International and ASEAN Law in the ASEAN 10 National Jurisdictions:
The Reception of International Law in the Legal System of Indonesia

Indonesia's Legal System and Treaty Law and Practice: Implementing ASEAN Obligations

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A. What ASEAN Means to Indonesia and What Needs to be Addressed

To understand what ASEAN means to Indonesia, one should go back to the period prior to 1967 to get a sense of the political and foreign relations situation in Southeast Asia. After centuries of living under colonisation, Indonesia finally declared its independence in 1945. As a newly independent country, Indonesia was very protective of its territorial integrity and very wary of its still western-colonised neighbours. The then President Soekarno, with the support of the now-defunct Indonesian Communist Party, was convinced that the formation of Malaysia was a form of neo-colonisation that can threaten Indonesia's stability. One of the means employed by Indonesia to delay the formation of the Federation of Malaysia was through participation in the Greater Malaya Confederation (Maphilindo, 1963), a non-political confederation consisting of Malaya, Philippines and Indonesia.

When this failed and Malaysia was formally established in 16 September 1963, Indonesia adopted a policy of Konfrontasi (confrontation) against Malaysia. The Konfrontasi was the manifestation of Indonesia's political opposition as well as armed opposition toward Malaysia. In January 1965, Indonesia unilaterally 'withdrew' its membership with the United Nations as a protest to the appointment of Malaysia to the Security Council. In addition to the tension between Indonesia and Malaysia, there were also a brewing tension between Malaysia and the Philippines over the sovereignty of Sabah and the concern of imminent penetration of communism to the rest of Southeast Asia. Indonesia's Konfrontasi policy lasted until late 1965 when Soeharto staged a coup and ousted Soekarno and his communist party. Even though Soeharto ended the Konfrontasi policy in 1966, foreign relations among the Southeast Asian States were still tense and coloured by distrust.

Reflecting on its experience with the Konfrontasi policy, Indonesia realised that antagonising its neighbours would only increase external interferences in the region. The new regime under Soeharto decided that to protect Indonesia's interest from the impacts of the Cold War, a solid

geopolitical environment in the region was needed. Soeharto highlighted this point in his presidential speech before the House of Representatives in August 1966:

> If an integrated Southeast Asia can be achieved, this region will be able to meet challenges, intervention from outside, both economically and militarily. A cooperative Southeast Asia… will be a very strong fortress and base to meet imperialism and colonialism in whatever form and from whatever direction it may come...

The speech was a significant indicator of Indonesia's new 'free and active' foreign policy with a focus on engaging in and maintaining political cooperation with its immediate neighbours to develop regional resilience.

On 8 August 1967, Indonesia together with Malaysia, the Philippines, Singapore, and Thailand established ASEAN (Association of Southeast Asian Nations). ASEAN goals were to accelerate economic growth and to promote regional peace and stability in the region. By 1969, Indonesia, Malaysia, the Philippines, and Singapore finally managed to mend their differences and normalise their foreign relations marking. The existence of ASEAN also helped to neutralise palpable threats of communism. ASEAN was considered as a symbol of peace and stability in the region. In 1973, Indonesian People's Assembly formally included the stability of Southeast Asia as a cornerstone of Indonesia's 'free and active' foreign policy.

In the years leading to the first ASEAN Summit (1976), ASEAN functioned more as a dialogue forum to stabilise the political tensions among its members. All of ASEAN decisions pertaining to political-security issued during this period were made through the adoption of non-binding instruments such as joint statements and declarations. Agreements adopted by ASEAN in this period only pertained to technical matters and most of the times did not even create obligations on the part of the member States. With the success of ASEAN in lessening the regional political tension, in 1976 ASEAN started to focus on regional economic cooperation and the process to become 'regional organisation proper'. Unlike in political-security matters, ASEAN member States are more comfortable in entering into economic agreements which give rise to binding obligations. However, it was not until the adoption of the ASEAN Charter in 2007 that ASEAN finally gained a legal personality as a full fledge subject of international law. This not only strengthen and ensure the implementation of existing commitments in member States' domestic legal setting but also provide a clearer legal framework for the conducts of Member States and ASEAN organs.

In light of these recent developments, the need for proper domestic implementation of ASEAN's commitments by member States has become imperative. In this regard, there are several areas that need to be observed and analysed in measuring Indonesia's capacity to implement its ASEAN obligations domestically. The first area is the effectiveness of Indonesia's legal system in implementing international law. Issues pertinent to this area are, among others, whether Indonesia's legal system accommodative toward international law, the status of international law under Indonesia's legal system, whether Indonesian Courts are equipped in handling claims related to violations of Indonesia's obligations under international law, etc. Other aspects, such as historical, political and cultural, should also be considered to better explain the dynamics of Indonesia's legal system.

The second area is Indonesia's practice in implementing its ASEAN commitments in the domestic legal setting. Does Indonesia treat its ASEAN obligations at the national level differently than its other obligations under international law? Does Indonesia have specific procedures in implementing ASEAN agreements and commitments? How does Indonesia implement certain ASEAN economic agreements? What are the hurdles in implementing ASEAN's instruments in Indonesia? These are some of the questions that need to be addressed to assess Indonesia's practice in implementing its ASEAN commitments. Additionally, it is also important to analyse Indonesia's practice in implementing ASEAN instruments in light of the growing concern that ASEAN will no longer be a cornerstone of Indonesia's foreign policy.

B. Implementation of International Law in Indonesia's Domestic Legal Setting

1. Status of International Law in Indonesia's Legal System

Indonesia is still grappling with the problem of domestic implementation of international law, partly because of the lack of clarity of the status of international law in its domestic legal system. Strong proponents of civil law system in Indonesia argue that international law can be directly applicable in Indonesia; but many others are of the opinion that in order to be applicable international law need to be translated into national law. Indonesia's Constitution is silent on this issue. Apart from Article 11, which grants power to the President to conclude international agreements, the Constitution does not mention the status of international law in domestic legal setting or in the hierarchy of sources of law in Indonesia. It is also silent on the issue of implementation of international law in Indonesia.

Another issue in relation to the implementation of international law in Indonesia is the inconsistency of existing domestic law with those international obligations. For instance, after Indonesia ratified the United Nations Conventions on Law of the Sea (UNCLOS) Indonesia has

yet to amend its Penal Code to include the definition of and application of the prohibition of piracy under Articles 100 – 101 UNCLOS. Another example is on the definition and criminalisation of torture. Indonesia is a party to both the International Covenant of Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), both of which require State Parties to criminalise the act of torture. Although Indonesia has defined the act of torture, it has yet to criminalise the act. These instances indicate a problem of discord between Indonesia's international obligations and domestic legislation.

2. Harmonisation of Domestic Legislation

Indonesia's legal framework does not expressly stipulate the roles of the executive and legislative branches in the implementation of international law. Technically, the executive and legislative branches can play active roles to harmonise Indonesia's international obligations with domestic legislation, making it possible for effective implementation of international law by way of legislation. Unfortunately, the Parliament has not been very active in proposing new laws or in amending existing laws to comply with Indonesia's international obligations. Most of the time, such proposal has always been initiated by the executive branch. The lack of initiative from the legislative branch may be due to the fact that most legislatures do not have proper legal trainings, and are not familiar with international law. Another challenge in the harmonisation of law in Indonesia is the lack of consistency in identifying existing legislation that need to be amended in order to bring Indonesia's law in compliance with the international treaties that Indonesia intends to ratify or accede.

Furthermore, there is a lack of coordination between the various ministerial bodies in implementing Indonesia's international obligations, especially in the day-to-day monitoring of the implementation of Indonesia's international obligations. Although with regards to some international agreements, proper monitoring mechanism has been established; this is not the case for most international agreements. For example, after accession to the ICCPR, Indonesia has yet to establish proper monitoring mechanisms, other than submitting periodical reports to the CCPR Committee. This is a stark contrast with the implementation of United Nations Convention again Corruption (UNCAC), where the Government has established a team consisted of various line ministries and other governmental bodies with clear functions to implement UNCAC, including a monitoring and evaluation mechanism.

3. Implementation of ASEAN Instruments in Indonesia

There is no requirement for ASEAN Member States to grant special status to ASEAN agreements or commitments made under ASEAN framework. Indonesia thus treats ASEAN agreements the same as it treats other international agreements to which it is a party. In compliance with Article 11 of the Constitution, agreements such as the ASEAN Charter and ASEAN Convention on Counter Terrorism were ratified by Parliament's Acts. In practice, however, Indonesia tends to ratify most of the ASEAN agreements by Presidential Regulations instead of by Parliament's Act. This is done despite the fact that some of the ASEAN instruments that Indonesia has ratified affected the State's Budget and most importantly, they require amendment of existing Laws and/or enactment of new Laws in order to comply with the obligations under such ASEAN instruments. It might be the case that the Government opted to ratify most of ASEAN agreements by executive acts to avoid the long process and procedure of having an Act passed by the Parliament.

To add confusion to the problem, there is no clear practice on how Indonesia implements ASEAN's declarations and plans of action. ASEAN member States are more comfortable in making commitments through the adoption of non-binding instruments such as declarations, memorandum of understandings, joint statements, etc. For instance, ASEAN Economic Community Blueprint, which obliged each member States to enact an e-commerce law, was adopted through a Declaration. This does not prevent Indonesia from enacting an e-commerce Law on 2010 which is consistent with the Blueprint. However, nowhere in the law did it mention the Blueprint as a consideration in enacting the law. This indicates that Indonesia's practice in implementing obligations arising from ASEAN soft law instruments is still unclear.

4. The Role of the Judiciary in Implementing International Law and ASEAN Instruments

A possible way to implement international law in Indonesia, amid the debates on the status of international law in Indonesia's legal system, is through the dynamic role of the judiciary. The judiciary have a wide discretion in applying or resorting to other sources of law, even the ones beyond national law, and especially in situations where the law is unclear or where there is an absence of law. In this case the judge has the obligation to find the applicable law, and is allowed to turn to international law.

Moreover, Indonesian legal system does not bar individuals or groups of individuals from bringing a claim and seek reparation before a domestic court against the Government for failure to comply with Indonesia's international obligations. This claim can be brought before a court notwithstanding the absence of an implementing legislation. This is in line with the principle of law that a judge cannot dismiss a case based on the absence of the law (or because

of lack of implementing legislation) or obscured law. Indonesian Human Rights Law also makes it possible for individuals to file complaints before a domestic or an international court for violations of human rights prescribed both under domestic and international law. The Law allows judges to apply international agreements in which Indonesia is a party to. The Human Rights Law confirms that any international obligations that Indonesia has accepted shall be considered as part of domestic law.

Unfortunately, to the knowledge of the authors, the judiciary has yet to play an active role in applying international law and in filling the lacunae in domestic law on the status and implementation of international law. In the last twenty years, there have been efforts to bring claims based on violations of international law to domestic courts. However, the courts rejected almost all of those claims on the basis of procedural obstacles. There are of course courts that apply international law in their considerations, but these courts are specialised courts, such as the human rights court or the constitutional court.

The lack of application of international law by the judiciary branch in Indonesia can be attributed to several reasons. First, judges are not familiar with and uncomfortable in applying international law. Second, most judges are of the opinion (inaccurately) that national law reigns supreme over international law; thus they cannot apply international law that has not been translated into domestic law.