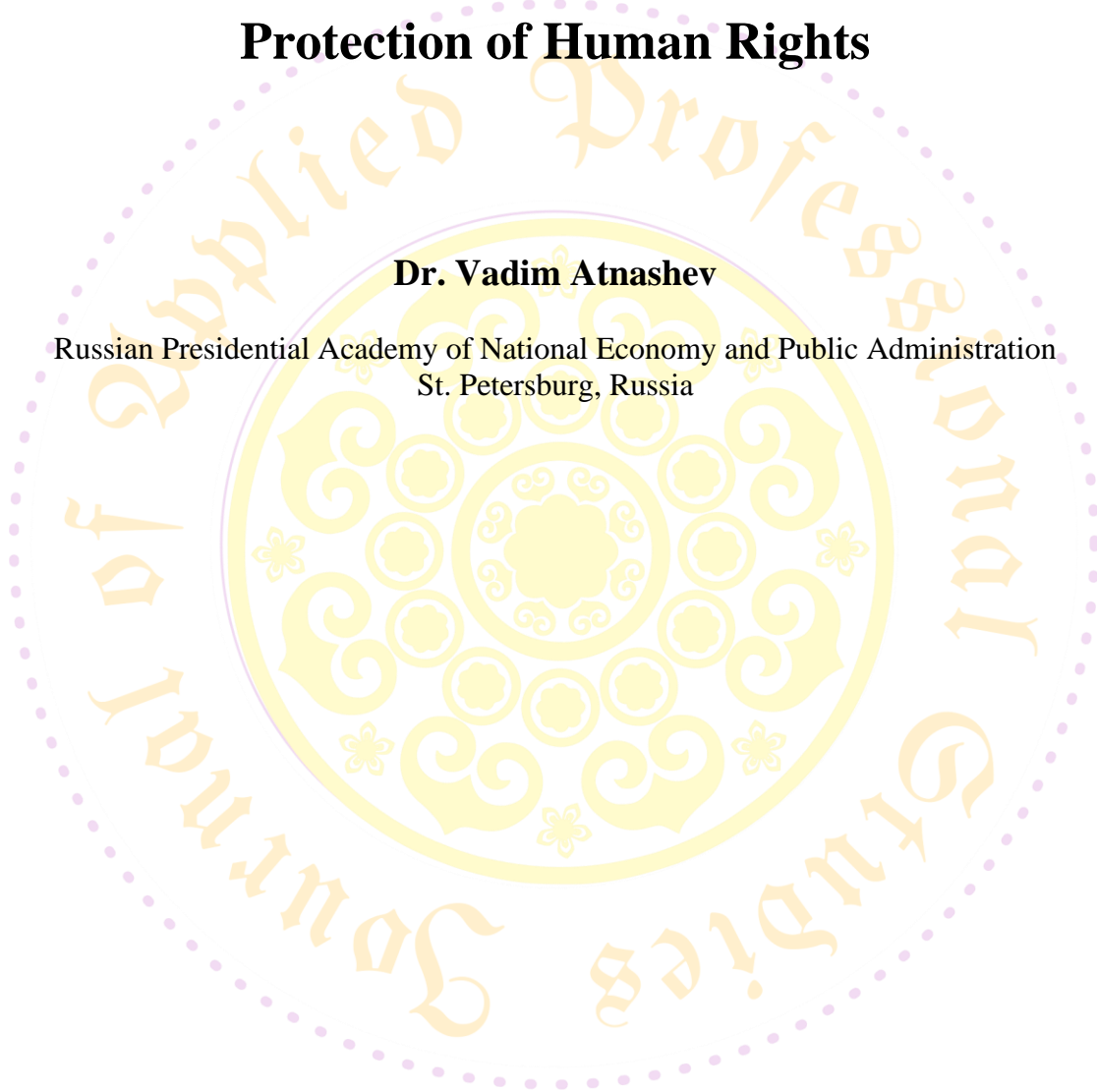


Nusantara Countries and the Constitutional Protection of Human Rights

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Abstract

This article compares the corresponding constitutional norms of the countries with the international standards. Its focus is on personal rights as a category placed as separate from basic laws (with the exception of few provisions).

From the end of 20th century, international law norms have been gradually implemented in the Nusantara countries. Recent amendments to the Indonesia 1945 Constitution thereupon are especially taken into consideration. Meanwhile, none of these constitutions still declares the right on life or abolishes the death penalty. Only after 2000, when the Second Amendment to the Constitution of Indonesia was adopted, everyone is entitled to the right to life (article 28A).

In the multi-ethnic and multi-confessional states of South East Asia with active migration processes, legal aspects of citizenship play a very important role, so the author doesn't pass the issue over. Finally, the paper examines the participation of the Nusantara countries in the seven core international human rights treaties. Incompleteness of the system of rights and duties often shows up in violations of the constitutional rights and freedoms in each Southeast Asian state.

Keywords: Constitution, human rights, South East Asia, Migration, Nusantara.

Introduction

The presented paper is based on the analysis of three constitutions in respect of human rights in the main Nusantara countries – Indonesia, Malaysia and Singapore. The articles concerning personal rights are usually placed into separate parts of the constitutions under review, though some provisions can also be given in other different parts. Many international legal norms have been gradually incorporated into the domestic law of all Nusantara countries from the end of 20th century, though in the Philippines the process started earlier.

In the constitutions of the Nusantara countries, the principle of equality is the most important constitutional principle of the personal legal status. It corresponds to the democratic principle of equal opportunities and has undoubtedly democratic content, because it prevents the various forms of subordination of some groups by others. However, the concept of equality obviously does not apply to many other human rights aspects regulated by international standards (political convictions, religious and other opinions, property status, etc.).

Besides, unlike constitutions of many countries, both Malaysian and Singapore constitutions do not fix the recognition of the supreme value of human life. There the principle of equality is interpreted *prima facie* as the equality of citizens before the law.

Thus Article 8 of the Constitution of Malaysia affirms the equality of all persons before the law and entitlement to the equal protection of the law. “There shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law” (clause 2). The next Article 9 states that no citizen shall be banished or excluded from the Federation.

Worthy of notice that the Constitution of Singapore 1963 has a separate article entitled “Equality”. It is similar to the provisions of the Malaysian constitution, but contents a clause that there shall be no discrimination in the appointment to any office or employment in the public (§2 of Article 12). Interestingly, the Singapore Constitution specially stipulates the position of Malays who are considered as a minority community.

At the same time, for an effective protection of the constitutional rights and freedoms the international law norms must be transformed into national legislation in accordance with international obligations assumed by the states ratified the core international treaties on human rights. The participation (non-participation) of Indonesia, Malaysia and Singapore in the conventions is shown in the table 1 (see below). However, in the Nusantara region all seven treaties were ratified by the Philippines only. Even there, as well as in the whole Southeast Asia, the death penalty is not forbidden.

Naturally, the real protection of human rights in Indonesia and Malaysia is not possible without their participation in the Convention against Torture. In view of the fact that most foreign workers in the region work in Malaysia and Singapore, these states in the first place should become parties to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

Human Rights in the Constitution of Indonesia

The Constitution of Indonesia was adopted in 1945 and contents 5 short chapters (X-XIV) concerning citizen rights and freedoms: “Citizens”, “Religion”, “Defense”, “Education”, “Social Welfare”. It should be noted that the initial project of constitution presumed observance of *shariah* law and compulsory election of a Muslim as the president of Indonesia. However, the provisions were not adopted.

Below we consider the rights and freedoms guaranteed by the Second Amendment of 18 August 2000. The amended “Section XA: Fundamental Human Rights” begins with Article 28A. Its content is really crucial: “Each person has the right to live and the right to defend his life and existence”. The legislators finally paid attention to and guaranteed the “other similar freedoms”. It was also logical that Second Amendment added the following definition in Chapter X “Citizens and Residents”: “residents include citizens of Indonesia and foreigners who reside in Indonesia” (clause 2, article 26).

The “old” Xth chapter of the Constitution (articles 26, 27 and 28) covers issues of citizenship and rights of citizens. The Article 26 stipulates that citizens must be Indonesians by birth or other nationals who acquired the citizenship by law. Unlike Malaysia and Singapore, the Constitution of Indonesia does not fix the procedure of acquisition or termination of citizenship. In the additional clause included in 2000, there is provision that issues of the citizenship and residence in Indonesia are regulated by law (clause 3, article 26).

Article 27 declares equality of all citizens before the law and state (the defense of which is civic duty) as well as their right to an occupation and “an existence proper for a human being”, though it is far from “an adequate standard of living” (ICESCR, Article 11 (<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>)). The next, 28th article guarantees the freedom of association and assembly, freedom of speech and press and “other similar freedoms”. By implication of the Constitution 1945, non-citizens of Indonesia did not possess the above mentioned rights as well as the right to education.

Meanwhile, Article 29 (chapter XI “Religion”) initially stipulated that the state basing on belief in the unique God “shall guarantee freedom to all residents to embrace their respective religion and to perform their religious duties”, that is the freedom applies not only to the citizens but to everybody who resides in Indonesia.

According to the Second Amendment, the basic human rights that can not be limited under any circumstances are: “the rights to life, freedom from torture, freedom of thought and conscience, freedom of religion, freedom from enslavement, recognition as a person before the law, and the right not to be tried under a law with retrospective effect” (Art. 28I). Nevertheless, other constitutions of Nusantara countries do not declare some of the rights mentioned.

The following definition seems to be apt in Article 28I: “Every person shall have the right to be free from discriminative treatment based upon any grounds whatsoever and shall have the right to protection from such discriminative treatment” (sub-clause 2). A special provision relates to children’s rights: “Every child shall have the right to live, to grow and to develop, and shall have the right to protection from violence and discrimination” (sub-clause 1 of Art. 28B). Besides, Article 28E also guarantees many personal rights some of which are mentioned in other articles:

1. “Every person shall be free to embrace and to practice the religion of his/her choice, to choose one's education, to choose one's employment, to choose one's citizenship, and to choose one's place of residence within the state territory, to leave it and to subsequently return to it.
2. Every person shall have the right to the freedom to hold beliefs (*kepercayaan*), and to express his/her views and thoughts, in accordance with his/her conscience.
3. Every person shall have the right to the freedom to associate, to assemble and to express opinions”.

For comparison, according to the 1966 International Covenant on Civil and Political Rights, “No one shall be arbitrarily deprived of the right to enter his own country” (sub-section 4 of Article 12).

Article 28G declares the right to protection of self, family, honor, dignity, and property, the right to feel secure against and receive protection from the threats. “Every person shall have the right to be free from torture or inhuman and degrading treatment, and shall have the right to obtain political asylum from another country”. The latter right regarding asylum is uncommon disposition for many developing countries. Though, it corresponds to the international legal norms such as the 1967 UN Declaration on Territorial Asylum and the Universal Declaration of Human Rights.

It is important that the protection, advancement, upholding and fulfillment of human rights have finally been recognized “the responsibility of the state, especially the government... For the purpose of upholding and protecting human rights in accordance with the principle of a democratic and law-based state, the implementation of human rights shall be guaranteed, regulated and set forth in laws and regulations” (28I). It is worthy to note that the modern Indonesia declares itself as the largest democracy in Asia, after India, so reference to “the principle of a democratic and law-based state” is absolutely logical.

As for the social rights and freedoms, there are guarantees of the right to work, to receive fair and proper recompense and treatment in employment, as well as the right to obtain equal opportunities in government (Art. 28D), the right to self-realization through the fulfillment of one’s basic needs, the right to education and to partake in the benefits of science and technology, art and culture (Art. 28C, clause 1). Besides, the assertion of the right “to self-improvement by way of a collective struggle” for one’s rights contributes to the formation of political and social identity of Indonesians (Art. 28C, clause 2).

The Second Amendment also allocates an article concerning the information right: everyone has the right to communicate and obtain information “for the purpose of the development of his/her self and social environment, and shall have the right to seek, obtain, possess, store, process and convey information by employing all available types of channels” (Art. 28F).

Another article (Art. 28H) declares that each person is entitled to protection of self, his family, honor, dignity and his property and has the right to feel secure from fear to do or not to do something. The last clause of the same article emphasizes the right to own private property and “such ownership shall not be appropriated arbitrarily by whomsoever” (Art. 28H, clause 4). Meanwhile, the “old” Section XIV “National Economy and Social Welfare” (adopted in 1945) still declares the right of “impoverished persons and abandoned children” to be taken care of by the state. According to the Street Children Statistics 2007 of UNICEF, there were over 170,000 street children in Indonesia (Irwanto P. et al (1999). Situation of Street Children in 12 Cities in Indonesia, Monograph Report for the Asian Development Bank, TA No. 3043 INO. Cited in Pinheiro, P. (2007), World Report on Violence Against Children, Chapter 7. P. 295).

The cultural identities and rights of traditional communities shall be respected according to the Article 28I (clause 3), it must include indigenous peoples like in the Philippines Constitution. Besides rights, the Constitution of Indonesia also allocates duties of the citizens and residents of Indonesia. Clause 2 of Article 26 defines: “Residents consist of Indonesian citizens and foreigners residing in Indonesia”. In compliance with democratic principles, every person in the orderly life of the community, nation and state must respect the human rights of others. In exercising his/her rights and freedoms, he/she has the duty to accept the restrictions established by law also for the

purpose of “satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society” (Art. 28J).

Up to 2000, the Constitution declared only the duty of all citizens "to hold without exemption the law and the government in esteem" (clause 1, Art. 27), as well as the right and the duty of each citizen to “participate in the defense of the nation” (clause 1, Art. 30). Meanwhile, the modified by the Second Amendment clause 3 of Article 27 is almost the same as the following provision of Article 30 (clause 1): “Each citizen has the right and the duty to participate in the defense and security of the state” (the words “and security” were added in 2000).

After adoption of the Forth Amendment to the Constitution (11th August 2002), the citizens not only have the right to education, they are obliged to follow an elementary education but the government has the duty to fund this (Art. 31, clause2). At least twenty percent of the state’s and regional budgets is to be allocated to the needs of the education system (Art. 31). As far as there is still a high percentage of illiterate population in Indonesia, the provisions are important and progressive and obviously should help to reduce the number of illiterate people.

Implementing national education system should enhance “religious and pious feelings as well as moral excellence with a view to upgrading national life" (clause 3 of Art. 31). Thus, in recent years, there has been a positive movement towards the democratization of many social life aspects in Indonesia.

Human Rights in the Constitution of Malaysia

The Constitution of Malaysia 1963 in force is one of the most voluminous and detailed not only in Asia, but all over the modern world. Part II of the Constitution, which has the name "Fundamental freedoms", includes 9 articles (Art. 5-13). They reflect main types of the rights of man and citizen - the personal, social, economic and political rights.

According to Article 5 concerning personal liberty, “no person shall be deprived of his life or personal liberty otherwise save in accordance with law”. If the High court receives a complaint that a person is being unlawfully detained, the court must consider it – when establishes the illegality of the detention, it shall order to produce the detainee before the court and release him (clause 2, Art. 5). It is worthy to note that two clauses of the same article are not applied to “enemy aliens” (clause 3 and clause 4, Art. 5): (3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice. (4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority:

Thereby, the right to *habeas corpus* and the said provisions shall apply to those aliens who are not considered "enemy" ones. The Constitution further provides guarantees against criminal laws in force with retroactive effect, and repeated trials (Article 7): (1) No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.

(2) A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted.

The mentioned provision corresponds to the “ne bis in idem” principle enshrined in fundamental international conventions such as the International Covenant on Civil and Political Rights (its Article 14.7). Article 6 of the Constitution prohibited slavery and all forms of forced labor, though “Parliament may by law provide for compulsory service for national purposes”. Meanwhile, according to Act A1130, section 2, in force from 28.09.2001, the end of the cited article was changed as follows: “(3) Work or service required from any person as a consequence of a conviction or a finding of guilt in a court of law shall not be taken to be forced labor within the meaning of this Article, provided that such work or service is carried out under the supervision and control of a public authority”.

The replaced clause defined such work just as “incidental to the serving of a sentence of imprisonment imposed by a court”. Thus, now all kinds of works imposed by a court should not be considered forced labor.

Article 9 of the Constitution of Malaysia affirms the right of every citizen to move freely within throughout the Federation and to reside in any part thereof (clause 2). This is a natural right and inalienable freedom, which concerns to the basic civil rights and freedoms.

The reflection of such understanding and the inclusion of Article 9 in the part II - "Fundamental Liberties" is advantage of the Constitution of Malaysia (as well as the one of Singapore). Meanwhile an amendment regarding the right in question was included in the Indian Constitution only in 1978. In the USSR, it was not at all assured, and in the modern Russia, this constitutional right is constantly violated at different authority levels. There are some interesting parallels between Russia and Indonesia, for example, such problems as corruption, xenophobia and extremism (See ATNASHEV, V.R., WARD, K., TERRORISM IN INDONESIA: INTERNATIONAL LAW AND POLITICAL ASPECTS (in Russian) // Russian Public Policy, 2013, No. 5, pp. 42-49).

In accordance with international standards, the mechanism of realization of the right to move freely and choice of residence also includes the possibility of certain restrictions. In the Constitution under review, they are given in the second clause of paragraph 2 (Art. 9): “Subject to Clause (3) and to any law relating to the security of the Federation or any part thereof, public order, public health, or the punishment of offenders.” The formulation is close to the first part of Article 16 of the Italian Constitution 1947.

Besides, paragraph 3 that was added in 1963 says: “So long as under this Constitution any other State is in a special position as compared with the States of Malaya, Parliament may by law impose restrictions... on the rights conferred by Clause (2) in respect of movement and residence”. This version of Article 9 is still in effect, particularly in relation to the states of Sabah and Sarawak which retain their respective immigration control systems.

Article 11 concerns the freedom of religion and guarantees everyone the right to profess and practice his religion and propagate it. The latter is possible subject to paragraph 4: "State law and in respect of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam". No one should be forced to pay any taxes, "the proceeds of which is specifically designed, in whole or in part, to the needs of the religion which he professes" (clause 2).

Article 11 also lists the following rights of each religious group (its definition, however, is not given):

- a. To manage its own religious affairs.
- b. To establish and maintain institutions for religious or charitable purposes.
- c. To acquire and own property and hold and administer it in accordance with law.

It is remarkable that some provisions of Article 11 coincide with the similar part in the Constitution of India 1950. Furthermore, Article 12 specifies that every religious group has "the right to establish and maintain institutions for the education of children in its own religion" without any discrimination". However, it shall be lawful for the Federation or a State to establish or maintain Islamic institutions or provide instruction in the religion of Islam and incur such expenditure as may be necessary for the purpose.

Then nobody shall be demanded "to receive instruction in or take part in any ceremony or act of worship of a religion other than his own (clauses 3 & 4). Finally, the article has a remark concerning children: "For the purposes of Clause (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian". (Remarkable that in Singapore the legal age is 21).

Regarding political rights, the Malaysian Constitution guarantees the freedoms of expression, assembly and association (Article 10). However, the freedoms are not absolute: the same article contains a verbose clause, according to which Parliament may by law establish such restrictions on these rights "as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality".

Besides, restrictions on the right to freedom of speech and expression also can be imposed to protect "the privileges of Parliament or of any Legislative Assembly or against contempt of court, defamation or incitement to any offense". And the right to form associations may be restricted by any law relating to labor or education. A separate clause provides the possibility to limit the right of citizens to form associations by any law relating to labor or education (clause 3), while in the Constitution 1957 such provision was absent.

Finally, a next amendment (clause 4, Art. 10) that was entered into force on 10th March 1971 according to Act A30, asserts the right of Parliament to pass "law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative" set or protected in accordance with several other articles of the Constitution, if such questioning does not cover implementation of such prohibiting law. The mentioned articles relate to the citizenship issues, the constitutional status of the Malay language and the special rights of Malays, as well as privileges

of the Malay rulers. It is important that the indigenous peoples of Sabah and Sarawak have the same rights and privileges as Malays.

The adoption of Law A30 on the amendment to the Constitution was caused by historical reasons: in February 1971, the state of emergency was lifted in Malaysia and the Parliament passed the respective law in order to stabilize the situation in the country. Since then, any amendments to the Constitution and legislation on the rights of ethnic minorities may be entered only with the consent of the Council of Rulers and subject to approval by both Houses of Parliament (two-thirds majority is required).

As is known, the further normal development of the Federation of Malaysia became possible largely owing to the consensus between the United Malays National Organization (UMNO) and the Malaysia Chinese Association (MCA) which represented the interests of the largest ethnic groups of Malaysia.

In this regard, it seems to be appropriate to cite the following statement of M. Mironyuk: "The existence or aggravation of ethnic and national problems causes the formation of political parties based on ethnicity" (M.G. MIRONYUK, *THE MODERN FEDERALISM: COMPARATIVE ANALYSIS* (in Russian). (Moscow, 2008), p. 117).

In the Constitution, citizenship issues are regulated mainly by Part III entitled "Citizenship" (it consists of three chapters, including 18 articles). It is important that Article 9 states that no citizen may be deported or expelled from the Federation.

One of the main factors of ethnic conflict in Malaysia of in 1950s-1960s was citizenship issue. Previously, I considered the question in several articles⁵ so I just present below some main points. ⁵ See, for example VADIM R. ATNASHEV, *REGULATION OF THE CITIZENSHIP ISSUES IN THE CONSTITUTION OF MALAYSIA // Problems of Law in the Modern Russia: Collected papers* (in Russian). (St. Petersburg, 2009), pp.9-23; *INTERNATIONAL LEGAL ASPECT OF THE CITIZENSHIP IN SINGAPORE // Problems of Law in the Modern Russia: Collected papers* (in Russian). (St. Petersburg, 2010), pp. 14-18.

On 1st February 1948, the British government announced the creation of the Federation of Malaya, restoring the privileges of the Malay sultans and the special rights of Malays. Obtaining citizenship for non-Malays was restricted. Later, in order to ease the tension between the Malay and Chinese communities (as well as reduce the influence of communist rebels on the Chinese one), British authorities amended the citizenship law which allowed about half of the Chinese population to become citizens of the Federation of Malaya.

In the independent Malaysia, bloody clashes occurred in 1969 between the left opposition and local government supporters in Perak, Penang and Selangor. Then due to outbreaks of racial violence across the country (13 May incident and others), the government declared a state of emergency. In February 1971, the state of emergency was lifted and the Parliament passed a law to amend the constitution. The amendment prohibited public discussion of the issues concerning the constitutional status of the Malay language, citizenship and special rights of Malays, while indigenous people of Sabah and Sarawak had acquired the same rights and privileges as Malays.

The Constitution and legislation on the rights of ethnic groups can be amended only with the consent of the Council of Rulers and subject to approval of the Parliament.

Nevertheless, owing to the cooperation of governments of Malaysia and Singapore, their separation took place rather peacefully in 1965, but both legislations still give careful consideration to the issues of citizenship in order to ease and prevent tension between the states. Eventually that contributed to the protection of the polyethnic rights in Malaysia and Singapore.

Conclusion

In the analyzed constitutions there is an increase of provisions on the human rights and freedoms, first of all due to the impact of international law and democratic processes. Just as Malaysia, the current government of Indonesia which is often called technocratic relies on the development of science and technology while preserving religious values and national unity and gradually has stabilized the political and economic situation in the country that until recently was on the verge of disintegration and economic collapse.

These positive changes are manifested in the legislative sphere, first of all in the amendments to the Constitution of Indonesia, especially with regard to fundamental human rights and freedoms. However, the Nusantara countries, in general, are characterized by inconsistency in constitutional provisions vis-à-vis the actual state governance. In a number of different cases, the system of rights and duties of citizens remains incomplete, that often reveals itself in disregard of the constitutional rights and freedoms.

Table 1. Participation of Indonesia, Malaysia, Singapore in the Main International Human Rights Treaties

Name of Treaty/Convention	Participation			Ratification		
	+	-	-	+	-	-
International Covenant on Civil and Political Rights (ICCPR)	+	-	-	+	-	-
International Covenant on Economic, Social, and Cultural Rights (ICESCR)	+	-	-	+	-	-
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	+	+	+	+	+	+
Convention on the Rights of the Child (CRC)	+	+	+	+	+	+
Convention on the Elimination of All Forms of Racial Discrimination (ICERD)	+	-	-	+	-	-
Convention Against Torture and Other Cruel, Inhuman or	-	-	+	-	-	+

Degrading Treatment or Punishment (CAT)						
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (MWC)	+	-	-	+	-	-

Ind. = Indonesia; Mal. = Malaysia; Sin. = Singapore

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