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Human Rights and Relativism Through the Lens of Developing Nations Case Study of Indonesia's Ratification on CEDAW

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Abstract

Universalists argue that human rights as laid out by current human rights law embodies universal ideals and rights that are universally relevant and applicable to all people. However, some relativists have questioned this idea, pointing out that ethical systems should evolve in the context of local cultures and not assume its universal applicability. It arises a question whether human rights indeed a universal concept that should be assumed to all nations irrespective of its cultural differences. Especially in the context of most developing nations that have their own cultural philosophies and societal conducts, it is intriguing to assess how does the "universal applicability" of human rights fare within the local enforcement of human rights treaties. This research will be normative legal research as it will analyze the legal aspect of relativism in the perspective of developing nations in its relation to the enforcement of human rights within the existing treaty that encompasses of Universal Declaration of Human

Rights, and Convention on the Elimination of All Forms of Discrimination against Women. This article argues that "consent" of the intended groups that the human treaties wanted to protect matters to bridge the difference between the two concepts.

KEYWORDS *Relativism, CEDAW, Indonesia, Human Rights, Developing Nations*

Introduction

According to the Universal Declaration of Human Rights (UDHR), human rights is a recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world. It states, in Article 1 of Universal Declaration of Human Rights (UDHR), that "*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*" Subsequent to that, it is reasonable to assume that human rights are and should be applicable to all human beings without exception. Some universalists argue that human rights as laid out by current human rights law embodies universal ideals and rights that are universally relevant and applicable to all people.[1] However, some relativists have questioned this idea, pointing out that ethical systems should evolve in the context of local cultures and not assume its universal applicability.[2]

Philosophically, the human rights story is rooted in Western philosophical and political thought. According to Julia Ching, the United Nation Declaration of Human Rights, including its preamble and articles, was drafted in under massive influence of the western nations, in particular the United States of America, at the end of the Second World War.[3] It was very apparent in the social and economic rights included within the

[1] Good, Colleen. 2010. "Human Rights and Relativism." Macalester Journal of Philosophy 19 (1): 27–48.

[2] *Ibid*

[3] Ching, Julia. 1977. Confucianism and Christianity: A Comparative Study. Tokyo: Kodansha International.

declaration, and how it was at the insistence of the Communist nations, which, however did not become signatories.[4] It arises a question whether or not human rights indeed a universal concept that should be assumed to all nations irrespective of its cultural differences. Especially in the context of most developing nations that have their own cultural philosophies and societal conducts, it is intriguing to assess how does the "universal applicability" of human rights fare within the local enforcement of human rights treaties.

In this paper the author will be evaluating the conflicting ideas of human rights as universal and human rights as relative through the perspective of developing nations in general and Indonesia in particular. Followed by an assessment on Colleen Good article titled "Human Rights and Relativism". I will assess the comparative of relativism and universalism of human rights elaborated by Good, and will focus on the unique perspective of developing nations in relation of that comparison of concept. The main limitation of the previous studies were just an assessment of types of cultural relativism and its discussion through concepts, whereas in this paper the Author intend to explore further on the practice of relativism by developing nations which would result in a more practical depiction of what relativism is in relation to human rights enforcement.

The aim of this paper to illustrate further the issue of relativism in case human rights by assessing the practical implementation such as reservations, declarations, and even legislations of developing nations regarding human rights treaties that they are signatories to and to assess whether there is a compromise for both human rights enforcement and relativism of developing nations. This paper will consist of a) a general observations of "*Human Rights and Relativism*", b) a more specific and empirical observations of relativism through assessing "Indonesia's Ratification of CEDAW".

This research will be normative legal research as it will analyze the legal aspect of relativism in the perspective of developing nations in its relation to the enforcement of human rights within the existing treaty that

[4] *Ibid*

encompasses of Universal Declaration of Human Rights, and Convention on the Elimination of All Forms of Discrimination against Women.

The primary legal materials in this research will consist of international and national statutory laws that regulates human rights in general, and protection of women's rights in particular including but not limited to Universal Declaration of Human Rights, Convention on the Elimination of All Forms of Discrimination against Women, Act No.7 1948 of Indonesian Legislation. The secondary materials are books, journals, expert reports, and other legal academic literatures relevant to evaluate the legal aspect of relativism in the perspective of developing nations in relation to human rights. Lastly, the tertiary materials will consist scientific research outside the field of law.

The data will be conducted through a method of literature study. This will be done to attain any data and information relevant to human rights, cultural relativism, and developing nations conduct on human rights treaty obligations. The data retrieved will be reviewed through a qualitative method and will be processed using prescriptive qualitative and grounded legal theory. Treaties will be assessed using the rules of treaty interpretation stipulated in Article 31 of the VCLT. Additionally, commentaries and the preparatory works will be useful in clarifying the intentions of a treaty or other instruments, as reflected in Article 32 of VCLT.

Human Rights and Relativism

A. Human Rights: The Basic Concept

The Universal Declaration of Human Rights, whose principal author was a Frenchman named René Cassin, was in fact directly modeled on the values of the French Revolution, with 27 articles declaring "dignity, liberty, equality and fraternity.[5] Micheline Ishay acknowledges that the modern conception of human rights is mostly European in origin. In Anthony Pagden's article "Human Rights, Natural Rights, and Europe's Imperial Legacy," Pagden argues the concept of human rights arose from

[5] Ishay, Micheline R. 2008. From Ancient Times to the Globalization Era. 2nd ed. University of California Press. http://www.jstor.org/stable/10.1525/j.ctv1xxscm.

an understanding of natural rights rooted in the purpose of legitimizing imperialist regimes, and the French Revolution linked the understanding of human rights to the idea of citizenship.[6]

The UN Office of the High Commissioner for Human Rights defines human rights as "*rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, color, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent, and indivisible.*" Understanding that similar to what previously mentioned, human rights are massively influenced by the Western culture, it is quite apparent in the definition of human rights given by the UN, the language used is culturally specific to the West. However, in all instances of human rights enforcement, it is generally claimed to be universally applicable. It can be seen in the current human rights paradigm, that human rights exist by the virtue of being a human being, that the right is attached to an individual subsequent to them being born to this world.

This is not to say that human rights are an imposition of western value, but rather an attempt to have an important discourse regarding the applicability of human rights across different nations. Some argue that the philosophical roots of human rights are trivial, just as human rights are universal, so are their underlying ideas.[7] But until relatively recently, human rights were not even presented as universal in the West. Documents cited as upholding old human rights ideals, such as the Magna Carta and the American Declaration of Independence, exclude many and explicitly state the rights of men only. Moreover, before the 17th century, rulers and religious figures were entitled to rights, while commoners only had duties to their superiors.[8] Ultimately, as ideas about human rights developed in the West, both Western philosophical and political circles agreed that human rights should be universal.[9] However, the gradual development of this idea did not occur in other parts of the world. Their lack of historical similarity to the idea of universal human rights in the

[6] Pagden, Anthony. 2003. "Human Rights, Natural Rights, and Europe's Imperial Legacy." Political Theory 31 (2): 171–99. http://www.jstor.org/stable/3595699.

[7] *Op.cit.*, Ching, p.70

[8] *Op.cit.*, Ching, p.68

[9] *Op.cit.*, Good

non-Western world is one of the reasons for rejecting their claims of universalism.[10]

In cases where the original root of human rights should be put aside, this different development of human rights value fundamentally becomes an explanation why the previous statement claimed that the current human rights is inclined to western values. The larger question at hand, is it just the difference in cultural language, or is the concept of human rights itself different or incompatible? This is where the discussion of relativism becomes important. By looking more closely at the arguments of relativism and universalism, we can see the roots of these arguments and question their implications more effectively.

B. Relativism in Human Rights

In Franz Boas' work in the field of anthropology with the publication of the article "The Mind of Primitive Man",[11] Boas argued that anthropology needed to change its approach to ethnography so that anthropologists could better understand the cultures they studied. He explained that anthropologists should seek to remove all traces of cultural influence from the region they were born in in order to better fit the thinking of the people of the culture they are studying. Contemporary cultural relativism takes many forms, from more extreme to less extreme claims. Some cultural relativists argue that all beliefs and ethical systems are culturally relative, and therefore that there are no universal moral ideals.[12]

The concern that arises from the Boas' concept of relativism is that no one could be justified in responding to atrocities such as genocide committed by Nazi or other atrocities that might exist across the world. It begs a question as how cultures work, and to what extend that external values could criticize the concept of one's culture.

[10] *Ibid*

[11] Boas, Franz. 1901. "The Mind of Primitive Man." Science 13 (321): 281–89.

[12] *Op.cit.*, Good

C. Human Rights and Relativism

Understanding difference of concept of relativism and human rights, in juxtapose, we can see a diametrically oppositional ideas between relativism and human rights. However, is that really the case? In "From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947- 1999" Engle points out that anthropologists need to understand where to draw the limits of tolerance proposed by relativism.[13] Engle recognizes the importance of cultural protection and tolerance advocated by relativist positions, but believes that steps should be taken to harmonize them with universalist human rights positions.[14] This suggest that there is a possibility of compromise to harmonize the seemingly a diametrically oppositional concept of both ideas.

To understand further the possibility of compromise, we have to assess the empirical case of relativism and implementation of human rights by non-western countries (developing nations in particular).

Indonesia's Ratification on CEDAW in Relation to Relativism

Legally, the three most important contemporary human rights instruments are: the Universal Declaration of Human Rights (UDHR) 1948; the Covenant on Economic, Social, and Cultural Rights (ICESCR) 1966; and the Covenant on Civil and Political Rights (ICPPR) 1966. These human rights treaties evolved in regulating specific matters of human rights including but not limited to: Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) 1984; Convention on the Rights of the Child 1989; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990; Convention on the Rights of Persons with

[13] Engle, Karen. 2001. "From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947-1999." Human Rights Quarterly 23 (3): 536–59. http://www.jstor.org/stable/4489347.

[14] *Ibid*

Disabilities 2006; and International Convention for the Protection of All Persons from Enforced Disappearance 2010.

The UDHR is generally seen as the starting point and foundation of the current human rights discourse and its political structure. The following documents are deemed to complement this document by supplementing the rights set forth in the UDHR and addressing rights not previously set forth in the UDHR. Therefore, the Author will assess the subsequent document, in particular Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979, as modern political authority on human rights and how the subsequent practice of developing nations on that treaty reflect the relativism in human rights implementation.

A. Indonesia's Declaration of CEDAW in Act No.7 1948

1. Declaration and Reservation of Treaties

According to Vienna Convention on the Law of Treaties (VCLT) 1969, reservations and declarations means a unilateral statement, however phrased, or named, made by a State, when signing, ratifying, 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 to that State. Whereas the prerequisite of formulation of reservation per Article 19 of VCLT are as follows: a) the reservation is prohibited by the treaty; b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

According to Kohona, the secretary-general recognizes as competent to formulate reservations only those authorities considered capable of performing treaty actions on behalf of their governments under the Vienna Convention, and the timing of reservations accommodate reservations formulated after a state has consented to be bound by a treaty, accordingly, the secretary-general now permits a state to formulate a reservation subsequent to the act of ratification, accession, approval, or acceptance

where the treaty does not prohibit reservations or permits only specific reservation.[15]

The intriguing question is whether the regulation regarding reservations and declarations also applies to human rights treaties, understanding its supposed nature of universality. According to Human Rights Committee in its General Comment No.24, Human rights are intended to apply to all human beings. Thus, it has been observed that treaties concluded in this field do not lend themselves to reservations and objections and that the objecting state cannot be released from its treaty obligations vis-a-vis citizens of the reserving state.[16] Professor Pellet, on the other hand, points out that the provision of the Vienna Convention should be universally applicable, including human rights treaties.[17] This becomes another testament of the indirect consequence of the relativism views versus the universalism. Ultimately, the practices regarding reservations and declarations will refer to Article 19 VCLT.

2. Declaration of Indonesia in Act No.7 1948

Indonesia pours down their ratification of CEDAW in their Act No.7 1948. Whereas according to CEDAW/SP/2006/2 they stated that "The Government of the Republic of Indonesia does not consider itself bound by the provision of article 29, paragraph 1, of this Convention and takes the position that any dispute relating to the interpretation or application of the Convention may only be submitted to arbitration or to the International Court of Justice with the agreement of all the parties to the dispute." On the surface, this reservation seems like any other

[15] Kohona, Palitha T. B. 2005. "Some Notable Developments in the Practice of the UN Secretary-General as Depositary of Multilateral Treaties: Reservations and Declarations." American Journal of International Law 99 (2): 433–50. https://doi.org/10.2307/1562508.

[16] UN Human Rights Committee (HRC), CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, 4 November 1994, CCPR/C/21/Rev.1/Add.6, available at: https://www.refworld.org/docid/453883fc11.html [accessed 13 December 2022]

[17] Pellet, Alain. 1996. "Second Report on Reservations to Treaties." http://www.un.org/law/ilc/index.htm.

reservation to CEDAW made by other countries. However, Indonesia did one more declaration to CEDAW included in Act No.7 1984, which states:

> "…the provisions of this treaty will not influence the principle and provisions in the national legislation of Indonesia regarding equal rights between men and women which we have considered to be good or better, and already in accordance with Indonesian citizens aspiration.
> And in its implementation, the provisions of this treaty will be adjusted to the societal system, including cultural values and norms along with religious norm that exist and followed by general population of Indonesia…"

The consequence of this declaration means that the provisions of CEDAW will be adjusted to the cultural relativism of Indonesia. To understand this matter further there are two important questions that should be noted: a) whether that declaration is permissible according to the international law; b) why the declaration is not recorded in UN Treaty Database.

To answer the first question, the practice of declaration is permissible in international law, especially in the case of CEDAW, where CEDAW recorded several declaratory statements from countries regarding modification of CEDAW legal effect of those countries. For instance, the case of India's declaration, it declares that it shall not be bound to the article 16 due to its customs, and domestic circumstances such as low level of literacy. Hence it can be drawn to a conclusion that the type of declaration done by Indonesia is permissible in international law.

Therefore, it begs a question, why then it is not recorded in the UN Treaty Database, the answer to that question is not conclusive, it could be because the document deposited to the UN is different from the Act No.7 1984 of Indonesian Legislation, or it could be cause by other political reasons such as an attempt to create a "sneaky declaration". What is important is not the cause of the declaration being not recorded, but what are the implications of it.

The importance of a recorded reservations and declaration is to notify other countries of such reservations and declaration. And it is customary to notify other governments. in advance of reservations to be inserted in the act of ratification and to ascertain whether they will be acceptable.[18] Hence for Indonesia, it means two things: a) the implementation of CEDAW that adjusted to the customs and norm of Indonesia could be seen as a non-compliance by other countries or NGOs; b) cultural relevance of Indonesia could be criticize due to its lack of legality in the documentation of the declaration to CEDAW.

Therefore, the cultural protection that Indonesia has the right to could only be solved if we find a common ground to the oppositional views between relativism and human rights. In this empirical analysis, it is apparent that the difference between what is considered as "universal" and the perspective of developing countries through its cultural lens. onsidering this difference, how a consensus can be reached on this issue. In “A World Consensus on Human Rights?"[19] Charles Taylor argues that one of the first obstacles to human rights consensus is the language used. As he puts it, “Rights discussion are rooted in Western culture. This is not to say that something very like the underlying norms do not turn up elsewhere. They are not expressed in that language." He goes on to point out that we face the terminology problem of being too culturally specific or too vague to be useful, citing “dignity” as a Western-based term, and “wellbeing” as a more widely culturally applicable term that is too vague.

The author will posit that "consent" is an important element in determining the consensus between the two concepts. Although universality of human rights is important in such cases of atrocities, it is also important to note the cultural relativism of nations. Hence "consent" is important in bridging between the two, "consent" serves as an evaluating question of whether the relativism of human rights is something that is within the purpose of the treaty. For instance, in the case of CEDAW, there needs to be an evaluation of Indonesia's custom and religious value

[18] Anderson, Chandler P. 1919. “The Ratification of Treaties with Reservations.” American Journal of International Law 13 (3): 526–30. https://doi.org/10.2307/2188265.

[19] Taylor, Charles. 1996. “A World Consensus on Human Rights.”

by the intended group that CEDAW wants to protect. "Consent" here means that the intended group that wanted to be protected, evaluates whether the "universal human rights concept" is something they need to feel the protection in the status quo they are living, or "cultural norms" that relatives to the place they live is something that they feel enough to give them protections. This idea of "consent" that evaluates the two concepts, shift the debate from which value should be superior to another, to which one is more meaningful to the intended groups that it wants to protect.

Conclusion

To bridge between universalism and relativism regarding human rights, it is important to include the element of "consent" of the intended groups that wanted to be protected by the human rights treaties. This is a middle ground to create a consensus between the concern of the western-centric idea of human rights, and the concern of inability to justifiably criticize one's culture. This "consent" itself will be a deciding factor to decide the meaningful application of the two concepts.

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