

Human rights provisions in Southeast Asian Constitutions

Outline of Today

As repeatedly discussed, Southeast Asian countries have particular social, cultural, economic and historical background that is quite different from West European countries, as well as the existence of law and rights in Asia is also different from Europe.

Especially, social diversity and economic backwardness are the common conditions shared by, more or less, ASEAN countries. Then, how are these social conditions reflected in Constitutions? This lecture will take right to equality, rights to liberty and social right as matter of discussion. I also refer to constitutional text of Indonesia for further discussion.

When you read Southeast Asian Constitutions, you may notice that almost all Constitutions equipped nice articles for human rights. But, at the same time, you may also find that there are many phrases saying "*in certain case, this right shall be limited.*" For example, broad exception of civil and political liberty is more rule than exception in this region. Because of religious and ethnic diversity, it is considered inevitable to give certain prestige for a part of their nationals, though constitutional guarantee for right to equality. Most of SE governments promise their people economic prosperity in order to procure a legitimacy for their (often oppressive) government. But, we should consider whether these promises are rights or mere political slogans.

1. Rights to Equality: inevitable inequality

What measures are taken to correspond domestic diversity (prominent or potential instability) ?

- (1) Giving superior status for majority group that are considered representing national identity.
--> e.g. setting national religion. In case of Indonesia: Art.29(1) the belief in "the One and Only God". -- Islamic state?
- (2) Taking special preferential measures for group that is majority but inferior in economic condition.
- (3) Giving minority groups special rights.
--> Art. 18B, 28I(3)
- (4) constitutional special protection for women
existence of unfavorable condition particular in poverty, cultural and religious traditions.

2. Civil and Political Liberty: its exception

Authoritarian (undemocratic) regime --> severely restrict political participation (especially freedom of opinion to criticize government)

- (1) combination of vague multi-interpretative constitution with oppressive regulation
e.g. previous Indonesian Constitution (article 28: The freedom to associate and to assemble, to express written and oral opinions, etc., shall be regulated by law.)
c.f. present Constitution: arts. 28E(3), 28F, and Art.28I (prohibition of retrospective law), 28J (limitation)
- (2) wide restrictive condition on a human right article

3. Social rights: is it rights?

- (1) Development in Developing countries

Combination of oppressive rule (controlling instability) and economic progress (procurement of

legitimacy)

--> restriction of political liberty (guarantee of stability) and the achievement of social, economic rights (dividend of achievement) are both sides of a coin. --> government led developmentalism

(2) Right to development

ASEAN governments --> interdependence of political rights and social rights (matter of priority)

a. opposition to aid conditionality and claim for new international economic order

b. right to development

but who have the right? -- country? society? or individuals?

(3) Characteristic of social rights

- right to demand government supplying limited financial resources (rights to social security, free education and unemployment compensation etc...)

International convention on ESC rights --> incremental realization according to capacity

(4) mode of provision

Separating social rights from other human rights articles

Provide non-binding target (government should... or state should....) --> these articles do not constitute legal entitlement immediately.

e.g. Indonesia chap.XIII on education, chap. XIV on national economy and social welfare

*Huntington

"Democracy" --> Political system within which there are free competition for vote among candidates, most influential decision makers are selected through universal franchise, equal, fair and regular election.

"authoritarianism" --> political system other than democracy. Thus "authoritarianism" includes socialist authoritarianism, anti-communist authoritarianism as well as religious authoritarianism.

Challenge of authoritarianism --> procurement of legitimacy through achievement (e.g. economic development = developmentalism, as well as security etc.). Other than achievement, nationalism and ideology can be source of legitimacy.

ハンチントン (坪郷實・中道寿一・藪野祐三訳) 『第三の波－20世紀後半の民主化』三嶺書房、1995 (Huntington, Samuel P., The Third Wave: Democratization in the Late Twentieth Century, 1991)