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Constitutional Review of ASEAN Charter and Maastricht Treaty: A Comparison of Indonesia and France

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ABSTRACT
This journal will discuss how the role of constitutional courts in Indonesia and France in reviewing the constitutionality of the ratification law of an international treaty. While both Indonesia and France possess a Constitutional Court/Council, both of them have different principles regarding the constitutional review of international treaties. This paper uses normative research with a descriptive analysis approach. We found that in practice, both Indonesia and France can constitutionally review the ratification of an international treaty. Although the Constitutional Court in Indonesia has never annulled the ratification of an international treaty, there remains the possibility of a treaty being ratified and later revoked by the process of judicial review. Meanwhile in France, while judicial review can conflict with the Constitution, in the case of the *Maastricht Treaty* this led to constitutional amendments to accommodate *Maastricht Treaty* with the Constitution instead of annuling the treaty altogether.

Keywords:
International Treaty;
Constitutional Court;
Judicial Review;
Judicial Preview

INTRODUCTION

The recent phenomenon of globalization has resulted in more international interaction and cooperation in economics, politics, technology, law, and various other fields. In this development, one of the efforts made by various countries and international organizations to regulate relations with each other and solve various problems and disputes, especially ones, is to form international treaties. International treaties are agreements designed by countries acting as subjects of international law. ("Vienna Convention on the Law of Treaties 1969," n.d.) The contents of treaty include many subjects ranging from economics, law, environment, formation of international organizations, and many others. Therefore, international treaties can provide opportunities for countries to participate in fostering better international cooperation.

However, in their development, the contents of international treaties can contradict with the fundamental laws of certain countries, such as Indonesia and France. In the context of Indonesia, in Decision Constitutional Court No. 38/PUU-IX/2011, various non-governmental organizations argued that one of the provisions of the ASEAN Charter, specifically on free trade is considered to be incompatible with the 1945 Constitution of the Republic of Indonesia because it threatened the economic rights of the Indonesian people in open economic competition.(*Putusan Nomor 33/PUU-IX/2011*, 2011) A similar situation also occurred in France, where the Maastricht Treaty was found to be contradictiory to the French Constitution. The mechanisms commonly used to resolve conflicts between international treaties and national constitutions are judicial review and judicial preview. Judicial review is the mechanism applied in Indonesia to examine laws deemed contrary to the Constitution, while France uses judicial preview, to constitutionally review a law or a treaty before they are promulgated. Although both used different terms and approaches, both

judicial review and judicial preview have the same objective: reviewing possible violations and revising or even revoking laws that violates the country's fundamental laws.(Jimly Asshiddiqie, 2005)

Judicial review in the Indonesian context is one of the authorities of the Constitutional Court as stipulated in the 1945 Constitution of the Republic of Indonesia, which is authorized to review national laws that are contrary to the Indonesian state constitution. The mechanism in the Constitutional Court process can judicially review one of the contents of the International Agreement with the following conditions: 1. The International Treaty Law has been ratified, 2. The law has been transformed into a national ratification law, 3. The context proposed in the judicial review is incompatible with the 1945 Constitution, 4. an application to the Constitutional Court to conduct a judicial review. However, one of the problems faced by the Constitutional Court in reviewing an international treaty is whether the Constitutional Court can examine the content of the international treaty, whose contents are only included in the appendix of ratification law, not the main body of the law, which only includes that Indonesia has ratified the international treaty. Not only Indonesia has experienced possible contradiction between treaty and constitution, but France also experienced such problems, namely the constitutional review on Maastricht Treaty using judicial preview.

Judicial preview differs from judicial review, which only reviews the constitutionality of laws that have already promulgated. On the other hand, judicial preview reviews the constitutionality of draft laws before they are passed into national law.(Jimly Asshiddiqie, 2005) According to Article 55 of the French Constitution, if a provision of international law is found to be contrary to the provisions of the Constitution, the authority to ratify or accept the treaty must first go through a constitutional amendment.(Andi Sandi Ant.T.T. & Agustina Merdekawati, 2012)

However, despite both Indonesia and France are able to review the constitutionality of an international treaty, the difference between judicial review and judicial preview, the different context regarding the role of treaties in their constitution and the unique context of European supranationalism in the European Union in comparison to ASEAN might give different impacts regarding constitutional review of treaties. Therefore, this study aims to compare constitutional review between Indonesia and France to find similarities and differences in how each country resolves the dynamics of possible contradictions between international treaty and constitution.

METHOD

The data collection method in this study uses a collaborative method between literature research methods conducted to obtain secondary data related to the field of law and normative juridical research on the decisions of the Constitutional Court of Indonesia and France to obtain comparative data. The method of analysis in this study uses a comparative analysis method, namely comparing the research results on two variables, namely Indonesia and France, to obtain comparative analytical data results. The qualitative method of analysis also qualifies and compares based on legal certainty and expediency of the provisions of both national law and international law based on their relevance to this research topic.

RESULTS AND DISCUSSION

1. The authority of the Constitutional Court in examining the Law on Ratification of International Agreements

In Indonesia, the Constitutional Court (MK) is authorized to review a law's constitutionality. The Constitutional Court's authority to review laws (*undang-undang)* that contradicts the Constitution is contained in Article 24C of the 1945 Constitution and Article 10 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court. Initially, the Constitutional Court was only entitled to review laws made after the amendment. However, the provisions of the Article were revoked through Constitutional Court Decision Number 006/PUU-II/2004 so that the Constitutional Court could review any laws that contradicts the Constitution. The procedural mechanism in reviewing the constitutionality of Laws is regulated in Constitutional Court Regulation Number 2 of 2021 concerning Procedure in Law Review Cases. Meanwhile, the Constitutional Court can materially and formally review *undang-undang* and Government Regulations in lieu of Law (*Peraturan Pemerintah Pengganti Undang-Undang/Perppu*). Because the regulations do not specifically distinguish between different types of *undang-undang* (such as regular laws, budgetary laws, ratification laws), any law that are considered as *undang-undang* or *perppu* should be able to be reviewed by the Constitutional Court.

The rules on international agreements in Indonesia are regulated by *Undang-Undang* Number 24 of 2000 on International Treaties (hereinafter referred to as Law on International Treaties). Indonesia's consent to be bound in an international treaty through ratification can be done by ratification laws (*undang-undang ratifikasi*, which requires legislative approval) or Presidential Decree. Only international treaties with broad and fundamental consequences on people's lives requires ratification by *undang-undang*. However, international treaties are typically within the realm of the executive and legislative powers, not the judiciary. Although Law on International Treaties provided certain limitations in ratifying international treaties**,** there remains a possibility for a ratified treaties to violate the 1945 Constitution. This creates ambiguity because the Law on International Treaties was enacted roughly about three years before the establishment of the Constitutional Court and has yet to be amended since then.

The authority of the Constitutional Court to review the constitutionality of ratification laws are not explicitly formulated, either in the 1945 Constitution or the Law on the Constitutional Court and their revisions. There are different opinions regarding the authority of the Constitutional Court to review a ratification law. The first opinion allows reviewing the constitutionality of ratification laws (*undang-undang ratifikasi*) by the Constitutional Court. Meanwhile, the second opinion considers that the Constitutional Court is not authorized to conduct constitutional review of international treaties because ratification law in Indonesia differs from ordinary laws, from the procedure to its substance (Galuh Chandra Purnamasari, 2017). A law must fulfill the formal requirements, that is their procedure must concur with Law Number 12/2011, and the material requirements, the content and substance of a law must not violate the 1945 Constitution. Article 10 c of Law Number 12/2011 on the Establishment of Legislation states that ratification of international treaties can be regulated by *undang-undang*. It should be noted that the ratification law only consists of two articles stating that Indonesia is bound to international treaties,(Dian Khoreanita Pratiwi, 2020) with

the entire text of the international treaty placed as an attachment. This led to discussions regarding the position of the ratification law of an international treaty. However, the content in the ratification law cannot be equated with ordinary laws (Azen Mahendra, 2021). If the ratification law is considered different from other laws, it will cause problems in reviewing their constitutionality.

While the regulations that concern the authority of the Constitutional Court to review ratification acts are rather unclear, Constitutional Court Decision Number 33/PUU-IX/2011 that reviews the constitutionality of the ratification law on ASEAN Charter may provide an answer. The Constitutional Court Decision Number 33/PUU-IX/2011 was a landmark decision, because although the Constitutional Court ultimately rejected the application, the Constitutional Court possesses the authority to review the constitutionality of the ratification law on ASEAN Charter. The Court based its authority on the provisions of the articles that concerns Constitutional Court's authority to review laws, such as on Article 44 section (1) and (2) of Law No. 10/2004 on the Establishment of Laws and Regulations (as later changed by Law No. 12/2011), where the appendix of the law is an integral part of the law itself. In a letter (g) in the section of the Court's Authority, the Court emphasizes that the Law No. 38/2008 on the Ratification of the ASEAN Charter must be constitutionally reviewed because they may contain foreign values that may contradict with the 1945 Constitution. This decision implicitly states three things, firstly it considers that both the ratification law and the international treaty in it's appendix as one. Secondly, the Constitutional Court can review ratification laws because it is also considered as *undang-undang*, and the form of the ratification law needs to be reviewed because there may be logical flaws or values that are contrary to the values of the 1945 Constitution.(Galuh Chandra Purnamasari, 2017)

In the *dissenting opinion of* Constitutional Court Decision Number 33/PUU-IX/2011, Judge Hamdan Zoelva argued that ratification laws are different from other laws. Ratification laws only provide opportunities for ratification if the international treaty provides it, and ratification laws are not immediately valid upon approval from the House of Representatives (DPR).(Sigar Aji Poerana, 2022) In short, the Constitutional Court has no authority to review ratification laws. However, even though the substance is essential and the legislation does not provide such a mechanism, this view is unpopular among Constitutional Court jugdes.

Meanwhile, according to Judge Maria Farida Indrati, ratification law is legally different from laws in general, especially regarding their formation process and the body of such laws. An ordinary law consists of many articles that concerns numerous different things. However, ratification law only consists of two articles, the first concerning ratification to the treaty and the second concerning the time of entry into force of the law. Ordinary laws generally require a relatively long process and deliberation in their formation. In contrast, the ratification law substantively only states their ratification to the treaty, because neither the President nor the legislature can change the substance of ratification law. The ratification law itself is impossible to be materially examined by the Constitutional Court because substantively their articles cannot conflict with the 1945 Constitution.(*Putusan Nomor 33/PUU-IX/2011*, 2011)

There has yet to be a formal discussion in the Indonesian Constitution in line with the opinions of Judge Zoelva and Judge Maria. However, in 2015, there was a discourse to revise Law on International Treaties by resolving it with national laws and Constitutional Court decisions,(Sinaga & Claudia, 2022) but Law on International

Treaties has not been revised since then. Constitutional Court Decision Number 13/PUU-XVI/2018 created new parameters, namely that the ratification of international treaties can be declared unconstitutional if it contradicts the principles of independence, lasting peace, and social justice.(Indonesia For Global Justice, 2019) Thus, Constitutional Court Decision Number 33/PUU-IX/2011 shows that the Constitutional Court is authorized to examine the constitutionality of ratification of international treaties.(Saragih & Situmeang, 2022) Meanwhile, Constitutional Court Decision 13/PUU-XVI/2018 declared Article 10 of Law No. 24/2000 conditionally constitutional, which widened the provisions regarding which types of treaties are included as treaties whose ratification must be carried out through a Presidential Decree after the Court.

Furthermore, the authority of the Constitutional Court to examine the law on ratification of international agreements in Indonesia creates problems and paradoxes. First, because the constitutional review of international treaties is limited, especially after the Constitutional Court Decision Number 13/2018, the Constitutional Court is only authorized to review international agreements ratified by *undang-undang*. The Court does not have the authority to review international treaties ratified by Presidential Regulation. Second, if the Constitutional Court ended up cancelling a ratification law because it violates the 1945 Constitution, it creates a specific dilemma. In one case, Indonesia still wants to bind itself to an international agreement, but the ratification law has been annulled by the Constitutional Court. This creates legal uncertainty and possible institutional conflict between the executive and the Constitutional Court. Conversely, if a ratification law is annulled by the Constitutional Court and the government complies with the decision by withdrawing from the treaty, problems might happen because the state itself has previously approved and consented to be bound to an international treaty. If Indonesia binds itself to a treaty but then withdraws from the treaty due to a Constitutional Court decision, this can damage Indonesia's reputation in the eyes of the international community. This shows that there is still a gap in this issue that must be fixed immediately. For this reason, an alternative mechanism is needed as a preventive measure so that there is no legal uncertainty in the ratification of an international treaty.

2. The Authority of the Constitutional Council in Reviewing the Constitutionality of International Treaties in France

France recognizes the primacy of international law, in which ratified international treaties hold superior position compared to regular acts.(Savitri, 2019) Hierarchically, according to Article 55 of the French Constitution, international treaties are above national regular acts but below the Constitution. The purpose of this principle is to ensure that national laws are compatible with international treaty, and to uphold the international law principle of *pacta sunt servanda*, im which international treaties in force are binding upon the parties and must be upheld by them in good faith. According to Article 46 (1) of the Vienna Convention on the Law of Treaties 1969, the incompatibility of international treaties with national laws cannot be used as an excuse to invalidate their consent to be bound with international treaties and their obligations, unless such incompatibility was manifest and concerned a rule of its internal law of fundamental importance.(Setyaningsih Suwardi & Ida Kurnia, 2019)

In France, the constitutional review of international treaties and regular acts is carried out by the Constitutional Council (*Conseil Constitutionnel)* in accordance to Chapter VII of the French 1958 Constitution (*Constitution francaise du 4 octobre*

1958). The Constitutional Council are composed of nine members, all of them are appointed for only one term which lasts for nine years. In terms of membership about 3 members of the Constitutional Council are appointed by the President of the Republic (executive), 3 members are appointed by the President of the National Assembly (lower house legislature) and 3 members are appointed by the President of the Senate (upper house legislature). Apart from these nine members, ex-Presidents of the Republic are ex-officio lifetime members of the Constitutional Court. In comparison, the composition of Constitutional Court membership in Indonesia is 3 judges are appointed by the President (executive), 3 judges are appointed by the People's Representative Council (legislative) and 3 judges are appointed by the Supreme Court (judiciary).

In addition to overseeing the electoral process and ensuring the validity of referendums, the Constitutional Council has the power to declare that a law violates the French Constitution or the constitutional principles enshrined in the Constitution and the 1789 Declaration of the Rights of Man and Citizen (*Declaration des droit l'homme et du citoyen*). The Constitutional Council can review ordinary laws (*lois ordinaires*), and their decision are final cannot be appealed. Not everyone have the authority to refer to the Constitutional Council, Only the President, Prime Minister, President of the National Assembly, President of the Senate, at least 60 members of the National Assembly, or at least 60 members of the Senate can refer to the Constitutional Council to examine the constitutionality of the law before it is enacted. This is different in Indonesia, where the parties entitled to apply for judicial review in the Constitutional Court are much broader, namely individuals, adat communities, public or private legal entities, or state institutions who considers that the enactment of a law violates their constitutional rights. Whereas in France ordinary people cannot refer to the Constitutional Council regarding the constitutionality of a proposed law.

The mechanism for reviewing the constitutionality of laws is different in France and Indonesia. Constitutional review in Indonesia is conducted a *posteriori* or at any time after promulgation. In contrast, constitutional review in France is generally conducted a *priori* or before the law is enacted(Huda et al., 2021), thus it was more properly called as judicial preview. Once the law is promulgated, it is considered constitutional. It cannot be challenged for its constitutionality by any court, even if it has not been previously submitted to the Constitutional Council.(Troper, 2003) However, this provision was amended following the 2008 amendments to the French Constitution, which allows for *a posteriori* review of the constitutionality of laws by the Constitutional Council following *referral* by the *Cour de cassation*, the head of the civil, criminal, commercial, and social courts, and the *Conseil d'Etat*, the head of the administrative courts.

The procedure for judicial preview of international agreements in France is similar to that of ordinary laws. Generally, before ratifying an international treaty, the government or parliament must apply to the Constitutional Council for a review to determine whether or not the treaty is unconstitutional. The Constitutional Council can cancel the ratification process if the international treaty is considered as unconstitutional(Huda et al., 2021). If the Constitutional Council declares an international treaty as unconstitutional, then the ratification of such treaty can only occur after an amendment to the Constitution. However, in practice, the judicial preview of international treaties under Article 54 is rarely conducted before the ratification of the 1992 *Maastricht Treaty*(Susan Wright, 1994).

The *Maastricht Treaty,* officially known as the *Treaty on the European Union*, established the *European Union* (EU), which set a new stage in the development of European supranational integration(Lawton, 2024). It replaced the *European Economic Community* (EEC) with the EU, strengthened the European Parliament, gave EU member states the right to vote, and established the *European Monetary Union* (EMU), which would start the process to unify European currencies(Warlouzet, 2022). However, the obligations from the signing of the *Maastricht Treaty* itself may be contradictionary to the French Constitution, thus the President then referred to the Constitutional Council(Stone, 1993). The Constitutional Council, in Decision No 92-308 DC on 9 April 1992, declared that the *Maastricht Treaty* was unconstitutional, thus authorization for ratification of the Maastricht Treaty cannot be made without prior amendment to the Constitution.

In the decision, the Constitutional Council sought to find a balance between the concept of national sovereignty and the reality of international relations, all of which are necessary for the functioning of a state. Because Article 54 itself, although providing for the possibility of constitutional restrictions on international treaties, does not provide criteria for the interpretation of constitutionality, thus the practice is left to jurisprudence (Susan Wright, 1994). On the national side, the Constitutional Council's decision is based on the 1958 Constitution, particularly in the Preamble, which references the Preamble of the 1946 Constitution and the 1789 Declaration. National sovereignty is vested in the people, as found in Article 3 of the 1789 Declaration and Article 3 of the 1958 Constitution. On the international side, the Constitutional Council also refers to the principles contained in Paragraphs 14 and 15 of the Preamble of the 1946 Constitution and Article 53 of the 1958 Constitution. The conflict between treaties and national sovereignty can be tolerated as long as four conditions are met, namely:

a. The principle of reciprocity in the limitation of sovereignty, France cannot be the only party whose sovereignty is undermined on the international stage;
b. The principle of conformity with the law means that the President cannot override the legislature in ratifying international treaties;
c. The principle of constitutionality, no clauses that contradict the Constitution, the protection of human rights must be guaranteed;
d. The principle of sovereignty, no clauses conflict with the "essential conditions for the exercise of national sovereignty."(Susan Wright, 1994)

The Constitutional Council's decision on the Maastricht Treaty was the first time that ratification of an international treaty in France required a constitutional amendment (Neuman, 2012). The main point in the ratification of the Maastricht Treaty was the issue of state *sovereignty*. Usually, the constitutionality of international treaties is reviewed because they may contradict the principle of national sovereignty according to Article 3 of the French Constitution (Troper, 2003). There are three parameters determining whether an international treaty violates national sovereignty by the Constitutional Council, namely the state's obligation to guarantee the institutions of the Republic, to ensure the survival of the nation and state, and to ensure guarantees for the rights and freedoms of its citizens (*Decision no. 91-294 DC du 25 julliet 1991*, 1991). Luchaire, as quoted by Wright, stated that the Constitutional Council does not consider sovereignty as an inviolable norm but as a set of powers, some of which can be transferred to international organizations (Susan Wright, 1994). In examining Maastricht Treaty, the Constitutional Council still considers whether the impact of the transfer of state authority to international organizations conflicts with the

essential conditions for exercising national sovereignty (Neuman, 2012). Not every transfers of policy-making powers to international organizations are prohibited as long as they do not conflict with core components for national sovereignty (Neuman, 2012).

Some provisions of the Maastricht Treaty contradicts with the conception of national sovereignty found in the French Constitution(Boyron, 1993), because it changes the parameters of national sovereignty. Several aspects of the Maastricht Treaty are considered contrary to national sovereignty in the Constitution, namely the right for all EU citizens to participate in municipal elections, the proposed creation of the EMU weakens state sovereignty over monetary policy because it removes the authority of national governments to determine national currencies, change interest rates and deficit spending (Lewis-Beck & Morey, 2007), and the authority for the EU Council in approving visa requirements for non-EU citizens.

In terms of monetary policy, there are three stages for the adoption of a common currency (Euro) established through EMU. In the third stage, each country's currency will be replaced by a common currency, where the *European Central Bank* supervises monetary policy. The Constitutional Council considers that this stage will eliminate the country's sovereignty over its monetary policy, which is essential in the exercise of national sovereignty, making it unconstitutional (Neuman, 2012). Regarding visa and immigration policy, third-country nationals must obtain a visa before crossing EU borders, in which initially EU Council determined the joint visa provision by unanimity. However, in 1996, the joint visa policy is later determined by a majority vote of the EU Council. The Constitutional Council considers that changing visa and immigration policy from unanimity to majority vote poses too much of a significant a risk to national sovereignty (Neuman, 2012).

In France, there are two scenarios regarding the outcome of a ruling on the constitutionality of an international treaty. If the international treaty is deemed constitutional, then the President can sign the ratification law (John Bell, 2017). However, if the international treaty is found to be unconstitutional, it generally requires a separate constitutional amendment process, either through an absolute majority (two-thirds vote) in a joint National Assembly and Senate session or through a referendum. When international agreements relating to international organizations is found to have clauses that conflict with the Constitution or threaten the exercise of state sovereignty, a constitutional amendment is required to ratify them (*Decision 92-308 DC of April 1992*, 1992). This provision exists because ultimately the state's sovereignty rests with the people and is exercised through its representatives (parliament) and referendums, in accordance to the Article 3 of the French Constitution. Thus, the decisions of the Constitutional Council generally do not change French foreign policy but tend to change internal political dynamics (John Bell, 2017).

Although the Constitutional Council has declared the *Maastricht Treaty* unconstitutional so that it cannot be ratified without a constitutional amendment, it has also provided opening regarding how its decision can be implemented (Stone, 1993). This paved the way for the French government to amend the Constitution through a referendum for ratification of the Maastricht Treaty, with the process of amendment approved by parliament and the referendum on the Maastricht Treaty succeding, albeit narrowly, by 51.04% (Warlouzet, 2022). Amendments to the French Constitution were then made to accommodate the *Maastricht Treaty* by amending the provisions of Article 88 and adding several articles that accommodate the French Republic's special bound to the EU. Although France also places the Constitution in the highest hierarchy,

in practice, when there is a conflict between the Maastricht Treaty and the Constitution, it is the Constitution that is amended, not international treaties, so it cannot be said that the Constitution has primacy over international treaties. (Traser et al., 2020).

CONCLUSION

In Indonesia, the authority of the Constitutional Court to constitutionally review international treaties is not explicitly found in regulations, but in Decision Number 33/PUU-IX/2011. The issue of international treaty seems too focused on executive and legislative and barely leaves any room for the judiciary. This results in possible conflicts between international treaties and the norms found in *Pancasila* and the 1945 Constitution. Although the jurisprudence allows the Constitutional Court to constitutionally review ratification acts, this does not solve the problem entirely. The difficulty lies in the fact that if an international treaty has been ratified and entered into force, but later the Constitutional Court annuls the ratification law, which creates numerous legal problems and possibly harms Indonesia's international relations.

France explicitly allows for a judicial review *of* international treaties as in Article 54 of the French Constitution. In the context of the judicial review of the *Maastricht Treaty*, the Constitutional Council found that the *Maastricht Treaty* contradicted France's 1958 Constitution, particularly concerning national sovereignty in Article 3. The Council considered that the transfer of powers to international organizations is permissible if it does not conflict with the essential condition of the exercise of national sovereignty. However, in France, if there is a conflict between an international treaty and the French Constitution, the Constitution is usually amended instead so that the international treaty is in accordance with the French Constitution.

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