ASEAN Human Rights Declaration & Regional Standards: State Treaty Ratification Behavior

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Abstract. The signing of the ASEAN Human Rights Declaration in 2012 supposedly provides a long awaited triumph for human rights in the region and a measure by which regional human rights can finally prevail in parallel with the new ASEAN Human Rights Body. It is my argument that there are two primary challenges to realizing universal regional human rights standards; ASEAN's constitutive norms/identity and fragmentation of human rights understandings in national legal interpretations of international human rights instruments. To substantiate this I will analyze primary documentation and treaty ratification behavior of ASEAN states in an attempt to find out what are interests and preferences of ASEAN states in terms of human rights by analyzing treaties and reservations/declaration/statements which are attached to international human rights instruments that ASEAN states sign/accede to. Furthermore, I will demonstrate that treaty ratification behavior of ASEAN states is generally consistent with two hegemonic strains of regional thought: sovereignty fears and cultural resistance to human rights norms and standards.

1. Introduction

On November 18, 2012, ASEAN Heads of State adopted at its 21st Summit the ASEAN Human Rights Declaration [1]. In 1993 ASEAN states at the Vienna Conference on Human Rights pledged to create a human rights mechanism, only succeeding some 18 years later. The very slow progress for the creation of a regional human rights body in Southeast Asia is evidence of a high level of contestation and low political will which lessens the probability for an effective mechanism of human rights implementation. It is my argument that treaty ratification behavior of ASEAN states will be in line with two strains of behavior: state sovereignty and primacy of cultural. This should not be construed to mean these are universal traits but rather that both strains will be general and consistent thus influencing a distinct lack of consensus and ability to unify common standards relating to human rights in the region.

The purpose of this study is twofold; first to uncover how ASEAN states position themselves relationally to human rights and secondly how state action may impact regional human rights

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standards formation and implementation. I will analyze international human rights treaties which ASEAN states have ratified as well as their statement (declarations/reservations) to the aforementioned. In order to find preferences of ASEAN states, decoding of their reservations/declarations will used to find frames of reference for analysis and how these can be interpreted. If ASEAN states do not ratify HR treaties they are signaling resistance to normative pledging behavior and if they do ratify then reservations/declarations will be made with specific mention to "cultural" and sovereignty indicators which structurally inhibit standards creation. Regional norms of sovereignty and non-interference referencing which support the state as a protected entity and cultural identity marking will also be analyzed to determine if these regional norms are articulated to feed state prerogative in social contestation and block regional human rights standardization. I will limit my analytical inquiry to four human rights treaties; ICCPR, ICESCR, CRC, CEDAW. Coding will be used to identify interests/preferences and IHRL interpretations of ASEAN states. Words and phrases such as "self-determination, supremacy of or deference to "constitutional and national law", reliance on definitions of "national and/or national and international law", "non-recognition of ICJ/external arbitration", references to the UN Charter Article 2 and lastly issues regarding citizenship, nationality and national racial policy will be interpreted as state sovereignty issues and frames. Whereas references to "religion", "Shariah", "custom", "personal", "family", "ethnicity" and national ideology will be interpreted as cultural issues and frames.

2. Theorizing State [ASEAN] Behavior Regarding Human Rights Treaty Ratification

Scholarly literature surrounding the study of ASEAN makes conflations of institutional agency which sees ASEAN as an autonomous site for policy formation and action. This is a misnomer and obscures the direction of inquiry. As such it is of the utmost importance to clarify what is meant when one refers to "ASEAN". ASEAN is not an autonomous institutional entity regardless of the recent upgrade of the Secretariat and its Secretary General to ambassadorial status with 'enhanced powers' [2,3]. The Secretariat has a staff of 295 [4] and budget of $15.7 [5] leading to an understanding that capacity to act is highly constrained due to the structure of finance and human resources [6]. ASEAN should be considered and studied as a collection of 10 independent states within an intergovernmental organizational structure [7,8] that share limited sets of interests and goals along a narrow consensus among elite [9]. With this in mind ASEAN as an organization is thus dependent upon its institutional framework of ***procedural*** norms of consultation and consensus decision-making [10] and ***regulative*** norms of state sovereignty, no external interference or subversion [11], non-interference in internal affairs and peaceful settlement of disputes [12]. Put together these constitute the ASEAN Way but more importantly direct academic inquiry to the behavior of ASEAN member states rather than ASEAN as an institution.

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Human Rights Treaty Ratification Behavior of ASEAN States

A reservation as defined by Article 2.1(d) of Vienna Convention on the Law of Treaties between States and International Organisations defines such practices as "a unilateral statement, however phrased or named, made by a State or by an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, whereby it purports to ***exclude or to modify the legal effect*** of certain provisions of the treaty in their application" while declarations, interpretive declarations and statements are not intended to have binding effect [13]. This is disputable however as statements can indeed constitute reservations if they are effectual and conditional thus bringing interpretation specific provisions [14,15].

3. International Covenant on Civil and Political Rights

There are six ASEAN member states party to the ICCPR of these only Cambodia has not lodged a declaration or reservation while the Philippines has broken ranks with other members and recognized jurisdiction of the Committee, in effect signaling a strong penchant towards peer review as well as ratifying optional protocols. Indonesia, Lao PDR and Thailand all seek to define self-determination in ICCPR Article 1 in accordance with the VDPA (Indonesia, Lao PDR, Thailand), Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States (Indonesia, Lao PDR), Declaration on the Granting of Independence to Colonial Countries and Peoples (Indonesia) which are all derived from Article 2 of the UN Charter upholding sovereign equality [16]. Lao PDR adds reservations to Article 22 (ICCPR Article 22) referring to freedom of labor union association which is governed by Article 7 of the Lao PDR constitution which states "Lao Federation of Trade Unions…are the organs to unite and mobilise all strata of the multi-ethnic people to take part in the tasks of protection and construction of the country; to develop the right of self-determination of the people and to protect the legitimate rights" [17] and Article 18 concerning freedom of religion and Laos' reservation that people have the right to believe or not to believe in religion and "all acts creating division and discrimination among ethnic groups and among religions are incompatible" [18]. Thailand adds an interpretive declaration to Article 20.1 stating war is defined in accordance with international law thus Geneva Conventions I-IV Common Article 2 where war can exist with or without declaration [19]. All statements by these states are specific in their conditional and provisional detail to constitute reservations. All reservations made link directly to sovereignty and national ideology which should be interpreted as national culture/identity and state security coding in their objections to the ICCPR. It would appear that national resilience in the form of socialist ideology, state security and historical underpinnings of state formation are expressed strongly in specifically defining rights and the limitations thereof.

4. International Covenant on Economic, Social and Cultural Rights

The same six countries are party to the ICESCR but only three lodged statements. Indonesia and Thailand are the same as their ICCPR declarations. While Vietnam lodged a declaration

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considering ICCPR Article 48(1) and ICESCR Article 26(1) discriminatory because only states which are members of the UN, its specialized agencies, Statute of the ICJ or invited by the UNGA can take part in these treaties. Vietnam stated that "in accordance with the principle of sovereign equality of States, should be open for participation by all States without any discrimination or limitation" [20]. These once again are conditional and specific in provisional detail thus constituting reservations and point directly to state sovereignty as an overriding principle of ASEAN states towards the ICESCR. The Vietnamese statements can be taken in the context of socialist fraternity and equal participation by all states on discriminatory terms of being compelled to be within the UN system rather than simply a part of international society.

5. Convention on the Elimination of All Forms of Discrimination against Women

All ASEAN members are party to CEDAW (three ratifying and one signing the optional protocol) with seven lodging statements, showing a high degree of contention concerning this convention. This should not come as a surprise due to the highly contested nature of gender relations and cross-cutting issues of education, employment, family, marriage, public service and services and especially the public/private nature of these issues. Nonetheless, CEDAW offers insight into the prevailing differences of interpretation and interests of ASEAN members. Brunei lodged a general reservation concerning all principles that may be contrary to its constitution and Islam derived from the father in instances of birth outside of Brunei Darussalam and only inclusive of the mother if born in Brunei to natural parents both of Brunei nationality or Malay race [21]. It further reserved against Article 29(1) concerning ICJ jurisdiction [22]. These reservations demonstrate two strains of understanding; first Islam hence culture is a central theme of apprehension and interpretation, second nationality as culture and sovereignty bound parallels its statement on constitutional supremacy and jurisdiction of dispute adjudication.

Malaysia lodged reservations concerning Article 5(a) inheritance, 7 public officials, 9(2) citizenship and 16 marriage stating that it would abide by principles in as far as the convention "do not conflict with the provisions of the Islamic Sharia' law and the Federal Constitution of Malaysia" [23]. This reservation also has dual nature in that Islam as the religion of governance for Malay Muslims concerning marriage and personal law, property, religious authorities, religious judiciary will be not be superseded by CEDAW but rather governed by the Constitution under Islamic law [24]. Marriage as such would be governed by Islamic law where women can marry at age 16 and men at 18. Citizenship and nationality would also be defined by Article 14 of the Constitution which of consequence is differential to children born out of wedlock abroad to a Malay mother, of which the child would take the fathers citizenship. Otherwise normal procedure would take place concerning naturalization [25]. This as in the case above of Brunei show a strong penchant for religious understandings/exceptions as supremacy of national law as embodying the protection of the prior, thus both culture and sovereignty issues are salient. Singapore while somewhat different accessed reservations for Article 2 and 16 citing the need not to abolish laws/customs/practices of discrimination due to Singapore being a "multiracial and

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multi-religious society and the need to respect the freedom of minorities to practice their religious and personal laws… not to apply the provisions…that would be contrary to their religious or personal laws" [26]. To explicate Singapore has an advisory council to the President relating to regulation of Muslim affairs and Syariah Court which deal with issue pertaining to personal laws of Islam in Singapore [27,28] and to a lesser extent Hindu's [29]. For example this council has the ability to deal with issues of marriage and distribution of estates in accordance with Islamic law and/or Malay custom [30]. It also reserved not to be bound by 29(2) jurisdiction of the ICJ. These also demonstrate a dualist tendency by appealing to culture and custom within the context of a diverse society and its protection via state sovereignty and non-interference by an external body.

Thailand only has two statements; a declaration stating clearly that the purposes of CEDAW are in accordance with the Thai Constitution and a reservation on Article 29(1) not to be bound by the ICJ. This shows clearly state sovereignty and deference to national constitutional provisions especially as CEDAW expressly places obligations on state parties. It should be noted that Thailand previously had reservations on Articles 7, 9(2), 10, 11.1(b), 15(3) and 16 the most recent of which Article 16 was withdrawn only in 2012 which dealt with issues of citizenship and restricted citizenship to persons in Thailand as servants, temporarily, illegal entry [31,32,33]. This both deals with issues of national custom, private family sphere, public service, security services, state security when Thailand's historical context of refugees and neighbor state conflict and state sovereignty regarding regulation of citizenship and supremacy of domestic constitutional law. Myanmar and Vietnam both lodged reservations using language of distinct intent relating to not recognizing ICJ jurisdiction in Article 29(1) by stating "[Myanmar] does not consider itself bound" "[Vietnam] will not be bound" thus showing very strong conviction in state sovereignty and non-interference in affairs of state concerning family, gender and dispute adjudication [34].

6. Convention on the Rights of the Child

Only three ASEAN members still have active statements to the CRC as three have withdrawn prior reservations. Brunei has reservations on Article 14 and 20 regarding freedom of religious belief and 21 regarding adoption of children. It has stated unequivocally that "provisions may run contrary to the beliefs and principles of Islam, the State, religion…[and in] particular expresses its reservation to articles 14, 20 and 21" [35]. This is verbatim its objection to CEDAW in line with religion hence culture with reference to supremacy of constitutional law. Malaysia has reservations with Article 2 concerning discrimination to race, religion that runs contrary to national Bumiputra policy, Article 7 dealing with nationality, Article 14 religious freedom of choice, Article 28.1(a) compulsory primary education with reference to religious schools and Article 37 legal representation for children. It is stated that all CRC articles must in be conformity with the "Constitution, national laws and national policies" [36]. These at once with reference to nationality and religion parallel is CEDAW reservations while national level

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policy concerning race and legal representation is subject to national prerogatives. These all signal religion and culture while simultaneously reference state sovereignty as the active medium for culture reservations. Singapore lodged declarations for Articles 12-17 which allow for child freedom in law, expression, religion, education and family and Articles 19 and 37 which deal with administrative law and imprisonment and punishment. It stated that it was not prohibited by the need for "maintaining law and order… necessary in the interests of national security, public safety, public order, the protection of public health or the protection of the rights and freedoms of others… corporal punishment in the best interest of the child" [37]. These point directly towards Asian Values of the Lee Kwan Yew era and are strictly indicative of cultural arguments of differential relativism [38,39]. Singapore's reservations pertain directly to obligations or rights of the Covenant that will not go beyond those "prescribed by the Constitution of the Republic" (CRC Singapore Statements) thus directly inferring supremacy of national law. Furthermore, its reservations extend to national prerogative for citizenship, migration to national law dependent on Singapore being "geographically one of the smallest independent countries in the world and one of the most densely populated" [40] and funds for primary education to citizens only. Singapore's statements indirectly access cultural rationale via Asian Value discourse which emanated from its island and sovereignty fears associated with being a small nation which must maintain order via supremacy of its national law. It should be noted that this discourse is not dead as Villanueva insists as evidenced by the remarks of Deputy Prime Minister S. Jayakumar and Foreign Minister George Yeo at the UNGA in 2005 where they stated "the penchant of some states to present their views as universal norms inevitably provokes resistance, unnecessarily politicizes the process and is ultimately unhelpful to the cause of human rights" [41].

7. Conclusion

From the analysis above it is possible to witness two distinct trends of ASEAN state behavior regarding obligations and derogation from human rights norms embodied in these core multilateral treaties; legally altering language used via treaty reservations and a strong penchant towards state sovereignty. State sovereignty can be seen by each treaty in that only two treaties are unanimously ratified CEDAW and CRC yet both of these treaties have/had the highest number of reservations attached; CEDAW fourteen reservations from seven countries and CRC seven with eight withdrawn from six countries. This may indicated that even with high ratification level there is a significant amount of resistance to the norms and state obligations embedded within these texts.

The over exuberance for the AHRD is misplaced and hopes for a substantive regional mechanism to protect and enforce human rights in the ASEAN region will be stunted for the foreseeable future. Petcharamesree has noted that standards are central to formulating meaningful mechanisms and primary inhibitors to those standards are ASEAN norms which are embedded in all the major regional text analyzed [42]. The harsh commentary is not justified when one views the history of human rights in the region and especially the structure of ASEAN

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and the behavior of its states regarding core human rights treaty ratification and statements. To expect an ASEAN level response is to expect too much from ASEAN. Human rights interpretations in the region are highly fragmented, disparate and subject to cultural interpretations and state sovereignty loss fears. Sovereignty strongly correlates to power; power to administer, adjudicate and deal with as state elites and institutions fit with culture is a masking device to support sovereignty. To tackle the formidable task of making human rights matter in ASEAN one must take to task the fragmentation of human rights understandings and build common ground and standards on the national level and work up, not down. ASEAN states have been resistant to human rights reforms and only grudgingly accepted in Vienna 1993 but as such have been able to stall a viable mechanism which needless to say is hardly viable if standards are not in place in ASEAN's parts. Counterfactually it can be stated by simply looking at how long it took to formulate even a weak document as the AHRD that if there were no ASEAN there would be no difference as it is the sum of its parts that flow or in this case fragment and lead to a weak regional document. This study has demonstrated that ASEAN states view human rights through different lenses and have different interests when it comes to rights. This is not to say that the AHRD is nothing but rather that it simply reflects structural equities of its parts and as such perhaps more research into national standards, measures and can help add pieces to the puzzle of how to make rights effective in a region so resistant. Weak international enforcement, post-colonial sovereignty fears, national identity fragmentation and state security all have strong roles in determining state interests and action, regional interests and action and by extension international interests and action.

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