Exploring the Relationship Between International Law and National Legal Systems: Economic, Social and Cultural Rights in Malaysia and Indonesia

Alice de Jonge, Dr, Monash University
Exploring the Relationship Between International Law and National Legal Systems: Economic, Social and Cultural Rights in Malaysia and Indonesia

Introduction

In theoretical terms, the application of international law in national legal systems is often explained in terms of the doctrines of incorporation (or monism) and transformation (or dualism). According to the doctrine of incorporation, international law is regarded as automatically incorporated into municipal law. In other words, international law is part of municipal law, and may be applied as such by the municipal courts. The doctrine of transformation, on the other hand, holds that the two systems of law, international law and municipal law, are completely separate. A rule of international law can only become part of municipal law if and when it is transformed into local law by passing local legislation.¹

In political terms, a nation’s approach to the application of international law in its national legal system (incorporation or transformation) can raise often sensitive questions of sovereignty and freedom from intervention in domestic affairs. The aim of this paper is to examine the relationship between international and domestic law in the legal systems of Indonesia and Malaysia through the prism of social and economic human rights. In other words, how have the Malaysian and Indonesian legal systems dealt with issues of social and economic rights when such issues have arisen at the interface of international and domestic law?

The comparison between Malaysia and Indonesia is a particularly relevant and interesting one for a number of reasons. First, there is the shared (yet at the same time very different) experience of a Southeast Asian colonial and post-colonial history. While Malaysia’s evolution towards independence was essentially peaceful and took place under close British tutelage, Indonesia’s struggle for Independence involved an indigenous declaration of independence (1945) that was followed by an acrimonious 4-year war with the country’s former Dutch colonial power.² There is also the shared experience of regional tensions (konfrontasi during the first half of the 1960s),³ not altogether ameliorated by regional cooperation through ASEAN. The ASEAN cooperative framework⁴ has now lasted nearly 50 years, and continues to expand – most recently into the areas of human rights and an ASEAN Socio-cultural Community Blueprint.⁵

² For further detailed discussion, see John F Cady, History of Postwar Southeast Asia: Independence Problems (Ohio University Press, 1975); Nicholas Tarling (ed), The Cambridge History of Southeast Asia: Volume 2 Part II, From World War II to the Present (Cambridge University Press, 1992, 1999).
³ See Agreement to Normalise Relations between the Republic of Indonesia and Malaysia, signed in Jakarta, 11 August 1966.
⁴ First established by the ASEAN Agreement, also known as the Bangkok Declaration, signed in Bangkok, Thailand, on 8 August 1967, by representatives of Indonesia, Malaysia, Philippines, Singapore and Thailand. Brunei Darussalam then joined on 7 January 1984, Viet Nam on 28 July 1995, Lao PDR and Myanmar on 23 July 1997, and Cambodia on 30 April 1999, making up what is today the ten Member States of ASEAN.
⁵ For further discussion and details, see the ASEAN Secretariat website at http://www.aseansec.org.
Second, there are the contrasting inheritances of legal system and government in the two neighbours. The Malaysian system of government is based upon the Westminster system inherited from a British colonial history, and the legal system is based upon common law with its emphasis on judicial precedence. Indonesia, in contrast, has a Presidential system of government and a civil-law legal system inherited from its Dutch colonial past.

There are also different approaches to legal diversity. In Malaysia, the state-based Syariah Courts of Peninsula Malaysia and the Native Courts of Borneo (Sabah and Sarawak) stand parallel to the civil law courts, and have their own constitutionally protected appellate structures. The Malaysian states are given legislative power over all aspects of Islamic law, including personal and family law of persons professing the religion of Islam; and in respect of the constitution, organisation and procedures of Syariah courts, which have jurisdiction only over persons professing the religion of Islam. The Malaysian Court of Appeal has no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts, so that the Syariah courts exercise a great deal of power and independence when it comes to Islamic law matters. Islam is also recognised by the Constitution as the religion of the Malaysian Federation (art. 3(1)), although freedom of religious worship for those of other faiths is protected (art. 3(1) and art. 11).

In Indonesia, the space allocated to Islamic law within the legal system is much more confined. The Pancasila or ‘five principles’ enshrined in the preamble to the Constitution includes, as its first principle, ‘belief in one supreme being’, but there is no direct reference to Islam or Sharia’h law. More importantly, the Constitution guarantees freedom of religion and religious worship in Indonesia, without expressing a preference for any particular religion.

In contrast to Malaysia’s federal approach to the allocation of control over the development of Islamic jurisprudence, the Indonesian approach is based on a deeply held belief in central control and a unified national approach. The Indonesian government administers aspects of Islam through the Ministry of Religious Affairs. The national legislature and executive have also enacted laws, applicable only to Muslims, which purport to incorporate Islamic legal norms. These laws include the Compilation of Islamic Law and recently-enacted statues on Islamic finance. Indonesia’s religious courts have jurisdiction over most matters arising under these laws – mostly family, inheritance and Islamic finance matters.

---

6 See further Wan Arfah Wan Hamzah, A First Look at the Malaysian Legal System (OUP South East Asia, 2011).
7 Tim Lindsey (ed), Indonesia: Law and Society (Federation Press, 2nd ed, 2008).
8 See article 121 of the Malaysian Constitution, especially para 121(1A).
9 See further Salsiah Ahmad, ‘Islam in Malaysia, Constitutional and Human Rights Perspectives’ (2004).
10 Constitution of Indonesia, Articles 28 and 29.
11 National Unity, another of the Pancasila five principles, was elevated to greatest importance during the Suharto era: See Tim Lindsey (ed), above n 7.
12 Kompilasi, Presidential Decision No 1 of 1999.
13 These include Law No 21 of 2008 on Syariah Banking, and Law No 19 of 2008 on Syariah Securities.
has been careful to confine the operation of Islamic law to these fields, which exclude public and criminal law. By retaining control over the content of ‘Islamic’ family laws and other ‘Islamic’ laws, the national government has ensured that more conservative or fundamentalist versions of such laws are effectively excluded. In other words, by passing laws which purport to comprehensively encapsulate and codify Sharia’h for the Indonesian context, the state has effectively denied Sharia’h independent authority as a source of law. The government has also retained control over the recruitment, training and employment of those bureaucrats and judges responsible for enforcing Islamic law – thereby ensuring that they give predominance to state law in their policy and decision making, rather than giving effect to their own understandings of Islamic doctrine.

The rest of this paper investigates the relationship between international law and the national legal systems of Malaysia and Indonesia, with a focus on the area of economic, social and cultural (ESC) human rights. The paper begins by outlining the most relevant international and regional instruments concerned with ESC rights. The paper then examines the relationship and interaction between international law and the domestic legal systems of Malaysia and Indonesia, with particular attention being paid to what Professor Hilary Charlesworth describes as the great gap between the fine ideals expressed in international human rights standards and institutions and what actually happens on the ground. I will argue below that both Malaysia and Indonesia have, in a number of important instances ostensibly accepted human rights standards and recommendations received through the UN Human Rights Review process, without actually achieving the relevant human rights outcomes in practice. Throughout the paper I also seek to demonstrate, as others have before me, that civil and political (CP) rights and ESC rights reinforce each other as ingredients for basic human dignity. The satisfaction of both is required by the unifying concept of human dignity. Just as there is no historical, logical, political, or moral reason for thinking that only CP concerns can and should be the subject of rights, so also it cannot be argued, as some have sought to, that unless and until SE rights are fully satisfied, CP rights are secondary and meaningless; and therefore ESC rights should have priority over CP rights. This insight is particularly important in present-day Malaysia and Indonesia, where the exercise of CP rights, particularly the right to freedom of expression, is proving essential to ensuring the exposure and remedying of failures by the state to protect ESC rights, most noticeably in Indonesian West Papua and the Borneo States of Malaysia.

the applicant claimed that the state-imposed limitation of the jurisdiction of the religious courts was unconstitutional.


Economic Social and cultural (ESC) rights are rights relating to the meeting of basic needs that are essential for human welfare in a collective sense. They are entitlements to the avoidance of severe deprivation, and to the enjoyment of the preconditions necessary for the realisation of collective and individual potential. They are not rights to the satisfaction of individual preferences more generally. ESC rights include, but are not necessarily limited to, a right to housing, a right to basic nutrition, including a right to potable water; a right to basic healthcare, a right to basic education, a right to work and decent working conditions, and a right to social security assistance when necessary.

ESC rights are by their nature diffuse, societal and fragmented. They have often been described as vague and not capable of clear definition in terms of the obligations they impose on states. This is partly because of difficulties of degree – how much and what quality of housing/education/health care/food/social security etc is sufficient to satisfy the right, and should that amount/quality be universally available without exception? The answer to these questions will differ between different societies, countries, economies and cultural traditions.19

There are also problems of definition – some rights are categorised by some as ESC rights, but seen by others as civil or political rights. For example, the right to form and join a trade union, including a right to collective bargaining and the right to strike, have often been categorised as ESC rights, but can also been seen as falling within the broader concept of civil and political (CP) rights. The right to self-determination encompasses the right of all peoples to ‘freely determine their political status and freely pursue their economic, social and cultural development’. It is thus both a political and an ESC right, and is given a prominent position in both of the major human rights conventions.20

There is wide agreement, however, that there exists an international set of standards shared between cultures as to what constitutes the essential features of ESC rights. The nature and extent of this agreement can best be identified by examining the content of international human rights instruments codifying ESC rights, and the level of support each such instrument has received.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is the major international instrument on ESC rights, and finds its origins in the Universal Declaration of Human Rights of 1948. By May 2012, there were 160 state parties to the ICESCR.

Indonesia acceded to the ICESCR on 23 February 2006, while Malaysia has yet to indicate its willingness to become a member of the Covenant.  

The Covenant begins with the right of all peoples to self-determination and makes clear that ‘in no case may a people be deprived of its own means of subsistence’. In line with its long-term preoccupation with national unity (one of the five Pancasila principles of the Indonesian Constitution), Indonesia made the following declaration when acceding to Article 1 of the ICESCR:

**Declaration:**

…, the words "the right of self-determination" appearing in this article do not apply to a section of people within a sovereign independent state and cannot be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states.

Other rights enumerated in the ICESCR include the right to work and to enjoy decent working conditions (arts 6 and 7), the right to form and join a trade union (art 8), the right to social security (art 9), the right to an adequate standard of living, including adequate food, clothing and housing (art 11), the right to the enjoyment of the highest attainable standard of physical and mental health (art 12), the right to education (including free and universal primary education) (art 13), the right to take part in cultural life and the right to enjoy the benefits of scientific progress and its applications (art 15).

An important limitation on the rights provided for in the ICESCR, however, is found in article 2, which ensures that state parties are only obliged to take steps towards the realisation of Covenant rights ‘progressively’ and to the extent of ‘available resources’.

Other major international human rights instruments containing provisions relating to ESC rights include the Convention on the Elimination of all forms of Racial Discrimination (CERD), the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), and the Convention on the Rights of the Child (CRC).

While Indonesia acceded to the Convention on the Elimination of all Forms of Racial Discrimination on 25 June 1999, Malaysia has yet to indicate its willingness to become party

---


22 The Declaration begins by referring to ‘the Declaration on the Granting of Independence to Colonial Countries and Peoples, and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, and the relevant paragraph of the Vienna Declaration and Program of Action of 1993,...’.

23 Adopted by GA Res. 2106(XX) on 21 December 1965; opened for signature on 7 March 1966; entry into force 4 January 1969. By May 2012, the CERD had 86 signatories and 175 Parties.


25 Adopted by the General Assembly without vote on 20 November 1989 (UN Doc A/44/25); entry into force 2 September 1990. By May 2012, the CRC had 140 signatories and 193 Parties.
to that treaty. Both Malaysia and Indonesia are party to the CEDAW convention,\textsuperscript{26} while Indonesia is also a member of the optional protocol to that Convention.\textsuperscript{27} Both countries are member states of the Convention on the Rights of the Child,\textsuperscript{28} as well as the ILO Convention Concerning the Prohibition and Elimination of the Worst Forms of Child Labour.\textsuperscript{29}

The human rights treaties referred to above are supported by a complex international human rights architecture. First, all of the major international human rights conventions are monitored by corresponding treaty bodies comprised of experts in the relevant field. Second, there is the Human Rights Council, an essentially political body comprised of 47 representatives filling seats allocated according to regional country groupings.\textsuperscript{30} The third major element in the UN human rights architecture is the Office of the UN High Commissioner for Human Rights, responsible for the promotion of human rights throughout the UN system.

An important development that came into effect as part of the reforms put into place when the Human Rights Council took over from its predecessor, the Commission on Human Rights, in 2006, is the introduction of a new procedure to monitor human rights, the Universal Periodic Review (UPR). The UPR began in 2007 and involves every member of the UN, all 193 of them, being subjected to human rights scrutiny by other UN members every four years. The UPR has now completed its first round, with not a single country refusing to participate, and a second round of the UPR began in the second half of 2012.\textsuperscript{31} Overall, the UPR has proved to be a valuable improvement of the system, not least because it is a process which sees powerful states being subjected to the same scrutiny and process of questioning as developing nations from Asia and Africa.

At the regional and organisational level, there are also a number of multinational human rights instruments of direct relevance to Malaysia and Indonesia. These include declarations emerging from the Organization of the Islamic Conference (OIC) – an organisation which both Malaysia and Indonesian have been members of since 1969. The most important OIC declarations for present purposes are the 1981 Universal Islamic Declaration of Human Rights and the Cairo Declaration on Human Rights in Islam, adopted by the (then) 45 member states of the OIC on 5 August 1990.

A number of articles in the Cairo Declaration emphasise the importance of ESC rights. These include:

\textsuperscript{26} Ratified by Indonesia on 13 September 1984 and by Malaysia on 5 July 1995.
\textsuperscript{27} Ratified by Indonesia on 28 February 2000.
\textsuperscript{28} Ratified by Indonesia on 5 September 1990 and by Malaysia on 17 February 1995.
\textsuperscript{29} ILO Convention No 182, Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, adopted by the ILO Conference at its 87\textsuperscript{th} Session on 17 June 1999; entry into force on 19 November 2000. ILO Convention 182 had 175 ratifications by May 2012. ILO Convention was ratified by Indonesia on 28 March 2000 and by Malaysia on 10 November 2000.
\textsuperscript{30} For details see \url{http://www.ohchr.org/EN/HRBodies/HRC/Pages/HRCIndex.aspx}.
\textsuperscript{31} For details see \url{http://www.upr-info.org}.
7. As of the moment of birth, every child has rights due from the parents, the society and the state to be accorded proper nursing, education and material, hygienic and moral care. …

9. The seeking of knowledge is an obligation and provision of education is the duty of the society and the State. The state shall ensure the availability of ways and means to acquire education and shall guarantee its diversity in the interest of society …

13: Work is a right guaranteed by the State and the Society for each person with capability to work. Everyone shall be free to choose the work that suits him best and which serves his interest as well as those of the society. The employee shall have the right to enjoy safety and security as well as all other social guarantees. He may not be assigned work beyond his capacity nor shall he be subjected to compulsion or exploited or harmed in any way. He shall be entitled – without any discrimination between males and females – to fair wages for his work without delay, as well as to the holidays allowances and promotions which he deserves.

14. Everyone shall have the right to earn a legitimate living without monopolization, deceit or causing harm to oneself or others. Usury (riba) is explicitly prohibited.

17. (a) Everyone shall have the right to live in a clean environment, away from vice and moral corruption, that would favour a healthy ethical development of his person and it is incumbent upon the State and society in general to afford that right.

(b) Everyone shall have the right to medical and social care, and to all public amenities provided by society and the State within the limits of their available resources.

(c) The State shall ensure the right of the individual to a decent living that may enable him to meet his requirements and those of his dependents, including food, clothing, housing, education, medical care and all other basis needs.

18. Everyone shall have the right to live in security for himself, his religion, his dependents, his honour and his property.

Equality before the law is protected by article 19 of the Cairo Declaration, while article 23 prohibits the abuse or exploitation of authority.

While OIC States have described the Cairo Declaration as complementary to the Universal Declaration of Human Rights (UDHR), a number of western NGOs have denied this, arguing that:
The Cairo Declaration of Human Rights in Islam is clearly an attempt to limit the rights enshrined in the UDHR and the International Covenants. It can in no sense be seen as complementary to the Universal Declaration.\(^{32}\)

The main reasons for this view are first, the absence of any reference to the UDHR in the Cairo Declaration, and second the explicit statement made in articles 24 and 25 of the Cairo Declaration that:

“All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari’ah”, and:

“The Islamic Shari’ah is the only source of reference for the explanation or clarification to any of the articles of this Declaration.”\(^{33}\)

While the Cairo Declaration received some recognition in 1997 when it was included by the Office of the High Commissioner for Human Rights in Human Rights: A Compilation of International Instruments: Volume II: Regional Instruments,\(^{34}\) it is not a binding treaty, and does not have the status of codifying binding customary international law. From a domestic law perspective, therefore, there is no reason why the Cairo Declaration should be preferred to the international human rights conventions. Moreover, from an international law perspective, there is no doubt that both Malaysia and Indonesia are bound by the provisions of those international human rights treaties they have signed up to, and also to those provisions of other international human rights instruments which have gained the status of customary international law.

A number of regional instruments also have relevance for ESC rights in Malaysia and Indonesia. These include the Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights (the HR Commission ToR), and the ASEAN Socio-cultural Community Blueprint.\(^{35}\)

The 2008 ASEAN Charter\(^{36}\) provides in article 14 for the establishment of an ASEAN human rights body, to operate in accordance with terms of reference to be determined by the ASEAN Foreign Ministers Meeting. The HR Commission ToR entered into effect in October 2009.\(^{37}\) The ToR lists amongst the purposes of the AICHR upholding ‘human rights standards as prescribed by the Universal Declaration of Human Rights … and international human rights instruments to which ASEAN Member States are parties’. Amongst the principles that are to

\(^{32}\) Joint written statement submitted by the International Humanist and Ethical Union (IHEU), a non-governmental organization in special consultative status, the Association for World Education (AWE) and the Association of World Citizens (AWC), non-governmental organizations on the Roster. Circulated in accordance with Economic and Social Council resolution 1996/ 31 [24 February 2008]. UN Doc A/HRC/NGO/96 (4 March 2008). Human Rights Council Seventh session, Agenda item 3. Para 22.

\(^{33}\) Ibid, para 6.


\(^{35}\) ASEAN Secretariat, 2009.


guide the ASEAN HR Commission is ‘respect for international human rights principles, including universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms’ (para 2.2). Next to these references to international human rights standards, however, stands another principle of international law – that of ‘non-interference in the internal affairs of ASEAN Member States’ (para 2.1(b)) – making clear that the role of the Commission is not in any way to impose compliance with human rights obligations on any unwilling ASEAN members state. Rather, the powers and functions of the ASEAN HR Commission are essentially consultative, advisory and educative in nature, and it has no powers to resolve disputes or make binding decisions. It contains within it, however, the potential to draw upon the common human rights features of ASEAN Constitutions and the ASEAN Socio-cultural Community Blueprint in the promotion of ESC human rights in the region.

The ASEAN Socio Cultural Community Blueprint commits ASEAN to cooperative action in realising human rights in respect of the following six areas:

1. Human Development, including by advancing and prioritising education; investing in human resource development; promotion of decent work; promoting information and communication technology; facilitating access to applied science and technology; strengthening entrepreneurship skills for women, youth, elderly and persons with disabilities; and building civil service capability.

2. Social Welfare and Protection: through poverty alleviation; the provision of a social safety net and protection from the negative impacts of integration and globalization; enhancing food security and safety; providing access to healthcare and promotion of healthy lifestyles; improving capability to control communicable diseases; ensuring a drug-free ASEAN; and building disaster-resilient nations and safer communities.

3. Social Justice and Rights: through the promotion and protection of the rights and welfare of women, children, the elderly, and persons with disabilities; protection and promotion of the rights of migrant workers; and promoting corporate social responsibility.
4. Ensuring Environmental Sustainability: including through addressing global environmental issues including climate change and its impacts; promoting sustainable development through environmental education and public participation; promoting quality living standards in ASEAN cities/urban areas; promoting the sustainable use of the coastal and marine environment; promoting sustainable management of natural resources and biodiversity; promoting the sustainability and accessibility of water resources; and promoting sustainable forest management.

5. Building ASEAN Identity: through promotion of ASEAN awareness and sense of community, preservation and promotion of ASEAN cultural heritage, promotion of cultural creativity and industry, and engagement with the community.


B Relationship between International Law and Domestic Law in Malaysia

Before independence, the practice of courts in Malaysia with regards to the application of international law was generally the same as that of the British courts at the time: namely, the doctrine of transformation in respect of treaties, and the doctrine of incorporation with certain limitation in respect of customary international law. Under its independence Constitution (as amended), Malaysian law has since travelled its own separate path, with respect to the application of both treaty law and customary international law principles.

The Federal Constitution of Malaysia contains no express provision with regards to the status of international law, or indeed any mention of international law at all. It does, however, contain certain provisions dealing with ‘treaty-making capacity’ in Malaysia.

The combined effect of article 74(1) and the ‘Federal List’ in the Ninth Schedule of the Constitution is that the Federal Parliament has exclusive power to make laws relating to external affairs and relations with other countries (including through treaties, agreements and conventions), as well as the power to implement treaties, agreements and conventions. In regards to the Executive power of the Federation, article 39 provides that it shall be vested in

---

55 Strategic objectives D.
56 Strategic objectives D1 and D10.
57 Strategic objective D3.
58 Strategic objective D5.
59 Strategic objective D7.
60 Strategic objective D8.
61 Strategic objective D9.
62 Strategic objective D11.
63 Strategic Objectives E
64 Strategic objective E1.
65 Strategic objective E2.
66 Strategic objective E3.
67 Strategic objective E4.
68 Strategic Objectives F.
‘the Yang di-Pertuan Agong and exercisable … by him or by the Cabinet or by any Minister authorized by the Cabinet’. Since article 80 ensures that the executive authority of the Federation extends to all matters with respect to which Parliament may make laws, this means that the Cabinet or its authorized Minister is effectively vested with the power to do all acts necessary for negotiating, making, signing and ratifying treaties and other agreements entered into with other countries.

When it comes to giving effect to treaty provisions in domestic law, however, it remains the case that for a treaty to be operative in Malaysia, legislation passed by Parliament is a must. This is despite suggestions that there may be some treaties which could be implemented locally without any necessity for the introduction of a statute. In other words, even though the executive Government has ratified a treaty and the treaty binds the Government under international law, it has no legal effect domestically unless the legislature passes a law to give effect to that treaty. Thus, for example, the Malaysian legislature had to pass the Diplomatic Privileges (Vienna Convention) Act 1966 (amended in 1999), to give legal effect to the Vienna Convention on Diplomatic Relations 1961. This stands in contrast to Indonesia, where the court was able to give direct effect to that treaty in the Saudi Arabia Land Dispute Case, even in the absence of implementing legislation. A similar difference can be seen in the approach taken to the Vienna Convention on Consular Relations 1963, which was implemented in Malaysia by the passing of the Consular Relations (Privileges and Immunities) Act 1999, but which in Indonesia has not relied upon legislation to have domestic effect.

In Public Prosecutor v Narogne Sookpavit, the respondents were Thai fishermen arrested while on a vessel 3 miles from the Malaysian coast and charged under the Malaysian Fisheries Act 1963. The respondents were unable to rely on a defence based on a right of innocent passage, as codified in article 14 of the Geneva Convention on the Territorial Sea. Shankar J held that:

… before a convention can come into force in Malaysia, Parliament must enact a law to that effect. … No Malaysian statute has been cited to me to show that Article 14 had become part of Malaysian law. …

So far as customary international law is concerned, Malaysian courts have recognised their common law inheritance, and have adopted the English common law approach which views customary international law as part of the common law, so long as it does not conflict with a statute or judicial decision of a superior court. This approach is the necessary result of section 3(1) of the Civil Law Act 1956 which requires the Malaysian courts to apply British common law in the absence of any relevant statute:

70 See Heliliah Bt Haji Yusof, ‘Internal Application of International in Malaysia and Singapore’ (1969) 1 Singapore Law Review 62-71, at 65, referring to the Treaty of Friendship between the Federation of Malaya and the Republic of Indonesia of 10 April 1959, and noting that since the conclusion of that treaty, there had been several cultural exchanges implemented without legislation.

71 Opened for signature 18 April 1961, 500 UNTS 95, entered into force 24 April 1964.


73 [1987] 2 MLJ 100 (High Court, Johore Bahru).
Save in so far as other provision has been made or may hereafter be made by any written law in force in the Federation or any part thereof, the Court shall apply the common law of England the rules of equity as administered in England at the date of the coming into force of this Act; provided always that the said common law and rules of equity shall be applied so far only as the circumstances of the States and Settlements comprised in the Federation and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

In addition, sections 13 and 14 of the Evidence Act 1950 require evidence to be given of a international law custom before the Court can recognise its existence. In the absence of sufficient evidence that an international law custom has been recognised as part of common law, therefore, the custom cannot be relied upon in a Malaysian court. In Public Prosecutor v Naronge Sookpavit, for example, the respondents were not able to rely on an alleged customary law right of innocent passage, because insufficient evidence of the existence and content of that custom had been provided to the court below.\(^{74}\)

In practice, however, the courts in Malaysia have felt able to apply customary international law in appropriate circumstances; albeit through the medium of common law, rather than directly. For example, the common law rule that the sovereign is immune from suit, based upon principles of sovereign immunity drawn from international law, was applied in Olofsen v Government of Malaysia.\(^{75}\) In Public Prosecutor v Oie Hee Kai,\(^ {76}\) the accused were captured during the Indonesian confrontation campaign against Malaysia. The Federal Court allowed the appeals of the accused on the ground that they were prisoners of war and entitled to the protection of the 1949 Geneva Conventions. On appeal, the Privy Council confirmed that the position of the accused was covered, \textit{prima facie}, by customary international law; although reaching a different conclusion based on its own interpretation of the Geneva Conventions and holding that the accused were not entitled to be treated as prisoners of war.

Although section 3 of the Civil Law Act requires any Court in Western Malaysia to apply the common law and the rules of equity as administered in England on 7 April 1956, this does not mean that common law, or customary international law as recognised by common law, stands still in Malaysia as at that date. In Commonwealth of Australia v Midford (Malaysia) Sdn Bhd,\(^ {77}\) the court held that it could properly depart from the doctrine of absolute sovereign immunity, even though that doctrine prevailed in England throughout the 1950s and 60s and until the mid 1970s. The Supreme Court held that even though the UK Court of Appeal case of Trendtex was only persuasive and not binding authority, there was no reason why the Malaysian Court could not agree with that decision and thus apply the more modern doctrine of restricted sovereign immunity.

\(^{74}\) Shankar J also went on to hold that “Even if there was such a right of innocent passage and such right was in conformity with customary English law or customary international law as it is applied in England, the passage by the accused persons in the circumstances of this case could not be regarded as innocent passage since it contravened Malaysian domestic legislation.”: Above n 59.

\(^{75}\) [1966] 2 MLJ 300.

\(^{76}\) [1968] 1 MLJ 148 (Privy Council Appeal from Malaysian Federal Court).

\(^{77}\) [1990] 1 CLJ 878, [1990] MLJ 475 (Supreme court of Malaysia).
So far as decisions of the International Court of Justice (ICJ) are concerned, article 94 of the UN Charter provides that every member of the United Nations undertakes to comply with the decision of the ICJ in any case to which it is a party. In its advisory opinion regarding *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, the ICJ concluded, *inter alia*, that Dato’ Param Cumaraswamy was entitled to immunity from legal process of any kind in respect of statements made during an interview he gave in his role as a UN Human Rights Commission Special Rapporteur on the Independence of Judges and Lawyers. The Court also held that the Government of Malaysia had an obligation to inform the Malaysian courts of the findings of the UN Secretary General that Cumaraswamy was entitled to immunity from legal process. The domestic effect in Malaysia of this ICJ decision emerged in the High Court decision of *Insas Bhd & Anor v Dato’ Param Cumaraswamy*, where the Court held that:

> Whilst the court might disagree with certain aspects of the decision of the ICJ, the decisive acceptance of the ICJ’s ruling by the parties will prevail in respect of this case because the parties had specifically agreed to refer this case for an advisory opinion from the ICJ and that the court was bound to give legal effect to the advisory opinion.

### C Economic, Social and Cultural Rights in Malaysia

The Malaysian Constitution contains an entire Part, Part II, on Fundamental Liberties (articles 5-13 inclusive). The rights protected by Part II are primarily civil and political rights, including the right not to be detained except in accordance with law; prohibition of forced labour; protection against retrospective criminal law or double jeopardy; the right to equality of treatment before the law; freedom of citizens to move freely and reside in any part of the Federation; freedom of speech and assembly (subject to laws deemed necessary for the security of the Federation) and freedom of religion. So far as ESC rights are concerned, Article 12 provides for freedom from discrimination in access to education ‘on the grounds only of religion, race, descent or place of birth’. Paragraph 2 of article 12 goes on to provide that every religious group has the right to establish and maintain institutions for the education of children in its own religion.

A recent (2011) article by Sambo and Abdulkadir argues strongly that ‘The socio economic rights provided in the Malaysian Constitution are grossly inadequate … Sustaining socio economic development in Malaysia requires the inclusion of adequate socio-economic rights in its Constitution and the justiciability of those rights’. The authors argue that Malaysia should learn more from the Constitutions of selected African countries with which Malaysia

---

79 The difference, in particular, arose from the fact that while the Malaysian courts had ruled that the question of whether Cumaraswamy had spoken in his capacity as a Special Rapporteur was an issue to be determined by the Malaysian courts at the trial stage, the ICJ held that ‘the finding of the Secretary General creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts.: (1999) ICJ Reports 62, at para 61.
80 [2000] 4 CLJ 709 (High Court Malaya, Kuala Lumpur).
shares a similar (Westminster style) system and structure of government, but which have a much greater emphasis on ESC rights in their Constitution. These countries include South Africa, Nigeria and Ghana. The authors do not mention Indonesia, or any other ASEAN member nation.

Shad Saleem Faruqi has noted a number of hurdles in the way of enforcing international human rights law in Malaysian courts. These include the fact that Malaysia has not ratified any but a few of the world’s human rights treaties, the fact that international law is not mentioned in the Malaysian Federal Constitution and is not part of the definition of ‘law’ in Article 160(2) of that Constitution. He also points to the fact that the civil courts have adopted a restrictive approach to the interpretation and application of the rights contained in article 5-13 of the Constitution, and that Malaysia has no Constitutional Court which might act as a forum for expanding the interpretation of these rights.

Faruqi also, however, points to evidence that the superior courts of Malaysia, under the intellectual leadership of Gopal Sri Ram JCA (as he then was), are beginning to take a more expansive approach to the interpretation of constitutionally guaranteed rights. For example, in the case of Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan, the court of appeal discussed the meaning of article 5 of the Constitution which provides that ‘no person shall be deprived of his life or personal liberty save in accordance with law’. Following the trend in the Indian courts, the court held that ‘Life’ as guaranteed by article 5 ‘incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life … It includes the right to live in a reasonably healthy and pollution free environment’.

The courts have also interpreted the word ‘life’ in Article 5 to include the right to livelihood. Employment is, therefore, a fundamental right within the expression of article 5(1): Tan Tek Seng v Suruhanjaya Perkhidmatan; Kanawagi s/o Seperumaniam v PPC. In Nor Anak Nyawi v Borneo Pulp it was held that native customary rights can be considered as a ‘right to livelihood’.

Another facet of personal liberty guaranteed by Article 5(1) is the liberty of an aggrieved person to go to court to seek judicial relief: Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor. This is also a right supported by Article 8 of the Constitution, which provides that ‘All persons are equal before the law and entitled to the equal protection of the law’.

In Tan Tek Seng and again in Sugumar Balakrishnan’s case, the court took an expansive approach to the interpretation of articles 5 and 8 in the Constitution to develop a doctrine of substantive fairness. The court held that equality before the law as protected by article 8 requires non-arbitrariness and reasonableness in decision making and proportionality in the

---

83 (1996) 2 AMR 1617.
84 [2001] 5 MLJ 433.
86 [1998] 3 CLJ 85.
choice of punishments. In *Sugumar Balakrishnan’s case* the court held that the combined effect of Articles 5(1) and 8(1) is to demand fairness not only in procedure, but also in substance whenever a public law decision has an adverse effect on a person’s life. The Court of Appeal elevated the status of the principles of natural justice, holding that they are an integral part of the constitutional guarantee of procedure fairness derived from article 8.

Sarguna Kumaari Munasary also highlights the efforts of Gopal Sri Ram in the area of human rights jurisprudence, first at the Appeal Court level, and more recently at the Federal Court level (Malaysia’s highest court). He also notes that Gopal Sri Ram’s efforts were not universally approved of. For example, his 1998 Court of Appeal decision in *Sugumar Balakrishnan’s case* was soon overturned by the then Federal Court. In *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan,* the Federal Court

... disagreed with the Court of Appeal that the words ‘personal liberty’ [in Article 5] should be generously interpreted to include all those facets that are integral part of life itself and those matters which go to form the quality of life.

Seven years later, in 2009, however, the Federal Court, now with Gopal Sri Ram on the bench, revisited the issue, and ruled in *Lee Kwan Who v Public Prosecutor* that constitutional rights, including those under Article 5, must be read in a liberal and generous fashion:

> On no account should a literal construction be placed on [the Constitution’s] language, particularly upon those provisions that guarantee to individuals the protection of fundamental rights. In our view, it is the duty of a court to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the Constitution. When light passes through a prism

In *Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia and ors,* the appellant’s employment as a flight attendant with MAS was terminated when she became pregnant. In seeking a declaration that the terms of the collective agreement under which she was dismissed were void on the basis of gender discrimination, the appellant relied on both article 8 of the Constitution and on Malaysia’s obligations under the CEDAW Convention. The Federal Court refused the appellant’s leave to appeal, however, finding that the collective agreement was not a violation of article 8 of the Constitution because that article only applied to outlaw discriminatory state action, and not to the acts of private entities like MAS. The Federal Court failed to address the submission based on CEDAW, presumably because no legislation had yet been passed to incorporate CEDAW into Malaysian domestic law.

---

90 Decision on application for leave to appeal, Application No 08-51 2003 (W); ILDC 1036 (MY 2005); (2005) 3 MLJ 681; 11 March 2005.
During its deliberations concerning Malaysia’s national report at its 35th session in May 2006, the CEDAW Committee highlighted the Beatrice a/p AT Fernandez case as evidence that Malaysia’s CEDAW implementation efforts continued to be hampered by the lack of direct incorporation of CEDAW into national law. The Committee was also concerned that the judges in the case displayed a lack of appreciation for CEDAW norms, and it urged Malaysia to ensure that those norms and related gender-protective legislation ‘are made an integral part of legal education and the training of judicial officers, including judges, lawyers and prosecutors’. 

Malaysia was first subjected to the UPR process on 11 February 2009, and its next review is due in October 2013. 49 states plus two UN observers (the Holy See and Palestine) put forward recommendations during Malaysia’s first Review in the Working Group, resulting in a total of 147 recommendations. At the UPR, Malaysia ‘accepted’ 76 of these recommendations, ‘rejected’ 29 of them (including those which related to abolition of the death penalty), and provided a ‘General Response’ to the remaining 52. The ‘Outcomes’ document of the Universal Periodic Review on Malaysia was adopted by the Human Rights Council on 12 June 2009.

UPR’s first Mid-term Implementation Assessment report for Malaysia is dated 15 February 2012. The UPR Mid-term Implementation report involves UPR contact with the representatives of the State under review, NGOs that participated in the UPR and the National Institute for Human Rights in the state under review where one exists. Responses are then graphed against recommendations received at the UPR to show the implementation level for each recommendation. UPR Info has developed an index to show the level of implementation for each recommendation after all responses have been graphed. On the basis of responses from the Human Rights Commission of Malaysia (Suruhanjaya Hak Asasi Manusia Malaysia, hereafter SUHAKAM) and the Malaysian Bar Council (MBC), the Mid-term Implementation Assessment report for Malaysia concluded that 24 recommendations from the UPR process had not been implemented, 53 had been partially implemented and 23 recommendations had been fully implemented. No answer was received in respect of the remaining 29 of the 147 recommendations. The MBC was the only one of the 8 NGOs invited to respond that did actually provide a response in time for the Mid-term Implementation Review.

A number of the 147 recommendations received and accepted, most notably those from friendly Islamic countries, can be seen as instances of human rights ritualism. That is, they are recommendations couched in the language of human rights, while involving no challenge or threat of change to the existing order. For example, Iran recommended that Malaysia should ‘Consider undertaking a comprehensive study on the positive implications of [sic] the

---

92 Oxford Reports on International Law in Domestic Courts ILDC 1036 (MY 2005).
94 For discussion of human rights ritualism, see Charlesworth, above n 16.
legal system of civil law and Shari’ah law’ (recommendation 62); while Morocco recommended that Malaysia should ‘Share its experience with other countries as regards education programmes for students to teach them the values of tolerance and openness of Islam’ (recommendation 96).

At least 15 recommendations called upon Malaysia to ratify major international human rights instruments such as the CAT, ICERD, ICCPR, CESCR and the optional protocol to CRC and CEDAW. These recommendations also called upon Malaysia to withdraw its reservations made to the CRC and the CEDAW. In response, SUHAKAM noted the following measures taken by Malaysia.

- Withdrawal of reservations to articles 1, 13 and 15 of the CRC and withdrawal of reservations to articles 5(a), 7(b) and 16(2) of CEDAW in 2010. Ratification of the Convention on the Rights of Persons with Disabilities in 2010.
- Ongoing studies on possible ratification of the optional protocol to CEDAW, and on withdrawal of the remaining reservations to CRC; as well as the establishment of a technical sub-committee to study possible implementation of ICCPR, ICESCR, CAT and ICERD.

At least 30 recommendations dealt with efforts to eradicate poverty, including through improved access to education, health and housing services. In response, SUHAKAM noted that the Government, through various agencies, has put in place a number of programmes which seek to address the issue of poverty. They include:

1. AZAM Programme which seeks to increase income generation of low income households;
2. E-Kasih system, which is a registry system that keeps a database of poor households for the purpose of planning, implementing and monitoring programmes related to poverty reduction.

The global economic crisis appears to have impacted on the effectiveness of poverty reduction programmes in Malaysia, with the result that while the number of registered hardcore poor households has reduced, the number of poor households has increased. What is more worrying is the point made by the Malaysian Bar Council, that disaggregated data from the United Nations Development Programme’s mid-term review of Malaysia’s progress towards the Millennium Development Goals shows that the overall socio-economic situation in Sabah has deteriorated. Other recommendations also made it clear that Malaysia still

---

96 Ibid, at p 7. The first MDG mid-term review, completed in 2005, showed that Malaysia was on track, even ahead of the target dates in achieving the MDGs. The 2010 report, however, has painted a more accurate story about Malaysia’s progress and achievements, by making it possible to disaggregate national data into more specific groups or areas. The 2010 report thus reveals that so far as the MDG objective of eradicating poverty is concerned, the goal appears to be on track because the aggregate figure for those living in poverty has fallen from eight percent in 2000 to 3.8% in 2009. The differentiated data by state, however, shows that Sabah (19.7%) is not at all on track to achieve the goal by 2015.: for discussion see Inge Witte, ‘Malaysia’s performance on the MDGs: a differentiated picture’, Penang Monthly (22 December 2011) available at http://penangmonthly.com/.
needs to improve its record as regards the rights of refugees, migrant workers and indigenous peoples. Each of these groups still lacks access to appropriate levels of decent housing, healthcare and education.

So far as civil and political rights are concerned, attention was drawn to the need for Malaysia to ensure that SUHAKAM was enabled to operate independently in accordance with the Paris Principles. Other recommendations called upon Malaysia to repeal or amend legislation under which arbitrary detentions continue to take place, including the Internal Security Act 1960, the Emergency (Public Order and Prevention of Crime) Ordinance 1969, and the Dangerous Drugs (Special Preventive Measures) Act 1985.

D The Relationship Between International and Domestic Law in Indonesia.

The Indonesian Constitution of 1945 begins in the Preamble by placing itself squarely within the Post WWII era of decolonisation:

Whereas independence is the inalienable right of all nations, therefore, all colonialism must be abolished in this world as it is not in conformity with humanity and justice; …”.

While there is no other reference to international law in the Indonesian Constitution, the Preamble also makes clear that the Constitution is based upon the Pancasila or five principles, including the principle of a ‘just and civilized Humanity’, sometimes translated as ‘internationalism’. The Elucidation to the 1945 Constitution noted that “the fourth basis idea in the preamble is that the state shall be based on the belief in the One and Only God and on just and civilized humanity. It follows that the constitution must make it the duty of the State and all its institutions to foster high human ethical norms and to live up to the noble aspirations of the people”.

The Indonesian constitution remains, however, essentially silent on the relationship between international and domestic law, and there exist no laws or doctrine on the implementation of treaties or customary international law in the Indonesian domestic legal system. Therefore, any assessment of the implementation of international law principles must depend on an examination of Indonesian practice when it comes to treaty implementation and the very small number of superior court decisions which have touch upon the relationship between international law and Indonesian domestic law.

An examination of Indonesian practice when it comes to treaty implementation leaves it unclear whether Indonesia adopts a monist or dualist approach. This is because Indonesian practice on implementation of treaties has not been consistent. While some treaties

---


98 See Chapters XI and XII of the UN Charter and see United Nations Declaration Regarding Non-Self Governing Territories.

99 The Elucidation was not part of the original Constitutional document, but was promulgated in the Government Gazette in 1946 and remained somewhat controversial until it was abolished in 2000.
(conventions) have been given force of law domestically through the issuance of implementing legislation / regulations following ratification, others have not. For example the 1982 UN Convention on the Law of the Sea (UNCLOS) was ratified by Law No 17 of 1985 and was implemented by Law No 6 of 1996. In contrast, the 1961 Vienna Convention on Diplomatic Relations\(^{100}\) and the 1963 Vienna Convention on Consular Relations\(^{101}\) were ratified through the enactment of Law No 1 of 1982 but this was not followed by any implementing legislation or regulations. Nor was such implementing needed to allow the Supreme Court to give direct effect to these treaties in its advisory opinion concerning the land dispute of the Saudi Arabian embassy.

In the case of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), ratification of the treaty (by Presidential Decision 34/181) was not enough to allow the courts to give effect to its terms. Instead, the Indonesian courts refused to enforce this supposedly ‘self-executing’ convention until the Supreme Court Regulation No 1/1990 on procedures concerning foreign arbitral awards was passed.\(^{102}\) Some Indonesian academics remained firmly of the opinion that the New York Convention was a self-executing treaty which did not require further implementing regulations. Sudargo Gautama, for example, pointed out that the New York Convention provides that procedures for the enforcement of foreign arbitral awards shall be in accordance with those for enforcement of domestic arbitral awards, which in Indonesia’s case had been laid down in decisions of the Indonesian National Arbitration Centre (Badan Arbitrase Nasional Indonesia / BANI).\(^{103}\) Supreme Court Judge Asikin Kusumaatmadja, on the other hand, expressed the view that an implementing regulation was always necessary because of the much greater caution required when foreign laws are involved and in order to equip the Indonesian courts with the capacity to deal with the technical and practical difficulties of foreign award enforcement.\(^{104}\)

In contrast to the Indonesian experience with the New York Convention, there are other treaties which have been honoured and applied by the Indonesian government and courts without any implementing legislation or regulations being issued - including the Vienna Conventions on Diplomatic and Consular Relations referred to above.

According to Mochtar Kusumaatmadja, Indonesia, like most European continental countries, practices monism and its law enforcement authorities are directly bound by treaties ratified by Indonesia without the need for such treaties to be transformed into national laws through

---

\(^{100}\) Opened for signature 18 April 1961, 500 UNTS 95, entered into force 24 April 1964.


\(^{102}\) Supreme Court Regulation No 1 of 1990 concerning the Procedures of Foreign Arbitration Awards (Peraturan Mahkamah Agung no 1 tahun 1990 tentang Tata Cara Putusan Arbitrase Asing.)


implementing legislation. He also recognises, however, that implementing legislation might be needed for treaty obligations which directly concern the rights of citizens as individuals.

Damos Dumoli Agusman has identified other examples of where Indonesia’s application of international law has taken on a decidedly monist flavour:

- Law 24 / 2000 requires instruments of ratification to a treaty to be published in the state gazette in order to inform the public of Indonesia’s commitment to the treaty and that the treaty binds all citizens, implying that the ratification of a treaty binds the state both externally and internally even without the existence of implementing legislation or regulations.
- The Constitutional Court in its judicial review of Law No 27 of 2004 on the Truth and Reconciliation Commission referred to ‘universal practice and international custom’.
- Law 39/ 1999 on Human Rights which states that international law provisions of treaties ratified by Indonesia are recognised as legally binding in Indonesia. The law further states that everyone within the territory of Indonesia is required to comply with Indonesian legislation and law, including unwritten law and international law concerning human rights ratified by Indonesia.

According to Hikmahanto Juwana, whether or not a treaty should be ‘transformed’ into domestic law through implementing legislation should be assessed based on the substance of the treaty. According to Juwana, treaties can be divided into ‘treaty contracts’ and ‘law-making treaties’. A ‘treaty-contract’ is a treaty between two or a small number of states dealing with a special matter concerning those states exclusively. Examples include territorial boundary treaties or loan agreement treaties. ‘Law-making’ treaties are those which codify widely accepted norms and are intended to affect the behaviour of states.

For law making treaties, states have the obligation to transform treaty obligations into national law because the treaty is intended to affect changes in the laws/ regulations of ratifying states. Examples include WTO treaties, in respect of which article 16(4) of the WTO Agreement provides that ‘Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements’. Similarly, article 4(1) of the Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment states that ‘Each Party shall ensure that all acts of torture are offences under its criminal law’, and Article 6 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) states that ‘State Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation or prostitution of women’.

---

Under these and other similar treaties, state parties have expressly recognised the need and the corresponding obligation to translate treaty obligations into national laws and regulations. According to Juwana, instruments of ratification only serve as an approval of the state to be bound by the treaty, but are not, alone, enough to enforce treaty obligations domestically. Separate implementing laws and/or regulations are needed to allow and empower law-enforcers in particular to give effect to treaty rules. Police, judges, and prosecutors rely only on domestic laws and regulations for their powers and duties, and do not, nor can they be expected to, refer to international law to guide them.

Juwana also urges that the Indonesian government should not be able to rely on monist arguments to justify its failure to enact implementing rules in line with its international obligations. He gives the example of Indonesia’s ratification of ILO conventions under pressure from international and national NGOs — conventions which have remained unenforceable in practice on the ground in Indonesia due to the lack of implementing laws.\(^\text{108}\)

In *Sianturi and Ors v Indonesia*,\(^\text{109}\) three Australian applicants who had been sentenced to death for drug offences under Indonesia’s Narcotics Law No 22 (1997) sought to rely on International law in two different ways – both of which were rejected. First, the applicants argued that they had standing to bring an application before the Indonesian Constitutional Court, despite Article 51(1) of the Constitution Court Act (Indonesia) which appeared to permit Indonesian nationals to apply to the court for review of legislation. The applicants called witnesses, including Andrew Byrnes, who argued that international law prohibited Indonesia from discriminating between nationals and non-nationals. The Court rejected this argument, holding that foreigners lacked standing to bring an application before the Constitutional Court to uphold rights in the Constitution. Read literally, Article 51(1) of the Constitutional Court Act (Indonesia) was exhaustive and did not explicitly provide standing to foreigners.

Second, the applicants argued that the provision in the Narcotics Law allowing judges to impose the death penalty was a violation of Article 28A of the Constitution which guarantees the right to life, and that this right was rendered non-derogable by Article 28I(1), which provides that the right to life (along with several other rights) ‘cannot be limited in any way’. Imposition of the death penalty, according to the applicants, was also a violation of the right to life provided for under Article 6 of the ICCPR,\(^\text{110}\) as ratified for Indonesia by Law No 12, 2005. The Court held, however, that despite its wording, Article 28I(1) did not confer upon citizens an absolute right to life. The Court also found that number of international instruments illustrated that the right to life was not absolute;\(^\text{111}\) and also held that Article 6(2)

---


\(^{111}\) International Conventions referred to by the Court (at para 3.24) in this regard include the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977) 1125 UNTS 3, entered into force 7 December 1979; the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977) 1125 UNTS 609, entered into force 7
of the ICCPR did not prohibit the imposition of the death penalty for the ‘most serious crimes’, such as drug offences.

In *Bin Nurhasyim & ors v Indonesia*, three men convicted to death by firing squad argued that the means of execution provided for in the death penalty law was a violation of article 28I of the Constitution which provides that the right not to be tortured (along with other core rights) ‘cannot be limited’. The Constitutional Court held that the Death Penalty Law did not violate article 28I because execution by firing squad did not constitute torture. In reaching this decision, the Court held that in determining the meaning of torture, reference should be had to relevant human rights instruments in force in Indonesia: Law No 39 on Human Rights 1999 (Indonesia) (‘Human Rights Law’) and Law No 5 of 1998 on the Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Indonesia). Interestingly, the Court relied not only on article 1(4) of the Human Rights Law which, while largely a translation of article 1(1) of the CAT, is by no means identical, but also referred directly to the Convention itself, XXXX For example, the Human Rights Law does not incorporate the ‘intimidating or coercing him’ limb of the definition contained in article 1 of the CAT. Nor does it incorporate the final sentence of CAT’s Article 1, which reads ‘[T]orture does not ‘

The wording of the Indonesian Constitution appears much more oriented towards ESC rights than that of the Malaysian Constitution. This is despite the much greater length and detail of the Malaysian Constitution (183 Articles plus 13 Schedules, compared to 37 Articles plus four transitional clauses in the 1945 Indonesian Constitution).

While civil-political rights are emphasised in the Part II of the Malaysian Constitution (articles 5-13), the Indonesian Constitution goes much further in its protection of socio economic rights. This is particularly noticeable in the case of the right to receive a basic education. Chapter XIII of the Indonesian Constitution (articles 31 and 32) is devoted solely to Education. As well as providing that every citizen has the right to education, Chapter XIII imposed a duty upon the state to establish and conduct a national education system, and to ‘advance the national culture’.

The Indonesian Constitution has undergone a series of four amendments since the fall of the Suharto regime in 1998 – in 1999, 2000, 2001 and 2002 respectively. Article 31 now elaborates on the right of citizens to receive education by adding a corresponding duty of citizens to undertake basic education. The duty of the State to establish a national education system is now re-worded to make clear that the duty includes an obligation to fund the education system by allocating a minimum of 20% of the State Budget and of Regional Budgets to do so.

Other socio economic rights are enshrined in Chapter XIV on Social Welfare. For example, article 34 imposes an obligation on the state to provide an adequate system of social security. Originally (in the 1945 version), article 34 provided simply that ‘The poor and destitute children shall be cared for by the State’. This has since been extended, so that article 34 now provides that

(1) Impoverished children and abandoned children shall be taken care of by the State.
(2) The State shall develop a system of social security for all of the people and shall empower the inadequate and underprivileged in society in accordance with human dignity.
(3) The state shall have the obligation to provide sufficient medical and public service facilities.
(4) Further provisions in relation to the implementation of this Article shall be regulated by law.

It is article 33 of the Constitution, however, that has become a key battle-ground of legal efforts to protect social entitlements in Indonesia. In 1945, article 33, inspired by a broad mix of leftist, nationalist and anti-colonialist ideals, provided the basis for state-control over essential social assets and services:

(1) ‘The economy shall be organized as a common endeavour based upon the principles of the family system.
(2) Sectors of production which are important for the country and affect the life of the people shall be controlled by the state.
(3) The land, the waters and the natural riches contained therein shall be controlled by the State and exploited to the greatest benefit of the people.

While article 33 has remained essentially untouched throughout four packages of post-Suharto Constitutional amendments, it has had two additional paragraphs added to it:

(5) The organisation of the national economy shall be conducted on the basis of economic democracy upholding the principles of togetherness, efficiency with justice, continuity, environmental perspective, self-sufficiency, and keeping a balance in the progress and unity of the national economy.
(6) further provisions relating to the implementation of this article shall be regulated by law.

Indonesia’s Constitutional Court began accepting cases in August 2003. The jurisdiction of the (then) new Court is defined in article 24C of the amended Constitution, and includes the power to make first and final – and binding – decision in the review of statutes (undang-undang) against the Constitution. It is this power which has been called upon in Article 33 cases to date. These cases have focussed on recent attempts by government to dilute its own investment in key economic sectors, and to encourage its replacement by private sector investment.
In the *Oil and Natural Gas (Migas) Law case,* applicants sought a review of Law 22/2001 on Oil and Natural Gas. In its decision, the MK made slight alterations to the law to bring it into line with the requirements of article 33.

In the *Forestry Law Case,* a group of many applicants unsuccessfully dispute the constitutionality of Law 19/2004 on the Stipulation of Interim Law 1/2004 on Amendments to Law 41/1999 on Forestry as a Statute (Hukumonline 2005).

In the *Water Resources (SDA) Law case,* almost 3,000 individuals and several NGOs requested the MK to review Law 7/2004 on Water Resources. A majority of the MK upheld the constitutionality of the Law, largely because the MK believed that under it the state retained control over the sector.

In the Electricity Law case, three applicants requested the MK to review the constitutional validity of Law 20/2002 on Electricity. Like the SDA Law, the Electricity Law generated significant controversy in the media and debate in the Indonesian Parliament (the DPR) mostly because they sought to privatise the essential services with which they dealt. The fear was that prices in the water and electricity sectors would rise if state control was relinquished.

Applicants in the SDA case argued that privatisation would introduce a profit-making motive into the supply of water which in turn could only serve to detract from the fulfilment of the people’s basic right to water:

> [t]here is concern that [privatisation] will lead to a relinquishing of state responsibility for fulfilling the people’s right to water. In other words, the state’s responsibility will be transferred to individuals or private entities, both national and foreign … This means that profits will become the main purpose of those entities, not the fulfilment of basic rights.

In line with this sentiment, the first applicant in the Electricity Law case argued that the privatisation of electricity – an important branch of production – contradicted article 33 of the Constitution. The second applicant argued that the Law’s ‘unbundling’ of the provision of electricity – that is, dividing provision of electricity into generation, transmission, distribution and sale, allowed different entities to perform these functions, and then allowing state companies to transmit and distribute electricity – undermined the state’s control, as required under article 33(2) of the Constitution. In this way, there would ‘no longer be protection for the majority of people who could not afford … electricity’. The third applicant argued that free competition would cause an electricity crisis in Indonesia, as was already occurring outside Java; criticised unbundling; and argued that leaving the market to determine prices was inconsistent with article 33’s emphasis on the people’s prosperity.

In response, the government emphasised the need for private sector capital to ensure electricity supply in Indonesia and the desirability of competition as a means of promoting

113 MK Decision 003/2005.
transparency and efficiency in electricity production. It also argued that it would still be regulating and controlling the sector by determining policy, and by regulating and supervising the sector. The government also noted that it would maintain control of distribution and transmission, and that the private sector could only be involved in the production and sale of electricity.

The Court’s decision focused on the state’s obligation to ‘control’ important branches of production under article 33(2) of the Constitution. It held that articles 16, 17(3) and 68 of the Electricity Law, which sought to introduce competition and ‘unbundling’ in the electricity sector, conflicted with article 33(2) of the Constitution because they would, in fact, result in a relinquishing of ‘control’ in the sense intended by that article. In addition, the court then went on to find that competition and unbundling were at the ‘heart’ of the Law, and on that basis, it declared the entire statute invalid on the ground that it was not in line with ‘the soul and spirit’ of article 33(2) of the Constitution, which, according to the Court, ‘forms the basis of the Indonesian economy’. Having invalidated the entirety of the 2002 Law, the MK then reinstated the previous Electricity Law (Law 15/1985).

The Court in the Electricity case rejected the government’s argument that regulating the electricity sector amounted to the same as ‘controlling’ the supply of electricity. It also held that the government could improve the sector and attract private capital without privatisation. Third, the court held that the state’s obligation to ensure public prosperity would not necessarily be fulfilled by allowing competition, because the private sectors would give priority to its own profits and would concentrate on established markets – primarily in Java, Madura, and Bali. The Court believed that cross-subsidies from these established markets would be required to support ‘less competitive’ parts of Indonesia, and that these subsidies could not be obtained from the private sector. In this context, competition would ‘tend to undermine state enterprises and might not guarantee the supply of electricity to all parts of the community’.

As Butt and Lindsey point out, the MK’s decision in the Electricity Law case may well have obstructed Indonesian compliance with the legal and economic reform programs it has agreed to with international lenders and donors such as the IMF. In its letter of intent of 16 March 1999, for example, the Indonesian government described the policies that it intended to implement ‘in the context of its request for financial support from the IMF’:

With the support of the World and ADB, the government will (i) establish the legal and regulatory framework to create a competitive electricity market; (ii) restructure the organisation of PLN [the national electricity provider]; (iii) adjust electricity tariffs; and (iv) rationalise power purchases from private sector power projects. The government has commenced renegotiations with independent power producers, will initiate the

organisational restructuring of PLN by June 1999; and will enact a new Electricity Law by December 1999.\textsuperscript{117}

The government, however, has effectively circumvented the potential impact of the MK decision on its privatisation-oriented policy plans, and has resurrected the Electricity Law in the guise of government regulation.

In January 2005, around two months after the MK handed down its decision in the Electricity Law case, the government issued a regulation, the full title of which was Government Regulation No 3 of 2005, Amending Government Regulation No 10 of 1989 on the Provision and Exploitation of Electricity’. Part (a) of the Regulations Considerations reveals its intent:

… in the framework of increasing the availability of electricity for the public interest, the roles of cooperatives, state-owned enterprises, regional state-owned enterprises, the private sector, community groups and individuals must be increased.

Government Regulation 3/2005 was not framed as a formal and direct replacement of the Electricity Law struck down by the MK, but it certainly appears to mitigate, even nullify, much of the effect of the MK decision. It has been described as being ‘not much different’ from the Electricity Law the MK invalidated, and Hotma Timpul, a Jakarta lawyer has said that it is just a re-enactment of the Electricity Law ‘in new clothes’.\textsuperscript{118} This is because the Regulation allows the state to grant permits to private sector operators the right to buy and sell electricity. Indeed, even a senior government official J Purnowo, the Director of Electricity Management Administration, has admitted that the Regulation was passed to provide certainty for private sector investors in the aftermath of the MK’s decision. More specifically, he expressed a hope that the Regulation would enable PLN to invite the private sector to compete for tenders.\textsuperscript{119}

The irony is that that the MK can do nothing to remedy the apparent unconstitutionality of the electricity regulation because it cannot review lower-level laws such as government regulations, but can only review statutes. Regulations, as lower-level laws are (in principle, at least) usually issued to implement statutes. Only the Supreme Court has jurisdiction to review the consistency of lower-level laws with statutes or with the Constitution. However, this is a jurisdiction the Makmah Agung has traditionally been extremely reluctant to exercise, with the result that such regulations are almost never struck down judicially. It is therefore likely that the Regulation will remain in force and applicable, a result that threatens to make a farce of the whole judicial review process.


So even with a strongly-worded Constitution, it seems that there is little the courts can do to change the direction of a government determined to ignore its social protection responsibilities. Yet the Constitution does achieve a very important aim – it provides public discourse with the language to debate such topics as the socio-economic obligations of government, placing the government under increased scrutiny in regards to its socio-economic rights record.

Evidence that the government was feeling the pressures placed upon it by findings such as those emerging from the decision in the Electricity case emerged in mid 2011 when the Indonesian parliament approved changes to the 2003 Constitutional Court Law. The revisions approved include some significant changes to the court’s authority, and have been criticised as limiting the powers of the court and posing a potential threat to its independence in handling future cases.

One controversial amendment is that the court is now prohibited from making ultra petita (beyond the request) findings. That is, the court may not issue a ruling that goes beyond the strict parameters of the petition actually before the court in a particular case. Another amendment ensures that the Court may not change or redefine the provisions of a law deemed unconstitutional, although it may still annul an entire law or certain articles in a law.

A third change involves the Constitutional Court Honorary Council. Before the amendments, the Honorary Council was comprised entirely of Constitutional Court judges. Now its composition has been changed to include a representative from the Parliament, from the Judicial Commission, from the Ministry of Law and Human Rights and from the Supreme Court.

All of these changes increase the degree of influence and control the executive government is able to exert over the court, over the court’s decisions and over the consequences emerging from those decisions. The role of the Constitutional Court as an independent protector of ESC rights threatened or damaged by executive action is thereby weakened.

Nor are these changes to the Constitutional Court occurring in a vacuum. Similar ‘changes’ have been legislated to alter the composition and operation of Indonesia’s independent Corruption Eradication Commission (Komisi Pemberantasan Korupsi, hereafter KPK) and the Special Court for Corruption. Since they were first established by Law No 30 of 2002,\textsuperscript{120} the KPK and the Special Court have developed an excellent track record in successfully investigating and prosecuting corruption cases, with a 100% conviction rate during its first six years. More importantly, most of these cases have involved the exposure and prevention of other criminal activities detracting from Indonesia’s socio-economic wellbeing, particularly illegal logging activities in Indonesia’s valuable forested areas. The Kalimantan\textsuperscript{121} and Riau/Sumatera cases, for example, led to the exposure and prevention of illegal logging and palm-plantation activities, and the recovery of over USD 50 million in assets otherwise lost to the state.

\textsuperscript{120} on the Commission for the Eradication
\textsuperscript{121} SAF – Former East Kalimantan Governor MTS UUA & RBN.
However, recent changes to the composition and operation of the KPK contain the potential to impact detrimentally on its anti-corruption efforts. The Corruption Crimes Court Law was passed in late 2009 to ensure the continued existence of the Court after the Constitutional Court rejected the legal validity of the original legislation establishing the Court. But this law also provided the basis for establishing a network of provincial level anti-corruption crimes courts throughout all of Indonesia’s 33 provinces. The practical problem will be how to find enough qualified and impartial judges to sit on these courts. The 2009 Law authorises heads of district courts to alter the composition of judicial panels on the Corruption crimes Courts, and in so doing provides for the use of fewer ‘ad hoc’ judges and more ‘career’ judges in the composition of the courts. The use of ad hoc judges, usually academics or other experts appointed from outside the ranks of the main court system, is widely considered to be crucial to the independence of such courts. The fear is that the inclusion of more career judges form within the justice system could undermine this independence, making it easier for those accused of corruption to influence the courts. If more anti-corruption courts open, but are themselves staffed with corrupt officials and/or judges open to corrupting influences, the anti-corruption cause will take a step backwards rather than forwards.

Indonesia’s first UPR in the Working Group took place on 9 April 2008 and resulted in 16 recommendations being received by Indonesia, of which 12 recommendations were accepted. Indonesia accepted recommendations that it should undertake human rights education and training, accede to international treaties, support the work of civil society, including human rights defenders, combat impunity and finalise the new draft Criminal Code, which includes the crime of torture, in consultation with stakeholders. Indonesia’s responses to the remaining 4 recommendations were left pending. The results of the first UPR were adopted by the Human Rights Council on 9 June 2008.

Indonesia’s second-round UPR Working Group was held on 23 May 2012. What is most interesting about this second-round UPR process is the considerable number of human rights NGOs that became actively involved. Sixteen NGOs made individual submissions to the UPR, while a total of 13 joint NGO submissions were also made, some involving up to 14 NGOs in the one submission.

A number of things emerge from the NGO submissions. A number of NGOs acknowledged the development of a first Indonesian Human Rights Action Plan in 2007-10 and a second Human Rights Action Plan for 2011-14. The problem is, however, that the development of these plans appears to have replaced, rather than served to facilitate the realisation of, commitments made during the first UPR. For example, there has been little progress in

---


124 Eg. Amnesty International submission to the UN Universal Periodic Review, 13th session of the UPR Working Group, May-June 2012 (November 2011);
combating impunity by bringing perpetrators of serious human rights violations to justice. Some efforts have been made to provide human rights training for police, and a new police regulation was introduced in 2009 aimed at protecting and promoting human rights.\textsuperscript{125} Yet there are continued reports of human rights abuses by police and a continued lack of accountability for such abuses.

First, the situation for religious minorities appears to have worsened significantly. Longstanding impunity for religious violence in Indonesia has fostered larger and more brutal attacks by Islamic Militants against religious minorities, particularly against Christians and the Ahmadiyah sect of the Muslim faith.\textsuperscript{126} On 6 February 2011, a violent attack against Jemaah Amadiyah members in Cikeusik, Baten Province, West Java resulted in the death of 3 Amadiyah members with five others wounded. In July 2011, 12 individuals were sentenced to periods ranging from 3 to 6 months for their involvement in the killings. In August, a member of Amadiyah received a much heavier sentence for the offence of ignoring an order to evacuate property in Cikeusik. Following a fatwa banning the Ahmadiyah in Indonesia, many adherents continue to receive threats. Christian churches have been attacked and congregations have consistently been denied necessary building permits for church buildings.\textsuperscript{127}

Laws and policies often contribute to this violence by criminalizing the practice of religion that is deemed to deviate from the central tenets of one of the country’s six officially protected religions under the 1965 Blasphemy Law. On 19 April 2010 the Constitutional Court upheld Indonesia’s 1965 Blasphemy Law as a lawful protection of public order and the country’s six major religions.\textsuperscript{128} However, the law has been used to imprison and prosecute members of religious minorities – in apparent disregard of the guarantee of freedom of worship in articles 28 and 29 of the Constitution.\textsuperscript{129}

The introduction of greater autonomy for Aceh over the period 1999 – 2011 included the right for Aceh to establish Shariah courts and Shariah by-laws. One such law has been the

\textsuperscript{125} Regulation of the Chief of the National Police regarding the implementation of Human Rights Principles and Standards in the Discharge of Duties on the Indonesian National Police (No 8/ 2009).
\textsuperscript{126} According to the Setara Institute, which monitors religious freedom, religious attacks have increased from 135 incidents in 2007, to 216 incidents in 2010, and 184 incidents for the first nine months in 2011.
\textsuperscript{127} Examples include the city of Malang, East Java, Mayor’s Decree of 30 December 2009 rejecting permit to build Diaspora Church In Kiduldalem Kelurahan, Klojen subdistrict and in the city of Bogor, West Java, where a Mayor’s decree dated 11 March 2011 permanently revoked building permit for Bapos Taman Yamin Christian Church, Bogor. See also Center for Human Rights and Democracy (CHRD) Faculty of Law, University of Brawijaya, Indonesia, ‘Submission to the UN Universal Periodic Review: 13th session of the UPR Working Group of the Human Rights Council May 2012 (November 2011).’
\textsuperscript{128} Under the Constitution, six formal religions are officially recognized and protected by the state — Islam, Buddhism, Hinduism, Catholicism, Protestantism and Confucianism. The Blasphemy Law makes it illegal to “publicize, recommend or organize public support” for non-orthodox versions of those six religions, but it does not prohibit followers of minor faiths, such as Sikhs: see further Camelia Pasandaran, ‘Constitutional Court keeps faith With Indonesia’s Controversial Blasphemy Law’ Jakarta Globe (20 April 2010). See also Human Rights First Submission to the Office of the High Commission for Human Rights, Universal Periodic Review: Indonesia 2011, Attachment: “Blasphemy Laws: the Consequences of Criminalizing Defamation of Religions.”
\textsuperscript{129} Global Legal Monitor, ‘Indonesia: Constitutional Court Upholds Blasphemy Law’ (22 April 2010), available online at http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205401941_text.
introduction of public caning as a form of corporal punishment permitted by Shariah law. A number of NGOs pointed out in their submissions to the 2012 UPR that such punishments in many cases amount to a violation of Indonesia’s obligations under international law, as well as under Indonesia’s own Constitution.\textsuperscript{130}

A number of NGO submissions as well as the report of the Indonesian Human Rights Commission (Komnas HAM) to the UN UPR also pointed to the failure of the Indonesian government to protect the economic, social and cultural rights of the indigenous Papuans in the Province of West Papua,\textsuperscript{131} and the systematic violation of the social, economic and cultural rights of poor villagers in eastern Indonesia. Small populated islands such as Flores, Timor, Lembata and Sumba have been mined by force by local Indonesian governments in conjunction with multinational corporations. As in Sabah, Malaysia, a number of court cases have arisen from attempts by local landowners to defend their land from expropriation by forestry and/or mining companies.

Impunity for official violence perpetrated in Papua and elsewhere continues while the government fails to pass draft criminal code legislation that has languished on the books since the early 1990s. Other legal reforms are also needed to remove obstacles to the prosecution of human rights offenders. At the moment, bringing perpetrators of human rights abuses to court under the Human Right Court Law (No 26/2000) involves a number of actors: Komnas HAM, the Attorney General’s Office, the Parliament (which makes recommendations based on the investigations of Komnas HAM and the AGO) and the President (who passes a degree to establish a court based on Parliament’s recommendations). A major impediment to the implementation of the Human Rights Court Law is the AGO’s refusal to take action to investigate cases until specifically mandated to do so by the Parliament or President. This is despite the fact that the Constitutional Court has held (judgement 18/PUU-V/2007) that a judicial investigation by the AGO has to be conducted before the Parliament can take other steps.\textsuperscript{132}

**Conclusion**

A number of lessons can be drawn from the recent human rights experience in Malaysia and Indonesia, and in particular from the UN Human Rights Universal Periodic Review that is now in its second round for both countries. An examination of these two countries confirms what a number of scholars have already shown more generally – that there is very little correlation between treaty acceptance and state behaviour.\textsuperscript{133} While Indonesia has the better record in terms of ratifying international human rights instruments, its human rights record on

\textsuperscript{130} Article 28: right to life and right to freedom from cruel, inhuman or degrading treatment.

\textsuperscript{131} Eg. ‘Threats against Human Rights Defenders’ in Human Rights First Submission to the Office of the High Commissioner for Human Rights, Universal Periodic Review: Indonesia 2011.


the ground leaves much to be desired. Of course, the fact that Malaysia is so much wealthier with a smaller population has helped ensure that the Malaysian government can promise its people a consistent improvement in living standards and can also have the confidence to withstand international pressure over its human rights record.

But perhaps the most significant lesson from the Malaysian/Indonesia experience concerns the power of civil action and public advocacy. In particular, the active work and advocacy of the NGO sector in both countries has brought the quality of human rights scrutiny in both countries to a new level. One of the most ways the NGO sector has achieved this is through its increasing willingness and ability to make use of the internet and other forms of modern communication and social media. NGOs and other civil society actors have shown, for example, how civil society can be empowered by a state’s treaty ratification even if the state itself fails to implement it. During the UPR process in both Malaysia and Indonesia, for example, NGOs were able to make submissions highlighting the discrepancies which remain between the standards set down in ratified human rights instruments and the realities on the ground. They were also able to use ratification of a particular instrument – such as the CEDAW in Malaysia, to push for greater realisation of the ideals embodied in that treaty through the withdrawal of remaining reservations and the further ratification of the optional protocol to CEDAW which is aimed at improving scrutiny of CEDAW compliance.

The experience of NGOs and other civil society actors has also demonstrated, yet again, the very important role played by a free and independent media – a role which both supports and is supported by social media. Which brings me to my final point – the inter-dependence of all human rights. It has long been said that a right to vote or a right to freedom of expression is of little use to a woman who is ill or hungry. In other words, economic and social rights have been seen as creating the basis – a necessary precondition – for the realisation of civil and political rights. What we are now seeing is that civil and political rights, in particular the right to freedom of expression and freedom from arbitrary detention, are a necessary precondition for bringing about much needed and long neglected improvements in the basic living standards of Papua and other poorer regions in Indonesia and of the extremely poor in Malaysia.

134 Malaysia has a population of around 28.5 million (2010-2011 figures) compared to Indonesia with a population of around 245 million. The IMF’s ranking of countries by gross domestic product at purchasing power parity per capita puts Malaysia at number 58 and Indonesia much lower at number 122.