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HUMAN RIGHTS TREATY RATIFICATION BEHAVIOR: THE ASEAN WAY OF CREATING STANDARDS

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. The importance of the new ASEAN Intergovernmental Commission on Human Rights lies in it being the first commission of its kind in Asia and a signal that human rights is finally being mainstreamed and accepted. However, as AICHR undertook its first work-plan and drafted the AHRD which fell below international standards, ASEAN's rhetoric/reality gap again came into plain view. 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.

Keywords:

ASEAN, ASEAN Intergovernmental Commission on Human Rights, Human Rights Southeast Asia, Treaty Ratification behavior

JEL Classification: F50, F59

Introduction

“a [human rights] body which, while lacking in teeth, will at least have a tongue, and a tongue will have its uses” George Yeo Foreign Minister Singapore¹

On November 18, 2012, ASEAN Heads of State adopted at its 21st Summit the ASEAN Human Rights Declaration.² Commentary surrounding the AHRD as with other recent ASEAN documents (i.e. ASEAN Charter) were highly polarized with civil society groups and NGOs criticizing ASEAN duplicity by adopting a document seen as falling below international standards of acceptability³ and general pragmatism of limitations entailed by the ‘ASEAN Way’ (common fair among diplomats and scholars) of ASEAN integration⁴ alongside views of optimism.⁵ Along with dismay were euphoric voices that pronounced a new era of human rights cooperation now emerging due to the ending of the Asian Values discourse.⁶ In 1993 ASEAN states at the Vienna Conference on Human Rights pledged to create a human rights mechanism and only succeeded in doing 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 intractability, obstruction, contestation and low political will which lessens the probability for an effective mechanism of human rights implementation. It is my argument that treaty ratification

¹ This statement by the richest ASEAN country and primary advocator for economic integration demonstrates the rather contemptuous regard for human rights by regional leaders. Furthermore, it perhaps shows the latent fear of granting such rights and a viable mechanism for people of the region.

² ASEAN. (2012a) Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration (AHRD). Phnom Penh.

³ Asia Pacific Forum on Women Law and Development, “Adding Value: Removing morality from the ASEAN Human Rights Declaration.” (2012). [ONLINE] Available at: http://www.apwld.org/wp-content/uploads/APWLD-paper-on-Morality_final.pdf. [Accessed September 13, 2013].

Human Rights Watch. (2012) *Civil Society Denounces Adoption of Flawed ASEAN Human Rights Declaration*. [ONLINE] Available at: <http://www.hrw.org/news/2012/11/19/civil-society-denounces-adoption-flawed-asean-human-rights-declaration>. [Accessed 01 September 13].

International Commission of Jurists. (2012) *ICJ condemns fatally flawed ASEAN Human Rights Declaration*. [ONLINE] Available at: <http://www>

⁴ Asplund, André. “ASEAN’s Democracy Deficit and the Protection of Human Rights,” *East Asia Forum*. (2012), [ONLINE] Available at: <http://www.eastasiaforum.org/2012/11/17/aseans-democracy-deficit-and-the-protection-of-human-rights/> [Accessed September 13, 2013].

Ng, Joel. (2012a) *The ASEAN Human Rights Declaration: Establishing a Common Framework*. RSIS Commentary. [Online]. No. 114/2012, a. Available at: <http://dr.ntu.edu.sg/bitstream/handle/10220/8618/RSIS1142012.pdf?sequence=1> [Accessed 01 September 2013].

Ng, Joel. (2012b) *ASEAN Human Rights Declaration: A Pragmatic Compromise*. RSIS Commentary. [Online]. No. 211/2012, a. Available at: <http://dr.ntu.edu.sg/bitstream/handle/10220/11694/RSIS2112012.pdf?sequence=1> [Accessed 01 September 2013].

⁵ American Bar Association. “*Experts’ Note on the ASEAN Human Rights Declaration*.” report prepared by American Bar Association. Washington, DC: Rule of Law Initiative. (2012).

⁶ Villanueva, Kevin H.R. (2013) ASEAN’s ‘Magna Carta’ Universalises Human Rights. *East Asia Forum*, 12 February. [ONLINE] Available at: <http://www.eastasiaforum.org/2013/02/12/aseans-magna-carta-universalises-human-rights/>. [Accessed 6 September 2013].

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 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 be used to find frames of reference for analysis and how these can be interpreted. I argue that the AHRD only stands as an aspirational marker of external signaling to other countries that human rights are and will be protected while providing little substance in protection. 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 six (6) core human rights treaties; ICCPR, ICESCR, ICERD, CAT, 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.

Underlying Objectives

The objective for this study is to find out the latent interests and preferences of ASEAN states which are best displayed in their actions regarding human rights norms and treaties. In particular how do ASEAN states interpret international human rights? How may national interpretation affect regional standards? Nominally this will at least provide some insight into possible reasons for ASEAN state behavior regarding human rights and their attendant instruments while shedding light on possible research trajectories. Second, is providing reasoning for why there exist very high obstacles to regional human rights standards due to national fragmentation. ASEAN state behavior towards core human rights treaties in their declarations/reservations, signing/ratification

should provide strong insight to the derivative arguments of whether the AHRD and AHRB will be effective or not. For if state behavior regarding the core human rights treaties is fragmented displaying particularist characteristics of sovereignty, supremacy of national law and cultural relativism then by extension the arguments surrounding the AHRD and AHRB are essentially moot and hold little relevance for sustained inquiry at the moment. Simply put ASEAN state treaty ratification behavior is the source of regional norms and understandings **NOT** regional level undertakings which cannot bypass ASEAN states thus activating normative and constructivist claims of spillover.

Central research questions are: what is the behavior of ASEAN states regarding core human rights treaties? Do ASEAN states and leaders act as they do because of culture and resistance, post-colonial fear attributable to weak state structure, rationalist calculations of opportunity costs or idealistic liberal democratic notions of liberty and freedom? There exists a large gap in the scholarly literature addressing ASEAN state preference and motivations for signing supposedly sovereignty eroding human rights treaties. The embryonic state of ASEAN level human rights instruments reflects the burgeoning literature in its depth. Strict legal analysis has been undertaken by Ginbar⁷ and Renshaw⁸ regarding legal interpretation of the ASEAN HR agreements while Collins⁹ and Durbach et. al.¹⁰ consider the problems of people-orientation and the nature of an ASEAN human rights mechanism while Davies¹¹ has considered a more theoretical perspective of regional rights. No studies currently systematically consider international treaty statements and the messages these are sending via state statements and action with regard to legal effect. Taking as a priori fact an ASEAN human rights mechanism and speculating as to its possible effectiveness or not confuses scholarship as it looks at regional level action as detached from national action, which in the case of ASEAN as will be discussed later is a fallacy in itself. Thus this short analysis seeks to modestly account for motivations and reasons for ASEAN (regional level) human rights behavior and national positioning relating to human rights treaties and how the three different levels perhaps interact with one another and produce regional human rights instruments such as the AHRD which signal a particular understanding of human rights standards in the region.

⁷ Ginbar, Yuval. (2010) Human Rights in ASEAN Setting Sail or Treading Water?. *Human Rights Law Review*, 10 (3), 504-518.

⁸ Renshaw, Catherine S. (2013) The ASEAN Human Rights Declaration 2012. *Human Rights Law Review*, Early online publication.

⁹ Collins, Alan (2007) Forming a Security Community: Lessons from ASEAN. *International Relations of the Asia-Pacific*, 7 (2), 203-225.

Collins, Alan (2008) A People-Oriented ASEAN: A Door Ajar or Closed for Civil Society Organizations?. *Contemporary Southeast Asia*, 30 (2), 313-331.

Collins, Alan. (2013) *Building a People-Oriented Security Community the ASEAN Way*. New York: Routledge.

¹⁰ Durbach, A., Catherine Renshaw and Andrew Byrnes (2009) 'A tongue but no Teeth?': The Emergence of a Regional Human Rights Mechanism in the Asia Pacific Region. *Sydney Law Review*, 31 (2), 211-238.

¹¹ Davies, Matthew. (2013) ASEAN and Human Rights Norms: Constructivism, Rational Choice, and the Action-identity Gap. *International Relations of the Asia-Pacific*, 13 (2), 207-231.

Theorizing State [ASEAN] Behavior Regarding Human Rights Treaty Ratification

The scholarly literature surrounding the study of ASEAN makes conflation 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".¹² 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'.¹³ The Secretariat has a staff of 295 and budget of \$15.7 million leading to an understanding that capacity to act is highly constrained due to the structure of finance and human resources.¹⁴ The Secretary-General is more Secretary than General and has little power historically and contemporarily.¹⁵ ASEAN should be considered and studied as a collection of 10 independent states within an intergovernmental organizational structure¹⁶ that share limited sets of interests and goals along a narrow consensus among elite.¹⁷ With this in mind ASEAN as an organization is thus dependent upon its institutional framework of **procedural** norms of consultation and consensus decision-making¹⁸ and **regulative** norms of state sovereignty, no external interference or subversion, non-interference in internal affairs and peaceful settlement of disputes. Put together these constitute the ASEAN Way but more importantly direct academic inquiry to the behavior (statements and actions) of ASEAN member states rather than ASEAN as an institution. ASEAN as such can be considered as a tool which serves state purposes for relational gains rather than relative regional gains. Descriptive treaty ratification behavior of individual states should shed light on some of the purposes of ASEAN and direct inquiry away from ASEAN an organization to ASEAN and its agreements as state tools.

International to Regional Human Rights Regimes: International & Regional Norms

¹² For this essay ASEAN when mentioned will pertain to the collective of its member states and member states speaking on behalf of ASEAN as a grouping not to the ASEAN Secretariat or its Secretary-General.

¹³ ASEAN. (2007) *The ASEAN Charter*. Jakarta. Article 2, 3

Severino, Rodolfo C. (2010) The ASEAN Charter: One year on. *Opinion Asia*, 3 January.

¹⁴ Chongkittavorn, Kavi. (2012) ASEAN Secretariat Must be Strengthened. *The Irrawaddy*, 21 May.

Fuller, Thomas. (2012) Wary Neighbors Turn Into Partners in a Quickly Developing Southeast Asia. *New York Times*, 5 July. A4.

Severino, Rodolfo C. (2008) *ASEAN*. Singapore: ISEAS. pp. 76

¹⁵ It should be noted that the ASEAN Secretariat was not even created until 1976, 9 years after ASEAN's birth.

¹⁶ Jones, Lee. (2010) Still in the "Drivers' Seat", But for How Long? ASEAN's Capacity for Leadership in East-Asian International Relations. *Journal of Current Southeast Asian Affairs*, 29 (3), 95-113.

Jones, Lee. (2011a) Beyond Securitization Explaining the Scope of Security Policy in Southeast Asia. *International Relations of the Asia-Pacific*. 11 (3), 403-432.

¹⁷ Chesterman, Simon (2010) Does ASEAN Exist? The Association of Southeast Asian Nations as an International Legal Person. In Sivakent Tiwari (ed.) *ASEAN Life After the Charter*. Singapore: ISEAS.

Narine, Shaun. (2002) *Explaining ASEAN: Regionalism in Southeast Asia*. Boulder: Lynne Rienner.

¹⁸ Acharya, Amitav. (2001) *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order*. 1st ed. New York: Routledge.

This section will trace ASEAN re-interpretations of international human rights in regional declarations and legal text within the context of creating a bulwark to substantive change by accessing internationally legitimating legal instruments to block regional mechanisms of reform and change regarding human rights. It will be shown that human rights standards at the regional level of ASEAN are rhetorically equivalent to international standards but are stripped of their universal potency by accentuating and emphasizing particular textual understandings of international human rights declarations and transposing these into ASEAN human rights standards. International human rights declarations of the Vienna Declaration and Programme of Action stand as a benchmark for ASEAN's retrogressive stance and standards of human rights and in fact mirror and inform ASEAN declarations regarding human rights such as the 1993 Joint Communique, ASEAN Charter and ASEAN Declaration on Human Rights.

The AHRD references the UDHR and essentially takes verbatim civil, cultural, economic, social and political rights. The AHRD lays claim that its contents are universal and dispels hierarchy in its general principles by stating that "all human rights are universal, indivisible, interdependent and interrelated" in line with the UDHR.¹⁹ However, national prerogatives and discrepancy with universality displays itself by the understanding that "enjoyment of human rights and fundamental freedoms must be **balanced** with the performance of corresponding duties as every person has responsibilities to all other individuals, the community and the society where one lives. It is **ultimately** the primary responsibility of all ASEAN Member States to promote and protect all human rights and fundamental freedoms".²⁰ The polemical notion of balancing rights and responsibilities between individual and community masks the nature of an abstract "community" and/or "society" in Southeast Asia as advocacy groups and transnational NGOs are to different degrees subject to state prerogatives of openness and access which leaves the notion of 'civil society' or for that matter individual in an asymmetrical position vis-à-vis governments who act on and behalf of the "community/society".

The seeming oxymoron of balance with illiberal governments is nothing new to the region and its human rights regime. In the lead up to the 1993 Vienna Conference on Human Rights, NGO's which drafted recommendations for the UNGA conceded political space for exploitation by recognizing "human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds".²¹ Particularism recognized by this epistemic community was considered legitimate as the 1993 VDPA noted that "having taken into account the Declarations adopted by the three regional meetings at Tunis, San

¹⁹ ASEAN. (2012b) *ASEAN Human Rights Declaration*. Phnom Penh. Article 7

²⁰ ASEAN. (2012b) *ASEAN Human Rights Declaration*. Phnom Penh. Article 6.

²¹ UNGA. (1993) A/CONF 157/ASRM/8-A/CONF 157/PC/59 *Report of the Regional Meeting for Asia of the World Conference on Human Rights (Bangkok Declaration)*. 7 April 1993. Geneva.

José and Bangkok”²² and subsequently was verbatim restated, recognizing that “all human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of **national** and **regional** particularities and various historical, cultural and religious backgrounds must be borne in mind”.²³ This demonstrates an appeal to universalism and interconnected rights without hierarchy but is countered by its subsequent sentence which in the ASEAN contexts means a non-politicization of human rights thus allowing leaders to interpret implementation according to regional fit. In the ASEAN context it should be contextualized as taking place simultaneously with the high point of the Asian Values debate which sought to counter the claims of universality and indivisibility. ASEAN leaders wasted no time in reaffirming relativism by further stressing “that human rights are interrelated and indivisible ... they should be addressed in a **balanced** and integrated manner and protected and promoted with due regard for **specific** cultural, social, economic and political circumstances”.²⁴ The VDPAs key principles were re-asserted by the ASEAN Inter-Parliamentary Organization and particularism upheld by stating that “taking in account the need for full respect of their human rights as well as their duties to the community. Freedom, progress and national stability are promoted by balance between the rights of the individual and those of the community”.²⁵ The timing of these documents and lobbying is not inconsequential as this period of time coincided with the end of the Cold War and shift in American and ‘Western’ foreign policies integrating and upgrading human rights.²⁶

Cambodian Exceptionalism?

Cambodia is an outlier of human rights treaty ratification in ASEAN and its behavior concerning such should be approached with a certain degree of cautious skepticism. Curiously it has ratified all major HR treaties (with optional protocols on CEDAW) with the exception of the migrant workers convention which it has signed. As such on the surface it would appear that Cambodia is at the forefront of the human rights movement and quite enlightened concerning the rights and the historical plight of its people. Rationalist would interpret its behavior as one of opportunity costs whereas institutionalist would see it as a means of a LDC signaling its place in the international community for legitimacy and presumably aid dispersal. Both these perspectives would

²² Ibid

²³ UNOCR. (1993) *Vienna Declaration and Programme of Action*. Geneva. Article 5.

²⁴ ASEAN. (1993) *Joint Communique of 26th ASEAN Ministerial Meeting*. Singapore. Article 16.

²⁵ ASEAN Inter-Parliamentary Organization. (1993) *Kuala Lumpur Declaration on Human Rights*. Kuala Lumpur. Article 1.

²⁶ Aziz, Davinia, Gérardine G. Meishan and Ernest L. W. Kuan. (2001) Southeast Asia and International Law. *Singapore Journal of International & Comparative Law*, 5, 814-850. p. 829.

Tay, Simon S.C. (2004) Singapore: Review of Major Policy Statements. *Singapore Yearbook of International Law*, 8, 219-234. p. 219.

not be wrong were it not for an interesting caveat of its behavior; all core human rights treaties with the exception of ICERD which Cambodia is party were signed and ratified by the genocidal Khmer Rouge (Democratic Kampuchea) regime. Timing in terms of its treaty ratification is quite interesting as the ICCPR, ICESCR and CEDAW were all signed on October 17, 1980 less than one year after the ouster of Democratic Kampuchea's leadership [January 7, 1979] and in the midst of intense ASEAN diplomacy in the UN to allow the DK regime to retain its UN seat. This can be seen as a measure of the DK regime to do an about face from its domestic practices of the preceding 5 years when it was in power in order to provide the international community with a veneer of legitimacy to its claim of international legitimacy. The Vietnamese diplomatic offensive to sign agreements with the PRK including Lao PDR and the NAM which began in April 1983 agreeing to frontier settlements and peace led to another bout of legitimacy strain coming into play.²⁷ This is seen in DK diplomatic texts which are increasingly robust in their denouncing of 'treaties' and threats to their legitimacy²⁸ the exile government ratified ICERD in October just after the Vietnamese attempted discredit the DK representatives at the 2nd World Conference on Racism and Racial Discrimination to shore up international support.²⁹ Lastly, after the UNSC³⁰ decision to deploy UNTAC in March 15, 1992 and prior to internationally monitored elections scheduled for 1993 the exiled DK leadership ratified the remaining five core human rights treaties (ICCPR & ICESCR on May 26 1992 and CAT, CRC, CEDAW on Oct 15 1992) under international pressure following the Paris Peace Agreements.³¹ Given the timing of these agreements and the absolute legitimacy needs of the exiled DK leadership it becomes evident that external demands for domestic political and military gains were the driving force for Cambodia. From this it may be inferred that human rights treaty ratification was as much part and parcel a method of retaining legitimacy in international politics and power rather than a genuine care for individual rights and constructivist claims of identity, unless identity is meant to construe illiberal genocidal behavior. These core treaties were signed by a regime responsible for genocide of its people and the timing bears eerie resemblance to critical periods of legitimacy struggles at the UN. Perhaps the sacrifice of human rights application is due to the parsimony of its mass ratification and history thereof?

²⁷ UNGA. (1983) A/38/157S/15707 *Letter from the Charge d'Affaires of the Permanent Mission of the Lao People's Democratic Republic to the United Nations addressed to the Secretary-General*. 14 April 1983. New York.

UNGA. (1983) A/38/316S/15891 *Letter from the Permanent Representative of the Lao People's Democratic Republic to the United Nations addressed to the Secretary-General*. 26 July 1983. New York.

²⁸ UNGA. (1983) A/38/314S/15885 *Letter from the Permanent Representative of Democratic Kampuchea to the United Nations addressed to the Secretary-General*. 25 July 1983. New York.

UNGA. (1983) A/38/510 *Letter from the Permanent Representative of Democratic Kampuchea to the United Nations, addressed to the Secretary-General*. 14 October 1983. New York.

²⁹ UN. (1983). A/CONF.119/22 *Letter to President of the Second World Conference to Combat Racism and Racial Discrimination*. 4 August 1983. Geneva.

³⁰ UNSC. (1991) *Resolution 717*. 16 October 1991. New York.

³¹ UN. (1991) *Department of Public Information. Agreement on a Comprehensive Political Settlement of the Cambodia Conflict*. 23 October 1991. Paris. Articles 15.1, 15.2.

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 VDMA, 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.³² 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”³³ (Constitution Lao PDR) 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”.³⁴ 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 (Geneva Convention I, II, III, IV). 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.

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 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

³² United Nations Treaty Collection Database Chapter IV Human Rights [ONLINE]. Available at: <http://treaties.un.org/Pages/Treaties.aspx?id=4>.

³³ Lao People’s Democratic Republic. (1991) *Constitution of Lao People’s Democratic Republic*. Vientiane. Article 7.

³⁴ United Nations Treaty Collection Database Chapter IV Human Rights [ONLINE]. Available at: <http://treaties.un.org/Pages/Treaties.aspx?id=4>.

participation by all States without any discrimination or limitation”.³⁵ 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.

International Convention on the Elimination of All Forms of Racial Discrimination

Three ASEAN members have lodged declarations and reservations to ICERD (Indonesia, Thailand, Vietnam). Indonesia’s reservation concerns Article 22 which pertains to jurisdiction of the ICJ and arbitration as dispute settlement mechanisms. Indonesia only allows for dispute settlement through Convention mechanisms when all parties consent. There are two readings to this reservation; first is that Indonesia is referring to Javanese political culture the Javanese tradition of “musyawarah” where leaders use informality and as the basis for decision-making, “mufakat” as the process or practice of decision-making; second and more plausible considering the language of ICERD of specifically referring to state parties having obligations and Indonesia’s reservation language of “may be referred to the International Court of Justice **only** with the consent of all the parties to the dispute” is that blunting external dispute settlement couched in sovereignty terms is the primary reason for non-recognition. Thailand’s general interpretive declaration “does not interpret and apply the provisions of this Convention as imposing upon the Kingdom of Thailand any obligation beyond the confines of the Constitution and the laws of the Kingdom of Thailand” and its interpretation of Article 4(a-c) “**only** where it is considered that the need arises to enact such legislation” demonstrates a clear understanding that racism is a hands off decision and that the supremacy of Thai law will inform the Convention. Its reservation of not being bound by Article 22 ICJ jurisdiction for dispute settlement shows state sovereignty is a major factor in Thailand’s signing of the Convention. Vietnam lodged the same declaration as it did with the ICESCR/ICCPR with reference to Article 17(1), 18(1) and a reservation to jurisdiction of the ICJ in Article 22.³⁶ All of these statements can be once again considered reservations and point once again towards state sovereignty with the exception of the Vietnamese appeals to fraternity as being a key determinant and preference for dissenting ASEAN states especially when considering that ICERD was the first human rights treaty undertaken with urgency in the post-colonial period.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

³⁵ United Nations Treaty Collection Database Chapter IV Human Rights [ONLINE]. Available at: <http://treaties.un.org/Pages/Treaties.aspx?id=4>.

³⁶ United Nations Treaty Collection Database Chapter IV Human Rights [ONLINE]. Available at: <http://treaties.un.org/Pages/Treaties.aspx?id=4>.

Of the five ASEAN members which have ratified the CAT, three have lodged statements thus showing a rather high degree of resistance. But as will be shown the specific nature of these statements essentially emasculates the CAT providing little impetus for focal reference. Indonesia's declaration regarding Article 20(1-3) concerning inquiry into offending states must be carried out with "strict compliance with the principles of the sovereignty and territorial integrity of States". While its reservation parallels its previous ICCPR and ICESCR statements regarding Article 30(1) ICJ jurisdiction and dispute settlement. Lao PDR reservations do not recognize competence of the CAT Committee in Article 20 and ICJ jurisdiction in Article 30. It also has declared regarding Article 8(2) that extradition of persons will only take place when an extradition treaty exists. These all are contingent upon its interesting declaration regarding the definition of torture in Article 1 where Lao states that torture is understood as "defined in both national law and international law".³⁷ This may seem innocuous at first glance until torture in Article 160 of its Criminal Code is shown to define torture as "physical violence and torture, use of measures or other acts inconsistent with the law against suspects or prisoners during arrest, trial or service of sentence".³⁸ This demonstrates that national rather than international definition of torture will be used and as Laos' criminal code shows torture is not defined aside from its noun usage. Furthermore, the argument by Laotian authorities is circular offering no definition other than simply torture is defined as torture. It should be noted that what the international community considers torture is recognized as part of customary law/practice by various ethnic groups such as Lu-Mien, Hmong, Akha, Lolo among others in their procedures to extract confessions which also points towards procedural deficiencies of fair trial and presumption of innocence.³⁹ Put together these show strong resistance to the CAT and a strong push to sovereignty norms not to be held accountable for national practices. Thailand's interpretive declaration merits consideration as it also states that torture "shall be interpreted in conformity with the current Thai Penal Code". This is rather interesting as Thailand's legal system does not have a definition of torture as is stated by Thailand "although there is neither a specific definition nor particular offence under the current Thai Penal Code corresponding to the term, there are comparable provisions" which leads one to understand that a piecemeal and fragmented case by case consideration of individual acts would be practiced rather than a coherent confluence of law derived from a source definitionally to inform practice and procedure. Thailand also has a reservation where it is not bound by Article 30(1) ICJ jurisdiction in line with the other ASEAN states. Thailand does mention aspirational consideration to revise its criminal law with reference to Article 4 and 5 though it is unlikely considering allegations of abuse stemming from the sustained civil conflict in

³⁷ Ibid.

³⁸ Lao People's Democratic Republic (1989) *Penal Code*. Vientiane. Article 160.

³⁹ Lao People's Democratic Republic (2011) *Customary Law and Practice in Lao PDR*. Ministry of Justice Law Research and International Cooperation Institute. Vientiane.

Thailand southern provinces and military suppression of the Thai state.⁴⁰ The Lao and Thai reservations to Article 1 puts into serious question these legal validity of their reservations as both do not have national legislation clearly defining torture and limitations to it internationally which may in fact undermine the purpose and intent of the treaty itself.

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.⁴¹ It further reserved against Article 29(1) concerning ICJ jurisdiction. 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”.⁴² 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.⁴³ 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.⁴⁴ This as in the case above of Brunei show a strong penchant for religious understandings/exceptions as supremacy of national law as

⁴⁰ United Nations Treaty Collection Database Chapter IV Human Rights [ONLINE]. Available at: <http://treaties.un.org/Pages/Treaties.aspx?id=4>.

⁴¹ Brunei Darussalam. (1984) *Brunei Nationality Act 1984 Ed. Cap. 15*. Bandar Seri Begawan.

⁴² United Nations Treaty Collection Database Chapter IV Human Rights [ONLINE]. Available at: <http://treaties.un.org/Pages/Treaties.aspx?id=4>.

⁴³ Malaysia. (1957) *Constitution of Malaysia*. Kuala Lumpur. Article 1 State List 2.

⁴⁴ Malaysia. (1957) *Constitution of Malaysia*. Kuala Lumpur. Article 14, 15, 16.

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 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”.⁴⁵ 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 and to a lesser extent Hindu’s.⁴⁶ 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.⁴⁷ 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.⁴⁸ 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.

Convention on the Rights of the Child

⁴⁵ United Nations Treaty Collection Database Chapter IV Human Rights [ONLINE]. Available at: <http://treaties.un.org/Pages/Treaties.aspx?id=4>.

⁴⁶ Republic of Singapore. (1965) *Constitution of the Republic of Singapore*. S1/63. Singapore.

Republic of Singapore. (1966) *Administration of Muslim Law Act 1 July 1968*. Singapore.

Republic of Singapore. (1999) *Muslim Marriage and Divorce Rules G.N. No. S331/1999*. Singapore.

⁴⁷ Republic of Singapore. (1966) *Administration of Muslim Law Act 1 July 1968*. Singapore. Article 112.

⁴⁸ United Nations Treaty Collection Database Chapter IV Human Rights [ONLINE]. Available at: <http://treaties.un.org/Pages/Treaties.aspx?id=4>.

Kingdom of Thailand. (B.E. 2535/1992) *Thailand Nationality Act B.E. 2535/1992 No. 2 & 3 amending Thailand Nationality Act B.E. 2508*. Bangkok.

Kingdom of Thailand. (B.E. 2551/2008) *Thailand Nationality Act B.E. 2551/2008 No. 4 amending Thailand Nationality Act B.E. 2535/1992*. Bangkok.

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”.⁴⁹ 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”.⁵⁰ These at once with reference to nationality and religion parallel is CEDAW reservations while national level 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”.⁵¹ These point directly towards Asian Values of the Lee Kwan Yew era and are strictly indicative of cultural arguments of differential relativism.⁵² 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” thus directly inferring supremacy of national law.⁵³ 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” and funds for primary education to citizens only.⁵⁴ 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

⁴⁹ United Nations Treaty Collection Database Chapter IV Human Rights [ONLINE]. Available at: <http://treaties.un.org/Pages/Treaties.aspx?id=4>.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Singapore Parliament. (1991) *Shared Values*, Parliament of Singapore, Singapore.

Zakaria, Fareed. (1994) Culture Is Destiny: A Conversation with Lee Kwan Yew. *Foreign Affairs*, 73 2, 109-126.

⁵³ United Nations Treaty Collection Database Chapter IV Human Rights [ONLINE]. Available at: <http://treaties.un.org/Pages/Treaties.aspx?id=4>.

⁵⁴ Ibid.

“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”.⁵⁵

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 indicate that even with high ratification level there is a significant amount of resistance to the norms and state obligations embedded within these texts. Aside from this if one considers the ratio of states ratifying these core treaties a rather bleak picture appears ICCPR – 6/10, ICESCR – 6/10, ICERD 7/10, CAT 5/10; only ICERD breaks a threshold of significant majority (considered as 66% of total ratio) and it has fully seven reservations from three states attached.

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.⁵⁶ The harsh commentary is not justified when one views the history of human rights in the region and especially the structure of ASEAN 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

⁵⁵ Cited in Lim 2006: 342.

⁵⁶ Cited in Clarke, Gerard. (2012) The Evolving ASEAN Human Rights System: The ASEAN Human Rights Declaration of 2012. *Northwestern Journal of International Human Rights*, 11 (1), 1-27.

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.