesia's position in ASEAN are not significant, because the Constitutional Court's decision is more aimed at harmonizing national law with Indonesia's international obligations. This study emphasizes the importance of a clear understanding of the limitations of the Constitutional Court's authority in the context of international law and its impact on Indonesia's relations in ASEAN.

Keywords:

Constitutional Court;
International Agreements;
ASEAN Charter;
Legal Authority;
National Law

INTRODUCTION

International agreements play a significant role in relations between countries and have become binding legal instruments for the countries involved. In this era, the practice of international relations has become an important element in building a country's progress. As a member of the international community, a country cannot function optimally without interacting and having relations with other countries. This is due to the need for interdependence that arises between these countries. Therefore, the realization of these international relations is often expressed in the form of international agreements. These agreements cover various aspects, ranging from economic, political, social, to cultural cooperation, which in turn helps create stability and prosperity at the global level.

In the context of Indonesia, international agreements to be ratified must go through a legislative process in the sense that they require approval from the House of Representatives to become part of national law and are expected to be implemented properly as regulated in Article 10 of Law Number 24 of 2000 concerning International Agreements. (Republik, 2000) International agreements that have been ratified become national law in the form of a Law. Often in the implementation of a Law, there are certain parties who feel disadvantaged and test the Law. In this regard, the institution that has the authority to test the Law is the Constitutional Court as regulated in Article 24C Paragraph (1) of the 1945 Constitution. (RI, 1945)

In its development, questions arose regarding the authority of the Constitutional Court to review international agreements. This has given rise to a prolonged polemic regarding whether the Constitutional Court has the authority to conduct such a review, especially in the context of the ASEAN CHARTER which was reviewed by the Constitutional Court in 2010. The review of the ASEAN CHARTER conducted by the Constitutional Court is an example of where the Constitutional Court took steps to review the conformity of an international agreement with the constitution, which interprets that the Constitutional Court acted broadly beyond the authority granted by the 1945 Constitution. (Pratiwi, 2020) If the Constitutional Court accepts the application, it will be recorded in history that there is a national court that is able to cancel "international agreements." Conversely, if the Constitutional Court rejects the application and the agreement is later proven to be contrary to the 1945 Constitution, this will create a significant new precedent, where the Constitutional Court seems to give the sovereignty of this country to international law contained in the agreement, even though it is contrary to the constitution . (Nelly, 2021)

The impact of the Constitutional Court's review of international agreements will not only affect the implementation of domestic law, but also Indonesia's diplomatic relations with other countries. Uncertainty about how the Constitutional Court will handle international agreements can reduce the trust of other countries, so in this context, it is necessary to reconstruct the authority of the Constitutional Court in the national legal system. (Ihsanudin Muhammad, 2019) Therefore, the author took the initiative to conduct further study on whether the Constitutional Court has the authority to conduct material review of an international agreement and how this has implications for international agreements that have been ratified by Indonesia.

METHOD

This study uses a library method to collect data from various literature sources. In nature, this study is descriptive analytical. The approach used is a conceptual approach, namely analyzing legal concepts and applying them in various legal contexts. The primary data used comes from laws and regulations, while secondary data includes journals, books, and other sources relevant to the research topic. Data collection techniques are carried out by searching for information from various books, journals, and related internet media. Furthermore, the analysis is carried out through the stages of reduction, organization, presentation, verification, and drawing conclusions.

RESULTS AND DISCUSSION

1. Authority of the Constitutional Court in Conducting Judicial Review Against the ASEAN Charter

The Constitutional Court carried out a material review of Law Number 38 of 2008 concerning Ratification of the Charter of the Association of Southeast Asian Nations based on the applicant's request to review Article 1 number 5 and Article 2 number 2 letter (n) of the ASEAN Charter. Article 1 number 5 of the ASEAN Charter states "To create a single market and production base which is stable, prosperous, highly competitive and economically integrated with effective facilitation for trade and investment in which there is free flow of goods, services and investment; facilitated movement of business persons, professionals, talents and labor; and freer flow of

capital", and Article 2 number 2 letter (n) states "adherence to multilateral trade rules and ASEAN's rules-based regimes for effective implementation of economic commitments and progressive reduction towards elimination of all barriers to regional economic integration, in a market-driven economy" (Tan and Maysura 2023). These two articles are considered to be in conflict with Article 27 paragraph (2) and Article 33 paragraph (4) of the UUD 1945. With the judicial review carried out by the MK, in the end the MK in its decision stated that it rejected the petitioners' petition on the grounds that, firstly, the law was binding on all the countries that make it, of which Indonesia is one of them. Second, the law is declared to apply as a legal norm, so that Indonesia as part of ASEAN is legally bound by Law no. 38 of 2008. Third, the Constitutional Court stated that the International Court of Justice is an institution that has authority regarding disputes that arise as a result of international agreements (Purnamasari 2018).

In fact, from the third statement above, according to the author, the Constitutional Court has declared itself to have no authority to review the two articles above, because as the Constitutional Court said, it is the International Court that has the authority for disputes arising from international agreements (Afidatussolihat 2014). However, in its decision, the Constitutional Court also stated that the Constitutional Court had the authority to hear the petitioners' petition. So, it can be said that the Constitutional Court declares that it has the authority to adjudicate laws that contain international substance, which in this case is the ASEAN Charter. When analyzed fundamentally, the Constitutional Court's statement implies that, firstly, Law no. 38 of 2008 as ratification with the ASEAN Charter as an attachment to the contents of the law. Then, because it is a single unit, the Constitutional Court feels it can test it. Third, the form of the law has logical fallacies so it must be reviewed.

If examined more deeply, from the beginning since the petitioners submitted their petition, the Constitutional Court did not need to declare that it rejected the petition, but stated that the Constitutional Court did not have the authority to review Law no. 38 of 2008. The author bases this opinion in accordance with Article 24C of the 1945 Constitution which confirms that the Constitutional Court has the authority to adjudicate at the first and final level where the decision is final in the context of reviewing laws against the Constitution. Meanwhile, the attachment which is part of Law no. 38 of 2008 is a translated copy of an international agreement or in this case the ASEAN Charter which is basically the content of the international agreement itself. This only gives one meaning, where the attachment means it is a complete product of international law. Apart from that, the ratification law is a law which aims to ratify international agreements, while the material or substance of the relevant international agreement is only contained in the attachment to the ratification law as an inseparable part of the ratification law. The ratification law does not necessarily make international agreements into Indonesian national law. The ratification law only makes Indonesia bound to international agreements as a manifestation of the DPR's approval as mandated by the constitution. As previously explained, in transforming the material content of international agreements, a national law is needed which contains the material of the international agreement in the national legal order.

When viewed from the perspective of Law no. 38 of 2008, this regulation only contains 2 articles, the contents of which in general only state that it ratifies the ASEAN Charter and the ratification law comes into force. So, if the law ratifying the ASEAN Charter is tested by the MK, then the MK is not actually testing the law against the

Constitution, but the MK is actually testing international law itself (Tan and Maysura 2023). Because, Article 1 of Law Number 38 of 2008 states that "To ratify the Charter of the Association of Southeast Asian Nations, a copy of the original text in English and its translation in Indonesian is attached and is part of which is inseparable from this Law". Thus, the attachment referred to in Article 1 is the ASEAN Charter itself, where the Constitutional Court should not have had the authority to review the ratification law from the start, because the contents of the attachment are an international agreement. The Constitutional Court does not have the authority to examine material contained in an international agreement. Based on this, it means that the Constitutional Court should not have the authority to review international agreement material contained in the attachment to the ratification law. If the Constitutional Court states that it has the authority to review international agreement material contained in the attachment to the ratification law, then this is not in accordance with the theories and principles that apply in both international law and national law (Purnamasari 2018).

2. The implications of the Constitutional Court's ruling on Indonesia's existence as a member of the ASEAN Charter

As the author has previously explained, the Constitutional Court does not have the authority to conduct a material review of the ASEAN Charter, as it is annexed to Law No. 38 of 2008. The implications of the Constitutional Court's ruling on Indonesia's existence as part of the ASEAN Charter can be viewed from various aspects, particularly concerning national legal sovereignty and commitment to international agreements. The Constitutional Court's ruling itself can be interpreted as being equivalent to the 1945 Constitution, as the Court serves as the "Guardian of the Constitution" for Indonesian citizens. The implications of the Constitutional Court's ruling on Indonesia's status as a member of the ASEAN Charter are as follows:

3. Diplomatic Consequences and Compliance with ASEAN Commitments

Indonesia is an archipelagic country, surrounded by vast seas, making international cooperation essential. One form of legitimacy for international cooperation is the ratification of international agreements, such as the ASEAN Charter, through Law No. 38 of 2008 concerning the ratification of the ASEAN Charter. Without international cooperation, Indonesia would face challenges in diplomacy and addressing global issues, including international trade. As one of the founding members of ASEAN, Indonesia has been actively involved in various ASEAN regional activities. Indonesia's diplomatic consequence as an ASEAN member is to comply with and adhere to the negotiations and agreements established within the ASEAN Charter.

In Indonesia, as previously explained by the author, there was a material review of Law No. 38 of 2008 concerning the ratification of the ASEAN Charter through Constitutional Court Decision No. 33/PUU-IX/2011. This decision has several implications for Indonesia's diplomatic consequences and its compliance with the ASEAN Charter. Although the decision ultimately rejected the petitioners' arguments regarding the articles under review, it highlighted important aspects of Indonesia's commitment to ASEAN agreements. Article 1, section 5 of the ASEAN Charter aims to establish the territory of ASEAN member states as a free trade area encompassing the flow of goods, services, and investments, facilitating freer movement of businesspeople, professionals, experts, skilled labor, and capital. This provision is expected to strengthen Indonesia's commitment to playing an active role in ASEAN

and contributing to regional agendas, which, in turn, can enhance national welfare, as the ASEAN Charter does not conflict with the Constitution of the Republic of Indonesia

As a member of ASEAN in the formation of the ASEAN Economic Community (AEC), Indonesia is committed, along with other ASEAN member states, to creating a more integrated single market and production base. This includes the free flow of goods, services, investments, skilled labor, and capital within Southeast Asia. Such measures can improve the economic welfare of the Indonesian population. ASEAN is also actively involved in free trade agreements with countries outside ASEAN, such as through the Regional Comprehensive Economic Partnership (RCEP).

In 2023, during Indonesia's fifth term as ASEAN Chair, it led the development of the ASEAN Declaration on the Placement and Protection of Migrant Fishers. This declaration serves as a symbol of ASEAN member states' commitment to protecting migrant fishers from various threats in the field while ensuring their rights are fulfilled. The formulation of this declaration not only gained support from other ASEAN member states but also from international organizations such as the International Labour Organization (ILO) and Greenpeace.(Greenpeace:23)

Indonesia's existence as part of the ASEAN Charter is essential. Interaction among countries in Southeast Asia is crucial to fostering regionalism, akin to the European Union today. Indonesia must play a key role in maintaining security in Southeast Asia. Furthermore, Indonesia must actively participate and be capable of shaping and transforming international relations through its ideas and thoughts, which can manifest in the evolution of norms, laws, economic capabilities, technological advancements, and education. Indonesia's national interests arise from social interaction and the product of thought and ideas.(Juliana:2023)

The points explained above represent the diplomatic consequences and Indonesia's compliance with ASEAN commitments. Even though the Constitutional Court has reviewed Law No. 38 of 2008 concerning the ratification of the ASEAN Charter, this has not affected Indonesia's position as a member of the ASEAN Charter. In fact, as one of ASEAN's founding members and a regular ASEAN Chair, Indonesia has become even more actively involved in all diplomatic relations and cooperation within the ASEAN region.

4. The Harmonization between International Law and National Law

In the conclusion of Constitutional Court Decision No. 33/PUU-IX/2011, the Court stated that the petitioners' arguments were legally unfounded. This is because the Constitutional Court can direct the government to ensure that national regulations are aligned with the principles of the ASEAN Charter without disregarding the values enshrined in the Indonesian Constitution. The Constitutional Court emphasized that the choice of legal form for the ratification of international agreements, such as the ASEAN Charter, which was ratified through Law No. 38 of 2008, should be reconsidered. (Indonesia Constitutional Court: 2023).

Article 11 of the 1945 Constitution does not specifically state that the legal form of an international agreement must be a law, but it does mention that the President, with the approval of the House of Representatives (DPR), makes international agreements. When related to the process of making laws, it is true that laws are created by the President and the DPR, but this does not imply that every legal product must take the form of a law. As noted by Tan Hsien-Li in some cases, harmonization may require the creation of new laws that explicitly adopt provisions of international law. For instance, human rights provisions in international conventions are often

integrated into national legislation to ensure their effective implementation (Tan Hsien-Li: 2023).

This differs from the context in Indonesia, where in this law, the result of the ratification is merely an annex to Law No. 38 of 2008, even though the substance of the ASEAN Charter is contained within that annex. In the context of Law No. 38 of 2008, where the ratification resulted in the formation of a law, this situation implies that other countries would be subject to Law No. 38 of 2008. As a consequence, these countries could potentially file lawsuits in Indonesian courts for violations committed by Indonesia regarding international agreements encompassed within Indonesian law. Similarly, Indonesia could file suits against other countries under the framework of Law No. 38 of 2008. However, international law provides its own mechanisms for dispute resolution, distinct from national law, such as through the International Court of Justice for disputes arising from treaties between states. Furthermore, other countries have the sovereignty not to be bound by the laws of another nation. Therefore, the Constitutional Court's decision can be interpreted as an effort to harmonize national law with Indonesia's international obligations within ASEAN.

CONCLUSION

The Constitutional Court's authority to conduct a judicial review of the ASEAN Charter, as annexed to Law No. 38 of 2008, has been subject to scrutiny in Decision No. 33/PUU-IX/2011. While the Court ultimately rejected the petitioners' claims, it affirmed its competence to review laws that contain international agreements, as in this case. However, it could be argued, based on both international and national legal principles, that the Constitutional Court does not have jurisdiction to review the substance of an international treaty like the ASEAN Charter. This is because ratification laws, such as Law No. 38 of 2008, only serve to confirm the international agreement, which remains separate from domestic legislation. Consequently, the Court's jurisdiction should be limited to national laws rather than the international treaties themselves. Therefore, a more appropriate conclusion might have been for the Court to declare itself without authority to review the ASEAN Charter's provisions, as they fall under the purview of international law rather than Indonesian constitutional law.

The Constitutional Court's ruling on Indonesia's membership in the ASEAN Charter has significant implications for both national legal sovereignty and the country's commitment to international agreements. The ruling underscores Indonesia's diplomatic responsibility to uphold ASEAN commitments, such as economic integration and regional security cooperation, without undermining the 1945 Constitution. Despite a material review of Law No. 38 of 2008, which ratifies the ASEAN Charter, the Court reaffirmed Indonesia's role in ASEAN as critical for both regional diplomacy and economic development. This decision further aligns national laws with international obligations, ensuring that Indonesia continues to play an active and strategic role in the regional and global context.

In particular, the ruling clarifies that although the Constitutional Court cannot review the ASEAN Charter itself, it can ensure that national regulations reflect the principles of international law, thereby harmonizing Indonesia's legal framework with its ASEAN commitments. This includes facilitating international cooperation in trade, labor mobility and diplomacy, while also protecting Indonesia's sovereignty in navigating international legal obligations. Through this balance, Indonesia strengthens

its position within ASEAN and reaffirms its dedication to regional cooperation without compromising its constitutional values.

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